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FILED
MAY 27 2011
K. TORRE, CLERK OF THE COURT
SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF CONTRA COSTA
By **A. MUESTRG**

6 Attorney for Defendant Robert Gray & Associates
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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF CONTRA COSTA
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11 CITY OF PIEDMONT,

12 Plaintiff,

13 v.

14 ROBERT GRAY & ASSOCIATES, HARRIS
15 & ASSOCIATES, INC., AND DOES 1-50,

16 Defendants.
17
18

Case No. C11-00762

[Assigned For All Purposes to
Hon. Judith Craddick, Department 9]

**VERIFIED ANSWER OF DEFENDANT
ROBERT GRAY & ASSOCIATES TO
COMPLAINT OF PLAINTIFF CITY OF
PIEDMONT**

TRIAL DATE: Not Set

19 COMES NOW the defendant ROBERT GRAY & ASSOCIATES (hereinafter "RGA")
20 to answer the complaint on file herein, as follows:

21 Defendant admits the allegations of the following numbered paragraphs: 2, 3, 5, 6, 8

22 Defendant RGA denies each allegation of the following numbered paragraphs: 19, 20

23 Defendant denies the allegations in Paragraph 9 of the complaint, by which it is stated that
24 HARRIS and RGA "jointly and severally" created plans and specifications.

25 Defendant denies the allegations in Paragraph 25 of the complaint to the extent it alleges that
26 RGA was negligent or otherwise acted or omitted to act in an improper manner and to the extent it
27 alleges that RGA has caused plaintiff to suffer damage.

28 Defendant admits the allegations of Paragraph 11 of the complaint by which it is alleged that

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1 the project in question encountered incidents, delays, problems and difficulties but denies that such
2 were due to the acts and/or omissions of this answering defendant.

3 Defendant admits the allegations of Paragraph 12 of the complaint by which it is alleged that
4 bedrock was encountered on the project and that specialized excavation equipment was thereupon
5 required, but denies the remainder of this paragraph, particularly to the extent it alleges and/or
6 implies that this answering defendant was responsible for any additional costs in connection
7 therewith.

8 Defendant is unable to admit or deny the allegations of the following numbered paragraphs,
9 due to lack of sufficient information and belief and thereupon denies them: 1, 4, 7, 10, 13, 14 through
10 18, 21 through 24

11 Defendant further submits the following affirmative defenses, which are pled herein on
12 information and belief:

13 1. FOR A FIRST, SEPARATE AND DISTINCT DEFENSE, this answering
14 defendant alleges that plaintiff's complaint and each alleged cause of action therein, fails to state
15 facts sufficient to constitute a cause of action as to this answering defendant.

16 2. FOR A FURTHER, SEPARATE AND DISTINCT DEFENSE, this answering
17 defendant alleges that at the times and places mentioned in the complaint, plaintiff was careless,
18 reckless and negligent in and about the matters and things alleged in the complaint, which said
19 carelessness, recklessness and negligence concurred in point of time with the alleged negligence of
20 defendant, if any there may have been, and legally caused and/or contributed to whatever injury
21 and/or damage plaintiff may have sustained, if any, and recovery by plaintiff, if any, should be
22 proportionately reduced according to the percentage of fault of plaintiff.

23 3. FOR A FURTHER, SEPARATE AND DISTINCT DEFENSE, this answering
24 defendant alleges that, in addition to the aforementioned negligence of plaintiff, any injury and/or
25 damage incurred by plaintiff was directly and legally caused and contributed to by the negligence
26 and/or fault of third persons or parties.

27 4. FOR A FURTHER, SEPARATE AND DISTINCT DEFENSE, this answering
28 defendant is informed and believes and thereupon alleges that plaintiff did, with full knowledge of

1 the facts, dangers, and consequences of their own actions or inaction,
2 of defendant, expressly, impliedly, and voluntarily accept the risk incident thereto.

3 5. FOR A FURTHER, SEPARATE AND DISTINCT DEFENSE, this answering
4 defendant is informed and believes and thereupon alleges that at the times and places alleged in the
5 complaint, plaintiff was engaged in a joint and common enterprise with other persons or parties; that
6 the negligence or fault of plaintiff and each such other person or party is imputed to the other; that
7 plaintiff and each of the other persons or parties was careless, reckless and negligent in and about
8 the matters and things alleged in the complaint, which said carelessness, recklessness and negligence
9 concurred in point of time with the alleged negligence of defendant, if any there may have been, and
10 legally caused and/or contributed to whatever injury and/or damage plaintiff may have sustained, if
11 any.

12 6. FOR A FURTHER, SEPARATE AND DISTINCT DEFENSE, this answering
13 defendant is informed and believes and thereupon alleges that plaintiff, by the exercise of reasonable
14 effort and/or care, could have mitigated the damages alleged to have been suffered, but plaintiff has
15 failed, neglected and refused, and continues to fail and refuse, to exercise reasonable effort to
16 mitigate the damages, if any.

17 7. FOR A FURTHER, SEPARATE AND DISTINCT DEFENSE, this answering
18 defendant is informed and believes and thereupon alleges that plaintiff could have avoided damages
19 by reasonable effort or expenditure.

20 8. FOR A FURTHER, SEPARATE AND DISTINCT DEFENSE, this answering
21 defendant is informed and believes and thereupon alleges (1) this answering defendant took
22 reasonable steps to prevent and correct the conduct alleged in plaintiff's complaint herein;
23 (2) plaintiff unreasonably failed to use preventative and corrective measures that this answering
24 defendant provided; and (3) reasonable use of this answering defendant's procedures would have
25 prevented the harm alleged in plaintiff's complaint herein.

26 9. FOR A FURTHER, SEPARATE AND DISTINCT DEFENSE, this answering
27 defendant alleges that the contract in issue between this answering defendant and plaintiff was
28 unconscionable at the time it was made and therefore unenforceable. In the alternative, application

1 of any and all unconscionable contract provisions should be limited so as to avoid any unduly
2 oppressive result.

3 10. FOR A FURTHER, SEPARATE AND DISTINCT DEFENSE, this answering
4 defendant alleges that the contract in issue between the this answering defendant and plaintiff
5 contained non-negotiable terms and conditions which exclusively benefitted the plaintiff to the
6 detriment of this answering defendant. As such, the contract is one of adhesion; any ambiguities in
7 the terms and conditions must be resolved against plaintiff as the drafter and contract must be
8 enforced, if at all, in accordance with the reasonable expectations of defendant.

9 11. FOR A FURTHER, SEPARATE AND DISTINCT DEFENSE, this answering
10 defendant alleges that the contract in issue between this answering defendant and plaintiff contains
11 vague, overbroad, unclear and ambiguous terms and conditions. These terms must be interpreted
12 against plaintiff as drafter and in light of the reasonable expectations of defendant.

13 12. FOR A FURTHER, SEPARATE AND DISTINCT DEFENSE, this answering
14 defendant alleges that the purported contract is not supported by additional consideration. Therefore,
15 it fails to qualify as a supplemental or substituted agreement and is void as a matter of law.

16 13. FOR A FURTHER, SEPARATE AND DISTINCT DEFENSE, this answering
17 defendant alleges that at no time mentioned herein did plaintiff, its agents, servants, representatives,
18 or predecessors in interests, rely on any promises, warranties, express or implied, or representations
19 which may have been made by this answering defendant in connection with the services which it is
20 alleged to have performed under the terms of the contract.

21 14. FOR A FURTHER, SEPARATE AND DISTINCT DEFENSE, this answering
22 defendant alleges that the plaintiff has engaged in conduct with respect to the activities and/or
23 property which are the subject of the complaint, and by reason of said activities and conduct, is
24 estopped from asserting any claim or damages or seeking any other relief against this answering
25 defendant.

26 15. FOR A FURTHER, SEPARATE AND DISTINCT DEFENSE, this answering
27 defendant alleges that the plaintiff has engaged in conduct and activities sufficient to constitute a
28 waiver of any alleged breach of contract, negligence or any other conduct, if any and each of which

1 are herein denied.

2 16. FOR A FURTHER, SEPARATE AND DISTINCT DEFENSE, this answering
3 defendant alleges that due to its tardiness in asserting its purported right to recover, plaintiff's claim
4 should be barred by the equitable doctrine of laches.


5 17. FOR A FURTHER, SEPARATE AND DISTINCT DEFENSE, this answering
6 defendant alleges that plaintiff's complaint, and each cause of action set forth therein, is barred by
7 applicable statute(s) of limitations, including but not limited to those set forth within Code of Civil
8 Procedure Section(s) 337, 337.1, 337.15, 338, 339, 340 and/or 343.

9 WHEREFORE, this answering defendant prays that plaintiff take nothing by way of
10 plaintiff's complaint and defendant goes hence with defendant's costs of suit, and for such other and
11 further relief as the Court deems proper.

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DATED: May 27, 2011

BORTON PETRINI, LLP

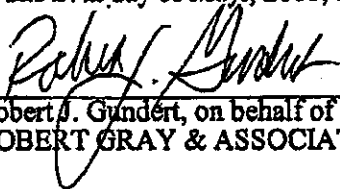
By 
Robert J. Gandert
Attorneys for Defendant Robert Gray & Associates

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VERIFICATION

I, Robert J. Gundert, am counsel of record for defendant ROBERT GRAY & ASSOCIATES, a defendant in the above-referenced action and, pursuant to Rule 7.103(c) of the California Rules of Court and Code of Civil Procedure Section 446, I am executing this Verification on its behalf since my client is absent from the county where I have my office. I have read the foregoing **ANSWER OF DEFENDANT ROBERT GRAY & ASSOCIATES TO PLAINTIFF'S COMPLAINT** and know the contents thereof. I am informed and believe that the matters expressed therein are true and on that ground allege that they are true.

I declare under penalty and perjury under the laws of the State of California that the foregoing is true and correct. Executed this 27th day of May, 2011, at San Francisco, California.



Robert J. Gundert, on behalf of Defendant
ROBERT GRAY & ASSOCIATES

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PROOF OF SERVICE

(Code of Civil Procedure §§ 1013a, 2015)

STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO

I am employed in the County of San Francisco, State of California. I am over the age of 18 and not a party to the within action. My business address is Merchants Exchange Building, 465 California Street, Suite 1020, San Francisco, California 94104.

On May 27, 2011, I served the foregoing document entitled:

VERIFIED ANSWER OF DEFENDANT ROBERT GRAY & ASSOCIATES TO COMPLAINT OF PLAINTIFF CITY OF PIEDMONT

on the other parties in this action by placing the true copies thereof enclosed in sealed envelopes addressed as follow below:

Matthew Conant, Esq. Maria M. Lampasona, Esq. Lombardi, Loper & Conant, LLP Lake Merritt Plaza 1999 Harrison Street, Suite 2600 Oakland, CA 94612-3541	Attorney for Plaintiff CITY OF PIEDMONT Tel: (510) 433-2600 Fax: (510) 433-2699
David Ward Lively, Esq. Hopkins & Carley ALC 70 South 1st Street San Jose, CA 95113-2406	Attorney for HARRIS & ASSOCIATES Tel: (408) 286-9800 Fax: (408) 998-4790

BY FIRST-CLASS MAIL: I am readily familiar with the firm's practice of collection and processing of correspondence for mailing. Under that practice, it is deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at San Francisco, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or the postage meter date is more than one day after date of deposit for mailing in affidavit.

BY PERSONAL SERVICE: I caused each envelope to be delivered by hand to the offices of the addressee.

BY OVERNIGHT COURIER SERVICE: I caused each envelope to be picked up by an authorized courier of GSO to receive documents, in an envelope or package designated by GSO with delivery fees prepaid, to be sent overnight by GSO.

BY FACSIMILE: I caused each document to be delivered by electronic facsimile to the offices of the addressee.

BY EMAIL: I caused each document to be delivered by electronic mail to the offices of the addressee.

Executed on May 27, 2011 at San Francisco, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Ana Munoz 