SHIPLEY & PEASE
INSURANCE

March 21, 2021

RE: Testimony to the Senate Committee on Judiciary & Ballot Measure 110 Implementation In Support of SB 213

Chair Prozanski, Vice-Chair Thatcher, and members of the Senate Committee on Judiciary and Ballot Measure 110 Implementation. For the record, my name is Stan Pease. I am President of Shipley & Associates, Inc. an Oregon Corporation doing business in Oregon since 1996. We are a retail Insurance Agency specializing in Architects & Engineers. We write Professional Liability, General Liability, Auto and other related insurance coverages for roughly 400 Oregon firms ranging from sole proprietors to large entities with multi-state operations.

Senate Bill 213 will bring fairness to professional services contracts by ending the inclusion of duty to defend clauses in public and private agreements. This duty to defend clause is onerous. It places responsibility on the design professional to defend an owner or other party against a third-party's claims even if the design professional is not negligent. This duty to defend clause is not fair, equitable, or inclusive. The industry standard Professional Liability Policies available in the U.S. specifically exclude coverage for these defense costs to be paid up front as the duty to defend clauses require. Instead, the policies provide indemnification to the extent the damages are caused by the negligence of the professional once that has been determined. Duty to defend clauses can cause these professional firms to pay out of their pocket up front in the hope that it will be reimbursed. This can financially cripple a private firm to pay the up-front costs and there is no provision in the typical contract for reimbursement of the costs if it turns out the Professional did not negligently cause the loss. When negotiating with multiple City, County, Educational Institution and Private Entity Risk Management officers we're told "sign the contract with the defend clause as-is or someone else will."

Unfortunately, the projects that include contractual defense obligations are very frequently public institutional projects with goals to improve diversity, equity, inclusion, and increase MWESB participation. These firms lack the resources to engage legal counsel making them particularly vulnerable to a negative outcome and the potential of suffering severe financial impacts should they be required to pay up-front legal costs to defend not only themselves but the owner. Our clients find the duty to defend language to be a deterrent to compete for projects, many of which are with governmental agencies. Our clients experience has been that the duty to defend provision shifts financial risk and liability disproportionately on a project regardless of fault. The duty to defend clause creates a "pay to play" situation that has serious potential to lead to uncovered or uninsured risks. If the

Professional takes on liability by contract that otherwise would not exist, the policy contractual liability exclusion comes into play and the costs cannot be transferred to the Insurance Company. Extending the defense clause beyond the proportionate or actual responsibility make the Professional an insurer or indemnitor for issues they did not cause and have no connection to.

We respectfully ask this committee to support amending SB 213 and send this bill to the Senate floor. These amendments are good business policies that will help firms across the state engage in construction projects, including many government-funded projects, by removing this onerous duty to defend clause.

Thank you for considering my input. Should you have any additional questions, I would be more than happy to assist in any way possible.

Sincerely,

Stan Pease,

President

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