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SCCA 233 (11/2003)

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF CHARLESTON )  
 )  
 K-CON, INC., )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 KING STREET ENTERPRISES, LLC )  
 and OHIO IMAGING ASSOCIATES INC. )  
 )  
 Defendants. )  
 )  
 \_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
 CASE NO. 2018-CP-10-3825

**OHIO IMAGING ASSOCIATES, INC.'S  
 MOTION TO DISMISS PLAINTIFF'S  
 COMPLAINT**

FILED  
 2018 SEP 18 PM 1:09  
 JULIE J. ANGSTROM  
 CLERK OF COURT  
 BY \_\_\_\_\_

Comes now Defendant, Ohio Imaging Associates Inc. (hereinafter, "OIA") by and through its undersigned attorneys responds to the allegations of Plaintiff's Complaint filed on or about August 1, 2018, and states the following:


1. Plaintiff and OIA entered into a contract for upfit of a commercial space on King Street, in downtown Charleston. A copy of the Contract is attached hereto as Exhibit "A".

2. Pursuant to the agreement, the parties chose and elected arbitration as the method of dispute resolution, in Section 6.2. Accordingly, OIA asks this Court to dismiss Plaintiff's Complaint, as to OIA only, and have their dispute proceed to binding arbitration.

WHEREFORE, OIA respectfully requests it dismiss Plaintiff's Complaint, as stated herein.

Respectfully submitted,

**Brent Souther Halversen, LLC**

By: \_\_\_\_\_

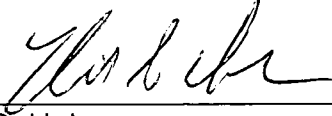
Brent S. Halversen  
751 Johnnie Dodds Blvd., Suite 200  
Mount Pleasant, SC 29464  
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F: 864-326-4844  
Email: [brent@halversenlaw.com](mailto:brent@halversenlaw.com)

9/18, 2018.

**CERTIFICATE OF SERVICE**


I certify that I served the foregoing Motion to Dismiss upon all counsel of record by affixing same with proper postage placing same with the United States Postal Service addressed to the counsel's last known address on this 18<sup>th</sup> day of September, 2018.

**Brent Souther Halversen, LLC**

By: 

Brent S. Halversen  
751 Johnnie Dodds Blvd., Suite 200  
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T: 843-284-5790  
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9/18, 2018.  
Mount Pleasant, South Carolina

FILED  
2018 SEP 18 PM 1:10  
JULIE J. ANDERSON  
CLERK OF COURT  
BY 

**Standard Form of Agreement Between Owner and Contractor  
where the basis of payment is a Guaranteed Maximum Price**

AGREEMENT made as of the 27<sup>th</sup> day of Oct in the year «Two Thousand Seventeen» 2017

**BETWEEN** the Owner:

Ohio Imaging  
Associates, Inc.  
810 S Main Street  
Akron, OH 44311  
Telephone Number: 855.615.5432

and the Contractor:

K-Con, Inc.,  
2728 Spruill Ave.  
Charleston, SC 29405  
Telephone Number: 843.745.0434

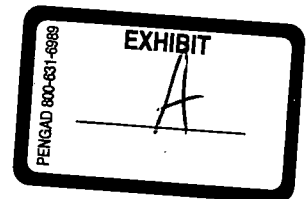
for the following Project:

484 King Street Suite 205  
484 King Street  
Charleston, SC 29403  
484 King St. Suite 205 Tenant Up fit

The Architect:

s.arch+studio, llc  
104 Fishburne Street  
Charleston, SC 29403  
Telephone Number: 843.720.1955

The Owner and Contractor agree as follows.



**TABLE OF ARTICLES**

- 1 THE CONTRACT DOCUMENTS
- 2 THE WORK OF THIS CONTRACT
- 3 DATE OF COMMENCEMENT AND SUBSTANTIAL COMPLETION
- 4 CONTRACT SUM
- 5 PAYMENTS
- 6 DISPUTE RESOLUTION
- 7 TERMINATION OR SUSPENSION
- 8 MISCELLANEOUS PROVISIONS
- 9 ENUMERATION OF CONTRACT DOCUMENTS
- 10 INSURANCE

**ARTICLE 1 THE CONTRACT DOCUMENTS**

The Contract Documents consist of this Agreement, Conditions of the Contract (General, Supplementary and other Conditions), Drawings, Specifications, Addenda issued prior to and mutually agree upon changes made after the execution of this Agreement, other documents listed in this Agreement and Modifications issued after execution of this Agreement, all of which form the Contract, and are as fully a part of the Contract as if attached to this Agreement or repeated herein. The Contract represents the entire and integrated agreement between the parties hereto and supersedes prior negotiations, representations or agreements, either written or oral. An enumeration of the Contract Documents, other than a Modification, appears in Article 9.

**ARTICLE 2 THE WORK OF THIS CONTRACT**

The Contractor shall fully execute the Work described in the Contract Documents, except as specifically indicated in the Contract Documents to be the responsibility of others.

**ARTICLE 3 DATE OF COMMENCEMENT AND SUBSTANTIAL COMPLETION**

§ 3.1 The date of commencement of the Work shall be the date of this Agreement unless a different date is stated below or provision is made for the date to be fixed in a notice to proceed issued by the Owner.

Date of Commencement shall be the date that the Contractor receives the building permit from the City of Charleston or the Owner, whichever is later. If Contractor fails to commence work within 3 weeks of the building permit being available from the City of Charleston, Owner shall have the right to cancel the contract without penalty.

§ 3.2 The Contract Time shall be measured from the Date of Commencement.

§ 3.3 The Contractor shall achieve Substantial Completion of the entire Work not later than Ninety (120) days from the Date of Commencement, subject to adjustments of this Contract Time as provide in the Contract Documents and the Addenda A & B.

**ARTICLE 4 CONTRACT SUM**

§ 4.1 The Owner shall pay the Contractor the Contract Sum or Guaranteed Maximum Price in current funds for the Contractor's performance of the Contract. The Contract Sum shall be Three Hundred Sixty-four Thousand Two Hundred Fourteen Dollars and no/100 (\$364,214.00), subject to additions and deductions as provided in the Contract Documents.

§ 4.2 The Contract Sum is based upon the following alternates, if any, which are described in the Contract Documents and are hereby accepted by the Owner: **NONE**

§ 4.3 Unit prices, if any: NONE

§ 4.4 Allowances included in the Contract Sum, if any: NO ALLOWANCES OR EXCLUSIONS

#### ARTICLE 5 PAYMENTS

##### § 5.1 PROGRESS PAYMENTS

§ 5.1.1 Based upon Applications for Payment submitted to the Owner by the Contractor, the Owner shall make progress payments on account of the Contract Sum to the Contractor as provided below and elsewhere in the Contract Documents.

§ 5.1.2 The period covered by each Application for Payment shall be one calendar month ending on the last day of the month.

§ 5.1.3 Provided that an Application for Payment is received by the Owner no later than the last day of a month, the Owner shall inspect and make payment of the certified amount to the Contractor no later than the Fifteenth (15) day of the following month. If an Application for Payment is received by the Owner after the application date fixed above, inspection and payment shall be made by the Owner no later than Fifteen (15)-days after the Owner receives the Application for Payment.

§ 5.1.4 Each Application for Payment shall be based on the most recent schedule of values submitted by the Contractor in accordance with the Contract Documents. The schedule of values shall allocate the entire Contract Sum among the various portions of the Work. The schedule of values shall be prepared in such form and supported by such data to substantiate its accuracy as the Owner may require. This schedule, unless objected to by the Owner shall be used as a basis for reviewing the Contractor's Applications for Payment.

§ 5.1.5 Applications for Payment shall show the percentage of completion of each portion of the Work as of the end of the period covered by the Application for Payment.

§ 5.1.6 Subject to other provisions of the Contract Documents, the amount of each progress payment shall be computed as follows:

- .1 Take that portion of the Contract Sum properly allocable to completed Work and materials installed as determined by multiplying the percentage completion of each portion of the Work by the share of the Contract Sum allocated to that portion of the Work in the schedule of values, less retainage of ~~Five~~ percent (~~5.00~~ %);
- .2 Subtract the aggregate of previous payments made by the Owner; and
- .3 Subtract amounts, if any, for which the Owner has withheld or nullified a Certificate for Payment

§ 5.1.7 The progress payment amount determined in accordance with Section 5.1.6 shall be further modified under the following circumstances:

- .1 Add, upon Substantial Completion of the Work, a sum sufficient to increase the total payments to the full amount of the Contract Sum, less such amounts as the Owner shall determine for incomplete Work, retainage applicable to such work and unsettled claims; and
- .2 Per Addenda A & B

§ 5.1.9 Except with the Owner's prior approval, the Contractor shall not make advance payments to suppliers for materials or equipment which have not been installed at the site.

##### § 5.2 FINAL PAYMENT

§ 5.2.1 Final payment shall be made by the Owner to the Contractor when



- .1 the Contractor has fully performed the Contract including the Contractor's responsibility to correct Work, and to satisfy other contract requirements, if any, which extend beyond final payment; and
- .2 a final Certificate for Payment has been issued to the Owner
- .3 all applicable Certificates of Occupancy have been issued by any governing authority, or unless the Contractor has completed all work and passed all inspections required by any governing authority and the Contractor's work or failure to pass inspections is not the cause.

§ 5.2.2 The Owner's final inspection and final payment to the Contractor shall be made no later than Fifteen (15) days after the issuance of the Owner's final Certificate for Payment pending section 5.2.1.

## ARTICLE 6 DISPUTE RESOLUTION

### § 6.1 INITIAL DECISION MAKER

The Owner will serve as Initial Decision Maker pursuant, unless the parties appoint below another individual, not a party to this Agreement, to serve as Initial Decision Maker.

### § 6.2 BINDING DISPUTE RESOLUTION

All Disputes and Claims not resolved by negotiations between the Contractor and Initial Decision Maker shall be resolved first by mediation, and for such Claims subject to, but not resolved by, mediation, the method of binding dispute resolution shall be as follows:

[~~X~~] Arbitration

## ARTICLE 7 TERMINATION OR SUSPENSION

§ 7.1 The Contract may be terminated by the Owner or the Contractor. If Contractor terminates or suspends work Owner shall have the right to terminate contract. The Owner's cost to terminate the contract shall not exceed the Contractor's costs incurred to date.

## ARTICLE 8 MISCELLANEOUS PROVISIONS

§ 8.1 Where reference is made in this Agreement to another Contract Document, the reference refers to that provision as amended or supplemented by other provisions of the Contract Documents shall supersede the original Contract Document.

§ 8.2 Payments due and unpaid under the Contract shall bear interest from the date payment is due at the rate of 3% (Three percent) per month until paid.

§ 8.3 The Owner's representative:

Mary Ann Kanters  
810 S Main Street, Akron, OH 44311  
Phone: (855) 615.5432  
Email Address: [Maryann@veracept.com](mailto:Maryann@veracept.com)

§ 8.4 The Contractor's representative:

Ed Kirsch  
2728 Spruill Ave.  
Phone: (843) 745.0434  
Email Address: [ekirsch@kconinc.com](mailto:ekirsch@kconinc.com)

§ 8.5 Neither the Owner's nor the Contractor's representative shall be changed without ten days' written notice to the other party.

§ 8.6 Other provisions: NONE

**ARTICLE 9 ENUMERATION OF CONTRACT DOCUMENTS**

§ 9.1 The Contract Documents, except for Modifications issued after execution of this Agreement, are enumerated in the sections below.

§ 9.1.1 The Agreement, Standard Form of Agreement Between Owner and Contractor.

9.1.2 Addendum A

§ 9.1.3 The Drawings: 484 King Street Suite 205 Tenant Up Fit Dated July 10, 2017, and Revision Dated 8-3-2017

§ 9.1.4 The Addenda, if any: Addendum B to 484 King Street Suite 205 Tenant Up fit

§ 9.1.5 Additional documents, if any, forming part of the Contract Documents: Suite 205 Finish Schedule with updated Finish Schedule Dated 10/03/2017

9.1.6 ColorSnap Sherwin Williams' Paint Selection "Project Shopping List"

**ARTICLE 10 INSURANCE**

The Contractor shall purchase and maintain builder's risk, general liability, worker's compensation and all other usual and customary insurance, naming King Street Enterprises LLC, as building Owner and Ohio Imaging Associates, Inc., as Tenant, as additional insureds.

<b>Type of insurance or bond</b>	<b>Limit of liability Amount</b>
See attached Certificate of Insurance	Per specifications and per project amount

This Agreement entered into as of the day and year first written above.

Mary Ann Kanters, Owner  
OWNER (Signature)

Ohio Imaging Associates, Inc.  
By: Mary Ann Kanters, Owner Representative

Eric R Combs, K-Con, Inc. only  
CONTRACTOR (Signature)

K-Con, Inc.  
By: Eric R Combs, C.O.O.

This agreement and its addenda are subject to the following:

- 1) Owners signature is proof of authority to bind the owner contractually and financially
- 2) Third party proof of sufficient funds availability and/or financing