

No. 09-20155

**In the United States Court of Appeals
for the Fifth Circuit**

ADDICKS SERVICES, INC.,

Plaintiff-Appellant,

v.

GGP-BRIDGELAND, L.P., formerly known as Rouse-Houston, L.P.;
BRIDGELAND GP, LLC; SAFECO INSURANCE COMPANY OF AMERICA,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Texas, Houston Division
No. 4:06-CV-3478

Stephen W. Smith, United States Magistrate Judge, Presiding

BRIEF OF APPELLANT ADDICKS SERVICES, INC.

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Interested Party	Connection to or Interest in Case
Addicks Services, Inc.	Plaintiff-Appellant
C. Nelson Barfield, Jr. David Norris	Owners of Plaintiff-Appellant

GGP-Bridgeland, L.P., formerly known as Rouse-Houston, L.P.	Defendant-Appellee
Bridgeland GP, LLC	Defendant-Appellee and General Partner of GGP-Bridgeland, L.P.
LP Rouse-Houston, LLC	Limited partner of GGP-Bridgeland, L.P.
Howard Research and Development Corporation	Sole Member of Bridgeland GP, LLC and LP Rouse-Houston, LLC
Safeco Insurance Company of America	Defendant-Appellee
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STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Federal Rule of Appellate Procedure 34(a) and Fifth Circuit Rule 28.2.3, Appellant Addicks Services, Inc. believes that oral argument would be helpful in this case. The legal arguments in this case have not been authoritatively decided. Oral argument will assist the Court in understanding the summary judgment evidence, and statutory and policy considerations involved in this case.

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STATEMENT OF JURISDICTION

Appellant Addicks Services, Inc. (“Addicks”) appeals from the district court’s February 24, 2009 Final Judgment in favor of Appellees GGP-Bridgeland, L.P., formerly known as Rouse-Houston, L.P. (“GGP-Bridgeland”), Bridgeland GP, LLC, and Safeco Insurance Company of America (“Safeco”) (collectively, “Bridgeland”). RE.2.2555.¹ Addicks timely filed its Notice of Appeal on March 18, 2009. RE.3.2556-57; *see* FED. R. APP. P. 4(a)(1)(A).

Addicks filed its Original Petition in the 133rd Judicial District Court, Harris County, Texas. R.25-65. Bridgeland removed this case pursuant to 28 U.S.C. § 1441 to the United States District Court for the Southern District of Texas on the basis of diversity of citizenship under 28 U.S.C. § 1332(a). R.17-69. Addicks is a Texas corporation with its principal place of business in Houston, Texas. R.17. GGP-Bridgeland’s partners are its general partner Bridgeland GP, LLC and its limited partner LP Rouse-Houston, LLC. *Id.* The sole member of both of GGP-Bridgeland’s partners is Howard Research and Development Corporation, a Maryland corporation with its principal place of business in Columbia, Maryland, or alternatively, Chicago, Illinois. R.17-18. Safeco is a Washington corporation, with its principal place of business in Seattle, Washington. R.18. It is undisputed

¹ Cites to the record are in the form R.[bates number]. Cites to the record excerpts are in the form RE[tab number].[page number].

that the amount in controversy is greater than \$75,000. R.18; *see* 28 U.S.C. § 1332(a).

This Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES FOR REVIEW

1. Whether the district court erred in granting summary judgment in favor of Bridgeland based on its finding that Addicks released its claims for extra-contractual work and lost productivity in lien releases that GGP-Bridgeland required Addicks to sign before issuing monthly progress payments to Addicks.

2. Whether the district court erred in finding that no genuine issue of material fact existed with respect to Addicks' claim that Bridgeland waived any right to rely on the lien releases by GGP-Bridgeland's conduct that was inconsistent with that claimed right.

3. Whether the district court erred in finding that no genuine issue of material fact existed with respect to Addicks' claim that Bridgeland was estopped from relying on lien releases as a bar to Addicks' claims for extra work and lost productivity even though GGP-Bridgeland repeatedly promised to pay Addicks, and even though Bridgeland raised the lien releases as a bar to Addicks' claims for the first time in connection with this litigation.

4. Whether the district court erred in finding that the lien releases were unambiguous as a matter of law.

INTRODUCTION

This case involves a payment dispute arising out of a construction project known as Bridgelands, Phase I Rough Grading and Spoil Disposal (the “Project”). GGP-Bridgeland was the Owner of the Project. Addicks and GGP-Bridgeland entered into a contract pursuant to which Addicks was to perform the site work for the Project. The Project consisted of a narrowly defined scope of work. GGP-Bridgeland, however, repeatedly directed Addicks to perform work outside the scope of work. Addicks performed the extra work as directed, always with the expectation that it would be paid for that work.

In addition to directing Addicks to perform extra work, GGP-Bridgeland interfered with Addicks’ ability to perform by refusing to release sufficient areas of land for efficient operation, refusing to allow Addicks to undercut areas of unsuitable soil, failing to coordinate the various contractors on the Project, and requiring Addicks to perform out-of-sequence work, all of which hindered and delayed Addicks’ ability to perform. This resulted in additional labor costs, equipment rental costs, and fuel costs for Addicks.

Pursuant to the parties’ contract, Addicks submitted pay estimates for the contractual work it performed each month. Addicks, however, was only permitted to include items on the official pay estimates that GGP-Bridgeland expressly authorized. Nevertheless, Addicks would simultaneously bill GGP-Bridgeland for

the unpaid extra work items on separate invoices, and GGP-Bridgeland was always aware that Addicks was seeking payment for this extra work. GGP-Bridgeland repeatedly represented to Addicks that it would contend with the extra work claims at a later date, repeatedly assuring Addicks that it would be paid for that work.

In order to receive monthly progress payments for its work under the Contract, each month GGP-Bridgeland required Addicks to execute a Waiver and Release of Lien Upon Progress Payment (“Lien Release”). Addicks executed these Lien Releases, always with the understanding that they would in no way affect Addicks’ right to receive payment for unpaid extra-contractual work, and in reliance on GGP-Bridgeland’s promise to pay for the extra work. GGP-Bridgeland also understood that the Lien Releases would not affect Addicks’ right to be paid for the extra work, evidenced by the fact that well after the date of the Lien Releases, GGP-Bridgeland paid at least thirty-four of Addicks’ separate claims for extra work that had been performed prior to the date of the Lien Releases, never once claiming Addicks had waived those claims.

The first time that Bridgeland asserted that Addicks waived its extra work and lost productivity claims was in connection with this litigation. By virtue of GGP-Bridgeland’s intentional inconsistent conduct, and by virtue of its repeated promises to pay Addicks for the extra work, Bridgeland is estopped from asserting the Lien Releases as a defense to Addicks’ claims. The summary judgment record

is replete with uncontroverted evidence raising a material fact issue as to the interpretation of the Lien Releases, as well as Addicks' waiver and estoppel claims.

Nor can the Lien Releases be interpreted to extend to Addicks' claims for extra work. Significantly, the Texas Property Code authorizes such lien releases as a condition precedent to payment only to the extent of payment. Indeed, evidence of the parties' conduct shows that they did not interpret the Lien Releases to extend to Addicks' extra work claims, and courts considering the issue have interpreted similar lien releases as being limited to the extent of the payment made. To the extent Bridgeland's interpretation of the Lien Releases can be considered reasonable, the Lien Releases are ambiguous, and fact issues relating to the circumstances surrounding their execution and the parties' interpretation of the Lien Releases preclude summary judgment.

STATEMENT OF THE CASE

This is a payment dispute arising out of a construction contract involving the interpretation and scope of the Waiver and Release of Lien Upon Progress Payment that GGP-Bridgeland required Addicks to execute each month before making progress payments to Addicks for contractual work. On October 6, 2006, Addicks filed its Original Petition in state court, asserting claims against Bridgeland for breach of contract and quantum meruit, R.25-65, later adding a

claim for promissory estoppel. R.1203. Addicks sought actual damages of \$2,160,957, along with costs, expenses, attorneys' fees, and interest. R.1205-1206. GGP-Bridgeland and Bridgeland GP, LLC filed their Original Answer on October 30, 2006, R.66-68, and Safeco filed its Answer on November 8, 2006. R.75-82.

On November 3, 2006, Bridgeland removed this case pursuant to 28 U.S.C. § 1441 to the United States District Court for the Southern District of Texas² on the basis of diversity of citizenship under 28 U.S.C. § 1332(a). R.17-69. Bridgeland subsequently filed a Counterclaim, asserting claims against Addicks for breach of contract, promissory estoppel, and fraud.³ R.2219, 2235-2243.

On March 12, 2008, Bridgeland filed a Motion for Partial Summary Judgment ("Motion"), arguing that Addicks had released all of its claims against Bridgeland on the basis of language contained in the monthly Lien Releases. R.1386-1704. The district court held a hearing on Bridgeland's Motion on October 6, 2008. *See* R.2447. On October 27, 2008, the district court issued a Summary Judgment Opinion, RE.4.2457-2471, granting Bridgeland's Motion and holding that Addicks' claims for damages incurred prior to November 25, 2005 "are barred by release." RE.4.2471. The district court entered a subsequent Order clarifying

² The case was originally assigned to the Honorable Lynn N. Hughes. Pursuant to 28 U.S.C. § 636(c), the parties consented to have Magistrate Judge Stephen W. Smith "conduct all further proceedings, including the trial and judgment." R.666.

³ Bridgeland later dismissed its fraud claim. *See* R.1040-61.

that the Summary Judgment Opinion applied “equally to any lien claim by Addicks,” and denying Bridgeland’s request to release the Release of Lien Bond that Bridgeland secured from Safeco as “premature.” RE.5.2535-2537.

Thereafter, the parties filed an Agreed Motion to Sever and Stay All Claims Not Disposed of in the Court’s October 27, 2008, Partial Summary Judgment Opinion and Enter Final Judgment. R.2543-2549. On February 24, 2009, the district court entered an Agreed Order severing all remaining claims in the case into a new case, staying the new case until the completion of this appeal, and dismissing with prejudice Addicks’ remaining claims for damages incurred after November 25, 2005. R.2553-2554. Accordingly, on February 24, 2009, the district court entered a Final Judgment. RE.2.2555. This appeal followed. RE.3.2556-2557.

STATEMENT OF FACTS

The Contract and the Project

On July 20, 2004, Addicks entered into a Standard Form of Agreement Between Owner and Contractor (“Contract”) with GGP-Bridgeland (known at the time as Rouse-Houston, L.P.) on behalf of the proposed Harris County Water Control and Improvement District No. 157 to perform site excavation and rough grading on approximately 500 acres of a master planned residential subdivision

development in Northwest Harris County known as Bridgelands, Phase I Rough Grading and Spoil Disposal (“the Project”). R.1937-2002. Addicks’ work under the Contract is what is known in the industry as a “cut and fill” job, in which the site work contractor excavates (or “cuts”) the raw land on the site in order to create lakes, and then spreads the dirt obtained from digging the lakes over the fill placement areas to bring up the site to a constant level elevation of 150.50'.⁴ R.1941, 1994; RE.6.1959; RE.9.1954-55.

The site work contractor is typically the first contractor on a job such as the Project. RE.7.1743. The site work contractor takes the raw land, clears and strips it of vegetation and grades it pursuant to the *rough* grading plan.⁵ *Id.* After the site work contractor’s rough grading is complete, the typical construction sequence is that follow-on contractors perform their work such as installing the water, sewer,

⁴ The dirt obtained from the excavation of the lakes is referred to in the industry as “spoil.” Under the Contract, the spoil was to be used to bring the site up to the grade reflected on the plans. *See* RE.9.1954.

⁵ Rough grading differs from final lot grading in that with rough grading, a site work contractor places the fill dirt over a large, unobstructed area and grades it all to a constant level elevation. RE.7.1744. With final lot grading, the contractor shapes and contours the individual home lots in a subdivision so that they are ready for builders to start constructing houses. *Id.* Final lot grading requires more time and detail because the contractor must grade to a tighter tolerance. *Id.* This results in a smaller area in which to work and requires more lifts in the smaller areas, all with different slopes to get the dirt to the final lot grades, each of which may be at a different elevation. *Id.* Final lot grading was not included in the scope of work under the Contract. *Id.*; *see* RE.9.1953-55.

and drainage utilities, excavating and paving streets, and other work that may be required to enable the developer to sell the lots. *Id.* GGP-Bridgeland represented that the Project would follow this typical construction sequence and that Addicks would have unfettered access to the site. *Id.*

Addicks planned its work⁶ and prepared an estimate for the job costs based on the plans GGP-Bridgeland provided. *Id.* Addicks was the low bidder, with a bid of \$4,582,722, which was slightly less than the next two lowest bids of \$4,802,836 and 4,903,142. *Id.* On August 6, 2004, Addicks received a notice to proceed. *Id.* The Contract provided for 150 days for Addicks to complete the work called for in the Contract, and contemplated allowances for time extensions. *Id.*; RE.6.1959. The scope of work under the Contract was narrow, as detailed on the Contract's bid form which was part of the Contract. RE.9.1954-55.

GGP-Bridgeland's changes to the scope of work and interference with Addicks' performance

After Addicks began work under the Contract, GGP-Bridgeland issued new plans that significantly increased the location and quantities of dirt to be excavated and raised the site elevation. RE.7.1743. GGP-Bridgeland also issued a unilateral change order to the Contract that changed the Project layout and increased both the

⁶ As explained at p.12, *infra*, "Work" is a defined term under the Contract, referring to the work described in the Project's drawings and specifications. RE.6.1959.

amount of work and contract price, but added no additional time for Addicks to perform the extra work. *Id.*; R.1767.

In November and December of 2004 and February of 2005, the Project was plagued with heavy rain and flooding, resulting in site conditions that made it impossible for Addicks to work on numerous days. RE.7.1743. Although Addicks requested time extensions as contemplated by the Contract, GGP-Bridgeland's Project Manager, Patsy Morris, flatly refused to grant extensions to Addicks. *Id.* Instead, Ms. Morris scheduled other contractors to perform their work ahead of Addicks and directed Addicks as to where it should work on the Project, without regard for Addicks' planned sequence of construction. *Id.* As a result of the out-of-sequence work, the utility and paving contractors obstructed Addicks' access to work areas and made Addicks' work more difficult as it had to grade around streets and utility stub-outs as opposed to the wide-open grading over 500 acres for which the parties' contracted. *Id.*⁷

In addition to hindering Addicks' ability to efficiently perform, Ms. Morris directed Addicks to perform extra work that was not within the scope of the Contract. RE.7.1745. This extra work included, among other things: (1) directing

⁷ Before GGP-Bridgeland's interference with Addicks' sequence of work, Addicks' productivity averaged 21,393 cubic yards of dirt per day. R.2064. Afterwards, Addicks' productivity plummeted to an average of 5,309 cubic yards per day. *Id.* GGP-Bridgeland's changes and interference required Addicks to incur significant increases in costs for equipment rental, labor, and supervision. *Id.*

Addicks to build huge landscape berms as high as 20 feet tall at the entrance of the subdivision that were not part of the Contract's scope of work, and directing Addicks to build them before finishing its Contract work or risk being terminated from the job⁸ (RE.7.1745; R.2005-06); (2) performing *final* lot grading in several subdivision sections (RE.7.1744; R.2059); and (3) performing *final* lot grading for a future development section known as the First Bend project. RE.7.1744; R.2060. Addicks' performance was also disrupted when it encountered large areas of unsuitable soil upon which fill could not be placed, as a result of Ms. Morris's refusal to pay Addicks to undercut this soil even though she had previously approved payments for other areas of unsuitable soil. RE.7.1751-55; R.2064.

Addicks seeks payment for extra work

Throughout the Project, GGP-Bridgeland was fully aware that Addicks was or would be requesting payment for extra work and delay and disruption costs (collectively referred to as "extra work") incurred as a result of these events. RE.7.1751-55. In January 2005, Addicks began submitting documentation and notices of claims for extra costs to GGP-Bridgeland. R.1810. Addicks continued

⁸ These berms were located approximately a mile farther from the lake excavation area than the fill placement areas called for in the Contract. RE.7.1745. It took Addicks months to complete this extra work, which was not called for in the Contract plans. *Id.* The berm work was reflected in landscaping plans that GGP-Bridgeland later gave to Addicks and directed Addicks to work from or risk being shut down. R.2005-06.

to submit Requests for Change Orders, Requests for Information, Change Order Logs, and Supplemental Work Item Invoices to GGP-Bridgeland advising of its claims and reserving its rights to seek associated costs. These included:

DATE	DESCRIPTION
January 6, 2005	Request for Information ⁹ advising of disruption and lost productivity claims due to Owner's testing lab not approving areas for fill placement. R.1810.
January 15, 2005	Request for Information requesting payment for 6 extra work items. R.1756-1762.
March 7, 2005	Request for change order for payment for equipment costs incurred in performing work not governed by Contract. R.1785-89.
March 9, 2005	Request for Information requesting payment for additional Enforcement TPDES. R.1793.
March 15, 2005	Request for change order for payment for extra work and reserving rights to related and indirect costs. R.1796-97.
March 17, 2005	Request for change order for payment for extra work and reserving rights to related and indirect costs. R.1818-19.
April 20, 2005	Change order log sent to GGP-Bridgeland showing pending items. R.1899-1900.
May 16, 2005 and June 21, 2005	Request for change order for payment for extra work and reserving rights to related and indirect costs. R.1815-42.
June 30, 2005	Change order log sent to GGP-Bridgeland showing pending items. R.1901-06.
August 4, 2005 and August 22, 2005	Request for change order for payment for extra work and reserving rights to related and indirect costs. R.1874-78.
August 10, 2005	Change order log sent to GGP-Bridgeland showing pending items. R.1913-16.

⁹ These letters are addressed to Brown & Gay Engineers who, per the Contract, were GGP-Bridgeland's liaison. R.1963-64, 1989-91.

August 31, 2005	Invoice for unpaid Supplemental Work Items totaling \$723,841.76. R.1889-90.
August 31, 2005	Change order log sent to GGP-Bridgeland showing pending items. R.1917-21.
September 30, 2005	Invoice for unpaid Supplemental Work Items totaling \$913,629.68. R.1891-92.
November 1, 2005	Invoice for unpaid Supplemental Work Items totaling \$1,221,597.13 with outstanding balance of \$695,057.79. R.1895-96.

As the documents cited in this table reflect, Addicks performed extra work outside the scope of the Contract every month of the Project. Although GGP-Bridgeland did eventually pay many of Addicks' claims for the extra work it had performed at GGP-Bridgeland's direction, a significant number of these claims remain unpaid.

The Payment Process

The Contract defined "Work" as "all labor, materials, equipment, supervision and other services to perform the work described in the Drawings and Specifications attached as Exhibit A, and any requirements set forth in any other Contract Documents enumerated in Article XIX." RE.6.1959. As a condition precedent to receiving progress payments for the Work under the Contract, Addicks was required to submit to GGP-Bridgeland a "written application for payment on a form approved by [Bridgeland] showing the value of Work . . . completed to date pursuant to an approved schedule of values, along with other

substantiating data and information and *lien waivers* on the forms attached [to the Contract]. RE.6.1963 (emphasis added).

Two form lien waivers were attached to the Contract. The first was an “INTERIM AND FINAL LIEN WAIVERS—WAIVER AND RELEASE OF LIEN UPON **PROGRESS PAYMENT**.” RE.8.1985-86 (emphasis added). The second lien waiver was a “WAIVER AND RELEASE OF LIEN UPON **FINAL PAYMENT**.” RE.8.1987-88 (emphasis added). The Lien Releases upon which Bridgeland’s Motion is based are the Waiver and Release of Lien Upon Progress Payment. *See, e.g.*, R.1415-16. Significantly, the Contract required Addicks to execute the Lien Releases as a condition precedent to obtaining progress payments for the “Work,” *i.e.*, the contractually agreed-upon scope of work, not extra work outside the scope of the Contract. RE.6.1963; RE.8.1985-86. Addicks and GGP-Bridgeland followed this contractually-mandated procedure. RE.7.1746-48.

The Lien Releases provide, in pertinent part:

The undersigned, in consideration of the sum of \$_____, hereby waives and releases its lien and right to claim a lien for labor, services, or materials furnished through _____ (*date of this waiver*) under contract with _____ on the job of _____ (*Owner*) to the following property: _____ (*Name and Address of Project*). This waiver and release does not cover any retention or labor, services or materials furnished after the date specified.

Any and all contractors, subcontractors, laborers, suppliers, and materialmen . . . have been paid and satisfied in full, and there are no

outstanding claims of any character arising out of, or related to, the undersigned's activities on, or improvements to, the Project.

This Waiver constitutes a representation . . . that the payment referenced above, once received, constitutes full and complete payment for all work performed, and all costs or expenses incurred . . . relative to the work or improvements at the Project as of the date of this Waiver The undersigned hereby specifically waives, quitclaims and releases any claim for damages due to delay, hindrance, interference, acceleration, inefficiencies or extra work, or any other claim of any kind it may have . . . as of the date of this Waiver, except as follows:_____

_____.

. . . . The amount of money set forth as due and owing in the immediately preceding Waiver dated _____, 20____, has been received, and is deemed paid in full.

R.1985.

The Lien Releases Addicks signed in order to receive the progress payments to which it was entitled, were submitted with the official pay estimate for the month. RE.6.1963. These pay estimates only included items GGP-Bridgeland allowed Addicks to include, and GGP-Bridgeland would not allow pending claims for extra-contractual work to be included in them. RE.7.1747. Consistent with the Contract's provisions, all items included on the official pay estimates were for Work within the scope of the Contract either because the items were within the initial scope of Work or because they had been added to the scope of Work by a written change order that GGP-Bridgeland issued. RE.6.1959, 1962-65, 1967.

Thus, it was a given that GGP-Bridgeland would pay for each item on the official pay estimate each month. RE.7.1747-48. When Addicks completed extra work and received approval from GGP-Bridgeland to include the extra work on an official pay estimate, that extra pay item would be placed on the pay estimate and turned into a written change order. RE.7.1747. Until GGP-Bridgeland allowed Addicks to officially invoice for extra work items, however, Addicks billed for these items via separate documentation. *See, e.g.,* Table on pp. 11-12, *supra*. Accordingly, the only items submitted on the monthly pay estimates were items within the Contract's definition of Work. The Contract did not contemplate that extra work that had not been reduced to a written change order would be included on the pay estimates to which the Lien Releases applied. *See* RE.6.1959-69.

Addicks understood that by signing the Lien Releases, it was only releasing its claims *to the extent of the progress payment received*. RE.7.1747. It was always Addicks' understanding that it was not releasing its claims for extra work and disruption when it submitted the monthly Lien Releases in exchange for monthly progress payments for Work under the Contract. *Id.* As explained below, GGP-Bridgeland's actions demonstrated that this was its understanding, too.

Bridgeland's course of conduct shows it did not believe Addicks released its claims for extra work by executing the monthly Lien Releases

On numerous occasions, GGP-Bridgeland paid Addicks for extra work performed prior to the date of the Lien Releases long after Addicks had signed the

Lien Releases. RE.7.1748-49. For the Court's convenience, a graphic depiction of these payments for extra work, with citations to the supporting record evidence, is attached as Exhibit A hereto. Ms. Morris continued to promise Addicks that it would be paid for the extra work. RE.7.1746. For example, she left a voicemail message for Addicks' president stating, ". . . we'll have to resolve whatever dollar amount you may or may not be over that, but we'll get you something for this dirt that you're moving for the berm¹⁰ and that kind of things." R.2008.

Relying on GGP-Bridgeland's promises to pay for the extra work, Addicks continued to comply with GGP-Bridgeland's directives and continued billing for unpaid extra work items separately. RE.7.1746-47. The parties continued to discuss unpaid items and negotiate the amount of the costs over a period of many months. RE.7.1749; R.2004-13, *see* Table at pp. 11-12, *supra*. Not once did GGP-Bridgeland ever take the position that Addicks released its extra work claims by executing the monthly Lien Releases that GGP-Bridgeland required before making contractual progress payment to Addicks. RE.7.1746.

Moreover, after Addicks executed the Lien Releases, GGP-Bridgeland paid for numerous items performed prior to the date of the Lien Releases. Exhibit A. For example, GGP-Bridgeland paid Addicks a portion of extra work costs for

¹⁰ The berm work was not included in the scope of Work under the Contract. *See* R.1953-57.

additional haul distances, in the amount of \$526,539.00 in October, 2005 for work performed from April through August of 2005, despite the fact that Addicks had executed Lien Releases covering each of those months. RE.7.1748; R.1848-98.

Addicks' unpaid claims

The unpaid amounts for which Addicks billed GGP-Bridgeland during the Project were: TPDES Adjustment (\$21,756.00), Fine Grading in Sections 2, 3 and 4 of the Shores (\$373,351.07), Fine Grading in Section 9 of First Bend (\$119,613.00), incremental fuel costs (\$135,989.00), additional lake excavation (\$59,634.83), and lost productivity costs due to delay and disruption (\$943,259.00).¹¹ R.1582-90, 2058-67. Addicks provided notice of these claims to GGP-Bridgeland during the Project.¹²

¹¹ Addicks also billed GGP-Bridgeland for incremental bond costs (\$16,890), but later dropped this claim.

¹² In his Summary Judgment Opinion, the Magistrate Judge incorrectly stated that only a small portion of the damages Addicks seeks are actually for extra work items. R.2467. The extra scope items amount to between \$574,355.70 and \$710,347.70. The reason for the range is that Addicks is unable to precisely allocate which amounts contained in the \$135,989 for incremental fuel costs relate to incremental costs due to extra work performed and which relate to delay and hindrance by GGP-Bridgeland. Moreover, the district court incorrectly stated that Addicks “never even submitted a claim specifying an amount for delay and disruption costs until after this lawsuit was filed” and “the rest is delay costs calculated after the project ended.” *Id.* Throughout the Project, well before this suit was filed, Addicks gave notice of its delay and disruption costs, specifically reserving its right to recover such costs. *See* Table at pp. 11-12, *supra*; *see also* R.461, 1588, 1899-1936; RE.7.1746. At the conclusion of the Project, before this suit was filed, Addicks quantified the amount it was seeking. *See* R.1588.

Addicks' expert calculated Addicks' total damages for extra work and lost productivity to be \$2,160,957. R.1691-95. Bridgeland did not offer any summary judgment evidence to dispute that Addicks performed the extra work, that disruption by GGP-Bridgeland caused Addicks to incur the lost productivity costs, that GGP-Bridgeland received the benefit of Addicks' extra work, or that the extra work costs Addicks' claimed are reasonable.

In February 2006, Addicks filed a lien on the property in the amount of \$2,257,394.97 for unpaid extra work and lost productivity claims. R.33-45. In order to sell the finished lots to builders free and clear of Addicks' lien, GGP-Bridgeland bonded around the lien by securing a Release of Lien Bond from Safeco. R.46-63.

The ensuing litigation

In October 2006, after efforts to resolve Addicks' outstanding claims for extra work failed, Addicks filed suit. R.25-65. For the first time—and only in connection with this litigation—Bridgeland argued that Addicks waived and released its claims for extra work when it executed the monthly Waiver and Release of Lien Upon Progress Payments in order to receive the progress payments to which it was entitled.

SUMMARY OF THE ARGUMENT

It is well established that intentional conduct that is inconsistent with a claimed right can waive that right. That is exactly the situation here. Addicks offered ample summary judgment evidence showing that despite the existence of Lien Releases covering the applicable time periods in which Addicks performed extra work, GGP-Bridgeland continued to acknowledge, negotiate, and often pay Addicks' claims for extra work. GGP-Bridgeland never once claimed that any of Addicks' extra work claims were waived or released by virtue of the Lien Releases—that purported defense to Addicks' claims was conceived for purposes of litigation only.

As if its entirely inconsistent conduct was not enough, GGP-Bridgeland also repeatedly promised Addicks that payment for extra work was forthcoming. As a result of GGP-Bridgeland's promises to pay Addicks' extra work claims, Bridgeland is estopped from asserting the Lien Releases as a defense.

Finally, the Lien Releases, by their own terms, do not extend to claims for extra work, only Work within the scope of work defined in the Contract. This interpretation is mandated by the applicable provisions of the Texas Property Code authorizing lien releases only to the extent of the progress payment made. It is also compelled by the parties' understanding as shown by their conduct, together with the custom within the industry. Alternatively, to the extent the Lien Releases can

also be reasonably interpreted as waiving Addicks' claims for extra work, the Lien Releases are ambiguous.

The district court ignored the significant evidence of GGP-Bridgeland's course of conduct and repeated promises to pay, and held that the Lien Releases barred Addicks' claims as a matter of law. The district court's holding is contrary to the record evidence and applicable case law. Genuine issues of material fact exist with respect to Addicks' claims of waiver, promissory estoppel, and ambiguity. The Court should reverse the summary judgment and remand the case for proper resolution of these fact issues at trial.

STANDARD OF REVIEW

A summary judgment is reviewed *de novo*. *Cooper Tire & Rubber Co. v. Farese, Farese & Farese Prof'l Ass'n*, 423 F.3d 446, 454 (5th Cir. 2005). It is improper for a district court to enter summary judgment unless "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). "An issue is 'genuine' if the evidence is sufficient for a reasonable jury to return a verdict for the nonmoving party." *Minter v. Great Am. Ins. Co.*, 423 F.3d 460, 465 (5th Cir. 2005) (quotation omitted). A fact issue is material if its resolution in favor of one party might affect the outcome of the lawsuit. *Id.*

Because Bridgeland’s summary judgment motion is based on its affirmative defense of release, Bridgeland had the burden to “establish beyond peradventure all of the essential elements of the . . . defense to warrant judgment in [its] favor.” *Chaplin v. NationsCredit Corp.*, 307 F.3d 368, 372 (5th Cir. 2002). In reviewing the summary judgment, the Court must “construe all facts and inferences in the light most favorable” to Addicks. *Cooper Tire & Rubber Co.*, 423 F.3d at 454.

ARGUMENT

I. GENUINE ISSUES OF MATERIAL FACT EXIST AS TO WHETHER BRIDGELAND’S CONDUCT RESULTED IN A WAIVER OF OR OTHERWISE PRECLUDED ITS RIGHT TO RELY ON THE LIEN RELEASES TO DEFEAT ADDICKS’ CLAIMS.

As the Magistrate Judge acknowledged in his Summary Judgment Opinion, Bridgeland paid Addicks’ claims for extra work on numerous occasions, “despite the fact that Addicks had signed numerous releases” after the date on which the extra work was performed. RE.4.2464. In fact, Bridgeland paid at least thirty-four of Addicks’ claims for extra work performed prior to the date of the Lien Releases, each of which was evidenced by a written change order to the Contract.¹³ *See* Exhibit A.

¹³ When Bridgeland prepared the change orders, it chose to group multiple claims for extra work together in the same change order, presumably for the sake of convenience. *See, e.g.*, R.1869-70, 1872-73. Thus, although Bridgeland issued payment for at least thirty-four separate extra work items, it issued only fifteen change orders. *Id.*

Moreover, the parties engaged in negotiations over Addicks' extra work claims for months, continuing well beyond the dates of the Lien Releases. RE.7.1746. Addicks invoiced GGP-Bridgeland separately for the extra work items and gave repeated notice to GGP-Bridgeland of its delay and disruption claims. *See* Table at pp. 11-12, *supra*. Addicks sent GGP-Bridgeland numerous letters reserving its claim for costs associated with the delay and disruption caused by GGP-Bridgeland. *Id.* GGP-Bridgeland's agent repeatedly represented that GGP-Bridgeland was reviewing Addicks' requests for payment for extra work, and repeatedly assured Addicks that payment was forthcoming. RE.7.1745-46. Not once while Addicks was working on the Project did GGP-Bridgeland contend that Addicks' claims were barred by the Lien Releases. *Id.* The first time Bridgeland asserted the Lien Releases as a defense to Addicks' claims was in connection with this litigation. Consequently, through its course of conduct, Bridgeland waived the right to rely on the Lien Releases to bar Addicks' claims for extra work. At a minimum, material fact issues exist precluding summary judgment on Bridgeland's defense of release.

A. Conduct that Is Inconsistent with a Contractual Right Results in a Waiver of or Otherwise Precludes Reliance on that Right.

“Waiver is an intentional relinquishment of a known right or intentional conduct inconsistent with claiming that right.” *Sun Exploration & Prod. Co. v. Benton*, 728 S.W.2d 35, 37 (Tex. 1987); *see also Bott v. J.F. Shea Co.*, 388 F.3d

530, 533 (5th Cir. 2004) (same). “Waiver is generally a question of fact,” and the “issue of waiver becomes a matter of law only where material facts and circumstances are undisputed or clearly established and there is no room for argument or inference.” *Bott*, 388 F.3d at 534 (citations omitted).

Green Int’l, Inc. v. Solis, 951 S.W.2d 384 (Tex. 1997), involved facts remarkably similar to the present case. Green International, Inc. (“Green”) was the general contractor for the construction of three prison projects. *Id.* at 386. Green hired Solis to provide labor for the steel erection and a portion of the concrete. *Id.* Ultimately, Solis abandoned the project before completion. *Id.* Green sued Solis, and Solis counterclaimed asserting, among other things, a claim for extra work performed on the project. *Id.*

In order to receive periodic payments, Solis was required to execute lien releases in which it released Green “from all claims arising out of or by reason of work performed and materials furnished under said subject Subcontract” *Id.* at 388-89. Green argued that “the waiver of lien releases signed by Solis bar Solis’ recovery on his claim for extra-contractual work.” *Id.* at 388. The question before the Texas Supreme Court was “whether the global language of the releases terminated Solis’ recovery for his extra work.” *Id.* at 389.

The Texas Supreme Court examined the parties’ contract and found that it contemplated written change orders for extra work. *Id.* It found it significant that

the lien releases were executed after extra work was performed and *months before* the change orders were issued. *Id.* The Court held that Solis was entitled to payment for the extra work performed despite the fact that he had executed the periodic lien releases *after* the work was performed, based on evidence that Green paid other claims for extra work after lien releases were executed covering the period in which the extra work was performed. Although the Court did not expressly hold that Green had waived its right to assert the release as a bar to Solis's claims, it is apparent that Green's approval of change orders after the date of the lien releases was a key factor on which the Court relied in holding that "the waiver of lien releases do not bar Solis' recovery for extra work." *Id.*

The facts in the present case are close to those in *Green*. Addicks performed extra work on countless occasions. *See* Exhibit A; Table at pp. 11-12, *supra*; R.1582-90, 2058-67. Although GGP-Bridgeland paid some of Addicks' claims for extra work, \$2,160,957 remains unpaid. *See* R.1691-95. As in *Green*, the extra work for which Addicks did receive payment was paid pursuant to a written change order issued long after the work was performed and after the applicable Lien Releases were signed. Exhibit A. Accordingly, under *Green*, the claims for extra work for which no change orders were issued were not released by the Lien Releases.

Apart from *Green*, there is a dearth of Texas case law on the issue of whether inconsistent conduct such as is present here, will waive a contractor or owner's right to claim that by executing a lien release, all claims for extra work are released. Other courts around the nation considering similar facts, however, have held that such inconsistent conduct will indeed waive the right to rely on lien releases or strict compliance with contract requirements to bar a contractor's claims for extra work.¹⁴ For example, in *Robert E. McKee, Inc. v. City of Atlanta*, 431 F. Supp. 1198, 1199 (N.D. Ga. 1977), the general contractor on a project for the City of Atlanta hired subcontractors to remove subsurface rock. In order to receive final payments, the subcontractors executed general releases stating that they had been paid in full for their services. *Id.* at 1200. These releases were executed after the subcontractors had made a claim for extra work, and negotiations on these claims continued after the subcontractors executed the

¹⁴ In support of its Motion, Bridgeland cited three cases for the proposition that lien releases such as the ones at issue here are "routinely enforced." R.1398-99 (citing *Kleinknecht Elec. Co. v. Jeffrey M. Brown Assocs., Inc.*, 2006 WL 1005007 (Pa. Com. Pl. 2006); *Kern v. City of Lawrenceburg*, 625 N.E.2d 1326 (Ind. Ct. App. 1993); *Wayne J. Griffin Elec., Inc. v. Dunn Constr. Co.*, 622 So. 2d 314 (Ala. 1993)). These cases are all distinguishable on their facts—notably, not one of these cases involved evidence of conduct inconsistent with the asserted right to claim release. Bridgeland will undoubtedly devote much of its argument to distinguishing the lien release language in the cases Addicks cites here. The principle in all of these cases, however, is not dependent upon the contract language. They all stand for the well-established rule that intentional conduct inconsistent with a claimed right can and does result in a waiver of that right.

releases. *Id.* Throughout these negotiations, as here, the City never raised the releases as a defense to the subcontractors' claims.¹⁵ *Id.* According to the court, the releases were "obviously" not intended to compromise the subcontractors' extra work claims, but were executed so that the subcontractors "could receive payment for what they were owed under the contract." *Id.* The court denied the City's motion for summary judgment, refusing to "allow such an inequity to occur." *Id.* The court concluded that the City and the contractor waived the subcontractors' releases by paying one of the subcontractors' claims and by continuing to negotiate unpaid claims after the releases were executed. *Id.* at 1200-01.

In *Industrial Window Corp. v. Federal Insurance Co.*, ___ F. Supp. 2d ___, 2009 WL 921120, *10 (S.D.N.Y. 2009), the contractor moved for summary judgment on the subcontractor's pending change orders for extra work on the grounds that the subcontractor had failed to comply with the change order procedures set forth in the subcontract. As here, the subcontractor submitted evidence that there were five other change orders that the contractor had approved and that work had been performed "[w]ithout the need for fully executed change

¹⁵ In *McKee*, as here, the releases were never raised as a grounds for denying payment to the subcontractors prior to litigation. The court was unimpressed with the City's attempt to undercut the subcontractors' claims "by relying on releases it knows were meant to be inapplicable to the claim at issue." 431 F. Supp. at 1200.

orders.” *Id.* Finding that genuine issues of material fact existed as to whether the contractor had waived the right to insist upon strict compliance with the change order provisions of the subcontract, the court denied the contractor’s motion for summary judgment. *Id.*

Other courts, although not necessarily characterizing it as waiver, have found that evidence of such inconsistent conduct shows that the contractor did not intend the lien releases to bar claims for extra work, and is sufficient to defeat summary judgment on the grounds of release. For example, in *Associated Mechanical Contractors v. Martin K. Eby Construction Co.*, 964 F. Supp. 1576, 1578 (M.D. Ga. 1997), the contractor claimed that release language in twenty-six pay applications submitted by the subcontractor operated as a waiver and release of all claims for work performed through the date of each pay application. The subcontractor argued that the contractor’s “acknowledgement and processing of [the subcontractor’s] delay claims after execution of the application for payment forms evidence an intent inconsistent with [the contractor’s] present contention that [the subcontractor] waived its delay claims” *Id.* at 1582. The court agreed, recognizing that “[t]he mutual conduct of parties to a contract may waive the original contract terms, resulting in a ‘mutual departure’ or ‘mutual disregard’ of the contract language.” *Id.* The court denied the contractor’s motion for summary judgment, concluding that the fact that the contractor discussed the

subcontractor's delay claims and offered to submit them to the owner is "evidence that [the contractor] viewed the claims as being properly submitted under the subcontract" *Id.* at 1583.

The court in *West End Interiors, Ltd. v. Aim Construction & Contracting Corp.*, 2000 WL 1201389 (S.D.N.Y. 2000), similarly found that evidence of a contractor's inconsistent conduct required denial of its motion for summary judgment on the basis of release. In *West End Interiors*, the contractor argued that the subcontractor released all of its claims when it executed twenty-seven Affidavits of Release containing a broad release. *Id.* at *2. The court held that the subcontractor had presented sufficient evidence of the parties' course of conduct to defeat summary judgment. *Id.* at *3. Specifically, in 1997, the subcontractor submitted twenty-seven change orders for extra work, none of which the contractor paid. *Id.* at *2. In January 1998, after the date of the last Affidavit of Release, the subcontractor submitted five more change orders. *Id.* The contractor then issued payment for several of the change orders, including ones that were "long dead under [the contractor's] release theory." *Id.* at *3. The next week, the contractor issued payment for six more of the pending change orders. *Id.* According to the court, the contractor's release theory was "severely undercut by the parties' course of conduct," *id.* at *2, and evidence of this inconsistent conduct was "sufficient to

deny [the contractor's] motion for summary judgment on the affirmative defense of release." *Id.* at *3.

Navillus Tile, Inc. v. Turner Construction Co., 770 N.Y.S.2d 3 (N.Y. App. Div. 2003), is yet another case in which the court denied a contractor's motion for summary judgment based on evidence of the contractor's inconsistent conduct. In *Navillus*, the subcontractor received partial progress payments from the contractor, each of which was conditioned upon the subcontractor executing a Partial Release and Waiver of Mechanics' and Suppliers' Liens. *Id.* at 4. Over the course of the project, the subcontractor executed eighteen partial releases. *Id.* The contractor, however, issued at least twelve change orders after the date of the last partial release. *Id.* at 5. The court found that this conduct undermined the contractor's claim that the last partial release was a final one,¹⁶ and reversed the trial court's summary judgment in favor of the contractor. *Id.*

Likewise, in *Metric Constructors v. United States*, 314 F.3d 578 (Fed. Cir. 2002), the court reversed the trial court's grant of summary judgment in light of evidence of the contractor's inconsistent conduct. The contractor entered into a contract with NASA, and hired a subcontractor to perform electrical work. *Id.* at 579. The contractor made a "substantial payment" to the subcontractor on an equitable adjustment claim after the date of an Affidavit and Release the

¹⁶ The Lien Releases at issue here were interim ones, not final. *See, e.g.*, R.1415.

subcontractor executed in connection with a partial payment. *Id.* at 584. The court rejected the government’s attempt to characterize this payment as “a voluntary transfer unsupported by any legal obligation.” *Id.* Reversing the trial court’s summary judgment in favor of the government, the court concluded that the fact that the parties behaved as if the contractor had continuing obligations to the subcontractor after the date of the Affidavit and Release “is strong evidence that the parties to the release did not regard it as an iron-bound release . . . from all further liability in connection with the subcontract.” *Id.* See also *Gilbane Building Co. v. Two Turners Elec. Co.*, 2007 WL 582252 at *10-11 (Tex. App.—Houston [14th Dist.] 2007, pet. denied) (holding that evidence did not conclusively establish subcontractor’s waiver of claims, where evidence showed that outstanding sums were owed at time subcontractor executed lien releases, and contractor had notice of those claims).

As these cases demonstrate, Bridgeland’s conduct in negotiating and paying Addicks’ claims for extra work performed prior to the execution of the Lien Releases, after the date of the Lien Releases, is inconsistent with Bridgeland’s belated claim of release. Genuine issues of material fact preclude summary judgment on Bridgeland’s release defense.

B. Evidence of Bridgeland's Inconsistent Course of Conduct Precludes Summary Judgment on Its Defense of Release.

The facts of this case are strikingly similar to those in the preceding cases. Addicks, like the subcontractors in those cases, was required to execute lien releases in order to receive progress payments. RE.6.1963; RE.7.1745. The Contract expressly contemplated written change orders for compensation for extra work. RE.6.1963; *see Green*, 951 S.W.2d at 389. The extra work for which Bridgeland did pay Addicks was done so pursuant to written change orders issued *after* the date of the Lien Releases. Exhibit A; *see, e.g., Green*, 951 S.W.2d at 389; *Navillus Tile*, 770 N.Y.S.2d at 5. Addicks continued to submit its claims for extra work, and the parties continued to negotiate these claims, after each Lien Release was signed. RE.7.1749; R.2004-13; *see* Table at pp. 11-12, *supra*; *see, e.g., Robert E. McKee*, 431 F. Supp. at 1200; *Associated Mechanical*, 964 F. Supp. at 1583. Bridgeland asserted the Lien Releases as a bar to Addicks' claim for extra work for the first time in connection with this litigation. *See Robert E. McKee*, 431 F. Supp. at 1200 (release issue not raised until two years after lawsuit filed).

Under *Green* and the additional authorities cited above, the Lien Releases do not bar Addicks' claim for the extra work it performed at GGP-Bridgeland's direction and for which GGP-Bridgeland promised to pay. By its course of conduct, Bridgeland has waived any right it may have had to rely on the Lien Releases as a waiver and release of Addicks' claims. In any event, there is ample

summary judgment evidence in the record to raise a fact issue with respect to Bridgeland's course of conduct inconsistent with its claimed contractual rights.

C. The District Court Erred in Holding that Bridgeland Did Not Waive Its Right to Enforce the Lien Releases.

The district court acknowledged that Bridgeland paid Addicks' claims for extra work on numerous occasions, "despite the fact that Addicks had signed numerous releases" after the date on which the extra work was performed. RE.4.2464. The district court nevertheless found that by requiring Addicks to sign additional Lien Releases prior to receiving payments for extra work, "Bridgeland's conduct is not inconsistent with enforcement of the releases." *Id.*

The district court's puzzling holding sharply conflicts with the aforementioned authorities. Notably, the district court failed to cite even a single authority to support its conclusion that by requiring Addicks to sign additional Lien Releases in connection with the change orders, Bridgeland's conduct was consistent with its position that the Lien Releases barred Addicks' claims. *See* RE.4.2464. The proffered basis for the district court's incorrect conclusion is its erroneous finding that by issuing payments for extra work followed by further releases "the contract *and releases* were serially modified in writing by the parties." *Id.* (emphasis added).

The district court's reasoning is erroneous. The fact that Bridgeland issued change orders and paid many of Addicks' extra work claims that would be barred

under Bridgeland’s release theory clearly shows conduct inconsistent with any right to claim release. Certainly the change orders Bridgeland issued in connection with the payments it made to Addicks for extra work modified the Contract—they were expressly intended to under Article X of the Contract. R.1964. In fact, the “List of Contract Documents” in Section 19.2 of the Contract includes “All Change Orders and written modifications that *amend or supplement the Contract Documents* pursuant to the Contract Documents.” RE.6.1968 (emphasis added).¹⁷

The fact that GGP-Bridgeland issued change orders after Addicks signed Lien Releases does not alter the fact of GGP-Bridgeland’s inconsistent conduct in paying claims that accrued before the Lien Releases were executed, long after the dates of the Lien Releases. The Lien Releases that Bridgeland required Addicks to sign before receiving payment for extra work were not modifications of prior Lien Releases. They were new Lien Releases for the contractual work Addicks performed (including contractual work for which GGP-Bridgeland had issued change orders), independently supported by separate and additional consideration as set forth in the Lien Releases.¹⁸ *See, e.g.,* R.1474-83.

¹⁷ The Interim and Final Lien Waivers are not included on the list of contract documents. RE.6.1968.

¹⁸ As the court recognized in *Quality Environmental Contractors, Inc. v. IT Corp.*, 1999 WL 1276829 at *3 (E.D. La. 1999), “[s]hould the release attempt to extend to claims outside the payment of invoices, an added consideration would either have

There is no evidence or authority to support the district court's conclusion that the subsequent Lien Releases did or were intended by either of the parties to modify the earlier Lien Releases. To the contrary, the summary judgment evidence shows that Bridgeland's course of conduct in negotiating Addicks' claims for extra work and issuing change orders after the date of the Lien Releases was inconsistent with its belatedly claimed defense of release. At bottom, material fact issues exist regarding the effect of Bridgeland's conduct on its claimed entitlement to rely on the Lien Releases to avoid Addicks' claims. The district court erred in granting summary judgment on Bridgeland's defense of release and waiver.

II. THE LIEN RELEASES DO NOT EXTEND TO ADDICKS' CLAIMS FOR EXTRA WORK.

As Nelson Barfield, Addicks' President, testified, Addicks performed extra work at Bridgeland's direction with the expectation that it would be paid for that work. RE.7.1746. In order to receive the progress payments to which it was entitled, it is undisputed that Addicks only included the items on its official pay estimates that Bridgeland's agent directed it to include.¹⁹ RE.7.1747. On the

been added or an existing consideration, apart from what was contained in the release, would have been explicitly provided.”

¹⁹ See *Gilbane*, 2007 WL 582252 at *10, n.9 (summarizing testimony of the Head of Facilities for the Clear Creek Independent School District that “even though there might be outstanding payment issues, it is standard practice in the construction industry for subcontractors to submit [lien releases] in the expectation that all open payment issues would be resolved and a final payment would be

occasions when Bridgeland formally approved amounts Addicks requested for extra work—often months after the work had been performed and Lien Releases had been executed for the month in which the work had been performed—Bridgeland would then direct Addicks to include the item on its official pay estimate and issue a change order. *Id.*; Exhibit A. Consistent with the applicable provisions of the Texas Property Code and the limiting language of the Lien Releases—and as evidenced by the parties’ conduct—neither party understood the Lien Releases to waive Addicks’ claims for extra work.

A. The Texas Property Code Contemplates Lien Releases Only to the Extent of the Payment Made.

An understanding of the statutory backdrop against which the Lien Releases were authorized and executed is important to the proper interpretation of the Lien Releases. Section 53.152 of the Texas Property Code authorizes Bridgeland’s requirement that Addicks execute a Lien Release in order to receive progress payments:

(a) When a debt for labor or materials is satisfied or paid by collected funds, the person who furnished the labor or materials shall, not later than the 10th day after the date of receipt of a written requests, furnish to the requesting person a release of the indebtedness and any lien claimed, *to the extent of the indebtedness paid*. An

forthcoming,” and that “this practice is almost mandated by the fact that most owners . . . require these releases before they will make final payments to the general contractor.”).

owner, the original contractor, or any person making payment may request the release.

(b) A release of lien must be in a form that would permit it to be filed of record.

TEX. PROP. CODE § 53.152 (emphasis added). The scope of the lien release authorized under the statute is expressly limited to “the extent of the indebtedness paid.”

There are few situations that come to mind in which a release can legitimately be *required*—not requested—before a paycheck will be issued. It is because of the statutory rights of mechanics, contractors, and materialmen to file a lien on property that the Texas Property Code permits an owner or contractor to *require* a lien release to the extent of the payment made as a condition precedent to payment. *See* TEX. PROP. CODE ch. 53, subch. B.

These lien release statutes, however, present special problems for the party required to execute them. As the court in *United States of America for the Use and Benefit of F&G Mechanical Corporation v. Manshul Construction Corporation*, 1998 WL 849327 (E.D.N.Y. 1998), explained:

The courts have, however, recognized that this type of lien provision presents a problem to subcontractors where the timing of payments lags behind the actual completion of work. Even though the subcontractor may have recognized at the time he is asked to execute the lien that there are outstanding claims for completed work not covered by the payment, the subcontractor knows that in the absence of an executed lien waiver, the payment will not be made.

Id. at *9.²⁰

In other words, the party seeking payment often finds itself between a rock and a hard place—execute the lien release despite outstanding claims for extra work in order to get paid, or refuse to execute the lien release for fear of waiving extra work claims and not get paid. For this reason, courts tend to construe lien releases narrowly, limiting them to the extent of the payment made.

B. Lien Releases Limited to Payments Made Do Not Extend to Claims for Extra Work.

Because of the problems created by the timing of lien releases, courts have interpreted lien releases similar to the ones at issue here as not being “meant by either party to be a release for amounts still owed for work performed.” *Manshul*, 1998 WL 849327 at *9 (citing *Orange Steel Erectors, Inc. v. Newburgh Steel Prods., Inc.*, 640 N.Y.S.2d 283 (N.Y. App. Div. 1996)); see *Gilbane Bldg. Co. v. Two Turners Elec. Co.*, 2007 WL 582252 at *10 (Tex. App.—Houston [14th Dist.] 2007, pet. denied) (by limiting release “to the extent such monies have been paid,” the releases excluded outstanding sums owing for extra labor costs); *Metric Constructors v. United States*, 314 F.3d 578, 583 (Fed. Cir. 2002) (release clauses

²⁰ In *Manshul*, as here, “[t]here was no testimony presented to [the] Court to even begin to suggest that at the time the waivers were signed, [the contractor] believed that [the subcontractor] was waiving its right to collect the additional amounts owed for work performed,” or “to demonstrate detrimental reliance by [the contractor] on these waivers.” 1998 WL 849327 at * 10.

limiting release “to the extent of payments actually received” “do no more than release the prime contractor (and the owner) from any claims or liens relating to the payments received.”); *Navillus Tile, Inc. v. Turner Constr. Co.*, 770 N.Y.S.2d 3 (App. Div. 2003) (fact issue existed as to what monies parties intended to waive with release that was limited to the extent of payments actually received).

Similarly, the Lien Releases at issue here are limited, in numerous instances, to the extent of the actual payment received by Addicks.

- The Lien Releases are entitled “Waiver and Release of Lien *Upon Progress Payment*”;
- The waiver and release of lien is made “*in consideration of* the sum of [stated dollar amount]”;
- The Lien Release “constitutes a representation . . . that *the payment referenced above, once received, constitutes full and complete payment for all work²¹ performed*”; and
- The Lien Release concludes that “[t]he *amount of money set forth as due and owing* in the immediately preceding Waiver dated [date of execution] *has been received and is deemed paid in full.*”

See, e.g., R.1415 (emphasis added).

The Lien Release language on which Bridgeland relies cannot be read in the vacuum Bridgeland urges. Rather, it must be harmonized with and interpreted in

²¹ As previously described, “work” is a defined term under the Contract, referring to the work described in the Project’s drawings and specifications, and thus, does not include extra-contractual work. RE.6.1959.

conjunction with all of the provisions of the Lien Release, including those limiting the Lien Release to the extent of the payment made, and Section 53.152 of the Texas Property Code authorizing such releases “to the extent of the indebtedness paid.” *See Quality Environmental Contractors v. IT Corp.*, 1999 WL 1276829, *3 (E.D. La. 1999) (finding that although paragraph in lien release contained “boilerplate language purporting to discharge [the contractor] from all claims, the context of the document undeniably limits the release to potential claims arising out of the payment of outstanding invoices”). GGP-Bridgeland’s own agent agreed that the Lien Releases “release[ed] claims to the amounts that were being paid.” R.2053.

The district court erred in holding that the Lien Releases waived Addicks’ claims for extra contractual work as a matter of law. RE.4.2471. The Texas Property Code, case law, and the parties’ conduct mandate the opposite conclusion.

III. GENUINE ISSUES OF MATERIAL FACT EXIST AS TO WHETHER BRIDGELAND IS ESTOPPED FROM CLAIMING ADDICKS WAIVED AND RELEASED ITS CLAIMS FOR EXTRA WORK.

Promissory estoppel is an equitable doctrine. *Hernandez v. UPS Supply Chain Solutions, Inc.*, 496 F. Supp. 2d 778, 783 (W.D. Tex. 2007). The elements of a claim for promissory estoppel are: (1) the defendant made a promise; (2) foreseeability by the defendant that the plaintiff would rely on that promise; and (3) the plaintiff suffered substantial detrimental reliance upon the defendant’s

promise. *Id.* at 783-84 (citing cases). Promissory estoppel precludes a promisor from denying the enforceability of a promise. *The Plaza at Turtle Creek, Ltd. v. Henry Building, Inc.*, 2002 WL 59603, *6 (Tex. App.—El Paso 2002, no pet.) (affirming trial court’s holding that general contractor was entitled to compensation for work performed outside the scope of its contract with owner because owner induced general contractor to perform such work and such reliance was foreseeable). Similarly, the equitable doctrine of quasi-estoppel prevents a party from asserting a position, to the disadvantage of another, inconsistent with a position previously taken by that party. *Eckland Consultants, Inc. v. Ryder, Stilwell, Inc.*, 176 S.W.3d 80, 87 (Tex. App.—Houston [1st Dist.] 2004, no pet.). “It applies when it would be unconscionable to allow a party to maintain a position inconsistent with one in which it had acquiesced, or from which it had accepted a benefit.” *Id.*

The record evidence demonstrates the existence of material fact issues relating to Addicks’ estoppel claim. To begin with, Bridgeland repeatedly promised Addicks it would deal with Addicks’ requests for payment on extra work items at a later date, as the requested amounts had either not been approved for inclusion on the pay estimate or the extra work was not yet complete. RE.7.1746; R.2008. GGP-Bridgeland also reassured Addicks that it would be paid once the work was complete. RE.7.1746; R.2008.

Moreover, there is substantial evidence in the record that Addicks relied on GGP-Bridgeland's promise to its obvious detriment by performing extra work, incurring the associated costs, and being denied payment. RE.7.1749. Addicks' reliance was justified in light of the fact that GGP-Bridgeland acted in a manner consistent with its promise by paying Addicks for some of its extra work claims long after Addicks had signed Lien Releases. *Id.* The summary judgment evidence shows that GGP-Bridgeland knew or at a minimum should have known that its promises to pay Addicks, combined with its occasional payments to Addicks after the Lien Releases were executed would result in Addicks relying to its detriment on those payment promises. *See, e.g.,* R.2005-06, 2008. It is undisputed that Bridgeland received the benefit of Addicks' work, and that the extra work was not within the Contract's scope of work.

Bridgeland's position that Addicks waived its claims for extra work and delay and disruption costs when it signed the Lien Releases is a made-for-litigation defense. Had GGP-Bridgeland claimed, even once during Addicks' work on the Project, in response to a Supplemental Work Invoice, Request for Information, or Request for change order, that Addicks released its extra work claims when it signed the Lien Releases, Addicks would not have continued to perform work on the Project. *See* RE.7.1749. Bridgeland succeeded in inducing Addicks to perform by repeatedly promising to pay Addicks' outstanding claims. RE.7.1745-49.

Accordingly, the district court erred in holding that Bridgeland was not estopped from relying on the Lien Releases. RE.4.2466 n.16, 2467. Contrary to the district court's findings, there is sufficient evidence in the record to raise a material fact issue as to (1) whether Bridgeland promised to pay Addicks' claims; (2) whether it was foreseeable that Addicks would rely on Bridgeland's promises; (3) whether Addicks relied to its detriment on Bridgeland's promises; and (4) whether Bridgeland asserted a position inconsistent with a position it previously took, to Addicks' disadvantage. This Court should reverse the summary judgment and remand this case for trial on the merits.

IV. ALTERNATIVELY, THE LIEN RELEASES ARE AMBIGUOUS.

To the extent that Bridgeland's interpretation of the Lien Releases as waiving Addicks' claims for extra work is a reasonable interpretation of the Lien Release, the Lien Releases are ambiguous, raising a fact issue as to their proper interpretation. It is well established that when a written instrument is susceptible to two or more reasonable interpretations, it is ambiguous and parol evidence is admissible to determine the intent of the parties. *Coker v. Coker*, 650 S.W.2d 391, 393-94 (Tex. 1983). In determining whether a writing is ambiguous, courts should consider the circumstances existing at the time it was executed, bearing in mind the particular business activity the writing sought to serve. *Reilly v. Rangers Management, Inc.*, 727 S.W.2d 527, 530 (Tex. 1987); *Tricentrol Oil Trading, Inc.*

v. Annesley, 809 S.W.2d 218, 221 (Tex. 1991) (to give effect to parties' intent, release must be construed in light of the facts and circumstances surrounding its execution). Conduct of the parties indicating their construction of a release may be considered when determining the parties' true intent. *See Consolidated Eng'g Co. v. Southern Steel Co.*, 699 S.W.2d 188, 192-193 (Tex. 1985). When possible, courts should avoid a construction that is inequitable and oppressive. *Reilly*, 727 S.W.2d at 530.

Material fact issues exist relating to the circumstances surrounding the execution of the Lien Releases. The statutory authorization to require a lien release extends only to the extent of the indebtedness paid. TEX. PROP. CODE § 53.512. GGP-Bridgeland only permitted Addicks to include on its pay estimates items authorized by GGP-Bridgeland. RE.7.1747. GGP-Bridgeland did not allow Addicks to include its claims for extra work on the pay estimates until GGP-Bridgeland turned them into a change order thereby making them part of the contract. *Id.* Thus, the Lien Releases applied only to payments for contractual work. RE.6.1959, 1962-65, 1967. It is beyond dispute that GGP-Bridgeland had actual notice of Addicks' claims for extra work at the time it required Addicks to execute the Lien Releases. *See* Table at pp. 11-12, *supra*. GGP-Bridgeland's actions in promising payment, issuing change orders, and paying for work

completed prior to the date of the Lien Releases months after the Lien Releases were signed supports Addicks' interpretation of the Lien Releases. Exhibit A.

Additionally, the Lien Releases specifically release claims for labor, services or materials furnished "on the job of Rouse-Houston, L.P. (Owner) to the following property: Bridgelands Ph. 1/House & Hahl Rd. (Name and Address of Project)."²² See, e.g., R.1415. The Contract for "Bridgelands, Phase I Rough Grading and Spoil Disposal Project" had a specified scope of work. RE.6.1959. Payment for the amount of this defined scope of work that Addicks completed each month was the only item, other than signed change orders, which Addicks was allowed to include on the monthly pay estimates. R.1747. The extra work and delay claims for which Addicks has not been paid *were not included in the Contract's scope of work and were not part of the Project*. This supports Addicks' interpretation of the Lien Releases as only releasing claims for work under the original Contract. The Lien Releases' later isolated reference to "extra work" is ambiguous at best.

Additionally, the Contract contemplated two separate lien release forms: a release upon Progress Payment and a release upon Final Payment. RE.8.1985-88. The Lien Releases upon which Bridgeland relies are releases upon Progress

²² The Lien Releases may contain slight variations in their wording of the name of the Project as this was handwritten on each Lien Release form.

Payment, not Final Payment. *See, e.g.*, R.1415-16. The fact that the Contract contemplated different releases for progress and final payments demonstrates that Addicks' interpretation of the Lien Releases Upon Progress Payment as releasing claims only to the extent of the payment received is reasonable.

Thus, in the event the Court finds both parties' interpretation of the applicable provision of the Lien Releases to be reasonable, the Lien Releases are ambiguous. Material fact issues exist regarding the circumstances surrounding Addicks' execution of the Lien Releases and the proper interpretation of any ambiguous language contained therein.

CONCLUSION

For all of the foregoing reasons, Appellant Addicks Services, Inc. respectfully requests that this Court reverse the district court's erroneous summary judgment in favor of Bridgeland, and remand the case for trial.

Dated: May 26, 2009.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 11,022 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

Dated: May 26, 2009

Cynthia A. Holub

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief of Appellant Addicks Services, Inc. was filed with the Court by Federal Express and in electronic format, on the 26th day of May, 2009, and two copies of the brief and an electronic copy of the brief were served on all counsel of record, as listed below, by Federal Express on the same date:

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