GEORGE MASON AMERICAN INN OF COURT

COVID-19 Factors and Force Majeure in Contracts

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Force Majeure Clauses in the Time of Covid-19

I. What is Force Majeure?

Force majeure is a superior or irresistible force that makes performance of contractual obligations difficult, delayed, or impossible. A force majeure event can potentially absolve one or both parties of some or all performance under their agreement. Force majeure provisions commonly require that the event be an unforeseeable one outside the parties' control. The Virginia Code only a handful of definitions of force majeure. Virginia's statute governing cable systems, Va. Code § 15.2-2108.19, defines force majeure as:

> an event or events reasonably beyond the ability of the cable operator to anticipate and control. "Force majeure" includes, but is not limited to, acts of God, incidences of terrorism, war or riots, labor strikes or civil disturbances, floods, earthquakes, fire, explosions, epidemics, hurricanes, tornadoes, governmental actions and restrictions, work delays caused by waiting for utility providers to service or monitor or provide access to utility poles to which the cable operator's facilities are attached or to be attached or conduits in which the cable operator's facilities are located or to be located, and unavailability of materials or qualified labor to perform the work necessary.

Virginia Title 44 governing Military and Emergency Laws defines a "disaster" as including a "communicable disease of public health threat." Va. Code § 44-146.16. The Insurance Title of the Virginia Code also includes an epidemic as part of its definition of a casualty event. Va. Code § 38.2-111(A)(5). Rather than strictly relying on the few definitions of

force majeure events that appear in the Virginia Code, Virginia courts defer to the clear and unambiguous bargained-for terms in individual contracts. *See D.C. McClain, Inc. v. Arlington County,* 249 Va. 131, 135 (1995) (holding that "It is the duty of the court, not the jury, to interpret a contract when its terms are clear and unambiguous.") In Virginia, contract is king, and courts will look to the specific language of any force majeure clause to determine its scope, foreseeability requirements, notice requirements, and available remedies. Virginia courts have held repeatedly that parties to a contract can assess the risk inherent to the provisions of the contract, and are loathe to reform or rescind contracts. *See Coady v. Strategic Resources, Inc.*, 258 Va. 12, 17 (1999). Parties to contracts in Virginia are free to define force majeure clauses more narrowly or more broadly as befits the particular contract and should expect the court to uphold those clear and unambiguous terms as written. Because Virginia courts rely upon the contract language in any dispute involving force majeure clauses, few bright line rules governing enforcement or remedies exist because each analysis is unique to the court's interpretation of the underlying contract. Even fewer holdings exist for cases citing the novel coronavirus pandemic as a force majeure because with courts either shut down or at limited capacity, particularly for civil cases, Virginia trial courts and certainly appellate courts have yet to render many reported decisions. Therefore, we must look to Virginia's view of force majeure clauses generally to anticipate coming decisions specific to the pandemic.

II. Force Majeure clauses in Private Contracts

Private contracts are not required to have a force majeure clause. If a contract does not contain such a clause, a court will not usually create one, relying on the parties to know what they have bargained for and trusting them to assess the risk of not including a force majeure clause. Contracts that do contain force majeure clauses can (and should) specify events or classes

of events that constitute force majeure. Pandemics or epidemics are often named as a qualifying event. Virginia courts enforce force majeure clauses only when it is proven, by a preponderance of the evidence, that the force majeure is the sole proximate cause of non-performance, and the party invoking force majeure could not have taken measures to avoid or minimize the effect of the force majeure event. *See United States v. Hampton Roads Sanitation Dep't*, 2012 WL 1109030 at *7 (2012) (unpublished).

Courts also tend to require that a force majeure event be unforeseeable. In the *Hampton Roads* case, the court examined the following force majeure clause:

> "Force Majeure" for purposes of this Consent Decree, is defined as any event arising from causes beyond the control of HRSD ... that delays or prevents the performance of any obligation under this Consent Decree despite HRSD's ... best efforts to fulfill the obligation.

The court found that while foreseeability was not expressly mentioned, the clause required the Party's "best efforts to fulfill the obligation," which would necessarily include its best efforts to foresee problems. *Id*. at *8. The court thus found an implied foreseeability and mitigation component within the force majeure clause. After implying these requirements, the court held that the weather events claimed as force majeure were not of a type that were out of the ordinary for the area and were foreseeable. That foreseeability foreclosed a series of storms as force majeure event. The court held that these kinds of storms were expected and should have been prepared for and mitigated against.

Virginia courts have declined to excuse performance when negligence was at least one proximate cause of non-performance. *See Gordonsville Energy, L.P. v. Va. Elec. & Power Co.*, 257 Va. 344, (1999). *See also Middle E. Broad. Networks*, 2015 WL 4571178, at *4-5 (E.D. Va.

July 28, 2015) (unpublished) (finding the Party's negligence in paying a supplier was a proximate cause of non-performance rather than interference from ISIS). In other words, to invoke a force majeure clause to excuse performance, the party must not have contributed to the reason for non-performance. In a current case pending in the U.S. District Court for the Central District of California, the parties are arguing this same issue where a party is claiming COVID-19 has prevented it from making payment while the adverse party asserts that payments have been late and insufficient since 2018, long before COVID-19, making the company's long-term delinquency the culprit rather than the pandemic alone. *G&H Diversified Manufacturing LP v. Regreen Technologies, Inc. et al.*, case number 8:21-cv-00062 (U.S. District Court for the Central District of California). In *Cooper v. Horn*, 248 Va. 417, 448 (1994) the Virginia Supreme Court examined the effect of flooding due to a dam that burst. It held that because the dam failed as a result of ineffective care. Because negligence in maintaining the dam was at least one proximate cause of the flood, the force majeure clause was not activated as it was not the sole proximate cause of the damage and did not relieve the contracting parties of their obligations.

Virginia courts also enforce notice requirements to invoke a force majeure clause and construe such notice provisions strictly as a condition precedent. *See Old Dominion Electric Cooperative v. Ragnar Benson, Inc.*, 2006 WL 2854444 at *58 (E.D. Va., Aug. 4, 2006) (unpublished) (finding the party waived force majeure for failure to give notice of what it asserted were qualifying weather events); *see also CMA CGM S.A. v, Leader Int'l Express Corp.*, 2020 WL 4249705, at *7 (E.D. Va. July 23, 2020) (unpublished) (declining to enforce a force majeure clause when the party gave no notice as required by the contract that its goods were retained by customs).

While force majeure clauses can include virtually any uncontrollable and unforeseeable event, an example of a more detailed clause that includes foreseeability and notice provisions follows:

> FORCE MAJEURE. Neither Party will be liable for any failure or delay in performing an obligation under this Agreement that is due to any of the following causes, to the extent beyond its reasonable control: reasonably unforeseeable acts of God, accident, riots, war, terrorist act, epidemic, pandemic, quarantine, civil commotion, breakdown of communication facilities, breakdown of web host, breakdown of internet service provider, natural catastrophes, governmental acts or omissions, changes in laws or regulations, national strikes, fire, explosion, generalized lack of availability of raw materials or energy.
>
> For the avoidance of doubt, Force Majeure shall not include (a) financial distress nor the inability of either party to make a profit or avoid a financial loss, (b) changes in market prices or conditions, or (c) a party's financial inability to perform its obligations hereunder.
>
> The Party claiming a force majeure event must notify all other Parties in writing within 24 hours of the qualifying event. Such notice shall include specific explanations of the event, its effect on the Party's obligations under the Contract, and mitigating actions taken. Failure of proper notice waives any claim under this provision.

III. Government Contracts

a. The FAR (Federal Acquisitions Regulations) defines Force Majeure as Federal Acquisition Regulation Section 52.249-14. ConsensusDocs 200, Section 6.3 states in part:

> *DELAYS AND EXTENSIONS OF TIME.*
>
> *(1) If Constructor is delayed at any time in the commencement or progress of the Work by any cause beyond the control of Constructor, Constructor shall be entitled to an equitable extension of the Contract Time. Examples of causes beyond the control of Constructor include, but are not limited to, the following: (a) acts or omissions of Owner, Design Professional, or Others; (b) changes in the Work or the sequencing of the Work ordered by Owner, or arising from decisions of Owner that impact the time of performance of the Work; (c) encountering Hazardous Materials, or*

concealed or unknown conditions; (d) delay authorized by Owner pending dispute resolution or suspension by Owner under §11.1; (e) transportation delays not reasonably foreseeable; (f) labor disputes not involving Constructor; (g) general labor disputes impacting the Project but not specifically related to the Worksite; (h) fire; (i) Terrorism; (j) epidemics; (k) adverse governmental actions; (l) unavoidable accidents or circumstances; (m) adverse weather conditions not reasonably anticipated. Constructor shall submit any requests for equitable extensions of Contract Time in accordance with ARTICLE 8.

(emphasis added)

Similarly, FAR 52.249-14 states in part:

EXCUSABLE DELAYS (APR 1984)

(a) *Except for defaults of subcontractors at any tier, the Contractor shall not be in default because of any failure to perform this contract under its terms if the failure arises from causes beyond the control and without the fault or negligence of the Contractor. Examples of these causes are (1) acts of God or of the public enemy, (2) acts of the Government in either its sovereign or contractual capacity, (3) fires, (4) floods, (5) epidemics, (6) quarantine restrictions, (7) strikes, (8) freight embargoes, and (9) unusually severe weather. In each instance, the failure to perform must be beyond the control and without the fault or negligence of the Contractor. Default includes failure to make progress in the work so as to endanger performance.*

(emphasis added)

FAR 52.249-14 address epidemics, actions the U.S. government and other public entities might take to combat such epidemics, and other unavoidable circumstances, the remedies granted in these provisions are only excusable time extensions, not additional compensation for the impacts. ConsensusDocs 200, Section 6.3 excludes epidemics, adverse governmental actions, and unavoidable circumstances from the causes for which the contractor is entitled to an equitable adjustment:

> *(2) In addition, if Constructor incurs additional costs as a result of a delay that is caused by items (a) through (d) immediately above, Constructor shall be entitled to an equitable adjustment in the Contract Price subject to §6.6.*

Similarly, FAR 52.249-14 addresses only a time extension for such impacts:

> *(c) Upon request of the Contractor, the Contracting Officer shall ascertain the facts and extent of the failure. If the Contracting Officer determines that any failure to perform results from one or more of the causes above, the delivery schedule shall be revised, subject to the rights of the Government under the termination clause of this contract.*

A court's or board of contract appeals' determination of whether delays caused by the spread of the coronavirus are excusable will depend on the specific facts and circumstances. A court may consider such factors as whether the length of the delay is reasonable; whether alternative pools of labor or sources of material could replace the pandemic-affected ones at a reasonable cost; whether the government shut down a project site or project management and for how long; and whether the government imposed an area-wide quarantine.

Even if the court or board finds that the delay was excusable, the language of the contract determines what, if any, remedies are available. If the contract has no force majeure clause, even a delay beyond the contractor's or supplier's control may not be excusable or compensable. The court will have to determine whether the purpose of the contract is entirely frustrated by the outbreak of coronavirus, nullifying it. It must also determine whether the contract affords only a time extension or compensation for damages related to the delay as well as considering what mitigating actions a contractor or supplier took to defray the delay and expense of the event.

Common to all force majeure clauses is the requirement to give written notice of the causes of delay. Generally, these clauses require notice to be given immediately upon the occurrence of the event that could impact performance, irrespective of whether the impact is

ultimately incurred. Project participants should be vigilant about potential disruptions to their work, even erring on the side of providing advance warnings and notices of possible disruptions. To be prudent, parties should immediately make inquiries as to the status of pending orders and ability of counter-parties to fulfill upcoming orders and any other links in the chain necessary to fulfill their contract obligations that may be stalled by COVID-related delays.

When giving notice of force majeure a party should (1) explain how the coronavirus qualifies as a force majeure or other excusable event under the contract; (2) provide as much specificity as possible about impacts to performance; (3) include any additional contractually required information to the extent it is known; and (4) provide updates as more information becomes available. For contracts still in negotiations, parties should consider including provisions specifically tailored to possible impacts from coronavirus, including suspension clauses that can be implemented on short notice and equitable adjustments to contract prices to account for disruptions and other impacts to performance.

We are seeing in the public and private construction world that contractors are working with owners to mitigate the effects of the pandemic and reach equitable solutions. Cases related to coronavirus as a force majeure event that seeks excusable delays or compensable damages have not yet made their way to the courts. If such disputes find their way to Virginia courts, parties can expect courts to defer to the specific language of the contract and should expect a thorough analysis of other potential causes of the delay or damages.

IV. The Effect of Government Orders, Regulations, or New Laws on a Contract and the Doctrine of Impossibility

Landlord/Tenant lease agreements are seeing a collision with their terms and the purpose of the contract itself with emergency orders issued by the governor during the pandemic.

Attached is a list of emergency orders Governor Northam has issued by date. Many of these orders have limited or entirely prevented the operation of certain classes of businesses. Restaurants, for example, have been limited at various times to take-out only service, outdoor-only dine-in seating and severely reduced indoor capacity. Gyms were shut down entirely during the spring months of 2020, and are currently restricted in their occupancy limit. Virginia will still look to the specific government regulation, statute, or order and its alleged effect on the specific contract to determine whether a force majeure clause applies. *See Westinghouse Electric Corp. Uranium Contracts Litigation*, 517 F. Supp. 440, 450 (E.D. Va. 1981) (holding that changing environmental regulations regarding the reprocessing of nuclear fuel was not the sole cause of non-performance and therefore did not excuse it or frustrate the purpose of the contract). While the Virginia Supreme Court has not yet spoken on force majeure invocation related to the regulations related to the pandemic, other courts across the nation are starting to see these sorts of claims. An Illinois bankruptcy court recently abated a restaurant's rent due to the pandemic. *In re Hitz Rest. Grp.*, 616 B.R. 374, 379 (Bankr. N.D. Ill. 2020). Meanwhile, an Ohio court analyzed an agreement and found that even before government regulations were in place, the effects of the pandemic were foreseeable, and in the absence of a force majeure clause, the party did not meet the impossibility doctrine standard. *Belk v. Le Chaperon Rouge Co.*, U.S. Dist. LEXIS 117985, at *32 (N.D. Ohio July 6, 2020). No consistent bright line rule is emerging across the nation in the pandemic-related force majeure cases. Like Virginia, courts are looking to the language of the contract and examining the specific circumstances in the cases, including foreseeability, proximate cause of non-performance, and mitigation efforts.

In the absence of a well drafted force majeure clause, a party may need to look to equitable remedies and defenses. Virginia law has "long recognized an impossibility defense in

contract actions." *RECP IV WG Land Investors, LLC v. Capital One Bank (USA), N.A.*, 295 VA. 268 (2018); *Hampton Rds. Bankshares, Inc. v. Harvard*, 291 Va. 42 (2016); *Long Signature Homes v. Fairfield Woods*, 248 Va. 95 (1994); *Housing Auth. Of Bristol v. East Tenn. Light & Power Co.*, 183 Va. 64 (1944). Impossibility occurs when there is a "fortuitous destruction or change in the character of something to which the contract related, or which by the terms of the contract was made a necessary means of performance." *Id.* The party relying on the defense must establish (1) the unexpected occurrence of an intervening act, (2) such occurrence was of such a character that its non-occurrence was a basic assumption of the agreement of the parties, and (3) that occurrence made performance impracticable.

The Restatement, Second, of Contracts §261 (1981), notes the duty to render performance under a contract is discharged where the performance "is made impracticable without [the party's] fault by the occurrence of an event, the non-occurrence of which was a basic assumption on which the contract was made …." The Restatement, Second of Contracts §264 (1981) further addresses the impact of an adverse Governmental Regulation or Order as, "If the performance or duty is made impracticable by having to comply with a domestic or foreign governmental regulation or order, that regulation or order is an event the non-occurrence of which was a basic assumption on which the contract was made. The Virginia Supreme Court adopted the Restatement formulations 261 and 264 in both *RECP IV WG Land Investors, LLC v. Capital One Bank (USA), N.A.*, 295 Va. 268 (2018) and *Hampton Rds. Bankshares, Inc. v. Harvard*, 291 Va. 42 (2016). The Fourth Circuit has further noted in applying Virginia law, that the impossibility doctrine "is an equitable one to be applied when fair and just." *Opera Co. v. Boston, Inc. v. Wolf Trap Foundation for the Perf. Arts*, 817 F.2d 1094 (4th Cir. 1987). In other words, the equitable doctrine of impossibility contemplates good faith dealing between parties

when a force majeure occurs and does not contemplate a windfall for a party.

Under these definitions, Virginia courts may have to answer whether Governor Northam's emergency orders foreclosing certain types of businesses such as restaurants and gyms frustrated the very purpose of the agreements these businesses entered into such as lease agreements with commercial landlords or materials agreements with suppliers. As a caveat, Virginia courts do not generally reform or rescind a contract because it becomes less profitable or financially difficult. The Western District of Virginia recently found that market conditions resulting from government regulations were not a force majeure sufficient to excuse performance. *Drummond Coal Sales, Inc. v. Norfolk S. Ry. Co.*, 2018 WL 4008993 at *11 (W.D. Va. August 22, 2018) (unpublished) (finding that foreseeable environmental regulation changes related to coal did not constitute a force majeure or relieve the party of performance under the impossibility doctrine).

V. Remedies

Force majeure clauses often (and should) include available remedies for force majeure events. Contracts may include only excusable delays, or they could include damages or cost escalation clauses to mitigate the effects of such events. Again, Virginia courts defer to the language of the bargained-for exchange where the purpose of the contract is not substantially frustrated or made impossible. As an example, if your particular force majeure clause does not provide for an escalation in price if your materials from China see a sudden cost increase as a result of supply chain difficulties due to the pandemic, you should not expect a court to insinuate such a term into the contract. You may find yourself absorbing that additional cost if your contract does not expressly provide for it as a damage due to force majeure that includes unforeseeable changing market conditions.

Court remedies for force majeure

a. Delay: If the force majeure will pass and result in an excusable delay, courts are not inclined to cancel the contract and may provide for excusable delay.

b. Reform: Courts are reluctant to reform contracts. In Virginia, contract is king, and courts expect that parties to a contract can determine the value of their bargained-for exchange, including the value of the existence, content, or absence of force majeure clauses.

c. Termination: When a contract's purpose is substantially frustrated by the force majeure so that performing it is an impossibility or where performance becomes illegal or against public policy, courts will terminate the contract in such a way as to put the parties in as substantially close a position as they occupied before the formation of the contract.

Conclusion

Court decisions related to COVID-19 as a force majeure are still sparse for the country and remain largely in the trial litigation phase in Virginia. Virginia will likely construe clear and unambiguous contract provisions narrowly, giving deference to the sophistication of the parties in arriving at an agreement that appropriately assesses and values risk related to force majeure. Those facing fall-out from the pandemic itself or resulting governmental regulations should give proper notice as required by the contract when a force majeure event arises, mitigate the effects of the pandemic where possible, and communicate with the other party to work through delays or changes in the contract necessitated by the pandemic. For those contemplating signing new contracts in the midst of the pandemic, expect the foreseeability component of any later force majeure claim to be a hurdle. After a year of COVID, it becomes more and more difficult to

assert that any of the myriad obstacles associated with navigating the pandemic were unforeseeable and entirely beyond the party's control.

COVID Order Timeline

Order Number	Date	Name	Effective Date	Expiration Date						
55	March 30, 2020	Temporary State At Home Order Due to novel Coronavirus	March 30, 2020	June 10, 2020						
61	May 8, 2020	Phase One Easing of Certain Temporary Restrictions due to Novel Coronavirus	May 15, 2020	June 10, 2020						
61 (Amended)	May 19, 2020	Phase One Easing of Certain Temporary Restrictions due to Novel Coronavirus	May 15, 2020	June 10, 2020						
61 (Second Amended)	May 28, 2020	Phase One Easing of Certain Temporary Restrictions due to Novel Coronavirus	May 15, 2020	June 10, 2020						
61 (Third Amended)	June 2, 2020	Phase One Easing of Certain Temporary Restrictions due to Novel Coronavirus	May 15, 2020	June 10, 2020						
62	May 12, 2020	Jurisdictions Temporarily Delayed from Entering Phase One in Executive Order 61 and Permitted to Remain in Phase Zero Northern Virginia Region	May 15, 2020	May 28, 2020						
62 (Amended)	May 14, 2020	Jurisdictions Temporarily Delayed from Entering Phase One in Executive Order 61 and Permitted to Remain in Phase Zero Northern Virginia Region	May 15, 2020	May 28, 2020						
63	May 26, 2020	Requirement to Wear Face Coverings While Inside Buildings	May 29, 2020	Further Order						
63 (Amended)	November 13, 2020	Requirement to Wear Face Coverings While Inside Buildings	November 16	Further Order						
65	June 2, 2020	Phase Two Easing of Certain Temporary Restrictions due to Novel Coronavirus	June 5, 2020	Further Order						
	March 17, 2020	Declaration of Public Health Emergency	March 16, 2020	Further Order						
	March 20, 2020	Amended Declaration of Public Health Emergency	March 16, 2020	Further Order						
51 (Amended)	May 26, 2020	Extending Declaration of a State of Emergency due to Novel Coronavirus	March 12, 2020	Further Order						
51	March 12, 2020	Declaration of a State of Emergency due to Novel Coronavirus	March 12, 2020	June 10, 2020						
53	March 23, 2020	Temporary Restrictions on Restaurants, Recreational Entertainment, Gatherings, Non-Essential Retail Businesses and Closure of K-12 Schools due to Novel Coronavirus	March 23, 2020	Further Order						
53 (Amended)	April 15, 2020	Extension of Temporary Restrictions on Restaurants, Recreational Entertainment, Gatherings, Non-Essential Retail Businesses and Closure of K-12 Schools due to Novel Coronavirus	March 24, 2020	June 10, 2020						
53 (Second Amended)	May 4, 2020	Further Extension of Temporary Restrictions on Restaurants, Recreational Entertainment, Gatherings, Non-Essential Retail Businesses and Closure of K-12 Schools due to Novel Coronavirus	March 24, 2020	June 10, 2020						
	March 25, 2020	Order of Public Health Emergency Two	March 25, 2020	April 24, 2020						
	April 23, 2020	Extending Order of Public Health Emergency Two	March 25, 2020	April 30, 2020						
65 (Amended)	June 9, 2020	Phase Two Easing of Certain Temporary Restrictions due to Novel Coronavirus	June 5, 2020	Further Order						
67	June 30, 2020	Phase Three Easing of Certain Temporary Restrictions due to Novel Coronavirus	July 1, 2020	Further Order						
67 (Amended)	August 21, 2020	Phase Three Further Easing of Certain Temporary Restrictions due to Novel Coronavirus	Immediately	Further Order						
67 (Second Amended)	September 3, 2020	Phase Three Further Easing of Certain Temporary Restrictions due to Novel Coronavirus	Immediately	Further Order						
67 (Third Amended)	##########	Phase Three Further Easing of Certain Temporary Restrictions due to Novel Coronavirus - Lifting Additional Restrictions on the Eastern Region	Immediately	Further Order						
67 (Fourth Amended)	October 29, 2020	Phase Three Further Adjusting of Certain Temporary Restrictions due to Novel Coronavirus	Immediately	Further Order						
67 (Fifth Amended)	November 5, 2020	Phase Three Further Adjusting of Certain Temporary Restrictions due to Novel Coronavirus	Immediately	Further Order						
67 (Sixth Amended)	November 13, 2020	Phase Three Tightening of Certain Temporary Restrictions due to Novel Coronavirus	November 16, 2020	Further Order						
68	July 28, 2020	Additional Restrictions on the Eastern Region due to Novel Coronavirus	July 31, 2020	Further Order						
68 (Amended)	August 3, 2020	Additional Restrictions on the Eastern Region due to Novel Coronavirus	July 31, 2020	Further Order						

Phase Restrictions

Phase	Begin Date (Northern Virginia)	End Date (Northern Virginia)	Effect on Restaurants	Effect on Retail Business	Effect on Fitness Facilities	Limit on Gatherings
0	March 23, 2020	May 15, 2020 (May 28, 2020)				Fewer than 10
1	May 16, 2020 (May 29 2020)	6/4/2020 (June 11, 2020)	No indoor dining; 50% capacity; no more than 10 patrons per table	50% capacity	Outdoor activity only	10 or fewer
2	June 5, 2020 (June 12, 2020)	June 30, 2020	Indoor and outdoor permitted; 50% capacity; no more than 50 patrons per party; social distancing	50% capacity;	Indoor and outdoor; 10 feet apart;	Fewer than 50
3	7/1/2020 (July 1, 2020)	##########	Social distancing	Social Distancing	10 feet apart	250 or fewer
3a	##########		No alcohol after 10pm; delivery and take out only from 12:00 am to 5am	Social Distancing	75% of occupancy or 25, whichever is less	25 or fewer

474 F.Supp.3d 807
United States District Court, E.D. Virginia, Norfolk Division.

CMA CGM S.A., Plaintiff,
v.
LEADER INT'L EXPRESS CORP. a/k/a Leader International Express, Inc., Defendant.

Civil Action No. 2:19-cv-357
|
Signed 07/23/2020

Synopsis

Background: Carrier filed suit against shipper claiming breach of contract, seeking costs for demurrage, detention, and related charges for containers subjected to a lengthy custom hold. Both sides moved for summary judgment.

Holdings: The District Court, Raymond A. Jackson, J., held that:

[1] shipper did not waive affirmative defenses by failing to assert them in answer;

[2] frustration-of-purpose defense did not apply to claim for breach of contract;

[3] doctrine of impossibility defense did not apply to claim for breach of contract; and

[4] shipping contract required shipper to assume the risks associated with any custom delays.

Carrier's motion granted.

Procedural Posture(s): Motion for Summary Judgment.

West Headnotes (22)

[1] Federal Civil Procedure By both parties

When considering cross-motions for summary judgment, court must review each motion separately on its own merits to determine whether either of the parties deserves judgment as a matter of law. Fed. R. Civ. P. 56(a).

[2] Federal Civil Procedure Contract cases in general

In a breach of contract action, summary judgment is appropriate where the language of the contract is unambiguous or where an ambiguity can be definitely resolved by reference to extrinsic evidence. Fed. R. Civ. P. 56(a).

[3] Federal Civil Procedure Affirmative Defense or Avoidance

The purpose of rule requiring parties to affirmatively state any affirmative defenses in response to a pleading is to give the opposing party notice of the affirmative defense and a chance to rebut it. Fed. R. Civ. P. 8(c).

[4] Federal Civil Procedure Affirmative Defense or Avoidance

Although a party's failure to raise an affirmative defense in the appropriate pleading generally results in a waiver, waiver is not automatic, since it requires a showing of prejudice to the plaintiff or unfair surprise. Fed. R. Civ. P. 8(c).

[5] Federal Civil Procedure Issues that may be raised by motion

Absent unfair surprise and prejudice to plaintiff, a defendant may raise an affirmative defense for the first time in a dispositive pre-trial motion. Fed. R. Civ. P. 8(c).

[6] Federal Civil Procedure Matters considered

Carrier was not unfairly surprised or prejudiced by shipper's raising of affirmative defenses for the first time in its summary judgment motion, as required for waiver of the defenses in breach of contract action seeking costs for demurrage,

detention, and related charges for containers subjected to a lengthy custom hold; shipper put carrier on notice in its answer that it reserved the right to raise additional defenses at the close of discovery, carrier had the opportunity to respond, and no additional discovery was needed to determine whether the affirmative defenses of frustration of purpose, impossibility, or force majeure applied. Fed. R. Civ. P. 8(c).

[7] **Contracts** Discharge by Impossibility of Performance

"Frustration of purpose" is an equitable doctrine that works to discharge a party from its outstanding contractual obligation due to a supervening frustration.

[8] **Contracts** Discharge by Impossibility of Performance

The frustration of purpose doctrine, which discharges a party from its outstanding contractual obligation due to a supervening frustration, is narrow and applies to instances where a wholly unforeseeable event renders the contract valueless to one party.

[9] **Contracts** Discharge by Impossibility of Performance

The defense of frustration of purpose requires proof of three elements: (1) frustration of the principal purpose of the contract; (2) the frustration is substantial; and (3) the non-occurrence of the frustrating event or occurrence was a basic assumption on which the contract was made.

[10] **Contracts** Discharge by Impossibility of Performance

In order for frustration of the principal purpose of a contract to be substantial, as required for frustration-of-purpose defense to apply to breach of contract claim, it must be so severe that it is not fairly to be regarded as within the risks assumed under the contract; it is not enough that the transaction has become less profitable for the affected party or even that he will sustain a loss.

[11] **Carriers** Construction and operation

Even though seizure of alloyed aluminum extensions by the United States Customs and Border Protection (CBP) was unfortunate to both shipper and carrier of the materials, purpose of contract between the two was not frustrated, as required for frustration of purpose doctrine to apply as defense to carrier's breach of contract action, since risk was assumed under the contract; contract provided that carrier was not responsible for delays in transporting or delivering cargo when such delays occur on cargo detained by CBP, quarantine officials, or other government-required cargo inspection organizations.

[12] **Contracts** Discharge by Impossibility of Performance

In a breach of contract action, to prove the defense of impossibility of performance, defendant must prove (1) the unexpected occurrence of an intervening act, (2) such occurrence was of such a character that its non-occurrence was a basic assumption of the agreement of the parties, and (3) the occurrence made performance impracticable.

[13] **Contracts** Discharge by Impossibility of Performance

In considering the non-occurrence of an event, as required to prove the defense of impossibility of performance on claim for breach of contract, the question is whether the event is one which the parties could reasonably be thought to have foreseen as a real possibility which could affect performance.

[14] **Contracts** Discharge by Impossibility of Performance

In resolving whether occurrence of intervening act was unexpected, as required to prove the

defense of impossibility of performance on claim for breach of contract, court considers (1) foreseeability of the event, and (2) whether the occurrence of the event, based on past experience, was of such reasonable likelihood that obligor should not merely foresee the risk but, because of the degree of likelihood should have guarded against it or provided for non-liability against the risk.

[15] **Carriers** Construction and operation

Contract between shipper and carrier of alloyed aluminum extensions required shipper to assume risks in the event the United States Customs and Border Protection (CBP) interfered with the shipment, whether by delay or seizure, and thus, doctrine of impossibility did not apply as a defense to carrier's breach of contract action; it was foreseeable that with any custom inspection, there was a possibility that the delay would be lengthy or result in the ultimate seizure of cargo, and given the parties' experience in the maritime industry, they had incorporated several provisions dealing with CBP inspections, delays, and actions.

[16] **Contracts** Application to Contracts in General

Contracts Discharge by Impossibility of Performance

Under Virginia law, in interpreting any force majeure provision, courts must construe contracts as they are written.

[17] **Contracts** Application to Contracts in General

Contracts Discharge by Impossibility of Performance

Under Virginia law, when a force majeure provision is clear and unambiguous, the provision will be enforced by court.

[18] **Contracts** Discharge by Impossibility of Performance

Under Virginia law, court's enforcement of a force majeure provision of a contract includes enforcement of any notice provisions to which the parties have agreed.

[19] **Carriers** Construction and operation

Under Virginia law, service contract between shipper and carrier required that, in the event of force majeure, the party affected by force majeure notify other party in writing within seven working days of the existence of such circumstances, specifying the effect of those circumstances on the party's ability to perform its obligations.

[20] **Carriers** Construction and operation

Under Virginia law, service contract between shipper and carrier for the transportation of alloyed aluminum extensions required shipper to assume the risks associated with any custom delays.

[21] **Contracts** Grounds of action

To prove a breach of contract claim under Virginia law, party must prove the existence of the following elements: (1) a legally enforceable obligation of defendant to plaintiff; (2) defendant's violation or breach of that obligation; and (3) injury or damage to plaintiff caused by the breach of obligation.

[22] **Contracts** Construction as a whole

Contracts Language of Instrument

Under Virginia law, court must interpret a contract according to the plain meaning of the terms, giving effect to all words, and must not search for meaning outside the contract, where the agreement is complete on its terms.

Attorneys and Law Firms

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Marissa Marriott Henderson, Ventker, Henderson, PLLC, Norfolk, VA, for Defendant.

AMENDED MEMORANDUM OPINION AND ORDER

Raymond A. Jackson, United States District Judge

Before the Court are Leader Int'l Express Corp.'s ("Leader") Motion for Summary Judgment and CMA CGM S.A.'s ("CMA") Cross-Motion for Summary Judgment pursuant to Federal Rule of Civil Procedure 56. ECF Nos. 18, 20. Both parties filed supporting memoranda and exhibits in support of their motions. ECF Nos. 18–22. Having been fully briefed, this matter is ripe for judicial determination.

I. FACTUAL AND PROCEDURAL HISTORY

This litigation concerns a breach of a maritime contract ("service contract") between Leader, a non-vessel operating common carrier ("NVOCC"), and CMA, a vessel operating common carrier, for failure to pay demurrage, detention, and related charges for containers subjected to a lengthy custom hold. ECF No. 1 at ¶ 4–6; ECF No. 19 at ¶ 1. The following facts are undisputed: On May 18, 2016, CMA and Leader entered into a service contract where CMA, the carrier, would ship cargo for Leader, the shipper, with Leader to pay for shipping and guarantee a minimum quantity of containers to ship. The service contract incorporated CMA's tariffs CMDU 037, 020, 100, and 044, as well as the terms and conditions of its bill of landing. [1] ECF No. 19 at ¶ 2; ECF No. 21 at ***811** ¶ 5. Relevant here, the service contract provides that NVOCC is responsible to the carrier for fees incurred for shipments, including detention and demurrage. ECF No. 19 at ¶ 6.

Detention is "the charge the Merchant pays for detaining Carrier equipment outside the port, terminal or depot, beyond the free time." ECF No. 1-9 at 12; ECF No. 21 at ¶ 6(d). Demurrage is "the charge, related to the use of the equipment only, the Merchant pays for Carrier's equipment beyond the free time allowed by Carrier for taking delivery of goods in the port, terminal or depot." ECF No. 1-9 at 13; ECF No. 21 at ¶ 6(b). Demurrage includes storage, equipment, and reefer service costs. *Id.* Gates fees charged by the Marine Terminal Operator ("MTO") are an additional demurrage cost. ECF No. 21 at ¶ 6(f).

CMDU 100, Rule 200 and CMDU 100, Rule 300 set forth the terms for detention and demurrage. ECF No. 19 at ¶ 4. The applicable detention rate for booking is $115 per day except for permitted free time through day 10, and then $165 per day thereafter. ECF No. 21 at ¶ 6(e); ECF No. 1-3. The demurrage rate for bookings is $160 per day except for permitted free time. ECF No. 21 at ¶ 6(c); ECF No. 1-2. Free time consists "of the day the equipment is interchanged plus the next four working days: Saturdays, Sundays and holidays shall be excluded. Upon expiration of free time, per diem charges [are] assessed on a straight calendar day basis until the equipment is returned." ECF No. 1-3 (CMDU 100, Rule 300). The daily charge for carrier equipment containers kept beyond the free time, includes 5 free working days in all U.S. ports, absent exceptions. ECF No. 19 at ¶ 4; ECF No. 1-2 (CMDU 100, Rule 200). There is no free time for both demurrage and detention for containers returned empty to carrier. [2] ECF No. 21 at ¶6(i); ECF No. 1-10 at 4, 7, and 10.

The service contract also incorporates provisions regarding custom delays. Tariff 044, Rule 2.39 reads that the carrier "shall not be responsible for delays in transporting or delivering cargo when such delays occur on cargo detained by Customs, quarantine officials or other government required cargo inspection organizations. Any demurrage charges that accrue from such delays either at origin or destination are for the account of cargo." ECF No. 21 at ¶ 6(h); ECF No. 19-11. For return cargo, the tariff reads, "[w]hen Carrier is required by U.S. Customs or any other legal entity to return cargo to the port of loading, for whatever reason, all charges including return carriage and additional onward carriage, plus the original freight charges are for the account of the Shipper." *Id.* "Any and all costs associated with or arising out of any such inspection, including but not limited to, spotting of container at the inspection point, storage of the container while awaiting inspection or thereafter, opening and closing container, manipulation of the contents of the container, opening and replacing packages, and taking samples shall be for the expense of the Cargo." *Id.*

Finally, the service contract includes a force majeure provision. According to the service contract, force majeure includes "strikes, lock-outs or exceptional circumstances arising from the threat thereof, acts of God, state or public

enemy, including ***812** but not limited to war, riots, civil disorder and insurrection, embargo or other disruption or interference with trade, act of the Prince, marine disaster, severe weather, condition, fire, explosion, or other casualty, and any unforeseen event beyond the control of the parties of whatever nature and however caused which materially affect business of trading conditions and/or the supply or demand for the services of Carrier or the cargo of the Shipper." ECF No. 1-9 at Term 12. The party affected by force majeure circumstances, "shall notify the other party in writing within seven (7) working days of the existence of such circumstances, specifying the effect of those circumstances on the party's ability to perform its obligations." ECF No. 21 at ¶ 6(g); ECF Nos. 1-4 to 1-9. In addition, the force majeure provision excuses the carrier from responsibility from any delay, damage, injury or expense "in the event the carrier is prevented from U.S. Customs or any other government entity from unloading some or all of the cargo on a particular vessel and such prohibition is not due to any act or omission of [c]arrier [and is] due to no fault of the carrier." *Id.* All extra charges and expenses incurred as a result of such prohibition are for the account of the shipper. *Id.*

In May 2016, Leader began a relationship with Perfectus Aluminum, Inc. ("Perfectus") to ship large numbers of containers, which contained a commodity called alloyed aluminum extensions from the Port of Long Beach to Asia. ECF No. 19 at ¶ 7. Leader used CM A as one of the carriers to ship Perfectus containers. *Id.* at ¶ 8. Specifically, Leader booked 103 containers with CMA. *Id.* at ¶ 8–9; ECF No. 21 at ¶ 9.

On September 15, 2016, the United States Customs and Border Protection ("CBP"), in connection with a criminal investigation into Perfectus, held and detained the 103 containers that Leader arranged to ship with CMA. [3] ECF No. 19 at ¶ 9; ECF No. 21 at ¶ 11. CBP prohibited CMA from notifying Leader of the hold until after the containers were delivered to the terminal. *Id.*; ECF No. 21 at ¶ 12. Containers subjected to the CBP hold could not load on the vessel as scheduled, and CMA administratively "rolled" them to the next available and appropriate vessel during the hold. ECF No. 19 at ¶ 12.

On September 19, 2016, CMA issued a notice to Leader regarding the CBP hold on containers already booked and released. ECF No. 21 at ¶ 13. CMA subsequently issued two other notices to Leader on October 3, 2016. *Id.* at ¶ 14–15. From September 19, 2016 to January 9, 2017, CMA sent Leader at least 20 additional notices and booking sheets addressing the custom holds placed on containers booked by Leader. ECF No. 21 at ¶ 16. Leader did not issue the force majeure notice required to seek relief under the service contract. ECF No. 21 at ¶ 20.

Eventually, 49 containers were shipped. ECF No. 19 at ¶ 16. CMA and Leader arranged for the released containers to ship in October and November 2016, and a few containers were shipped in March 2017. *Id.* For these shipped containers, Leader paid freight and other charges, and $257,703 in demurrage charges. *Id.* at ¶ 17. CMA seeks $144,537 as the balance of demurrage charges for the shipped containers. *Id.*

***813** On January 9, 2017, CBP officially seized the remaining 54 containers that Leader booked with CMA. *Id.* at ¶ 18. These unshipped containers were released empty to CMA on various dates in January and February 2017. *Id.* at ¶ 19. In August 2017, CMA invoiced Leader for late fees, detention and demurrage for the 54 containers. ECF No. 19 at ¶ 20. CMA charged detention for the 54 containers from the day the containers were picked up and left at the terminal until in-gating, and demurrage from the day from container delivery/in gating to the terminal until the day the container was released empty to CMA. *Id.* CMA did not provide free time for demurrage or detention for the containers returned empty. ECF No. 21 at ¶ 20. For the 54 unshipped containers, CMA assessed 7,216 demurrage days. ECF No. 19 at ¶ 20. CMA seeks $1,154,560.00 as demurrage charges for the 54 unshipped containers. *Id.* at ¶ 21.

The MTO unilaterally reduced its contract charges for container storage for unshipped containers and stopped charging on the date of seizure. *Id.* at ¶ 22. The MTO cancelled two invoices for storage charges for two of the three shipments of sailed containers. *Id.* The MTO total invoices to CMA for storage costs for the containers at issue amounts to $213,366. *See* ECF No. 21 at 7; ECF No. 22 at 3. Perfectus has made no payments to Leader for CMA. [4] ECF No. 19 at ¶ 24. Leader has not paid any of the demurrage, detention, or gate fee charges for the unshipped containers. ECF No. 21 at ¶ 23.

After unsuccessfully attempting to secure payment from Leader, CMA initiated the instant action on July 10, 2019, claiming breach of contract and seeking $1,310,139.68 USD in damages. ECF No. 1. On August 26, 2019, Leader filed its Answer with affirmative defenses. ECF No. 10. Specifically, Leader claimed force majeure and unclean hands as defenses, but reserved the right to amend its answer to include other

defenses as it became available or apparent during discovery. *Id.* at 6–7.

On March 3, 2020, Leader filed a Motion for Summary Judgment and a supporting memorandum. ECF Nos. 18–19. In its supporting memorandum, Leader dispensed with its unclean hands' argument, but maintained its force majeure defense. ECF No. 19 at 24–28. Leader also asserted two new affirmative defenses–Frustration of Purpose and Impossibility. *Id.* at 8–24.

On March 10, 2020, CMA filed a Cross-Motion for Summary Judgment and its memorandum in opposition. ECF Nos. 20-21. On March 16, 2020, Leader filed its reply, and its opposition to CMA's Cross Motion for Summary Judgment. ECF No. 22. CMA did not file a reply. On May 22, 2020, Leader filed a notice of supplemental authority regarding a new rule by the Federal Maritime Commission ("FMC"), which though not controlling, is relevant to the cross-motions for summary judgment. ECF No. 24.

II. LEGAL STANDARD

[1] Federal Rules of Civil Procedure provides that "[t]he Court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed R. Civ. P. 56(a); *see also* *McKinney v. Bd. of Trustees of Md. Cmty. Coll.*, 955 F.2d 924, 928 (4th Cir. 1992) ("[S]ummary judgments should be granted in those cases where it is perfectly clear that no issue of fact is involved and inquiry into the fact is not necessary to clarify the application of the ***814** law.") (citations omitted). In deciding a motion for summary judgment, the court must view the facts, and inferences to be drawn from the facts, in the light most favorable to the nonmoving party. *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 247-48, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). When considering cross-motions for summary judgment, the Court "must review each motion separately on its own merits 'to determine whether either of the parties deserves judgment as a matter of law.' " *Rossignol v. Voorhaar*, 316 F.3d 516, 523 (4th Cir. 2003) (*quoting* *Philip Morris, Inc. v. Harshbarger*, 122 F.3d 58, 62 n.4 (1st Cir. 1997)).

Once a motion for summary judgment is properly made and supported, the opposing party "must come forward with specific facts showing that there is a genuine issue for trial." *Matsushita*, 475 U.S. at 586–87, 106 S.Ct. 1348 (internal quotations omitted). Summary judgment will be granted "against a party who fails to make a showing sufficient to establish the existence of an essential element to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). "Genuineness means that the evidence must create fair doubt; wholly speculative assertions will not suffice." *Ross v. Commc'ns Satellite Corp.*, 759 F.2d 355, 364 (4th Cir. 1985), abrogated on other grounds by, *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989); *see also* *Ash v. United Parcel Serv., Inc.*, 800 F.2d 409, 411–12 (4th Cir. 1986) (noting that the nonmoving party must offer more than unsupported speculation to withstand a motion for summary judgment).

III. DISCUSSION

[2] In a breach-of-contract action, summary judgment is appropriate where the language of the contract is unambiguous or "where an ambiguity can be definitely resolved by reference to extrinsic evidence." *Washington Metropolitan Area Transit Authority v. Potomac Investment Properties, Inc.*, 476 F.3d 231, 235 (4th Cir. 2007). Here, the parties do not dispute any material facts, and agree that the service contract which incorporates the tariffs and the bill of landing, governs their duties. The parties also do not dispute that the service contract is unambiguous. Rather, the parties dispute whether an equitable doctrine excuses the parties from their contractual obligations. *Compare* ECF No. 19 *with* ECF No. 21.

Leader raises three defenses in support of its motion for summary judgment. First, Leader claims that Leader should be relieved from its contractual performance because the purpose of the contract was frustrated, and therefore relies on the frustration of purpose doctrine. ECF No. 19 at 8–24. Second, Leader relies on the doctrine of impossibility to relieve it of its contractual obligation under the service agreement. *Id.* Lastly, and in the alternative, Leader argues that the force majeure clause outlined in the service contract

excuses Leader from the demurrage charges assessed by CMA. *Id.* at 24–28.

In opposition, and in support of its own motion for summary judgment, CMA argues that Leader breached the service contract and that no affirmative defense applies in this case. ECF No. 21. Specifically, CMA argues that Leader waived its right to bring the affirmative defenses of frustration of purpose and impossibility by failing to waive these defenses in its Answer. ECF No. 21 at 12–20. CMA also argues that Leader cannot rely on force majeure terms when it failed to adhere to ***815** the required written notice. ECF No. 21 at 20–24. CMA requests that this Court grant summary in their favor for breach of contract. *Id.* at 24–27.

1. Waived Affirmative Defenses

[3] **[4]** **[5]** The Court begins its analysis by first addressing CMA's procedural argument about whether Leader waived its affirmative defenses by raising it for the first time in a summary judgment motion. ECF No. 21 at 12–15. Federal Rule of Civil Procedure 8(c) requires that "a party must affirmatively state any avoidance or affirmative defense" in response to a pleading. Fed. R. Civ. P. 8(c). The purpose of Rule 8(c) is to give the opposing party notice of the affirmative defense and a chance to rebut it. *Grunley Walsh U.S., LLC v. Raap*, 386 F. App'x 455, 459 (4th Cir. 2010). Therefore, a party's failure to raise an affirmative defense in the appropriate pleading generally results in a waiver. However, a waiver of an affirmative defense is not automatic and requires a showing of prejudice to the plaintiff or unfair surprise. *Peterson v. Airline Pilots Ass'n*, 759 F.2d 1161, 1164 (4th Cir. 1985). Thus, "[a]bsent unfair surprise and prejudice to a plaintiff ... a defendant may raise an affirmative defense for the first time in a dispositive pre-trial motion." *Babb v. Lee Cty. Landfill SC, LLC*, 298 F.R.D. 318, 323 (D.S.C. 2014).

[6] Here, the Court does not find that CMA is unfairly surprised or prejudiced by Leader raising affirmative defenses for the first time in a summary judgment motion. First, CMA had notice from the Answer that Leader reserved the right to raise additional offenses at the close of discovery. While Leader did not specifically name these defenses in the Answer or seek leave to amend the Complaint before filing its summary judgment motion, Leader put CMA on notice by raising these affirmative defenses in a pleading where CMA had an opportunity to respond. *See* *Grunley Walsh U.S., LLC*, 386 F. App'x at 459 (finding no prejudice or unfair surprise because the merits of the affirmative defense raised for the first time in a summary judgment motion was fully briefed). Though CMA argues that they are prejudiced because they lost the opportunity to issue interrogatories, request for admissions, or request for production to examine the specific defenses raised for the first time in a summary judgment motion, the Court does not find any additional discovery needed to address these affirmative defenses given the undisputed facts. *See* ECF No. 21 at 12–13; *see also* ECF No. 22 at 7. This is further demonstrated by CMA's ability to rebut these defenses in its opposition to Leader's motion for summary judgment by relying on the undisputed facts. ECF No. 21 at 15–20. In other words, based on the undisputed facts before the Court, no additional discovery is needed to determine whether the equitable defenses apply in this case, and CMA has failed to demonstrate otherwise. Therefore, the Court finds that CMA is not prejudiced, and will address Leader's affirmative defenses based on the merits. [5]

2. Frustration of Purpose

[7] **[8]** **[9]** **[10]** Leader's first affirmative defense is that the purpose of the service contract was frustrated. ECF No. 19 at 8–24. Frustration of purpose is an equitable doctrine that works to discharge a party from its outstanding contractual obligation due to a supervening frustration. ***816** *Caper Corp. v. Wells Fargo Bank, N.A.*, 578 F. App'x 276, 288 (4th Cir. 2014) *citing* Restatement (Second) of Contracts § 265. The doctrine is narrow and applies to instances "where a wholly unforeseeable event renders the contract valueless to one party." *Id. citing United States v. Gen. MacArthur Senior Village, Inc.*, 508 F.2d 377, 381 (2d Cir. 1974). The defense of frustration of purpose requires proof of three elements: 1) frustration of the principal purpose of the contract; 2) the frustration is substantial; and 3) the non-occurrence of the frustrating event or occurrence was a basic assumption on which the contract was made. *Drummond Coal Sales, Inc. v. Norfolk S. Ry. Co.*, No. 7:16CV00489, 2018 WL 4008993, at *15 (W.D. Va. Aug. 22, 2018). "[I]n order for frustration of the principal purpose of a contract to be substantial, it 'must be so severe that it is not fairly to be regarded as within the risks ... assumed under the contract.' " *Drummond Coal Sales, Inc.*, 2018 WL 4008993 at *15 *citing* *Sabine Corp. v. ONG W., Inc.*, 725 F. Supp. 1157, 1179 (W.D. Okla. 1989). "It is not enough that the transaction has become less profitable

for the affected party or even that he will sustain a loss." *Id.* *citing* Restatement (Second) of Contracts § 265 (comment (a)).

Here, Leader argues that the purpose of the contract was frustrated when the parties were unable to ship the 54 containers of cargo that CBP held and seized through no fault of the parties. ECF No. 19 at 13. Leader argues that while it is familiar with short-term delays in shipping due to CBP inspections and related charges, lengthy custom holds and seizures at the terminal due to a federal criminal investigation are rare, and therefore unforeseeable. *Id.* at 15. Leader argues that this risk was not incorporated into the contract. *Id.* CMA, on the other hand, argues that the parties did allocate the risk by incorporating the tariffs that cover detention and demurrage, and custom delays. ECF No. 21. Leader contends that these provisions apply to containers that ship, not unshipped containers. ECF Nos. 19, 22.

[11] The Court has doubts as to whether the purpose of the contract was frustrated in this case with regards to the 54 unshipped containers. Even if the purpose of the contract was frustrated with regards to the unshipped containers, however, Leader fails to demonstrate that any frustration of the contract was substantial. Leader also fails to demonstrate that the non-occurrence of the frustrating event or occurrence was a basic assumption on which the contract was made.

Tariff 044, Rule 2.39, which is incorporated into the contract, reads that the carrier "shall not be responsible for delays in transporting or delivering cargo when such delays occur on cargo detained by Customs, quarantine officials or other government required cargo inspection organizations. Any demurrage charges that accrue from such delays either at origin or destination are for the account of cargo." ECF No. 21 at ¶ 6(h); ECF No. 19-11. This tariff also provides that "[w]hen carrier is required by U.S. Customs or any other legal entity to return cargo to the port of loading, for whatever reason, all charges including return carriage and additional onward carriage, pays the original freight charges are for the account of the shipper." ECF No. 19-11. Finally, the provision also provides that "[a]ny and all costs associated with or arising out of any such inspection, including but not limited to, spotting of container at the inspection point, storage of the container while awaiting inspection or thereafter, opening and closing container, manipulation of the contents of the container, opening and replacing packages, and taking samples shall be for the expense of the Cargo." *Id.*

The language of this tariff, and the parties agree, is unambiguous, and applies ***817** when CBP detains cargo. Though Leader argues that this provision does not apply to situations "when the carrier is *unable* to transport or deliver cargo," ECF No. 19 at 23, the Court finds otherwise. The tariff applies generally to CBP detentions and holds. The existence of the tariff itself, which is incorporated in the service contract, indicates that custom delays occur in the maritime industry, and Leader does not deny this. *See* ECF No. 19 at 15. Though Leader claims that a lengthy custom delay is rare and unanticipated, the parties allocated the risk of custom delays, regardless of how long the delay. The tariff also applies when cargo is seized. *CMA CGM S.A. v. AZAP Motors, Inc.*, No. 2:14CV504, 2015 WL 9601157, at *9 (E.D. Va. Nov. 25, 2015), report and recommendation adopted, No. 2:14CV504, 2016 WL 50926 (E.D. Va. Jan. 4, 2016) (holding that a similar provision applies when cargo is seized by customs). In any custom inspection, hold, or detention, it is always possible that the items will be seized. The purpose of addressing custom holds and detentions in the service contract was to allocate the risk if there were any delays or seizures, and Leader assumed this risk, regardless of where the seizure took place. *See* ECF No. 19-11 (noting that "[a]ny and all costs associated with or arising out of any such inspection, *including but not limited to* ... manipulation of the contents of the container ... and taking samples shall be for the expense of the Cargo") (emphasis added). While the Court understands that the custom seizure was unfortunate placing both parties in difficult situations, these risks were assumed under the contract. *See* *Drummond Coal Sales*, 2018 WL 4008993, at *15. Therefore, the frustration of purpose doctrine does not apply in this case.

3. Impossibility/ Impracticability

[12] **[13]** **[14]** Leader also raises the doctrine of impossibility as an affirmative defense. Though Frustration of purpose and impossibility are legally distinct defenses, they are related, and the elements are similar. *See* *Drummond Coal Sales*, 2018 WL 4008993, at *15. To prove the defense of impossibility of performance, a defendant must prove: (1) the unexpected occurrence of an intervening act; (2) such occurrence was of such a character that its non-occurrence was a basic assumption of the agreement of the parties; and (3) the occurrence made performance impracticable. *Fla. Power & Light Co. v. Westinghouse Elec. Corp.*, 826 F.2d 239, 264 (4th Cir. 1987). In considering the non-occurrence

of an event, the question is whether the event is "one which the parties could reasonably be thought to have foreseen as a real possibility which could affect performance." *Opera Co. of Bos. v. Wolf Trap Found. for Performing Arts*, 817 F.2d 1094, 1102 (4th Cir. 1987). Thus, foreseeability is just one factor to be considered in resolving how likely the occurrence of the event in question is. *Id.* The other factor is whether the occurrence of the event, "based on past experience, was of such reasonable likelihood that the obligor should not merely foresee the risk but, because of the degree of likelihood ... should have guarded against it or provided for non-liability against the risk." *Id.*

[15] Based on the Court's analysis above, the Court finds that the doctrine of impossibility is inapplicable. It is foreseeable that with any custom inspection, there is a possibility that the delay would be lengthy or result in the ultimate seizure of the cargo. Given their experience in the maritime industry, the parties incorporated several provisions dealing with Custom inspections, delays, and actions. As the Court noted previously, the parties allocated the risks in the event Customs interfered with shipments, whether by delay or seizure. Leader assumed that risk in the contract, and therefore, the doctrine of impossibility also does not apply.

*818 4. Force Majeure

[16] **[17]** **[18]** In interpreting any force majeure provision, courts must construe contracts as they are written. *Vienna Metro LLC v. Pulte Home Corp.*, 786 F. Supp. 2d 1076, 1086 (E.D. Va. 2011) *citing Christopher Assocs. v. J.C. Sessoms, Jr.*, 245 Va. 18, 22, 425 S.E.2d 795 (1993). Where a force majeure provision is clear and unambiguous, the provision will be enforced. *Washington Metropolitan Area Transit Authority*, 476 F.3d at 235; *Philip Morris USA, Inc. v. Appalachian Fuels, LLC*, No. 3:08-CV-527, 2009 WL 1011650, at *7 (E.D. Va. Apr. 15, 2009). This includes any enforcement of notice provisions that the parties agreed to. *See United States v. Sunoco, Inc. (R & M)*, No. CIV.A. 03-4625, 2007 WL 1652266, at *4 (D.N.J. June 7, 2007) (noting that failure to provide adequate notice of force majeure renders the defense unavailable); *Sabine Corp. v. ONG W., Inc.*, 725 F. Supp. 1157, 1168–69 (W.D. Okla. 1989) (noting that the failure to give proper notice is fatal to a defense based upon a force majeure clause requiring notice).

[19] Here, the service contract provides that in the event of force majeure, "the party affected by the force majeure shall notify the other party in writing within seven (7) working days of the existence of such circumstances, specifying the effect of those circumstances on the party's ability to perform its obligations." ECF No. 21 at ¶ 6(g); ECF Nos. 1-4 to 1-9. Leader did not issue any notice regarding the force majeure provision. However, Leader argues that the notice requirement should be excused because it did not become apparent that there was a force majeure event until after the items were officially seized. ECF No. 19 at 26. Given the clear and unambiguous terms of the force majeure provision, the Court does not find a full waiver of the notice requirement appropriate in this case.

[20] Furthermore, the Court does not consider the lengthy custom delay which resulted in seizure of cargo to fall under the provision of force majeure. Included within the force majeure section is a provision excusing the carrier from responsibility of any delay, damage, injury or expense in the event the carrier is prevented from U.S. Customs or any other government entity "from unloading some or all of the cargo on a particular vessel and such prohibition is not due to any act or omission of [c]arrier, which is due to no fault of the carrier ..." *Id.* All extra charges or expenses incurred as a result of such prohibition are for the Shipper's account. *Id.* The existence of this provision under the force majeure provision indicates not only that the parties allocated the risk for any governmental or custom interference, but also that the parties did not consider this event to be fully excused by the force majeure provision. Leader agreed to assume the risks associated with any custom delays and therefore, the force majeure provision is inapplicable for this reason as well.

5. Breach of Contract

[21] **[22]** The Court now turns to CMA's Cross-Motion for Summary Judgment regarding its breach of contract claim. To prove a breach of contract claim, a party must prove the existence of the following elements: (1) a legally enforceable obligation of a defendant to a plaintiff; (2) the defendant's violation or breach of that obligation; and (3) injury or damage to the plaintiff caused by the breach of obligation. *Middle E. Broad. Networks, Inc. v. MBI Glob., LLC*, No. 1:14-CV-01207-GBL, 2015 WL 4571178, at *4 (E.D. Va. July 28, 2015) *citing Filak v. George*, 267 Va. 612, 594 S.E.2d 610, 614 (2004.) Courts must interpret the contract

according to the plain meaning of the terms, giving effect to all ***819** words, and must not search for meaning outside the contract, where the agreement is complete on its terms. *Design & Prod., Inc. v. Am. Exhibitions, Inc.*, 820 F. Supp. 2d 727, 736 (E.D. Va. 2011) (citation omitted).

There are no genuine disputes as to any material fact regarding Leader's liability for costs arising from the seizure of cargo by CBP. Both parties agree that the service contract, which incorporates its tariffs and bill of lading, governs the contractual obligations between the parties. ECF Nos. 19, 21.CMA claims that Leader failed to pay the detention and demurrage costs associated with the CBP seizure. ECF No. 21. Leader admits that it failed to pay the demurrage and detention costs for unshipped containers, and a partial balance for the shipped containers, but that it did not have to pay due to equitable defenses. ECF Nos. 19, 22. As analyzed above, the Court does not find that any equitable defenses apply in this case. Therefore, Defendant has breached the terms of the contract by failing to pay detention and demurrage charges in connection with the CBP detention. As a result of this breach, Leader owes, and is ordered to pay CMA **$1,310,139.68** in damages. *See* ECF No. 21-10.

IV. CONCLUSION

Based on the foregoing reasons, Defendant's Motion for Summary Judgment is **DENIED.** Plaintiff's Cross-Motion for Summary Judgment is **GRANTED.** Defendant is ordered to pay Plaintiff **$1,310,139.68** in damages, post-judgment interest in the amount of **.15%** to run from the date of judgment until paid, costs, and reasonable attorneys' fees.

IT IS SO ORDERED.

All Citations

474 F.Supp.3d 807

Footnotes

1 The Service contract was amended five times. ECF No. 21 at 4; *see also* ECF Nos. 1-4 to 1-9 (Exs. 3A–3F).

2 Tariff 100, Rule 90A excludes free time for both demurrage and detention for containers returned empty to carrier and reads "[u]nits returned empty due to a reduction in or delayed loading of the expected units for a booking shall have no Free Time Detention (off dock terminal/CY), and no Free Time Demurrage (on dock terminal/CY). Shipper or responsible party will be liable for any and all of these accrued charges as per Tariff." ECF No. 1-10.

3 The federal government investigated Perfectus for avoiding import tariffs on massive quantities of aluminum extrusions imported from China, tariffs designed to avoid the dumping of raw materials into the United States. ECF No. 19 at ¶ 13. Defendant claims no prior ties to or knowledge about the Perfectus group prior to being approached by Perfectus to provide NVOCC services for shipments to Asia. ECF No. 19 at ¶¶13–15.

4 Perfectus settled with the other two carriers Leader did business with. ECF No. 19 at ¶ 25. Perfectus fled the U.S., are beyond extradition, and have not been prosecuted. *Id.*

5 The Court notes that Leader may also request leave to amend its Answer to add the specific affirmative defenses. However, given the undisputed facts in this case, the Court finds that this is unnecessary. Raising the affirmative defenses for the first time in a summary judgment motion is sufficient where plaintiff is neither unfairly surprised nor prejudiced.

258 Va. 12
Supreme Court of Virginia.

Jerry J. COADY
v.
STRATEGIC RESOURCES, INC.

Record No. 981857.
|
June 11, 1999.

Synopsis

Consultant filed a warrant in debt against company, seeking payment for services performed under consulting contract. Company counterclaimed for breach of contract and breach of warranty. The General District Court, Fairfax County, dismissed both the warrant and the counterclaim, and awarded attorney fees to company, and consultant appealed. The Circuit Court, Fairfax County, Jane Marum Roush, J., awarded company the same amount in attorney fees and an additional amount for expert witness fees, and consultant appealed. The Supreme Court, Carrico, C.J., held that: (1) whether company was entitled to attorney fees and costs from consultant was controlled by indemnification clause of contract; (2) warrant in debt triggered company's entitlement to attorney fees and costs pursuant to indemnification clause; (3) award of $3,228 to company for attorney fees was supported by evidence; but (4) company was not entitled to allowance of $305 as fee for expert witness.

Affirmed in part, reversed in part, and final judgment.

Kinser, J., filed dissenting opinion in which Koontz, J., joined.

Procedural Posture(s): On Appeal.

West Headnotes (5)

[1] **Costs** Stipulations and agreements
Costs Contracts

Whether company was entitled to attorney fees and costs from consultant, in connection with consultant's warrant in debt against company for payment of services performed under consulting contract and company's counterclaim for breach of contract, was controlled by indemnification clause of contract, which provided that consultant would indemnify company for attorney fees and court costs caused by, or arising out of, or in connection with, consultant's performance or non-performance under contract.

4 Cases that cite this headnote

[2] **Costs** Stipulations and agreements
Costs Contracts

Attorney fees and costs incurred by company in defending warrant in debt filed against it by consultant for services performed under contract were caused by, or arose out of, or in connection with consultant's performance or non-performance under consulting agreement so as to trigger company's entitlement to attorney fees and costs pursuant to contract's indemnification clause.

4 Cases that cite this headnote

[3] **Costs** Evidence as to items

Award of $3,228 to company, pursuant to indemnification clause in its contract with consultant, for attorney fees incurred in defending consultant's warrant in debt against company for payment of $3,450 for services performed under contract was supported by testimony of company's president and expert witness called by company, by time records submitted by company's counsel, and by the lack of countervailing evidence submitted by consultant.

1 Cases that cite this headnote

[4] **Costs** Discretion of court

An award of attorney's fees rests within the sound discretion of the trial court.

8 Cases that cite this headnote

[5] **Costs** Time for application

Company was not entitled to allowance of $305 as a fee for its expert witness, absent prayer for expert witness fees in its counterclaim to consultant's warrant on debt filed in general district court, motion for amendment, order allowing amendment, or motion for expert witness fees at outset of trial in circuit court.

Attorneys and Law Firms

****273** ***14** Arlene L. Pripeton, Fairfax, for appellant.

Todd A. Suko (Janice Davis; McKenna & Cuneo, on brief), Washington DC, for appellee.

Present: All the Justices.

Opinion

CARRICO, Chief Justice.

This appeal involves a "Consulting Agreement" entered into on April 22, 1996, between Strategic Resources, Inc. (SRI) and ****274** Jerry J. Coady (Coady) whereby SRI retained Coady as a consultant to perform services at a rate of $50.00 per hour in connection with "SRI's contract with the Food and Drug Administration (FDA) Center for Drug Evaluation and Research." The focus of the controversy is this provision of the Consulting Agreement:

> CONSULTANT shall indemnify SRI ... and hold [it] harmless from any and all claims, suits, proceedings, costs, losses, expenses, damages and liabilities, including but not limited to attorney's fees and court costs, caused by or arising out of, or in connection with, CONSULTANT'S performance or non-performance under this Agreement.

The record shows that Coady submitted an invoice to SRI for his work during the month of September 1996 in the amount of $7,700.71. SRI refused to pay the amount billed and sent Coady a check in the amount of $3,350.95 accompanied by a letter dated January 13, 1997, stating as follows: "This check covers all approved hours and expenses for all projects per our discussions. This will now settle your account with SRI." Coady wrote on the front of the ***15** check "Accepted as Partial Payment Balance due $3450.00." On the back, he endorsed the check "For Deposit Only" and below his signature wrote " Accepted as partial payment of account."

Coady requested payment of the $3,450.00, but SRI refused. On July 22, 1997, Coady filed a warrant in debt against SRI in the General District Court of Fairfax County alleging that SRI owed him $3,450.00 plus interest, costs, and attorney's fees for services performed under their contract. SRI answered the warrant in debt and also filed a counterclaim alleging breach of contract and breach of warranty on Coady's part and requesting damages in the amount of $30,000.00.

Prior to commencement of the trial in the district court, SRI moved to dismiss the warrant in debt on the ground of accord and satisfaction. The court dismissed both the warrant and the counterclaim "on the basis that an accord and satisfaction had been reached by the parties pursuant to Section 8.3A–311 of the Code of Virginia." [1]

With leave of the district court, SRI subsequently filed a motion for attorney's fees based upon the indemnification provision of the Consulting Agreement. The court allowed SRI $3,228.00 in attorney's fees, and Coady appealed this award to the Circuit Court of Fairfax County. In its final order, the circuit court awarded SRI the same amount in attorney's fees and an additional $305.00 for the fee of an expert witness SRI presented in the circuit court. We awarded Coady this appeal.

[1] In an argument that ignores the indemnification clause of the Consulting Agreement, Coady cites three of our earlier decisions applying what is now Code § 17.1–604, which allows the recovery of costs in this Court by the "party substantially prevailing." [2] Those decisions recognize the principle that when a case becomes moot while an appeal is pending, the controversy ceases to exist and there is no prevailing party. Coady asserts that because the claims of both ***16** the parties in this case were dismissed in district court on the ground of accord and satisfaction, the "controversy ceased to exist" and there was no prevailing party. Hence, Coady concludes, neither party should be liable for the other's attorney's fees and costs.

Further, quoting ****275** *United States v. One Bally Golden Gate,* 225 F.Supp. 552 (W.D.Va.1964), Coady argues that the " 'general principle of Anglo–Saxon jurisprudence has always been that the loser of a lawsuit had to pay the taxable court costs but that other costs incurred by the winner (legal fees, expert witness fees, etc.) are not such costs as can be charged to the loser.' " *Id.* at 554. Finally, Coady argues that under Code § 14.1–178 (now Code § 17.1–601), "the party for whom final judgment is given in an action or motion shall recover his costs against the opposite party." Here, Coady says, "neither party obtained a judgment against the other in the underlying cases and, therefore, neither should be granted costs against the other."

The difficulty with these arguments is that the outcome of this case is controlled not by the statutes Coady cites or Anglo–Saxon jurisprudence but by the indemnification clause of the Consulting Agreement. There is nothing in the language of the indemnification clause that hinges the allowance of attorney's fees and costs upon a determination whether SRI was the prevailing party or not, was a winner or not, or was given a final judgment or not. The allowance depends upon whether the attorney's fees and costs SRI claimed were "caused by or [arose] out of, or in connection with, [Coady's] performance or non-performance under" the Consulting Agreement.

But, Coady argues, "[t]he indemnification clause in this contract does not mean that the party agreeing to indemnify the other is indemnifying it from a suit to enforce the provisions of the contract." The answer to this argument is found in *Chesapeake & Potomac Telephone Co. v. Sisson & Ryan, Inc.,* 234 Va. 492, 362 S.E.2d 723 (1987). There, the telephone company (C & P) entered into an agreement with a contractor (S & R) for the site work incident to the construction of several buildings. When one of the buildings collapsed, C & P sued S & R for its damages and also made a claim for its attorney's fees. The trial court denied the fee claim, and C & P appealed. The contract between the parties contained this provision:

> To the fullest extent permitted by law, the Contractor shall indemnify and hold harmless the Owner and the Architect from and against all claims, damages, losses and expenses, ***17** including but not limited to attorneys' fees, arising out of or resulting from the performance of the Work....

Id. at 501, 362 S.E.2d at 728. S & R contended that the indemnification provision was "one of indemnity against liability for property damage sustained by third parties" and that "indemnification does not operate *between* parties to a contract in a dispute involving those parties." *Id.* at 502, 362 S.E.2d at 728. Dismissing this argument and holding that C & P was entitled to recover its attorney's fees, we said: "We are committed to the view that parties may contract as they choose so long as what they agree to is not forbidden by law or against public policy. S & R contracted ... to pay C & P's attorneys' fees in certain situations, and we think the present situation falls fairly within the terms of that agreement." *Id.* at 503, 362 S.E.2d at 729.

[2] The remaining question, therefore, is whether SRI's attorney's fees and costs were "caused by or [arose] out of, or *in connection with,* [Coady's] performance or non-performance under" the Consulting Agreement. (Emphasis added.) Coady says that his original warrant in debt was not a proceeding in connection with his performance or non-performance but rather one in connection with SRI's non-performance, *i.e.,* not paying Coady for the services he rendered. Coady also says that although SRI's counterclaim alleged his non-performance, the counterclaim was dismissed and decided in his favor and, accordingly, "the indemnity cannot be construed to apply to the Counterclaim either because it certainly cannot include claims by SRI against Coady in which SRI is not successful."

For Coady to say that his original warrant in debt was not a proceeding in connection with his performance or non-performance under the Agreement is pure sophistry. While the warrant did not mention Coady's performance or non-performance as such, he cannot deny that what he sought recovery for in the warrant was his performance under the Agreement during the month of September 1996, as shown by a bill of particulars he filed. If that did not make the warrant ****276** proceeding one in connection with Coady's performance or non-performance, the answer and grounds of defense SRI filed to the warrant certainly did. SRI not only denied liability for Coady's claim but also asserted as grounds of defense unclean hands, fraud, misrepresentation, breach of contract, and lack of authorization, all obviously

related to Coady's performance or non-performance under the Consulting Agreement.

***18** The terms of the indemnification clause are broad and all-encompassing. The clause permits of no conclusion other than that SRI's attorney's fees were incurred in connection with Coady's performance or non-performance under the Agreement.

[3] Coady contends, however, that "[a]ttorney's fees of $3,228.00 are not reasonable and necessary in a case where the defendant is being sued for $3,450.00." Coady says that, although the hourly rate of SRI's attorney is reasonable, "the amount of hours spent to defend a claim of $3,450.00 is not reasonable." Coady states that the case was heard in general district court on SRI's motion to dismiss on the ground of accord and satisfaction in approximately fifteen minutes; had SRI filed the motion immediately after the warrant in debt was served, all the necessary preparation for trial could have been avoided. Coady says that the fact "this motion was not filed makes the amount of attorney's fees unreasonable and unnecessary." [3]

[4] We disagree with Coady. An award of attorney's fees rests within the sound discretion of the trial court. *Ingram v. Ingram,* 217 Va. 27, 29, 225 S.E.2d 362, 364 (1976). In *Mullins v. Richlands National Bank,* 241 Va. 447, 403 S.E.2d 334 (1991), we said:

> Where [a contract] provide[s] for attorney's fees, but [does] not fix the amount thereof, a fact finder is required to determine from the evidence what are reasonable fees under the facts and circumstances of the particular case.... In determining a reasonable fee, the fact finder should consider such circumstances as the time consumed, the effort expended, the nature of the services rendered, and other attending circumstances.... Ordinarily, expert testimony will be required to assist the fact finder.

Id. at 449, 403 S.E.2d at 335.

Here, the trial court heard the testimony of SRI's president and an expert witness called by SRI. The expert testified that "the amount of the attorney's fees was necessary and reasonable." In addition, the court had available to it the time records submitted by SRI's counsel. Coady submitted no countervailing evidence. Under ***19** the circumstances, we cannot say that the trial court abused its discretion in fixing the amount of attorney's fees it awarded to SRI.

[5] Finally, Coady objects to the trial court's allowance of $305.00 as a fee for SRI's expert witness. Coady says there was no prayer for expert witness fees in SRI's counterclaim filed in general district court and, therefore, that it cannot be recovered.

SRI says it did not move for expert witness fees in the general district court because it did not employ an expert witness in that proceeding. SRI states, however, that it "moved for its expert witness fees at the outset of the trial in the Circuit Court and the issue was fully litigated between the parties." SRI also says "that it is within the discretion of the trial court to allow amendments of pleadings, including a party's ad damnum, at *any time* before a verdict is rendered."

This suggests that SRI sought and was granted an amendment. However, there is nothing in this record resembling a motion for amendment or an order allowing an amendment. Furthermore, the record discloses no motion by SRI for expert witness fees at the outset of the trial in the circuit court or at any other time. Accordingly, we will disallow the award of $305.00 to SRI for the fee of its expert witness. "In Virginia, a plaintiff cannot recover more than he sues ****277** for though he can recover less." *Powell v. Sears, Roebuck & Co.,* 231 Va. 464, 469, 344 S.E.2d 916, 919 (1986).

Accordingly, we will reverse the award of $305.00 to SRI for the fee of its expert witness, affirm the award to SRI of attorney's fees in the amount of $3,228.00, and enter final judgment in favor of SRI for the latter amount.

Affirmed in part, reversed in part, and final judgment.

KINSER, Justice, with whom Justice KOONTZ joins, dissenting.

I am not persuaded that the indemnification clause of the "Consulting Agreement" between Jerry J. Coady and

Strategic Resources, Inc. (SRI), is applicable in the factual context of this case. Moreover, even if the indemnification clause applies as the majority concludes, I would reverse the circuit court's award of attorney's fees to SRI ***20** because I believe that the circuit court abused its discretion in awarding a reasonable fee.

In *Mullins v. Richlands Nat'l Bank,* 241 Va. 447, 403 S.E.2d 334 (1991), we said that, in determining a reasonable fee, a court should consider several factors, including "the effort expended, the nature of the services rendered, and other attending circumstances." *Id.* at 449, 403 S.E.2d at 335. In the present case, these factors do not support the award of attorney's fees in an amount that almost equaled that of Coady's claim for services rendered. The general district court dismissed both the warrant in debt and the counterclaim on the basis of accord and satisfaction. SRI waited until just prior to the commencement of the trial in that court to present its motion to dismiss. The grounds for the motion were not complicated, and the motion could have been presented with minimal effort before SRI filed its counterclaim.

For these reasons, I conclude that the circuit court abused its discretion with regard to the amount of attorney's fees awarded to SRI and, therefore, respectfully dissent from that part of the majority opinion affirming the award of attorney's fees to SRI.

All Citations

258 Va. 12, 515 S.E.2d 273

Footnotes

1 In pertinent part, Code § 8.3A–311 provides that "[i]f a person against whom a claim is asserted proves that (i) that person in good faith tendered an instrument to the claimant as full satisfaction of the claim, (ii) the amount of the claim was unliquidated or subject to a bona fide dispute, and (iii) the claimant obtained payment of the instrument ... the claim is discharged if the person against whom the claim is asserted proves that the instrument or an accompanying written communication contained a conspicuous statement to the effect that the instrument was tendered as full satisfaction of the claim."

2 The cases cited by Coady are *Ficklen v. City of Danville,* 146 Va. 426, 131 S.E. 689, *reh'g denied,* 146 Va. 426, 132 S.E. 705 (1926), *Wallerstein v. Brander,* 136 Va. 543, 118 S.E. 224 (1923), and *Branscome v. Cunduff,* 123 Va. 352, 96 S.E. 770 (1918).

3 Coady asserts on brief that SRI's "statement of attorney's fees also included time to establish the right of indemnity" and that SRIshould not have received an allowance of fees for such time. SRI has not included the statement of attorney's fees in the appendix, but, assuming the statement did include time for establishing the right of indemnity, we find no objection by Coady to the allowance on that ground. Rule 5:25.

249 Va. 131
Supreme Court of Virginia.

D.C. McCLAIN, INC., et al.,
v.
ARLINGTON COUNTY, et al.

Record No. 940149.
|
Jan. 13, 1995.

Synopsis

Public contractor on bridge construction contract sued county to recover damages contractor allegedly incurred due to county's wrongful termination of contract, and due to alleged defectiveness of county's design of bridge. County counterclaimed, alleging that contractor breached contract. County also filed third-party motion for judgment against contractor's performance and payment bond surety. After jury returned verdict in favor of contractor on its claim against county, and in favor of contractor and surety on county's claims against them, the Circuit Court, Arlington County, Benjamin N.A. Kendrick, J., granted county's motion to set aside verdicts, and entered final judgment in favor of county for $661,000. Contractor and surety appealed. The Supreme Court, Hassell, J., held that: (1) contract required contractor to obtain easement necessary for posttensioning of bridge; (2) county's approval of shop drawings did not relieve contractor of errors that existed in shop drawings; and (3) evidence supported amount of damages awarded to county.

Affirmed.

Procedural Posture(s): On Appeal.

West Headnotes (11)

[1] **Contracts** Application to Contracts in General

Courts Other particular matters, rulings relating to

Court must enforce contract as written, and contract becomes law of case unless contract is repugnant to some rule of law or public policy.

11 Cases that cite this headnote

[2] **Contracts** Questions for Jury

When contract is clear and unambiguous, it is duty of court, and not jury, to decide contract's meaning.

11 Cases that cite this headnote

[3] **Contracts** Language of Instrument

Words that parties use in contract are normally given their usual, ordinary, and popular meaning.

48 Cases that cite this headnote

[4] **Contracts** Construction to give validity and effect to contract

Contracts Presumptions and burden of proof

No word or clause in contract will be treated as meaningless if reasonable meaning can be given to it, and there is presumption that parties have not used words needlessly.

56 Cases that cite this headnote

[5] **Bridges** Contracts

Public Contracts Construction of buildings and other public works

Contract for construction of bridge required general contractor, not county, to acquire necessary easement on abutting land to posttension bridge; contract required county to provide lands shown in contract drawings, land that general contractor needed to posttension bridge was not shown on those drawings, and contract imposed obligation upon general contractor to obtain necessary easement at its expense because additional land it needed to perform posttensioning was not area "available on the [construction] site or right-of-way."

1 Cases that cite this headnote

[6] **Bridges** Contracts

Public Contracts Defective plans and mistakes

County's approval of subcontractor's shop drawing of its proposed posttensioning of bridge by utilizing blockout method did not relieve general contractor of its contractual obligation to build bridge in compliance with contract documents; shop drawing was defective because bridge could not be posttensioned as specified in drawing, and even though county was required to "pass upon" shop drawings, contract documents clearly stated that general contractor remained responsible for any errors that might exist in those drawings.

2 Cases that cite this headnote

[7] **Bridges** Contracts

Public Contracts Defective plans and mistakes

General contractor on bridge construction contract was not entitled to recover from county expenses that contractor incurred due to incorrect dimensions contained in contract documents relating to height and width of bridge, and bridge's structural members; contract required contractor to verify measurements and dimensions shown in drawings before commencing construction, contractor failed to do so, and, had contractor complied with contract, county would have had opportunity to make necessary changes before contractor commenced work.

1 Cases that cite this headnote

[8] **Bridges** Performance or breach of contract

Public Contracts Termination for default

County was justified in terminating bridge construction contract on ground that general contractor failed to construct bridge in diligent and timely manner as required by contract; contractor failed to complete bridge because it believed that county was required to provide necessary easement, but contract in fact required contractor to obtain that easement.

[9] **Bridges** Contracts

Public Contracts Construction of bond and surety's liability in general

Surety was liable to county on performance and payment bond where surety's principal was in default on bridge construction contract with county due to contractor's failure to acquire necessary easement as required by contract, under which county had performed all its obligations.

[10] **Damages** Breach of contract in general

Plaintiff in contract action is not required to prove exact amount of his damages, but rather, must show sufficient facts to permit trier of fact to make intelligent and probable estimate of damages sustained.

5 Cases that cite this headnote

[11] **Bridges** Actions

Public Contracts Damages and amount of recovery

Evidence supported award of $661,000 to county and against general contractor and its surety due to contractor's default on bridge construction contract; county's expert testified that it would cost nearly $980,000 to complete bridge, and that another contractor had executed contract to complete bridge for $650,000.

Attorneys and Law Firms

****660 *132** Thomas B. Newell (Charlie C.H. Lee; Susan L. Timoner; Watt, Tieder & Hoffar, on briefs), for appellants.

Joseph P. Dyer, Jr. (Carolyn E. Kane; Barbara S. Drake, County Atty.; Ara L. Tramblian, Deputy County Atty.; Siciliano, Ellis, Dyer & Boccarosse, on brief), for appellee Arlington County.

William J. Carter (Timothy R. Hughes; James F. Lee, Jr.; Carr, Goodson & Lee, on brief), for appellees Wilbur Smith Associates, Inc.; Wilbur Smith Associates; Wilbur Smith Associates BTML Division; Byrd, Talamy, MacDonald

& Lewis Consulting Engineers (Div. of Wilbur Smith Associates).

***131** Present: All the Justices

HASSELL, Justice.

***133** I.

This appeal involves numerous issues arising out of the breach of a construction contract.

II.

D.C. McClain, Inc. (McClain) executed a contract with Arlington County to construct a bridge in Arlington known as the Loop Road Bridge. McClain filed its motion for judgment against the County and the Board of Supervisors of Arlington County (collectively the County). McClain alleged, among other things, that it incurred damages because the County wrongfully terminated the contract, and that the County's design of the bridge is purportedly defective.

The County filed a counterclaim, alleging that McClain breached the contract and certain express and implied warranties, and filed a third-party motion for judgment against McClain's performance and payment bonding company, the Fidelity & Deposit Company of Maryland (Fidelity). The County also filed a third-party motion for judgment against the designer of the bridge, Wilbur Smith Associates, Inc. and its related divisions (collectively Wilbur Smith). The County asserted contract, indemnification, and tort claims against Wilbur Smith.

A jury returned a verdict of $569,000 in favor of McClain on its claims of wrongful termination and damages attributed to the purported design errors. The jury also found in favor of McClain and Fidelity on the County's claims against them. The jury ****661** awarded a verdict of $250,000 in favor of the County on its third-party motion for judgment against Wilbur Smith.

The trial court granted the County's motion to set aside the verdicts and entered final judgment in favor of the County in the amount of $661,000. The court also set aside the verdict against Wilbur Smith. We awarded McClain and Fidelity an appeal.

III.

Wilbur Smith designed the bridge and provided construction phase engineering services. The bridge was designed as a single-span, cast-in-place, post-tensioned bridge, to be situated upon abutments of an adjoining landowner, Westfield Realty, Inc. (Westfield).

***134** A major portion of the bridge construction work involved a process described as "post-tensioning." This process required pre-stressing the poured concrete bridge by adding tension to the tendons. "As these tendons are pulled, the bridge rises and the weight of the bridge shifts to its ultimate load bearing point[s] on the abutment[s].... The pulling of the tendons to add tension, and thereby camber the bridge to its ultimate shape and location, is a process called post-tensioning." Daniel Curtis McClain, McClain's president, and Dennis Pisarcik, Fidelity's assistant managing attorney, testified that McClain was required to provide the means and methods necessary for the post-tensioning of the bridge.

Mr. McClain visited the site where the bridge was to be constructed and reviewed the plans and specifications for construction before McClain submitted its bid to the County. Mr. McClain knew, before he submitted McClain's bid and signed the construction contract, that there was not sufficient space between the end of the bridge and the existing bridge abutments to locate the mechanical jacks, which are necessary for the post-tensioning process.

VSL Corporation submitted a bid to McClain to perform the post-tensioning of the bridge before McClain signed the County's contract, but the bid included an express qualification for the need of eight feet of clear space behind the bridge to perform the post-tensioning. VSL included this qualification in its bid because the County's contract documents did not show the existence of an easement to use Westfield's property. Henry J. Cronin, vice-president of VSL, specifically told Mr. McClain, before McClain submitted its bid to the County, that an easement to use Westfield's property was necessary for the post-tensioning process.

William G. Brakefield, an employee of Westfield, had informed Mr. McClain that Westfield would not give McClain the necessary easement. Even though Mr. McClain knew on February 15, 1988 that Westfield would not provide an easement, McClain executed the contract on March 16, 1988

to construct the bridge for $789,755.90. Mr. McClain testified that he did not put an exception in McClain's bid because he had "always been under the premise that you do not put exceptions on bids or they will throw your bid out."

McClain was unable to post-tension the bridge without the easement because of the lack of sufficient space. Subsequently, ***135** McClain's subcontractor, VSL, developed an alternative method for post-tensioning of the bridge by utilizing "blockouts." This method permitted post-tensioning by creating holes, or blockouts, within the bridge. Mechanical devices would utilize the space created by the "blockouts" to post-tension the bridge. McClain was unable to complete the bridge by using this method because the temporary shoring, which was used to support the bridge before post-tensioning, was not capable of supporting the bridge's weight.

McClain encountered other problems during its attempt to construct the bridge that resulted in work stoppages. Ultimately, McClain and the County executed Change Order No. 4. This change order required the County to pay McClain an additional $365,000 in return for McClain's agreement to complete the bridge by July 1, 1990. The change order provided that the additional payment would constitute "full compensation" to complete all remaining work on the bridge, including minor revisions.

A few months after Mr. McClain had signed Change Order No. 4, McClain informed the County that McClain would not ****662** complete construction of the bridge unless the County agreed to pay an additional $180,000 and provide an easement for post-tensioning. The County refused to acquiesce in these demands and, subsequently, on June 15, 1990, the County sent McClain notice of the County's intent to terminate the contract. The County terminated the contract on July 20, 1990.

IV.

[1] **[2]** **[3]** **[4]** Familiar principles of contract interpretation are pertinent to our resolution of this appeal. We must enforce the contract between McClain and the County as written, and the contract becomes the law of the case unless the contract is repugnant to some rule of law or public policy. *Winn v. Aleda Const. Co.,* 227 Va. 304, 307, 315 S.E.2d 193, 194 (1984); *Mercer v. S. Atlantic Ins. Co.,* 111 Va. 699, 704, 69 S.E. 961, 962 (1911). It is well-established that when a contract is clear and unambiguous, it is the duty of the court, and not the jury, to decide the meaning of the contract. *Winn,* 227 Va. at 307, 315 S.E.2d at 194; *Russell Co. v. Carroll,* 194 Va. 699, 703, 74 S.E.2d 685, 688 (1953); *Krikorian v. Dailey,* 171 Va. 16, 24, 197 S.E. 442, 446 (1938). Words that the parties used are normally given their usual, ordinary, and popular meaning. No word or clause in the contract will be treated as meaningless if a reasonable meaning can be given to it, and there ***136** is a presumption that the parties have not used words needlessly. *Winn,* 227 Va. at 307, 315 S.E.2d at 195; *Ames v. American Nat. Bank,* 163 Va. 1, 39, 176 S.E. 204, 216–17 (1934).

V.

A.

[5] In Count VI of its motion for judgment, McClain asserted that the bridge "as designed, including the post-tensioning system, could not be commercially constructed without obtaining an easement from Westfield Realty Company to cut into the abutment wall to place the post-tensioning equipment and thereby allow the anchors for the tendons to be located on a proper bearing point." McClain further asserted that the County was "obligated pursuant to the terms of the Contract to obtain the easements which were necessary for construction" and the County failed to provide the necessary easement. McClain and Fidelity argue that they presented sufficient evidence at trial in support of these allegations.

The County and Wilbur Smith assert that McClain admitted that the bridge could be constructed from the designs and specifications, but McClain was unable to do so because it did not have an easement. The County and Wilbur Smith contend that the contract required that McClain, not the County, acquire the necessary easement to execute the work. We agree with the County and Wilbur Smith.

Paragraphs C(8) and C(9) of the general conditions, which are a portion of the construction contract at issue here, state:

8. *LANDS BY OWNER*

The Owner shall provide the lands shown on the Drawings upon which the work under the Contract is to be performed and to be used for rights of way and for access. In case all of the lands, rights-of-

> way or easements have not been obtained as herein contemplated before construction begins, the Contractor shall begin his work on such lands and rights-of-way as the Owner may have previously acquired. If by reason of tardy acquisition of all of the lands, rights-of-way or easements, the Contractor is unduly delayed in his prosecution of the work, as determined by the Engineer, then the Contractor shall be entitled ***137** to make claim and act as stipulated hereinafter for extension of time and other provisions of these Contract Documents.
>
> 9. *LANDS BY CONTRACTOR*
>
> Should the Contractor require additional land for temporary construction facilities and for storage of materials and equipment *other than the areas available on the site or right-of-way, or as otherwise furnished by the Owner, he shall provide such other lands and access thereto entirely at his own expense and without liability to the Owner.* The Contractor ****663** shall not enter upon private property for any purpose without written permission.

(Emphasis added).

Applying the aforementioned principles of contract interpretation, we hold that the language contained in these paragraphs does not require the County to obtain the easement. Paragraph C(8) requires that the County provide the lands shown on the contract drawings. It is undisputed that the land McClain needed to use to post-tension the bridge is *not* shown on those drawings. Thus, McClain needed to acquire an easement from Westfield. Paragraph C(9) imposes the obligation upon McClain to obtain the necessary easement at its expense because the additional land McClain needed to perform the post-tensioning was not an area "available on the [construction] site or right-of-way."

B.

[6] As we mentioned earlier, VSL Corporation, McClain's subcontractor retained to undertake the post-tensioning of the bridge, sought to post-tension the bridge by utilizing the blockout method. VSL submitted a shop drawing to McClain that was in turn submitted to Wilbur Smith and the County. After Wilbur Smith reviewed the shop drawing, it affixed a stamp, containing the following language, to the drawing:

> Review of this document is for conformance with the design concept of the project only. Contractor is responsible for confirming field dimensions, for information that pertains solely to the fabrication processes or to techniques of construction, and for coordination of the work of all trades. This review ***138** does not relieve the contractor from complying with all requirements of the contract documents.

The County's Department of Public Works employees reviewed the drawing and affixed a stamp on the shop drawing which stated, "Accepted as noted" and was signed by a County employee.

McClain and Fidelity assert that McClain is entitled to recover damages for purported delay associated with post-tensioning because the County approved the shop drawing. The County and Wilbur Smith argue that the County's approval does not relieve McClain of its contractual obligation to build the bridge in compliance with the contract documents.

McClain and Fidelity fail to discuss in their brief paragraph B(6)(g) of the general conditions of the contract, which states in relevant part:

> The Engineer shall pass upon the shop drawings with reasonable promptness. Checking and/or approval of shop drawings will be general, for conformance with the design concept of the Project and compliance with the information given in the Contract Documents, and will not include quantities, detailed dimensions, nor adjustments of dimensions to actual field conditions. *Approval shall not be construed as permitting any departure from contract requirements ... nor as relieving the Contractor of the responsibility for any error in details,*

> *dimensions or otherwise that may exist.*

(Emphasis added). The word "Engineer," as used in paragraph B(6)(g), means "the Director, Department of Public Works, Arlington County, or his authorized representatives."

Even though the County's director of public works, or his designee, was required to "pass upon" the shop drawings, the contract documents clearly state that McClain remained responsible for any errors that might exist in the shop drawings. The uncontroverted evidence at trial reveals that the shop drawing is defective because the bridge could not be post-tensioned as specified in the shop drawing. Applying the plain language in the contract, which as we have stated is the law of this case, we hold that the County's approval of the shop drawing does not relieve McClain of its contractual obligation to properly construct the bridge. ***139** Thus, McClain may not recover any damages that it may have incurred because of the defective shop drawing.

C.

[7] McClain asserted in Count V of its motion for judgment that it discovered numerous design errors during the construction ****664** of the bridge. McClain alleged, and presented evidence at trial, that certain critical dimensions contained in the contract documents relating to the height and width of the bridge, and the depth of the bridge's structural members, were incorrect. McClain presented evidence at trial that it incurred certain expenses caused by these design deficiencies. Thus, McClain asserts that there is sufficient evidence to support this particular claim, and the trial court erred by setting aside the jury's verdict. The County and Wilbur Smith assert that McClain is not entitled to recover damages because it failed to verify the dimensions as required by the contract documents. We agree with the County and Wilbur Smith.

The contract states in relevant part:

> *COORDINATION OF WORK AND MEASUREMENTS AND DIMENSIONS*
>
> A. The Contractor shall carry out the Work in accordance with the Drawings and Specifications. *The measurements and dimensions shown on these drawings shall be verified at the site by the Contractor.* The Contractor shall be responsible for all dimensions and coordinated execution of the Work. The Contractor shall verify that bridge components will fit as specified, or notify the Engineer sufficiently in advance if components do not fit so that modifications can be made without holding up the work. The contractor shall verify all foundation plans, framing plans, and finished surfaces and shall coordinate the Work before proceeding.... Where there are discrepancies in the contract documents [the Contractor shall] notify the Engineer before proceeding with the Work.

Mr. McClain testified that McClain did not check the dimensions of the existing structures or measure those dimensions before beginning work on the bridge. McClain's project manager, John A. ***140** Robertson, testified that McClain did not measure the elevations of the roads adjoining the bridge before commencing construction to ascertain if the roads corresponded with the planned bridge work.

Simply stated, even though the contract plainly required that McClain verify the measurements and dimensions shown in the drawings before commencing construction, McClain failed to do so. The evidence reveals that McClain did not discover any of the elevational discrepancies until after it had begun to execute the work. Had McClain complied with the contract, the County would have had an opportunity to make necessary changes before McClain commenced work on the bridge. Accordingly, we hold that the trial court did not err by setting aside the jury's verdict on this count.

D.

[8] McClain and Fidelity argue that the County breached the contract because purportedly the County wrongfully terminated the contract. McClain and Fidelity contend that at the time of termination, McClain was not in default of the contract; that McClain was entitled to substantial time extensions because of the post-tensioning design errors; and that McClain had not failed to comply with the applicable contractual deadlines. McClain says that it presented sufficient evidence at trial to support these allegations.

The County and Wilbur Smith assert, however, that as a matter of law the County was entitled to terminate the contract because McClain had failed to prosecute the work as required by the contract. We agree with the County and Wilbur Smith.

Although the completion date was extended in December 1989, by Change Order No. 4 to July 1, 1990, a few months later McClain refused to complete construction of the bridge unless the County agreed to pay an additional $180,000 and to provide an easement for post-tensioning. As required by the contract, the County wrote McClain on June 15, 1990, informing it that McClain was in default because it had failed to prosecute the work in accordance with the agreed schedule of completion and it was obvious that the bridge could not be constructed by July 1. This termination letter reminded McClain that it had 15 days to cure the default. Copies of the letter were forwarded to Fidelity. By letter dated July 20, 1990, ****665** the County terminated the contract because McClain failed to cure the default.

***141** The construction contract contains the following language that is pertinent to this discussion:

TIME FOR COMPLETION AND LIQUIDATED DAMAGES

a. It is hereby understood and mutually agreed by and between the Contractor and the Owner that the date of beginning, the rate of progress, and *the time for completion of the work to be done hereunder are essential conditions of the Contract. The Contractor agrees that the work shall be started promptly upon receipt of any communication authorizing the Contractor to proceed and shall be prosecuted regularly, diligently, and uninterruptedly* at a rate of progress that will ensure full completion thereof in the shortest length of time consistent with good workmanship.

b. It is further agreed that time is of the essence of each and every portion of this Contract and of the Specifications wherein a definite and certain length of time is fixed for the performance of any act whatsoever.

....

c. It is further agreed that where an additional time is allowed for the performance of any act by the Contractor according to the new time limit fixed by such extension shall be of the essence of this Contract.

(Emphasis added).

The plain and unambiguous contractual language, including Change Order No. 4, required McClain to prosecute the work "regularly, diligently, and uninterruptedly" and to complete the bridge no later than July 1, 1990. McClain failed to complete the bridge because McClain believed that the County was required to provide the necessary easement, and Mr. McClain was of opinion that without the easement, the bridge could not be constructed in accord with the design.

As we have previously stated, the clear and unambiguous language in the contract required that McClain obtain the necessary easement to undertake the post-tensioning of the bridge. Furthermore, Mr. McClain admitted that "[t]he bridge is not ***142** unbuildable. If you get an access through that backwall, it could be built.... If they didn't get an easement, the bridge became unbuildable. If they got the easement, the bridge is buildable." Therefore, applying the contractual language that the parties used, we hold that, as a matter of law, the County was justified in terminating the contract with McClain because it failed to construct the bridge in a diligent and timely manner as required by the contract. [*]

VI.

A.

[9] McClain and Fidelity argue that the trial court erred in setting aside the jury's verdict for Fidelity on the County's third-party motion for judgment. McClain and Fidelity contend that Fidelity has no liability to pay under the terms of its performance bond unless: (i) McClain is in default and (ii) the County has performed all its obligations under the contract. McClain and Fidelity assert that they presented credible evidence that the County failed to prove these conditions.

We disagree. Our review of the extensive record in this case reveals that, as a matter of law, the County did not materially breach the contract and that McClain breached the contract by failing to construct the bridge. Contrary to McClain's assertions, its failure to construct the bridge cannot be attributed to the County's design. Rather, as Mr. McClain admitted, McClain was unable to build the bridge because McClain could not acquire the necessary easement.

****666** As we have stated, "[w]here a surety's liability for the principal's obligation has been established, the surety is liable for the whole debt.... The surety's liability to the obligee is measured by that of the principal; the liability of both is

primary." *Board of Sup. v. Southern Cross Coal,* 238 Va. 91, 96, 380 S.E.2d 636, 639 (1989). We hold that the liability of Fidelity is co-extensive with McClain's liability, and Fidelity is liable for the work ***143** McClain agreed to perform. *New Amst. Co. v. Moretrench Corp.,* 184 Va. 318, 326, 35 S.E.2d 74, 78 (1945).

B.

McClain and Fidelity argue that the trial court erred in entering the $661,000 judgment in favor of the County. McClain and Fidelity argue that the County's evidence of damages upon which the trial court based the judgment is speculative. The County argues that the judgment is supported by the evidence.

[10] We agree with the County. We have repeatedly held that a plaintiff in a contract action is not required to prove the exact amount of his damages, but rather, the plaintiff must show sufficient facts to permit the trier of fact to make an intelligent and probable estimate of the damages sustained. *Estate of Taylor v. Flair Property Associates,* 248 Va. 410, 414, 448 S.E.2d 413, 416 (1994); *Harkins v. Reynolds Associates,* 221 Va. 1128, 1131–32, 277 S.E.2d 222, 224 (1981).

[11] Vance Allen Perry, Sr., qualified as the County's expert witness on the subjects of construction management, engineering, cost analysis, and shop drawing review. Perry testified that it would cost $979,924 to complete the bridge. This analysis was based upon several proposals that general contractors had submitted to the County to complete the construction of the bridge. Perry's analysis also included the costs of labor and materials as well as alternative methods of post-tensioning the bridge. He further testified that another contractor had executed a contract to complete the bridge for the County for $650,000. Upon our review of the evidence of record, we hold that there is sufficient evidence to support the trial court's award of damages.

VII.

In view of the aforementioned holdings, we need not consider McClain's remaining assignments of error. Accordingly, the judgment of the trial court will be affirmed.

Affirmed.

All Citations

249 Va. 131, 452 S.E.2d 659

Footnotes

* McClain, relying upon *Spotsylvania County School Board v. Seaboard Surety Company,* 243 Va. 202, 415 S.E.2d 120 (1992), argues that whether an owner breaches its contract by terminating a contractor is a jury issue. McClain's reliance is misplaced because Mr. McClain admitted that had he been able to acquire the easement, McClain could have constructed the bridge. Here, unlike *Spotsylvania,* no jury issue exists.

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United States District Court, W.D. Virginia,
Roanoke Division.

DRUMMOND COAL SALES, INC., Plaintiff,
v.
NORFOLK SOUTHERN
RAILWAY COMPANY, Defendant.

Civil Action No. 7:16cv00489
|
Signed 08/21/2018
|
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MEMORANDUM OPINION

Michael F. Urbanski, Chief United States District Judge

***1** This is the second time the court has been called upon to resolve a dispute between these two parties arising out of a 2006 contract for rail transportation services from a terminal in Charleston, South Carolina to 23 specified coal-burning power plants in the southeastern United States. The parties resolved their initial dispute in 2010, agreeing to amend certain provisions of the contract and extend its term. Plaintiff Drummond Coal Sales, Inc. now seeks a declaration that its performance under the contract, as amended, should be excused.

Drummond's theory of this case from the outset has been that the market for imported coal at the majority of the 23 contractually-designated destinations has ceased to exist. As a result, it has been unable to meet its minimum volume obligations under the parties' contract. In the course of discovery, Drummond's theory shifted. The current thrust of Drummond's argument is that defendant Norfolk Southern Railway Company entered into confidential third-party contracts with the destination power plants, requiring the destinations to ship minimum volumes of coal under their contracts or pay shortfall fees. Drummond contends these third-party contracts prevent the destinations from taking coal on Drummond's contract and deprive Drummond of the benefit of the bargain it struck with Norfolk Southern.

For its part, Norfolk Southern contends this is simply a case of buyer's remorse. Norfolk Southern asserts Drummond was well aware at the time the contract was executed and later amended that environmental regulations looming on the horizon could affect the market for coal in the southeastern United States. Drummond also was aware that Norfolk Southern had separate, confidential transportation contracts with the destination utilities. Norfolk Southern insists that Drummond, a sophisticated party, understood and accepted the risks inherent in this contract, requiring it to ship certain volumes of coal or pay a shortfall fee. As such, Drummond should not be excused from performing because the deal did not turn out as it had hoped.

There is no dispute that since 2011, Drummond has shipped no coal under the parties' contract. Nor is there any dispute that Drummond has paid Norfolk Southern millions of dollars in annual shortfall fees as a result. What is in dispute, however, is why Drummond fails to meet its minimum volume requirements year after year. And as to their views on that issue, these parties are like two trains passing in the night.

As detailed below, the particular factual circumstances at play in this case lead the court to conclude that the breach of contract claims alleged in Count One must be resolved by a finder of fact. Accordingly, the court will **DENY** the cross motions for summary judgment (ECF Nos. 122 & 123) as to the first count of the amended complaint. The court also will **DENY** Norfolk Southern's motion (ECF No. 122) as to Count Six, alleging rescission, modification, or reformation of the contract, to the extent it relies on Count One.

***2** The remaining counts of the amended complaint fail as a matter of law. Drummond cannot maintain a cause

of action against Norfolk Southern for unjust enrichment (Count Two) given the express, valid contract governing the subject matter at issue. And, as explained below, Drummond's defenses of force majeure (Count Three), frustration of purpose (Count Four), or impossibility/ impracticability of performance (Count Five) cannot survive summary judgment. As such, the court will **GRANT** Norfolk Southern's motion (ECF No. 122) as to these four counts, as well as to Count Six to the extent it relies on Counts Two through Five.

I.

Drummond is in the business of marketing and selling Colombian coal. Norfolk Southern is a freight railroad engaged in the transportation of goods and materials in the southeastern, eastern and midwestern United States.

A.

On January 20, 2006, Norfolk Southern and Drummond entered into a contract ("C-9337") for the transportation of coal and coal products from the Shipyard River Terminal ("SRT") in Charleston, South Carolina to 23 coal-fired power plants (the "Destinations") in the southeastern United States. This contract between a coal supplier and a rail carrier is unique in the industry. C-9337 does not guarantee the sale or shipment of any amount of commodity; rather, Drummond is required to market and successfully sell its coal to the utility Destinations. The end price of that coal, paid by the utility, consists of two component parts—the price of the coal itself (set by Drummond, the coal supplier) and the cost to transport it. Typically, utility customers enter into confidential transportation contracts with rail carriers, leaving coal suppliers like Drummond in the dark as to what the utilities' transportation costs are. By entering into its own transportation contract, C-9337, Drummond purchased a schedule of calculable, guaranteed rates that it could use to price and sell its coal to the utilities in this market.

To that end, Article 13 of C-9337 provides for base transportation rates for each net ton of commodity shipped by Drummond from SRT on Norfolk Southern rail lines to the 23 Destinations. These rates, based on the specific Destination and shipment characteristics, are set forth in detail in Appendices A-H of the parties' contract.

Pursuant to Article 27, Drummond is required to ship a minimum volume of coal each year of the contract term from SRT to one or more of the 23 Destinations on Norfolk Southern's rail lines. Drummond may ship this guaranteed volume pursuant to C-9337 or any third-party contract. If it fails to ship the guaranteed volume in any given year, Drummond must pay Norfolk Southern a shortfall fee. Article 27(i) further provides that if Drummond notifies Norfolk Southern that it anticipates not being able to ship the guaranteed volume from SRT to the Destinations, the parties shall work together in good faith to identify and implement sales and transport alternatives that will permit Drummond to satisfy its guaranteed volume obligations.

Also relevant to this dispute is Article 20, which provides that Norfolk Southern must pay Drummond certain refunds for the cost of improvements made to rail infrastructure in South Carolina. These refunds are calculated on a per net ton basis of commodity shipped from SRT by Norfolk Southern, regardless of whether it is shipped by Drummond.

C-9337 also contains a force majeure provision, Article 29, which provides that neither party shall be liable for any delay or nonperformance caused in whole or in part by any cause not within the control of said party, including without limitation:

> ***3** any act of God or of a public enemy or terrorist act, wars, rebellions, labor troubles, strikes, lockouts, riots, embargoes, blockades or interventions or expropriations by government or governmental authorities, interference by civil, military or governmental authorities, other civil unrest, failure or delay of manufacturers, suppliers or other third parties to deliver machinery or equipment or otherwise to perform, or any Force Majeure Event with respect to Kinder Morgan or a Consignee.

The original term of C-9337 was ten years, from 2006 to 2016. In April 2006, Drummond declared a force majeure event pursuant to Article 29 of the contract, citing Kinder Morgan's [1] failure to expand the port capacity at SRT. Norfolk Southern sued Drummond for breach of contract,

which action subsequently was resolved by the parties at a settlement conference conducted by the undersigned, then a United States Magistrate Judge. See Norfolk Southern Railway Company v. Drummond Coal Sales, Inc., Case No. 7:08cv00340. The parties entered into a settlement agreement and executed a mutual release. The settlement agreement contemplated an amendment to C-9337, which extended the contract term through 2019 but reduced the guaranteed volume requirement set forth in Article 27 and adjusted the terms of the infrastructure refund set forth in Article 20.[2] All other provisions of C-9337 were to remain in full force and effect. Amendment Number 1 to C-9337 was executed on January 12, 2010. One week later, Case No. 7:08cv00340 was dismissed from the docket of this court.

B.

In January 2016, Drummond brought suit on the contract, as amended, in the Northern District of Alabama. Norfolk Southern filed a motion to transfer venue to the Western District of Virginia in the Alabama case, and simultaneously filed a motion to reopen the case, assign the matter to the undersigned, and enforce the settlement agreement and mutual release in this district's Case No. 7:08cv00340. In an opinion entered August 29, 2016 in Case No. 7:08cv000340, the court held that Counts One and Two of Drummond's Alabama complaint were barred by the parties' mutual release but Counts Three through Seven were not. The remaining counts of Drummond's Alabama complaint thereafter were transferred to this district. Drummond subsequently amended its complaint to allege the following six claims:

- Count One: Declaratory Relief—Excused Performance Due to Norfolk Southern's Breach
- Count Two: Money Had and Received and/or Unjust Enrichment
- Count Three: Declaratory Relief—Force Majeure
- Count Four: Declaratory Relief—Frustration of Purpose
- Count Five: Impossibility / Impracticability of Performance
- Count Six: Rescission, Modification or Reformation

C.

Two factual narratives come together to form the basis for Drummond's amended complaint. Setting the scene for the majority of Drummond's claims, Counts Three through Five, is the current state of the coal market in the relevant area. Drummond contends that since the contract was amended in 2010, the demand for coal at the 23 contractually-designated Destinations has declined dramatically. See Schwartz Expert Report, ECF No. 128-2, at 3. Specifically, 12 of the 23 Destinations identified in C-9337 retired between 2012 and 2015 due to the Mercury and Air Taxies Standard ("MATS"), which went into effect in 2012. Id. at 4-5. The remaining 11 Destinations continue to burn coal, but much less of it, due to the increased availability and lower price of natural gas. Id. at 6. Additionally, these Destinations have begun to source high-sulfur, lower-cost coal from the Northern Appalachian region and the Illinois Basin, rather than the low-sulfur coal Drummond imports from Colombia.[3] Id. at 11.

***4** Norfolk Southern generally does not disagree with these facts. It acknowledges the demand for coal among the Destinations has decreased. But it maintains that Drummond was aware of the changing market at the time the parties executed the amended contract in 2010—specifically, the shift away from low-sulfur coal, the declining cost of natural gas, and the environmental regulations on the horizon. See Steul Dep., ECF No. 132-2, at 83-85, 89-96, 98, 118-120, 122, 124; Drummond R. 30(b)(6) Dep., ECF No. 132-6, at 120, 130-40. Additionally, Norfolk Southern offers evidence that the remaining coal-fired power plants continue to solicit bids for coal delivery, and that the demand for coal at these utilities since 2010 far exceeds Drummond's annual guaranteed volume requirements. See ECF No. 132-17. According to Norfolk Southern, the reason these plants do not buy coal from Drummond is simply a matter of economics—the price is cheaper elsewhere. See Steul Dep., ECF No. 132-2, at 166-67; Drummond R. 30(b)(6) Dep., ECF No. 132-6, at 54-55, 120, 142-43.

Nevertheless, Drummond posits that it was a basic assumption of the contract that more than half of the 23 Destinations would not close or stop burning coal during the contractual period. Drummond alleges three related but legally distinct concepts—force majeure (Count Three), frustration of purpose (Count Four), and impossibility / impracticability of performance (Count Five)—in an effort to excuse its performance based on these market changes.

But there is more. Not only did half of the 23 Destinations stop burning coal or close after 2010—of the remaining 11 Destinations that still burn coal, 8 have separate, confidential transportation contracts with Norfolk Southern that preclude them from taking coal on C-9337 without incurring liquidated damages.[4] Transportation contracts between utilities and rail carriers are common in the industry. See Steul Dep., ECF No. 132-2, at 82-83. Similar to C-9337, these third-party contracts set transportation rates for coal shipped to utilities from certain origins.[5] Also like C-9337, these contracts contain guaranteed volume requirements and provide for liquidated damages should the volume commitments not be met. Some volume requirements are as high as 95%—meaning a utility would have to ship 95% of the coal it receives pursuant to that utility's transportation contract with Norfolk Southern.[6] According to Drummond, this renders the rates in its own transportation contract, C-9337, worthless.

All of these third-party utility contracts contain confidentiality provisions. Thus, while Drummond may have been aware of their existence at the time it executed and amended C-9337, it was not aware of their terms. See McClellan Dep., ECF No. 132-8, at 47; Steul Dep., ECF No. 132-2, at 82; Drummond R. 30(b)(6) Dep., ECF No. 132-6, at 93-94.

SRT is a designated origin in some (but not all) of the third-party contracts. As Norfolk Southern points out, C-9337 expressly allows Drummond to meet its minimum volume requirements by shipping from SRT to the Destinations pursuant to C-9337 "and/or any Third Party Contract(s)." Thus, conceivably, Drummond could meet its guaranteed volume commitments by shipping coal from SRT on the utilities' transportation contracts.

***5** However, Drummond always was able to ship coal on the utilities' contracts. The entire purpose of entering into its own transportation contract with Norfolk Southern, C-9337, was to guarantee a schedule of rates for a duration of time that Drummond could use to sell and ship coal to the Destinations. Norfolk Southern R. 30(b)(6) Dep., ECF No. 110-1, at 78-79; see also Hamilton Dep., ECF No. 132-9, at 47-48 ("From the beginning ... the statements were that Drummond would help NS, NS would help Drummond, Drummond would help us get into markets where we hadn't served before and, likewise, we would help them get into markets where they hadn't served before."). Necessarily implied in that contract is Drummond's ability to actually use those rates. Drummond bargained for an opportunity to use these specific rates to try to sell into this market. Drummond alleges this opportunity was foreclosed by Norfolk Southern's double dealing.

Thus, not only did half of the 23 Destinations identified in C-9337 stop burning coal or close after 2010, but the remaining coal-fired plants had their own minimum volume obligations to Norfolk Southern, decimating the value of C-9337 to Drummond. This forms the basis for Count One of Drummond's amended complaint, alleging excused performance due to Norfolk Southern's prior material breach of contract.[7]

D.

The parties have filed cross motions for summary judgment. Norfolk Southern moves for judgment in its favor as to all six claims. Drummond moves for summary judgment as to Count One only—specifically, its allegation that Norfolk Southern breached C-9337 by entering into separate, confidential third-party contracts that deprived Drummond of the benefit of its bargain. The issues have been fully briefed and argued, and this matter is ripe for adjudication.

II.

Pursuant to Federal Rule of Civil Procedure 56(a), the court must "grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); see Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Glynn v. EDO Corp., 710 F.3d 209, 213 (4th Cir. 2013). When making this determination, the court should consider "the pleadings, depositions, answers to interrogatories, and admissions on file, together with ... [any] affidavits" filed by the parties. Celotex, 477 U.S. at 322. Whether a fact is material depends on the relevant substantive law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." Id. (citation omitted). The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. See Celotex, 477 U.S. at 323. If that burden has

been met, the non-moving party must then come forward and establish the specific material facts in dispute to survive summary judgment. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586–87 (1986).

In determining whether a genuine issue of material fact exists, the court views the facts and draws all reasonable inferences in the light most favorable to the non-moving party. Glynn, 710 F.3d at 213 (citing Bonds v. Leavitt, 629 F.3d 369, 380 (4th Cir. 2011)). Indeed, "[i]t is an 'axiom that in ruling on a motion for summary judgment, the evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor.' " McAirlaids, Inc. v. Kimberly–Clark Corp., No. 13-2044, 2014 WL 2871492, at *1 (4th Cir. June 25, 2014) (internal alteration omitted) (citing Tolan v. Cotton, 134 S. Ct. 1861, 1863 (2014) (per curiam)). Moreover, "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge...." Anderson, 477 U.S. at 255. However, the non-moving party "must set forth specific facts that go beyond the 'mere existence of a scintilla of evidence.' " Glynn, 710 F.3d at 213 (quoting Anderson, 477 U.S. at 252). Instead, the non-moving party must show that "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Res. Bankshares Corp. v. St. Paul Mercury Ins. Co., 407 F.3d 631, 635 (4th Cir. 2005) (quoting Anderson, 477 U.S. at 249). "In other words, to grant summary judgment the [c]ourt must determine that no reasonable jury could find for the nonmoving party on the evidence before it." Moss v. Parks Corp., 985 F.2d 736, 738 (4th Cir. 1993) (citing Perini Corp. v. Perini Const., Inc., 915 F.2d 121, 124 (4th Cir. 1990)).

III.

***6** The parties have filed cross motions for summary judgment as to Count One, alleging excused performance due to Norfolk Southern's prior material breach of contract. "Generally, a party who commits the first breach of a contract is not entitled to enforce the contract." Horton v. Horton, 254 Va. 111, 115–16, 487 S.E.2d 200, 203–04 (1997) (citations omitted). [8] Such breach, if material, excuses the non-breaching party from performance. Id. at 116, 487 S.E.2d at 204. "A material breach is a failure to do something that is so fundamental to the contract that the failure to perform that obligation defeats an essential purpose of the contract." Id. at 115, 487 S.E.2d at 204 (citations omitted). While a specific amount of monetary damages flowing from the breach can serve as evidence of a material breach, proof of damages is not essential "when the evidence establishes that the breach was so central to the parties' agreement that it defeated an essential purpose of the contract." Id. at 116, 487 S.E.2d at 204 (citations omitted).

There are three aspects to Drummond's material breach of contract claim. First, Drummond alleges that Norfolk Southern breached Article 13 of C-9337 and/ or the duty of good faith and fair dealing by actively impairing Drummond's ability to use its bargained-for rates. Second, Drummond contends that Norfolk Southern breached Article 27(i) of the contract by failing to work in good faith with Drummond to identify alternatives that would allow Drummond to meet its minimum volume requirements. Third, Drummond claims that Norfolk Southern breached Article 20(b) by failing to pay in a timely manner infrastructure refunds due to Drummond. As detailed below, the unique factual circumstances presented in this case lead the court to conclude all three aspects of Count One raise questions of fact that must be resolved by a jury.

A. Article 13

In C-9337, Drummond purchased an opportunity to use a schedule of calculable, guaranteed rates to sell coal to 23 Destinations in the Southeast. Half of these Destinations have been eliminated due to a decline in market conditions. While this market decline does not give rise directly to Drummond's breach of contract claim, it cannot be ignored in the broader context of this case. Drummond's allegations that Norfolk Southern actively impaired its ability to use the rates set forth in Article 13 of C-9337 must be viewed against this factual backdrop.

Of the 11 contractually-designated Destinations still burning coal, three have (or had) transportation contracts with Norfolk Southern during the relevant period that do not list SRT as an origin: Asheville Station (C-9290), Clover Station (C-7545) [9]

and Wateree Station (C-9623). All three of these contracts have minimum volume requirements. Thus, these utilities could not take coal on C-9337 without incurring liquidated damages. Nor could Drummond ship coal from SRT on these utility contracts.

One of these contracts is worthy of further mention. C-9623, Norfolk Southern's contract with Wateree Station, did not list SRT as an origin. The contract, as amended, had a term of August 9, 2012 through March 31, 2015. One year later—*after* the instant lawsuit was filed—Norfolk Southern entered into a new contract with Wateree Station, C-9815, which had a term beginning March 1, 2016 that was extended by amendment to June 30, 2018. Tellingly, this new contract expressly provides that shipments under C-9337 count towards Wateree Station's minimum volume requirements.

Six of the Destinations that still burn coal have contracts with Norfolk Southern that do include SRT as an origin: Belews Creek, Allen Station, Marshall Station, Roxboro Station, Mayo Station, and McIntosh Station. However, all of these contracts contain minimum volume obligations that preclude the Destinations from taking coal on C-9337 without incurring liquidated damages. [10]

***7** Theoretically, Drummond could have received credit under C-9337 towards its minimum volume requirements (and perhaps avoided shortfall fees) by shipping its coal from SRT to these six Destinations on the utilities' transportation contracts, using their rates. See C-9337 § 27 (providing for credit towards minimum volume requirements for shipments from SRT to Destinations pursuant to "this Contract and/or any Third Party Contract(s)"). But this is not what Drummond bargained for by entering into C-9337; it bargained for its own schedule of rates, which rates are different than those set forth in the utility contracts.

Drummond, a coal supplier, always had the opportunity to ship coal to the utilities using the utilities' transportation rates. Those rates were previously unknown to Drummond, so Drummond purchased from Norfolk Southern its own fixed set of rates—rates that, as it turns out, are good for only three of the 23 Destinations listed in C-9337: [11] Wateree (as of March 1, 2016, pursuant to C-9815), Wansley Station and Hammond Station.

Norfolk Southern entered into two contracts—one with Drummond, the coal supplier, and one with the utility itself—for the transportation of coal to the same utility Destination. A reasonable trier of fact could find that Norfolk Southern's alleged double dealing so deprived Drummond of the benefit it expected from the base rates set forth in Article 13 of C-9337 that it defeats an essential purpose of the contract and constitutes a material breach. At the same time, a reasonable juror could find that Drummond simply struck a bad bargain by entering into this unique transportation contract as a coal supplier, and that Norfolk Southern did not materially breach C-9337 by entering into separate contracts with the utilities. As Norfolk Southern testified in its Rule 30(b)(6) deposition, C-9337 is the only contract of its type—it does not have any other transportation contracts with coal suppliers, only with utilities. Norfolk Southern R. 30(b)(6) Dep., ECF No. 110-1, at 83-84.

To be sure, C-9337 does not contain a "most favored nations" clause. But the fact that Drummond bought a schedule of rates to use to ship coal to 23 Destinations and, in reality, only had the opportunity to use those rates to ship to three Destinations, cannot be ignored. On top of that, Drummond submits evidence that Norfolk Southern actually incentivized the utilities to source coal from Northern Appalachia and the Illinois Basin region. See Lawson Dep., ECF No. 156-6, at 82-85; ECF No. 92-1; ECF No. 92-17; see, e.g., C-9545, at§§ 18.5, 19.3. A reasonable juror could find on this record that Norfolk Southern actively worked against Drummond and materially breached C-9337 in the process.

Norfolk Southern's alleged breach can take one of two forms. Implicit in the rates set forth in Article 13 and Appendices A-H of C-9337 is Drummond's ability to use those rates. See Schmidt v. Bartech Grp., Inc., 119 F. Supp. 3d 374, 383 (E.D. Va. 2014), aff'd, 620 Fed.Appx. 153 (4th Cir. 2015) ("[W]hat is necessarily implied is as much a part of the instrument as if plainly expressed, and will be enforced as such.") (citing Pellegrin v. Pellegrin, 31 Va. App. 753, 525 S.E.2d 611, 614 (2000)); Southern Ry. Co. v. Franklin & P.R. Co., 96 Va. 693, 32 S.E. 485, 487 (1899) ("It adds nothing to the written contract to infer an obligation to do what was actually intended by the parties and what is essential to give effect and vitality to it."). Thus, there is a question of fact as to whether Norfolk Southern's simultaneous contractual dealings materially breached Article 13 of C-9337. It is for the finder of fact to determine whether Norfolk Southern actively worked to prevent Drummond from shipping coal using the rates set forth in C-9337, which Norfolk Southern acknowledges was an essential purpose of this agreement,

and whether the alleged double dealing worked a material breach of the contract. United States ex rel. Virginia Beach Mech. Servs., Inc. v. SAMCO Const. Co., 39 F. Supp. 2d 661, 670 (E.D. Va. 1999) ("A material, as opposed to a minor, breach occurs when the nonbreaching party did not receive the substantial benefit of its bargain."); cf. Va. Elec. & Power Co. v. Bransen Energy, Inc., 850 F.3d 645, 655 (4th Cir. 2017) (Bransen's delivery of coke breeze and subpar coal was first material breach, as essential purpose of parties' agreements was to provide Dominion with coal that would be acceptable performance fuel to test the Plant's operating capacity and comply with environmental regulations).

***8** Alternatively, Drummond argues Norfolk Southern breached the implied duty of good faith and fair dealing. See Tandberg, Inc. v. Advanced Media Design, Inc., No. 1:09cv863, 2010 **WL** 11569540, at *3 (E.D. Va. Jan. 26, 2010) ("[A]n implied covenant of good faith and fair dealing arises only out of specific contractual provisions; it does not bind the parties where no contractual duty is imposed."). "Violation of the duty of good faith and fair dealing constitutes a breach of contract." 23 Williston on Contracts § 63:22 (4th ed.).

> [C]ourts have viewed "evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance" as bad faith. [Restatement (Second) of Contracts § 205] cmt. d. Taken together, these examples sensibly reflect the fundamental principle that a contracting party cannot arbitrarily or unreasonably deprive the other contracting party of the benefit of the parties' contractual bargain. See 23 Richard A. Lord, Williston on Contracts § 63:22 (4th ed. 1990) ("[N]either party shall do anything to injure or destroy the right of the other party to receive the benefits of the agreement."). In the commercial context, and where a covenant of good faith and fair dealing is implied, this general principle prevents a contracting party from "act[ing] in a commercially unreasonable manner while exercising some discretionary power under the contract." Id.; see also U.C.C. § 2–103(b) (2004) (defining good faith as "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade").

Tandberg, 2010 **WL** 11569540, at *3; see Va. Vermiculite, Ltd. v. W.R. Grace & Co.-Conn., 156 F.3d 535, 542 (4th Cir. 1998) ("[I]t is a basic principle of contract law in Virginia, as elsewhere, that although the duty of good faith does not prevent a party from exercising its explicit contractual rights, a party may not exercise contractual discretion in bad faith, even when such discretion is vested solely in that party."); see also E. Shore Markets, Inc. v. J.D. Assocs. Ltd. P'ship, 213 F.3d 175, 184 (4th Cir. 2000) ("[U]nder the covenant of good faith and fair dealing, a party impliedly promises to refrain from doing anything that will have the effect of injuring or frustrating the right of the other party to receive the fruits of the contract between them." (applying Maryland law)). There is a question of fact as to whether Norfolk Southern acted in bad faith or a "commercially unreasonable manner," Tandberg, 2010 **WL** 11569540, at *3, by actively impairing Drummond's ability to utilize the rates it bargained for in C-9337. Williston, supra, at§ 63:22 ("Thus, whether particular conduct violates or is consistent with the duty of good faith and fair dealing necessarily depends upon the facts of the particular case and is ordinarily a question of fact to be determined by the jury or other finder of fact.").

B. Article 27

There is also a question of fact as to whether Drummond's performance is excused by Norfolk Southern's breach of the express provision of Article 27(i), which provides:

> If for any calendar year or Stub Year, as the case may be, Shipper [Drummond] notifies NS that it anticipates not being able to ship the Guaranteed Volume from Origin to the Destinations, the parties shall work together in good faith to identify and implement sales and transport alternatives that will permit Shipper to satisfy its Guaranteed Volume obligations.

***9** This provision is found in the same Article of the contract that sets forth the guaranteed volumes and required shortfall fees. Article 27(i) appears, to some extent, to ameliorate the harshness of this "take-or-pay" provision of the contract, see Int'l Minerals & Chem. Corp. v. Llano, Inc., 770 F.2d 879, 882-83, 885 (10th Cir. 1985), which is a fundamental purpose of the parties' agreement.

Drummond claims Norfolk Southern breached its contractual obligation to work with Drummond in good faith to find alternatives that would allow Drummond to meet its minimum volume commitments. Instead, Norfolk Southern accepted millions of dollars from Drummond each year in shortfall fees, despite transporting no coal on C-9337.

Norfolk Southern argues this precatory language imposes no legal duty—and even if it did, Article 27(i) imposes a *mutual* obligation on the parties to cooperate in identifying alternatives that would allow Drummond to satisfy its guaranteed volume requirements. Norfolk Southern posits that Drummond never expressly invoked the provision of Article 27(i); rather, it sent perfunctory letters advising it anticipated shipping no coal under the contract and paid the corresponding shortfall fee invoice without protest.

These perfunctory letters, however, plainly put Norfolk Southern on notice that Drummond did not anticipate meeting its guaranteed volume obligations,[12] and between 2011 and 2015, Norfolk Southern accepted payments of more than $35 million in shortfall fees from Drummond despite the fact that it shipped no coal whatsoever under the contract. Drummond offers evidence that it approached Norfolk Southern with ways to mitigate its liquidated damages under the contract, but its efforts were rebuffed. See Ex. 27 to Steul Dep., ECF No. 132-2; Drummond R. 30(b)(6) Dep., ECF No. 132-6, at 57-76. Drummond further cites evidence that Norfolk Southern knew about potential opportunities through which Drummond could ship coal and avoid shortfall fees, but failed to share that information with Drummond. Norfolk Southern R. 30(b)(6) Dep., ECF No. 110-1, at 236-44; ECF No. 156-3.

Article 27(i) provides that once Drummond notifies Norfolk Southern that it anticipates not being able to ship the guaranteed volume (which Drummond plainly did), the parties "shall work in good faith to identify and implement sales and transport alternatives...." The term "shall" is mandatory in nature. Trumball Investments, Ltd. I v. Wachovia Bank, N.A., 436 F.3d 443, 447 (4th Cir. 2006). Whether Norfolk Southern's efforts constitute good faith within the meaning of Article 27(i), and whether Norfolk Southern's actions constitute a material breach of contract, are questions of fact.

C. Article 20

The third aspect of Drummond's claim in Count One is that Norfolk Southern breached Article 20(b) by failing to pay the agreed-upon infrastructure refund when shipping coal from the Charleston terminal. Norfolk Southern acknowledges that two of its shipments from SRT—one in 2010 and one in 2016—qualified for this refund, but insists its initial failure to credit Drummond with these refunds was simply an "oversight." See Ex. 1 to Zehringer Decl., ECF No. 132-23; Def. Summ. J. Br., ECF No. 132, at ¶ 49. Norfolk Southern maintains that it satisfied its contractual obligation by adjusting Drummond's shortfall fee to account for the refunds, once the oversight was brought to Norfolk Southern's attention. See Sewell Dep., ECF No. 132-13, at 107-09; Ex. 1 to Smith Decl., ECF No. 132-24. But Drummond is quick to point out that these errors were corrected only after Drummond notified Norfolk Southern. See Norfolk Southern 30(b)(6) Dep., ECF No. 110-1, at 313-19; Ex. 1 to Smith Decl., ECF No. 132-24. Viewed in light of the broader factual circumstances presented in this case—specifically, Norfolk Southern's conduct as a whole—there are questions of fact as to whether Norfolk Southern's failure to pay Drummond the infrastructure refunds it was due under the parties' contract constitutes a material breach.

***10** For these reasons, the cross motions for summary judgment will be **DENIED** as to Count One.

IV.

Because it is premised on the breach of contract alleged in Count One, Count Two, alleging unjust enrichment, fails as a matter of law. "The existence of an express contract covering the same subject matter of the parties' dispute precludes a claim for unjust enrichment." CGI Fed. Inc. v. FCi Fed., Inc., 814 S.E.2d 183, 190 (Va. 2018) (citing Southern Biscuit Co. v. Lloyd, 174 Va. 299, 311, 6 S.E.2d 601, 606 (1940) ("[A]n express contract defining the rights of the parties necessarily precludes the existence of an implied contract of a different nature containing the same subject matter.")). Accordingly, Norfolk Southern's motion for summary judgment will be **GRANTED** as to Count Two.

V.

In Count Three, Drummond seeks relief from its contractual obligations by way of the force majeure provision in Article

29. Norfolk Southern argues that environmental regulations do not fall within the language of the force majeure clause. It urges the court to apply rules of statutory construction—specifically, ejusdem generis and noscitur a sociis—to find as a matter of law that no force majeure· event, as that term is defined in Article 29, has occurred.

The rule of ejusdem generis applies "when a particular class of persons or things is spoken of in a statute and general words follow." Rockingham Co-op. Farm Bureau v. City of Harrisonburg, 171 Va. 339, 344, 198 S.E. 908, 911 (1938). " 'Where general words follow specific words in a statutory enumeration, the general words are [usually] construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.' " Yates v. United States, 135 S. Ct. 1074, 1086 (2015) (quoting Washington State Dep't of Social & Health Servs. v. Guardianship Estate of Keffeler, 537 U.S. 371, 384 (2003)). However, the language in Article 29 does not contain a list of specific words followed by general words. Just the opposite is true, in fact—Article 29 refers generally to "any cause not within the control of said party," and then sets forth the following non-exclusive list of examples:

> [A]ny act of God or of a public enemy or terrorist act, wars, rebellions, labor troubles, strikes, lockouts, riots, embargoes, blockades or interventions or expropriations by government or governmental authorities, interference by civil, military or governmental authorities, other civil unrest, failure or delay of manufacturers, suppliers or other third parties to deliver machinery or equipment or otherwise to perform, or any Force Majeure Event with respect to Kinder Morgan or a Consignee.

Of the two principles of statutory construction, noscitur a sociis—"a word is known by the company it keeps"—is the more applicable here. Yates, 135 S. Ct. at 1085. Courts rely on this principle to " 'avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words.' " Id. (citing Gustafson v. Alloyd Co., 513 U.S. 561, 575 (1995)).

> The maxim of noscitur a sociis provides that the meaning of doubtful words in a statute may be determined by reference to their association with related words and phrases. When general words and specific words are grouped together, the general words are limited and qualified by the specific words and will be construed to embrace only objects similar in nature to those objects identified by the specific words.

***11** Cuccinelli v. Rector, Visitors of Univ. of Virginia, 283 Va. 420, 432, 722 S.E.2d 626, 633 (2012). Applying this tenet of statutory construction, the. specific examples of force majeure events set forth in Article 29 of C-9337 lend meaning to the general words "any cause not within the control of said party." None of the events described in this enumeration can be read to encompass the alleged cause of nonperformance here—market conditions resulting from governmental regulation. Environmental regulations are not "act[s] of God" or the result of wars, strikes, civil unrest, or failure of a third party to perform. Changes in market conditions stemming from environmental regulations do not fall within the protection of the force majeure clause for "interventions," "expropriations," or "interference by civil, military or governmental authorities." Nor are they events of the same type as those examples set forth in Article 29. See Swift & Co. v. Columbia Ry. Gas & Elec. Co., 17 F.2d 46, 48 (4th Cir. 1927) (applying ejusdem generis and holding "[c]rop shortage is not included among the causes specifically mentioned, nor is it of the same general class"); Wheeling Valley Coal Corp. v. Mead, 186 F.2d 219, 222 (4th Cir. 1950) ("Under familiar principles of interpretation, the general expressions 'acts of the government' and 'causes beyond the control of the lessee' are limited to things of the same general sort as those specifically set forth in the same connection...."); cf. Kansas City Power & Light Co. v. Pittsburg & Midway Coal Mining Co., No. 88-2224 S., 1989 WL 151919, at *2-4 (D. Kan. Nov. 17, 1989) (finding material questions of fact as to whether nonperformance excused by force majeure event, where agreement defined "force majeure" as including "acts

or orders of any court, regulatory agency or administrative body having jurisdiction").

Additionally, Article 29 addresses events that directly affect the parties' abilities to perform the contract. See C-9337, § 29(a) (excusing "delay or *nonperformance*" that is "caused in whole or in part" by a force majeure event (emphasis added)); see also id. at§ 29(b) ("In the event a party is *unable to perform* its obligations under this Contract because of a Force Majeure Event...." (emphasis added)). In this case, Drummond offers no evidence that environmental regulations render it unable to perform under this contract.

On this point, Sabine Corp. v. ONG Western, Inc., 725 F. Supp. 1157 (W.D. Okla. 1989), is instructive. In Sabine, a gas seller brought suit against a buyer for breach of a take-or-pay contract. Defendant ONG Western, Inc. asserted its take-or-pay obligation under the contract was modified or excused by a force majeure clause. The clause in question provided that the party's contractual obligations would be suspended "[i]f either Buyer or Seller is rendered unable, wholly or in part, by force majeure or other cause of any kind not reasonably within its control, to perform or comply with any obligations or conditions of this contract...." 725 F. Supp. at 1166. The contract defined "force majeure" to include

> acts of God and of the public enemy, the elements, freezing of wells or lines of pipe, repairing or altering machinery or lines of pipe, fires, accidents, breakdowns, strikes, labor disputes, and any other industrial, civil or public disturbance, inability to obtain materials, supplies, rights-of-way on customary terms, permits, or labor, any act or omission by parties not controlled by the party having the difficulty, any act or omission (including failure to take gas) of a purchaser of gas from Buyer which is excused by any event or occurrence of the character herein defined as constituting force majeure, failure of gas supply, and any laws, orders, rules, regulations, acts, or restraints, of any governmental body or authority, civil or military, or any other causes beyond the control of the parties hereto.

Id. ONG alleged a number of events, including regulatory changes, which, individually or in combination, resulted in a substantial disappearance in the market for natural gas. Id. at 1166-67. An affidavit submitted by ONG in opposition to plaintiff's motion for partial summary judgment detailed those events and submitted that "the price of gas under ONG's contract with Sabine remained at the highest price paid in the area, while the market price declined substantially." Id. at 1168. This price differential eliminated a major portion of ONG's sales of natural gas. Id. The district court held, however, that ONG "failed to submit any evidence showing that any or all of these alleged force majeure events rendered ONG *unable* to take gas within the meaning of the force majeure clause." Id. at 1171.

***12** ONG cited Rule 1-305 of the Oil and Gas Rules of the Oklahoma Corporation Commission, a rule of a governmental body that arguably falls within the contractual definition of force majeure. See id. at 1166 (defining force majeure to include "any laws, orders, rules, regulations, acts, or restraints, of any governmental body...."). The court held that Rule 1-305 did not render ONG unable to perform, however. Id. at 1170. The court reasoned:

> At best, ONG's evidence demonstrates that the effect of the various alleged events of force majeure was a decline in market demand and a disparity between ONG's contract price and the market price or value of gas, with the result that if ONG were to have taken the gas, it would have had to resell it at a loss. Such a loss of market demand which, as opposed to absolute demand, is a function of price, and the inability to resell gas at a profit, does not render a party "unable" to take gas.

Id. at 1171 (internal citations omitted).

Here, environmental regulations impacted market conditions. But these events cannot "reasonably be said to have been among the contingencies contemplated by the absolving

clause." Wheeling Valley Coal Corp., 186 F.2d at 223. And, as in Sabine, there is no evidence in this record establishing these regulations prevented Drummond from actually performing under this take-or-pay contract. To be sure, the market for coal is less favorable to Drummond than it was at the time the contract was executed, and the number of Destinations burning low-sulfur coal has decreased. Cf. Sabine, 725 F. Supp. at 1179 ("While Defendant has submitted evidence that it has lost some of its customers and that its customer base is smaller, it is implicit in affidavits submitted by Defendant and in Defendant's arguments that Defendant has customers who still need a supply of gas and that its parent's division, as a public utility, is still obligated to supply customers with gas." (citation omitted)). But, as Norfolk Southern points out, there is some price at which Drummond could sell and ship its coal to the remaining Destinations. See Sabine, 725 F. Supp. at 1171 ("Such a loss of market demand which, as opposed to absolute demand, is a function of price, and the inability to resell gas at a profit, does not render a party 'unable' to take gas."); see also N. Ind. Pub. Serv. Co. v. Carbon Cty. Coal Co., 799 F.2d 265, 275 (7th Cir. 1986) (holding Indiana Public Service Commission's "economy purchase orders" did not prevent NIPSCO from using the coal it agreed to buy).

There is also another method of performance under this take-or-pay contract—payment of shortfall fees. Drummond offers no evidence to suggest that it is unable to perform by payment. Indeed, it has been paying shortfall fees to Norfolk Southern each year since the contract's inception.

Because there is no evidence of a force majeure event as defined in Article 29, nor is there evidence that any event would render Drummond unable to perform under this take-or-pay contract, the court will grant Norfolk Southern's motion for summary judgment as to Count Three.

VI.

Counts Four and Five allege related but legally distinct defenses of frustration of purpose and commercial impossibility / impracticability. The elements of these two doctrines are essentially the same. To survive summary judgment, Drummond must offer evidence to show the contract's principal purpose has been substantially frustrated and/or its performance made impracticable "without [Drummond's] fault by the occurrence of an event the non-occurrence of which was the basic assumption on which the contract was made." Restatement (Second) of Contracts §§ 261, 265; see also id. at§ 266. [13]

***13** The Fourth Circuit had occasion to consider the defense of impossibility / impracticability in the case of Opera Co. of Boston v. Wolf Trap Foundation for the Performing Arts, 817 F.2d 1094 (4th Cir. 1987). Opera Company arose out of a contract, pursuant to which the plaintiff agreed to give four staged operatic performances at the Filene Center, an outdoor venue within a national park, sponsored by defendant Wolf Trap Foundation for the Performing Arts. Wolf Trap, in turn, agreed to make payment to plaintiff and furnish the place of performance, to include lighting equipment. 817 F.2d at 1095. On the date of the final performance, a severe thunderstorm caused a power outage. Wolf Trap, in agreement with the National Park Service, cancelled the performance out of concern for the safety of the performers and attendees. Due to this cancellation, Wolf Trap failed to make the final payment under the contract. Id. at 1095-96. The Opera Company filed suit. Wolf Trap defended on the ground that performance of its obligation was excused under the doctrine of impossibility of performance. Id.

The Fourth Circuit adopted the modern doctrine of impossibility / impracticability, which requires proof of three elements: 1) the unexpected occurrence of an intervening act; 2) that such occurrence was of a character that its non-occurrence was a basic assumption of the agreement of the parties; and 3) that occurrence made performance impracticable. Id. at 1102. The first fact to be established is the existence of an occurrence of an event, the non-occurrence of which was a basic assumption on which the contract was made.

> And, in determining the existence of such occurrence, it is necessary to have in mind the Restatement's definition of an "occurrence" in this context as that which, because of the "destruction, or such · deterioration" of a "specific thing necessary for the performance" of the contract "makes performance impracticable."

Id. at 1100. This occurrence must be unexpected but does not necessarily have to be unforeseeable. Id. (citing Transatlantic Financing Corp. v. United States, 363 F.2d 312, 315 (D.C. Cir. 1966)). The question is one of degree —how unexpected at the time the contract was made was the event that prevented performance? Id. at 1101 (quoting

Companhia De Navegacao Lloyd Brasileiro v. C.G. Blake Co., 34 F.2d 616, 619 (2d Cir. 1929)).

In Opera Company, the court held that "the existence of electric power was necessary for the satisfactory performance by the Opera Company" on the night in question. Id. at 1102. The Fourth Circuit remanded the case to the district court, however, for findings as to "whether the possible foreseeability of the power failure in this case was of that degree of reasonable likelihood as to make improper the assertion by Wolf Trap of the defense of impossibility of performance." Id. at 1103. The court explained:

> Foreseeability, as we have said, is at best but one fact to be considered in resolving first how likely the occurrence of the event in question was and, second, whether its occurrence, based on past experience was of such reasonable likelihood that the obligor should not merely foresee the risk but, because of the degree of its likelihood, the obligor should have guarded against it or provided for non-liability against the risk. This is a question to be resolved by the trial judge after a careful scrutiny of all the facts in the case.

Id. at 1102-03.

In the instant case, Drummond invokes the defenses of impracticability and frustration of purpose based on the unexpected closure or substantial reduction or elimination of imported coal at 12 of the 23 Destinations, as a result of environmental regulations. "[G]overnmental regulation is foreseeable as a matter of law," however, so these defenses must fail. Sabine, 725 F. Supp. at 1177; see N. Ind. Pub. Serv. Co. v. Carbon Cty. Coal Co., 799 F.2d 265, 278 (7th Cir. 1986) (holding impossibility and related doctrines have no place when a fixed-price contract explicitly assigns a particular risk to one party or the other; "[i]t does not matter that it is an act of government that may have made the contract less advantageous to one party").

***14** What is more, the evidence in this case suggests that Drummond was aware of environmental conditions that might affect the market for coal at the time the contract was amended in 2010. See Steul Dep., ECF No. 132-2, at 83-85, 89-96, 98, 118-20, 122; Drummond R. 30(b)(6) Dep., ECF No. 132-6, at 120, 129-40. "While it may be true that the extent of the ensuing regulations could not have been foreseen by [Drummond in 2010], it is equally true that the winds of change were blowing and that [Drummond] was aware of that fact." Cook v. Deltona Corp., 753 F.2d 1552, 1558 (11th Cir. 1985). [14]

"The normal risk of a fixed-price contract is that the market price will change." N. Ind. Pub. Serv. Co., 799 F.2d at 275. "If, as is also the case here, the buyer forecasts the market incorrectly and therefore finds himself locked into a disadvantageous contract, he has only himself to blame and so cannot shift the risk back to the seller by invoking impossibility or related doctrines." Id. at 278. C-9337, as amended, was negotiated at arm's length by two sophisticated parties. Drummond took a risk in entering into a transportation contract with Norfolk Southern—indeed, this is the only contract of its kind the rail carrier has—and lost. The non-occurrence of MATS, or any similar environmental regulations, was not a basic assumption of this contract.

Beyond that, Drummond cannot meet the third element of the impracticability defense. To be sure, half of the contractually-designated Destinations have substantially reduced or eliminated coal consumption—or closed altogether. But eleven are still taking coal. Even though Norfolk Southern's third-party utility contracts arguably deter the majority of these Destinations from taking coal pursuant to C-9337, "[p]erformance that has become merely more difficult or unprofitable is not enough to establish objective impracticability." Kansas City Power & Light Co. v. Pittsburg & Midway Coal Mining Co., No. 88-2224 S., 1989 WL 151919, at *5 (D. Kan. Nov. 17, 1989); see also Ballou v. Basic Constr. Co., 407 F.2d 1137, 1141 (4th Cir. 1969) (rejecting defense of impossibility, holding "[t]he manufacture of two hundred acceptable columns might have been extremely difficult or so expensive as to consume any profit the contractor may have contemplated, but neither factor excuses Prestressed's failure to meet its contractual obligation"). Drummond has failed to establish as a matter of law its ability to transport coal under C-9337 is commercially impractical.

Additionally, "[t]o show that performance of the take-or-pay contract by payment is impracticable, even assuming that the other elements of commercial impracticability are satisfied, [Drummond] has the burden of submitting evidence from which a jury could conclude that [Drummond's] performance of the contract by payment would require *unreasonable* expense." Sabine, 725 F. Supp. at 1175. Drummond offers no evidence that its general financial health is threatened by this contract or other extreme financial hardship. Id.; see also id. at 1176 ("Whether 'grave injustice' would result from failure to excuse performance is merely an inquiry used to assess whether the cost to the contracting party of performing the contract is so excessive and unreasonable as to warrant the conclusion that performance has become impracticable." (emphasis omitted)). Indeed, it would undermine the entire purpose of a take-or-pay contract to hold that Drummond's performance is excused as a result of these market changes. The parties' basic agreement was that Drummond would ship a certain quantity of coal on Norfolk Southern rail lines to the Destinations and, if it failed to do so, it would pay a shortfall fee. Market changes do not affect Drummond's performance by payment.

***15** The defense of frustration of purpose fails for the same reasons. It, too, requires proof of three elements: 1) frustration of the principal purpose of the contract; 2) that the frustration is substantial; and 3) that the non-occurrence of the frustrating event or occurrence was a basic assumption on which the contract was made. Id. at 1178. As previously discussed, Drummond has failed to show that the non-occurrence of governmental regulations was a basic assumption on which the parties' contract was made. Also, for reasons discussed supra, Drummond cannot show that any frustration of the principal purpose of the contract is substantial. "[I]n order for frustration of the principal purpose of a contract to be substantial, it 'must be so severe that it is not fairly to be regarded as within the risks ... assumed under the contract.' " Sabine, 725 F. Supp. at 1179 (citing Restatement (Second) of Contracts § 265 (cmt (a))). "It is not enough that the transaction has become less profitable for the affected party or even that he will sustain a loss." Sabine at 1179 (citing Restatement (Second) of Contracts § 265 (comment (a))).

For these reasons, the court will grant summary judgment in Norfolk Southern's favor on Counts Four and Five.

VII.

Count Six, seeking rescission, modification or reformation of the contract, is premised on the causes of action set forth above. As such, Norfolk Southern's motion for summary judgment will be denied as to Count Six, to the extent it relies on Count One, and granted to the extent it relies on Counts Two, Three, Four and Five, for the reasons previously stated.

VIII.

In this case, Drummond raises multiple claims in an effort to excuse its performance under C-9337. Given the unique factual circumstances at play, Count One, alleging prior material breach of contract, raises questions of fact that must be resolved by a jury. As such, the court will **DENY** Drummond's motion for summary judgment (ECF No. 123) and **DENY** Norfolk Southern's motion for summary judgment (ECF No. 122) as to Count One. Because Count Two fails as a matter of law, and because no reasonable fact finder could find in Drummond's favor on Counts Three, Four, and Five, Norfolk Southern's motion for summary judgment (ECF No. 122) will be **GRANTED** as to these claims. Norfolk Southern's motion will be **DENIED** as to Count Six, to the extent it relies on Count One, but **GRANTED** as to Count Six, to the extent it relies on Counts Two through Five.

An appropriate order will be entered.

All Citations

Not Reported in Fed. Supp., 2018 WL 4008993

Footnotes

1 Kinder Morgan owns the Shipyard River Terminal in Charleston, South Carolina.

2 The amendment to C-9337 further provided that failure to expand the physical size and throughput capacity of SRT, regardless of the reason for such failure, shall not constitute a force majeure event under the contract pursuant to Article 29.

3 The advent of MATS required coal-fired power plants to have some type of scrubbing technology to reduce hydrogen chloride emissions. Newer, larger plants already had scrubbers in place to remove sulfur dioxide in order to comply with earlier environmental regulations. Older, smaller plants that did not have scrubbers had been purchasing low-sulfur coal to satisfy these emissions standards pre-MATS. Because the cost of retrofitting an existing coal-fired plant with a scrubber was high, the plants without scrubbers declined to make such capital improvements and instead retired in response to MATS. The remaining plants, which had scrubbers, now have less of a need for low-sulfur coal to comply with environmental regulations. Schwartz Expert Report, ECF No. 128-2, at 4-5.

4 It should be noted that it is not only these eight Destinations that have separate, confidential transportation contracts with Norfolk Southern.

5 The third-party contracts between-the Destinations and Norfolk Southern were executed at various points in time, and some have been amended during the relevant period. All of these third-party contracts overlap the relevant term of C-9337 in some respect.

6 While one might argue that Drummond could satisfy its guaranteed volume requirements under C-9337 by shipping the 5% difference to these Destinations, Drummond insists this is impractical, as utilities do not buy coal in piecemeal. According to Drummond, 95% might as well be 100%. Tr. of Apr. 13, 2018 Hrg., ECF No. 173, at 36-38; see also Zehringer Dep., ECF No. 128-6, at 114.

7 Count One also alleges Norfolk Southern breached the contract by failing to work with Drummond in good faith to meet annual minimum volume requirements pursuant to Article 27, and by failing to pay infrastructure refunds due Drummond in a timely fashion, as required by Article 20.

8 Article 5 of C-9337 provides that the interpretation and performance of the contract shall be governed by Virginia law.

9 The parties dispute whether “N&W Origins” in C-7545 includes SRT. Even if it does, it does not change the court's analysis given the minimum volume requirement in this contract.

10 C-9569, covering Belews Creek, Allen Station, and Marshall Station, had a term of July 1, 2010 through August 31, 2010. It required Belews Creek and Allen Station to ship 95% of the coal they receive, and 25% of the coal Marshall Station receives, pursuant to C-9569. A second contract covering these Destinations from September 1, 2010 through June 30, 2018, C-9545, as amended, required all three Destinations to ship 95% of the coal they receive pursuant to C-9545.

C-9290, covering Roxboro Station, Mayo Station, and Asheville Station, has a term of July 1, 2010 through June 20, 2020. It requires Roxboro Station and Mayo Station to ship 95% of the coal they receive, and 85% of the coal Asheville Station receives, pursuant to C-9290. While SRT is listed as an origin with respect to Roxboro Station and Mayo Station, it is not an origin with respect to Asheville Station.

C-9517, covering McIntosh Station, had a term of January 1, 2010 through December 31, 2010, but was amended to extend the term to “the later of (i) April 30, 2016 or (ii) the date by which Shipper has shipped 125,000 tons after May 1, 2015 pursuant hereto.” Minimum volume commitments increased by amendment from 60% to 95% at various times in the life of the contract.

11 Of course, Drummond has not shipped any coal under C-9337 during the relevant contractual term, not even to these three Destinations.

12 Norfolk Southern was well aware of the state of the coal market. Its coal group met twice per month to discuss plant closures and traffic flows. Smith Dep., ECF No. 154-3, at 97-108.

13 The court in Kansas City Power & Light Co. v. Pittsburg & Midway Coal Mining Co., Civ. A. No. 88-2224 S., 1989 WL 151919 (D. Kan. Nov. 17, 1989), described the distinction between these two related doctrines as follows. “[U]nder the doctrine of frustration, performance remains possible but is excused because a fortuitous event supervenes to cause a failure of the consideration or a total destruction of the expected value of the performance of the contract.” Id. at *6.

14 Indeed, Drummond was interested in the southeastern market to begin with because of the effect of environmental regulations—Drummond could offer low-sulfur coal to Destinations that did not have scrubbing technology. Drummond R. 30(b)(6) Dep., ECF No. 132-6, at 113, 142; ECF No. 156-5.

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KeyCite Yellow Flag - Negative Treatment
Distinguished by White Oak Power Constructors v. Mitsubishi Hitachi Power Systems Americas, Inc., E.D.Va., June 22, 2020

257 Va. 344
Supreme Court of Virginia.

GORDONSVILLE ENERGY, L.P.
v.
VIRGINIA ELECTRIC AND POWER COMPANY.

Record No. 980813.
|
Feb. 26, 1999.

Synopsis

Independent power producer brought motion for judgment against electric utility for breach of power purchase and operating agreement based on utility's allegedly wrongful assessment of liquidated damages as a result of forced outage. The Circuit Court, City of Richmond, Randall G. Johnson, J., entered judgment for utility, and producer appealed. The Supreme Court, Keenan, J., held that: (1) producer's failure to perform was not excused under agreement if failure was caused by negligence of subcontractor retained by producer; (2) finding that power plant forced outage was not excused under agreement was supported by evidence; (3) a "Force Majeure Day" was excused from being counted toward number of allowed forced outage days, for purposes of calculating liquidated damages; and (4) producer's waiver of right to object to liquidated damages clause in agreement was not repugnant to public policy.

Affirmed in part, reversed in part, and final judgment.

Procedural Posture(s): On Appeal.

West Headnotes (12)

[1] **Electricity** Contracts for supply in general

Power purchase and operating agreement, entered into between electric utility and independent power producer, did not excuse producer's failure to perform under agreement if the failure was caused by the negligence of a subcontractor retained by producer to perform functions for which producer was responsible.

[2] **Contracts** Questions for Jury

It is the duty of the court, not the jury, to interpret a contract when its terms are clear and unambiguous.

9 Cases that cite this headnote

[3] **Contracts** Construing whole contract together

The court must interpret the contract as a whole to determine the parties' intent.

1 Cases that cite this headnote

[4] **Appeal and Error** Construction, interpretation, and application in general

Since the interpretation of plain and unambiguous terms of a contract is a question of law, appellate court is not bound by the trial court's determination and is afforded the same opportunity as the trial court to review the contract provisions.

11 Cases that cite this headnote

[5] **Electricity** Contracts for supply in general

Finding that power plant forced outage was not beyond the control of independent power producer and, thus, was not excused under producer's power purchase and operating agreement with electric utility, was supported by evidence that generator failure was due to negligence of subcontractor hired by producer to manufacture generator.

[6] **Electricity** Contracts for supply in general

Under power purchase and operating agreement entered into between electric utility and independent power producer, a "Forced Outage Day" designated as a "Force Majeure Day" was excused from being counted toward the number of allowed forced outage days, for purposes of calculating liquidated damages.

[7] **Contracts** Language of Instrument

When contract terms are clear and unambiguous, the words used by the parties must be given their plain and ordinary meanings.

3 Cases that cite this headnote

[8] **Damages** Form and Language of Instrument

Independent power producer's waiver of right to object to liquidated damages clause in power purchase and operating agreement with electric utility was not repugnant to public policy and, thus, was not unenforceable, absent allegation of duress, fraud, mistake, or any other circumstances that might serve as basis for declaring waiver unenforceable.

1 Cases that cite this headnote

[9] **Damages** Proportion of Sum Stipulated to Actual Debt or Damage

A liquidated damages provision may constitute an unenforceable penalty if the agreed amount is grossly in excess of actual damages.

2 Cases that cite this headnote

[10] **Contracts** Application to Contracts in General

A term of the parties' contract becomes the law of the case unless such term is repugnant to public policy or to some rule of law.

2 Cases that cite this headnote

[11] **Contracts** Waiver

Generally, a party may waive by contract any right conferred by law or contract.

11 Cases that cite this headnote

[12] **Contracts** Waiver

If the party being charged with relinquishment of a right had knowledge of the right and intended to waive it, the waiver will be enforced

10 Cases that cite this headnote

Attorneys and Law Firms

****812** ***346** James vanR. Springer (Larry F. Eisenstat; Gretchen Schott, Washington, DC; Samuel W. Hixon, III; William R. Mauck, Jr., Richmond; Dickstein Shapiro Morin & Oshinsky, Washington, DC; Williams, Mullen, Christian & Dobbins, Richmond, on briefs), for appellant.

Michael R. Shebelskie (Cassandra C. Collins, Richmond; William H. Wright, Jr., Washington, DC; George W. Marget, III; Hunton & Williams, Richmond, on brief), for appellee.

Present: All the Justices.

Opinion

KEENAN, Justice.

In this appeal, we determine whether the terms of a contract between Virginia Electric and Power Company (Virginia Power) and Gordonsville Energy, L.P. (Gordonsville) entitle Virginia Power to recover liquidated damages for an 11–day period in which Gordonsville's electric power plant was "shut down" due to a mechanical failure.

***347** Under the parties' "Power Purchase and Operating Agreement" (the Contract), Gordonsville ****813** agreed to build a $200 million electric power facility capable of producing electricity for sale exclusively to Virginia Power. The Gordonsville facility consists of two identical electric generating plants, designated as Unit 1 and Unit 2. The outage at issue in this dispute involves Unit 1.

Article 8 of the Contract, entitled "Interconnection," provides in § 8.2 that Gordonsville "shall be responsible for the design, construction, installation, maintenance and ownership of the Facility." "The Facility" is defined as including "all energy producing equipment."

The Gordonsville facility began operating in June 1994. When Virginia Power requires electricity from Gordonsville, Virginia Power "dispatches" Gordonsville by notifying it of the number of kilowatts required. Gordonsville responds by producing the electricity and supplying it to Virginia Power's distribution system. Since the Gordonsville facility went into service in 1994, Virginia Power has "dispatched"

Gordonsville only about 15 to 20 percent of the time. A typical dispatch of the Gordonsville facility lasts four to six hours.

Virginia Power makes two types of payments to Gordonsville under the Contract. The first type is made for Gordonsville's "Net Electrical Output," or the net amount of kilowatt hours of electricity actually delivered by Gordonsville to Virginia Power. This payment amount varies from month to month.

The second type of payment, termed "Capacity Payments," is a fixed monthly payment for Gordonsville's "Dependable Capacity," which represents the amount of electricity available for dispatch at Virginia Power's request from the Gordonsville facility. The Capacity Payments were designed to compensate Gordonsville for the costs incurred in building its facility, as well as the fixed costs related to operating and maintaining the facility. At the time this dispute arose, Virginia Power was obligated under the Contract to make Capacity Payments of about $1.2 million per month, or $40,000 per day, for each of the two units in the Gordonsville facility.

The Contract defines two types of "outages" that may occur when either unit of Gordonsville's facility is unavailable for a potential dispatch request from Virginia Power. A "Scheduled Outage" is a planned interruption in the operation of a unit of the facility that has been coordinated in advance with Virginia Power for the purpose of conducting inspections or routine maintenance. During Scheduled ***348** Outages, Virginia Power remains obligated to make Capacity Payments to Gordonsville.

A "Forced Outage" is defined in § 1.18 of the Contract as "[a]n occurrence where: (i) any or all of [a unit's] Dependable Capacity is not available for Dispatch; or (ii) [a unit's] delivery of Net Electrical Output deviates from Virginia Power's Dispatch level by greater than 5%." Section 1.20 defines a "Forced Outage Day" as "[a] continuous twenty-four (24) hour period (a) beginning with the start of a Forced Outage, regardless of the number of actual outages that may occur during such twenty-four (24) hour period(s), and (b) designated by [Gordonsville] as a Forced Outage Day."

A "Force Majeure Day" is defined in § 1.19 as "a Forced Outage Day that is both (i) excused under the provisions of Article 14 and (ii) ... designated as a Force Majeure Day by [Gordonsville]." Section 14.1 of the Contract provides, in relevant part:

> [N]either Party shall be responsible or liable for or deemed in breach hereof because of any delay or failure in the performance of their respective obligations hereunder to the extent that such delay or failure is *due solely to circumstances beyond the reasonable control of the Party experiencing such delay or failure, including but not limited to* acts of God; unusually severe weather conditions; strikes or other labor difficulties; war; riots; requirements, actions or failures to act on the part of governmental authorities preventing performance; inability despite due diligence to obtain, maintain or renew required licenses; accident; fire; *damage to or breakdown of power generation materials and equipment that is not caused by normal wear and tear;* or transportation delays or accidents. (Emphasis added.)

****814** Under the Contract, Gordonsville is allowed a specified number of Forced Outage Days during the facility's initial six months of operation and for each one-year period thereafter throughout the 30–year term of the Contract. The Contract further provides in § 10.18:

> The Parties agree that Virginia Power will be substantially damaged in amounts that will be difficult or impossible to determine if ... the Facility exceeds the allowance for Forced Outage Days ... Therefore, ... the Parties have agreed on sums which the Parties agree are reasonable as liquidated damages for such occurrences. It is further understood and agreed ***349** that the payment of the liquidated damages is in lieu of actual damages for such occurrences. [Gordonsville] hereby waives any

> defense as to the validity of any liquidated damages stated in this Agreement as they may appear on the grounds that such liquidated damages are void as penalties or are not reasonably related to actual damages.

For each Forced Outage Day in excess of the allowed number, § 10.15 of the Contract directs that Virginia Power's Capacity Payments will be reduced by $600,000 per day as liquidated damages. The Contract also states that this liquidated damages provision does not apply if a Forced Outage Day qualifies as a Force Majeure Day. However, the Contract relieves Virginia Power of its obligation to make Capacity Payments to Gordonsville for such Force Majeure Days.

In September 1995, while Unit 1 was operating under a dispatch from Virginia Power, an alarm indicated an electrical short circuit inside the Unit's 100–ton steam turbine generator. The generator had been manufactured for Gordonsville by General Electric Company (General Electric), one of two manufacturers of that type generator in the United States. Gordonsville personnel performed tests on the generator for several days, but were not able to determine the cause of the short circuit. On September 9, 1995, Kenneth Nieman, the executive director of the Gordonsville facility, decided to "shut down" Unit 1 and "take it off line" so that the generator problem could be diagnosed and repaired. On September 12, 1995, Gordonsville notified Virginia Power that Unit 1 was experiencing an event of Force Majeure and was unavailable for dispatch until further notice. Personnel from General Electric and Gordonsville disassembled the generator and shipped its 17–ton rotor to a General Electric facility in Richmond, where it was determined that a copper "pole-to-pole" connector inside the rotor had failed. Unit 1 was returned to service on September 20, 1995, 11 days after it had been "shut down."

Virginia Power concluded that the 11 outage days in September 1995, did not qualify as Force Majeure Days and informed Gordonsville that, for this reason, those days constituted unexcused Forced Outage Days under the Contract. Virginia Power also informed Gordonsville that it previously had exhausted its allowance of Forced Outage Days. Virginia Power asserted a claim against Gordonsville for a total of $6.6 million in liquidated damages under the Contract ***350** for the 11–day period, and began withholding $600,000 per month from its payments to Gordonsville.

Gordonsville filed a motion for judgment against Virginia Power in the trial court, alleging breach of contract based on Virginia Power's "wrongful assessment of liquidated damages" as a result of the September 1995 outage. In Count I, Gordonsville alleged that all 11 days of the September 1995 outage were Force Majeure Days and that, therefore, Virginia Power was not entitled to liquidated damages. Gordonsville alleged in the alternative in Count II that even if the September 1995 outage did not result from a Force Majeure event, Gordonsville was entitled to count three of the outage days as allowed Forced Outage Days. Thus, Gordonsville alleged that Virginia Power was not entitled to $1.8 million of the $6.6 million claimed in liquidated damages. In Count V, Gordonsville essentially alleged that the liquidated damages clause of the Contract was an unenforceable penalty. [1]

****815** The trial court sustained Virginia Power's demurrer and plea of *res judicata* or collateral estoppel addressed to Count V, holding that it was bound by its ruling on the same issue in an earlier action between the parties, which arose from two unrelated outages at the Gordonsville facility in June–July 1994, and February 1995. In that earlier action, the court had ruled that the liquidated damages provision of the Contract was not an unenforceable penalty.

The trial court ruled in the alternative that even if this issue was not barred by *res judicata* or collateral estoppel, Virginia Power was entitled to summary judgment on Count V. Based on its assumption that the evidence in the pending case concerning the liquidated damages clause would not differ from the evidence presented in the prior action, the court awarded summary judgment for Virginia Power on Count V for "reasons of judicial economy," but permitted Gordonsville to submit a written offer of proof for the court's consideration. Following Gordonsville's submission of the offer of proof, the trial court entered an order affirming its award of summary judgment for Virginia Power on Count V.

The trial court then considered the parties' cross motions for summary judgment on Count II. In the prior action between the parties, the jury had found that the June–July 1994 and February 1995 outages were caused by Force Majeure events. Gordonsville argued ***351** that because of that finding, those outage days could not be counted toward the number of Forced Outage Days allowed under the Contract. Gordonsville argued, therefore, that it still had three allowed

Forced Outage Days available to be applied to the September 1995 outage. The trial court ruled that although the earlier 1994 and 1995 outage days constituted Force Majeure Days, they also constituted Forced Outage Days under the terms of the Contract, and that these outage days must be counted in computing Gordonsville's allowed number of Forced Outage Days. The trial court awarded summary judgment for Virginia Power on Count II.

The claims asserted in Count I were tried before a jury. Thomas Butler, who qualified as an expert in mechanical engineering, testified that the pole-to-pole connector in the generator rotor of Unit 1 failed because it had been improperly brazed, or soldered, during its manufacture and assembly. Butler further testified that the connector did not fail due to normal wear and tear, and that there was nothing Gordonsville "could [have] or should have done" to prevent failure of the connector.

Robert Hamilton, a retired mechanical engineer who had worked for General Electric for about 36 years, also testified as an expert witness. He explained that the General Electric workers who manufactured and assembled the pole-to-pole connector used in the Gordonsville generator were required to follow detailed drawings. In essence, Hamilton testified that one of the drawings contained a mistake and deviated from the actual design requirements because the drawing showed a rigid, brazed piece, rather than a flexible piece, extending into an area of the connector. Hamilton concluded that the Gordonsville generator failed due to the inability of the defective pole-to-pole connector to withstand normal wear and tear. He further testified that a properly manufactured pole-to-pole connector should not wear out, but should "last forever." In Hamilton's opinion, if the Gordonsville pole-to-pole connector had been manufactured in accordance with General Electric's own design requirements, the generator failure would not have occurred.

In contrast to Hamilton's testimony, Robert Fenton, a retired electrical engineer who was formerly a general manager of generator design and engineering at General Electric, testified that there was nothing General Electric could have done differently that would have prevented the failure of the pole-to-pole connector in Gordonsville's generator. In Fenton's opinion, the failure of the Gordonsville generator was a "random, unexpected failure."

***352** Over Gordonsville's objection, the trial court gave the jury Instruction No. 10, which stated:

> Gordonsville Energy is responsible to Virginia Power under the parties' contract for the design and construction of Gordonsville ****816** Energy's electric generating facility, including the steam turbine generator, its rotor and the rotor's component parts that failed in September, 1995. Although Gordonsville Energy relied on General Electric Company to design and construct the rotor, Gordonsville Energy is responsible to Virginia Power for General Electric's performance of those activities just as if Gordonsville Energy had performed them itself.

The jury returned its verdict in favor of Virginia Power, finding that "the [September 1995] outage was not a *force majeure* event." The trial court entered final judgment in favor of Virginia Power, and this appeal followed.

[1] Gordonsville first argues that the trial court erred in granting Instruction No. 10 because the instruction improperly directed the jury to impute to Gordonsville any act of negligence by General Electric. Gordonsville also asserts that, as a matter of law, the outage in September 1995 was a Force Majeure event under the terms of the Contract because there was no evidence of negligence by Gordonsville. Thus, it contends that the jury was required by the evidence to find that the September 1995 outage was "beyond the control" of Gordonsville and resulted in Force Majeure Days under the Contract. We disagree with Gordonsville's arguments.

In granting Instruction No. 10, the trial court ruled that the Contract did not excuse Gordonsville's failure to perform under the Contract if the failure was caused by the negligence of a subcontractor retained by Gordonsville to perform functions for which Gordonsville was responsible. Under familiar principles of contract interpretation, we reach the same conclusion and hold that the trial court did not err in granting Instruction No. 10.

[2] **[3]** **[4]** It is the duty of the court, not the jury, to interpret a contract when its terms are clear and unambiguous. *D.C. McClain, Inc. v. Arlington County,* 249 Va. 131, 135,

452 S.E.2d 659, 662 (1995); *Winn v. Aleda Const. Co.,* 227 Va. 304, 307, 315 S.E.2d 193, 194 (1984). The court must interpret the contract as a whole to determine the parties' intent. *Westmoreland–LG&E Partners v. Virginia Elec. and Power Co.,* 254 Va. 1, 11, 486 S.E.2d 289, 294 (1997). Since the ***353** interpretation of plain and unambiguous terms of a contract is a question of law, we are not bound by the trial court's determination and are afforded the same opportunity as the trial court to review the contract provisions. *C.F. Garcia Enterprises, Inc. v. Enterprise Ford Tractor, Inc.,* 253 Va. 104, 107, 480 S.E.2d 497, 498–99 (1997); *Tuomala v. Regent Univ.,* 252 Va. 368, 374, 477 S.E.2d 501, 505 (1996); *Langman v. Alumni Ass'n of the Univ. of Va.,* 247 Va. 491, 498, 442 S.E.2d 669, 674 (1994).

In § 8.2 of the Contract, the parties agreed, in plain and unambiguous language, that Gordonsville was "responsible for the design, construction [and] installation" of the Facility, which is defined in § 1.16 of the Contract as "all energy producing equipment." In a later section of the Contract, § 14.1, the parties agreed that an outage would be excused if it was "due solely to circumstances beyond [Gordonsville's] reasonable control ... including ... damage to or breakdown of power generation materials and equipment that is not caused by normal wear and tear."

The provisions of § 14.1 do not override or alter the allocation of responsibilities set out in § 8.2. By its plain terms, § 14.1 does not purport to address the duties of parties to the Contract. Instead, that section addresses the circumstances under which the failure of performance of contractual duties will be excused as Force Majeure days. Thus, under the Contract, Gordonsville remained responsible for the contractual obligations it subcontracted to General Electric and was excused from performance only if an outage also was "beyond the reasonable control" of any subcontractors hired to perform Gordonsville's duties set forth in § 8.2.

[5] The evidence did not establish as a matter of law that the September 1995 outage was beyond Gordonsville's reasonable control. The evidence showed that the failure of the pole-to-pole connector was either a random, unexpected occurrence or the result of negligence by General Electric. In returning its verdict in favor of Virginia Power, ****817** the jury necessarily rejected the proposition that the failure was a random, unexpected occurrence.

[6] Gordonsville next contends that the trial court erred in holding that the Force Majeure Days from the previous 1994 and 1995 outages should be counted against Gordonsville's allowance of Forced Outage Days. Gordonsville argues that summary judgment on Count II should have been entered in its favor, because a Force Majeure day is an *excused* "Forced Outage Day" for which Gordonsville merely loses its Capacity Payment under § 10.15 of the Contract.

***354** In response, Virginia Power argues that the Contract specifically designates Force Majeure Days as Forced Outage Days. Thus, Virginia Power contends that the trial court properly concluded that the earlier Force Majeure Days had to be included in Gordonsville's allotment of Forced Outage Days. We disagree and hold that the trial court erred in granting summary judgment in favor of Virginia Power on Count II.

[7] As the trial court correctly noted, § 1.19 of the Contract defines a Force Majeure Day as "a Forced Outage Day that is ... excused under the provisions of Article 14." When contract terms are clear and unambiguous, the words used by the parties must be given their plain and ordinary meanings. *Hutter v. Heilmann,* 252 Va. 227, 231, 475 S.E.2d 267, 270 (1996); *Marina Shores, Ltd. v. Cohn–Phillips, Ltd.,* 246 Va. 222, 225–26, 435 S.E.2d 136, 138 (1993). In the context of the Contract provisions, the usual and customary meaning of the term "excuse" is "to grant [an] exemption ... to or from." Webster's Third New International Dictionary 794 (1993). The Contract only limits the scope of the exemption for Force Majeure Days by eliminating the Capacity Payment of about $40,000 to Gordonsville for each such day.[2] Since the Contract does not otherwise limit the exemption provided for Force Majeure Days, such days are excused, or exempted, under the Contract from being counted toward the number of allowed Forced Outage Days.

This conclusion also is supported by the plain language of § 14.4, which provides that "each Day of a Forced Outage excused under this Article 14 shall be considered a Forced Outage Day unless [Gordonsville] appropriately designates such Day as a Force Majeure Day." This language compels the conclusion that a day that *is* appropriately designated as a Force Majeure Day and is excused under Article 14 is not "considered a Forced Outage Day" under the terms of the Contract. Thus, the trial court erred in ruling that the earlier 1994 and 1995 Force Majeure Days were Forced Outage Days chargeable to Gordonsville in computing the number of Forced Outage Days allowed under the Contract. Therefore,

we conclude that the trial court erred in awarding summary judgment for Virginia Power on Count II and in failing to award summary judgment for Gordonsville on that Count. [3]

[8] ***355** Finally, Gordonsville argues that the trial court erred in dismissing Count V of the motion for judgment because Gordonsville's offer of proof established that the liquidated damages clause of the Contract constituted an unenforceable penalty. Virginia Power responds, in part, that Gordonsville is barred from contesting the reasonableness of the liquidated damages clause since it waived in the Contract the right to raise such an objection. [4]

The Contract provides in § 10.18 that Gordonsville "waives any defense as to the validity ****818** of any liquidated damages stated in this Agreement as they may appear on the grounds that such liquidated damages are void as penalties or are not reasonably related to actual damages." Nevertheless, Gordonsville argues that it should be relieved from this contractual obligation because such a waiver violates public policy. We disagree with Gordonsville's argument.

[9] **[10]** This Court has recognized that a liquidated damages provision may constitute a penalty and, therefore, be unenforceable when the amount agreed to is "out of all proportion to the probable loss." *Brooks v. Bankson,* 248 Va. 197, 208, 445 S.E.2d 473, 479 (1994); *Taylor v. Sanders,* 233 Va. 73, 75, 353 S.E.2d 745, 746–47 (1987). Such a provision also may constitute an unenforceable penalty if the agreed amount is "grossly in excess of actual damages." *O'Brian v. Langley School,* 256 Va. 547, 551, 507 S.E.2d 363, 365 (1998). However, it is equally well-settled that a term of the parties' contract becomes the law of the case unless such term is repugnant to public policy or to some rule of law. *Rash v. Hilb, Rogal & Hamilton Co. of Richmond,* 251 Va. 281, 285, 467 S.E.2d 791, 794 (1996); *D.C. McClain, Inc.,* 249 Va. at 135, 452 S.E.2d at 662.

We decline to hold that Gordonsville's contractual waiver of the right to object to a liquidated damages clause is "repugnant to public policy." We long have recognized that a party may enter into an agreement in which he waives a significant right. *See e.g., Blue Cross of Southwestern Va. v. McDevitt & Street Co.,* 234 Va. 191, 196–97, 360 S.E.2d 825, 828 (1987) (waiver of right to claim damages); ***356** *Flintkote Co. v. W.W. Wilkinson, Inc.,* 220 Va. 564, 570, 260 S.E.2d 229, 232 (1979) (waiver of right to jury trial on amount of attorney's fees); *VNB Mortgage Corp. v. Lone Star Indus., Inc.,* 215 Va. 366, 369, 209 S.E.2d 909, 912 (1974) (waiver of right to file mechanic's lien).

[11] **[12]** Generally, a party may waive by contract any right conferred by law or contract. *See Roenke v. Virginia Farm Bureau Mut. Ins. Co.,* 209 Va. 128, 135, 161 S.E.2d 704, 709 (1968); *Woodmen of the World Life Ins. Soc. v. Grant,* 185 Va. 288, 299, 38 S.E.2d 450, 454 (1946). If the party being charged with relinquishment of a right had knowledge of the right and intended to waive it, the waiver will be enforced. *Roenke,* 209 Va. at 135, 161 S.E.2d at 709; *Woodmen,* 185 Va. at 299, 38 S.E.2d at 454.

Gordonsville raised no allegation at trial and presented no evidence that it entered into § 10.18 of the Contract under duress, or as the result of fraud or mistake, or under any other circumstances that might serve as a basis for declaring the waiver unenforceable. Instead, the evidence at trial established that the entire Contract resulted from extended, "arms-length" negotiations between two sophisticated corporate entities, both represented by counsel. Therefore, we conclude that Gordonsville's contractual waiver is enforceable and bars its claims alleged in Count V. [5]

For these reasons, we will affirm the trial court's judgment in favor of Virginia Power on Counts I and V. We will also reverse the trial court's judgment on Count II and enter final judgment in favor of Gordonsville on that Count.

Affirmed in part, reversed in part, and final judgment.

All Citations

257 Va. 344, 512 S.E.2d 811

Footnotes

1 Gordonsville alleged two other Counts in its motion for judgment that are not at issue on appeal.

2 This limitation of exemption is contained in § 10.15(b) of the Contract.

3 Virginia Power argues on appeal that an additional, independent basis exists for affirming the trial court's award of summary judgment in its favor on Count II. Virginia Power argues that Gordonsville's motion for judgment alleged that the *last* three days of the September 1995 outage should be counted as allowed Forced Outage Days, when Gordonsville should have alleged that the *first* three days of the outage were allowed. Since this claim was not raised before the trial court, we will not address it for the first time on appeal. *See* Rule 5:25.

4 We find no merit in Gordonsville's contention that Virginia Power is procedurally barred from asserting that Gordonsville waived its objection to the Contract's liquidated damages provision, because Virginia Power did not assign cross-error to an alleged ruling by the trial court that the waiver was unenforceable. The trial court did not rule on this issue in this action and did not expressly adopt such a ruling from the earlier action. Thus, an assignment of cross-error was not required under Rule 5:18.

5 Since Gordonsville waived any objection to the reasonableness of the liquidated damages clause, we do not address Gordonsville's assignment of error concerning the trial court's application of *res judicata* or collateral estoppel to bar relitigation of the validity of the liquidated damages provision.

KeyCite Yellow Flag - Negative Treatment
Declined to Extend by RECP IV WG Land Investors LLC v. Capital One Bank (USA), N.A., Va., April 5, 2018

291 Va. 42
Supreme Court of Virginia.

HAMPTON ROADS BANKSHARES, INC., et al.
v.
Scott C. HARVARD.

Record No. 150323.
|
Jan. 14, 2016.

Synopsis
Background: Former employee, who had been employed as chief executive officer (CEO) of former employer's predecessor and executive vice president of former employer, brought action against former employer and predecessor for breach of contract after former employer refused to make a golden parachute payment to him. The Circuit Court, City of Norfolk, Charles E. Poston, J., entered judgment for approximately $655,000 in favor of former employee. Former employer appealed.

Holdings: The Supreme Court, William C. Mims, J., held that:

[1] Virginia state courts had subject matter jurisdiction;

[2] former employer was discharged from its obligation to make golden parachute payment;

[3] attorney fees award to former employee was barred by federal law as a golden parachute payment.

Reversed.

Procedural Posture(s): On Appeal.

West Headnotes (8)

[1] Appeal and Error Construction, interpretation, and application in general

An appellate court reviews questions of contract interpretation de novo.

[2] Courts Exclusive or Concurrent Jurisdiction

State court had subject matter jurisdiction over breach of contract action by former executive vice president against his former employer for failure to make golden parachute payment that was required by employment agreement following change in control, although former employer claimed as a defense federal Emergency Economic Stabilization Act of 2008 (EESA) and rule eliminating exception for golden parachute payments; dispute turned on question of state contract law, and court could apply federal law if necessary to resolve dispute. Emergency Economic Stabilization Act of 2008, Div. A, Title I, § 111(b)(2)(C), 12 U.S.C.A. § 5221(b)(2)(C); 31 C.F.R. § 30.9.

[3] Contracts Discharge by Impossibility of Performance
Contracts Destruction of subject-matter

Where impossibility of performance is due to domestic law, to the death or illness of one who by the terms of the contract was to do an act requiring his personal performance, or to the fortuitous destruction or change in the character of something to which the contract related, or which by the terms of the contract was made a necessary means of performance, the promisor will be excused, unless he either expressly agreed in the contract to assume the risk of performance, whether possible or not, or the impossibility was due to his fault. Restatement (Second) of Contracts §§ 261, 264.

2 Cases that cite this headnote

[4] Contracts Discharge by Impossibility of Performance

The validity of the law rendering performance impossible does not affect the validity of the defense of impossibility of performance to a

breach-of-contract claim, provided the promisor relies upon the law in good faith.

2 Cases that cite this headnote

[5] **Finance, Banking, and Credit** Compensation and indemnity

Finance, Banking, and Credit Federal Regulation

Former employer, which was financial institution holding company which had obtained funding through Troubled Assets Relief Program (TARP), was discharged by defense of impossibility of performance from its obligation under employment agreement to make golden-parachute payment to its former executive vice president, where federal government's clearly expressed its intent to enforce Emergency Economic Stabilization Act of 2008 (EESA) and rule eliminating exception for golden-parachute payments, and employer could not in good faith perform its contractual obligation without violating the law. Emergency Economic Stabilization Act of 2008, Div. A, Title I, § 111(b)(2)(C), 12 U.S.C.A. § 5221(b)(2)(C); 31 C.F.R. § 30.9(a); Restatement (Second) of Contracts § 264.

1 Cases that cite this headnote

[6] **Contracts** Discharge by Impossibility of Performance

Under the defense of impossibility of performance, where the government has clearly expressed its intent to enforce the law, and the promisor cannot in good faith perform its contractual obligation without violating the law, the promisor is discharged from its obligation under the contract. Restatement (Second) of Contracts § 264.

3 Cases that cite this headnote

[7] **Eminent Domain** What Constitutes a Taking; Police and Other Powers Distinguished

Eminent Domain Corporations or persons liable

The Fifth Amendment applies to governmental actors, not private parties, and if a party believes that it has suffered an unconstitutional taking due to government action, then it must seek either damages from the government or an injunction against the government. U.S.C.A. Const.Amend. 5.

1 Cases that cite this headnote

[8] **Finance, Banking, and Credit** Compensation and indemnity

Finance, Banking, and Credit Actions

Award of attorney fees to former executive employee of financial institution and holding company, which had obtained funding through Troubled Assets Relief Program (TARP), pursuant to contract provision requiring payment of former employee's legal fees and expenses incurred as a result of any contest brought concerning the validity or enforceability of change of control provision fit the definition of a "golden parachute payment," and, thus, was barred by federal Emergency Economic Stabilization Act of 2008 (EESA) and rule eliminating exception for golden parachute payments as the employer. Emergency Economic Stabilization Act of 2008, Div. A, Title I, § 111(b)(2)(C), 12 U.S.C.A. § 5221(b)(2)(C); 31 C.F.R. § 30.9.

Attorneys and Law Firms

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Amicus Curiae: United States; Alisa B. Klein (William E. Havemann, on brief), in support of appellants.

Present: All the Justices.

Opinion

Opinion by Justice WILLIAM C. MIMS.

***47** In this appeal, we consider whether a financial institution participating in the federal Troubled Assets Relief Program ("TARP") can assert the federal prohibition on "golden parachute payments" as a defense to a breach of contract action brought by one of its former senior executive officers, and whether said officer may collaterally attack the prohibition as an unconstitutional taking without just compensation. We also consider whether a fee shifting provision in an employment agreement falls within the scope of a prohibited "golden parachute payment."

I. BACKGROUND AND MATERIAL PROCEEDINGS BELOW

A. Background

Scott C. Harvard ("Harvard") was the president and chief executive officer of Shore Bank, as well as the chief executive officer of its parent holding company, Shore Financial Corporation. On January 8, 2008, Harvard and Shore Bank entered into a new employment agreement (the "Employment Agreement") occasioned by a merger between Shore Financial Corporation and Hampton Roads Bankshares. Hampton Roads Bankshares was the surviving entity.

Pursuant to the Employment Agreement, Harvard became an executive vice president of Hampton Roads Bankshares, while continuing to serve as Shore Bank's president and chief executive ***48** officer. [1] The Employment Agreement provided a generous compensation package, including, among other benefits, an annual base salary of not less than $250,000, a $244,000 retention bonus, $400,000 in deferred compensation, a car allowance, country club membership dues, and a $175,000 non-compete payment.

The Employment Agreement contained additional provisions governing compensation in the event of termination. In relevant part, Section 3(b)(iii) permitted Harvard "to terminate his employment ... within six (6) months after the occurrence of a 'Change in Control' with respect to HRB, its successors or assigns, ... in which case Employer shall be obligated to pay the Officer and furnish him the benefits provided in Section 4 hereof." Section 4 provided for a "severance allowance," defined as "2.99 times (2.99x) the base amount" and payable in sixty equal monthly installments. The "base amount" was equal to Harvard's "average annualized includible compensation" for "the most recent three (3) taxable years ending before ****175** the date on which the Change of Control occurs." [2]

At the same time that the parties entered into the Employment Agreement, America was descending into the Great Recession, precipitated by a financial downturn that began in August 2007. *See* Marc Labonte, Cong. Research Serv., R40198, The 2007–2009 Recession: Similarities to and Differences from the Past 7 (2010). On October 3, 2008, in response to the developing financial crisis, Congress enacted the Emergency Economic Stabilization Act of 2008, Pub.L. No. 110–343, 122 Stat. 3765 ("EESA"). Congress designed EESA "to immediately provide authority and facilities that the Secretary of the Treasury can use to restore liquidity and stability to the financial system of the United States." EESA § 2, 12 U.S.C. § 5201. To that end, the act created TARP and authorized the Secretary to purchase "troubled assets" from financial institutions to promote market stability. EESA §§ 3, 101, 12 U.S.C. §§ 5202, 5211.

EESA imposed conditions on financial institutions that elected to participate in TARP, requiring adherence to certain standards for ***49** executive compensation and corporate governance. As relevant to this case, it prohibited participating financial institutions from "making any golden parachute payment to its senior executive officer during the period that the Secretary holds an equity or debt position in the financial institution." EESA § 111(b)(2)(C) (then codified at 12 U.S.C. § 5221(b)(2)(C)). At the time, the term "golden parachute payment" was not defined in EESA.

In subsequent regulations implementing EESA and TARP, Treasury defined a "golden parachute payment" as

> any payment in the nature of compensation to (or for the benefit of) a [senior executive officer] made on account of an applicable severance from employment to the extent the aggregate present value of such payments equals or exceeds an amount equal to three times the [senior executive officer's] base amount.

TARP Capital Purchase Program, 73 Fed. Reg. 62205, 62209 (Oct. 20, 2008) (then codified at 31 C.F.R. § 30.9(a)) ("October Rule").

During the 2008 financial crisis, HRB was threatened by "[d]ramatic declines in the housing market," related "turmoil and tightening of credit" throughout the financial market, and a corresponding "lack of confidence in the financial market." Hampton Roads Bankshares, Form 10–K, Annual Report for the Fiscal Year Ended December 31, 2008, at 16. Consequently, HRB applied to participate in TARP.

On December 31, 2008, HRB and the federal Department of the Treasury ("Treasury") entered into an agreement for TARP funding (the "TARP Agreement") whereby Treasury recapitalized HRB with an infusion of $80.3 million that HRB agreed to use "to expand the flow of credit to U.S. consumers and businesses ... to promote the sustained growth and vitality of the U.S. economy."[3] This cash infusion helped HRB weather significant losses throughout 2009. *See* Hampton Roads Bankshares, Form 10–Q, Quarterly Report for the Quarterly Period Ended September 30, 2009, at 4. The TARP Agreement required HRB to comply with the limits on executive compensation set forth in EESA and its implementing ***50** regulations. Significantly, in the TARP Agreement HRB also agreed that Treasury could "unilaterally amend any provision of this Agreement to the extent required to comply with any changes after the Signing Date in applicable federal statutes."

On the same day that HRB and Treasury entered into the TARP Agreement, Harvard agreed to amend the Employment Agreement to comply with EESA and its implementing regulations. Specifically, Harvard acknowledged that, in consideration of the $80.3 million cash infusion obtained pursuant to the TARP Agreement, HRB was required to amend its existing compensation agreements to comply with EESA. He also acknowledged ****176** that he would receive personal benefits from HRB's participation in TARP. Accordingly, Harvard agreed to a marginal modification of his golden parachute payment to comply with the October Rule. Harvard also agreed that the golden parachute payment provision in the amended Employment Agreement would be construed and administered to comply with EESA § 111, 12 U.S.C. § 5221.

Also on that day, HRB acquired Gateway Bank, which resulted in a "Change of Control" under the Employment Agreement. Thus, the acquisition triggered Harvard's right to terminate his employment within six months from the change in control and receive the golden parachute payment.

On February 17, 2009, Congress amended EESA by enacting the American Recovery and Reinvestment Act of 2009, Pub. L. No. 111–5, 123 Stat. 115 ("ARRA"). It overrode Treasury's definition of a "golden parachute payment" in the October Rule, defining the term as

> any payment to a senior executive officer for departure from a company for any reason, except for payments for services performed or benefits accrued.

ARRA § 7001, 12 U.S.C. § 5221(a)(2).[4] On June 15, 2009, Treasury issued an interim final rule implementing the ARRA amendments to EESA. TARP Standards for Compensation and Corporate Governance, 74 Fed. Reg. 28394 (June 15, 2009) (codified at ***51** 31 C.F.R. pt. 30) ("June Rule"). The preamble to the June Rule explained that "[g]iven the language of the ARRA, there is no longer any exception for any amount of a golden parachute payment.... In addition, a golden parachute payment is treated as paid at the time of the employee's departure, regardless of when the amounts are actually paid." *Id.* at 28399; *see also id.* at 38414 (codified at 31 C.F.R. § 30.9). The June Rule further clarified that a "golden parachute payment" included a payment due to a change in control. *Id.* at 28408 (codified at 31 C.F.R. § 30.1).

On June 24, 2009, Harvard terminated his employment, citing HRB's acquisition of Gateway Bank and requesting the golden parachute payment pursuant to the change in control provision in the Employment Agreement. After consulting with Treasury, HRB refused to make that payment.

B. Material Proceedings Below

Harvard filed a breach of contract action against Shore Bank and HRB in the Circuit Court of the City of Norfolk. In Count I, Harvard alleged that HRB had breached the Employment Agreement by refusing to make the golden parachute payment. In Counts II through IV, he alleged that HRB had breached the Employment Agreement by refusing to pay his attorney's fees for the current breach of contract action, a declaratory judgment action previously filed in the

circuit court by Harvard, and a declaratory judgment action previously filed in federal court by HRB.

HRB filed a plea in bar to Count I. In its plea in bar, HRB argued that the prohibition on golden parachute payments in EESA § 111, as implemented by the June Rule, barred it from paying Harvard pursuant to the Employment Agreement. In its answer, HRB asserted that federal law also barred it from paying the attorney's fees sought by Harvard. In response, Harvard argued that HRB could not assert EESA § 111, as implemented by the June Rule, as an affirmative defense to his breach of contract claim. Harvard asserted that if federal law barred HRB from making the golden parachute payment, then it would result in a taking of his contractual rights without just compensation, and therefore the prohibition was unenforceable as applied to him.

The circuit court overruled the plea in bar. The circuit court concluded that EESA § 111, as implemented by the June Rule, ***52** effected a taking without just compensation as applied to Harvard. *Harvard v. Shore Bank,* 88 Va. Cir. 204, 215 (Norfolk Cir.Ct. Apr. 30, 2014). Accordingly, HRB could not assert EESA § 111 and the June Rule as defenses at trial.

****177** Subsequently, HRB argued that the circuit court lacked jurisdiction to award a remedy. In its view, if EESA § 111 and the June Rule constituted a taking as applied, then Harvard was required to bring a claim against the United States for just compensation in the United States Court of Federal Claims. The circuit court rejected HRB's argument and awarded Harvard $655,495.43 plus interest. *Harvard v. Shore Bank,* 89 Va. Cir. 328, 334 (2014) (Norfolk Cir. Ct. Nov. 21, 2014). The court also awarded Harvard his attorney's fees for the current breach of contract action and the federal declaratory judgment action filed by HRB. *Id.* at 336. However, the court found that HRB was not responsible for the fees incurred during the declaratory judgment action filed by Harvard in the circuit court. *Id.* at 335–36.

We granted HRB this appeal.

II. ANALYSIS

[1] The parties and the United States, appearing as amicus curiae, have presented the dispute as a question of constitutional interpretation: whether EESA § 111, as implemented by the June Rule, effects a taking without just compensation, and thereby violates the Takings Clause of the Fifth Amendment to the United States Constitution. However, the case can be resolved according to principles of contract law. Consequently, we do not reach the takings claim. *See Alexandria Redevelopment & Hous. Auth. v. Walker,* 290 Va. 150, 156, 772 S.E.2d 297, 300 (2015) ("[W]e strive to decide cases on the 'best and narrowest grounds available.' ") (citation omitted). We review questions of contract interpretation de novo. *Schuiling v. Harris,* 286 Va. 187, 192, 747 S.E.2d 833, 836 (2013).

A. Subject Matter Jurisdiction

[2] We begin by addressing the question of subject matter jurisdiction raised by the parties. HRB contends that, if EESA § 111, as implemented by the June Rule, effects a taking, then Harvard's sole ***53** remedy is a claim for just compensation against the United States in the Court of Federal Claims. [5] The United States assures us that the takings claim is ripe for adjudication and that we have jurisdiction over the claim because it is not one against the United States for money damages. However, when this case is distilled to its essence as a question of contract law, the basis for our jurisdiction thereunder is clear.

Harvard filed an action for the breach of a private contract. In response, HRB asserted EESA § 111 and the June Rule as an affirmative defense. To avoid HRB's defense, Harvard alleged that EESA § 111 and the June Rule effected an unconstitutional taking without just compensation. Certainly, we have jurisdiction over the breach of contract action, and we can apply federal law if necessary to resolve the dispute. *See Merrell Dow Pharm., Inc. v. Thompson,* 478 U.S. 804, 808, 106 S.Ct. 3229, 92 L.Ed.2d 650 (1986) (the existence of a federal statutory defense generally does not create federal subject matter jurisdiction). Indeed, the United States District Court for the Eastern District of Virginia dismissed HRB's prior action for declaratory judgment because the case turned on a question of Virginia contract law, and the "mere fact that TARP is implicated" was insufficient to support the exercise of federal jurisdiction. *Shore Bank v. Harvard,* 934 F.Supp.2d 827, 841 (E.D.Va.2013). Although the dispute comes to us in a different posture, it still turns on a question of Virginia contract law, and we will resolve it accordingly.

B. Impossibility of Performance

[3] The defense of impossibility of performance is an established principle of contract law.[6] In Virginia, it is "well settled ****178** that where impossibility is due to domestic law, to the death or illness of one who by the terms of the contract was to do an act requiring his personal performance, or to the fortuitous destruction or change ***54** in the character of something to which the contract related, or which by the terms of the contract was made a necessary means of performance, the promisor will be excused, unless he either expressly agreed in the contract to assume the risk of performance, whether possible or not, or the impossibility was due to his fault." *Housing Auth. of Bristol v. East Tennessee Light & Power Co.,* 183 Va. 64, 72, 31 S.E.2d 273, 276 (1944); *see* Restatement (Second) of Contracts §§ 261 & 264 (1981).[7]

Harvard does not dispute that EESA § 111, as implemented by the June Rule, directly bars HRB from making the severance payment to Harvard upon the termination of his employment, because the payment falls within the definition of a prohibited "golden parachute payment." 12 U.S.C. § 5221(a)(2); 31 C.F.R. § 30.1. Moreover, Harvard does not suggest that HRB "expressly agreed in the contract to assume the risk of performance, whether possible or not." *Housing Auth. of Bristol,* 183 Va. at 72, 31 S.E.2d at 276. Nor could he; the amended Employment Agreement clearly places the risk of future changes in the law regulating golden parachute payments on Harvard.

On December 31, 2008, Harvard agreed that the Employment Agreement had been "amended to the extent necessary to give effect to Provision[ ](1)," which prohibited HRB from "engaging in any golden parachute payment to [Harvard] during any [relevant timeframe]." Harvard also agreed that:

> Provisions (1), (2), and (4) of this letter are intended to, and will be interpreted, administered and construed to, comply with Section 111 of EESA (and to the maximum extent consistent with the preceding, to permit operation of the Benefit Plans in accordance with their terms before giving effect to this letter).

By its plain language, the amended Employment Agreement must be read to comply with EESA § 111. Nothing therein exempts the ***55** agreement from amendments to EESA § 111 by subsequent legislation or places the risk of performance in the face of subsequent legislation on HRB.

Further, HRB voluntarily chose to participate in TARP, and it did so with Harvard's full knowledge and acquiescence. Harvard does not dispute that he had notice of the TARP Agreement, which stated:

> [HRB] shall have effected such changes to its compensation, bonus, incentive and other benefit plans, arrangements and agreements (including golden parachute, severance, and employment agreements) (collectively, "*Benefit Plans* ") with respect to its Senior Executive Officers ..., as may be necessary, during the period that the Investor owns any debt or equity securities of the Company acquired pursuant to this Agreement or the Warrant, in order to comply with Section 111(b) of the Emergency Economic Stabilization Act of 2008 ("EESA") as implemented by guidance or regulation thereunder that has been issued and is in effect as of the Closing Date.

Section 5.3 expressly reserved Treasury's right to "unilaterally amend any provision of this Agreement to the extent required to comply with any changes after the Signing Date in applicable federal statutes." Pursuant to this section, Treasury could require HRB to make additional changes to its compensation packages (or refuse to make any ****179** prohibited payment) to comply with amendments to EESA § 111.

Finally, the rules of interpretation agreed upon by HRB and Treasury provide that "[e]xcept as expressly stated in this Agreement, all references to any statute, rule or regulation are to the statute, rule or regulation as amended, modified, supplemented or replaced from time to time (and in the case of

statutes, include any rules and regulations promulgated under the statute)." Accordingly, the reference to any "regulation thereunder that has been issued and is in effect as of the Closing Date" must be interpreted to include any amendment, modification, or supplementation to that regulation. The TARP Agreement clearly states that HRB must "take *all* necessary action to ensure its Benefit Plans" continue to ***56** comply with EESA § 111 and the regulations thereunder, even as amended. Accordingly, Harvard cannot contend he was unaware that Treasury could prevent HRB from making the golden parachute payment.

At best, the non-occurrence of a supervening amendment to EESA § 111 was a "basic assumption" on which both parties amended the Employment Agreement. *See* Restatement (Second) of Contracts §§ 261 cmt. b & 264 cmt. a. Certainly, Harvard can point to nothing in the record that would indicate HRB agreed to pay Harvard the golden parachute payment regardless of supervening amendments to EESA § 111.

[4] Instead, Harvard attempted to mount a collateral attack on the constitutionality of EESA § 111, as amended by the June Rule. But the validity of the law rendering performance impossible does not affect the validity of the defense, provided the promisor relies upon the law in good faith. *See White v. J.M. Brown Amusement Co.,* 360 S.C. 366, 601 S.E.2d 342, 345–46 (2004) (holding that subsequent invalidation of a law did not revive a contract after the parties had ceased performing in good faith compliance with the law); *Gaunt v. Shelter Mut. Ins. Co.,* 808 S.W.2d 401 (Mo.Ct.App.1991) (holding that the respondent did not breach a settlement agreement by making payment pursuant to a lien that was subsequently declared invalid); *Directions, Inc. v. New Prince Concrete Constr. Co.,* 200 N.J.Super. 639, 491 A.2d 1347 (Ct.App.Div.1985) (concluding that the appellant was not required to challenge an apparently valid administrative order to determine its validity before refusing to perform a contract).

[5] **[6]** There is nothing in the record that would suggest HRB refused to make the golden parachute payment in bad faith. After Harvard terminated his employment, HRB sought guidance from Treasury regarding its contractual obligation to make the disputed golden parachute payment, and whether it could perform that obligation in light of EESA § 111, as implemented by the June Rule. In response, Treasury provided informal guidance indicating that HRB could not make the payment and comply with EESA § 111.[8] Where, as here, the government has clearly expressed its intent to ***57** enforce the law, and the promisor cannot in good faith perform its contractual obligation without violating the law, the promisor is discharged from its obligation. *See Harriscom Svenska v. Harris Corp.,* 3 F.3d 576 (2d Cir.1993) (finding that, in light of evidence that the government would not allow continued sales, the seller complied in good faith with the government's requirements and refused to perform its remaining obligations); Restatement (Second) of Contracts § 264 cmt. b.

[7] This rule encourages parties to conduct their affairs under the law as it evolves, without requiring the promisor to mount expensive challenges to the validity of a law that apparently renders performance of a contractual provision impossible, or analyze the relative cost of penalties for noncompliance with a law on one hand and damages for breach of contract on the other. The rule also prevents parties from using private contract disputes to attack the validity of a law when, as here, the government is not a party and cannot be enjoined from enforcing the allegedly invalid law. *See* ****180** *Finkel Outdoor Prods., Inc. v. Bell,* 205 Va. 927, 929, 140 S.E.2d 695, 698 (1965) ("The defendant must be properly brought before the court, else there will be no jurisdiction over him and a judgment against him will be void.").[9]

For these reasons, the circuit court erred when it ordered HRB to make the golden parachute payment despite the federal prohibition on such payments found in EESA § 111, and as implemented by the June Rule.

C. Attorney's Fees

HRB argues that the attorney's fees awarded by the circuit court pursuant to Section 11 of the Employment Agreement are also barred by the prohibition on golden parachute payments. HRB contends this provision cannot be invoked unless a change in ***58** control occurs. Thus, it concludes the attorney's fees constitute a payment due to a change in control, and accordingly, a golden parachute payment.[10] We agree.

Section 11 of the Employment Agreement provides:

> Employer agrees to pay promptly as incurred, to the full extent permitted by law, all the legal fees and expenses which the Officer may reasonably

> incur as a result of any contest ... brought by Employer, the Officer or others concerning the validity or enforceability of, or liability under, the Change in Control of Employer's Parent Company (as defined above) provision of this Agreement....

The June Rule defines a "golden parachute payment" as

> any payment for the departure from a TARP recipient for any reason, or any payment due to a change in control of the TARP recipient ..., except for payments for services performed or benefits accrued.

31 C.F.R. § 30.1. Under the June Rule, a payment, or a right to a payment, is treated as one "for services performed or benefits accrued only if the payment would be made regardless of whether the employee departs or the change in control event occurs, or if the payment is due upon the departure of the employee, regardless of whether the departure is voluntary or involuntary." *Id.*

[8] Section 11 of the Employment Agreement clearly creates a right to a "payment." Further, the parties would only litigate "the validity or enforceability of, or liability under," the change in control provision if a change in control had occurred or was imminent. Thus, it cannot be said that Harvard's right to the payment of his attorney's fees would have accrued "regardless of ***59** whether ... the change in control event occurs." 31 C.F.R. § 30.1. It follows that Harvard's right to the payment provided for in Section 11 accrues due to a change in control event. This fits the definition of a "golden parachute payment," and the exception for "payments for services performed or benefits accrued" does not preserve the award.

III. CONCLUSION

For the foregoing reasons, we conclude that EESA § 111, as implemented by the June Rule, renders HRB's payment of the severance allowance impossible. Therefore, the circuit court erred in overruling the plea in bar. Because federal law prohibits the golden parachute payment under these circumstances, Section 3(b)(iii) of the Employment ****181** Agreement is void and unenforceable. Accordingly, we reverse the judgment of the circuit court and vacate the award of damages in favor of Harvard. Moreover, because federal law also bars any payment pursuant to Section 11 of the Employment Agreement, we also reverse the judgment of the circuit court with respect thereto and vacate the award of attorney's fees in favor of Harvard.

Reversed and final judgment.

All Citations

291 Va. 42, 781 S.E.2d 172, 166 Lab.Cas. P 61,675, 40 IER Cases 1859, 61 Employee Benefits Cas. 1115

Footnotes

1 Hereinafter, this opinion will refer to Shore Bank and Hampton Roads Bankshares collectively as "HRB."

2 Such payments are commonly known as "golden parachutes." *See* Black's Law Dictionary 807 (10th ed.2014).

3 In consideration for its capital investment, Treasury received HRB securities that were to be returned when HRB repaid the TARP funds.

4 The statutory prohibition on golden parachute payments was amended and recodified at 12 U.S.C. § 5221(b)(3)(C). Hereinafter, citations to Section 111 of EESA refer to the amended version unless stated otherwise.

5 The Tucker Act confers upon the United States Court of Federal Claims exclusive jurisdiction over any claim against the United States for damages exceeding $10,000 that is "founded either upon the Constitution, or

any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491(a)(1).

6 Throughout these proceedings, HRB has asserted that it is "legally prohibited" from making the golden parachute payment to Harvard. We view HRB's argument as, in effect, invoking the defense of impossibility of performance due to supervening circumstances—in this case, a change in federal law.

7 In the case of sales, a modern formulation of the defense is codified in Virginia's version of the Uniform Commercial Code. Code § 8.2–615 provides that "[d]elay in delivery or nondelivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the nonoccurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be valid."

8 If HRB does not comply with EESA § 111, it will be exposed to significant civil and criminal penalties. *See* 18 U.S.C. § 1001; 31 C.F.R. §§ 30.15(c) & Apps. A–B.

9 The Fifth Amendment applies to governmental actors, not private parties, and if a party believes that it has suffered an unconstitutional taking due to government action, then it must seek either damages from the government or an injunction against the government. *See* *Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 18, 20–21, 60 S.Ct. 413, 84 L.Ed. 554 (1940) (noting that "there is no liability on the part of [a] contractor for executing [Congress'] will"); *Eastern Enters. v. Apfel*, 524 U.S. 498, 520–22, 118 S.Ct. 2131, 141 L.Ed.2d 451 (1998) (plurality opinion) (holding that an injunction against the enforcement of a law may be an appropriate remedy when "it cannot be said that monetary relief against the [g]overnment is an available remedy.").

10 Harvard argues that HRB failed to preserve this alleged error, because it failed to provide the circuit court with a meaningful opportunity to rule on the argument. *See* Rule 5:25. However, the record shows HRB asserted in its answer that federal law prevented it from paying Harvard's attorney's fees, argued during the trial on damages that EESA § 111 and the June Rule barred it from paying Harvard's attorney's fees, and renewed its argument at the close of the evidence. The circuit court concluded that federal law could not bar these fees, because its ruling on the plea in bar precluded HRB from asserting federal law as a defense. For these reasons, we conclude that the issue has been preserved.

183 Va. 64
Supreme Court of Appeals of Virginia

HOUSING AUTHORITY
OF THE CITY OF BRISTOL
v.
EAST TENNESSEE LIGHT & POWER COMPANY.

September 6, 1944.

***64** Present, Campbell, C.J., and Hudgins, Gregory, Eggleston and Spratley, JJ.

Synopsis
Error to Corporation Court of City of Bristol; Joseph L. Cantwell, Jr., Judge.

Action by the Housing Authority of the City of Bristol against East Tennessee Light & Power Company instituted by notice of motion for judgment for damages for breach of two contracts. To review a judgment refusing to set aside a verdict for defendant, plaintiff brings error and defendant brings cross-error.

Affirmed.

West Headnotes (6)

[1] **Contracts** Discharge by Impossibility of Performance

Generally, where impossibility of performance is due to domestic law, to death or illness of one who by terms of contract was to do an act requiring his personal performance, or to the fortuitous destruction or change in character of something to which contract related, or which by terms of contract was made a necessary means of performance, promisor will be excused, unless he either expressly agreed in contract to assume risk of performance or impossibility was due to his fault.

13 Cases that cite this headnote

[2] **Contracts** Destruction of subject-matter

Where, from nature of contract itself, it is apparent that parties contracted on basis of continued existence of substance to which contract related, a condition is implied that, if performance becomes impossible because that substance does not exist, performance is excused.

6 Cases that cite this headnote

[3] **Gas** Supply to municipalities

Where contract by which utility undertook to furnish natural gas to housing authority disclosed that parties contemplated continued existence of a nearby gas deposit as a means of performance and there was a failure of supply of natural gas and utility could not reasonably be assumed to have taken the risk thereof, utility was excused from performance of contract.

2 Cases that cite this headnote

[4] **Appeal and Error** Instructions

In action against utility for breach of contract to furnish natural gas, plaintiff could not complain of instruction which told jury to find for plaintiff if they found either that there was no failure of supply of natural gas, or that parties did not contract with reference to a continued existence of an adequate supply, or that defendant could reasonably be assumed to have taken risk by failing to provide against event which occurred.

1 Cases that cite this headnote

[5] **Appeal and Error** Jury as factfinder below in general

Findings of jury supported by evidence are binding upon Supreme Court of Appeals as to the facts.

[6] **Trial** Contracts and actions relating thereto in general

Trial Inconsistent or contradictory instructions

Trial Contracts and actions relating thereto

In action against utility for breach of contract to furnish natural gas, plaintiff's requested instructions which either directed a verdict for plaintiff, were in conflict with appropriate general instruction upon the subject matter, or deprived utility of any defense based on impossibility of performance, were properly refused.

VIRGINIA REPORTS SYNOPSIS

Error to a judgment of the Corporation Court of the city of Bristol. Hon. Joseph L. Cantwell, Jr., judge presiding.

Affirmed.

The opinion states the case.

VIRGINIA REPORTS HEADNOTES AND CLASSIFICATION

1. CONTRACTS — *Excuses for Nonperformance — When Impossibility of Performance Excuses Promisor.* — Where impossibility of performance is due to domestic law, to the death or illness of one who by the terms of the contract was to do an act requiring his personal performance, or to the fortuitous destruction or change in the character of something to which the contract related, or which by the terms of the contract was made a necessary means of performance, the promisor will be excused, unless he either expressly agreed in the contract to assume the risk of performance, whether possible or not, or the impossibility was due to his fault.

2. CONTRACTS — *Excuses for Nonperformance — Failure of Means of Performance.* — Impossibility of performance due to the failure or non-existence of a certain state of affairs or means of performance, the continued existence of which was contemplated by both parties as the basis of their contract, but not contracted for, excuses the promisor.

3. CONTRACTS — *Excuses for Nonperformance — Where Substance of Contract Ceases to Exist.* — If one makes a contract to do a thing which is in itself possible, he will be liable for a breach of the contract, notwithstanding it is beyond his power to perform it. But where, from the nature of the contract itself it is apparent that the parties contracted on the basis of the continued existence of the substance to which the contract related, a condition is implied that if performance becomes impossible because that substance does not exist, this will and should excuse such performance.

4. CONTRACTS — *To Furnish Natural Gas — Excuses for Nonperformance — Where Supply Ceased to Exist — Case at Bar.* — In the instant case, an action for breach of a contract to furnish natural gas for heating purposes, defendant based its defense upon the ground that performance had become impossible because the subject matter essential to performance had ceased to exist. The contract between the parties provided that neither should be liable by reason of failure to deliver or to receive the gas as the result of acts beyond the control of the party affected. Defendant's supply of natural gas became so reduced, without any apparent reason therefor, that it became impossible to supply sufficient gas for heating, and plaintiff thereupon replaced its gas heating units with coal heating boilers, the amount of plaintiff's claim being the cost of such change-over. A verdict for defendant was confirmed by the trial court.

Held: No error, since the parties contemplated and assumed the continued existence of the gas supply and contracted with reference thereto as the means of performance.

5. CONTRACTS — *To Furnish Natural Gas — Excuses for Nonperformance — Instruction — Case at Bar.* — In the instant case, an action for breach of a contract to furnish natural gas for heating purposes, defendant based its defense upon the ground that performance had become impossible because the subject matter essential to performance had ceased to exist. Plaintiff assigned as error the giving of an instruction under which the jury was told that they should find a verdict for the plaintiff if they believed that the evidence disclosed any one of three circumstances, (1) that there was no failure of the supply of natural gas; (2) that the parties did not contract with reference to a continued existence of an adequate supply of gas; or (3) that the defendant could reasonably be assumed to have taken the risk by failing to provide against the event which occurred.

Held: That there was no merit in the assignment, since the instruction was most favorable to plaintiff.

END OF VIRGINIA REPORTS HEADNOTES AND CLASSIFICATION

Attorneys and Law Firms

****273** ***65** *Donald T. Stant* and *Floyd H. Roberts,* for the plaintiff in error.

H. G. Lavinder and *Jones & Woodward,* for the defendant in error.

Opinion

JUDGE: SPRATLEY

SPRATLEY, J., delivered the opinion of the court.

Housing Authority of the city of Bristol, Virginia, hereinafter referred to as plaintiff or Authority, instituted this proceeding by notice of motion for judgment against East Tennessee Light & Power Company, sometimes referred to ***66** as defendant or Utility, for damages in the sum of $18,878.07, with interest, subject to a credit of $5,500, for breach of two contracts. The terms and provisions of the contracts, so far as we are concerned, are identical. They will be hereinafter referred to as constituting one contract.

The breach alleged is that, during the winter of 1941-42, Utility failed to furnish, in accordance with its contract, natural gas for heating the tenanted buildings of Authority, with the result that Authority was forced to replace the gas heating units in its buildings with coal heating boilers. The amount of damages claimed is the cost of the change-over of such heating units.

Authority contended that the agreement to furnish its gas requirements was a clear, complete, and unambiguous contract of ****274** hazard, and that to excuse its performance would enable Utility to profit by its own wrong.

Utility based its defense upon the grounds, first, that the express provisions of the contract excused its performance, in that impossibility of performance was occasioned by an act beyond its control; and, second, that performance had become impossible because the subject matter essential to performance, which both parties used as the basis of the contract, had ceased to exist. The trial court restricted tis defense to the second ground. Upon the evidence, and under the instructions of the court, the jury returned a verdict for the defendant which the court refused to set aside.

Authority assigns error to the action of the court in refusing to strike all of the grounds of defense, and in giving and refusing certain instructions, especially to the giving of instruction 'E,' hereinafter set out in full. The defendant assigns cross-error because it was not permitted to rely upon its first ground of defense.

The case presents questions both of fact and of law. In view of the favorable verdict for the defendant, the facts may be summarized as follows:

Authority is an agency organized, under state and federal statutes, for the purpose of constructing and renting lowrent dwellings in the city of Bristol, Virginia. Utility is a ***67** public service corporation engaged in the business of supplying electricity and gas to customers in the Bristol area.

In 1940, Authority made plans for the construction of twenty-five large dwellings in two projects, one for white persons and one for negroes. For many months prior thereto, together with the advice and assistance of National Housing Authority, its superior, it considered the character of heating to be used in its buildings. After extended investigations and negotiations, it decided to use natural gas for refrigeration, cooking, and space heating. The specifications for the construction of its buildings were prepared to that effect. Thereafter, on September 5, 1940, it entered into a contract with Utility, whereby Utility agreed to supply Authority and its tenants all of their gas requirements for refrigeration, cooking, and heating. The gas to be supplied was described as 'natural gas,' and the charge therefor was twenty-five cents per M cubic feet, delivered by the facilities of Utility through two meters, one in each project. The contract was to continue in effect for five years, with the right of renewal under conditions therein prescribed.

Section 19 of the contract read as follows:

'19. *Impossibility of Performance:* The Utility shall use all reasonable diligence in providing a constant and uninterrupted supply of electric energy and gas, but the Utility shall not be liable to the Authority hereunder, nor shall the Authority be liable to the Utility hereunder by reason of failure of the Utility to deliver or the Authority to receive electricity or gas as the result of fire, strike, riot, explosion, flood, accident, breakdown, acts of God, or the public enemy, or other acts beyond the control of the party affected; it being the intention of each party to relieve the other of the obligation to supply electricity or gas or to receive and pay for electricity or gas when as a result of any of the above mentioned causes, either party may be unable

to deliver or use in whole or in part the electricity or gas herein contracted to be delivered and received. Both parties shall be prompt and diligent in removing and overcoming the cause or causes of said interruption, but nothing herein ***68** contained shall be construed as permitting the Utility to refuse to deliver or the Authority to refuse to receive electricity or gas after the cause of interruption has been removed. In case of impaired or defective service, the Authority shall immediately give notice to the nearest office of the Utility by telephone or otherwise, confirming such notice in writing as soon thereafter as practicable.'

Preceding the execution of the contract, natural gas had been discovered in an area adjacent to the city of Bristol, by a corporation known as the Bristol Natural Gas Corporation. Bristol undertook to develop this field and drilled several wells, with a measure of success. The gas therefrom was piped to the city of Bristol, Virginia, in lines owned by the Industrial Gas Corporation, a public service corporation, which had, in 1937, been granted a limited franchise from the above city permitting it to supply natural gas to industrial users, public buildings, schools, and colleges.

East Tennessee Light & Power Company, in 1937, manufactured artificial gas and owned a distributing system for such gas in the cities of Bristol, Virginia, and Bristol, Tennessee. Industrial Gas Corporation ****275** suggested that Utility discontinue its distribution of artificial gas and take over the distribution of natural gas in its stead. Utility, not being entirely satisfied with the assurance of Industrial that there was ample natural gas to take care of all of its requirements, had its officers and engineers examine into and discuss the situation with qualified geologists, who had examined and tested the gas fields. It caused to be checked all industrial plants and possible domestic customers, and made up estimates as to the amount required by them for cooking, water heating and space heating. These estimates were made up for separate years up to a ten-year period, and showed that Utility could reasonably be expected to sell over the ten-year period approximately two billion cubic feet of gas. It was assured by experienced geologists and engineers that there was ample natural gas to supply all of its needs in its territory. The lowest estimate of the natural reserve was in excess of two billion cubic feet, a supply sufficient to last for at least ten ***69** years, while other estimates ran as high as a minimum reserve of three and one-half billion cubic feet.

During the period of these investigations and negotiations, an additional well was drilled, which appeared to be nearly as good as two of the best already drilled. As a result, an agreement was entered into on February 8, 1939, between Industrial Gas Corporation and Utility, whereby the former agreed to sell and deliver to Utility all of the natural gas which might be necessary to enable Utility to supply the total gas requirements of all of its customers then for thereafter to be served in the cities of Bristol, Virginia, and Bristol, Tennessee, and their environs, reserving to Industrial sufficient gas, obtained under its agreement with Bristol Natural Gas Corporation, to supply such customers as Industrial then had or might thereafter secure, pursuant to its franchise in the above cities.

J. F. McCrary, the executive director and housing manager of Authority, sometime in the early part of 1939, conferred with officers of the Industrial Gas Corporation about securing gas for heating the project buildings. He said he was assured by that corporation that they had ample gas. Later in the year, representatives of the United States Housing Authority and the Bristol Authority discussed the matter with the president of Industrial. United States Housing Authority agreed to the installation of gas heating boilers. Thereafter Industrial informed McCrary that East Tennessee Light & Power Company, the distributor of natural gas under the contract of February 8, 1939, above mentioned, would probably like to make the contract with Authority. McCrary then discussed the matter with the president and other officers of Utility, in person and by written correspondence. Representatives of the United States Housing Authority of Washington, D.C., entered into this discussion, and eventually the contract in question, prepared from a standard form used by United States Housing Authoirty, with certain modifications and changes, was signed by the parties. The officers of Authority knew of the existence of the gas fields. They were satisfied by their investigations ***70** and negotiations, for McCrary testified that, at the time the contract was signed, he and the other officers of Authority felt there was ample gas for all of their requirements.

Natural gas was first turned into the mains of Utility in June, 1939, approximately a little more than a year before the contracts of September 5, 1940. Authority estimated that it would require approximately two million cubic feet per month. This additional load on the system was much less than the amount which Utility had estimated to be used.

In September, 1940, the open flow from the wells was approximately four million feet a day, which meant that about one and one-third million feet a day was deliverable in Bristol

to Utility. In 1939 and 1940, Utility was selling only a small portion of the gas which was available to it. At no time did it have a load of more than 50% of the million cubic feet per day which came from the wells. The pressure of the wells in the fall of 1939 was around 1200 pounds; in September, 1940, 800 pounds; and in March, 1941, it dropped to 230 pounds. It remained fairly constant at the latter figure during the next few months. In October, 1941, it reached 395 pounds; but in January, 1942, it abruptly fell to 150 pounds. The result was that the amount of gas available to Utility's customers had been reduced to less than one-fourth of the amount which it had been estimated it would receive, and it was impossible during the cold weather to supply the requirements of all of its customers for cooking, refrigeration, and heating. The engineers said it looked like the gas was gone. No ****276** one was able to give a specific reason therefor.

Faced with this situation, Utility realized that the burden on its system must be reduced in the interest of all of its customers. Artificial gas was not procurable. Utility had dismantled its artificial gas plant. If they had reconstructed it and manufactured artificial gas to the entire capacity of their plant, it would not have been sufficient, together with the natural gas, to fill the requirements of all of its customers. Besides, artificial gas is a different kind of gas from natural gas. It has different characteristics, and different ***71** means have to be provided for its distribution. The contract, however, was for natural gas. The amount of natural gas served customers taken on by Utility after September, 1940, would not have relieved the situation if it had been reserved for Authority's requirements. The real reason Utility could not deliver the natural gas was that the quantity required had ceased to exist.

Since it was clearly apparent that in cold weather space heaters would drain the system empty, Utility declined to take on additional users at the first indication of a shortage. Two additional gas wells were then being drilled. When their production was so small that the difficulty was not removed, Utility, by personal interviews, advertisements, letters and the radio, undertook to persuade its customers using space heating to voluntarily change to another type of fuel heating for the common good. A large number of them did so, including Authority. Authority was advised of the shortage in November, 1941, and beginning in January, 1942, it changed the installation in its twenty-five buildings from gas-fired boilers to coal-fired boilers, completing the change on April 6, 1942. This change was made after the execution of a supplemental agreement between the parties, dated January 23, 1942, whereby Authority agreed to discontinue the use of natural gas for heating its buildings as soon as it could change over to another form of heating, but without waiving any of its rights under the contract of September, 1940. Utility did not cut off the gas supply to Authority or to any other customer, nor was any reduction made in the cooking and refrigeration requirements of any customer.

This controversy relates only to natural gas required for space heating. Evidence of the failure of a sufficient supply therefor clearly appears from the record.

The defense of impossibility of performance has become in modern times an established principle of law in many jurisdictions. Its origin and development have been exhaustively ***72** discussed in textbooks, law reviews and encyclopedias, as well as in many reported cases. *

The conclusions reached in the decided cases are not harmonious, due, perhaps in part, to the multitude of circumstances or conditions under which the question was presented . It is impossible to state a general rule which will be applicable to all classes of cases.

[1] It is, however, fairly well settled that where impossibility is due to domestic law, to the death or illness of one who by the terms of the contract was to do an act requiring his personal performance, or to the fortuitous destruction or change in the character of something to which the contract related, or which by the terms of the contract was made a necessary means of performance, the promisor will be excused, unless he either expressly agreed in the contract to assume the risk of performance, whether possible or not, or the impossibility was due to his fault.

[2] The tendency of the law is towards an enlargement of the defense, provided the application of the principle does not conflict with other established rules governing the construction of contracts. As a result a fourth classification has been frequently allowed in recent years, that is, impossibility due to the failure or non-existence of a certain state of affairs or means of performance, the continued existence of which was contemplated by both parties as the basis of their contract, but not contracted for. Williston on Contracts, Revised Edition, Vol. 6, section 1935, *et seq.;* Williston on Sales, section 661.

In Williston on Contracts, *supra,* section 1948, it is said:

'Not only where a specific thing is itself **277 to be sold or transfered, but wherever a contract required for its performance the existence of a specific thing, the fortuitous destruction of that thing, or such impairment of it as makes *73 it unavailable, excuses the promisor, unless he has clearly assumed the risk of its continued existence.'

In 12 Am. Jur., Contracts, section 372, this is said:

'372. Destruction of Specific Thing. — In the absence of a contrary provision, if the act to be performed is necessarily dependent on the continued existence of a specific thing, the perishing thereof before the time for performance, without the fault of the promisor, will excuse non-performance of the contract. This is especially true where, from the nature of the contract, it appears that the parties must, from the beginning, have known that it could not be fulfilled unless when the time for the fulfillment of the contract arrived, some particular specified thing continued to exist. The contract is not, in the absence of any express or implied warranty that the thing shall exist, to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor.' (Cases cited.)

In Restatement of the Law of Contracts, section 460, the subject is covered as follows:

'Non-existence or Injury of Specific Thing or Person Necessary for Performance.

'(1) Where the existence of a specific thing or person is, either by the terms of a bargain or in the contemplation of both parties, necessary for the performance of a promise in the bargain, a duty to perform the promise

'(a) never arises if at the time the bargain is made the existence of the thing or person within the time for seasonable performance is impossible, and

'(b) is discharged if the thing or person subsequently is not in existence in time for seasonable performance

'unless a contrary intention is manifested, or the contributing fault of the promisor causes the non-existence,'

17 C.J.S., Contracts, section 464, is to like effect:

'Where from the nature of the contract it is evident that the parties contracted on the basis of the continued existence of the person or thing, condition or state of things, to which it relates, the subsequent perishing of the person or thing, *74 or cessation of existence of the condition, will excuse the performance, a condition to such effect being implied, in spite of the fact that the promise may have been unqualified.' (Cases cited.)

In *Virginia Iron, etc., Co. v. Graham,* 124 Va. 692, 98 S.E. 659, the mining company, a lessee of ore lands upon a royalty basis, brought a suit in equity to cancel the lease, because it was found, after a period of mining, that the low grade of the remaining ore did not justify the continuance of mining operations. It appeared from the record that the basis of the contract, the existence of iron ore in quantities great enough to justify the continuance of mining operations, was assumed as a fact by both parties. Under these circumstances, we said:

'If one makes a contract to do a thing which is in itself possible, he will be liable for a breach of the contract, notwithstanding it is beyond his power to perform it. But where, from the nature of the contract itself it is apparent that the parties contracted on the basis of the continued existence of the substance to which the contract related, a condition is implied that if performance becomes impossible because that substance does not exist, this will and should excuse such performance.' (Citing many cases.)

The above case is the nearest approach we have made to the particular subject under discussion, and in its decision we committed ourselves to the above principles as supported by right, reason, and justice. In *Lehigh Portland Cement Co. v. Virginia Steamship Co.,* 132 Va. 257, 111 S.E. 104, that case was cited and our conclusion approved.

With these governing principles in mind, we come now to their application to the facts and circumstances of this case.

[3] The contract related to natural gas. While it did not specify the particular source of supply as a necessary means of its performance, the evidence, as the trial judge stated in his able written opinion, 'shows beyond a doubt that both parties did, in fact, contemplate the continued existence of a nearby gas deposit as a means of performance, that deposit being the only one known to this section of the country.'

**278 *75 Each party to the contract knew that the supply of gas had to come from that specific locality. No other

source of supply was available. Each knew that the supply from that field furnished the essential and necessary means of performance, and that the contract could not be fulfilled unless the gas supply continued to exist. They contemplated and assumed its continued existence and contracted with reference thereto as the means of performance. Their contemplation is not in conflict with the language of the contract. The evidence of that fact, as the learned trial judge said, 'simply applies the language used to the transaction.'

[4] In addition to a number of instructions requested by each of the parties, the trial court, of its own motion, gave instruction 'E,' as follows:

'The Court instructs the jury that if you find from a preponderance of the evidence that defendant has breached the contract sued upon, in arriving at a verdict you shall, first, ascertain whether a failure of the supply in the gas deposit from that existing at the time of the contract, not caused by defendant, otherwise than by normal withdrawal in due course of business, has rendered performance of the contract impossible. *If you find that no such change has occurred, or that if such change occurred, it did not render performance impossible, then your verdict shall be for the plaintiff.*

'If you find that such change has occurred, and that such change rendered performance by defendant impossible, then you shall ascertain, second, whether both parties to the contract did in fact contract, though not set forth in the terms of the contract, with reference to the continued existence of an adequate supply of gas from the fields of Bristol Natural Gas Corporation as the contemplated means of fulfilling the contract by defendant. *If you find that they did not both contract with reference to such supply, then your verdict shall be for the plaintiff.*

'If you find that they did both contract with reference to such source of supply, then you shall determine, third, under the whole evidence, including the contract (as construed by the Court), and all the circumstances and conditions ***76** *at the time of the contract, and the relative knowledge by the parties of such circumstances and conditions, whether defendant may be reasonably assumed to have taken the risk of liability in the event of such impossibility by failing to provide against it in the contract.*

If you find that defendant may reasonably be assumed to have taken the risk by failing to provide against the event in the contract, then you shall find for the plaintiff. If you find that defendant may not reasonably be assumed to have taken the risk by failing to so provide, then you shall find for the defendant.

'The burden is upon the defendant of proving the foregoing three conditions relieving it from liability by a preponderance of the evidence.' (Italics supplied.)

This instruction was most favorable to the plaintiff. Under it the jury was told that they should find a verdict for the plaintiff if they believed that the evidence disclosed any one of three circumstances, (1) that there was no failure of the supply of natural gas; (2) that the parties did not contract with reference to a continued existence of an adequate supply of gas; or (3) that the defendant could reasonably be assumed to have taken the risk by failing to provide against the event which occurred.

[5] A verdict could, under the fourth paragraph of the instruction, have been reached for the defendant only if the jury believed that a preponderance of the evidence showed the negative or reverse of all three of the above hypotheses or conditions. The jury found for the defendant upon each hypothesis, and their findings supported by the evidence are binding upon us as to the facts.

[6] We find no merit in the assignments of error relating to the refusal of the court to give certain instructions requested by the plaintiff. The refused instructions either directed a verdict for the plaintiff, were in conflict with instruction 'E,' or deprived the defendant of any defense based on impossibility of performance.

In view of the verdict of the jury, the judgment of the trial court, and our conclusions above expressed, it is unnecessary to discuss the contentions of the defendant relative to the ruling of the court in striking out its ground of ***77** defense under paragraph 19 of the contract, or whether it duly assigned cross-error thereto. Under the circumstances, the alleged cross-error, if any, was harmless to the defendant.

For the foregoing reasons, the judgment of the trial court is affirmed.

Affirmed.

All Citations

183 Va. 64, 31 S.E.2d 273

Footnotes

* Williston on Contracts, (Rev. Ed.) Vol. 6, section 1931, *et seq.;* 18 Michigan Law Review, page 589; 1 Columbia Law Review, page 529; 2 Columbia Law Review, page 421; and Annotation: 'Destruction or loss of specific property which is the subject or basis of a contract, after the inception of the contract, as excuse for nonperformance,' 12 A.L.R., page 1273, and 74 A.L.R., page 1289.

248 Va. 95
Supreme Court of Virginia.

LONG SIGNATURE HOMES, INC.
v.
FAIRFIELD WOODS, INC.

Record No. 930890.
|
June 10, 1994.

Synopsis

Purchaser under real estate development contract brought action against vendor, seeking declaratory judgment that contract was still in effect despite inability to satisfy sewer connection contingency. The Circuit Court, Spotsylvania County, J. Peyton Farmer, J., determined that contract was no longer enforceable, and purchaser appealed. The Supreme Court, Whiting, J., held that: (1) vendor assumed risk of burdensome performance caused by unreasonable delay, and (2) present unavailability of sewer connections made performance of contract only temporarily impossible.

Reversed and judgment entered.

Procedural Posture(s): On Appeal.

West Headnotes (7)

[1] **Contracts** Discharge by Impossibility of Performance

Ordinarily, supervening condition that renders promisor's performance temporarily impossible will not release him from duty from performing, but will only suspend that obligation; this general rule is inapplicable, however, if delay will make promisor's performance materially more burdensome, in which case promisor's duty of performance is discharged rather than suspended. Restatement (Second) of Contracts § 269.

1 Cases that cite this headnote

[2] **Contracts** Discharge by Impossibility of Performance

General rules governing obligation to perform when supervening condition renders performance temporarily impossible are subject to contrary agreement. Restatement (Second) of Contracts § 269.

2 Cases that cite this headnote

[3] **Vendor and Purchaser** Time of Performance and Payment

Although parties to real estate development contracts assume that their contracts will be performed within commercially reasonable time period, this assumption may be modified by contract.

[4] **Vendor and Purchaser** Effect of Default or Delay

Vendor's duty of performance under real estate development contract was not discharged merely by passage of reasonable time after performance became temporarily impossible, due to inability to satisfy contingency regarding availability of sewer service, where agreement provided that purchaser could delay date for closing until 60 days after contingency was satisfied; vendor assumed risk of more burdensome performance, even though that performance could be delayed for unreasonable period of time.

2 Cases that cite this headnote

[5] **Vendor and Purchaser** Conditions and Provisos

Although vendor assumed risk that its performance under real estate development contract might be delayed temporarily because of inability to provide public sewer connections for lots, it did not assume risk that county would never provide such connections.

[6] **Perpetuities** Creation of Future Estates in General

Since real estate development contract affected alienability of land and vendor was corporation, under rule against perpetuities vendor's

obligation to satisfy contract contingencies and to convey land could not extend beyond 21 years from date of contract, where vendor assumed that its performance might be delayed temporarily because of inability to provide public sewer connections for lots.

[7] **Vendor and Purchaser** Evidence to Aid Construction

County administrator's testimony regarding capacity of sewer plant, which did not preclude possibility that county would later build new facilities or expand existing ones to provide sewage facilities sufficient for remaining lots covered by real estate development contract, supported trial court's findings that vendor's performance of contract was temporarily impossible, but did not support holding that county would never provide such connections and that contract could no longer be enforced against vendor, which had assumed risk only of temporary delay.

1 Cases that cite this headnote

Attorneys and Law Firms

****490** ***96** Thomas P. Mains, Jr., Alexandria (Mains & Mains, on brief), for appellant.

Ronald M. Maupin, Spotsylvania (Gardner & Maupin, on brief), for appellee.

***95** Present: All the Justices.

Opinion

WHITING, Justice.

In this declaratory judgment action, we decide whether a contract to sell building lots has been terminated due to an alleged impossibility of performance.

On June 18, 1987, Fairfield Woods, Inc. (the seller) and Long Signature Homes, Inc. (the purchaser) entered into a contract in which the seller agreed to develop, and the purchaser agreed to buy, 382 building lots in the seller's subdivision known as Fairfield Woods in Spotsylvania County (the County). The purchase of these lots was to take place over a period of approximately three and one-half years after Fairfield had complied with the conditions of the contract.

Paragraph 5 of the contract provided in pertinent part:

***97** Purchaser's obligation to proceed to closing is contingent upon satisfaction of the following:

Purchaser receiving certification from the appropriate authorities of Spotsylvania County that there exist water, sewer and electric [facilities] of adequate size and capacity to service 382 single family dwellings.... Purchaser shall have the right to waive the aforementioned contingency and proceed to closing. In the event the aforementioned contingency is not satisfied within on [sic] year of the date hereof, Purchaser hall [sic] have the option to declare this contract null and void.

And paragraph 10(b) provided in pertinent part:

> If Seller fails to satisfy any contingency at least 60 days prior to any settlement hereunder, Purchaser shall have the option to waive the contingency and proceed to closing, specifically enforce the terms of the contract if applicable or *delay the date for closing until 60 days after said contingency is satisfied (Delayed Closing)*. If closing is delayed by Purchaser due to the failure of a contingency, the per lot purchase price will not escalate beyond 2.5% per lot over the per lot purchase price paid in the prior closing.

(Emphasis added.)

When the contract was signed, the County had a sewer plant with sufficient capacity to serve the Fairfield Woods area; hence, both parties thought that public sewer would be available to serve the 382 lots. However, the County notified them by letter in August 1988 that the sewer plant serving this area of Spotsylvania County was approaching its maximum treatment capacity. The County further advised the parties that if houses were built on the lots of all recorded subdivision plats in the area, the plant would not ****491** have the capacity

to serve all the additional houses. Accordingly, the County warned that it would provide sewer service up to the plant's capacity on a "first come, first serve" basis.

The parties closed on 40 lots in early August 1989, and were scheduled to close on 10 more lots a short time later. On August 21, the seller wrote the purchaser in pertinent part:

> ***98** Since there are no sewer taps available beyond these lots, the contract between us which is contingent upon the availability of sewer cannot be fulfilled. Accordingly, this letter is to advise you that the contract is terminated for the ground beyond the ten lots because of the inability to meet the sewer contingency.

By letter of September 6, 1989, the purchaser responded that "[p]aragraph 5 of the contract refers to the contingency of the sanitary sewer; however, the only rights for termination in this paragraph are for the purchaser." Although the purchaser told the seller to "let me know if you have any questions or comments on this matter," the seller did not reply to the purchaser's letter.

The parties closed on the 10 lots on October 30, 1989. On September 19, 1990, the purchaser wrote to the seller asking for a completion schedule for the development of the next lots in Fairfield Woods. Two days later, the seller responded and referred the purchaser to its letter of September 6.

In October 1990, the purchaser filed this action seeking a declaratory judgment that the contract was still in effect and that the purchaser had the right to delay closing "without any escalation in price, for sixty days beyond the time all contingencies have been removed." The county administrator testified at a June 1992 hearing before the trial court that the County was not then planning to construct new facilities or to expand existing facilities to serve more lots in the planned subdivision. However, the administrator also testified that a "draft water and sewer master plan" to serve this area had been submitted, but not yet acted upon by the Board of Supervisors of Spotsylvania County.

Following that hearing and its consideration of memoranda from both parties, the court held that availability of public sewer was a condition precedent to the performance of the contract and found that "it is impossible to meet that condition now or in the near future." The court concluded that "further performance is impossible within a reasonable period of time," and found that "the contract is null and void and no longer enforceable by either party." The purchaser appeals.

At the outset, we review principles of contract law regarding impossibility of performance. In general, if a promisor's contractual performance is made impossible by a "change in character of something to which the contract related, or which by the ***99** terms of the contract was made a necessary means of performance, the promisor will be excused, unless he ... expressly agreed in the contract to assume the risk of performance." *Housing Auth. of the City of Bristol v. East Tennessee Light & Power Co.,* 183 Va. 64, 72, 31 S.E.2d 273, 276 (1944) (supervening loss of source of natural gas supply relieved supplier of future performance).

[1] **[2]** Ordinarily, a supervening condition that renders a promisor's performance temporarily impossible will not release him from the duty of performing, but will only suspend that obligation. Restatement (Second) of Contracts § 269 (1981); 18 Samuel Williston, *A Treatise on the Law of Contracts* § 1957, at 150 (3d ed. 1978). This general rule is inapplicable, however, if the delay will make the promisor's performance materially more burdensome. Restatement (Second) of Contracts § 269 (1981). In that instance, the promisor's duty of performance is discharged rather than suspended. *Id.* Nevertheless, as the comments to the Restatement point out, "[t]he rule stated in this Section is, of course, subject to contrary agreement." *Id.* at cmt. a.

[3] Further, we note that although parties to real estate development contracts assume that their contracts will be performed within a commercially reasonable time period, this assumption, too, may be modified by contract. *See* ****492** *The Ryland Group, Inc. v. Wills,* 229 Va. 459, 465, 331 S.E.2d 399, 403 (1985). "Settled contract law implies a reasonable time limitation for performance of conditions in contracts for the sale of land *where no time for performance is fixed by the contract itself.*" *Id.* (Emphasis added.)

[4] In this case, we will assume that the trial court correctly held that, at the time of the trial in June 1992, a reasonable time had passed for the removal of the contingency regarding the availability of sewer service. Nevertheless, we conclude

that the seller's duty to perform was not discharged because the contract required the seller to perform even after the expiration of what would otherwise be a reasonable time period. Paragraph 10(b) provided that the purchaser could "delay the date for closing until 60 days after the contingency is satisfied." Thus, the seller assumed the risk of a more burdensome performance, even though that performance could be delayed for an unreasonable period of time. Hence, the court erred in holding that the seller's duty of performance was ***100** discharged merely by the passage of a reasonable time after performance became temporarily impossible.

[5] **[6]** **[7]** Although the seller assumed the risk that its performance might be delayed temporarily because of an inability to provide public sewer connections for the lots, it did not assume the risk that the County would never provide such connections. And, since the contract affects the alienability of land and the seller is a corporation, under the rule against perpetuities the seller's obligation to satisfy the contract contingencies and to convey the land cannot extend beyond 21 years from the date of the contract. *Wills,* 229 Va. at 463, 331 S.E.2d at 402. The county administrator's testimony supports the trial court's finding that the seller's performance of the contract is temporarily impossible. However, that testimony does not preclude the possibility that the County later will build new facilities or expand existing ones to provide sewage facilities sufficient for the remaining lots covered by the contract. Thus, the court erred in holding that the contract could no longer be enforced against the seller.

Accordingly, we will reverse the judgment of the trial court and will enter a declaratory judgment that the contract is still in effect and will continue in effect until the expiration of 21 years from June 18, 1987, but without prejudice to the seller's right to file a later action should the County decide that it will not provide such facilities within the remaining 21–year period.

Reversed and final judgment.

All Citations

248 Va. 95, 445 S.E.2d 489

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United States District Court, E.D. Virginia,
Alexandria Division.

MIDDLE EAST BROADCASTING NETWORKS, INC., Plaintiff,
v.
MBI GLOBAL, LLC, Defendant.

No. 1:14–cv–01207–GBL–IDD.
|
Signed July 28, 2015.

Attorneys and Law Firms

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MEMORANDUM OPINION AND ORDER

GERALD BRUCE LEE, District Judge.

***1** THIS MATTER is before the Court on Plaintiff/Counterdefendant Middle East Broadcasting Networks, Inc.'s ("MEBN") Motion for Summary Judgment (Doc. 31). This case concerns MEBN's claim that Defendant/Counterclaimant MBI Global, LLC ("MBI"), breached a contract between the parties when it failed to timely deliver and install a Blast Resistant Building ("BRB") to MEBN's Baghdad, Iraq office. The issue before the Court is whether the Court should grant MEBN's Motion for Summary Judgment on (1) MEBN's breach of contract claim, (2) MEBN's unjust enrichment claim, (3) MBI's breach of contract claim, and (4) MBI's breach of the implied covenant of good faith and fair dealing claim.

The Court GRANTS MEBN's Motion for Summary Judgment for two reasons. First, the Court GRANTS MEBN's Motion for Summary Judgment on MEBN's breach of contract claim and MBI's breach of contract claim because MBI failed to timely deliver and install the BRB at MEBN's Baghdad office and the force majeure contract provision does not apply. Second, the Court GRANTS MEBN's Motion for Summary Judgment on MBI's breach of the implied covenant of good faith and fair dealing claim because Virginia law does not recognize an independent cause of action for this claim. The Court DENIES MEBN's Motion for Summary Judgment as to its unjust enrichment claim because an unjust enrichment claim cannot be brought in the face of an express contract.

I. BACKGROUND

MEBN is a broadcasting company that provides news and information, in Arabic, to countries in the Middle East and North Africa. (Compl.¶ 1.) "[MEBN's] mission is to provide objective, accurate, and relevant news and information to the people of the Middle East about the region, the world, and the United States." (*Id.* ¶ 5.) MEBN is fully-funded by the United States government. (*Id.*) Though headquartered in Springfield, Virginia, MEBN also has branches in Dubai, Beirut, Jerusalem, Cairo, Washington, D.C., and Baghdad. The Baghdad office has been open since 2004 and employs 77 news professionals, technicians, and administrative staff. (*Id.* ¶ 6.)

Since its opening, the Baghdad office rented space in the Palestine Hotel. (*Id.* ¶ 7.) In 2013, after facing eviction from the Palestine Hotel space for reasons not relevant here, MEBN rented office space elsewhere. (*Id.* ¶ 9.) However, this space was insufficient because it did not have space for a television studio. (*Id.*) MEBN decided to buy a BRB where it could assemble and house a television studio. (*Id.* ¶ 10.) MEBN sent out a Request for Quote ("RFQ") to various American manufacturers for suitable BRBs, noting that delivery and installation of the BRB in Baghdad was to be done by December 31, 2013. (*Id.* ¶¶ 10–11.) According to MEBN, the companies submitting quotes for the BRB knew that timing was being driven by MEBN's pending eviction from the Palestine Hotel and that it was "critical[ly] important" that MEBN's Baghdad news operation continue unabated. (*Id.* ¶ 12.)

***2** MBI received MEBN's RFQ. MBI billed itself as an expert "in the construction of BRBs" and as an "expert in the delivery of BRBs to locations in the Middle East." (*See* Doc. 32–2 at 266.) On September 23, 2013, MEBN and MBI entered into a contract ("the Agreement"), under which MEBN was to pay $473,611 to MBI and MBI was to deliver

and install the BRB at MEBN's Baghdad office. (*See* Doc. 32 ¶ 6; Doc. 32–3.) The Agreement required delivery and installation of the BRB by December 31, 2013. (Doc. 32 ¶ 6.) The Agreement also required MBI to prepare a notarized progress report to accompany each invoice. MEBN had no obligation to pay MBI until it received the proper invoices from MBI. (*Id.* ¶ 9.) Finally, the Agreement included a waiver clause, which provided that "(n)either party's failure to enforce, nor waiver of, any right or term hereof, shall be considered a continuing waiver of any of that party's rights or right to enforce said term." (Doc. 32–3 at 14, ¶ 19.)

On September 24, 2013, MBI prepared a progress report and invoice that conformed to the agreement. MBI submitted these documents to MEBN and requested a $187,001 down payment, which MEBN tendered on October 2, 2014. (Doc. 32 ¶ 12.) MBI failed to submit any additional progress reports or invoices to MEBN. (*Id.*)

According to the Agreement, the BRB was to be delivered to MEBN in Baghdad by December 31, 2013. On December 6, 2013, MBI represented that the delivery date would be met. However, on December 20, 2013, MBI informed MEBN that the manufacture, delivery, and installation of the BRB were four-to-five weeks behind schedule. (*Id.* ¶ 22–23.) MBI estimated that the new delivery date would be in late-February or early-March, which is eight-toeleven weeks after the original due date. (*Id.* ¶ 27.) The BRB was not delivered by December 31,2013.

On January 23, 2014, the parties executed an Amendment to the Agreement ("First Amendment"), under which MBI agreed to manufacture, deliver, and install the BRB at MEBN's Baghdad office by April 16, 2014. (*Id.* ¶¶ 29, 32.) The First Amendment included a $100,000 credit to MEBN and shifted to MBI the risk of loss of the BRB. (*Id.* ¶¶ 30–31.) On April 10, 2014, MBI informed MEBN that the April 16th deadline would not be met. (*Id.* ¶ 35.) On April 15, 2014, MBI sent a revised delivery schedule to MEBN, including a new deadline of June 3, 2014, for the delivery and installation of the BRB. MBI also missed this deadline. (*Id.* ¶¶ 36–38.) However, MBI sent MEBN photos of what appeared to be a completed BRB. (*Id.* ¶ 40.)

On July 3, 2014, MEBN extended a final written offer to MBI ("July 3rd Letter"). The offer stated that MEBN would accept delivery of the BRB at its Baghdad office provided that the delivery was completed by August 3, 2014. (*Id.* ¶ 41.) The offer also stated that the August 3rd deadline was not flexible and that it "would not be waived or excused for any reason whatsoever." (Doc. 32–19.) MBI accepted this offer in writing on July 7, 2014. (Doc. 32 ¶ 42.)

***3** MBI failed to deliver the BRB by August 3, 2014. MBI claims that it was unable to deliver the BRB because the delivery routes were blocked due to the ongoing conflict involving ISIS, invoking a "force majeure" defense. (Doc. 39 ¶ 47.)

On September 11, 2014, MEBN filed this case against MBI, asserting claims of breach of contract and unjust enrichment. On December 19, 2014, MBI asserted counterclaims of breach of contract and breach of the implied covenant of good faith and fair dealing against MEBN. On May 22, 2015, MEBN filed a Motion for Summary Judgment as to all claims. That motion is now before the Court.

II. DISCUSSION

A. Standard of Review

Under Federal Rule of Civil Procedure 56, the Court must grant summary judgment if the moving party demonstrates that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. FED.R.CIV.P. 56(c).

In reviewing a motion for summary judgment, the Court views the facts in a light most favorable to the non-moving party. *Boitnott v. Corning, Inc.*, 669 F.3d 172, 175 (4th Cir.2012) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)). Once a motion for summary judgment is properly made and supported, the opposing party has the burden of showing that a genuine issue of material fact for trial exists. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986): *Bouchat v. Balt. Ravens Football Club, Inc.*, 346 F.3d 514, 522 (4th Cir.2003) (citations omitted). "[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Emmett v. Johnson*, 532 F.3d 291, 297 (4th Cir.2008) (quoting *Anderson*, 477 U.S. at 247–48).

A "material fact" is a fact that might affect the outcome of a party's case. *Anderson,* 477 U.S. at 248; *JKC Holding Co. v. Wash. Sports Ventures, Inc.,* 264 F.3d 459,465 (4th Cir.2001). Whether a fact is considered to be "material" is determined by the substantive law, and "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson,* 477 U.S. at 248; *Hooven–Lewis v. Caldera,* 249 F.3d 259, 265 (4th Cir.2001).

A "genuine" issue concerning a "material" fact arises when the evidence is sufficient to allow a reasonable jury to return a verdict in the nonmoving party's favor. *Res. Bankshares Corp. v. St. Paul Mercury Ins. Co.,* 407 F.3d 631, 635 (4th Cir.2005) (quoting *Anderson,* 477 U.S. at 248). Rule 56(e) requires the nonmoving party to go beyond the pleadings and by its own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue of material fact for trial. *Celotex Corp. v. Catrett,* 477 U.S. 317, 324 (1986).

B. Analysis

***4** The Court GRANTS MEBN's Motion for Summary Judgment for two reasons. First, the Court GRANTS MEBN's Motion for Summary Judgment on MEBN's breach of contract claim and MBI's breach of contract claim because MBI failed to timely deliver and install the BRB at MEBN's Baghdad office and the force majeure contract provision does not apply. Second, the Court GRANTS MEBN's Motion for Summary Judgment on MBI's breach of the implied covenant of good faith and fair dealing claim because Virginia law does not recognize an independent cause of action for this claim. The Court DENIES MEBN's Motion for Summary Judgment as to its unjust enrichment claim because an unjust enrichment claim cannot be brought in the face of an express contract.

1. *Breach of Contract*

The Court GRANTS MEBN's Motion for Summary Judgment on MEBN's breach of contract claim and MBI's breach of contract claim because MBI failed to timely deliver and install the BRB at MEBN's Baghdad office and the force majeure contract provision does not apply. To prove a breach of contract claim, a party must prove the existence of the following elements: (1) a legally enforceable obligation of a defendant to a plaintiff; (2) the defendant's violation or breach of that obligation; and (3) injury or damage to the plaintiff caused by the breach of obligation. *Filak v. George,* 267 Va. 612, 619 (2004).

MBI's breach of contract argument is premised on the notion that MEBN breached a contract it created in settlement discussions. However, because the Court granted MEBN's Motion in Limine to Exclude Confidential Settlement Communications under FED.R.EVID. 408, (*see* Doc. 47), MBI's claim is baseless and summary judgment in MEBN's favor must be granted.

With regard to MEBN's breach of contract claim, at oral argument the parties agreed that the final offer contained in the July 3rd Letter was the operative agreement for the breach of contract analysis. The parties do not dispute that MBI breached the contract contained in the July 3rd Letter when it failed to deliver and install the BRB by August 3, 2014. However, the parties do dispute whether MBI's nonperformance is excused as MBI asserts force majeure as an affirmative defense. MBI asserts that ISIS' blocking of delivery routes implicates the force majeure provision. The Agreement's force majeure provision provides as follows:

> Additionally, delivery of Client's building, or performance of MBI's obligations, may be affected by matters outside the control of either party, such as war, weather, and acts of God. In some cases, certain governmental or regulatory approvals or inspections are required either prior to production or prior to delivery. In calculating the date of delivery, MBI estimates a reasonable period of time in which such approvals are ordinarily granted; however, MBI has no control over these matters and MBI reserves the right to adjust the delivery date accordingly. Specified delivery dates may be changed by Client only pursuant to the Change Order provisions set forth in Section 7 herein.

***5** (Doc. 32–3 ¶ 9). The Court finds that the force majeure clause is inapplicable for two reasons: (1) the sole reason MBI

failed to timely deliver the BRB is because it failed to pay a subcontractor, not because of any effects of a war; and (2) the force majeure provision was superseded by language in the July 3rd Letter that stated that the August 3, 2014 deadline had to be met, no exceptions.

First, the force majeure clause is inapplicable because Philip Moore, President of MBI during the time period relevant to this litigation, testified that the *sole* reason for MBI's failure to deliver the BRB was because MBI did had not paid a subcontractor. As Moore testified:

> Q: The ... failure of MBI to take the BRB from Turkey and deliver and install it in Baghdad, Iraq in July or August of 2014 was solely because RB Group failed to or refused to release the BRB to MBI's transporter company due to MBI's failure to pay RB Group moneys that were owed on other contracts?
>
> A: Yes.

(Doc. 32 ¶ 43.) Because MBI's failure to pay a subcontractor is not a reason for nonperformance under the Agreement's force majeure provision, the Court finds that the force majeure provision is inapplicable.

Second, assuming that the Court found that the ISIS conflict implicated the force majeure provision, the Court finds that the terms of the July 3rd Letter supersede the force majeure provision. Courts must construe contracts as they are written. *Christopher Assocs. v. J.C. Sessoms, Jr.,* 245 Va. 18, 22 (1993). "The guiding light in the construction of a contract is the intention of the parties as expressed by them in the words they have used, and courts are bound to say that the parties intended what the written instrument plainly declares." *W.F. Magann Corp. v. Virginia—Carolina Elec. Works, Inc.,* 203 Va. 259, 264 (1962).

The offer in the July 3rd Letter, which was accepted in writing by MBI, contained a provision that the August 3rd deadline was not flexible, stating that it "*would not be waived or excused for any reason whatsoever.*" (Doc. 32–19) (emphasis added). The Court finds that the plain language of the July 3rd Letter controls the contract and supersedes the force majeure provision. Because that language renders the force majeure language obsolete, the force majeure clause is inapplicable.

In sum, there is no genuine issue of material fact as to the breach of contract claims because MBI failed to timely deliver and install the BRB and the force majeure provision is inapplicable. Accordingly, the Court finds that MEBN's Motion for Summary Judgment on the parties' breach of contract claims must be GRANTED.

2. *Implied Covenant of Good Faith and Fair Dealing*

The Court GRANTS MEBN's Motion for Summary Judgment on MBI's breach of the implied covenant of good faith and fair dealing claim because Virginia law does not recognize an independent cause of action for this claim. "In Virginia, every contract contains an implied covenant of good faith and fair dealing." *Enomoto v. Space Adventures, Ltd.,* 624 F.Supp.2d 443, 450 (E.D.Va.2009) (citations omitted). The implied covenant of good faith and fair dealing "simply bars a party from 'acting in such a manner as to prevent the other party from performing his obligations under the contract.' " *De Vera v. Bank of Am., N.A.,* Civil Action No. 2:12cv17, 2012 WL 2400627, *3 (E.D. Va. June 25, 2012) (quoting *E. Shore Markets, Inc. v. J.D. Assocs. Ltd. P'ship,* 213 F.3d 175, 182 (4th Cir.2000)).

***6** Here, the record evidence shows that MBI breached the contract by failing to timely deliver and install the BRB, in part because MBI failed to compensate a subcontractor. Because the Court finds that MBI failed to establish a genuine issue of material fact as to whether MEBN acted in a manner to prevent MBI from performing its obligations under the contract, MEBN's Motion for Summary Judgment on this claim must be GRANTED.

3. *Unjust Enrichment*

The Court DENIES MEBN's Motion for Summary Judgment as to its unjust enrichment claim because an unjust enrichment claim cannot be brought in the face of an express contract. In Virginia, in order to succeed on a claim of unjust enrichment, MEBN must prove: (1) MEBN conferred a benefit on MBI; (2) MBI knew of the benefit and should reasonably have expected to repay MEBN; and (3) MBI accepted or retained the benefit without paying for its value. *See Schmidt v. Household Fin. Corp., II,* 276 Va. 108, 116 (2008) (citations omitted). However, "an action for unjust enrichment is quasi-contractual in nature and may not be brought in the face of an express contract." *Acorn Structures, Inc. v. Swantz,* 846 F.2d 923, 926 (4th Cir.1988) (citations omitted).

At oral argument, MEBN and MBI conceded that an express contract existed. Accordingly, MEBN's unjust enrichment claim must fail as a matter of law.

III. CONCLUSION

The Court GRANTS MEBN's Motion for Summary Judgment for two reasons. First, the Court GRANTS MEBN's Motion for Summary Judgment on MEBN's breach of contract claim and MBI's breach of contract claim because MBI failed to timely deliver and install the BRB at MEBN's Baghdad office and the force majeure provision does not apply. Second, the Court GRANTS MEBN's Motion for Summary Judgment on MBI's breach of the implied covenant of good faith and fair dealing claim because Virginia law does not recognize an independent cause of action for this claim. The Court DENIES MEBN's Motion for Summary Judgment as to its unjust enrichment claim because an unjust enrichment claim cannot be brought in the face of an express contract.

Accordingly, it is hereby

ORDERED that MEBN's Motion for Summary Judgment (Doc. 31) is **GRANTED IN PART** as to MEBN's breach of contract claim, MBI's breach of contract claim, and MBI's breach of the implied covenant of good faith and fair dealing claim; it is further

ORDERED that MEBN's Motion for Summary Judgment (Doc. 31) is **DENIED IN PART** as to MEBN's unjust enrichment claim; it is further

ORDERED that the jury trial scheduled for August 10–12, 2015, will be solely on the issue of damages.

IT IS SO ORDERED.

All Citations

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United States District Court,
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OLD DOMINION ELECTRIC COOPERATIVE, Plaintiff,
v.
RAGNAR BENSON, Inc., Defendant.

No. Civ.A. 3:05CV34.
|
Aug. 4, 2006.

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FINDINGS OF FACT AND CONCLUSIONS OF LAW

SPENCER, Chief J.

I. FINDINGS OF FACT

***1** 1. Old Dominion Electric Cooperative ("ODEC") is a not-for-profit Virginia utility aggregation cooperative. It is owned by and supplies power to its 12 member cooperatives located in Virginia, Maryland, and Delaware, who in turn are owned by and supply power to their members/customers. Tr. 78:4-10 (Debiec); Am. Compl. ¶ 1; Answer to Am. Compl. ¶ 1. Ragnar Benson, Inc. ("RBI") is an Illinois corporation engaged in the construction business. RBI is a wholly owned subsidiary of The Austin Company.

2. In the summer of 2002, ODEC solicited bids from various companies for an "Engineer, Procure and Construct Contract" (the "EPC Contract") to engineer, procure, and construct a power generating facility (the "Facility" or "Generation Station") to be located in Fauquier County, Virginia (the "County"), on a site known as Marsh Run (the "Project"). The Facility was to consist of three combustion turbines that could be fired on both natural gas and oil with a nominal power output of 680 megawatts. It would be a "peaking" facility to be used only during Virginia's peak demands for power in summer and winter. Tr. 78:24-79:13 (Debiec); P 26 Recitals (p.1), § 3.3; P 108 § 1.0; P 675.

3. The EPC Contract is a turnkey contract requiring the EPC Contractor to provide the engineering, procurement, construction, start-up, and commissioning, resulting in a fully functioning power plant. Tr. 78:24-79:5 (Debiec); Berthelsen Dep. 68:1-4.

4. All bidders received the same pre-bid information. P 25, 244, 676, 678, 679; Tr. 81:9-84:2 (Debiec).

5. The bid documents informed bidders that ODEC would provide the land, combustion turbines, electrical generators, and certain related equipment, and the EPC Contractor would have to design and build the Facility to meet ODEC's performance requirements. P 26 § 3 .3; P 108 § 1.0.

6. RBI was one of five bidders for the Project. Tr. 84:21-85:1 (Debiec); 2184:10-18 (Hobratschk); 2221:24-2222:18 (Hobratschk); P 675.

7. Unlike the other bidders, RBI had never been the EPC Contractor for construction of a power plant. At a post-bid meeting at Burns & Roe's ("B & R") offices, the Owner's Engineer on the Project, in an attempt to secure award of the EPC Contract, RBI led ODEC to believe that it had previously been an EPC Contractor on similar power plant projects. RBI saw the Marsh Run Project as a means of becoming known as an EPC Contractor for power plants. Tr. 217:22-218:4 (Debiec); 89:9-90:6 (Debiec); 766:18-767:5 (Irvin); Berthelsen Dep. 13:12-15; P 99.

8. Before submitting its bid to ODEC, RBI attended a pre-bid meeting with ODEC and other bidders where RBI was permitted to ask questions about the bid documents and the Project. RBI also obtained bids from several subcontractors. Tr. 81:9-84:2 (Debiec); 1115:14-1131:20 (Irvin); P 244, 676, 678, 679.

9. RBI based its bid on at lest a 50-hour work week. Tr. 1109:22-1131:20 (Irvin); 2058:2-2064:13 (Kern); P 23, 24, 103, 268, 269, 270, 359, 541, 683, 684, 685, 686, 687, 688, 689.

***2** 10. RBI submitted its bid on or about October 7, 2002, and submitted a revised bid on October 8 to correct mistakes in its bid. P 27; Tr. 84:12-20 (Debiec).

11. Unlike the bids of the other bidders, RBI's bid contained very few qualifications or exceptions. Tr. 84:12-85:1

(Debiec); P 27 (Book 2, Schedule V, "Basis of Bid," Bates 2090), 1197, 1198, 1199, 1201, 1202, 1203, 1204.

12. After submitting its bid, RBI exchanged correspondence with B & R in an effort to clarify certain items in RBI's bid. P 28, 29, 30, 31, 32, 33, 34, 35, 36, 99. Tr. 85:2-93:14 (Debiec).

13. RBI initially qualified its bid to state that it assumed the material on site would be suitable to use as fill and the EPC Contractor would not be responsible for bringing fill material from off site. In negotiations, RBI withdrew this qualification. P 27 (Book 2, Schedule V, "Basis of Bid," Bates 2090), 29, 32; Tr. 86:10-87:11 (Debiec).

14. RBI qualified its bid to state that the final site elevation would be 275 feet, which is exactly what the bid documents said it would be. P 27 (Book 2, Schedule V, "Basis of Bid," Bates 2090), 244; Hetrick Dep. 106:15-108:17, 134:20-137:22.

15. In response to a Request for Clarification by B & R, RBI confirmed that the drawings included with the request for proposal were conceptual and for informational purposes. Tr. 87:12-24 (Debiec); P 29.

16. Unlike all other more knowledgeable bidders, RBI made no exception or qualification in its bid concerning the EPC Contractor's responsibility for excavating "hard" rock on the site (i.e., rock that could not be "ripped" using a backhoe or bulldozer). P 27, 1197, 1198, 1199, 1201, 1202, 1203, 1204; Hetrick Dep. 134:20-140:16; RBI 30(b)(6) Dep. 48:22-49:5; Melsop Dep. 120:8-122:9.

17. At a post-bid meeting in November 2002 and in subsequent correspondence, RBI acknowledged and accepted the fact that it had the responsibility to manage the GE Turbine Purchase Agreement on behalf of ODEC. Tr. 90:8-91:23 (Debiec); P 32.

18. RBI did not submit the lowest gross bid. Black & Veatch, who submitted the lowest gross bid, specifically required additional payment for the excavation of hard rock, with a cap on such payment of $500,000. This, along with Black & Veatch's other adders, made its bid higher than RBI's and still left ODEC with risk for subsurface conditions. ODEC chose to award the EPC Contract to RBI because, after evaluating the exceptions taken by all of the bidders, RBI had the lowest cost bid submitted for the Project. P 1196, 1198, 1199, 1200; Tr. 95:14-24 (Debiec).

19. Through their respective lawyers, ODEC and RBI negotiated the terms contained in Volume 1 of the EPC Contract (the "commercial terms"). Berthelsen Dep. 29:17-30:10, 63:4-64:11.

20. Among the provisions of the commercial terms specifically negotiated by RBI and ODEC were the daily amount of and the cap on liquidated damages found in § 12 of the commercial terms. P 26, 27 (Book 2, Schedule V, "Basis of Bid," Bates 2090), 32, 319, 1196; Tr. 92:17-93:3 (Debiec); 93:15-95:1 (Debiec); 226:5-229:24 (Debiec); Melsop Dep. 122:12-22.

***3** 21. ODEC issued RBI a Limited Notice to Proceed on December 4, 2002. The Limited Notice to Proceed allowed RBI to immediately begin working on permitting issues, among other things. P 578; Tr. 95:25-96:23 (Debiec).

22. The parties executed the EPC Contract on December 16, 2002, P 26, 108, 580, 581, 582.

23. The parties executed Amendment # 1 to the EPC Contract on April 2, 2003. The Amendment, among other things, updated the GE Turbine Purchase Agreement included as part of the EPC Contract to include Revision 1 dated December 2002. Tr. 97:17-98:8 (Debiec); P 1091, 1092, 1113.

24. Over the course of the EPC Contract, the parties executed 34 change orders for a final Contract Price of $47,475,967.35. The final Scheduled Substantial Completion Date was May 5, 2004. Tr. 99:16-100:15 (Debiec); P 579.

25. In accordance with § 3.4 of the EPC Contract, ODEC had the responsibility to obtain the permits listed in Appendix III to the EPC Contract: "Owner shall obtain all approvals, licenses and permits listed in *Appendix III* hereto." P 26.

26. The permits listed in Appendix III are the Air Permit and the Certificate of Public Convenience and Necessity (the "CPCN"). P 581.

27. Under § 3.4 of the EPC Contract, RBI was responsible for obtaining "all other approvals, licenses and permits that must be obtained under all Applicable Laws for the design, engineering, procurement, construction, startup, and testing of the Facility before the Final Completion Date." P 26.

28. Addendum No. 2, Paragraph 6 to the Invitation to Bid specified, "Regarding availability of the site for the start of clearing and grubbing, assume that the Air Permit and CPCN will be available at the time of award. The constraint then to start working is obtaining the required local permits, which are the responsibility of the EPC Contractor." P 676.

29. RBI knew that it had the responsibility to complete and submit the Major Site Plan for the Project to the Fauquier County Department of Community Development (the "Department"), the governmental entity responsible for the plan's approval. Tr. 934:8-12 (Irvin).

30. The Major Site Plan consisted of, among other things, several checklists titled Major Site Plan Checklist, SWM/BMP (Storm Water Management and Best Management Practices) Checklist, and Virginia Department of Transportation ("VDOT") Checklist and associated documents. P 105.

31. During the bidding phase of the Project, RBI submitted information regarding its Basis of Bid, one item of which indicated that the bid included the costs of the building and zoning permits. Tr. 85:24-86:4 (Debiec); P 27 (Book 2, Schedule V, Division 1, Item 2, Bates 0290); Debski Dep. 183:1-184:8.

32. In response, Mr. Seb Marano, of B & R, sent a clarification to RBI stating, "It should be clear that the Owner is obtaining only those permits discussed in Appendix III of the RFP. *All* other permits that are required are the responsibility of the EPC Contractor. Please verify." P 28; Tr. 85:2-5 (Debiec). RBI responded, "Ragnar Benson, Inc. understands that the Owner is obtaining only those permits discussed in Appendix III of the RFP. All other permits that are required are the responsibility of Ragnar Benson, Inc." Tr. 85:13-86:5-87 (Debiec); P 29.

***4** 33. RBI withdrew its qualification regarding permits in its Basis of Bid. Tr. 85:13-86:9 (Debiec); P 29, 32.

34. In November 2003, RBI met with ODEC and B & R. Tr. 88:1-5 (Debiec). At that meeting, RBI made a PowerPoint presentation. Tr. 88:6-9 (Debiec); P 99. During that presentation, RBI, ODEC, and B & R had a discussion in which it was made clear that RBI was responsible for obtaining all permits other than the air permit and Certificate of Public Convenience and Necessity. Tr. 88:11-89:8 (Debiec); P 99.

35. The Department of Community Development's Major Site Plan review ordinarily takes from four to six months for a project like Marsh Run. Tr. 301:5-8 (Carr).

36. In the usual course of the Department's business, an applicant's first submission of its Major Site Plan is reviewed against the checklists associated with the Major Site Plan. Tr. 298:22-23 (Carr); 305:5-8 (Carr); 2443:16-18 (Carr).

37. If the submission does not contain all the information required on the checklists, the submission is not accepted by the Department and is returned to the applicant. Tr. 305:22-306:21 (Carr). Once an application conforms with the checklists and all required information is submitted, the Department accepts the submission for review and the review period mandated by ordinance (60 days) begins. Tr. 305:7-8 (Carr); 306:19-307:2 (Carr).

38. Upon accepting the application for the Major Site Plan, the Department refers the various parts of the submission to other state and county agencies (e.g., VDOT and John Marshall Soil & Water Conservation District) for review and input. Tr. 303:24-304:3 (Carr); 304:9-19 (Carr). It generally takes 45 days for the County agencies to complete their reviews of the submission and to return comments to the Department. Tr. 299:7-8 (Carr); 308:3-4 (Carr). The agency review process can take longer if referral agencies identify issues that need clarification or revision or if parts of the application otherwise do not meet requirements and resubmission is required. Tr. 299:11-15 (Carr); 308:4-7 (Carr). VDOT and the John Marshall Soil & Water Conservation District have an additional 45-day review period if those agencies choose to take that period of time. Tr. 298:20-299:22 (Carr); 304:9-19 (Carr); 308:10-14 (Carr).

39. After approval of the Major Site Plan, the Department moves on to obtaining the necessary documents for the Land Disturber's Permit application. The component parts of this application are the Land Disturber's Permit (the "LDP"), Land Developer's Agreement (the "LDA"), and Storm Water/BMP Agreement. To execute and approve the LDA, the Department requires a bond to be posted in an amount set by the County Engineering Department. The Department typically takes 30 days after approval of the Major Site Plan to execute and approve the LDP application. Tr. 299:23-300:18 (Carr).

40. In the context of § 3.4 of the EPC Contract, John Irvin, RBI's project manager at Marsh Run, spearheaded RBI's

efforts to obtain the approvals, licenses, and permits necessary for the Project. Tr. 788:3-6 (Irvin); 934:20-22 (Irvin).

***5** 41. The first time RBI contacted Fauquier County was during the bid stage to learn how much construction permits were going to cost in order to put that information in its bid submission to ODEC. Tr. 788:9-12 (Irvin). At this point, RBI made no effort to determine what approvals, licenses, and permits might be required or how long it would take to obtain them. Tr. 935:10-13 (Irvin).

42. Irvin did not investigate the requirements for obtaining necessary approvals, licenses, and permits until on or about January 21, 2003, more than six weeks after the Limited Notice to Proceed. Tr. 792:25-793:4 (Irvin); P 104.

43. Only after Irvin's January 21, 2003 initial visit to Fauquier County did Irvin find out for the first time that the Department had stringent requirements for Major Site Plans and had long lead times for submissions to be reviewed by the Technical Review Committee. Tr. 793:17-794:5 (Irvin). The time it would take to get the necessary approvals was longer than Irvin had anticipated. Tr. 938:22-25 (Irvin); P 104.

44. The comprehensive nature of the requirements and the length of time necessary to obtain an approved Major Site Plan were reinforced during pre-application meetings Irvin had with County officials on or about January 24, 2003, and again on or about February 6, 2003. Tr. 795:4-7 (Irvin); 793:10-13 (Irvin); P 104.

45. Throughout the early stages of the Project, RBI did not have a clear understanding of the proper permitting procedure. RBI confused the Major Site Plan with the Land Developer's Agreement, which RBI thought were one and the same. Tr. 939:22-940:8 (Irvin).

46. Not until January 24, 2003 did RBI know that it had to submit the Major Site Plan to the Department no later than February 10, 2003 (i.e., only 17 days later) in order to have its plan reviewed on March 18, 2003 by the Department's Technical Review Committee. Tr. 940:9-22 (Irvin). RBI also then learned that if the Major Site Plan were not approved, the 30-day approval cycle would start over again. Tr. 940:23-941:12 (Irvin); P 105. To be able to get approval near the scheduled start date of April 1, 2003, RBI decided to submit whatever it had by February 10, 2003. Tr. 941:13-17 (Irvin).

47. On February 7, 2003, RBI executed a subcontract with Framatome for Framatome to provide engineering and design support for the Project. Debski Dep. 54:11-16; Lindsay Dep. 10:18-19, 25:1-16; P 432. Framatome's engineering work supported RBI's permitting and approval efforts. Schlumpf Dep. 9:25-10:10; Lindsay Dep. 26:9-15.

48. On January 24, 2003, Irvin sent to Schlumpf, Framatome's engineer, the SWM/BMP, the VDOT Subdivision and Site Plan, and the Major Site Plan checklists for his and Framatome's use in developing the engineering plans. P 388.

49. A preliminary schedule of deliverables from Framatome and Schlumpf dated January 28, 2003 showed that Framatome planned to issue the initial engineering drawings for permitting on March 10, 2003. Schlumpf Dep. 46:18-47:9; P 394; Tr. 944:5-15 (Irvin). Framatome understood that those deliverables would be used to support the permitting effort. Lindsay Dep. 28:10-16.

***6** 50. On January 29, 2003 at the Monthly Project Meeting in Charlotte, North Carolina, RBI accelerated Framatome's work by requiring it to issue drawings for permitting by February 10, 2003, a month earlier than the preliminary schedule. Lindsay Dep. 38:3-39:8; P 12, 400, 438.

51. Framatome indicated to RBI at the January 29, 2003 Project Meeting, that the February 10 submittal date was unrealistic in light of issues related to drawings. RBI insisted, however, that Framatome meet the February 10, 2003 submittal date. Lindsay Dep. 36:2-37:2; P 437. As a result, the documents submitted to the Department for approval were grossly inadequate, demonstrating considerable ignorance of what the Department would require. Lindsay Dep. 48:15-49:2; P 439; Tr. 306:4-13 (Carr).

52. The start of construction was delayed because RBI failed to adequately research and plan for obtaining the Major Site Plan approval.

53. David Berthelsen, Senior Vice President and General Manager, RBI-Pittsburgh, notified William Melsop, then-Chairman of the Board and Chief Executive Officer of The Austin Company, via email on February 3, 2003, that Fauquier County wanted more engineering than RBI would normally face at that stage of the Project. P 106.

54. RBI knew at the end of January 2003 that "it was going to be a difficult task to get a site plan together" by February 10,

2003. Tr. 797:18-20 (Irvin). RBI decided, however, to "submit something just to try to get a reaction from the County." Tr. 797:21-22 (Irvin).

55. RBI made its first submission pursuant to the Major Site Plan Checklist, the SWM/BMP Checklist, the VDOT Checklist, and associated documents to the Department on or about February 10, 2003. P 146.

56. The Department's first pass at RBI's first submission was a compliance check against all the Major Site Plan checklists and not a detailed review reserved for complete submissions. Because RBI's submission lacked 28 out of 45 items on the checklists, the Department viewed the submission as seriously deficient, and, therefore, concluded that it could not be reviewed as would be the case for a complete submission. Tr. 305:5-8 (Carr); 306:7-12 (Carr); 2444:21-2445:3 (Carr).

57. Some of the identified deficiencies were not simple issues, but deficiencies directly traceable to RBI's acceleration of Framatome's engineering and design support. Tr. 320:10-24 (Carr); 2443:7-11 (Carr).

58. Even though the process is linear, RBI was able to submit engineering upgrades at any time to the Department in support of RBI's submission. Tr. 2444:7-14 (Carr). Further, RBI could submit several documents in parallel for departmental approval. Tr. 313:11-12 (Carr).

59. ODEC submitted its application for an amendment to the Zoning Special Exception on February 10, 2003, after finalizing the location of the centerline for the access road. Tr. 103:20-22 (Debiec).

60. It was not necessary for ODEC to have in place recorded easements and rights-of-way at the time of RBI's first submission of the Major Site Plan to the Department. Tr. 2442:14-2443:4 (Carr). The Department's return of the Major Site Plan submission was in no way related to easements and right-of-way issues. Tr. 2443:14-18 (Carr).

***7** 61. Another issue that did not impact approval of the Major Site Plan was the sanitary permit, which was RBI's responsibility. P 29; Tr. 969:24-970:4 (Irvin). Not having a sanitary permit in place had no impact on the Department's decision to return RBI's initial submission. Tr. 2446:10-15 (Carr).

62. Although the Major Site Plan Checklist has provisions for an emergency response plan, the Department did not need a final version of the plan until approval of the Major Site Plan. The emergency response plan had no effect on the Department's decision to return the initial submission; nor did it have any effect on the date when the Department finally approved the Major Site Plan. Tr. 2446:16-24 (Carr).

63. After the Department returned RBI's initial submission, RBI did not immediately resubmit the Major Site Plan, choosing instead to "wait[ ] for those administrative things [i.e., approval of the amendment to the Zoning Special Exception] before we submitted an updated plan." Tr. 815:16-18 (Irvin).

64. Had RBI asked the Department, RBI would have been informed that it need not have waited for approval of the amendment to the Zoning Special Exception. Tr. 2445:24-2446:9 (Carr). RBI ultimately decided to resubmit its Major Site Plan long before the County Board of Supervisors approved the amendment to the Zoning Special Exception on May 18, 2003. Tr. 830:6-9 (Irvin).

65. Under § 1.2 of the Technical Specifications of the EPC Contract, ODEC was entitled to approve the design of certain parts of the Project, including the Administrative Building. P 108. Only at the conclusion of the Monthly Project Meeting on March 27, 2003 did RBI show ODEC plans for the Administrative Building for ODEC's approval. Tr. 823:20-23 (Irvin); 345:20-25 (Raymond). RBI had designed the building so that the control room windows faced the access road rather than the combustion turbine generators (the "CTGs"). Tr. 345:25-346:3 (Raymond). Applying common sense, ODEC asked that the building be reoriented so that the control room windows faced the CTGs, thereby allowing ODEC's operators to view the units while in operation. Tr. 346:3-6 (Raymond). RBI agreed to change the building's orientation without question or complaint. Tr. 346:16-22 (Raymond). RBI never asked ODEC for a change order related to the Administrative Building. Tr. 963:15-19 (Irvin). Because RBI's submission had already been returned, the reorientation of the administrative building did not delay approval of the Major Site Plan.

66. RBI received the Department's letter returning RBI's first submission on March 17, 2003. Irvin Dep. 101:1-8; P 147.

67. RBI made a second submission of the Major Site Plan and accompanying documents on April 10, 2003, nine days after

the scheduled start of construction. Tr. 814:23-24 (Irvin); P 149.

68. Because the Department and referral agencies could review the Major Site Plan submission while the amendment to the Zoning Special Exception was pending, the amendment to the Zoning Special Exception played no role in the timeline of the Major Site Plan's approval. Tr. 309:7-310:8 (Carr).

***8** 69. After RBI's first submission, ODEC specifically asked the County if there was anything ODEC needed to furnish in order not to hold up the process. The County indicated that there was nothing for ODEC to furnish at that time because it was still reviewing the Major Site Plan submission. Tr. 295:19-23 (Debiec).

70. The Department treated RBI's second submission as one moving along the conventional timeline of four to six months for approval. Tr. 308:8-9 (Carr). Even this submission, however, contained deficiencies, and the Department was not sure that the submission would even be approved in the usual four to six month review timeline. Tr. 310:14-17 (Carr).

71. As late as April 11, 2003, RBI still did not have a complete understanding of all the approvals, licenses and permits required to begin construction, asking the Department whether RBI needed to submit a "Land Disturber's agreement [sic]." P 150.

72. On May 19, 2003, the County provided feedback to RBI on its April 10 re-submission of the Major Site Plan application. P 152.

73. At the May 22, 2003, Project Monthly Meeting in Glen Allen, Virginia, RBI asked ODEC for help with the County because it had failed to secure the permits required to begin construction by April 1, 2003 ("It is critical that actions be taken to secure the permits in order to minimize further slip in the project schedule."). Tr. 107:9029 (Debiec); P 1243. Immediately, Debiec left the meeting and spoke to John Lee, who arranged for a meeting with representatives of Fauquier County for the very next day, May 23, 2003. Tr. 108:3-10 (Debiec); 331:4-10(Lee).

74. Lee, ODEC's Vice President of Member and External Relations, met with representatives of RBI, Framatome, and Fauquier County to assist RBI in getting the permitting process back on track. Tr. 331:18-332:16(Lee).

75. Several meetings among RBI, ODEC, Framatome, and the Department were held at ODEC's instigation so that outstanding issues with the Major Site Plan could be resolved and the Major Site Plan could be finalized as quickly as possible. Meetings took place on May 23, 2003 and June 4, 2003. Tr. 835:17-836:8 (Irvin); 331:18-332:16(Lee); 333:4-24(Lee); P 152, 153, 403.

76. During the May 23, 2003 meeting, Schlumpf produced a list of numerous areas that needed correction for Major Site Plan approval. P 403. A subsequent meeting was scheduled for June 4, 2003 for coordination prior to the final submission of RBI's application. Tr. 314:24-315:24 (Carr).

77. At the May 23, 2003 meeting, the Department made it clear that RBI could submit necessary paperwork in parallel to the Major Site Plan so that once the Department approved the Major Site Plan, the other necessary documents (the Land Disturber's Permit and the Land Developer's Agreement with bond) could be approved in short order. Tr. 314:9-23 (Carr).

78. After the June 4, 2003 meeting, the Department identified the remaining areas needing correction before the final submission of RBI's application on June 11, 2003. Tr. 314:24-316:1 (Carr); P 153.

***9** 79. The Department approved the Major Site Plan on June 12, 2003, only 63 days after RBI submitted its second application. Tr. 309:2-6 (Carr); 316:2-23 (Carr); 317:8 (Carr); P 586.

80. The Department then expedited the typical 30-day process for approval of the Land Disturber's Permit and Land Developer's Agreement. Tr. 318:7-13 (Carr); P 587, 588. The Land Developer's Agreement is generally boilerplate language requiring description of the development and a bond amount. Tr. 318:14-24 (Carr).

81. RBI was required to have a construction cost estimate in order for ODEC to obtain the bond necessary for the Department's Land Developer's Agreement. Tr. 839:1-16 (Irvin); 319:2-25 (Carr).

82. RBI did not have the required construction cost estimate for ODEC to obtain the bond necessary for the Land Developer's Agreement until May 30, 2003. P 1179. RBI also did not submit its VDOT bond estimate until May 30, 2003. P 1180.

83. Other than posting the bond based on RBI's cost estimate, and executing the Land Developer's Agreement, ODEC was not required to do anything else for construction to begin. Tr. 111:7-20 (Debiec). There was nothing from ODEC that delayed approval of the Land Developer's Agreement. Tr. 111:24-112:7 (Debiec).

84. RBI was responsible for and obtained the Land Disturber's Permit on June 13, 2003, 74 days after the scheduled start of construction of April 1, 2003. Tr. 837:24-838:1 (Irvin); Tr. 317:16-318:4 (Carr); P 587.

85. The County executed the Land Developer's Agreement with ODEC on June 13, 2003. Tr. 320:5 (Carr); P 588.

86. The Department did not have a codified "pre-construction" meeting requirement; therefore, RBI could have begun construction immediately after the Department approved the Land Disturber's Permit and the Land Developer's Agreement. Tr. 2447:24-2448:16 (Carr).

87. RBI did not begin construction until June 16, 2003. Tr. 840:20 (Irvin); 841:3 (Irvin).

88. The start of construction was delayed because RBI failed to adequately research, plan for, and execute what was required for obtaining the Major Site Plan's approval. RBI's failures resulted in the Department's refusal to accept RBI's first submission. Because RBI's February 10, 2003 submission was so deficient, the formal permitting review process did not begin until April 10, 2003, and there was no chance for RBI to begin construction on April 1, 2003.

89. But for ODEC's intervention to persuade the County Board of Supervisors to put the Project on an expedited review path, the permitting process would have taken significantly longer than it did. Tr. 316:24-317:15 (Carr).

90. RBI, therefore, is solely responsible for any permit-related delays to the critical path of the Project.

91. On April 23, 2003, RBI requested a change order in the amount of $548,167 for the change in the access road. Tr. 112:12-25 (Debiec); P 589. In the letter for that change, RBI noted that the change "did increase the duration required to complete engineering for the site development permit by 15 working days." P 589. In this letter, RBI linked the access road, the Major Site Plan, and the permit delay, but it did not offer any support for the increased time.

***10** 92. On April 29, 2003, RBI sent a letter to ODEC requesting a 28-day contract extension with an additional day-for-day extension until approval of the Major Site Plan because of the access road, the amendment to the Zoning Special Exception, easements, and the sanitary permit. P 1270. On May 13, 2003, ODEC rejected RBI's request, noting that ODEC was supporting RBI's permitting efforts and that no ODEC issues were delaying approval of the Project. P 1273.

93. On July 18, 2003, ODEC and RBI executed Change Order # 1 for costs associated with the change to the Site's access road. The Change Order showed no change to the Scheduled Substantial Completion Date, and stated: "The price adjustment or time extension or both set forth in this Change Order is full compensation for all costs and delays, direct and indirect, incurred in connection with the conditions giving rise to this Change Order, the work specified herein, and any consequential costs or delays resulting therefrom." Tr. 116:7-16 (Debiec); P 579 (CO # 1). When RBI executed Change Order # 1, it did not make any exceptions or note any disagreement with the language in the order. Tr. 978:2-13 (Irvin).

94. Debiec wrote a letter on December 2, 2003 responding to RBI's request for a schedule extension because of the road extension and permitting delays in which he wrote, "In addition, RBI has been fully compensated for all aspects of the changes to the access road by Change Order 1." P 579, 1280; Tr. 119:8-12 (Debiec). Change Order # 1 fully compensated RBI for any and all increased costs with the change to the access road, and by signing Change Order # 1, RBI waived any entitlement to additional time or money in relation to the delay associated with approval of the Major Site Plan.

95. RBI did not comply with the 15 working days notice requirement of § 8.1 of the EPC Contract regarding its permitting-related claim. P 26. It was not until July 17, 2003, a month after RBI was aware of or should have been aware of, the complete circumstances surrounding permitting the delay, that RBI submitted a request for additional time to complete the Project. Tr. 115:2-12 (Debiec); P 1278. That notice itself was deficient because it did not comply with the detailed requirements of the EPC Contract notice provision (§ 8.1), and it did not show any delay on the Project's critical path. P 1278. Not until November 17, 2003, more than five months after issuance of the permits, did RBI allege any costs

associated with the delay; such cost was put at $64,918.66. Tr. 117:13-14 (Debiec); P 1279.

96. The EPC Contract required the EPC Contractor to prepare and maintain a detailed critical path method ("CPM") schedule that would be "current, accurate and ... updated and revised as project conditions and the Contract Documents require." P 108 § 2.3.2; Tr. 120:8-121:19 (Debiec).

97. The purpose for requiring the CPM Project Schedule was, *inter alia,* to:

a. "Assure adequate planning...."

***11** b. "Assure coordination of the efforts of all parties contributing to project completion...."

c. "Assist Contractor and Owner in monitoring the progress of the Work and in evaluating proposed changes to the Contract and the Project Schedule."

d. "Establish a baseline for the planned use of resources."

e. "Identify float for each line item and critical path for project."

P 108 § 2.3.1; Tr. 120:8-121:7 (Debiec).

98. It is standard in the industry to use a valid (i.e., logically consistent), complete, accurate, and updated CPM schedule to plan and manage the construction of a dual fuel simple cycle combustion turbine project such as the Marsh Run Project. Tr. 486:23-490:7 (Dykema); 617:8-618:1 (Harvey); 619:19-620:8 (Harvey); Dreher Dep. 180:2-181:12.

99. Section 2.3.3 of the Specifications required the EPC Contractor, within 30 days after the execution date of the contract, to submit for the Owner's approval a detailed CPM schedule as the Target Schedule. Upon ODEC's approval, the Target Schedule would have been used as a baseline for comparing updated schedules. P 108 § 2.3.3.

100. RBI based its bid on a draft CPM schedule it created and included in its bid submission that showed Substantial Completion on April 30, 2004. Tr. 1003:24-1004:11 (Irvin); P 27 (Bates 0099).

101. After signing the EPC Contract, RBI generated a schedule designated "WRK1." This schedule was copied from a schedule prepared not by RBI, but by GE on a different project, in a different state, with a different owner, different EPC contractor, different engineer, and different subcontractors. Tr. 767:20-769:13 (Irvin); 771:11-772:16 (Irvin); 991:8-992:24 (Irvin); Stanton Dep. 13:4-14:3; P 154.

102. RBI submitted WRK1 to ODEC in January 2003 as a draft schedule. Tr. 776:16-777:12 (Irvin); 342:20-23 (Raymond); 343:11-344:6 (Raymond); P 154.

103. WRK1 reflected that RBI should have submitted its site work permit application on January 6, 2003. Tr. 1005:10-23 (Irvin); P 154.

104. WRK1 reflected that RBI should have completed developing cable schedule reports and termination reports by August 15, 2003. Tr. 1005:24-1007:5 (Irvin); P 154.

105. WRK1 did not show a Substantial Completion date as required by the EPC Contract. Instead it showed an activity called Provisional Acceptance concluding on April 3, 2004. Tr. 1007:6-1008:3 (Irvin); P 154.

106. On March 20, 2003, more than 90 days after execution of the EPC Contract (i.e., more than 60 days late), RBI submitted to ODEC a schedule designated "MR00" for approval as the Target Schedule. ODEC did not accept MR00 as the Target Schedule because it contained numerous deficiencies. Among other things, it had a number of logic problems, failed to include milestone contract dates, and failed to address Mechanical and Substantial Completion dates as called for in the EPC Contract. P 155; Tr. 122:8-22 (Debiec); 780:11-19 (Irvin).

107. MR00 failed to comply with the requirements of the EPC Contract and did not contain a meaningful critical path that a Project Manager could use to manage construction of the Marsh Run Project. Tr. 495:4-497:10 (Dykema); P 826 Ex. B.

***12** 108. In a letter dated April 9, 2003, B & R commented on MR00, identifying numerous deficiencies in the schedule. The April 9 letter was not an approval of MR00 as the contractually required Target Schedule. B & R had no authority to approve the schedule and was merely relaying comments back to RBI. P 593, 594, 1242; Tr. 122:23-127:16 (Debiec).

109. One major problem with RBI's early schedules was RBI's failure to include activities for reliability runs, and for Mechanical Completion and Substantial Completion as defined by the EPC Contract. Instead, RBI left reliability runs

out of the schedules completely and based its early schedules (from the beginning through October 2003) on achieving "provisional acceptance" rather than Substantial Completion. Tr. 1851:14-19 (Manginelli); 1858:5-23 (Manginelli); P 536.

110. The EPC Contract requires the EPC Contractor to conduct reliability runs on each unit for each fuel (gas and oil) consisting of a minimum of 15 starts and 120 hours of operation with operations not exceeding 16 hours per day. P 108 § 14.5.4. The fastest this could be accomplished for a single unit would be 8 days for each fuel for a total of 16 days per unit. Tr. 1013:16-1016:13 (Irvin). Reliability runs are the very last thing to be tacked onto the back of the schedule and would therefore increase the forecasted Substantial Completion date of RBI's Project schedules by at least 16 days. Tr. 2526:8-2527:7 (Dykema); P 536.

111. RBI's failure to incorporate into its schedules (including WRK1, MR00, and MR10) activities based on the EPC Contract requirements for Mechanical Completion and Substantial Completion resulted in schedules that, had they otherwise been logically sound, artificially improved their forecasted completion dates by at least four weeks. P 549. In the schedules prior to October 15, 2003, RBI understood mechanical completion to mean that construction is complete and the turbines are ready for commissioning. Tr. 1017:14-1021:25 (Irvin); P 161, 373, 374. RBI understood "provisional acceptance" to occur before performance testing and reliability runs. Tr. 1016:14-1017:13 (Irvin); P 155. Substantial Completion as defined in the EPC Contract is very different from "provisional acceptance" and required RBI to complete much more work. Both Performance Testing and reliability runs are required to be complete to achieve Substantial Completion under the EPC Contract. P 26 § 6.5; P 108 § 14.5. Use of the proper definition of Substantial Completion would have added at least four weeks to the Provisional Acceptance/Substantial Completion activities in RBI's early schedules. P 2, 4, 154, 155, 159, 160, 161, 162, 373, 374, 549; Tr. 122:8-22 (Debiec); 135:5-137:5 (Debiec); 344:7-345:17 (Debiec).

112. Between March and October 2003, RBI submitted several other schedules to ODEC. All of them suffered from inaccuracies and logic problems that prevented them from complying with the contractual requirements for a Target Schedule. None of them contained a meaningful critical path that a project manager could use to manage construction of the Marsh Run Project. Tr. 128:21-141:12 (Debiec); 495:4-497:10 (Dykema); 499:1-503:18 (Dykema); Stanton Dep. 13:4-18:15; 44:17-50:17; P 2, 4, 5, 6, 7, 8, 9, 21, 156, 157, 158, 159, 160, 161, 162, 369, 370, 371, 373, 374, 826 Exs. B, D, E, F.

***13** 113. RBI's first two schedulers on the Marsh Run Project, Bart Talmadge and John Farren, either quit or were fired by RBI. Tr. 1010:4-7 (Irvin); Irvin Dep. 160:23-162:15; P 4, 162.

114. In early September 2003, nine months into the Project, RBI hired a scheduling expert, Alex Stanton, to try to fix its Marsh Run schedule. Stanton testified that he found the schedule so flawed that it would have been easier to throw it out and start from scratch. RBI insisted, however, that he revise the existing schedule. He worked 10 hours a day, seven days a week for several weeks to do so. Stanton Dep. 46:10-47:6, P 2, 4, 21, 162.

115. Stanton found, among other problems, that the schedule had numerous logic errors, constraints, and no meaningful critical path. Stanton Dep. 46:10-50:17; P 2, 4, 7, 21.

116. On October 15, 2003, RBI submitted to ODEC a schedule designated "BASE," which ODEC conditionally accepted as the Target Schedule (also called the "baseline schedule" by the parties). Tr. 127:17-128:20 (Debiec); 140:2-141:12 (Debiec); P 10, 597.

117. The Target Schedule, BASE, did not show the Project meeting the dates for Mechanical Completion or for Substantial Completion, as those terms are defined in the EPC Contract. Tr. 140:11-25 (Debiec); P 10, 597.

118. BASE did not contain a meaningful critical path that could be used to manage the Marsh Run Project. Tr. 503:19-505:20 (Dykema); P 826 Exs. G, H.

119. ODEC conditionally accepted BASE because it had been trying to get an acceptable and usable Target Schedule from RBI for 8 months. ODEC decided at this point that it should accept BASE and ask for a Recovery Schedule that could be used to monitor the progress of the Project. Tr. 141:1-12 (Debiec).

120. Because of an approved Change Order due to Hurricane Isabel, the Scheduled Substantial Completion Date under the EPC Contract was extended from May 1, 2004 to May 5, 2004. P 579, CO # 11; Tr. 119:15-120:7 (Debiec).

121. ODEC conditioned its acceptance of BASE on RBI's creation of a Recovery Schedule, as required by § 2.3.5 of the Specifications, in order to show how the Project would achieve Mechanical Completion and Substantial Completion by May 5, 2004. Tr. 140:11-141:12 (Debiec); P 11, 12, 597.

122. ODEC requested that, once the Recovery Schedule had been approved, the Recovery Schedule be frozen and used as the Target Schedule or baseline for the completion of work on the Project. Tr. 143:10-144:9 (Debiec); P 13.

123. Stanton left RBI in November 2003, and RBI brought in Sam Strelecki to replace him.

124. RBI submitted its first attempt at a Recovery Schedule on November 7, 2003. The Schedule was named MRRS. Tr. 144:10-14 (Debiec); P 14.

125. MRRS was a flawed schedule. Among other things, it had logic sequencing errors and unrealistic durations for activities. Parrish Video Dep. 25:4-30:16; P 551, 552.

126. One major problem with MRRS and with all subsequent schedules was that RBI failed to adequately account for time GE needed (and to which it was contractually entitled) to complete its work on the combustion turbine units. Under the GE Turbine Purchase Agreement, GE is entitled to 90 days of time from first roll of the unit (placing the unit on turning gear). Tr. 144:15-146:13 (Debiec); P 582 (Bates 2921). Additionally, GE is entitled to 8 weeks to work on the units prior to first fire. Tr. 1496:25-1497:6 (Williams); P 822.

***14** 127. MRRS did not contain a meaningful critical path that could be used to manage the Marsh Run Project. Tr. 505:21-506:24 (Dykema); P 826 Exs. I, J.

128. Because of its numerous problems, MRRS was not accepted by ODEC as the Recovery Schedule. Tr. 144:15-146:13 (Debiec); P 822.

129. RBI submitted a second Recovery Schedule on November 25, 2003. Tr. 146:14-147:6 (Debiec); P 15. This schedule also contained numerous errors and deficiencies, including logic errors and failure to include sufficient time for reliability runs and other contractual requirements. Tr. 146:14-152:17 (Debiec); P 1221.

130. RBI provided the final version of the recovery schedule, named MRRT, at the December 18, 2003 monthly meeting, and as late as January 8, 2004, represented to ODEC that it could (and would) complete the Project on time. Tr. 152:24-153:8 (Debiec); P 16. ODEC conditionally accepted MRRT as the Recovery Schedule on December 22, 2003, noting that it did not comply with the agreed upon GE timetable. ODEC reiterated that RBI was responsible for managing GE under the GE Turbine Purchase Agreement. Tr. 152:24-154:23 (Debiec); P 823.

131. MRRT was a flawed schedule. MRRT did not contain a realistic plan for achieving Substantial Completion by May 5, 2004. For example, the manpower histogram derived from MRRT shows that RBI would have had to triple the workforce on site within a week in order to meet the projected Substantial Completion date. Tr. 508:22-509:23 (Dykema); P 826 Ex. M. Additionally, MRRT did not contain a meaningful critical path that could be used to manage the Marsh Run Project. Tr. 506:25-511:12 (Dykema); P 826 Exs. K, L, M.

132. Immediately after RBI submitted MRRT as the recovery schedule, it began to fall behind because the schedule was unrealistic and because it did not have the manpower to meet the requirements of the Recovery Schedule. Tr. 154:24-155:7 (Debiec); 435:2-25 (Dykema); 511:13-512:15 (Dykema); P 824, 825, 826 Ex. N.

133. Because RBI seemed incapable of maintaining the Recovery Schedule, ODEC engaged MPR Associates, Inc. and its principal engineer, William Dykema, to review RBI's schedule, observe how RBI was managing the Project, and make suggestions to improve the process. Tr. 155:8-22 (Debiec); 433:20-24 (Dykema); 434:17-435:1 (Dykema); 440:8-14 (Dykema); 444:19-446:1 (Dykema); 450:22-452:5 (Dykema); 461:16-462:4 (Dykema); 469:16-483:16 (Dykema); P 877, 878, 884, 887, 888, 904, 906.

134. With input from Dykema, RBI created a valid schedule for the first fire of Unit 3 on gas. Tr. 476:12-477:2 (Dykema); P 887. However, RBI then failed to manage the Project or to commit the resources necessary to meet the plan indicated in the schedule. During May 2004, RBI displayed a lack of responsiveness on activities clearly identified as the critical path to Unit 3 firing on gas. For example, in May 2004, flushing the closed cooling water system became critical to achieve Unit 3 first fire. Even though RBI was potentially incurring $45,000 per day in liquidated damages, RBI chose to discontinue flushing at night to save about $800 per night in overtime costs, thereby delaying Unit 3 first fire at least

one day for each night RBI would not continue flushing. Tr. 476:12-480:6 (Dykema); P 877.

***15** 135. By mid-May 2004, RBI and its upper management demonstrated that they lacked the commitment to abide by the schedules they developed with Dykema's assistance, and experienced a total management breakdown, establishing an environment of tolerance for substandard performance. Tr. 480:20-482:18 (Dykema); P 888.

136. In the power plant construction industry, contractors will do whatever it takes to complete a project on time. They take contractually required end dates extremely seriously. RBI was 180 degrees away from the industry standard and its upper management did not have the commitment to do what it took to finish the Project on time. RBI would only commit to do what it thought was reasonable. Tr. 431:10-433:19 (Dykema); 482:19-483:16 (Dykema); 625:5-18 (Harvey).

137. Week after week, RBI would issue an updated schedule and then fail to adhere to it, slipping further and further behind on the Project. In some cases the Scheduled Substantial Completion Date slipped as many as 13 days in a single week. Tr. 511:13-512:15 (Dykema); P 826 Ex. N.

138. RBI failed to produce and therefore could not use a CPM schedule for the Marsh Run Project. RBI's negligence in scheduling contributed significantly to and was symptomatic of RBI's problems with managing the Project effectively and its inability to finish the Project in a timely fashion. When ODEC finally terminated RBI from the Project on December 23, 2004, RBI was 233 days late in achieving Substantial Completion and had no schedule for achieving Substantial Completion. Tr. 512:16-513:10 (Dykema); P 826; Tr. 619:19-620:8 (Harvey); Dreher Dep. 180:2-182:1; Voss Dep. 24:21-27:11; 28:17-29:24; P 455, 456; Voss Dep. 40:4-21; P 459.

139. RBI failed to plan properly for and otherwise manage the Project. Tr. 617:8-625:18 (Harvey); Dreher Dep. 180:2-185:22; Voss Dep. 24:21-27:11; 28:17-29:24; P 455, 456; Voss Dep. 40:4-21; P 459 ("The volume of RFI's ... is more a reflection of the large number of Ragnar Benson subcontractors and Ragnar Benson's relative inexperience in turnkey power projects....").

A. Permitting

140. A reasonable contractor bidding on the Marsh Run Project would have informed itself about all requirements for approvals, licenses, and permits, as well as the time normally required for obtaining same, before bidding. RBI submitted its bid on October 7 and 8, 2002. Tr. 84:12-20 (Debiec); 618:10-620:8 (Harvey).

141. A reasonable contractor bidding on the Marsh Run Project would have been ready to begin the permitting process immediately upon receiving the Limited Notice to Proceed, which RBI received on December 4, 2002. Tr. 618:10-18 (Harvey); P 578; Tr. 95:25-96:23 (Debiec).

B. Rock

142. The preliminary geotechnical report prepared by Schnabel Engineering ("Schnabel") and furnished to all bidders (the "Schnabel Report") showed that rock was virtually everywhere on the construction site. P 580 (Bates 2200). Starting with an earlier report of eight borings on the site by Burns & McDonnell, Schnabel performed another 24 borings in those areas where the Project's heaviest structures were expected to be located. Each boring went to "auger and sampler refusal," Schnabel Report § 2.2, meaning that the borings stopped only when 100 blows of a 140-1b. hammer falling 30 inches could not penetrate the rock more than two inches. *Id.* App. A, § 1. Every one of 32 borings hit bedrock at depths of 1.5 to 9 feet. Schnabel Report § 2.3; Tr. 627:24-629:1 (Drahos); P 580, 810, 828, 829.

***16** 143. The Schnabel Report also gave the results of the earlier investigation by Burns & McDonnell, whose borings showed that the "rock was generally competent [i.e., solid] based on coring data and unconfined compressive strength test results that varied from 11,380 to 15,910 psi." By comparison, concrete has an unconfined compressive strength of approximately 3,000 to 5,000 psi. Tr. 629:2-17 (Drahos); P 580, 810, 828, 829.

144. Only two of Schnabel's 24 borings included coring of the rock below the depth of auger and sampler refusal. As for the other 22 borings, one could only conclude that the rock below the depth of refusal may or may not be rippable. P 580, 810, 828, 829.

145. Section 3.2.3 of the Schnabel Report, headed "Rock Excavation," put bidders on notice that there was a very good likelihood of having to use "rock excavation techniques" (e.g., blasting and hoe-ramming) to excavate the rock on the Project, and suggested further testing:

> Disintegrated rock and rock were encountered in all of the borings at depths of about 0.9 to 5 ft. with an average depth of about 3 ft. below the ground surface.... Rock excavation techniques [e.g., blasting and hoe-ramming] may be required to excavate these materials for deeper excavations [such as foundations] and utility excavations [i.e., trenches].... Rock excavation techniques may be needed to remove *disintegrated* rock materials in small excavations such as footings and utility excavations, where these techniques may not be needed for mass excavation. A rippability test could be performed prior to bidding to confirm the excavation characteristics of the materials present on the site.

Schnabel Report § 3.2.3 (emphasis added); Tr. 630:1-631:16 (Drahos); P 580, 810, 828, 829.

146. Section 3.0 of the Specifications, headed "Site Characteristics," put RBI on notice that there could be diabase, a hard rock, on the Project site, particularly its northern half. P 108 § 3.0.

147. Despite all of this information and the fact that the site was available for such testing, RBI did no independent testing or investigation of the site before bidding or even before applying for approval of the Major Site Plan. Tr. 95:2-13 (Debiec); 618:24-619:18 (Harvey); 631:17-632:11 (Drahos); 301:9-16 (Carr).

148. Even when it knew that the permitting process would delay the start of construction several weeks so that RBI had additional time for planning and additional incentive to take measures to expedite construction whenever it started, RBI did nothing to investigate or plan for the rock on site. Tr. 1025:25-1033:6 (Irvin); P 88, 89, 103, 331.

149. RBI ignored warnings of its engineer, Framatome, which suggested that RBI take additional borings to determine the difficulty of excavation on the west side of the Project site. Tr. 1025:25-1033:6 (Irvin); 1279:8-1281:4 (Castellano); P 88, 89, 331, 390.

150. RBI ignored warnings from its subcontractors about the potential for unrippable rock on the Project site. Pat Krum, Vice President of Casey Industrial, Inc. ("Casey"), reviewed the Schnabel Report, determined there would likely be hard rock on the site, excluded rock excavation from Casey's bid to RBI, and had a meeting with Joe Castellano in which Krum relayed his interpretation of the Schnabel Report to RBI. Krum Dep. 11:19-12:22; 13:13-17:2; 17:14-20; 18:22-22:22; P 95, 255, 256. Nearly every subcontractor performing underground work excluded rock excavation from its scope of work. P 44, 85, 95, 96, 251, 252, 253, 254, 255.

***17** 151. Despite these warnings, in planning for and scheduling the Project, RBI made no provision for having to use "rock excavation techniques." Instead, RBI launched into the Project completely ignoring the likelihood of having to blast or hoe-ram the site's pervasive rock. RBI had no plan for dealing with unrippable rock other than "let the owner know what [RBI's] recommendations were to take it out, and get paid for it." Berthelsen Dep. 153:2-154:6; Tr. 870:7-18 (Irvin) ("How we planned to deal with rock is to deal with it."); Gallik Dep. 159:14-23; Tr. 1028:3-8 (Irvin), 1030:24-1031:1 (Irvin), 1279:8-18 (Castellano), 617:8-619:18 (Harvey).

152. Additionally, in the design of the Project, RBI failed to coordinate with Framatome regarding the potential for encountering unrippable rock. Tr. 1028:3-8 (Irvin); Lindsay Dep. 20:21-21:18. Instead, RBI gave Framatome a copy of the plans from a different project, Armstrong, to use in designing the underground electrical portion of the Project. Lindsay Dep. 19:14-23; 20:2-13; Tr. 993:15-995:16 (Irvin). Framatome used a modeling program to route underground piping and utilities to prevent interferences. However, this modeling technique made building the Facility in rock much more difficult and time consuming because the utilities were not routed in easily excavatable corridors. Voss Dep. 34:25-37:22; P 458; Tr. 1033:23-1035:17 (Irvin).

153. RBI began construction on June 16, 2003. Tr. 840:13-841:3 (Irvin). On July 23, 2003, RBI ran into unrippable rock. P 37. RBI encountered unrippable rock on the west portion of the site and in the utility trenches, the same locations identified in the Schnabel Report. Tr. 1281:5-1284:4 (Castellano); 630:1-631:16 (Drahos); P 430, 580, 828.

154. Due to the presence and impact of unrippable rock, Pat Krum from Casey specifically asked RBI to delay mobilizing Casey. Ryan Incorporated Central ("Ryan"), the site work subcontractor, had not been able to finish preparing the site to the proper elevation required for Casey to begin its work. Disregarding Casey's request, RBI directed Casey to mobilize on July 27, 2003. Casey was unable to proceed with its work due to the unrippable rock. Krum Dep. 27:23-32:19; P 1014.

155. Rather than stop construction and blast out the unrippable rock all together, RBI proceeded to try to construct the Project and blast at the same time, dealing with the unrippable rock on an ad hoc day-to-day basis. This lack of planning and proper management caused the removal of the unrippable rock to be very inefficient and caused stacking of trades, which therefore caused the subcontractors to have to work very inefficiently. Weeks Dep. 53:25-54:1, 54:16-55:14; Tr. 618:10-619:18 (Harvey); Krum Dep. 34:5-20.

156. RBI's scheduler, Alex Stanton, observed, "When I first walked on the site, the site was not-was exactly what Dave [Berthelsen], John [Irvin] and Joey [Castellano] thought the site was, in chaos, it was out of control, it was not being constructed in a normal sequence of events that matched the schedule." Stanton Dep. 34:20-35:2.

***18** 157. "The presence of rock and the manner in which it was handled created a domino effect impacting every phase of [the] project. RBI's lack of a viable plan to handle rock along with no provisions to control rain water and an overall lack of coordination by RBI and stacking of contractors resulted in everyday impacts and delays." P 77; Manion Dep. 210:16-213:15.

C. Supervision and Coordination

158. RBI subcontracted virtually all of the work on the Project in order to place some of its risk onto its subcontractors. Irvin Dep. 258:8-261:17. Throughout the Project, however, RBI had on site too few supervisory personnel to coordinate and oversee the work of its subcontractors. Parrish Video Dep. 30:17-31:10, 31:17-32:25, 33:23-36:5; Tr. 355:22-358:11 (Craddock); 621:9-622:16 (Harvey); Dreher Dep. 182:2-185:22.

159. In its bid proposal, RBI represented that APC would provide personnel to supervise the craft of subcontractors during the construction phase of the Project. Tr. 1060:10-1068:5 (Irvin); P 27 (Bates 0021). In fact, APC only provided supervision of craft labor during the commissioning and start-up phases. APC did not supervise any craft during the construction phase. Tr. 1066:25-1068:5 (Irvin); 1673:13-20 (Sherras); 414:24-415:17 (Craddock); Sherras Dep. 13:20-23, 21:20-22:11.

160. From Teton Industrial Construction, Inc.'s ("Teton") perspective, RBI did not have anyone specifically overseeing Teton's subcontract or its craft, including its piping craft, millwright craft, and electrical craft. Dreher Dep. 127:25-131:9. On other similar projects Teton performed, the EPC contractors had multiple superintendents supervising each of Teton's different crafts. Dreher Dep. 21:6-23:9. Instead, Teton was supervised only by Jeff Williams, the site manager, while at times interacting with APC "coordinators" who were more focused on start-up rather than construction. Dreher Dep. 127:25-131:9.

161. In order for the Project to progress efficiently, it must be run by the site manager-RBI's highest level person on site continuously. Tr. 620:9-621:8 (Harvey).

162. RBI's management was severely disrupted during the fall of 2003, one of the most crucial time periods of work on the Project. In September 2003, RBI arranged for Jeff Williams to come to Marsh Run to assist its site manager, Joe Osler. However, RBI fired Osler almost immediately thereafter, thereby cutting personnel costs on the Project. Tr. 1068:11-1069:17 (Irvin); P 115, 116.

163. On October 2, 2003, one of RBI's project managers, John Irvin, attempted to resign because he had made numerous promises to ODEC which he could not keep. Tr. 1069:18-1071:17 (Irvin); P 117.

164. At nearly the same time, Dave Berthelsen transferred Paul Debski out of his duties. Up until that point, Debski had been RBI-Pittsburgh's Vice President of Operations and the executive in charge of the Marsh Run Project. Berthelsen took over as the executive in charge of the Project. Tr. 1071:18-1072:1 (Irvin).

***19** 165. RBI's site managers, Joe Osler, Jeff Williams, and superintendent Gallik, had virtually no control over the subcontractors. The daily site meetings were ineffective, so much so that they were cancelled for a period of time, and at times, the subcontractors had to get together and meet by themselves without RBI involvement in order to effectively coordinate their work. Dreher Dep. 125:6-127:24; Tr. 621:9-622:19 (Harvey). As Dave Gallik observed,

it was like "inmates watching the prison." Gallik Dep. 97:24-101:25; P 410.

166. Throughout the course of the Project, RBI internally admitted and criticized its own inability to coordinate its subcontractors. In a February 2, 2004 email to four members of his team (Jeff Williams, Dave Gallik, John Levelle and John Irvin), Joe Castellano stated, "You know guys I am sick and tired of everyone from Casey and Sauer telling me RBI cannot coordinate anything. What are we doing out there? Should I start believing them?" P 170.

167. In June 2004, Joe Castellano, in an email to Dave Berthelsen and John Irvin, again internally acknowledged RBI's inability to properly manage and coordinate work on the Project. He stated:

> Our largest single issue on this project is we lack the early warning signals that would allow us to plan around. There is a number of reasons for this-the ever evolving design or lack of design from Framatome, not being afforded the time or opportunity to review design before it is issued for construction, *the lack of RBI M/E coordinators,* the compressed schedule, *doing and not managing.*

P 172 (emphasis added).

168. The next day, Joe Castellano, in an email to John Irvin, again acknowledged the many coordination and management problems RBI experienced. He states, "We keep making noise about not enough people. This is still by far our 2nd largest issue for you and I." Castellano also admits, "We didn't have enough coordinator time in the estimate." Identifying another prevalent problem with RBI's management, failure to subcontract out RBI's entire scope of work ("white space"), Castellano states, "What were our thoughts about managing construction turnover to commissioning? Who was to manage the pre-commissioning?" Finally, and importantly, Castellano acknowledges the reality that "[i]t will be easy for people to push the issues off on rock, weather, etc delays," implicitly admitting that RBI's terrible management and coordination severely impacted its work on the Marsh Run Project as much as the unrippable rock and other delays. P 91; Tr. 1251:19-1253:8 (Castellano).

169. This lack of proper staffing and management resulted in significant inefficiencies and delays in the progress of the Project. P 91, 170, 172; Parrish Video Dep. 36:20-21, 37:13-39:13, 40:3-41:20, 41:25-44:12; Tr. 361:1-364:22 (Craddock); 621:9-622:16 (Harvey); Dreher Dep. 182:2-185:22; Gallik Dep. 97:24-101:25; P 410.

D. Micromanagement from Pittsburgh/Lack of Management on Site

***20** 170. RBI was also severely handicapped by Dave Berthelsen's micromanaging the Project from Pittsburgh and shutting off virtually all funds to the Project after ODEC denied RBI's rock claim.

171. On November 20, 2003, the day ODEC denied RBI's claim for removal of unrippable rock, RBI, because it was not going to get paid for the rock, shut down operation of the rock crusher even though there were large amounts of rock left to crush. P 409; Gallik Dep. 91:23-94:19.

172. Knowing that the Project was significantly behind schedule, Berthelsen represented to ODEC that RBI would still finish on time. P 16. Simultaneously, Berthelsen told his managers for the Project that the Project was over budget, that no overtime would be approved, that no additional supervisors would be provided to the site (despite repeated requests therefor by all on-site management-Site Manager Jeff Williams, Project Managers John Irvin and Joe Castellano, and Quality Control Director Paul Brinks), and that no unbudgeted expenditures were to be made without Berthelsen's express approval. P 136, 179, 180, 181, 182, 184, 187, 190, 191, 192, 193.

173. On February 3, 2004, Berthelsen told his team, "We are closing the faucet on this project." P 190.

174. To manage the Project effectively, the on-site manager needs to have authority to do what needs to be done to keep the Project on schedule. Tr. 621:9-622:16 (Harvey). Berthelsen's attempts to micromanage the Project from Pittsburgh effectively tied the hands of RBI's site manager (Williams), and even those of the project managers (Irvin and Castellano). On a number of occasions both of RBI's site managers, Joe Osler and later his replacement Jeff Williams, complained to ODEC's site manager, Ron Craddock, that RBI's Pittsburgh office was tying their hands by limiting their

ability to make any substantive decisions or to spend money. Tr. 358:15-360:12 (Craddock). Additionally, both Williams and Castellano told Casey employees that they could not make decisions at the Project site without Dave Berthelsen's approval. Krum Dep. 41:20-44:1. Castellano repeatedly had problems with Dave Berthelsen not giving the site team the personnel or monetary resources necessary to complete the Project.

E. Quality Assurance and Quality Control

175. Section 6.0 of the Specifications of the EPC Contract required RBI to have an integrated quality assurance/quality control ("QA/QC") program with a permanent, independent QA/QC Group responsible to RBI's corporate management (as opposed to the site manager or project manager). Section 6.2 provides: "Owner shall have direct communication with the QA/QC group leader and staff." P 108 § 6.0; Tr. 372:16-373:20 (Craddock). RBI, recognizing the EPC Contract's requirement, represented at the Project Kick-off Meeting on January 29, 2003, that it would have a full-time QA/QC manager on site. P 1239.

176. RBI's QA/QC management of the Project was deficient. The QA/QC Group was understaffed and unable to adequately perform its obligations. Tr. 371:15-373:20 (Craddock); 623:8-624:20 (Harvey); Parrish Video Dep. 49:11-51:23; P 183, 185, 194, 195, 661, 1173. Both David Reed, the first RBI QA/QC site manager, and Paul Brinks, his successor, expressed their concerns to Ron Craddock that they were understaffed. Tr. 371:15-372:2 (Craddock); 373:10-20 (Craddock). Paul Brinks also repeatedly told RBI's site superintendent, Dave Gallik, that he needed more people and that he could not cover the entire Project site with his manpower. Gallik Dep. 81:17-82:18.

***21** 177. RBI's abysmal QA/QC program resulted in many problems at the site. The very first concrete pour, which was the foundation for GSU (Generator Step-Up) # 1, was a failure. RBI suffered a total loss of control during the pour resulting in a foundation that had to be torn out and completely replaced. Parrish Video Dep. 37:13-39:13; P 1015.

178. Similarly, RBI's lack of QA/QC oversight caused substantial problems with the pour of the foundation for the Administrative Building. With a major storm approaching, RBI allowed its subcontractor to begin the pour of this very large concrete slab. The storm arrived during the pour, ruining the slab. Gallik Dep. 191:22-195:3. RBI was never able to adequately correct the floor, and ODEC still experiences problems with the Administrative Building as a result. Tr. 368:14-370:7 (Craddock); Parrish Video Dep. 40:3-41:20.

179. Additionally, RBI failed to properly administer a foreign material exclusion program, which is a QA/QC program designed to ensure that foreign material such as dirt, mud, rocks, etc. is kept out of pipes and other containers. RBI allowed their piping to sit in the lay down yard without the ends being capped or covered, resulting in the pipes rusting and becoming filled with dirt, mud, and other foreign material. RBI's QA/QC failure directly increased the amount of time required to flush the fuel oil pipes due to the large amount of foreign material and debris that was allowed to enter the pipes. Tr. 379:8-380:15 (Craddock); 168:1-14 (Debiec); 169:22-170:24 (Debiec); P 577 (FF, CC).

180. Reflective of RBI Management's attitude toward the QA/QC program, RBI fired David Reed, the first Director of the RBI QA/QC Group, and later Howard Doyle. Tr. 371:15-372:11 (Craddock).

181. Howard Doyle, a member of RBI's QA/QC Group who worked for David Reed and Paul Brinks, was fired by RBI for talking to the Owner about quality problems, even though the contract required that the Owner have direct communication with the QA/QC leader and staff. Tr. 373:21-375:20 (Craddock); P 188; 108 § 6.0.

182. Throughout the Project, RBI failed to comply with the EPC Contract's QA/QC requirements including, among others, the reporting requirements set forth in § 6.3 of the Specifications. Tr. 376:5-378:6 (Craddock); P 108 § 6.3.

183. Despite the fact that Paul Brinks had far more QA/QC work than he could handle and repeatedly requested more people, Dave Berthelsen refused to provide more people and refused to allow QA/QC personnel to work overtime, demanding that they stagger their shifts. P 184.

184. Even though RBI's QA/QC department was seriously understaffed, Dave Berthelsen allowed RBI's subcontractors to scale back their QA/QC personnel, placing even more of a burden on RBI's already overwhelmed QA/QC forces. Paul Brinks appealed for help to no avail. P 185.

185. On March 27, 2004, Paul Brinks reported RBI's complete abandonment of its QA/QC responsibilities to Tom Paserba, stating that performing QC work on concrete placement alone

"has become nearly unmanageable," and that "it has become impossible to effectively perform QA activities such as audits of the subcontractors' documentation and performing meaningful observations of installations." P 661.

F. Firing First on Gas

***22** 186. By the spring of 2004, after several revisions to the commissioning and start-up sequence of the units, RBI had planned to commission and start up the units in the following sequence: Unit 3 on gas; Unit 2 on gas; Unit 1 on gas; Unit 3 on oil; Unit 2 on oil; Unit 1 on oil. Tr. 441:14-443:21 (Dykema); 1048:24-1050:20 (Irvin); P 902.

187. At the March 18, 2004 monthly meeting, ODEC expressed concerns to RBI regarding availability of the Facility to produce power during the summer months. ODEC told RBI that it needed to know whether or not it needed to buy power for June and July. Tr. 1305:7-1306:14 (Castellano); P 86 (Bates 97). When it became apparent that RBI would not achieve the May 5, 2004 Scheduled Substantial Completion date, and might not have any of the units ready for the peak cooling season (mid-June to mid-September), ODEC explored with RBI the extent to which RBI might be willing to work toward testing and commissioning all three units first for firing on gas and then on oil. Tr. 157:25-159:11 (Debiec). ODEC had commitments to its members and to the Pennsylvania, New Jersey, and Maryland Regional Transmission Organization (the "PJM") to have a certain amount of capacity to furnish power by a certain date, and was eager to get power from the units as soon as possible in order to mitigate its damages. Tr. 226:17-24 (Debiec); D 219.

188. By early April 2004, ODEC had engaged Bill Dykema to review RBI's schedule, to observe how RBI was managing the Project, and to make suggestions to improve the process. Tr. 155:8-22 (Debiec); 433:20-24 (Dykema); 434:17-435:1 (Dykema); 440:8-14 (Dykema); 444:19-446:1 (Dykema); 450:22-452:5 (Dykema); 461:16-462:4 (Dykema); 469:16-483:16 (Dykema); P 877, 878, 884, 887, 888, 904, 906.

189. RBI asserts that Bill Dykema suggested getting the plant up and running on gas prior to liquid fuel to make the units available for dispatch on gas during the summer. Tr. 865:23-866:18 (Irvin). However, RBI did not have to follow that suggestion. Tr. 879:23-880:18 (Irvin).

190. By letter dated April 15, 2004, RBI's V.P./General Manager Berthelsen wrote to ODEC's Sr. V.P. Greg White, stating that firing first on gas would benefit the Project and that RBI would do so at ODEC's direction, but that doing so would constitute a Change for which RBI would be entitled to additional time and money under the EPC Contract. P 130; Tr. 159:12-161:5 (Debiec).

191. In a letter dated April 21, 2004, White responded to Berthelsen that the decision of whether to fire first on gas was entirely up to RBI, that ODEC was not directing RBI to change anything, and that RBI would receive nothing additional under the EPC Contract if it decided to fire first on gas. P 131; Tr. 161:6-162:18 (Debiec).

192. RBI completely ignored Greg White's letter. Neither Dave Berthelsen nor John Irvin communicated ODEC's intent to their site manager, Jeff Williams. Tr. 1472:25-1473:20 (Williams). If RBI had actually changed the sequence of its work by this time, it would only have taken from a few hours to a maximum of a few days to return to its original sequence. Tr. 1474:15-19 (Williams); 1475:12-17 (Williams).

***23** 193. In fact, RBI had not changed the sequence of its work, and never did. On May 10, 2004, Dave Berthelsen sent Jim Debiec a letter listing the anticipated firing milestones for its units as follows: Unit 3 on gas; Unit 2 on gas; Unit 1 on gas; Unit 3 on oil; Unit 2 on oil; Unit 1 on oil. Tr. 1052:10-1053:14 (Irvin); 1056:18-22 (Irvin); P 132. RBI was beginning to fire the units on oil only 7 days after the last was fired on gas, which was virtually the same as its original plan. P 132; P 902.

194. None of the Project Schedules reflect that RBI changed the sequence of construction in order to fire first on gas. D 90 p. 9.

195. In July 2004, in a last ditch effort to get any of the units commercially available before the summer peaking season was over, ODEC offered to share with RBI any benefits that might accrue to ODEC from making the units commercially available on gas. The parties entered into a Sharing of Economic Benefits and Testing Protocol Agreement dated July 20, 2004, pursuant to which RBI agreed to fire first and commission on gas and ODEC agreed to share the economic benefits of that decision with RBI. Tr. 162:19-163:18 (Debiec); P 133. Unfortunately, RBI could not make any of the units available in time. The units became commercially operational on gas on September 15, 2004. Tr. 164:9-22 (Debiec).

196. The agreement states: "This agreement will not affect any conditions in the EPC contract, does not constitute a change under the EPC contract, and does not entitle RBI to any additional time on the schedule or any increase in the price of the EPC contract." Tr. 163:19-164:22 (Debiec); P 133. RBI agreed to accept a share of the economic benefits of dispatching the units in lieu of negotiating a reduction in liquidated damages. Tr. 1057:14-1060:5 (Irvin).

197. Despite the plain meaning of the Sharing of Economic Benefits and Testing Protocol Agreement and the plain language in Greg White's April 21, 2004 letter, RBI is still seeking both time and money in this lawsuit for allegedly changing its commissioning sequence. On January 19, 2005, two months after completing the commissioning of the CT Units on oil, RBI requested an equitable adjustment under § 8.1 of the EPC Contract for additional time and/or money resulting from the decision made several months earlier to fire first and commission on gas. This request was not timely. P 660.

G. Turnover Packages

198. Section 13.1.2(m) of the Specifications provided that the Contractor would "[p]repare and submit system turnover packages to Owner." P 108.

199. The Project was divided into 74 "systems" so that, rather than deliver the entire Project to ODEC at one time, RBI would deliver discrete portions or "systems" of the Project. Tr. 181:20-182:6 (Debiec); Tr. 274:16-18 (Debiec); Tr. 1542:13-16 (Williams); P 231.

200. RBI's subcontractor, APC, agreed with ODEC on a protocol to be followed in delivering or "turning over" each system to the Owner. Tr. 1643:17-1644:6 (Sherras); Parrish Video Dep. 81:25-82:3; 84:11-17; P 377.

***24** 201. Pursuant to the "turnover" protocol, when a system had been completed except for minor items, RBI and the relevant subcontractor would declare the system commissioned to ODEC and deliver the system turnover package. Parrish Trial Dep. 94:17-21; P 377.

202. ODEC would review the turnover package. If the package appeared complete, and if there was no reason to believe that the system was not complete, then ODEC would designate someone to do a formal "walk down" of the system with RBI and the appropriate subcontractor to verify that the system was complete and ready to be delivered to the Owner. Parrish Video Dep. 94:17-21; 99:15-20.

203. During the formal "walk down," the parties would prepare a punch list for the system. Parrish Video Dep. 94:17-21; 101:1-5; Tr. 272:15-20 (Debiec); 1712:10-15 (Sherras).

204. If it could be operated as designed, a system could be deemed complete and ready for delivery or "turnover" to ODEC even if there remained minor punch list items (e.g., painting) to complete before Final Completion. However, if any of the punch list items could affect the safety, reliability, or operation of the system, then the "turnover" would not be accepted by ODEC. Parrish Video Dep. 101:7-102:8; Tr. 271:19-272:3 (Debiec); 1637:16-1638:2 (Sherras); Williams Dep. 411:10-413:20.

205. This turnover package procedure was incorporated into a written document by APC. P 377; Tr. 1699:5-1700:5 (Sherras); Parrish Video Dep. 85:14-86:4. APC obtained the format from RBI who obtained the format, which was based on ODEC's Rock Spring project, from ODEC. Tr. 1699:5-1700:9 (Sherras). Although never "formally" transmitted from APC to RBI, the system turnover process was actually used on the Marsh Run Site. Tr. 1701:25-1711:16 (Sherras); 1712:10-1717:15 (Sherras); Parrish Video Dep. 85:14-86:4.

206. As to many of the systems, RBI incorrectly certified that the system was ready to turn over to ODEC when the system was in fact still far from complete and still had deficiencies that would prevent it from operating as designed. Parrish Video Dep. 96:21-25, 117:8-17, 190:18-20; Tr. 393:10-19 (Craddock); 1545:9-1546:2 (Williams); 1327:9-1328:12 (Castellano).

207. Among the systems that were incomplete and not ready to operate as designed when RBI certified to ODEC that they were complete are the following: SMV-A; SMV-B; SLV-A; SLV-B; 1UGP; 2UGP; 3UGP; SGS, STW, SFO, HT. P 229, 236, 558, 569, 570, 573, 987, 988, 989; Parrish Video Dep. 95:14-97:12; Tr. 184:3-9 (Debiec); 185:12-186:7 (Debiec); 186:22-187:21 (Debiec); 188:1-3 (Debiec); 189:10-190:2 (Debiec); 545:4-553:12 (Soares); 598:20-599:13 (Parham); 601:9-602:10 (Parham); 1328:7-12 (Castellano); 1536:14-1538:2 (Williams); 1545:9-1546:2 (Williams); 751:15-752:23 (Strickland).

208. As of the date of its termination, RBI recognized that the following systems were not complete and, consequently, had not furnished these turnover packages to ODEC: SDC and SCP. P 571, 572; Tr. 184:10-185:11 (Debiec); 186:8-21 (Debiec); 187:22-25 (Debiec); 541:22-543:15 (Soares); 597:13-25 (Parham); 751:9-14 (Strickland); 1105:22-1106:1 (Irvin); Williams Dep. 439:21-22, 476:24-477:4, 478:6-21.

H. Mechanic's Liens

***25** 209. Section 3.16 of the EPC Contract precludes RBI from filing or allowing its subcontractors to file any mechanic's liens on the Project except to the extent of "undisputed amounts due" under the Contract. P 26 § 3.16.

210. Section 3.16 also requires RBI to "pay or discharge (by bond or otherwise) any such Lien for labor, materials, supplies or other charges which, if unpaid, might be or become a Lien upon the Site or the Facility or any component of either." *Id.*

211. RBI's subcontractor Casey filed two mechanic's liens against the Project (i.e., upon the Site and the Facility) on May 20, 2004, in the amounts of $401,995.20 and $1,802,117.90, respectively. RBI received notice of the liens. Tr. 223:13-224:17 (Debiec); 225:10-12 (Debiec); P 1191. Shortly after ODEC notified RBI of Casey's liens, RBI sent ODEC what ODEC understood to be copies of the bonds RBI would use to remove the liens. Due to a mistake, RBI sent ODEC the original bonds and did not have Casey's liens removed. Tr. 196:21-197:23 (Debiec); 287:9-288:11 (Debiec); 1107:17-1109:15 (Irvin); P 1191, 1315. When ODEC discovered the mistake and demanded that RBI remove the liens, RBI refused to do so. Tr. 292:17-293:2 (Debiec). On November 12, 2004, Casey filed suit to enforce the liens. That suit is currently pending. Am. Compl. ¶ 25; Answer to Am. Compl. ¶ 25.

212. RBI filed its own mechanic's lien upon the Site and the Facility on March 23, 2005, in the amount of $5,783,547. Tr. 224:18-225:9 (Debiec); P 1216. RBI filed suit to enforce its lien on September 20, 2005. That suit is currently pending. Am. Compl. ¶ 25; Answer to Am. Compl. ¶ 25.

I. Substantial Completion

213. Section 6.1 of the EPC Contract enumerates the conditions required in order for the EPC Contractor to achieve Mechanical Completion. Tr. 180:13-21 (Debiec); P 26 § 6.1. Among other things, the EPC Contractor must complete and turn over to ODEC all systems except the General Site Turnover Package, develop and agree on a punch list for Substantial Completion with the Owner, ensure that the Work is mechanically and electrically sound and that all systems have been satisfactorily checked out and are capable of being operated safely without damage, and ensure that the facility is capable of being operated by the planned level of staff. RBI did not meet any of these requirements prior to being terminated from the Project. P 26 § 6.1; Tr. 180:22-190:11 (Debiec).

214. RBI failed to achieve Mechanical Completion as defined by § 6.1 of the EPC Contract prior to being terminated by ODEC. Tr. 180:13-15 (Debiec); P 26 § 6.1; P 145.

215. By its own admission, RBI failed to achieve Substantial Completion as defined by § 6.5 of the EPC Contract prior to being terminated by ODEC. P 126; Tr. 194:8-22 (Debiec); 1101:19-1103:1 (Irvin).

216. Among the conditions required to achieve Substantial Completion are that the Facility is Mechanically Complete and that the total estimated cost of items remaining on the punchlist is not more than $500,000. P 26 § 6.5. RBI has not met either of these requirements.

***26** 217. In the spring of 2005, while waiting for the Surety to decide whether or not it would step in to complete work under the Performance Bond, ODEC solicited bids from Black & Veatch and AMEC Kamtech to complete the remaining work on the Project. Both contractors essentially evaluated the cost to complete the remaining punchlist items on the Project on a time and materials basis. AMEC Kamtech's estimate was $4,350,000; and Black & Veatch's estimate was $5,435,174, with $3,564,987 designated specifically for punchlist items. Tr. 217:22-220:07 (Debiec); P 940, 941.

218. The Surety has been working on completion of the Work on the Project since June 2005. Since then it has only completed about half of the 932 punch list items. Tr. 681:13-682:19 (Dungan). As of September 14, 2005, it had already spent more than $790,000 to complete Work on the Project. Tr. 695:5-703:3 (Dungan); P 1060, 1061, 1062, 1063, 1192, 1310.

219. As of October 11, 2005, the Project was still not Substantially Complete, and the Surety had not given ODEC notice of either Mechanical or Substantial Completion

as required by the EPC Contract. Tr. 220:8-18 (Debiec); 711:10-713:2 (Dungan).

J. Termination for Default

220. On May 6, 2004, ODEC gave RBI and its surety written notice that ODEC was considering declaring RBI in default because RBI was so far from completing the Project and the Scheduled Substantial Completion Date, as defined in the EPC Contract, had passed. P 647; Tr. 194:23-195:21 (Debiec).

221. Section 12.1 of the EPC Contract provides for liquidated damages of $15,000 per Combustion Turbine Unit for each day of delay from and including the Scheduled Substantial Completion Date to and including the Substantial Completion Date. P 26 § 12.1.

222. Section 12.5 imposes a cap on liquidated damages of 10% of the Contract Price, "except that such limitations shall not apply to any payments required to be made by Contractor that are the result of Contractor's fraud, negligence or willful misconduct." *Id.* § 12.5.

223. At the rate of $15,000 per unit per day, the liquidated damages would reach 10% of the Contract Price (as adjusted by Change Orders) on the 106th day of delay, i.e., on August 18, 2004. P 798, 799; Tr. 220:19-221:17 (Debiec).

224. When it became clear that RBI would reach the 10% cap on liquidated damages, RBI ceased to staff the Project as required to reach Substantial Completion or Final Completion, as defined in the EPC Contract, within a reasonable time. Tr. 199:19-200:8 (Debiec); 391:11-392:15 (Craddock); Parrish Video Dep. 187:25-188:19, 189:17-190:4, 190:9-192:10, 192:14-193:17.

225. During the period from May 6, 2004 to December 23, 2004, ODEC complained to RBI, both orally and in writing, about the lack of adequate staffing to complete the Project. Tr. 196:12-200:8 (Debiec); 391:11-392:15 (Craddock); P 652; Parrish Video Dep. 187:25-188:19.

226. During this period, ODEC also made numerous written demands of RBI to pay liquidated damages. RBI refused to pay any liquidated damages to ODEC. Tr. 220:19-222:14 (Debiec); P 690-799.

***27** 227. Section 7.1(A)(ii) of the EPC Contract states:

> Owner may withhold all or part of any Scheduled Payment upon the occurrence of any of the following events: ...
>
> (c) one or more third parties have filed a mechanics' lien or similar claim against Owner, the Project or Site resulting from the actions or inactions of Contractor, any subcontractor, or any person for whom Contractor is legally responsible, and Contractor has not furnished a bond meeting the requirements of this Agreement with respect to such lien or claim provided that the amount withheld as a consequence thereof may not exceed the amount of the lien(s) or similar claim(s);
>
> (d) Contractor has failed to make timely payments of undisputed amounts due subcontractors as required under applicable subcontracts (or, if Contractor withholds disputed amounts Contractor has failed to establish reserves sufficient for payment in full of such disputed amounts), so long as Owner has not wrongfully withheld payments due Contractor hereunder provided that the amount withheld as a consequence thereof may not exceed the amount of the undisputed amounts due but not paid to subcontractors;
>
> (f) any event which would permit a termination by Owner pursuant to Section 11 hereof has occurred and is continuing.

P 26 § 7.1.

228. Although ODEC would have been well within its rights under the EPC Contract to withhold further payment from RBI in June 2004, ODEC, without waiving its rights, continued to make progress payments to RBI in good faith and with the hope that RBI would try to complete the Project as rapidly as possible. Tr. 197:24-199:18 (Debiec); 221:24-222:5 (Debiec); P 646, 652, 655. Instead, once RBI knew that it had reached the cap on Liquidated Damages, RBI scaled back its manpower and its efforts, and attempted to escape its contractual obligations to furnish ODEC with a fully functioning power plant in accordance with the EPC Contract. RBI contended that once the turbines produced electricity, RBI's work was virtually complete. Tr. 199:19-200:8 (Debiec); 391:11-392:15 (Craddock); Parrish Video Dep. 187:25-188:19, 189:17-190:4, 190:9-192:10, 192:14-193:17; P 638, 643, 655.

229. Section 11.1 of the EPC Contract provides:

11.1 *Default by Contractor.*

If, during the continuance of this Agreement, one or more of the following events (each such event being called an *"Event of Default"*) shall occur:

(A) Contractor shall default in the payment of any sum payable to Owner hereunder and such default shall continue for five (5) Business Days after Contractor's receipt of written notice from Owner that such payment is overdue.

(B) For any reason other than (i) a material delay caused by Owner, (ii) a material breach by Owner of its obligations hereunder, or (iii) a Force Majeure event, where such delay, breach or Force Majeure event in fact materially affected the Work and did not result from a material breach by Contractor of its obligations hereunder, Contractor shall (A) fail to complete the Work and satisfy the conditions precedent for Substantial Completion set forth in Section 6.5 hereof on the Scheduled Substantial Completion Date unless Contractor has, in good faith, commenced to cure such deficient Work and is diligently pursuing such cure, not to exceed a period of sixty (60) days from the Scheduled Substantial Complaint Date, or (B) fail to complete the Work and satisfy the conditions precedent for Final Completion set forth in Section 6.6 hereof prior to the expiration of one hundred fifty (150) days after the Substantial Completion Date.

***28** (D) Contractor shall default in any respects in the observance or performance of any other covenant, condition or agreement of Contractor contained herein and such default shall continue for sixty (60) days after written notice to Contractor specifying the default and demanding that the same be remedied, unless Contractor has, in good faith, commenced to cure such default and is diligently pursuing such cure, not to exceed a further period of thirty (30) days, and except a default caused by a failure to satisfy the Performance Guarantees, which shall not be an Event of Default as long as Contractor complies with Section 12.1 and/or 12.4 hereof (but shall be an Event of Default thereafter);

(E) any material representation knowingly or negligently made by Contractor in Section 15.16(A) or in any certificate, statement, document or Scheduled Payments given pursuant to the terms hereof shall prove to be false or materially misleading in any respect as of the date on which it was made;

(H) Contractor fails to pay any amount when due as required by Sections 12.1 and 12.4;

then in any such case, Owner while such Event of Default is continuing, may (a) terminate this Agreement by notice to Contractor and to its surety, and such notice shall state the reason for the termination (provided, however, that such notice to surety shall not be a condition precedent to Owner's exercise of any right or remedy under this Agreement)....

The remedies in this Section 11.1 provided in favor of Owner shall be cumulative and may be exercised concurrently or consecutively, and in the event of Contractor's negligence, fraud or willful misconduct, shall be in addition to all other breach of contract remedies in Owner's favor existing at law or in equity.

P 26 § 11.1.

230. RBI's default in the payment of liquidated damages to ODEC continued for more than five Business Days after RBI's receipt of written notice from ODEC that such payment was overdue, entitling ODEC to terminate its contract with RBI pursuant to § 11.1(A) and (H). Tr. 220:19-221:23 (Debiec); P 690-799.

231. Without legal excuse therefore, RBI (a) failed to complete the Work and satisfy the conditions precedent for Substantial Completion within 60 days from the Scheduled Substantial Completion Date; (b) failed to complete the Work and satisfy the conditions precedent for Final Completion within 150 days of the Scheduled Substantial Completion Date, and (c) knowingly or negligently misrepresented to ODEC in the certificates contained in turnover packages that the various systems were mechanically/electrically complete, that all functional testing had been completed, and that the system was now turned over to ODEC-that is, the system is ready to operate as designed-when in fact the systems were not mechanically/electrically complete, not all functional testing had been completed, and the system was not ready to be turned over to ODEC. Parrish Video Dep. 123:21-131:6; Tr. 545:4-551:2 (Soares); P 569, 570, 571, 572, 573. In addition, RBI failed to pay any of the sums due to ODEC pursuant to § 12.1 of the EPC Contract and failed to pay or discharge the mechanic's lien filed by Casey Industrial, Inc.

These failures by RBI constituted multiple Events of Default entitling ODEC to terminate the EPC Contract. P 26 § 11.1, 652, 655.

***29** 232. On December 23, 2004, while the above-described Events of Default were continuing, ODEC delivered to RBI and its surety a written notice of termination stating the reasons for termination. Tr. 196:12-200:8 (Debiec); P 654, 655.

233. Section 11.3 of the EPC Contract provides:

> 11.3 *Effect of Owner Termination.*
>
> Upon receipt of any termination notice pursuant to Section 11.1 ... hereof....
>
> Upon such termination:
>
> (ii) Contractor shall be deemed to have waived any claim for damages, including loss of anticipated profits and unabsorbed overheads on account of this Agreement....
>
> (iv) If such termination is pursuant to Section 11.1, Contractor shall be liable for the reasonable costs and expenses incurred because of the occurrence of any Event of Default or the exercise of Owner's remedies with respect thereto, including all costs and expenses incurred in connection with the return of the Facility, the completion of the Work, or any suit to enforce Owner's rights.

P 26 § 11.3.

K. Engineering and Procurement Delays

234. RBI entered into a fixed price contract with Framatome ANP for the majority of RBI's engineering responsibilities under the EPC contract. Lindsay Dep. 9:20-11:7, 11:17-12:7; P 432.

235. Framatome initially stated that it could support the Marsh Run preliminary construction schedule if RBI developed an integrated engineering and construction schedule. Lindsay Dep. 13:3-14:21; Tr. 1000:19-24 (Irvin); P 101.

236. RBI never provided Framatome with an integrated engineering and construction schedule. Lindsay Dep. 13:3-14:21; Voss Dep. 24:21-25:3, 25:11-27:11, 28:17-29:24, 40:4-21; P 455, 456, 459 ("Your commentary on project schedule and late engineering does not require a response other than to say 'what schedule?' The first and only time we ever saw a project schedule from Ragnar Benson was in February of 2004, just three months prior to what we understand to be target commercial operation.").

237. Due to extended contract negotiations with Framatome, RBI delayed Framatome in starting its engineering work as planned by two months. RBI did not even consult Framatome when RBI accelerated its Project schedule from a planned completion date of May 1, 2004 to March 1, 2004 in an attempt to earn the $600,000 early completion bonus provided for by the EPC Contract. Although RBI accelerated Framatome's engineering by four months, RBI refused to agree to a change order compensating Framatome for this acceleration. Lindsay Dep. 37:6-42:22, 43:8-44:25, 45:7-46:5, 46:9-51:8; Tr. 1000:25-1003:23 (Irvin); P 438, 439.

238. RBI continually resisted agreeing to change orders proposed by Framatome for increases in Framatome's scope of work. Lindsay Dep. 56:23-57:5, 58:15-59:13, 59:17-60:14; P 442; Voss Dep. 11:17-12:3.

239. RBI did not provide Framatome with any specific guidance for designing the Marsh Run plant. RBI only provided Framatome with the EPC technical specifications, GE's drawings (without ever obtaining GE's permission) from another power plant (the Armstrong Plant), and held one or two coordination meetings. RBI did not have any constructability meetings with Framatome or any of its other subcontractors in order to test or evaluate the constructability of Framatome's design. Lindsay Dep. 15:4-9, 15:17-16:12, 16:17-17:3, 19:14-23, 20:2-21:25, 22:13-23:3, 23:8-12; Tr. 1028:3-8 (Irvin).

***30** 240. RBI failed to have Framatome take into consideration in its design of the Marsh Run facility the potential for unrippable rock (especially in the utility trenches and in deeper excavations such as foundations) on the Project site. Only after actually encountering the rock and blasting it out for more than a month did RBI request Framatome to consider rerouting underground utilities to lessen the impact of rock on the performance of the work. RBI refused to pay Framatome for this redesign work after Framatome completed the work. Tr. 1036:25-1037:16 (Irvin);

Lindsay Dep. 57:8-16, 57:21-58:2, 58:15-59:13, 59:17-60:14, 60:17-62:15; P 441, 442, 443, 444.

241. Due to RBI's lack of guidance, Framatome designed the underground piping work by using a three-dimensional computer model to route the pipe (without taking the potential for rock into consideration). Although the model should have prevented piping interferences, RBI's method of executing the work created havoc on the Project site. By splitting up the piping scope of work between an underground piping contractor, Sauer Inc. ("Sauer"), and an above-ground piping contractor (Teton), RBI created the potential for massive coordination problems unless RBI closely supervised and enforced the quality of Sauer's work. These potential problems became real when RBI failed to adequately supervise and support Sauer in the installation of the underground pipe, resulting in most of the piping stub-ups being incorrectly placed. Tr. 1033:23-1035:17 (Irvin); Voss Dep. 34:25-38:22, 39:10-21; Manion Dep. 177:25-182:2; P 69 ("On a number of occasions we expressed our concerns to your surveying crew that the trench bedding was at the wrong elevation or the trench locations were not adequate to allow installation of ... our piping in strict accordance with the isometric drawings. Our expressions of concern were at times met with a quick retort of 'close enough." '); Dreher Dep. 144:15-145:23 ("Some of the people, some of the foremen on our job site actually made the comments that not one single piece of pipe fit."); P 171 ("FANP is extremely disappointed with the installation of the underground piping. The quantity of piping installed incorrectly is nothing more than disgraceful."); P 458.

242. RBI bid out the underground piping work based on an incomplete design. As a result, RBI was forced to issue a change order to Sauer in November 2003 for the installation of more than 14,000 additional linear feet of pipe, nearly doubling the scope of Sauer's original work. Tr. 1074:23-1081:25 (Irvin); Berthelsen Dep. 226:4-231:6; P 43; Manion Dep. 21:3-23:5, 25:22-27:12, 27:20-28:19, 34:2-9, 35:4-18, 37:5-27; P 44, 45, 46, 47, 48, 1314. The incomplete design was partially a result of RBI's failure to give Framatome an integrated CPM Project schedule. Because RBI failed to provide Framatome with a CPM schedule, Framatome could not coordinate its deliverables with RBI's plan. Framatome planned on completing and issuing for construction the underground piping drawings in July 2003. Instead, in May 2003, RBI demanded that Framatome immediately produce *preliminary* underground drawings, then blamed Framatome for the drawings being incomplete, and then refused to pay Framatome for its work. Lindsay Dep. 61:16-68:15; P 392, 445.

***31** 243. RBI also delayed Framatome's design in the electrical area. RBI was responsible for the procurement and expediting of equipment. Framatome could not complete the civil and electrical designs for various sections of the plant until it received vendor drawings for the equipment RBI procured. RBI's delay in providing vendor drawings to Framatome delayed Framatome's design of certain portions of the power plant for months. Lindsay Dep. 68:19-75:18, 75:24-76:9; P 392, 446, 447; Voss Dep. 56:11-61:18, 62:2-7, 62:21-68:5; P 467, 468, 469, 470, 471. Notably, RBI was five months late in providing Framatome with vendor drawings for the 480V Switchgear System, delaying Framatome's design of this critical system. Voss Dep. 56:11-58:5; P 467.

244. Whether due to RBI's late supply of vendor drawings, or because of its own failures, Framatome's electrical system became an ever-evolving design. P 91, 172. Cable quantities were originally estimated to be less than 400,000 feet, the cable design was scheduled to be complete by August 2003, and the cable work was expected to be complete by January 2004. In July 2004, Framatome was still issuing changes to the cable schedule, and the quantity of electrical cable installed on the Marsh Run site had grown to nearly 800,000 feet. Likewise, the number of cable terminations nearly doubled, as well. Tr. 1086:20-1089:13 (Irvin); 1005:24-1007:5 (Irvin); 141:13-143:9 (Debiec); 156:7-157:24 (Debiec); 622:17-623:7 (Harvey); P 11, 154, 895, 1316.

245. RBI has admitted that its engineer, Framatome, was negligent in the design of the Marsh Run plant by, among other things:

a. providing incomplete, flawed and/or untimely bid packages;

b. providing incomplete, flawed and/or untimely specifications;

c. issuing drawings for construction containing significant errors, omissions and/or holds requiring revision by Framatome and/or additional work by RBI and/or its subcontractors;

d. failing to implement and/or follow its own Quality Management Manual;

e. improperly performing its Basic Services, thereby necessitating a multitude of requests for information ("RFI's");

f. over-designing the Project, including, but not limited to, designing excessive and unnecessary cabling for the Project; and

g. failing to design the Project for its intended purpose- a nominal 680 megawatt natural gas and oil fire combustion turbine generating facility.

P 249; RBI 30(b)(6) Dep. 176:17-177:18, 178:7-18, 179:7-182:18; Berthelsen Dep. 243:12-258:21, 259:13-262:18, 263:2-11; Tr. 1085:1-1086:19 (Irvin).

246. Framatome's negligence forced RBI to incur additional costs for subcontractors and vendors due to incomplete or flawed bid packages; delayed RBI in performing its EPC Contract work; forced RBI to perform its EPC Contract work out of sequence, in an inefficient manner, and during time periods not contemplated under the schedule or by RBI; forced RBI to incur overtime and additional premium time costs; forced RBI to accelerate its performance; and subjected RBI to subcontractor claims directly related to Framatome's material breaches of its subcontract with RBI. P 249; RBI 30(b)(6) Dep. 182:19-187:21; Berthelsen Dep. 243:12-258:21, 259:13-262:18, 263:2-11; Tr. 1085:1-1086:19 (Irvin).

***32** 247. RBI stopped paying Framatome for its work in January 2004, when Framatome still had much to do on the Project. P 121, 122, 453; Berthelsen Dep. 231:8-232:6.

248. To date, significant engineering issues on the Project, such as the relay coordination study, have not been completed by RBI or Framatome. Tr. 206:20-208:2 (Debiec); 533:8-539:1 (Soares); 1105:11-21 (Irvin); 693:25-694:10 (Dungan); 710:20-711:5 (Dungan); P 227.

L. Delays By and Between RBI and its Subcontractors

1. Casey

249. RBI subcontracted with Casey to perform the civil concrete and foundations work. RBI entered into another subcontract with Casey to perform the electrical underground portions of the work. Tr. 1218:16-23 (Castellano); Krum Dep. 22:23-23:13, 26:14-27:2; P 95, 96.

250. Casey refused to accept the risk of subsurface conditions and excluded rock excavation in its bid. RBI agreed that Casey would not be responsible for the excavation of unrippable rock. Krum Dep. 6:1-13, 6:19-12:22, 13:13-17:2, 17:14-20, 18:22-22:22; P 95, 96, 251, 252, 253, 254, 255, 256.

251. When RBI first encountered unrippable rock on the Project site, Casey recognized that RBI should delay mobilizing it as the site would not be ready for Casey to begin work. Nonetheless, RBI ordered Casey to mobilize as planned, with the result that Casey mobilized too early and could not begin working. Krum Dep. 27:23-32:19; P 1014.

252. RBI failed to provide adequate management, coordination, and supervision of Casey's work on the Project. Casey's work had numerous quality problems which RBI failed to remedy in a timely manner or at all. The very first concrete pour on the Project, the large GSU # 1 foundation, was a fiasco. Numerous people observed that the pour was clearly defective. Yet, RBI insisted on waiting the full 28 days for the break tests to come back. When the tests proved the poured foundation to be defective, the entire foundation had to be ripped out and repoured, thereby delaying the Project. Parrish Video Dep. 37:13-39:13; P 412, 1015.

253. As another example of extremely poor work, RBI allowed Casey to pour the Administrative Building slab during an impending rain storm. The resulting foundation was a disaster. This time, instead of removing the foundation and repouring it, RBI tried ineffectively to repair it. There are still numerous problems with the Administrative Building as a result. Gallik Dep. 191:22-195:3; Tr. 368:14-370:7 (Craddock); Parrish Video Dep. 40:3-41:20.

254. RBI failed to manage Casey properly and failed to require Casey to perform its work with sufficient manpower and motivation to meet the schedule. According to Dave Gallik, RBI's Civil Superintendent, Casey never put in any effort to attempt to bring its work back on schedule. He felt that because of RBI's poor supervision in allowing subcontractors to dictate their own schedules, work locations and pace of work to RBI, it looked like "the inmates were watching the prison." Gallik Dep. 98:1-101:25, 113:22-115:10; P 410, 414, 415, 1018, 1023. As a result, Casey's work was continually late. The late installation of foundations, for which Casey and RBI were responsible,

directly impacted Teton's ability to complete its work on the Centerline portion of the Project in a timely manner. Dreher Dep. 42:2-46:1, 54:12-18, 54:23-56:11, 58:3-59:10; P 482, 485, 487.

***33** 255. Because of Casey's failure to make progress, RBI threatened to terminate Casey's contract in October 2003, and did remove a significant number of foundations from Casey's scope of work in November 2003. Tr. 1072:18-23 (Irvin); P 1021, 1028. RBI intended to self-perform these foundations and promised Teton that they would be installed by the end of 2003. RBI, however, refused to begin work on any of the foundations it removed from Casey's scope of work until it completed the negotiation of the deductive change order with Casey, a process that took nearly two months. Dreher Dep. 72:5-76:20; Tr. 1072:18-1074:19 (Irvin); P 1028, 1312. Additionally, the foundations removed from Casey's scope of work included some of the most difficult foundations on the Project. Gallik Dep. 128:24-132:11. As a result of its poor planning, supervision, and coordination, RBI did not begin work on these foundations until January 2004, and did not complete them until July 2004. Teton could not complete its work installing the fuel oil piping until after RBI completed the foundations. Tr. 1072:18-1074:19 (Irvin); Dreher Dep. 72:5-76:20, 159:2-162:18; P 517.

256. RBI, in turn, impacted and delayed Casey's work by refusing to provide Casey with adequate backfill to use on the Project. The Specifications required that backfill must be free of all rocks greater than three inches in diameter. P 108 § 11.5.1. At one point, rather than provide Casey with suitable backfill, RBI directed it to "hand remove" the large rocks from the backfill material. Krum Dep. 44:2-46:15; P 1030.

257. RBI's incomplete design for the issuance of the underground electrical bid package delayed Casey's work on the Project. In late December 2003, near the time when all underground electrical work should have been completed, RBI issued Casey a Change Order in excess of $200,000, more than 20 percent of Casey's original electrical contract, for the installation of an additional electrical conduit. Additionally, due to engineering design deficiencies regarding the grounding grid, RBI ordered Casey to stop installation of the grounding grid and then increased the quantity of grounding cable Casey was to install by 80 percent. Krum Dep. 46:16-49:19; P 257, 1029.

258. Due to RBI's poor management, supervision and coordination of Casey, the relationship between Casey and RBI became very strained. In December 2003, Casey refused to perform additional underground electrical work until RBI executed a Change Order. Casey also refused to go to two shifts to try to get back on schedule because it knew RBI would not pay it for the work. Casey delayed installing the underground conduits and Trenwa trenches, which by RBI's own admissions were on the critical path of the Project at the time. To make matters worse, Dave Gallik allowed Casey to knowingly install the underground conduit for the grounding grid incorrectly. When confronted by Gallik, Casey's field superintendent told him, "All I want to do is get this stuff in the ground and get out of here." Incredibly, RBI did not require Casey to correct its work. Gallik Dep. 135:19-137:10, 140:15-148:1; P 210, 419, 420, 421, 1032.

***34** 259. To cap it off, RBI allowed Casey to demobilize from the Project site without finishing its work. Dave Gallik again explained that it was like "inmates running the prison" because "[h]ere's a subcontractor that's not done with his work and he's going home." Gallik Dep. 166:8-168:16; P 426.

2. Sauer

260. RBI split the scope of work for the installation of underground and above-ground piping. RBI entered into a subcontract for the underground piping with Sauer for the installation of approximately 16,000 linear feet of pipe, with Sauer's work to be completed by late November 2003. Tr. 1074:23-1075:17 (Irvin); Manion Dep. 16:1-18, 17:13-24, 18:9-20:14; P 44, 53.

261. RBI's management, coordination, and supervision of Sauer's work was terrible. For example, rather than having Sauer start working in the bathtub area of the Project site in order to complete that portion of the work prior to the arrival of the turbines and generators, RBI wasted valuable time having Sauer install pipe in other areas. Tr. 1356:22-1357:10 (Williams); 1456:13-1459:9 (Williams); Williams Dep. 248:2-250:14; P 199.

262. RBI failed to ensure that Sauer maintained adequate manpower to keep its work on schedule. As a result, Sauer fell behind on its work very quickly. P 210, 62. As Joe Castellano stated to Sauer in a December 11, 2003 letter:

> This fact reaffirms the notice previously given to Sauer by RBI

> during discussions and meetings in late October through November that Sauer was delaying the project. At that time Sauer refused to man the project and attack the job aggressively. This failure by Sauer is highlighted by the number of ductbanks and foundations that the pipe installation must now work under and around. *Sauer set the tone of the project from day one.* The failure to man the project with supervision authorized to hire qualified labor and schedule delivery of materials has been Sauer's deterrent [sic]. Project controls were never in place to track progress and quality problems further impacted progress.

P 59 (emphasis added).

Sauer's manpower problems continued. When discussing Project delays in February 2004, John Irvin reiterated to Sauer:

> It is Sauer's previous failure to pursue the work aggressively that is driving the delay. Prior to the on site mobilization of other contractors, Sauer had ample opportunity to get in front of the follow on contractors, but lack of manpower, materials, lack of productivity and quality problems prevented you from doing so. The current situation is a direct result of these previous failures.

P 64.

263. When issued for bid, the initial design of the underground piping by RBI (through Framatome) was woefully incomplete. In November 2003, at about the time Sauer was supposed to have completed its work on the Project, RBI was forced to issue a change order to Sauer for the installation of more than 14,000 linear feet of additional pipe, nearly doubling Sauer's scope of work on the Project. Tr. 1074:23-1081:25 (Irvin); Berthelsen Dep. 226:4-231:6; P 43; Manion Dep. 21:3-23:5, 25:22-27:12, 27:20-28:19, 34:2-9, 35:4-18, 37:5-27; P 44, 45, 46, 47, 48, 52, 1314.

***35** 264. In an effort to cut corners and thereby save money, RBI decided that it would perform the excavation, backfill, surveying and pumping (dewatering) work for Sauer's piping installation associated with the Change Order. Agreeing to self-perform this work allowed RBI to negotiate the price of the Change Order down from approximately $1.734 million to $1.251 million. Tr. 1079:14-1080:9 (Irvin); Manion Dep. 25:21-27:12, 27:20-28:19, 29:1-2, 37:5-41:23, 43:20-44:7; P45, 47. Although RBI was to begin its excavation, backfill, surveying, and pumping duties for Sauer on November 15, 2003, RBI immediately failed to support Sauer's work. From November 2003 through at least May 2004, RBI delayed Sauer's work by having inadequate resources to excavate, backfill, survey, and dewater trenches for Sauer. Jim Manion, Sauer's project manager, stated to John Irvin in a March 1, 2004 letter, "You are well aware that Ragnar Benson's surveying, pumping and excavation quality issues are numerous, however, my comments will be limited to stating that you have delayed us since November 17, 2004[sic] and continue to do so." P 65; Manion Dep. 55:24-57:9, 133:12-140:9, 151:19-154:18, 155:1-158:25, 159:9-24, 164:9-166:9, 167:14-170:3, 177:25-182:2, 185:23-188:20; Tr. 1082:1-1083:4 (Irvin); P 49, 56, 58, 60, 61, 63, 65, 69, 70.

265. RBI's coordination, supervision, management, and quality control of its own work in supporting Sauer was also poor. Most of the underground stub-ups were incorrectly located. In order for Sauer's underground piping to match Teton's prefabricated above-ground piping, the stub-ups must be set in precisely the correct location. Sauer observed that RBI's personnel were not concerned with quality, and if piping stub-ups shifted during backfill (done by RBI), RBI considered them "close enough." Manion Dep. 177:25-182:2; P 69; Tr. 1033:23-1035:17 (Irvin); Voss Dep. 34:25-38:22, 39:10-21; Dreher Dep. 144:15-145:23 ("Some of the people, some of the foremen on our job site actually made the comments that not one single piece of pipe fit."); P 171 ("FANP is extremely disappointed with the installation of the underground piping. The quantity of piping installed incorrectly is nothing more than disgraceful."); P 458.

266. RBI's inadequate supervision of subcontractors, and extremely poor management and coordination of subcontractors, led to numerous incidents where Sauer's,

Casey's, and RBI's excavation teams dug up and otherwise destroyed each other's previously completed work. As a result, many underground pipes and conduits had to be dug up and repaired. Manion Dep. 113:25-120:17; P 55. As Jim Manion of Sauer stated to Joe Castellano on December 15, 2003:

> It was Ragnar Benson that set the tone on this project from day one. This project was impacted early on by rock. From that first encounter of rock and throughout this project RBIC has on a nearly daily basis disrupted the flow of our work. The disruptions were usually in the form of directing us to move out of areas so other contractors could perform their work even thought [sic] our activities were agreed upon in the daily coordination meetings. RBIC's inability to properly coordinate this project is the real reason for this project's present situation. The number of ductbanks and foundations that we have to work under is proof of that.

***36** P 60.

267. RBI's design errors for a portion of Sauer's work also critically impacted and delayed the work on the entire Project site. RBI (through Framatome) initially specified the wrong type of pipe to be installed underground in support of the Fuel Gas System. When Sauer recognized RBI's error in August 2003, RBI had Framatome correct and reissue the specification. The piping required for the Fuel Gas System was a special type of stainless steel pipe (A358) which had a long procurement lead time (12-16 weeks). Once the piping material was delivered, Sauer had to fabricate the pipe into spools, which took several additional weeks. Due to RBI's design error, the installation of the Fuel Gas pipe was delayed four months, from its scheduled dates of September-October 2003 to January-February 2004. The majority of this A358 pipe was to be installed in an east-west running trench on the north side of the combustion turbine units. Due to RBI's design error, this trench remained open for about 6 months (or as Dave Gallik described it, the trench was open "Since Christ was a corporal in the Roman Legion") and greatly impeded, interfered with, and delayed Teton's work on the Project. Manion Dep. 94:21-95:10, 95:21-98:1, 98:10-99:18; P 59, 60, 484, 1050, 1051, 1052, 1053, 1054, 1055, 1056, 1057, 1058, 1059; Gallik Dep. 174:23-177:12; Dreher Dep. 63:24-65:16.

3. Teton

268. RBI entered into a subcontract with Teton for completion of the Centerline portion of the work, which involved erecting and assembling the many components associated with the combustion turbine generator units themselves. Dreher Dep. 66:18-67:17; P 486.

269. RBI promised Teton that the portion of the site around the CTs (the "bathtub" area) would be backfilled and brought to grade for easy access for Teton's construction equipment. Dreher Dep. 29:3-18, 30:9-31:19; P 486. Because of RBI's non-existent plan for removing rock, and its poor coordination and supervision of its other subcontractors, RBI did not have the bathtub area ready as promised to Teton (backfilled and to grade for easy access) when RBI directed Teton to mobilize to the Project site. Dreher Dep. 31:20-33:1, 40:14-46:1, 59:11-66:15; P 164, 481, 482, 483, 484. As a result, Teton was forced to bring additional, extremely large cranes onto the Project site to gain access to the CTs in order to accomplish its work. Dreher Dep. 59:11-66:15; 68:7-24; P 483, 484, 487.

270. Additionally, even though Teton specifically requested it, RBI refused to supervise and coordinate Casey to ensure that Casey would pour the ancillary foundations in the bathtub area in an organized, sequenced, and timely manner to allow Teton to complete its work sequentially on the CTs as planned. Most of these ancillary foundations were poured from 30 to 90 days late with several as late as 130 to 140 days. Dreher Dep. 42:4-46:1; 47:24-52:19, 53:2-56:11, 56:22-59:10; P 482, 484, 485.

271. RBI delayed Teton's work on the Centerline portion of the contract because of its poor planning, and its poor management, supervision, and coordination of its subcontractors. Partly in recognition of its failure to provide Teton with adequate working conditions for the Centerline portion of its work, RBI awarded Teton a subcontract for installation of the Balance of Plant ("BOP") above-ground piping. Dreher Dep. 71:14-74:4; P 489.

***37** 272. Teton depended on the installation of various BOP foundations in order to support its efforts to install the BOP piping. RBI promised Teton that the BOP foundations would be installed by the end of 2003 to support Teton's work. In fact, RBI failed to deliver on its promise and was still installing foundations necessary for Teton's BOP piping work in July 2004, thereby delaying Teton's work. The delay in installing BOP foundations meant that Teton could not complete the installation of the fuel oil pipe until July 2004, more than 2 months after the Scheduled Substantial Completion Date in the EPC Contract. The BOP foundation delay, thus, critically delayed the completion of the Fuel Oil System for the Project. Dreher Dep. 74:5-77:19, 78:1-79:14, 159:2-162:18; P 491, 517; Tr. 2484:22-2485:5 (Holman); 2496:3-24 (Holman).

273. In support of the BOP piping subcontract, RBI was to procure, fabricate, and provide to Teton a large amount of certain types of pipe. In early January 2004, several weeks after Teton had mobilized its forces in support of the BOP piping subcontract, RBI informed Teton that it would not supply Teton with much of this pipe and directed Teton to procure and fabricate such pipe on its own. RBI then dragged its feet for about 3 months in negotiating a change order for the extra work it directed Teton to do, initially offering to pay Teton only half of what Teton claimed. Dreher Dep. 79:18-85:9, 85:16-86:2, 86:21-90:20; P 490, 491, 492, 493.

274. RBI would not provide Teton with redlined drawings showing the actual stub-up locations of the underground pipe. Instead, Teton was forced to fabricate the piping according to Framatome's isometric drawings. Due to RBI's very poor quality control, supervision, coordination, and management of Sauer's work, most of the underground piping stub-ups were incorrectly placed. RBI required Teton to modify the piping it had pre-fabricated in order for the above-ground pipe to be able to connect with the misplaced underground pipes. Dreher Dep. 92:23-94:9, 144:15-145:23; P 495; Manion Dep. 177:25-182:2; P 69; Tr. 1033:23-1035:17 (Irvin); Voss Dep. 34:25-38:22, 39:10-21; P 171.

275. RBI used a Work Authorization ("WA") system to authorize Teton (and RBI's other subcontractors) to perform extra work, such as modifying piping to fit incorrectly placed underground pipes. Dreher Dep. 94:10-95:15.

276. RBI initially allowed Jeff Williams (its site manager) to approve WAs in the field. RBI also initially paid Teton for these WAs when Teton invoiced them monthly. In February 2004, RBI withdrew Jeff Williams' authority to approve WAs on site and then in March 2004, Dave Berthelsen, RBI's general manager in Pittsburgh, withdrew all authority for anyone associated with the Project (other than himself and Joe Castellano only in Berthelsen's absence) to approve any expenditures. This cumbersome process delayed the Project because it often took several weeks for routine low dollar value WAs to be approved. Dreher Dep. 141:15-143:17, 144:3-149:10; P 510, 511, 191, 193.

***38** 277. In mid-April 2004, RBI informed Teton that it would not pay Teton for any WAs until they were incorporated into a Change Order, and it recharacterized its previous payments to Teton for WAs as credits against progress payments due under Teton's subcontracts. Dreher Dep. 152:8-154:18; P 514.

278. Not willing to work for free, Teton slowed down its work on the Project and threatened to walk off the job. During intense negotiations in May 2004, both Dave Berthelsen and Joe Castellano promised Teton that RBI would pay Teton for WAs without the necessity for incorporating them into Change Orders. Dave Berthelsen and RBI, after inducing Teton to begin working again, reneged on Berthelsen's promise and refused to pay Teton for any WAs, insisting through December 2004 that WAs must be incorporated into a Change Order to be paid. Dreher Dep. 152:8-154:18, 156:17-158:11; Tr. 1271:10-1274:6 (Castellano); P 309, 514, 516; D 219.

279. As stated by Teton's project manager, Dion Dreher, in a letter to RBI on December 16, 2004:

> After Teton depended upon RBI's assurances of payment by continuing to perform substantial amounts of WA's, RBI now decides not to follow through with their commitments at a time when Teton has already expended the funds to provide the labor, materials, and equipment that RBI demanded. *This is bad faith of the worst sort.*

P 519 (emphasis added).

280. RBI awarded Teton a subcontract for the BOP electrical work in December 2003. Recognizing that RBI's electrical design was still not complete as of December 2003, Teton and RBI clarified the scope of Teton's work during negotiations for the electrical subcontract, limiting, among other things, the amount of cable Teton would supply and install, and the number of instruments Teton would calibrate. Based on these negotiations, RBI issued Teton a notice to proceed for the BOP electrical work. Dreher Dep. 99:8-100:22, 101:8-108:12; P 498, 499, 500, 501.

281. Teton's electrical work was supposed to be complete by mid-March 2004. Dreher Dep. 117:5-11.

282. More than a month after awarding Teton the electrical subcontract, and after directing Teton to mobilize and begin work, RBI sent Teton the proposed subcontract. RBI included in the proposed subcontract numerous additional and revised drawings from those on which Teton had bid. When Teton pointed out the drawing additions and discrepancies in the subcontract through its Attachment "ZZ" and signed the subcontract contingent upon RBI's acceptance of the attachment, RBI refused to execute the subcontract. Dreher Dep. 108:16-24, 109:23-110:2, 110:20-114:15, 114:22-115:24; P 502.

283. RBI took four months to review and respond to Teton's Attachment "ZZ." Dreher Dep. 115:25-117:11; P 503.

284. RBI and Teton agreed among other things that Teton's bid had been based on approximately 388,000 feet of cabling with 25,000 feet of contingency for extra cable built into the bid. Due to RBI's deficient, late, and admittedly negligent design of the Project, the cable quantities Teton was forced to procure and install nearly doubled. In June 2004, after the Project should have been completed, RBI agreed and signed a Change Order for installation of an additional 350,000 feet of cable for a price of about $910,000. P 509. Additional cable continued to be designed by Framatome after this Change Order was executed. RBI then refused to pay Teton for all of the cable to which RBI had agreed. Dreher Dep. 118:20-120:8, 134:16-137:6, 138:13-139:3, 139:19-141:12; Tr. 1086:21-1088:20 (Irvin); P 503, 507, 509.

***39** 285. Additionally, because of RBI's deficient, late, and admittedly negligent design, Teton was forced to perform additional terminations for the additional cables. Teton was also forced to calibrate numerous additional instruments that were not included in the basis of its bid. RBI insists that Teton is responsible for calibration of all GE instruments on the Project, and has refused to pay Teton for this additional work. Dreher Dep. 105:3-106:7, 118:20-120:8; Tr. 1132:18-1134:10 (Irvin).

286. The late and ever-evolving design delayed Teton's work on the Project and substantially delayed the completion of the Project itself. Dreher Dep. 118:20-120:8, 134:16-137:6; P 91, 172, 124, 249, 507.

M. ODEC's Damages

1. Liquidated Damages

287. The Marsh Run Project Scheduled Substantial Completion Date was May 5, 2004. Tr. 100:10-15 (Debiec).

288. RBI agreed in § 12.6 of the EPC Contract that the liquidated damages "do not constitute a penalty and are reasonable considering the damages that Owner shall sustain in the event of ... Contractor's failure to cause the Substantial Completion Date to occur on or prior to the Scheduled Substantial Completion Date." P 26 § 12.6.

289. RBI benefited from the liquidated damages provision because it limited RBI's exposure to liability for delaying completion of the Project. Tr. 227:21-229:9 (Debiec); P 26, 27, 32, 319, 1196.

290. When the EPC Contract was executed by the parties, it was reasonable for them to believe that actual damages would be difficult to ascertain and prove in the event of a delay in achieving Substantial Completion of the Project. Tr. 93:15-95:1 (Debiec); P 26, 27, 32, 319, 1196.

291. The amount of liquidated damages provided by the EPC Contract was a reasonable estimate of potential actual damages viewed from the date of execution of the contract. In fact, ODEC's initial estimate for a reasonable figure for liquidated damages, based on ODEC's potential losses should the power plant be completed late, was $100,000 per day. ODEC, recognizing that potential EPC Contractors would likely be unwilling to accept liquidated damages in the $100,000 per day range, revised the liquidated damage amount to $50,000 per day to issue in its Request for Proposals. ODEC and RBI negotiated the liquidated damages amount down to $45,000 per day ($15,000 per unit per day). This is a typical level of liquidated damages associated with

a combustion turbine project such as the Marsh Run Project. Tr. 93:15-95:1 (Debiec); 226:25-229:24 (Debiec); 480:7-18 (Dykema).

292. ODEC is entitled to $45,000 per day in liquidated damages for each day RBI is late in achieving Substantial Completion as defined in the EPC Contract. P 26 §§ 6.5, 12.1.

293. As of December 23, 2004, the date on which ODEC terminated RBI for Default, RBI had not achieved Substantial Completion on the Project. Thus, as of December 23, 2004, RBI was 233 days late in achieving Substantial Completion. Tr. 196:12-200:8 (Debiec); P 655.

***40** 294. In accordance with the Court's pre-trial ruling, [1] ODEC's liquidated damages are capped at 10% of the total EPC Contract Price. The total EPC Contract Price is $47,475,967.35. Therefore, the maximum amount of liquidated damages ODEC can be awarded is $4,747,596.73. After 106 days of delay in achieving Substantial Completion, the liquidated damages cap had been reached. Tr. 99:16-100:9 (Debiec); 220:19-222:14 (Debiec); P 690-P 799.

2. ODEC's Other Damages

295. ODEC has incurred costs amounting to $140,190.24 to date in completing the Project. P 801, 1174; Tr. 221:9-12 (Debiec).

296. ODEC has incurred costs of $19,259.76 in defending the lawsuit brought by Casey in accordance with its mechanic's liens. P 801; Tr. 223:17-19 (Debiec). Under § 3.16 of the EPC Contract, RBI was required to remove Casey's liens. P 26 § 3.16. RBI failed to do so. Under § 9.1 of the EPC Contract, RBI is required to indemnify ODEC for its costs in defending Casey's claim. *Id.* § 9.1.

297. ODEC has incurred additional overhead costs in the amount of $248,367.93 as of August 16, 2005. P 801, 1174; Tr. 223:9-12 (Debiec); 286:12-287:8 (Debiec).

298. ODEC has incurred litigation costs substantially greater than $1,500,000. P 801, 1174.

N. RBI's Damages

1. Trauner Expert-William Manginelli

299. Mr. Manginelli, RBI's first proffered scheduling expert, has no experience in the power plant industry or with scheduling power plant construction projects. Manginelli has no experience helping contractors obtain permits. Tr. 1733:5-15 (Manginelli); 1739:13-1740:1 (Manginelli).

300. Manginelli's methodology involves two steps. The first step, contained in Section III of his expert report, is a mathematical process that tracks the critical path through the project, identifies every shift in the critical path and continually calculates the change in the length of the longest path. It is an objective process because the results of the analysis have nothing to do with which party is responsible for a delay. The second step, contained in Section IV of his expert report, involves interpreting the results of the mathematical first step using other relevant information from the Project. Manginelli analogizes this interpretation as one of rounding numbers. Tr. 1737:23-1738:23 (Manginelli); 1779:1-1780:15 (Manginelli); 1795:13-20 (Manginelli); 1865:17-1869:3 (Manginelli); D 1.

301. Performed properly, Manginelli's methodology "look[s] at the as-planned versus as-built performance of the work along the critical path of the project, moving chronologically from the beginning of the project through the execution of the project." Tr. 1734:19-1735:4 (Manginelli).

302. Manginelli's methodology requires that the project schedules be reliable enough to use as the basis for measuring delay. Manginelli testified that the project schedules were sufficient and reliable enough to use as the basis to measure delay. Tr. 1775:5-7 (Manginelli). He also stated in his expert report that "[t]he project schedules issued by RBI were considered to be a reliable model of RBI's project plan and execution and, as such, were used as the basis for analyzing project delays through March 13, 2004." D 1, p. 6.

***41** 303. In contrast to his stated methodology, Manginelli stopped his analysis slightly more than halfway through the Project, on March 13, 2004, in part because, according to him, for the time period following that date, the schedules could not solely be relied upon to measure delay. Due to that factor and Mr. Kern's experience with power plants, Kern conducted the delay analysis for the period from March 13, 2004 until RBI was terminated on December 23, 2004. Tr. 1775:5-1778:25 (Manginelli); D 1, p. 6.

304. As a predicate to his analysis, Manginelli attempted to establish MR00 as the baseline schedule for the Project. Tr. 1799:18-1809:18 (Manginelli). Manginelli concluded that MR00 was an acceptable schedule to use as the baseline schedule. Tr. 1809:19-25 (Manginelli). In coming to this conclusion, Manginelli disregarded all the testimony and documentary evidence, including the deposition testimony of RBI's scheduler, Alex Stanton, that demonstrated that RBI was still attempting to provide ODEC with an acceptable baseline schedule as late as October 2003. Tr. 1833:2-1834:21 (Manginelli); 128:21-141:12 (Debiec); 495:4-497:10 (Dykema); 499:1-503:18 (Dykema); Stanton Dep. 13:4-18:15; 44:17-50:17; P 2, 4, 5, 6, 7, 8, 9, 21, 156, 157, 158, 159, 160, 161, 162, 369, 370, 371, 373, 374, 826 Exs. B, D, E, F.

305. Manginelli also ignored the fact that MR00 and all of RBI's early schedules were deficient in a number of crucial aspects, including the omission of reliability runs from the schedule. Reliability runs are the very last thing to be tacked onto the back of the schedule and would therefore increase the forecasted Substantial Completion date of RBI's Project schedules by at least 16 days. Tr. 1858:5-23 (Manginelli); 2526:8-2527:7 (Dykema); P 536.

306. Manginelli did not establish that MR00 was a valid, accurate, adequate, reasonable, or actual baseline schedule for the Marsh Run Project. In fact, Manginelli, while trying to explain why he discounted his "objective" Section III methodology in determining delays attributed to permitting, stated that he concluded he *could not* rely on MR00 for evaluating the permitting delay. In short, he "[does not] trust the schedules for the first delay." Tr. 1894:14-1898:9 (Manginelli); 2473:24-2475:16 (Holman).

307. Another major problem with Manginelli's methodology is that he could not use the Project schedules RBI produced without modifying them. Manginelli confirmed that running Primavera's Longest Path filter on RBI's raw schedules produced meaningless results. Tr. 1844:1-1851:13 (Manginelli); P 537. In order to get past the "raw" longest path of RBI's schedules, Manginelli manipulated them by adding dummy variables and/or changing or removing constraints that appear in the schedules. Tr. 1760:10-1762:24 (Manginelli). Manginelli did not disclose this procedure in his expert report and, when trying to recall how he manipulated RBI's MR00 schedule to produce a longest path, changed his testimony twice. Manginelli testified at his deposition that he added a dummy variable to MR00. When confronted with his own printout of the longest path showing no dummy variable, he testified that he removed the Switchyard Complete constraint. Finally, at trial, Manginelli testified that he did not remove the constraint but changed the mandatory constraint on the Switchyard Complete activity to an "expected finish" constraint. Tr. 1787:8-1788:23 (Manginelli); 1851:14-1853:5 (Manginelli); 2473:24-2477:1 (Holman); P 536.

***42** 308. Manginelli based his methodology on his conclusion that the Project schedules are reliable. His "objective" Section III analysis determined there were 20 days of delay to the critical path associated with obtaining the sitework permit and that the delay was from May 23, 2003 to June 16, 2003. Tr. 1872:7-22 (Manginelli); D 1. For the entire period from March 14, 2003 to June 13, 2003, Manginelli's "objective" mathematical analysis determined there were 66 days of delay to the critical path of the Project, and through July 18, 2003 determined there were 85 days of delay to the critical path of the Project. Tr. 1873:23-1874:25; D 1. According to his espoused methodology, Manginelli should then interpret his Section III results in order to assign delays, rounding where necessary as where one rounds a number taken out to 20 decimal places to the nearest whole number. Tr. 1865:17-1869:3 (Manginelli).

309. In order to avoid the mathematical determination of 20 days of permitting delay, Manginelli circumvents his methodology and discards his "objective" "mathematical" analysis completely in determining how permitting delays affected the critical path of the Project. Tr. 1813:15-1818:6 (Manginelli). He "rounds" the 20 days of permitting delay into 76 days of delay by declaring, contrary to his previous assertions, that the MR00 project schedule is not sufficiently reliable. Tr. 1886:5-1898:9 (Manginelli). In his "subjective" Section IV analysis, Manginelli merely counts up the number of days between April 1, 2003 and June 16, 2003, and assigns all 76 days of delay to ODEC. In doing so, he completely disregards the facts that: the "Start of Construction" activity is not on the longest path (i.e., critical path) of *any* of RBI's Project schedules even after Manginelli's manipulations; the first construction activity does not come onto the critical path of Manginelli's baseline schedule, MR00, until December 15, 2003; construction activities are not on the critical path directly after the sitework permit has been obtained; and RBI asked for only 74 days of delay in its correspondence with ODEC. Tr. 1854:24-1855:18 (Manginelli); 1884:18-1885:23 (Manginelli); 1907:13-1908:2 (Manginelli); P 536.

310. Manginelli used the combination of his mathematical "objective" process and his subjective "rounding" process to assess a total of 104 days of delay to the Project from March 14, 2003 to March 13, 2004. His analysis resulted in assigning 76 days of delay to ODEC for the permitting issues, 3 days of delay for the hurricane force majeure event, and a net of 25 days of delay to RBI (which reflected substantial forecasted "savings" he credited to RBI). Tr. 1830:24-1831:1; D 89. Manginelli's report consolidated these delays and "savings" and minimized their total impact. In fact, for the same time period, Manginelli's "objective" analysis resulted in a total of 279 days of delay to RBI, 20 days of delay to ODEC for permitting (assuming *arguendo* that RBI is not responsible for the permitting delays), and 195 days of "savings." Tr.1924:15-1927:21 (Manginelli); P 1084.

***43** 311. Manginelli freely admits that in using his methodology you have to go all the way to the end of the Project to determine whether or not the projected "savings" were actually realized. Tr.1923:22-1924:4 (Manginelli); 1927:19-1928:8 (Manginelli).

312. Manginelli failed to follow his own basic methodology because he did not start his analysis at the beginning of the Project and he did not follow it through to the end of the Project. Despite the fact that the first day of the Project was the date of the Notice to Proceed, December 4, 2002, that there were critical path activities that occurred prior to March 14, 2003, and that these activities were engineering and procurement activities, Manginelli only began his analysis on March 14, 2003. Tr. 1810:7-13 (Manginelli); 1840:16-1843:25 (Manginelli). Manginelli only took his analysis through March 13, 2004. Tr. 1777:22-23 (Manginelli).

313. As pointed out by the Court, "the bottom line is that we could not look at [Manginelli's] numbers at the end of [his] process because of the hand-off [to Kern] and just accept those numbers as valid." Tr.1932:3-16 (Manginelli).

314. Manginelli's methodology is flawed and meaningless. Even if the "objective" analysis contained in Section III of Manginelli's report were reasonable, Manginelli stepped away from and discarded the "objective" Section III analysis in reaching his opinions on responsibility for delays. His opinions regarding the amount and responsibility for delays are not supported by the evidence. Manginelli has no experience in power plant construction by which to apportion delays based on judgment. Tr. 2477:2-2481:5 (Holman).

315. As such, RBI has failed to establish that any alleged delays by ODEC affected the critical path of the Project between March 14, 2003 and March 13, 2004.

316. RBI also failed to establish that it actually accelerated the Project during this period because it cannot show that it realized any of the forecasted "savings."

317. Thus, at least 279 days of delay to the Project during the time period March 14, 2003 through March 13, 2004, are the responsibility of RBI.

2. Deloitte Expert-Dale Kern

318. RBI's second proffered scheduling expert, Mr. Kern, analyzed delays on the Marsh Run Project from March 13, 2004 until RBI was terminated on December 23, 2004. Unlike Manginelli, Kern conducted a windows analysis. Tr. 2482:14-2484:19 (Holman).

319. Because Kern's analysis was substantially different from Manginelli's, his methodology does not validate the 195 days of "savings" Manginelli credits to RBI in his report. Tr. 2480:14-2481:17 (Holman); 1950:23-1952:12 (Kern).

320. In a windows analysis, the windows are selected on a subjective basis. One can affect the outcome of the analysis by how one chooses the windows. By selectively choosing the milestones and windows, the results can be controlled. Tr. 1838:8-1839:23 (Manginelli); 2069:5-20 (Kern); 2482:14-2484:19 (Holman).

***44** 321. Kern's methodology is flawed because he selectively used schedules that he admits are flawed and that were not used to manage the start-up and commissioning of the units. He then selected arbitrary milestones in order to break his analysis into windows that benefit RBI. For example, even though the Project schedules Kern used for his Periods 1 and 2 (March 13, 2004 to June 27, 2004) show that Unit 1 was the critical path to completion of the Project, Kern used milestones from Unit 3 to assess delay. Inexplicably, Kern split first fire of Unit 3 on gas into two separate windows (breaking it at the "Unit 3 on turning gear" milestone), while he evaluated first fire of Unit 1 on gas as one entire window. Tr.2072:16-2073:15 (Kern); 2084:15-2085:14 (Kern); 2092:25-2094:13 (Kern); 2482:14-2484:19 (Holman).

322. In a misguided effort to attempt to show he did not conduct a windows analysis, Kern created an entirely new chart, not contained in his expert report, and claimed that it demonstrated his analysis was really an as-built critical path analysis. D 721. Tr.1962:22-1966:7 (Kern). Kern's new as-built chart, however, proves that he did not actually conduct an as-built critical path analysis. The as-built chart does not reveal the same number of days of delay that Kern calculated in his report. In fact, it shows less delay than Kern's report shows. In order to yield the increased delays in Kern's report, Kern must use his windows analysis rather than the as-built chart. Kern used the windows analysis to reach back into previous periods and double count delays. Tr.2085:15-2087:23 (Kern); 2094:14-2098:4 (Kern). Specifically, Kern's new chart shows the 4-day reach-back from Period 4 to Period 3. Tr. 2484:10-2487:5 (Holman); 2096:20-2098:4 (Kern); D 721. Even the initial work in Kern's own Project files was labeled "Windows Analysis." Tr.2070:15-2071:9 (Kern); P 547.

323. Kern's alleged "as-built" critical path is flawed and unreliable. Tr. 2484:10-2485:5 (Holman). In reality, Kern selectively used three windows to attempt to show that first fire of Units 1 and 3 were on the critical path of the Project when in fact the Fuel Oil System was on the critical path of the Project throughout Kern's entire analysis period. Because of RBI's construction delays, Teton's completion of the fuel oil piping was delayed, thereby impacting the critical path of the Project. Tr. 2482:14-2485:5 (Holman); 2496:3-24 (Holman); 2097:15-2099:16 (Kern).

324. Assuming *arguendo* that any of Kern's schedule methodology is valid, RBI has failed to provide the requisite notice and to preserve its claims for delays under § 8.1 of the EPC Contract. In fact, RBI failed to give proper notice for *any* claims it is now pursuing, except arguably the permit claim. In response to the Court's order requiring RBI to provide ODEC with all of its claims for delay and to list all notices provided to ODEC, RBI submitted with its supplemental answers to ODEC's interrogatories, a delay chart listing all of its delays. P 128 RBI-INT SUPPL 0144. In its 30(b)(6) deposition, RBI confirmed that there were no other claims for delay. RBI 30(b)(6) 62:6-16. In its deposition, RBI admitted that it was either no longer pursuing, or had not provided timely notice for every claim after the 11/17/2003 Permit claim. RBI 30(b)(6) 322:18-323:20; 323:22-324:10; 324:12-25; 325:2-14; 328:5-16; 330:11-331:11; 333:1-13; 333:20-334:6; 334:8-20; 334:22-335:18; 335:20-336:6; 338:24-339:20; 342:21-344:1; 150:23-152:3; 152:5-153:1; 346:5-347:6; 347:18-22; 348:12-14; 156:5-158:25. RBI also admitted that it had failed to give proper notice to ODEC for each of the alleged delays asserted by Kern in his report. RBI 30(b)(6) 325:16-328:3; 331:13-23; 332:13-25; 336:8-338:22; 338:24-339:20; 339:21-342:12; 342:21-344:1; 344:2-13; 344:15-345:17.

***45** 325. ODEC never waived the requirement for giving such notice as required by § 8.1 of the EPC Contract. "Unless otherwise specifically provided by the terms of this Agreement ... [a]ny waiver shall be in writing and signed by the party granting such waiver." P 26 § 15.7.

326. In an attempt to equivocate and explain his deposition testimony waiving RBI's claims for delay, John Irvin testified at trial that he had not had an opportunity to review Kern's report before testifying about it as RBI's corporate designee in RBI's 30(b)(6) deposition. Tr. 1197:15-25 (Irvin). In fact, at the deposition, when asked whether or not RBI was familiar with the expert reports, Mr. Irvin testified, "Ragnar Benson has seen these reports." Further, Mr. Irvin testified that RBI's counsel engaged the experts, including Kern, to provide expert reports dealing with, among other things, delays. Irvin testified that "Ragnar Benson concurs with the conclusions [the expert] reached." RBI 30(b)(6) Dep. 304:23-22; 306:22-307:4.

327. Even though, according to RBI's schedules, first fire of Unit 3 was not on the critical path of the Project, Kern deemed that it was the critical path for his first two periods. Doing so allowed him to apportion delays to ODEC that would otherwise be RBI's delays. Kern went one step further and broke the first fire of Unit 3 milestone into two separate windows in his analysis. By doing so, he was able to hide the fact that problems in the gas yard and with punchlist items (RBI's responsibilities) were delaying the first fire of Unit 3. Tr.2072:16-2085:13 (Kern); 2482:14-2485:5 (Holman); P 381, 384, 670, 671, 1358, 1359, 1360; Tr. 1476:18-1491:6 (Williams).

328. The GE TA (Technical Advisor) daily reports show that, as of June 8, 2004, GE was waiting on gas to be made available to Unit 3 so that GE could complete its work on Unit 3. P 670, 671. Likewise, Brian Sherras' June 3, 2004 punchlist of items required to be complete prior to the first fire of Unit 3 on gas shows that the gas yard is incomplete and there are problems with, among other things, the gaskets, the thermo couples, and the pressure relief valve.

These problems are confirmed in numerous APC daily reports and in emails between Joe Castellano and Brian Sherras. Tr.2072:16-2085:13 (Kern); P 670, 671, 381, 384, 1358, 1359, 1360; Tr. 1476:18-1491:6 (Williams).

329. Bill Dykema testified that he was on site and personally observed the issues associated with achieving first fire of Unit 3 on gas. Contemporaneously with the events themselves, Dykema prepared a chart cataloging the delays to Unit 3 first fire. P 926. His testimony and chart confirm the documentary evidence and that the delays were related to the gas yard and punchlist problems, and were not in any way related to GE's Mark VI activities. Tr. 2519:19-2525:9 (Dykema); P 281, 926.

330. Disregarding all of this evidence, and in order to improperly assign delay to ODEC, Kern relied on an obviously incorrect Mark VI completion date from one of RBI's updated schedules, the very schedules that both Kern and Manginelli said were too unreliable to use for calculating delays. Tr.2075:15-2076:5 (Kern).

***46** 331. In Deloitte's Period 1, Kern assigned 4 days of delay to ODEC for work required to modify GE's air inlet filter house. As stated above, Kern improperly created two windows for this milestone to hide the fact that problems with the fuel gas yard and fuel gas system were delaying first fire of Unit 3 at this time. In any case, RBI never provided ODEC with a request for equitable adjustment for this alleged delay as required by § 8.1 of the EPC Contract and has therefore waived this claim for delay. RBI 30(b)(6) Dep. 325:16-328:3.

332. In Deloitte's Period 2, Kern assigned 20 days of delay to ODEC for GE delays associated with the Mark VI Control and Protection sequencing. As stated above, Kern improperly created two windows for this milestone to hide the fact that problems with the fuel gas yard and fuel gas system were delaying first fire of Unit 3 at this time. Even if these alleged delays were ODEC's responsibility, RBI never provided ODEC with a request for equitable adjustment as required by § 8.1 of the EPC Contract and has therefore waived this claim for delay. RBI 30(b)(6) Dep. 331:13-332:25; Tr. 1171:19-1172:9 (Irvin).

333. In Period 3, Kern assigned 14 days of delay to ODEC for GE delays and 12 days of delay to a force majeure event of lightning. Kern's analysis disregarded the fact that the Fuel Oil System was on the critical path of the Project at this time. Tr. 2482:14-2485:5 (Holman); 2097:15-2099:16 (Kern). Kern also disregarded the fact that GE was allowed eight weeks from energization of the PEECC (Control Cab/Packaged Electric and Electronic Control Compartment) to complete its activities prior to first fire of a unit. Tr.2089:5-2092:22 (Kern).

334. The Unit 1 PEECC was energized on June 11, 2004. By RBI's (through Jeff Williams) own admissions, GE had eight weeks to complete its work on Unit 1 to achieve first fire on gas-or until August 6, 2004. First fire on gas for Unit 1 was achieved on July 29, 2004. Tr.2089:5-2092:22 (Kern); 1496:25-1497:6 (Williams). Because first fire on gas for Unit 1 was achieved within the eight-week window allowed to GE, there can be no delays to the Project attributable to GE during this period.

335. Kern also disregarded the actual delays reported at the time which were the treated water system and faults with electrical cables. P 662. Additionally, even if the alleged GE delays had occurred, RBI never provided ODEC with a request for equitable adjustment for the alleged GE delays in this period as required by § 8.1 of the EPC Contract and has therefore waived this claim for delay. RBI 30(b)(6) Dep. 336:8-338:2; Tr. 1172:10-13 (Irvin); 2091:23-2092:3 (Kern).

336. Kern also attributed 12 days of force majeure delay to the Project during Period 3 due to lightning strikes that damaged some equipment. Lighting strikes from thunderstorms are not a force majeure event under the EPC Contract. The definition of Force Majeure specifically excludes "weather conditions reasonably foreseeable in the geographic area in which the Site is located." P 26 § 2. As admitted by RBI's engineer Framatome, RBI was responsible for designing a Lightning Protection System for the plant because lightning strikes are reasonably foreseeable and expected. Voss Dep. 70:5-16. In fact, RBI initially blamed Framatome for design deficiencies related to the lightning system. Tr. 1505:24-1509:12 (Williams); Voss Dep. 70:5-16; P 472. Kern alleges that the lightning strikes delayed GE in completing its work on Unit 1. Tr.2092:13-22 (Kern). As discussed above, GE had until August 6, 2004, eight weeks, to complete its work. Because first fire of Unit 1 was achieved on July 29, 2004, GE completed its work within its allotted time, even accounting for the lightning strikes.

***47** 337. Finally, RBI did not comply with the EPC Contract provisions which require RBI to give ODEC notice of a specific number of force majeure days of delay for such an incident. Tr. 1154:16-1156:4 (Irvin); RBI 30(b)(6) Dep. 338:24-339:20; P 127 RBI-INT 0030. Even if lightning

strikes were a force majeure event, RBI failed to comply with the EPC Contract notice provisions and has waived this claim for delay.

338. In Period 4, Kern assigned 33 days of delay to ODEC for fuel oil flushing delays. Of the 33 days of delay Kern assigned to ODEC, he attributed 18 days to ODEC for a change in RBI's flushing procedure, 11 days to ODEC for allegedly enforcing higher cleanliness standards for the fuel oil flushing, and 4 days to ODEC reaching back into Period 3. Tr.1992:23-2000:02 (Kern); 2002:9-2003:4 (Kern). None of the alleged delays cataloged by Kern is validly attributable to ODEC.

339. Kern disregarded the agreement reached by ODEC and RBI whereby ODEC paid more than $100,000 to speed up the fuel oil flushing process on the Marsh Run Project. Culminating this agreement, ODEC and RBI signed Change Order # 33 for costs related to fuel oil flushing and agreed that the Scheduled Substantial Completion Date would not be extended. Therefore, RBI has waived these claims. Tr. 170:25-197:4 (Debiec); 1168:1-1169:3 (Irvin); 2099:17-2102:1 (Kern); P 220, 972, 973, 976, 977, 982, 983, 984, 985. Additionally, RBI never provided ODEC with a request for equitable adjustment for these alleged delays as required by § 8.1 of the EPC Contract and has therefore waived this claim for delay. RBI 30(b)(6) Dep. 342:21-344:1.

340. As far as the alleged heightened cleanliness standards, Kern attributed 11 days of delay to ODEC based on an October 1, 2004 internal email from Jeff Williams to John Irvin in which Jeff Williams stated that he believed the fuel oil flush was clean. Tr.1996:22-2000:02 (Kern); D 130. In reaching his conclusion, Kern disregarded a number of facts including: the GE flushing cleanliness standard specifies a visual test requiring no "visible sign of debris;" Tr. 1514:8-1516:19 (Williams); P 554; Jeff Williams, who testified that he believed the screens were clean as of September 22, 2004, told no one at ODEC of his beliefs other than "saying something [on October 1] out of frustration and walk[ing] away;" Tr. 1517:24-1519:2 (Williams); 1524:20-1523:23 (Williams); a photograph taken by Dave Hansen of PIC on September 24, 2004, shows large amounts of visible debris on the flushing filter; Tr. 1519:3-1521:6 (Williams); P 577 EE; Jeff Williams wrote an email to Jim Manion, Sauer's project manager on September 27, 2004, informing him that RBI was still finding all kinds of slag and debris (including gaskets) in the fuel oil flushes; Tr. 1521:7-1524:19 (Williams); P 219; and Kern's own assessment that RBI should have been complaining to ODEC. Tr. 2102:2-18 (Kern). In fact, RBI never provided ODEC with a request for equitable adjustment for these alleged delays as required by § 8.1 of the EPC Contract and has therefore waived this claim for delay. RBI 30(b)(6) Dep. 344:2-13.

***48** 341. By reaching back into Period 3, Kern assigned four days of delay to ODEC in Period 4 for the late construction of fuel oil piping. As is revealed by Kern's "as-built" chart, he double counted days of delay by reaching back into previous windows. Tr.2097:1-2099:16 (Kern); 2486:5-2487:4 (Holman); D 721. Not only did Kern double count days, but he completely disregarded the following facts: ODEC never directed RBI to resequence its schedule to fire first on gas and then on oil; RBI never actually changed its scheduled sequence to fire and commission first on gas and then on oil; no one from RBI's management ever communicated ODEC's position to Jeff Williams, RBI's site manager; even if Williams had already moved craft to support a resequencing of work, he could have moved them back within a few hours; none of RBI's schedules reflect this alleged change in sequence; RBI had insufficient manpower on the job to work both oil and gas systems at the same time; RBI's own numerous delays, poor management and supervision, and petty arguments with subcontractors resulted in late installation of the fuel oil pipe foundations; RBI entered into the Sharing of Economic Benefits and Testing Protocol Agreement with ODEC agreeing to no time extension; and RBI never provided ODEC with a timely request for equitable adjustment for these alleged delays as required by § 8 .1 of the EPC Contract and has therefore waived this claim for delay. RBI 30(b)(6) Dep. 339:21-342:12.

342. In Period 5, Kern assigned 17 days of delay to ODEC for alleged GE delays due to defective equipment in the start-up and commissioning of the combustion turbines on fuel oil. Any reasonable contractor would build time into the schedule to compensate for the inevitable equipment problems which occur during commissioning and start-up. For exactly this reason, the GE Turbine Purchase Agreement allows GE 90 days from first roll of the unit (placing the unit on turning gear) to complete its work. Tr. 144:15-146:13 (Debiec); P 582. RBI's purported baseline schedule, MR00, allowed GE 34 days from first fire on liquid fuel to completion of performance testing. GE completed its work in only 32 days, less time than allotted by the schedule, and, therefore, did not delay the Project. Tr. 2487:5-2489:5 (Holman); 2105:11-2113:6 (Kern); P 875; 1371; D 721. Even if GE

delayed the Project during this period, the delays did not affect the critical path to Substantial Completion of the Project because RBI was so far behind in completing and correcting work on the Turnover Packages. Additionally, RBI did not provide ODEC with a timely request for equitable adjustment for this delay as required by § 8.1 of the EPC Contract and has therefore waived this claim for delay. RBI 30(b)(6) Dep. 344:15-345:17; 156:5-158:25.

3. RBI's Monetary Damages

343. RBI had its expert, Mr. Kern, put forth its claims for monetary damages without conducting an independent causation analysis, such that Kern merely served as a mouthpiece for RBI's untenable claims. RBI's initial damages asserted by Kern in his expert report totaled $25,420,966. D 90; P 1311. On the eve of trial, Kern adjusted his damages schedule, supposedly to reflect this Court's ruling dismissing RBI's rock claim on summary judgment. Kern decreased the total damages to $23,114,476 but actually *increased* the subcontractor claims that RBI is attempting to pass through from $11,705,594 to $13,556,093 based on a newly received claim from Casey that was never even given to ODEC or to the Court. D 829; 90; P 1311; Tr.2035:12-2037:7 (Kern); 2046:2-2047:19 (Kern). After nine days of trial, Kern again revised his damages schedule down to $15,630,599, in an attempt to demonstrate that there is some methodology behind his calculations. D 831. As was shown at trial, RBI's damages are totally unsupported by the evidence.

***49** 344. Kern's treatment of the subcontractor pass-through claims is indicative of the unreliability of his entire damages analysis. First, other than Kern's summary schedule (which is double hearsay), neither RBI nor Kern introduced the first shred of evidence at trial regarding any of the subcontractor claims. Tr.1953:15-1954:12 (Kern); 2014:21-2015:4 (Kern). Therefore, RBI has not proven any damages based on subcontractor claims and cannot recover any of the alleged $6,559,232 in subcontractor claims.

345. Under §§ 7.1 and 8.1 of the EPC Contract, the Contract Price and/or Scheduled Substantial Completion Date can be changed only by Change Order proposed by either Owner or Contractor. Section 8.1 provides:

> If in either case Contractor believes it is entitled to an equitable adjustment in schedules or the Contract Price, or both, as a result of a proposed Change Order, then Contractor shall notify Owner as soon as reasonably practical of the potential for such effect, and shall provide Owner with written notice of its request for equitable adjustment within fifteen (15) working days after receiving Owner's notice of change or becoming aware of the facts or circumstances Contractor believes justifies an adjustment in the Contract Price or schedule or both. If Contractor fails to submit a request for equitable adjustment within the prescribed fifteen (15) working day period, Contractor shall forfeit its rights to such an adjustment. Contractor's request for an equitable adjustment shall include a statement setting forth in detail, with a suitable breakdown of materials, equipment and services, Contractor's proposed adjustment in the Contract Price or schedule or both.

P 26 § 8.1 (emphasis added). By comparison, RBI's subcontracts provided that subcontractors waived any claim as to which they failed to submit a detailed request for a Change Order within three days of the event giving rise to the requested change. P 44, 85, 95, 96, 486, 491, 502.

346. Kern performed no analysis of any of the subcontracts. He did no analysis of whether the subcontractors met all the notice provisions and requirements in their subcontracts despite the fact that RBI had asserted lack of timely notice as a defense to Casey's, Sauer's, and Teton's claims. Tr.2020:1-11 (Kern). Kern performed no analysis of RBI's promise to indemnify ODEC for subcontractor claims and did nothing to assess what part, if any, of the subcontractors' claims arose after September 14, 2004. Tr.2022:12-2023:21 (Kern); P 247. Kern did not do what is reasonable and customary in the industry to validate the subcontractors' claims. Tr. 2489:25-2490:8 (Holman).

347. Rather than analyzing each subcontractor's claim to actually determine what indirect costs were related to rock delays as opposed to other delays, Kern decided to prorate

the subcontractor claims as a way "to at least get to allocate the subcontractor claims between ODEC and RBI." In other words, by arbitrarily prorating the claims without any investigation, Kern could assure RBI that it would get some money from ODEC based on subcontractor claims. Tr.2007:23-2009:4 (Kern); 2021:2-2022:11 (Kern).

***50** 348. Kern merely relied on RBI to tell him what were valid claims, and conducted only minimal superficial analysis related to correcting arithmetical and typographical errors. Tr.1948:10-19 (Kern); 2020:16-2021:1 (Kern).

349. RBI attempted to pass through Sauer's $1,685,368 claim. Sauer's claim was all related to rock. In October 2003, RBI wrote to Sauer asking them to submit a claim for rock. P 72. In January 2004, Sauer submitted its first claim which was totally related to rock. P 73. Dave Berthelsen of RBI replied to Sauer that its rock claim was "clearly overstated and deceptive at best," and that it did not comply with the notice requirements of Sauer's subcontract. P 74. In March 2004, Sauer submitted its updated rock claim. P 77. Subsequently, RBI liquidated Sauer's claims on the Project. RBI has no further liability to Sauer for any amount related to the Marsh Run Project. P 246. After entering into a liquidation agreement with Sauer, RBI allowed Sauer to submit a second updated rock claim in the amount of approximately $2.08 million. All of Sauer's claim was related to unrippable rock and poor management by RBI. P 1369, 1370. Tr.2023:22-2035:11 (Kern); 2036:8-2041:7 (Kern). Therefore, RBI cannot recover damages for any part of the Sauer claim.

350. Rather than attempt to verify that any part of Sauer's pass-through claim was related to something other than rock, Kern merely prorated the claim based on delays assigned to ODEC and "savings" assigned to RBI through Manginelli and Kern's defective scheduling methodologies. This allowed Kern "to at least get to allocate the subcontractor claims between ODEC and RBI," rather than giving RBI nothing at all. Tr.2007:23-2009:4 (Kern); 2034:14-2035:11 (Kern).

351. Similarly, Kern and RBI provided no evidence that any part of Casey's claim is related to anything but rock. In October 2003, RBI sent to Casey the same letter RBI had sent to Sauer, asking Casey to submit a rock claim. P 1362. Casey submitted its rock claim in early 2004. RBI responded to Casey's claim in a similar manner as it did to Sauer's claim by telling Casey that its rock claim was "clearly overstated and deceptive at best," and that it did not comply with the notice requirements of Casey's subcontract. P 1234. Later, RBI sent a letter to its surety asserting defenses to Casey's claim on the payment bond and stating that Casey was not entitled to anything due to Casey's own mismanagement and poor performance. P 143. As RBI promised Casey's surety, it has filed a counterclaim against Casey for up to $5 million due to Casey's poor performance. P 1235; Tr.2041:8-2046:1 (Kern). Finally, despite the fact that RBI increased its damages on October 7, 2005, based on a newly asserted Casey claim, RBI provided no evidence of what was contained in Casey's new claim. Instead, RBI had Kern request the Court to award RBI 52% of Casey's new claim, thereby implicitly asking the Court to take Kern's word that the Casey claim is not related to rock. Kern asks this despite being unable to recall anything about what was in Casey's claim. Tr.2046:2-2047:19 (Kern). The only evidence in the record regarding Casey's claim is that it was submitted as a rock claim, and that RBI is vehemently opposing Casey's claim in state court. RBI has offered no evidence that Casey's claim is related to anything else. Therefore, RBI cannot recover damages for any part of the Casey claim.

***51** 352. Regarding Teton's claim, RBI contends that Teton was delayed by unrippable rock, denies that it owes Teton in full for its claim, and contends that RBI has not even fully evaluated Teton's claim. Tr.2047:20-2050:8 (Kern). In spite of this, Kern and RBI attempt to pass through the prorated amount of Teton's $6,809,727 claim without offering any evidence of the claim itself, or that it is in any way related to ODEC's actions or inactions. Tr.2047:20-2050:8 (Kern). Therefore, RBI cannot recover damages for any part of the Teton claim.

353. RBI liquidated APC's claims on the Project. RBI has no further liability to APC for any amount related to the Marsh Run Project. Tr. 1140:19-1141:6 (Irvin). RBI offered no evidence to prove that ODEC is liable for the amount, if any, by which RBI's payments to APC exceeded the amount of APC's subcontract.

354. RBI liquidated Framatome's claims on the Project. RBI has no further liability to Framatome for any amount related to the Marsh Run Project. Voss Dep. 71:5-25; 76:3-77:10; P 474. RBI offered no evidence to prove that ODEC is liable for the amount, if any, by which RBI's payment to Framatome exceeded the amount of Framatome's subcontract.

355. RBI's claims for damages based on subcontractor claims are entirely related to responsibility for rock excavation and/

or RBI's failure to properly manage, coordinate and supervise its subcontractors. Because RBI is responsible for the costs associated with rock excavation and for its own failures in managing, coordinating and supervising subcontractors, RBI may not collect any of the alleged $6,559,232 in damages based on its subcontractors' claims. D 831 Schedule E. Additionally, RBI failed to provide ODEC with a request for equitable adjustment in accordance with § 8.1 of the EPC Contract for claims of its subcontractors and therefore has waived these claims. Tr.2017:10-2018:2 (Kern); D 831 Schedule G.

356. RBI claims damages of $750,848 for Extended General Condition Costs in Schedule A of Kern's damages summary. D 831 Schedule A. RBI has not proved that any delays attributed to ODEC either affected the critical path of the Project or were properly preserved by RBI. As such, RBI may not collect any of the alleged $750,848. In fact, the only claim, albeit untimely, made by RBI for extended general condition costs was for $64,918.66 on November 17, 2003, as part of its untimely permit claim. P 1279.

357. RBI claims $607,291 in damages for acceleration costs in Schedule C of D 831. RBI has not proven that any of these costs were unanticipated and not accounted for in its bid to ODEC. Again demonstrating his complete lack of analysis of any of RBI's claims, Kern was forced to reduce the acceleration damages he claimed on behalf of RBI after John Irvin's testimony at trial. Tr.2009:5-2010:10 (Kern); P 1311; D 831. As with his other adjustments, Kern failed to consider all the evidence and made a partial downward adjustment only in an attempt to salvage some damages for RBI. The evidence demonstrated that RBI based its bid on at least a 50-hour work week, including its concrete work, all of its electrical work, and its mechanical work. Tr. 1109:22-1131:20 (Irvin); 2058:2-2064:13 (Kern); P 23, 24, 103, 268, 269, 270, 359, 541, 683, 684, 685, 686, 687, 688, 689. The schedule RBI claimed as the baseline schedule (MR00) indicated that the Centerline work and BOP electrical work were planned on a 6-day work week of 10 hours per day. Tr. 1109:22-1115:12 (Irvin); P 541. RBI's claims in Schedule C of the Deloitte Report are for nothing more than what RBI originally planned and therefore do not justify additional compensation. Tr. 2490:9-2491:9 (Holman). Additionally, as both Mr. Manginelli and Mr. Holman pointed out, RBI double counted its damages, asking for both acceleration costs and a schedule extension related to the permitting delay. Tr.1915:8-24 (Manginelli); 2479:3-2480:13 (Holman); P 875. Furthermore, RBI has waived its claim for these alleged acceleration costs, because RBI never provided ODEC with a timely request for equitable adjustment as required by § 8.1 of the EPC Contract. According to § 8.1, RBI must provide its costs within 15 working days or its claim is waived. RBI submitted a request for equitable adjustment on November 17, 2003, claiming $64,918.66 in costs related to the alleged permit delay and/or acceleration. P 1279. As this request was untimely (almost six months after the delay had ended), RBI has waived this claim. Furthermore, RBI did not attempt to claim acceleration costs for other subcontractors as reflected in Schedule C of Kern's damages schedule. D 831 Schedule C. As such, RBI has waived its claim for these alleged damages.

***52** 358. RBI claims $1,017,975 in damages related to out-of-scope costs incurred. D 831 Schedule D. RBI has failed to justify these costs as extra work, and, in any case, did not give ODEC timely notice of a request for equitable adjustment based on such claims as required by § 8.1 of the EPC Contract.

359. RBI demands $244,905 from ODEC for calibration of GE instruments, notwithstanding RBI's simultaneous assertion that calibration of all GE instruments is within the scope of Teton's subcontract with RBI. D 831 Schedule D. Indeed, it is customary in the industry for all instruments to be “bench checked” at the project site because, even though they may come pre-calibrated, it is important to know that they have retained that calibration and are calibrated correctly before they are placed in service. If calibration of GE instruments is within the scope of Teton's subcontract (by RBI's own admission), then it must be within the scope of the EPC Contract between RBI and ODEC. Tr. 2491:10-20 (Holman); 1132:4-1135:18 (Irvin); 2050:25-2052:14 (Kern). Finally, even if calibration of these instruments were outside the scope of the EPC Contract, RBI did not request a timely change order. In fact, RBI did not request a change order for this item until after it was terminated for default, more than 9 months after the issue arose. Tr. 1134:11-1135:18 (Irvin); P 689. RBI is not entitled to any damages for calibration of GE instruments.

360. At the beginning of trial, RBI was claiming $27,895 for the installation of birdscreens it claimed were out-of-scope. At trial, John Irvin admitted on cross-examination that the birdscreens were RBI's responsibility to install pursuant to revisions to the GE Turbine Purchase Agreement made part of the EPC Contract by Amendment 1 to the EPC Contract. Tr. 1135:19-1138:18 (Irvin); P 1091, 1097, 1105, 1113. It is indicative of RBI's overstated claims that even though ODEC advised RBI on April 1, 2004 that installation of the

birdscreens was part of the EPC Contract due to Amendment 1, RBI continued to pursue this claim until forced to concede it on cross-examination at trial. It is equally indicative of Kern's passivity, lack of attention to detail, and total abrogation of his responsibilities to conduct any type of causation analysis regarding RBI's claims, as well as the fact that Kern merely relied on RBI's assertions that this claim was valid and included it in his damage calculations. Tr.2050:9-24 (Kern).

361. RBI claims $238,479 in damages allegedly resulting from the change in sequence in separating natural gas and fuel oil simultaneous erection. D 831 Schedule D; Tr. 1138:19-1141:6 (Irvin). Again, Kern merely repeated RBI's claims in his damage calculations based on RBI's word that they were valid, without one bit of analysis or inquiry into the claim itself. Kern completely disregarded the following facts: ODEC never directed RBI to resequence its schedule to fire first on gas and then on oil; RBI never actually changed its scheduled sequence to fire and commission first on gas and then on oil; no one from RBI's management ever communicated ODEC's position to Jeff Williams, RBI's site manager; even if Williams had already moved craft to support a resequencing of work, he could have moved them back within a few hours; none of RBI's schedules reflect this alleged change in sequence; RBI had insufficient manpower on the job to work both oil and gas systems at the same time; RBI's own numerous delays, poor management and supervision, and petty arguments with subcontractors resulted in late installation of the fuel oil pipe foundations; RBI entered into the Sharing of Economic Benefits and Testing Protocol Agreement with ODEC agreeing to no time extension; RBI's liquidation agreement with APC (as part of this claim includes costs for APC personnel), Tr. 1140:19-1141:6 (Irvin); and the fact that RBI never provided ODEC with a timely request for equitable adjustment for these alleged costs as required by § 8.1 of the EPC Contract and has therefore waived this claim. RBI 30(b)(6) Dep. 339:21-342:12. RBI is not entitled to any of the $238,479 claimed as damages for separating natural gas and fuel oil simultaneous erection.

***53** 362. RBI claims $169,407 in damages for ODEC's alleged failure to reimburse RBI for lightening damage to the Project. D 831 Schedule D. RBI never made any sort of monetary claim to ODEC for lightning damage, much less a claim that complied with the notice requirements of § 8.1 of the EPC Contract. Tr. 1154:16-1156:3 (Irvin); P 1168, 1170. As such, RBI is not entitled to any of the $169,407 claimed as damages due to lightning strikes.

363. RBI now claims $121,068 in damages for excessive fuel oil flushing. D 831 Schedule D, D-3. As with RBI's other damages claimed in this case, RBI and Kern put forth a questionable claim with inflated numbers. Interestingly, Kern initially claimed $247,468 on behalf of RBI based on 43 days of excessive fuel oil flushing. D 90; P 1311. After Kern's deposition, at which he was confronted with the fact that RBI was asserting that ODEC delayed the fuel oil flushing by only 11 days due to enforcing cleanliness standards, Kern partially reduced RBI's exaggerated monetary amounts to $121,068 based on 11 days of flushing. Kern, however, did not also reduce any of the other costs associated with the allegedly excessive flushing. At trial, his explanation was, “I didn't know exactly what they were for.” Tr.2055:23-2056:24 (Kern). Again Kern utterly failed in his responsibility to validate RBI's alleged damages. He merely took numbers RBI gave him and placed them in his report without any inquiry until forced to concede under oath that they are inappropriate. Kern disregarded all evidence that demonstrated that this claim for excessive fuel oil flushing is bogus. As admitted by John Irvin at trial, RBI never gave ODEC any notice about GE cleanliness issues. Tr. 1141:7-1143:15 (Irvin). As such, RBI is not entitled to any of the $121,068 claimed as damages for excessive fuel oil flushing.

364. RBI claims $46,736 in damages for excessive Unit 1 lube oil flushing. D 831 Schedule D. At the RBI 30(b)(6) deposition, RBI waived its claims for 9 days of delay based on a Unit 1 Lube Oil Leak. RBI 30(b)(6) Dep. 334:22-335:7. The leak was discovered on April 29, 2004, one day after the lube oil flush on Unit 1 began. At RBI's request, GE delayed fixing the leak and allowed RBI to continue flushing. P 1137. Repairs to the lube oil pipes were completed on June 16, 2004. The next day, RBI requested a 9-day schedule extension due to the leaking piping. P 1136. On June 30, 2004, ODEC denied RBI's request for the 9-day extension for numerous reasons, including RBI's election to continue flushing the system rather than to repair the leak. P 1186. On July 6, 2004, RBI advised Teton that ODEC had denied the 9-day extension for the Unit 1 lube oil system and attributed the delay to Teton. RBI asked Teton for a response. P 1138. Upon obtaining Teton's response, which was a claim for compensation for the 9-day delay, RBI promptly forwarded Teton's claim to ODEC for reimbursement. P 1140, 1141. On July 19, 2004, RBI forwarded Teton's claim to ODEC for additional money for extended lube oil flushing for Unit 1, which ODEC promptly denied. P 1141, 1142. At trial, Irvin insisted that the 9 days of delay he waived in the RBI 30(b)(6)

deposition is a separate incident from the 9 days of extended flushing now claimed by RBI, and testified, "it may have happened at the same time period." Irvin's assertions are not true. That RBI's claim for money is for the same 9-day delay waived by RBI can be seen through RBI's own documents. Therefore, RBI has waived this claim. Moreover, RBI put forth no evidence to justify its claimed damages and has not shown that its request for a Change Order complied with the notice provisions of § 8.1 of the EPC Contract. In fact, the evidence demonstrates that RBI's request for a Change Order did not comply with the notice requirements of the EPC Contract. Tr. 1143:16-1149:20 (Irvin). As such, RBI is not entitled to any of the $46,736 claimed as damages for extended lube oil flushing.

***54** 365. RBI makes two claims for damages based on costs for storage of the turbines: $21,300 for payment to American Heavy Rigging and $4,118 for payment to Securitas for guard services. D 831 Schedule D. RBI provided no evidence that these alleged damages were the result of the permit delay as opposed to the rock delay. In fact, as RBI's own documents clearly prove, the turbines and generators had to be stored because the foundations were completed late due to the rock encountered on site. RBI's July 18, 2003 schedule, MR10, indicates that all three turbine foundations were to be installed and cured by September 17, 2003. MR10 also indicates that all turbines and generators would be delivered to the site between September 22, 2003 and October 6, 2003. P 159. Since MR10 already accounted for the permit delay and projected installation of the turbines upon their delivery, the delays in completing the foundations which necessitated storage of the turbines and generators were the result of rock encountered on the Project site, for which RBI was solely responsible. RBI's documents and the Change Order request from American Heavy Rigging demonstrate that the turbines and generators arrived on site and were progressively placed into storage beginning with the arrival of the first turbine on September 25, 2003 through the arrival of the last generator on October 22, 2003. P 1045, 1046. The foundations were not complete when predicted by MR10 because of delays due to rock excavation. Because the turbines and generators arrived after RBI (through MR10) planned the foundations to be complete, and had to be placed into storage because the foundations were not ready, the storage costs are attributable to RBI's problems with unrippable rock. Furthermore, RBI admits that it never gave ODEC any notice of these claims as required by § 8.1 of the EPC Contract. Tr. 1149:21-1151:23 (Irvin). As such, RBI is not entitled to any of the $21,300 claimed for payment to American Heavy Rigging, or of the $4,118 for payment to Securitas for guard services.

366. Finally, RBI claims $171,962 in damages for payment to CB & I for tank erection indirect costs. Despite Irvin's claims at trial that the damages related to CB & I were caused by the permit delay, Irvin testified as RBI's corporate designee in the Teton case that the CB & I tanks were installed late because the foundations were completed late due to the unrippable rock. Moreover, RBI admits that it never gave ODEC any notice of these claims as required by § 8.1 of the EPC Contract. Tr. 1151:24-1154:15 (Irvin). As such, RBI is not entitled to any of the $171,962 claimed as damages related to CB & I tank erection indirect costs.

367. RBI claims $6,025,546 in outstanding contract balance including retainage. D 831 Schedule F. RBI is not entitled to any of this amount because it was terminated for default and did not complete work on the Project. Under § 11.3 of the EPC Contract, RBI waived all claims for damages including lost profits and unabsorbed overhead when it was terminated for default. P 26 § 11.3.

***55** 368. Other than for RBI's initial rock claim which the Court has determined is RBI's responsibility, RBI never provided ODEC with a timely request for equitable adjustment for any type of monetary damages as required by § 8.1 of the EPC Contract and has therefore waived all claims for monetary damages under the EPC Contract.

369. ODEC never waived the requirement for giving such notice as required by § 8.1 of the EPC Contract. "Unless otherwise specifically provided by the terms of this Agreement ... [a]ny waiver shall be in writing and signed by the party granting such waiver." *Id.* § 15.7.

4. RBI's Alleged Consequential Damages

370. In trying to persuade ODEC to award it the EPC Contract, RBI represented that, together with its parent company, RBI had average annual sales exceeding $600 million and an "unlimited bonding capacity." Tr. 79:14-81:4 (Debiec); 2252:10-2253:20 (Hobratschk); P 140, 675.

371. In fact, RBI never had any bonding capacity to lose because RBI's parent company, The Austin Company, possessed the bonding capacity and the relationship with St. Paul. Tr. 2215:19-2216:2 (Hobratschk). The Austin Company

had a blanket indemnification agreement for all bonds issued to Austin operating units or subsidiaries. Tr. 2216:3-21 (Hobratschk); P 285, 286.

372. RBI was not set up to operate as an independent entity. Austin treated RBI-Pittsburgh the same as any of its other 9 operating units. RBI-Pittsburgh reported to Austin, not to RBI-Chicago. Hobratschk Dep. 7:7-10:15; Melsop Dep. 7:8-9:1. RBI had no working capital, no line of credit, no independent bonding capacity, and relied on Austin to provide it with those things. RBI kept no funds of its own. All of its deposits were swept into an Austin account nightly. RBI had an unfunded disbursement account to write checks. RBI wrote checks on the unfunded disbursement account, and Austin funded the account to pay the checks. The Austin Company also provided RBI with a variety of other services for which it charged RBI a management fee. Tr. 2217:2-2223:16 (Hobratschk); 2259:22-2265:2 (Hobratschk); Hobratschk Dep. 11:11-24:3; 114:7-116:7; P 288, 337; Tr. 2318:14-2322:16 (Falconi).

373. In June 2004, Austin lost its $15 million line of credit with Key Bank because it failed to maintain the required minimum working capital. Austin's line of credit was an important factor to St. Paul in determining whether it would issue bonds on behalf of Austin. Tr. 1575:16-1576:20 (Rogers). When Austin lost its line of credit, Austin voluntarily stopped bidding bonded work and St. Paul eventually terminated Austin's bonding capacity. Tr. 2248:10-2250:6 (Hobratschk); P 289, 298, 299, 300.

374. Austin asserts that it lost its line of credit after writing down the Marsh Run Project by $2.8 million in May 2004. Tr. 2242:3-2243:17 (Hobratschk); P 1294. Austin had to make such a large write down on the Marsh Run Project only because Dave Berthelsen, RBI-Pittsburgh's Senior Vice President and General Manager, had inflated the profits on the Marsh Run Project by 40% at the end of 2003, in order to make the company's budgeted profit for the year. Berthelsen raised the profit on the Marsh Run Project despite the numerous problems RBI was having at Marsh Run at the end of 2003 and the extreme unlikelihood (given Berthelsen's refusal to spend money on the Project) of completing the job on time. P 313, 527; Tr. 2223:17-2230:2 (Hobratschk). Berthelsen also received a bonus for achieving budgeted profit in 2003. Tr. 1295:7-1296:19 (Castellano); P 1205. Austin reported RBI's inflated profits on the Marsh Run Project to its banks and surety at least until April 28, 2004. P 338; Tr. 2240:4-2241:9 (Hobratschk). It was only after ODEC notified the surety that it was considering declaring RBI in default under the EPC Contract that RBI and Austin wrote down the profits on the Marsh Run job in order to correct Berthelsen's inflated representation. P 647, 1294; Tr. 2242:3-2243:17 (Hobratschk).

***56** 375. By May 2004, Austin had been in a general decline for several years. Its sales performance had been "dismal" for at least 4 years, coming in $50-100 million under budget each year. Tr. 2252:10-2255:20 (Hobratschk); P 140, 343. Through May 2004, Austin was already well into another dismal year of sales, achieving only 19% of its budgeted sales in the first 42% of the year (with RBI-Pittsburgh achieving only 3% of its budgeted sales during the same time period). Tr. 2255:21-2257:16 (Hobratschk); P 137. Austin was facing other lawsuits for its poor performance, including one with NECCO in which NECCO had refused to pay Austin over $7 million. Tr. 2243:18-2245:2 (Hobratschk); 2259:3-13 (Hobratschk); P 302. In May 2004, Austin experienced losses in 7 out of 10 of its operating divisions and had a total projected EBITDAP loss for 2004 of $7.92 million. Tr. 2250:7-2251:9 (Hobratschk); P 289, 137. During the first half of 2004, before Austin lost its bonding capacity, Austin was below budgeted profit by $6.8 million. Tr. 2257:17-2259:13 (Hobratschk); P 344.

376. In short, Austin was already in terrible shape when RBI represented to ODEC that Austin was in great financial condition with average sales greater than $600 million over five years. The evidence is uncontroverted that ODEC did not foresee and could not reasonably have foreseen that its failure to grant RBI's requested change orders would cause RBI's parent company, The Austin Company, to lose its line of credit, bonding capacity, and the ability to perform other projects, or to bankrupt Tr. 100:16-101:4 (Debiec). Even Austin, at the time it lost its line of credit and bonding capacity, could not foresee that it would suffer lost profits and diminution in value as a result. As part of its full disclosure in its offering memorandum to prospective buyers, Austin stated only that it had cost overruns on one power project which caused its 2004 projected gross profits to be $2.5 million lower. Tr. 2265:3-2266:17 (Hobratschk); P 337. If Austin could not foresee its consequential damages at the time it lost its bonding capacity and line of credit, ODEC certainly cannot be charged with foreseeing the same consequential damages in 2002 when it entered into the EPC Contract with RBI.

377. In any case, RBI has failed to prove it sustained any of the $20.1 million in consequential damages it claims based on

lost profits due to its inability to obtain bonded work and its diminution in value.

378. RBI's expert, James Falconi, asserted that RBI sustained $6.6 million in lost profits on lost opportunities to perform bonded projects. Falconi based his opinion on a list of lost bonded job opportunities provided to him by Dave Berthelsen. Without further inquiry, Falconi assumed that RBI was actually pursuing all of the listed bonded jobs. In fact, RBI's comprehensive sales prospect list from April 2004, immediately preceding Austin's loss of bonding capacity, shows that only 1 out of 10 prospective jobs required a bond and that even that project had been delayed. P 1207. Falconi took none of this into account. Tr. 2334:9-2346:13 (Falconi); P 1088, 1090, 1207. Falconi's analysis is incomplete, flawed, and unreliable, and it cannot be relied on by the Court to prove that RBI has sustained any damages due to lost bonding capacity. Tr. 2388:1-2395:1 (Martin); P 873.

***57** 379. Likewise, Falconi's diminution in value analysis is not helpful. Falconi has virtually no experience in the valuation of closely held companies. Tr. 2276:18-2277:19 (Falconi). His first expert report did not even contain the most basic elements of a valuation such as the valuation date, the standard of value, or the premise of value. According to Harold Martin, ODEC's valuation expert, in Martin's many years of valuation experience he has never seen a report of this type where these elements were left out of the report. Tr. 2395:2-2402:4 (Martin). In fact, Falconi had no appreciation of, and confused the concepts of, fair market value and strategic or investment value, concepts which are critically important in deriving the value of a company. Tr. 2346:14-2359:5 (Falconi); 2395:13-2398:15 (Martin). Falconi wrote a completely new report in response to the criticisms of Harold Martin, ODEC's valuation expert. Falconi's second report also had problems. Among other major problems, it used a valuation date for the company of December 31, 2004, long after the alleged harm had already occurred. Tr. 2359:7-2363:16 (Falconi); 2419:24-2420:14 (Martin). Additionally, Falconi double counted damages between his diminution of value and lost profits calculations. Tr. 2425:3-2426:1 (Martin).

380. Falconi's diminution of value calculation is flawed and unreliable and cannot be relied on by the Court to prove that RBI has sustained any damages due to loss of value of the company. Tr. 2420:15-21 (Martin); 2423:25-2425:1 (Martin); 2426:2-8 (Martin); D 835; P 873.

381. As such, RBI cannot recover any of the claimed $20.1 million in consequential damages due to lost profits and diminution of value.

II. CONCLUSIONS OF LAW

382. RBI delayed achievement of the Scheduled Substantial Completion Date more than 106 days. Such failure constituted an Event of Default that continued until RBI's termination.

383. RBI materially breached the EPC Contract by failing to pay or discharge the more than $2.2 million in mechanic's liens filed by Casey. Such failure constituted an Event of Default which continued until RBI's termination.

384. RBI materially breached the EPC Contract by filing a mechanic's lien upon the Site and the Facility.

385. The Scheduled Substantial Completion Date was May 5, 2004. As of October 18, 2005, the Project had yet to reach Mechanical Completion or Substantial Completion as defined by the EPC Contract. As of October 18, 2005, the Project was 532 days late. More than 106 days of delay are attributable to RBI. Therefore, ODEC is entitled to liquidated damages for delay in the amount of $4,747,596.73, the full amount of the cap on liquidated damages of 10% of the Contract Price.

386. The EPC Contract's liquidated damages clause is enforceable. It is well settled that the parties to a contract may agree in advance about the amount to be paid for loss resulting from breach of the contract "[w]hen the actual damages contemplated at the time of the agreement are uncertain and difficult to determine with exactness and when the amount fixed is not out of all proportion to the probable loss." *301 Dahlgren Ltd. P'ship v. Bd. of Supervisors,* 240 Va. 200, 202-03, 396 S.E.2d 651, 653 (1990) (alteration in original) (quoting *Taylor v. Sanders,* 233 Va. 73, 75, 353 S.E.2d 745, 747 (1987)). As this quotation indicates, the focus when determining the enforceability of a liquidated damages clause is upon its reasonableness at the time of contracting, not following a party's breach. Other, more recent cases, confirm this focus. *See, e.g., Ameritech Constr. Corp. v. Cummings,* 66 Va. Cir. 328, 330 (2005) ("[T]he amount fixed is reasonable to the extent that it approximates the loss anticipated at the time of the making of the contract, even though it may not approximate the actual loss.") (quoting Restatement (Second) of Contracts § 356 cmt. b). The liquidated damages sought in this case are not "out of all proportion to the probable loss" that the parties considered when the Contract was negotiated.

The amount was negotiated by the parties. The potential losses to ODEC were considered in detail, and the liquidated damages sum sought reflects those negotiations. RBI has not met its burden to show that the liquidated damages provision constitutes a "penalty." *See* *O'Brian v. Langley Sch.,* 256 Va. 547, 551, 507 S.E.2d 363, 365 (1998) ("As the party challenging the validity of [the liquidated damages provision], the O'Brians bear the burden of proof on that issue."). Indeed, the liquidated damages amount benefited RBI because it converted exposure to liability in an unlimited amount to exposure in a limited amount. It would have been quite possible for the actual damages to exceed greatly the liquidated damages. The Supreme Court of Virginia has never pronounced an absolute rule as to the permissible percentage that the liquidated damages bear to the total contract amount. *See Ameritech Constr. Corp.,* 66 Va. Cir. at 330. The Supreme Court of Virginia has ruled that, similarly to this case, liquidated damages totaling 10 percent of the entire contract price are not excessive. See *Brooks v. Bankson,* 248 Va. 197, 209, 445 S.E.2d 473, 480 (1994).

***58** 387. ODEC is entitled to $140,190.24 in damages for its costs expended to complete the Project.

388. ODEC is entitled to recover from RBI the reasonable costs and expenses, including attorneys' fees, incurred in defending Casey's mechanic's lien law suit.

389. ODEC is entitled to recover from RBI the reasonable costs and expenses, including attorneys' fees, incurred in defending RBI's mechanic's lien law suit.

390. ODEC is entitled to $248,367.93 in damages for its additional overhead incurred.

391. ODEC properly terminated RBI for Default by Contractor pursuant to § 11.1 of the EPC Contract.

392. Under § 11.3 of the EPC Contract, ODEC is entitled to recover the reasonable costs and expenses incurred in any suit to enforce the Owner's rights under the EPC Contract, including attorneys' fees.

393. ODEC is entitled to damages in the amount of $5,155,414.66, plus all reasonable costs and expenses (including attorneys' fees) incurred in connection with this lawsuit. ODEC shall file an affidavit stating all reasonable costs and expenses incurred in connection with the lawsuit.

The damages amount includes the following:

(a) $4,747,596.73-liquidated damages;

(b) $248,367.93-additional overhead;

(c) $140,190.24-cost expended to complete the project; and

(d) $10,259.76-cost of defending Casey lawsuit.

394. The forfeiture or waiver provisions of § 8.1 are enforceable by ODEC. As this Court has stated:

> Numerous cases have come before the courts where a contractor has been denied recovery for additional work under a contract because of failure to give the required notice of the costs before the work was done. In such cases the courts have generally held that giving the notice requires strict compliance and giving of the notice is a condition precedent.

West v. United States Postal Serv., 907 F.Supp. 154, 159 (E.D.Va.1995). *See, e.g.,* *McDevitt & Street Co. v. Marriott Corp.,* 713 F.Supp. 906, 922 (E.D.Va.1989) (holding that a contractor's claim for additional compensation was barred because of failure to promptly notify owner); *United States v. Centex Const. Co.,* 638 F.Supp. 411, 413 (W.D.Va.1985) (holding that a contractor's failure to comply with seven-day damage notification clause barred subsequent claim for additional payment and noting that "Virginia courts have upheld such contractual clauses [requiring notice] between contractors and subcontractors for nearly a hundred years"); *Serv. Steel Erectors Co. v. SCE, Inc.,* 573 F.Supp. 177, 180-81 (W.D.Va.1983) (holding that absent a waiver by the general contractor, the subcontractor's failure to provide timely notice of extra work barred claim for additional compensation); *Blake Constr. Co. v. Upper Occoquan Sewage Auth.,* 266 Va. 564, 579, 587 S.E.2d 711, 719 (2003) (upholding the denial of a contractor's claims where notice was not timely).

395. RBI's failure to give ODEC the required detailed written notice within 15 working days of becoming aware of the

facts or circumstances that would justify an adjustment in the Contract Price and/or Scheduled Substantial Completion Date constitutes a waiver of RBI's claims related to the following:

***59** a. alleged weather/force majeure delays;

b. alleged delays related to GE and GE equipment;

c. alleged delays related to gray water;

d. alleged damages due to lightning;

e. alleged damages concerning the Sanitary System;

f. alleged damages due to premium costs for acceleration;

g. alleged costs for calibration of GE supplied equipment;

h. alleged damages due to pass-through claims for subcontractors;

i. alleged costs and delays for separating natural gas and fuel oil simultaneous erection;

j. alleged damages and delays based on fuel oil flushing;

k. alleged damages and delays based on lube oil flushing;

l. alleged damages based on a claim of American Heavy Rigging;

m. alleged damages based on a claim of Securitas;

n. alleged damages based on CB & I tank erection indirect costs; and

o. alleged extended general conditions costs.

396. RBI has failed to prove that ODEC breached the EPC Contract, and ODEC is therefore entitled to judgment in its favor on Counterclaims I, III, IV and XII.

397. RBI has failed to prove that ODEC breached the implied warranty of the adequacy of the specifications, and ODEC is therefore entitled to judgment in its favor on Counterclaim V.

398. RBI has failed to prove that ODEC delayed the Project.

399. A claim for *quantum meruit* will not lie for matters covered by a contract between the parties. *See Raymond, Colesar, Glaspy & Huss, P.C. v. Allied Capital Corp.,* 961 F.2d 489, 491 (4th Cir.1992) (citing *Ellis & Meyers Lumber Co. v. Hubbard,* 123 Va. 481, 502, 96 S.E. 754, 760 (1918)). In the EPC Contract, the parties created a procedure for dealing with the very requests for additional compensation and/or extensions of time asserted by RBI in this suit. P 26 § 8.1. The parties also provided a procedure for resolving disputes regarding such requests, and specifically foresaw that some disputes might be "Major Disputes," i.e., "involving a matter with a value of $1,000,000 or greater." *Id.* § 13.1. Therefore, the disputes raised by RBI are covered by the EPC Contract, and ODEC is entitled to judgment in its favor on RBI's claim for *quantum meruit.*

400. RBI has failed to prove rescission of or entitlement to rescission of the EPC Contract, and ODEC is therefore entitled to judgment in its favor on Counterclaim XIII.

401. RBI has failed to prove a cardinal change of the EPC Contract, and ODEC is therefore entitled to judgment in its favor on Counterclaim XIV (misnumbered by RBI as the second Counterclaim IX).

402. Additionally, under § 11.3 of the EPC Contract, RBI has waived any claim for damages, including loss of anticipated profits and unabsorbed overhead. Virginia has long recognized that a party may waive a significant right when entering into an agreement. *See Tripp v. Charlie Falk Auto,* No. 3:00cv512, 2001 U.S. Dist. LEXIS 14096, *10 (E.D.Va. Aug. 22, 2001); *Gordonsville Energy, LP v. Virginia Elec. & Power Co.,* 257 Va. 344, 355, 512 S.E.2d 811, 818 (1999); *Blue Cross of Sw. Va. v. McDevitt & Street Co.,* 234 Va. 191, 196-97, 360 S.E.2d 825, 828 (1987) (involving a waiver of the right to claim damages); *Flintkote Co. v. W.W. Wilkinson, Inc.,* 220 Va. 564, 570, 260 S.E.2d 229, 232 (1979) (involving a waiver of the right to a jury trial on the amount of attorney's fees); *VNB Mortgage Corp. v. Lone Star Indus., Inc.,* 215 Va. 366, 369, 209 S.E.2d 909, 912 (1974) (involving a waiver of the right to file a mechanic's lien). RBI's complete waiver of any claim for damages, including loss of anticipated profits and unabsorbed overhead, is enforceable and binding under Virginia law. Therefore, ODEC is entitled to judgment in its favor on all of RBI's remaining Counterclaims.

***60** 403. As a result of RBI's liquidation of the claims of Sauer, APC, and Framatome, RBI is precluded from recovering for claims based on the claims of such subcontractors more than the amount it paid to liquidate each of those claims.

404. Having promised to indemnify ODEC against the claims of any subcontractors for work performed before September 14, 2004 (P 247), RBI is precluded from basing its own claims against ODEC on such claims of its subcontractors for work performed before September 14, 2004.

405. RBI failed to prove that its alleged consequential damages were contemplated or reasonably foreseeable by ODEC when ODEC signed the EPC Contract. Therefore, RBI cannot recover any consequential damages, including RBI's alleged loss of bonding capacity and any consequent loss of business opportunities or future profits. ODEC is entitled to judgment in its favor on Counterclaim IX.

Let the Clerk send a copy of these Findings of Fact and Conclusions of Law to all parties of record.

It is SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2006 WL 2854444

Footnotes

1 ODEC preserves its objection to that ruling.

817 F.2d 1094
United States Court of Appeals,
Fourth Circuit.

The OPERA COMPANY OF BOSTON, INC., Appellee,
v.
The WOLF TRAP FOUNDATION FOR the PERFORMING ARTS, Appellant.

No. 86–2505.
|
Argued Nov. 13, 1986.
|
Decided May 4, 1987.

Synopsis

Opera company brought breach of contract action against auditorium lessee. The United States District Court for the Eastern District of Virginia, Claude M. Hilton, J., granted judgment in favor of plaintiff, and defendant appealed. The Court of Appeals, Donald Russell, Circuit Judge, held that remand was required to determine whether possible foreseeability of power failure was of that degree of reasonable likelihood as to make improper lessee's assertion of defense of impossibility of performance of contract.

Vacated and remanded with instructions.

McMillan, District Judge, sitting by designation, filed opinion dissenting in part and concurring in part.

Procedural Posture(s): On Appeal.

West Headnotes (4)

[1] **Contracts** Discharge by Impossibility of Performance

Impossibility of performance is defense to breach of contract which is essentially equitable in character based on the unfairness or unreasonableness of giving the contract the absolute force which its words clearly state, which can be applied when thing is not practicable, i.e., it can only be done at an excessive and unreasonable cost.

7 Cases that cite this headnote

[2] **Contracts** Discharge by Impossibility of Performance

A requirement of absolute nonforeseeability as a condition to application of defense of impossibility or impracticability of performance would be so logically inconsistent as to nullify doctrine.

16 Cases that cite this headnote

[3] **Contracts** Discharge by Impossibility of Performance

In order to show impossibility of performance as defense to breach of contract, party relying on defense must establish unexpected occurrence of intervening act, that such occurrence was of character that its nonoccurrence was basic assumption of parties' agreement, and that occurrence made performance impracticable.

27 Cases that cite this headnote

[4] **Contracts** Discharge by Impossibility of Performance

Outdoor auditorium lessee was entitled to show impossibility of performance as defense to breach of contract action by opera company; outdoor concert in national park auditorium was cancelled due to power outage during electrical storm after consultation between park service, lessee, and opera company, following decision by park service and lessee, without dissent from opera representative, that prompt cancellation was necessary to enable audience to leave the park safely and to prevent others from coming.

4 Cases that cite this headnote

Attorneys and Law Firms

***1094** Rodney F. Page (David L. Kelleher, Arent, Fox, Kintner, Plotkin & Kahn, Washington, D.C., on brief), for appellant.

Edward Gross, for appellee.

***1095** Before RUSSELL and HALL, Circuit Judges, and McMILLAN, United States District Judge for the Western District of North Carolina, sitting by designation.

Opinion

DONALD RUSSELL, Circuit Judge:

This is a breach of contract suit by the plaintiff to recover the agreed payment from the defendant for four operatic performances at the Filene Center in The Wolf Trap Park. The plaintiff asserts it was prepared, able and willing to perform as agreed but that it was prevented from giving one of the performances because of cancellation by the defendant of the performance on the ground it considered the performance impossible as a result of an electrical storm which terminated power to the pavillion during the time this performance was to be given. The court found against defendant's claim of cancellation of the performance because of an unexpected occurrence and granted judgment in favor of plaintiff. Defendant has appealed. We reverse and remand with instructions.

I.

The parties in this suit are the The Opera Company of Boston, Inc., an operatic organization recognized both nationally and internationally. The defendant The Wolf Trap Foundation for the Performing Arts is an organization for the advancement of the performing arts headquartered at Vienna, Virginia, and as such sponsors at the Filene Center in the Wolf Trap Park [1] operatic performances and similar artistic programs. The Filene Center is located in the Wolf Trap National Park and is a part of the various facilities maintained and controlled by the National Park Service. It consists of a main stage tower, an auditorium and an open lawn. The main stage tower contains the stage, dressing rooms and space for the scenery and electrical effects. In front of the tower is a covered auditorium seating approximately 3,500 people. Beyond this is the uncovered lawn providing seating for an additional 3,000 people. The Park provides parking space. This parking area is separated from the Center itself. A number of pathways leading from the parking area to the Filene Center are available. The distance of the parking area from the Center varies from approximately 300 to 700 yards. Ordinarily, when there are any night performances at the Center, the roads in the park, the parking area and the pathways to the Center are lighted for the guidance of patrons at performances at the Center.

This suit between the parties arises under a contract between the plaintiff The Opera Company of Boston, Inc. (Opera Company) and the defendant The Wolf Trap Foundation for the Performing Arts (Wolf Trap) by which the Opera Company for its part agreed to give four "fully staged orchestrally accompanied [operatic] performances to the normally recognized standards" of the Opera Company on the nights of June 12, 13, 14 and 15, 1980 at the Filene Center. For this the Opera Company was to be paid by Wolf Trap $272,000 payable under a schedule providing for payment of $20,000 at the signing of the contract and a further $40,000 on April 1, 1980, with the balance payable in four equal installments before the rise of the curtain on each performance. Wolf Trap, in turn, for its part under the contract was obliged to make the above payments and also to furnish the place of performance including an undertaking "to provide lighting equipment as shall be specified by the Opera Company of Boston's lighting designer." [2]

Both parties to the contract performed apparently all their obligations under the contract through the operatic performance on June 14. These performances had been fully sold as well as had the remaining performance on June 15. During this final day, the weather was described as hot and humid, with rain throughout the day. Sometime between 6:00 and 6:30 p.m. a ***1096** severe thunderstorm arose causing an electrical power outage. As a result all electrical service in the Park, in its roadways, parking area, pathways and auditorium were out. Conferences were had among representatives of the Park Service and that of Wolf Trap. The public utility advised that it would be at least after eleven o'clock before any service by it could be resumed in the Park and that it was likely power might not be available before morning. Various alternatives for supplying power were considered but none was regarded as relieving the situation. Already some 3,000 people were in the Park for the performance; 3,500 more were expected before 8:00 p.m. when the performance was to begin. The Park Service recommended the immediate cancellation of the performance and advised Wolf Trap if the performance were not cancelled, it disclaimed any responsibility for the safety

of the people who were to attend as well as those who were to perform. It was the Park Service's view that a prompt cancellation was necessary to enable the parties to leave the park safely and to prevent others from coming. Wolf Trap agreed and the performance was cancelled. While some of these discussions were being carried on a representative of the Opera Company was present but she took no part in the decision to cancel, though she voiced no objection. Since the performance was cancelled, Wolf Trap failed to make the final payment under the contract to the Opera Company. Five years after the cancellation, the Opera Company filed this suit to recover the balance due under the contract. Wolf Trap defended on the ground that performance by it of its obligation under the contract was excused under the doctrine of impossibility of performance.[3] The basis for this defense was that the final performance by the Opera Company for which payment was claimed had been cancelled because a performance was impracticable as a result of the power outage.

II.

The district judge began his oral opinion granting judgment in favor of the plaintiff by noting that the parties had stipulated the contract in question, a memorandum detailing the occurrence at the Park on the evening of June 15 by Craig Hankenson, an official of Wolf Trap, and the amount in issue. He then proceeded to find the storm, which caused the power shortage in the Wolf Trap Park, resulted in a complete loss of power at Filene Hall from about 6 o'clock on the evening of June 15. He apparently accepted the accuracy of Mr. Hankenson's memorandum that the performance on the night of June 15 was cancelled "based on a public safety decision, that the performance should not go forward since there was no lighting in the parking area to the walkways, and very questionable as to whether or not a generator could be set up to provide additional light for the theater itself and still provide adequate light for the people who had to move backstage." He found as a fact "that the Opera Company was there [at the Park] and was ready to go forward with the performance," but that "the only reason the performance did not go on was the fact that there wasn't adequate lighting." As he read the contract Wolf Trap was obligated to provide sufficient lighting "for the performance to go on," and that power outages were "reasonably foreseeable," as there had been some outages in the past and while "none had affected a performance prior to this occasion," it was "readily foreseeable that a power outage could affect a performance." He, therefore, held Wolf Trap had not made out its defense of impossibility of performance and granted judgment for the plaintiff.

The single question on appeal is whether this dismissal of Wolf Trap's defense of impossibility of performance was proper. The resolution of this issue requires a review of the doctrine of impossibility. We proceed first to that review.

***1097** III.

The doctrine of impossibility of performance as an excuse or defense for a breach of contract was for long smothered under a declared commitment to the principle of sanctity of contracts. This rationale for constrained application of the doctrine was expressed by the United States Supreme Court in *Dermott v. Jones* (2 Wall.), 69 U.S. 1, 8, 17 L.Ed. 762 (1864):

> The principle which controlled the decision of the cases referred to rests upon a solid foundation of reason and justice. It regards the sanctity of contracts. It requires parties to do what they have agreed to do. If unexpected impediments lie in the way, and a loss must ensue, it leaves the loss where the contract places it. If the parties have made no provision for a dispensation, the rule of law gives none. It does not allow a contract fairly made to be annulled, and it does not permit to be interpolated what the parties themselves have not stipulated.

The growth of commercial activity in the nineteenth century, however, made this rigidity of the doctrine of impossibility both "economically and socially unworkable," *see* *Cook v. Deltona Corp.,* 753 F.2d 1552, 1558 (11th Cir.1985), and in *Taylor v. Caldwell,* 3 B. & S. 826, 122 Eng.Rep. 309, 324, 6 R.C. 603 (1863), the English courts recognized these changed conditions and, relying largely on civil law precedents,[4] relaxed the constraints on the doctrine by the principle of sanctity of contracts as followed by the English courts since *Paradine v. Jayne,* Alleyn, 27, 23d Charles II (1670). It based

such relaxation on the theory of an implied condition arising without express condition in the contract itself. In stating this new rule on impossibility of performance as a defense to a breach of contract suit, the court said:

> The principle seems to us to be that in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility arising from the perishing of the person or thing shall excuse the performance. In none of the cases is the promise in words other than positive, nor is there any express stipulation that the destruction of the person or thing shall excuse the performance, but that excuse is by law implied, because from the nature of the contract it is apparent that the parties contracted on the basis of the continued existence of the particular person or chattel.

Though the United States Supreme Court had not taken note of *Taylor v. Caldwell* in its decision in *Dermott v. Jones,* rendered the year after *Taylor v. Caldwell,* it, two decades later, adopted the reasoning and the restatement of the doctrine of impossibility as enunciated in *Taylor v. Caldwell* in its decision in *The Tornado,* 108 U.S. 342, 351, 2 S.Ct. 746, 752, 27 L.Ed. 747 (1883). In that case the Court said:

> In *Taylor v. Caldwell,* 3 Best & Smith, 826, it is laid down as a rule, that, "in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied, that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance." The reason given for the rule is, that without "any express stipulation that the destruction of the person or thing shall excuse the performance," "that excuse is by law implied, because, from the nature of the contract, it is apparent that the parties contracted on the basis of the continued existence of the particular person or chattel."

Other American cases had even earlier embraced the new rule as to impossibility of performance stated in *Taylor v. Caldwell: Dexter v. Norton,* 47 N.Y. 62, 65, 7 Am.Rep. 415 (1871); *Wells v. Calnan,* 107 Mass. 514, 516 (1817); *Walker v. Tucker,* 70 Ill. 527, 543 (1873). Based on all these authorities Lawson in his *The Principles of the American Law of Contracts at Law and in Equity,* § 425 at p. 465 (F.H. Thomas ***1098** Law Book Co., St. Louis, 1893), stated as the prevalent American rule in this regard:

> Where the contract relates to the use or possession or any dealing with specific things in which the performance necessarily depends on the existence of the particular thing, the condition is implied by the law that the impossibility arising from the perishing or destruction of the thing, without default in the party, shall excuse the performance, because, from the nature of the contract, it is apparent that the parties contracted on the basis of the continued existence of the subject of the contract.

This relaxed rule for the application of the doctrine of impossibility of performance was adopted by the Supreme Court of Virginia, in whose jurisdiction this action arose, in *Virginia Iron, Coal & Coke Co. v. Graham,* 124 Va. 692, 98 S.E. 659, 662 (1919), and again in *Housing Authority, Etc. v. East Tenn. L. & P. Co.,* 183 Va. 64, 31 S.E.2d 273, 276 (1944). In the latter case, the Court, observing that "[t]he tendency of the law is towards an enlargement of the defense, ..." said:

> It is, however, fairly well settled that where impossibility is due to domestic law, to the death or illness of one who by the terms of the contract was to do an act requiring his personal performance, or to the fortuitous destruction or change in the character of something to which the contract related, or which by the terms of the contract was made a necessary means of performance, the promisor will be excused, unless he either expressly agreed in the contract to assume the risk of performance, whether possible or not, or the impossibility was due to his fault.

In between these two Virginia cases, the United States Supreme Court in *Texas Co. v. Hogarth Shipping Co.,* 256 U.S. 619, 629–30, 41 S.Ct. 612, 614, 65 L.Ed. 1123 (1921) declared:

> [W]here parties enter into a contract on the assumption that some particular thing essential to its performance will continue to exist and be available for the purpose and neither agrees to be responsible for its continued existence and availability, the contract must be regarded as subject to an implied condition that, if before the time for performance and without the default of either party the particular thing ceases to exist or be available for the purpose, the contract shall be dissolved and the parties excused from performing it.

As we have indicated, *Taylor v. Caldwell,* the United States Supreme Court cases and the Virginia cases all relied in their statement of the doctrine on an implied, though unstated, condition in the contract. Increasingly, though, commentators and text writers were uncomfortable with the implied condition rationale for the new doctrine of impossibility of performance. In 6 Corbin on *Contracts,* § 1331, p. 360 (1962 ed.), the author puts his objection to the implied condition theory strongly and rephrased the rationale for the doctrine thus:

> Though it has been constantly said by high authority, including Lord Sumner, that the explanation of the rule is to be found in the theory that it depends on an implied condition of the contract, that is really no explanation. It only pushes back the problem a single stage. It leaves the question what is the reason for implying a term. Nor can I reconcile that theory with the view that the result does not depend on what the parties might, or would as hard bargainers, have agreed. The doctrine is invented by the court in order to supplement the defects of the actual contract. The parties did not anticipate fully and completely, if at all, or provide for what actually happened. [5]

18 Williston on *Contracts,* § 1937, p. 33 (3d. ed. Jaeger 1978) is equally forceful in its rejection of the implied condition theory:

> Any qualification of the promise is based on the unfairness or unreasonableness of ***1099** giving it the absolute force which its words clearly state. In other words, because the court thinks it fair to qualify the promise, it does so and quite rightly; but clearness of thought would be increased if it were plainly recognized that the qualification of the promise or the defense to it is not based on any expression of intention by the parties.

Moreover, in line with the "tendency of the law ... towards an enlargement," [6] modern authorities also abandoned any absolute definition of impossibility and, following the example of the Uniform Commercial Code, [7] have adopted impracticability or commercial impracticability as synonomous with impossibility in the application of the doctrine of impossibility of performance as an excuse for breach of contract. *Matter of Westinghouse Elec. Corp., Etc.,* 517 F.Supp. 440, 451 (E.D.Va.1981). [8]

Under these revisions the doctrine of impossibility of performance is basically according to Corbin one "invented by the court in order to supplement the defects of the actual contract" in the interest of reason, justice and fairness. 6 Corbin on *Contracts* § 1331, p. 360. Williston is equally specific in recognizing that the revision in the doctrine as envisioned by both it and *Corbin* had made the doctrine "essentially an equitable defense, [which could] ... be asserted in an action at law." 18 Williston on *Contracts,* § 1931, p. 6. And, in effect, that was the declaration of the court in *Paddock v. Mason,* 187 Va. 809, 48 S.E.2d 199, 202 (1948). Similarly,

Restatement (Second) on Contracts has accepted this view in its statement of the doctrine.

In its Introductory Note to Chapter 11 on Impossibility of Performance (pp. 309–10) Restatement (Second) on Contracts said:

> Even where the obligor has not limited his obligation by agreement, a court may grant him relief. An extraordinary circumstance may make performance so vitally different from what was reasonably to be expected as to alter the essential nature of that performance. In such a case the court must determine whether justice requires a departure from the general rule that the obligor bear the risk that the contract may become more burdensome or less desirable. [9]

This is but another way of declaring, as did Williston, that essentially the doctrine is an equitable one to be applied when fair and just.

The modern doctrine of impossibility or impracticability, deduced from these authorities, has been formulated in § 265, pp. 334–35 of the Restatement (Second) of Contracts in these words:

> Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary.

Supplementing this statement of the doctrine, the Restatement in § 263, p. 328, defines the event the "non-occurrence of which [may be] a basic assumption on which the contract was made":

> ***1100** If, ... the existence of a specific thing is necessary for the performance of a duty ... its failure to come into existence or its destruction or deterioration makes performance impracticable, [is an event] ... "the non-occurrence of which was a basic assumption on which the contract was made.

This statement of the revised doctrine is restated in 2–615(a) of the Uniform Commercial Code which excuses non-delivery under a contract "if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made...."

In *Eastern Air Lines, Inc. v. McDonnell Douglas Corp.,* 532 F.2d 957, 991 (5th Cir.1976), the court, adopting the modern statement of the doctrine, said impossibility-impracticability arises as a defense to breach of contract when "the circumstances causing the breach has made performance so vitally different from what was anticipated that the contract cannot reasonably be thought to govern."

A shorter statement of the new rule is given in *Mishara Const. Co., Inc. v. Transit-Mixed Con. Corp.,* 365 Mass. 122, 310 N.E.2d 363, 367 (1974) in which the court said: "It is implicit in the doctrine of impossibility (and the companion rule of 'frustration of purpose') that certain risks are so unusual and have such severe consequences that they must have been beyond the scope of the assignment of risks inherent in the contract, that is, beyond the agreement made by the parties." Probably, though, the fullest statement of the modern doctrine of impossibility or impracticability is that of Judge Wright, speaking for the Court, in *Transatlantic Financing Corporation v. United States,* 363 F.2d 312, 315 (D.C.Cir.1966):

> The doctrine of impossibility of performance has gradually been freed from the earlier fictional and unrealistic strictures of such tests as the "implied term" and the parties' "contemplation." Page, *The Development of the Doctrine of Impossibility of Performance,* 18 Mich.L.Rev. 589, 596 (1920). See generally 6 Corbin, *Contracts* §§ 1320–1372 (rev. ed. 1962); 6 Williston, *Contracts* §§ 1931–1979 (rev. ed. 1938). It is now recognized that "A thing is impossible in legal contemplation when it is not practicable; and a thing is impracticable when it can only

> be done at an excessive and unreasonable cost." (citing authorities) The doctrine ultimately represents the ever-shifting line, drawn by courts hopefully responsive to commercial practices and mores, at which the community's interest in having contracts enforced according to their terms is outweighed by the commercial senselessness of requiring performance. When the issue is raised, the court is asked to construct a condition of performance based on the changed circumstances, a process which involves at least three reasonably definable steps.

[1] In line with these cases, we accept as the correct statement of the modern and prevailing doctrine of impossibility of performance as a defense to a breach of contract to be essentially as equitable in character "based [to quote Williston] on the unfairness or unreasonableness of giving [the contract] the absolute force which its words clearly state" and to be applied under the circumstances so well stated in *Transatlantic.*

[2] Manifestly the first fact to be established in making out this modern defense of impossibility or impracticability of performance is the existence of an "occurrence of an event, the non-occurrence of which was a basic assumption on which the contract was made." And, in determining the existence of such occurrence, it is necessary to have in mind the Restatement's definition of an "occurrence" in this context as that which, because of the "destruction, or such deterioration" of a "specific thing necessary for the performance" of the contract "makes performance impracticable." [10] The occurrence, as *Transatlantic* puts it, must be unexpected but it does not necessarily have to have been unforeseeable. A requirement of absolute ***1101** non-foreseeability as a condition to the application of the doctrine would be so logically inconsistent that in effect it would nullify the doctrine. This was recognized by Judge Clark in *L.N. Jackson & Co. v. Royal Norwegian Government,* 177 F.2d 694, 699 (2d Cir.1949), where he said that to require an absolute absence of foreseeability would, if accepted,

> practically destroy the doctrine of supervening impossibility, notwithstanding its present wide and apparently growing popularity. Certainly the death of a promisor, the burning of a ship, the requisitioning of a merchant marine on the outbreak of a war could, and perhaps should, be foreseen. In fact, the more common expression of the rule appears to be in terms which tend to state the burden the other way, e.g., that "the duty of the promisor is discharged, unless a contrary intention has been manifested" or "in the absence of circumstances showing either a contrary intention or contributing fault on the part of the person subject to the duty."

Williston expressed the same objection to such an absolute rule. It said:

> It is frequently said that where an event which causes impossibility "might have been anticipated and guarded against in the contract," one who makes an absolute promise is bound by it unconditionally.
>
> Such a test, however, seems of little value. It has descended in the law from a time when it was more nearly true than it now is, because impossibility was more rarely an excuse. Any kind of impossibility is more or less capable of anticipation. The question is one of degree, and if anticipated, any circumstance whatever may be guarded against by the draftsman of the contract. [11]

In Comment c, § 261 of the Restatement (Second) on Contracts the drafters follow this reasoning in the requirement of foreseeability in the application of the doctrine. They said:

> If the supervening event was not reasonably foreseeable when the contract was made, the party claiming discharge can hardly be expected to have provided against its occurrence. However, if it was reasonably foreseeable, or even foreseen, the opposite conclusion does not necessarily follow. Factors such as the practical difficulty of reaching agreement on the myriad of conceivable terms of a complex agreement may excuse a failure to deal with improbable contingencies.

These statements of the Restatement and of Williston were accepted and repeated by Judge Wright in the decision in *Transatlantic:*

> Foreseeability or even recognition of a risk does not necessarily

> prove its allocation. Compare Uniform Commercial Code § 2–615, Comment 1, Restatement, Contracts § 457 (1932). Parties to a contract are not always able to provide for all the possibilities of which they are aware, sometimes because they cannot agree, often simply because they are too busy. Moreover, that some abnormal risk was contemplated is probative but does not necessarily establish an allocation of the risk of the contingency which actually occurs. [12]

As the Court in *Mishara Const. Co., Inc. v. Transit-Mixed Concrete Corp., supra,* 310 N.E.2d at 367 remarked this question is much broader than mere foreseeability and is, "Was the contingency which developed one which the parties could reasonably be thought to have foreseen as a *real possibility* which could affect performance?" [13] and this question is in turn what Judge Learned Hand in *Companhia De Navegacao Lloyd Brasileiro v. C.G. Blake Co.,* 34 F.2d 616, 619 (2d Cir.1929) said was "in the end a question of how unexpected at the time [the contract was made] was the event which prevented performance." After all, as Williston has said, practically any occurrence can be foreseen but whether the foreseeability is sufficient to render unacceptable ***1102** the defense of impossibility is "one of degree" of the foreseeability and whether the non-occurrence of the event was sufficiently unlikely or unreasonable to constitute a reason for refusing to apply the doctrine. And that is the rule which we think accords with modern reasoning of the doctrine as an equitable doctrine and is the one we approve. [14]

The second fact to be determined in the proposed application of the doctrine is that the frustration of performance was substantial. To satisfy this requirement "[t]he frustration must be so severe that it is not fairly to be regarded as within the risks [the obligor] assumed under the contract." Comment a, § 265 of Restatement (Second) of Contracts And, finally, the defendant asserting the defense must establish that performance was impossible as that term has been defined in the refinements of the doctrine.

[3] In summary, then, a party relying on the defense of impossibility of performance must establish (1) the unexpected occurrence of an intervening act, (2) such occurrence was of such a character that its non-occurrence was a basic assumption of the agreement of the parties, and (3) that occurrence made performance impracticable. When all those facts are established the defense is made out.

IV.

[4] Applying the law as above stated to the facts of this case, we conclude, as did the district judge, that the existence of electric power was necessary for the satisfactory performance by the Opera Company on the night of June 15. While he seems to conclude that public safety was the main consideration on which the cancellation was based, he found that the power outage was the reason assigned for cancellation, and in that connection he found it to be questionable that "a generator could [have been] set up to provide additional light for the theater itself (when power from the utility company became unavailable) and still provide adequate light for the people who had to move backstage." Such findings meet the requirement of Restatement (Second) on Contracts § 263 for an event, the "non-occurrence of which was a basic assumption on which the contract was made" and accordingly satisfies the definition of an impracticability which will relieve the obligor of his duty to perform as declared in section 265 of such Restatement (which we have accepted as the proper present statement of the doctrine of impossibility of performance as a defense to a breach of contract suit). Moreover, the facts as found make out impracticability of performance under the phraseology of the doctrine of impossibility in the Virginia case of *Housing Authority, supra.* The district judge, however, refused to sustain the defense because he held that if the contingency that occurred was one that could have been foreseen reliance on the doctrine of impossibility as a defense to a breach of contract suit is absolutely barred. As we have said, this is not the modern rule and he found that the power outage was foreseeable. In this the district judge erred. Foreseeability, as we have said, is at best but one fact to be considered in ***1103** resolving first how likely the occurrence of the event in question was and, second whether its occurrence, based on past experience, was of such reasonable likelihood that the obligor should not merely foresee the risk but, because of the degree of its likelihood, the obligor should have guarded against it or provided for non-liability against the risk. This is a question to be resolved by the trial judge after a careful scrutiny of all the facts in the case. The trial judge in this case made no such findings. The cause must be remanded for such findings. In connection with

that remand, the parties may be permitted to offer additional evidence on the matters in issue.

Because of the dissent, we would review anew some of the other undisputed facts in this case, it should be noted in this connection that, while the lack of power may have interfered with the immediate commencement of the performance, that, as we have seen, was not the basic consideration which motivated the Park Service in pressing for the cancellation of the performance and it must be remembered that it was the Park Service which was the primary advocate of cancellation. There was, it is admitted, auxiliary power available for the stage and perhaps the dressing rooms furnished by the Park as a part of the Park's service. But to have made this auxiliary service operable would have delayed the commencement of the performance until ten or eleven o'clock. The Park Service's concern was for the safety of the thirty-five hundred people already in the Park and the additional three thousand who were due to come into the Park for the performance. The situation confronting the Park Service must be understood: Should the performance be delayed while the auxiliary services *for the Pavillion* were brought into operation? Even when the auxiliary service was brought into operation, it would not have provided lights for the roads and paths in the wooded park. To have sixty-five hundred people stranded in a wooded park during a lightning storm without any lights for a period of hours was a hazard to safety for which the Park Service was understandably unwilling to take the responsibility. All the parties at the conference—the Park Service, Wolf Trap, and Boston Opera—recognized the problem. After debating it, the agreement to cancel was reached, based, as we have said, primarily on "the Park Service's view that a prompt cancellation was necessary to enable the parties to leave the Park safely and to prevent others from coming." To this decision the Boston Opera's representative did not, it is true, affirmatively agree but she did not dissent. It may be that this situation would not have arisen if the Park had had auxiliary power services which, in the event of a power shortage on the part of the public utility, would have provided ample lighting for the roads and paths in the Park. But can it fairly be said that this was the obligation of Wolf Trap, the lessee of merely the Pavillion area, whatever may have been its obligation for the stage and dressing rooms at the Pavillion itself, or that the failure of Wolf Trap to provide auxiliary lighting for all the roads and paths in the Park was such action on its part as would preclude it from asserting the defense of impossibility of performance *on its part?* We think not.

CONCLUSION

The judgment herein must, therefore, be vacated and the action remanded to the district court to make findings, based on a statement of reasons, whether the possible foreseeability of the power failure in this case was of that degree of reasonable likelihood as to make improper the assertion by Wolf Trap of the defense of impossibility of performance.

The judgment of the district court is reversed, and the action is remanded with instructions.

VACATED and REMANDED WITH INSTRUCTIONS.

McMILLAN, District Judge, dissenting in part and concurring in part:

The majority opinion does an admirable job of analyzing and declaring the state of the court decisions on the doctrine of impossibility of performance.

***1104** However, I believe that the District Court takes that law into account and that although he did not fully articulate a classic statement of the law, he reached the right result for the right reasons and ought to be affirmed.

Evening opera on an indoor stage obviously requires power and lights. Supplying power and lights was a necessary part of Wolf Trap's undertaking, a cost figured into their charges for the facility.

The financing and the preparation for the delivery of the essential power required nothing esoteric, inspirational, unforeseeable or expensive.

Mr. Craig Hankenson, a representative of Wolf Trap who apparently negotiated the contract, made a detailed statement about the situation immediately after the cancellation of the concert. On pertinent matters, his statement included the following:

> From my experience in theatres with which I have been affiliated prior to Wolf Trap, I know it is possible to install at the main service panel for the theatre a switchover system so that within 10 minutes an external portable generator or an emergency stage lighting generator can provide emergency service for minimal theatrical lighting and sound. *This is not a major investment.*

Generally every region of the country has a civil defense program which has stationed somewhere in its region a large portable generator. Prior arrangement can be made with the Civil Defense so that in emergencies, such as ours, the generator, which is usually on a trailer, could be transported to the rear of the Theatre.

In my opinion *a far better solution though it is a capital investment of some size is to have a generator of sufficient capacity to deliver power to our stage so that we can carry on a performance with minimal interruption, though we would certainly have to compromise with less than the full lighting and sound which was designed for that performance.*

It is my feeling that a theater without this capacity is incomplete. I attach a memo to Claire which I wrote last summer voicing this opinion along with her response.

My memo addressed two equally critical issues: public safety and the ability to continue the performance. Her reply seems to be based solely on public safety and a very "let's wait to see it if it ever happens and then maybe we'll do something" attitude.

The facts are that we have experienced power outages on several occasions. It is perhaps a matter of opinion as to how many occurrences can be called frequent. There have been many other occasions of power outage at *Wolf Trap has been very lucky* they *did not occur during the evening* when the performance would have been affected. It can perhaps be said that tonight, too we were lucky. What if the failure had occurred after 9:30 in the middle of the performance in *darkness?*

I recommend that this situation be addressed immediately. *The cost* to the Foundation, the Park Service and the Opera Company of Boston *for the evening's cancellation would go along way if not all the way toward providing emergency backup equipment to prevent such a recurrence.*

[Emphasis added.]

From this evidence, the trial court could rationally have concluded, and did obviously conclude, that performance of this contract was not "impossible"; that power failures were not only foreseeable in an abstract sense, but were, in fact, inevitable; that a theater without emergency capacity to carry on in case of a power outage is "incomplete"; that Hankenson had advised "Claire," chairman of the theater board, of this opinion during the previous summer; that power outages had occurred on several previous occasions; that "Wolf Trap has been very lucky they did not occur during the evening when the performance would have been affected"; and that the "cost to the Foundation, the Park Service and the Opera Company of Boston for the evening's cancellation would go along [sic] ***1105** way if not all the way toward providing emergency backup equipment to prevent such a recurrence."

It would have taken only a few seconds to write into the contract a sentence which said, in effect, "If the electric power fails, Wolf Trap will not be responsible for any losses caused by the power failure."

If the parties had agreed to such a provision I would not raise my voice.

They did not so agree.

I do not think we should write for the defendant a defense it did not write for itself.

I would affirm the decision of the trial court.

All Citations

817 F.2d 1094

Footnotes

1 Wolf Trap Park is a national park owned by the United States Government and operated under the jurisdiction of the National Park Services.

2 The contract included a number of other provisions but such provisions are irrelevant to the resolution of the issues posed by the action.

3 Wolf Trap has not argued on this appeal that its non-performance was excused because of an Act of God. For a statement of the rule in connection with the plea of Act of God, *see* Sanders v. Coleman, 97 Va. 690, 34 S.E. 621 (1899).

4 *See* Bruce, *An Economic Analysis of the Impossibility Doctrine,* XI, The Journal of Legal Studies 211, 324–25 (1982).

5 The Restatement (Second) on Contracts accepts this statement of the doctrine in its Introductory Note to Chapter 11 ("Impracticability of Performance and Frustration of Purpose") at pp. 310–11.

6 *See* *Housing Authority Etc. v. East Tenn. L. & P. Co., supra,* 31 S.E.2d at 276.

7 *See* U.C.C. § 2–615(a) (1978).

8 Impossibility or impracticability may not be "subjective" but must be "objective," and the difference between the two concepts has been summarized in the phrases "the thing cannot be done" (this being objective impossibility or impracticability) and "I cannot do it" (classified as subjective impossibility or impracticability). *B's Company, Inc. v. Barber & Associates, Inc.,* 391 F.2d 130, 137 (4th Cir.1968); *Ballou v. Basic Construction Co.,* 407 F.2d 1137, 1140–41 (4th Cir.1969). It is often necessary in this connection to consider when the performance, as stipulated, is objectively impossible, whether there is an alternative form of performance and, if there is, if it is not "so excessive [in cost of performance] as to make performance extremely impracticable," there is no objective impracticability so far as the obligor is concerned. *See* *Waegemann v. Montgomery Ward & Co., Inc.,* 713 F.2d 452, 454 (9th Cir.1983).

9 *See also* Comment, Restatement (Second) on Contracts § 261: "Even though a party, in assuming a duty, has not qualified the language of his undertaking, a court may relieve him of that duty if performance has unexpectedly become impracticable as a result of a supervening event."

10 Restatement (Second) on Contracts § 263.

11 18 Williston on Contracts, § 1953, pp. 117–18.

12 *Transatlantic, supra,* 363 F.2d at 318.

13 Emphasis added.

14 We do not intend to suggest that there are not dicta—some even in the more recent decisions—which still adhere to the obsolete rule that foreseeability, whether reasonably likely or not, bars the application of the doctrine. There is in *Eastern Air Lines, supra,* 532 F.2d at 992 a dictum, which, though somewhat ambiguous, could be assumed to support this view. It finds warrant for its dictum in two authorities, *Lloyd v. Murphy,* 25 Cal.2d 48, 54, 153 P.2d 47, 50 (1944) and in *Madeirense Do Brasil S/A v. Stulman-Emrick Lumber Co.,* 147 F.2d 399, 403 (2d Cir.1945). *Madeirense* may be quickly dismissed. The opinion in that case was written by Judge Clark who authored the subsequent case of *L.N. Jackson,* quoted *supra.* If his language in *Madeirense* could be considered to establish what *Eastern Air Lines* seems to assume (contrary to our reading of the decision) it is difficult to reconcile that construction with the strong contrary declaration of Judge Clark in *L.N. Jackson.* It is noteworthy that any construction of *Lloyd v. Murphy* as stating a rule that foreseeability was an absolute bar to the use of the doctrine as a defense in a breach of contract action was found to be improper by the Ninth Circuit (within whose jurisdiction federal appeals involving California law were reviewable) in *West Los Angeles Institute for Cancer Research v. Mayer,* 366 F.2d 220, 225 (9th Cir.1966).

295 Va. 268
Supreme Court of Virginia.

RECP IV WG LAND INVESTORS LLC
v.
CAPITAL ONE BANK (USA), N.A.

Record No. 161506
|
April 5, 2018

Synopsis

Background: Vendor's assignee brought action against purchaser's assignee for breach of contract for sale of portion of subdivided office park, alleging that purchaser's assignee breached its obligations under contract's floor area ratio formula by developing the property without allocating and conveying a portion of those floor area ratio rights to vendor's assignee. The Circuit Court, Fairfax County, John M. Tran, J., sustained purchaser's assignee's plea in bar and demurrer, granted summary judgment for purchaser's assignee, and awarded attorney's fees and costs. Vendor's assignee appealed.

Holdings: The Supreme Court, Elizabeth A. McClanahan, J., held that:

[1] vendor's assignee's claim that purchaser's assignee breached contract was not the proper subject of a declaratory judgment;

[2] increase in permissible floor area to parcel area ratio was to be allocated by reference to the development density allowed under the county plan's metro overlay, which eliminated caps and made allocation provision impossible to perform; and

[3] attorney's fees provision in purchase agreement was enforceable.

Affirmed.

Procedural Posture(s): On Appeal; Judgment; Demurrer; Motion for Summary Judgment.

West Headnotes (21)

[1] **Pleading** Insufficiency of facts to constitute cause of action

The purpose of a demurrer is to determine whether a complaint states a cause of action upon which the requested relief may be granted.

[2] **Appeal and Error** Objections and exceptions; demurrer

Because the decision to sustain a demurrer presents an issue of law, Supreme Court reviews the circuit court's judgment de novo.

[3] **Declaratory Judgment** Particular Contracts

Vendor's assignee's claim that purchaser's assignee breached contract by its use of, and refusal to allocate to vendor's assignee, excess development density or floor area rights was not the proper subject of a declaratory judgment; claim was a matured disputed issue which was subject of requests for injunction and damages, and any request to resolve rights for a theoretical scenario under a future county plan was an improper request for an advisory opinion.

[4] **Declaratory Judgment** Object and purpose of statutes

The General Assembly created the power to issue declaratory judgments to resolve disputes before the right is violated.

1 Cases that cite this headnote

[5] **Declaratory Judgment** Object and purpose of statutes

The intent of the declaratory judgment statutes is not to give parties greater rights than those which they previously possessed, but to permit the declaration of those rights before they mature.

1 Cases that cite this headnote

[6] **Declaratory Judgment** Moot, abstract or hypothetical questions

Where claims and rights asserted have fully matured, and the alleged wrongs have already been suffered, a declaratory judgment proceeding is not an available remedy.

1 Cases that cite this headnote

[7] **Contracts** Language of contract

The fundamental question before court in construing a contract is "what did the parties agree to as evidenced by their contract," and the guiding light for such construction is the intention of the parties as expressed by them in the words they have used.

[8] **Contracts** Application to Contracts in General

Contracts Rewriting, remaking, or revising contract

Court construes a contract as written, without adding terms that were not included by the parties.

2 Cases that cite this headnote

[9] **Contracts** Language of Instrument

When the terms in a contract are clear and unambiguous, the contract is construed according to its plain meaning.

5 Cases that cite this headnote

[10] **Contracts** Language of Instrument

Words that the parties used in a contract are normally given their usual, ordinary, and popular meaning.

4 Cases that cite this headnote

[11] **Contracts** Existence of ambiguity

An instrument will be deemed unambiguous if its provisions are capable of only one reasonable construction; it will be deemed ambiguous if its language admits of being understood in more than one way or refers to two or more things at the same time.

1 Cases that cite this headnote

[12] **Contracts** Existence of ambiguity

A contract is not ambiguous simply because the parties to the contract disagree about the meaning of its language.

[13] **Covenants** Nature and operation in general

When the disputed term of a written instrument is a restrictive covenant imposing an encumbrance on land, to the extent it suffers from any substantial doubt or ambiguity it is to be strictly construed against the party seeking to enforce.

[14] **Contracts** Discharge by Impossibility of Performance

Contracts Destruction of subject-matter

Where impossibility is due to the fortuitous destruction or change in the character of something to which the contract related, or which by the terms of the contract was made a necessary means of performance, the promisor will be excused, unless he either expressly agreed in the contract to assume the risk of performance, whether possible or not, or the impossibility was due to his fault.

[15] **Appeal and Error** Sufficiency of Presentation of Questions

Vendor's assignee failed to preserve for appeal argument that evidence of lobbying efforts by purchaser's assignee showed that purchaser's assignee caused or contributed to county's removal, through metro overlay, of floor area ratio cap which rendered ratio allocation provision of purchase agreement impossible, and that this contribution should preclude the

application of the impossibility doctrine to issue of whether county overlay governed ratio allocation, where, at trial, vendor's assignee only argued, after the dismissal of its claims, that the lobbying efforts caused or contributed to the impossibility of performance of the ratio formula, and that this should preclude purchaser's assignee from receiving attorney's fees.

[16] **Vendor and Purchaser** Particular description

Zoning and Planning Area, frontage, and yard requirements

Under purchase agreement for sale of portion of subdivided office park, any increase in permissible floor area to parcel area ratio, which was capped at time of agreement, was to be allocated by reference to development density allowed under county plan's metro overlay, rather than by reference to ratio actually received by purchaser's assignee through rezoning application, such that amended metro overlay which removed cap rendered allocation formula in purchase agreement impossible to calculate and perform; agreement specifically covered additional ratio that "is ever available to the Property as a result of either" the existing metro overlay or an amended metro overlay, and agreement attached and incorporated existing metro overlay to show how additional ratio space could become available.

[17] **Zoning and Planning** Changes within business, commercial, or industrial districts in general

Amended metro overlay removed cap on permissible floor area ratio for property acquired by purchaser's assignee, where amended overlay expressly stated that "no" such property, with proximity to new metro rail stations, was any longer "subject to a maximum FAR."

[18] **Vendor and Purchaser** Damages

Fact that purchaser's assignee prevailed on its defense that future floor area ratio allocation in purchase agreement was rendered impossible by metro overlay which removed floor area ratio caps did not render attorney's fees provision in purchase agreement unenforceable; floor area ratio provision was not the basic purpose of the agreement, and agreement contained a severability clause.

[19] **Vendor and Purchaser** Damages

Lobbying efforts by purchaser's assignee to lift floor area ratio caps in county, which were eliminated on subject property through amended county overlay plan removing caps near transit station, did not preclude purchaser's assignee from recovering attorney's fees from vendor's assignee, in action alleging that purchaser's assignee breached purchase agreement for part of commercial property by failing to allocate future increased floor area ratio as required by the agreement, on grounds that purchaser's assignee brought about the impossibility; purchaser's assignee was not at fault for county's legislative action, as it had no tort or contract duty to stay silent as county created plan, and lifting of cap benefited all entities near transit station, including vendor's assignee.

[20] **Contracts** Discharge by Impossibility of Performance

Defense of impossibility of performance is not available to a promisor when the impossibility was due to his fault.

1 Cases that cite this headnote

[21] **Vendor and Purchaser** Damages

Circuit court's observation that impossibility of enforcement of purchase agreement's formula for allocating increased in floor area ratio, due to county's lifting of floor ratio area caps on properties near transit station, could be temporary in light of the fact that the county might re-impose a cap at some point in the future did not preclude finding that purchaser's assignee

was the prevailing party entitled to attorney's fees.

Attorneys and Law Firms

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FROM THE CIRCUIT COURT OF FAIRFAX COUNTY, John M. Tran, Judge

PRESENT: Lemons, C.J., Goodwyn, McClanahan, Powell, Kelsey, and McCullough, JJ., and Koontz, S.J.

Opinion

OPINION BY ELIZABETH A. McCLANAHAN

***271** This case involves a dispute over contractual provisions in a real estate purchase agreement ("Agreement") allocating future development rights for properties located near a new Metro rail station in Tysons Corner. Appellant RECP IV WG Land Investors LLC ("WG Land") is an assignee of certain rights of the seller under the Agreement and appellee Capital One Bank (USA), N.A. ("Capital One") is the assignee of the purchaser. WG Land challenges the circuit court's dismissal of its suit against Capital One instituted on allegations that Capital One breached the Agreement and certain related covenants by Capital One's development of the property acquired under the Agreement. WG Land also challenges the court's award of attorney's fees to Capital One. Concluding there is no reversible error in the judgment of the circuit court, we affirm.

***272** I.

A.

In 2000, WG Land's predecessor, West*Group Properties, LLC ("West*Group"), subdivided an office park ("Office Park Property") in the Tysons Corner area of Fairfax County and sold approximately 29 acres of the park ("Capital One Property") to Capital One's predecessor, Capital One Financial Corporation ("Capital One Financial"), pursuant to the terms of the Agreement and a related Supplemental Declaration and Restrictive Covenant ("Declaration"). At the time of the sale, the Office Park Property was subject to a numerical cap on the development density under Fairfax County's Comprehensive Plan by the allocation of a maximum amount of floor area ratio ("FAR") for the properties in that area. FAR is the relationship between the total amount of a building's usable floor area and the total area of the parcel upon which the building stands. For example, a FAR of 1.0 means the gross floor area of the building(s) must not exceed the area of the parcel, whereas a FAR of 2.0 means the gross floor area of the building(s) must not exceed twice the area of the parcel. Thus, with this cap on FAR in place, an allocation of more FAR for the Capital One Property meant that less FAR would be available for West*Group's remaining parcels, and vice versa. FAR is commonly expressed in square footage and using that formulation, as set forth in the Agreement and recorded Declaration, West*Group transferred 1.1 million square feet of FAR to Capital One Financial from the total amount of FAR allocated for the Office Park Property by the County.

The parties included provisions in the Agreement and Declaration restricting Capital One Financial's use and development of the Capital One Property. An eight-year restriction on Capital One Financial's right to ****820** apply for additional FAR rights from the County was imposed. West*Group was also given the right to repurchase the Capital One Property if Capital One Financial sought to sell or lease it, including any FAR associated with it, within a ten-year period.

Furthermore, because the parties anticipated that the Metro rail system's expansion would result in the County allowing more development density in the area, they included a specific mathematical ***273** formula ("FAR formula") to apportion between West*Group and Capital One Financial any additional FAR that might become "available" to the Capital One Property. Under this "shar[ing]" formula, Capital One Financial would receive the first 200,000 square feet of such FAR and the remainder would be fractionally divided between the two parties. The Agreement in § 28.7(b) and the Declaration in 4 contain identical language in setting forth the FAR formula. Significantly, the FAR formula incorporated a portion of Fairfax County's 2000 Comprehensive Plan ("2000

Plan") entitled "Transit Station Areas," which specified the expected fixed amount of FAR that would be available to properties located around a new Metro rail station in Tysons Corner such as the Capital One Property and neighboring properties. Pursuant to the 2000 Plan, the FAR for the Capital One Property would range from 1.0 to 1.5 within what the FAR formula referred to as the County's "Existing Metro Overlay" district.

In 2010, West*Group assigned its rights under the Agreement and Declaration to WG Land and transferred to WG Land ownership of the remaining parcels comprising the Office Park Property. WG Land immediately assigned and transferred the same to various special purpose entities of which WG Land was the majority owner. Those entities subsequently assigned their intangible rights under the Agreement back to WG Land, including the right to receive a portion of new FAR allocated to the Capital One Property. But those entities did not transfer title to their respective properties. Thus, WG Land does not hold title to any of the neighboring properties benefited by the Declaration ("Neighboring Properties").

Also in 2010, the County amended its Comprehensive Plan ("2010 Plan") with an "Amended Metro Overlay" district, which lifted the cap on FAR for properties located around the new Metro rail stations in Tysons Corner. More specifically, the Amended Metro Overlay provided that "[t]he highest intensities in Tysons should be built in areas closest to the Metro station entrance. ... [T]he intensity of redevelopment projects within 1/4 mile of the Metro stations should be determined through the rezoning process; in other words, *no individual site within these areas should be subject to a maximum FAR*." (Emphasis added.) Such areas ***274** included the Capital One Property and the Neighboring Properties owned by the above-referenced special purpose entities.

Capital One, as Capital One Financial's assignee and the owner of the Capital One Property, subsequently filed rezoning requests with the County for additional FAR, and in 2012 received approval to develop an additional 3.8 million square feet of FAR on the Capital One Property, which was then the location of Capital One's headquarters. [1] Capital One thereafter began construction in furtherance of its plans approved by the County to use this additional FAR for expansion of its corporate campus and other mixed-use development of the Capital One Property.

B.

WG Land, in 2015, filed suit against Capital One based on Capital One's use of its additional FAR rights acquired from the County. The special purpose entities holding title to the Neighboring Properties did not join the suit. WG Land alleged that additional FAR became "available" under the terms of the FAR formula as a result of Capital One's zoning requests, and that Capital One breached its obligations under the FAR formula in the Agreement and Declaration by developing the Capital One Property without allocating and conveying a portion of those FAR rights to WG Land. WG Land's complaint set forth three counts, all of which ****821** were based on this alleged breach of contract. In Count I, WG Land sought a declaratory judgment that the FAR allocations in the Agreement and Declaration were enforceable and Capital One's development activities violated the FAR formula governing those allocations. In Count II, WG Land sought a prohibitory injunction to preserve the status quo and a permanent injunction against the development of the Capital One Property in excess of the development rights granted under the Agreement and Declaration. In Count III, as an alternative to the injunction, WG Land sought $120 million in damages against Capital One for this alleged breach of the Agreement and Declaration.

For its response, Capital One initially filed a demurrer and plea in bar. Capital One asserted in the demurrer, *inter alia*, that WG ***275** Land's request for declaratory judgment should be dismissed because WG Land was not simply requesting a declaration of the parties' rights and obligations. Rather, WG land sought a finding that Capital One had actually breached the Agreement and Declaration by failing to allocate and convey FAR rights to WG Land. Having thus alleged a claim that had "accrued and matured," WG Land was not entitled to a declaratory judgment, Capital One argued.

In support of the plea in bar, Capital One asserted as one of its principal defenses that the changes in the County Comprehensive Plan in 2010 with the removal of the FAR cap through an Amended Metro Overlay defeated the purpose of the FAR formula and rendered it impossible to perform. Capital One argued that with this removal of the cap on development density for the Capital One Property and the Neighboring Properties, there was no basis for the Neighboring Properties to secure from Capital One an extra share of what was previously a maximum amount of

development density rights for the area. Moreover, Capital One argued, the removal of the cap made the equations in the FAR formula impossible to calculate in the absence of a set number for a maximum FAR. Thus, according to Capital One, its performance under the FAR formula was excused by the doctrine of impossibility, thereby barring WG Land's action against it.

Capital One also asserted in its plea in bar that property ownership was a requirement under the FAR formula, which expressly provided that FAR may only be "conveyed, allocated or otherwise made available to [West*Group or its successors], for their use in connection with properties now or then owned by them in the area." Because WG Land did not hold title to any of the Neighboring Properties, Capital One argued, WG Land had no contractual right, i.e., standing, to seek enforcement of the FAR formula against Capital One, thereby presenting an additional bar to WG Land's action against it.

The parties subsequently filed cross-motions for summary judgment on the issue of liability. As stated in WG Land's supporting memorandum, "[t]he parties agree that this case turns on the interpretation of [the Agreement and Declaration]" and that interpretation presents a "purely legal" issue "ripe for adjudication." Furthermore, WG Land asserted, "because [its] principal ***276** claims for declaratory and injunctive relief are equitable and do not depend on disputed issues of fact, there is no reason to proceed to a trial on the merits; rather summary judgment should be granted in [its] favor." According to WG Land, the FAR formula plainly provided that the "available" FAR should be determined by reference to actual development density Capital One received through a rezoning application, and not by reference to the development density available under the County Comprehensive Plan.

Conversely, in support of its motion for summary judgment in regard to its interpretation of the FAR formula, Capital One reiterated the central argument supporting its plea in bar. Capital One again argued that the "available" density development under the FAR formula was expressly based on the maximum FAR available under the County Comprehensive Plan's Metro Overlay; and when the 2010 Plan removed the FAR cap through an Amended Metro Overlay, the FAR formula became impossible to calculate and perform.

In further support of its motion for summary judgment, Capital One repeated the above-stated argument supporting its plea in bar that WG Land had no contractual right to enforce any of the rights or remedies under the Agreement or Declaration because ****822** WG Land was not a fee simple owner of the Neighboring Properties. Also, Capital One argued that WG Land's claim for damages was invalid because it was not based on any legally recognized theory of damages. [2]

C.

The circuit court issued a 26-page letter opinion in which it ultimately ruled in Capital One's favor on these dispositive motions and denied WG Land's motion for summary judgment. The opinion was later incorporated by reference into the final order.

As a preliminary matter, the circuit court agreed with Capital One that WG Land, as a non-landowner, lacked standing to enforce ***277** the Declaration under Virginia law. [3] However, contrary to Capital One's assertions, the court ruled that WG Land had standing to enforce the Agreement as an assignee of West*Group. [4]

Turning to the merits of the three counts in WG land's complaint, the circuit court first sustained Capital One's demurrer to WG Land's request for declaratory judgment under Count I. The court did so on the basis that, as alleged in the complaint, "Capital One has proceeded with development [of the Capital One property] under its interpretation of the [Agreement] and the rights of the parties have been fully invaded," due to Capital One's alleged "wrongful retention of excess FAR" in the course of that development. Thus, the court concluded, WG Land was not entitled to declaratory judgment because its claims had "accrue[d] and mature[d]."

The circuit court then sustained Capital One's plea in bar and granted its motion for summary judgment as to Counts II and III. The court ruled, as a matter of law, that WG Land had not established grounds for an injunction based on an alleged breach of contract under Count II, and had not established, in the alternative, grounds for a breach of contract and damage award under Count III. The court so ruled upon concluding that Capital One had not breached the FAR formula because it was impossible to calculate and perform.

The circuit court framed the issue as follows:

> Capital One argues that the [FAR] Formula is impossible to perform because the additional FAR available is infinity. WG Land argues that the actual number of FAR received in Capital One's Rezoning Application ... is the "Additional Metro FAR Number." This issue turns on whether the phrase "If ... additional FAR is ever available to the [Capital One] Property" means square footage made available due to ***278** a change in the FAR value (e.g., a change from a FAR of 1.5 to a FAR of 3.5 in a metro overlay), or the amount approved for development in a re-zoning application submitted to the County.

Upon a plain reading of its terms, the court reasoned, the FAR formula was rendered impossible to perform when "the County eliminated the cap on FAR" in 2010 (for the first time) under the terms of an Amended Metro Overlay, which was incorporated into the FAR formula by reference. "[G]iven the now uncapped FAR associated with the Property," the court determined, "the value of 'additional' FAR under the Formula is infinity, which is no longer a numerical value capable of being multiplied. As Capital One states, any number multiplied by infinity equals infinity." The court went on to explain that the FAR formula "depended on the existence of a fixed value of FAR. As the removal ****823** of the cap has rendered the Formula unworkable, Capital One is excused from performing. This [c]ourt declines to rewrite the Formula to render it workable in an 'unlimited FAR' scenario and will apply it [as] written." [5]

Lastly, the circuit court awarded attorney's fees, costs and expenses to Capital One totaling $1,894,477.27. The court made this award to Capital One as the "prevailing party" pursuant to the fee-shifting provision under § 32 of the Agreement. [6] In doing so, the court rejected as relevant here the following arguments asserted by ***279** WG Land as reasons for denying the award: (i) the fact that Capital One prevailed on its impossibility defense means that § 32 was rendered unenforceable; (ii) Capital One lobbied the County for the elimination of the cap on FAR; and (iii) Capital One was not a "prevailing party" because the impossibility of the FAR formula's enforcement could be temporary. [7]

WG Land now appeals each of these rulings of the circuit court.

II. [8]

A. Count I

WG Land argues that it alleged a proper claim for declaratory judgment under Count I of the complaint and thus the circuit court erred in sustaining Capital One's demurrer to this claim. We disagree.

[1] **[2]** "The purpose of a demurrer is to determine whether a complaint states a cause of action upon which the requested relief may be granted." *Collett v. Cordovana*, 290 Va. 139, 144, 772 S.E.2d 584, 587 (2015) (alteration and citation omitted); *see also* Code § 8.01-273. "Because the decision to sustain a demurrer presents an issue of law, we review the circuit court's judgment de novo." *Dye v. CNX Gas Co., LLC*, 291 Va. 319, 323, 784 S.E.2d 703, 705 (2016); *see La Bella Dona Skin Care, Inc. v. Belle Femme Enters., LLC*, 294 Va. 243, 255, 805 S.E.2d 399, 405 (2017).

****824** **[3]** WG Land's central and repeated allegation in Count I of the complaint, as well as Counts II and III, was that Capital One ***280** breached the Agreement and Declaration by its use of, and refusal to allocate to WG Land, excess development density or FAR rights under the FAR formula. This is exemplified by the following excerpts from the "Facts" section of the complaint, which was incorporated into each of the three counts:

- [S]eeking to take advantage of the newly available density and no longer satisfied with the bargain it struck, Capital One intentionally breached its obligations by, among other things, filing with Fairfax County in August, 2010, and thereafter obtaining Fairfax County's approval of an application to rezone the Capital One Property ... (the "Rezoning"). In the Rezoning, Capital One improperly sought and obtained approval of a mixed-use development plan through which Capital One purported to retain for its exclusive use and enjoyment additional density rights far in excess of what is permitted under the [Agreement] and [Declaration].

- The purpose of Capital One's Rezoning was to "re-plan the remainder of the Capital One campus to an exciting, vibrant, transformative, transit-oriented, mixed-use development" to contain in excess of 4.9 million square feet of development. Such a development

would be roughly 3.8 million square feet of FAR more than the original Allocated FAR Rights, and in excess of any FAR allocable under the formula set forth in the [Agreement] and [Declaration].

- Capital One thereafter further breached the terms of the [Agreement] and [Declaration] by, among other things, filing and, on or about April 23, 2014, obtaining County approval of, the Final Development Plan Amendment ... that likewise sought to exercise and keep for itself development rights grossly in excess of its allocation under the [Agreement] and [Declaration] without making any provision ***281** for allocation of any additional density rights to West*Group and/or its successors and assigns.

Based on these and other similar allegations, WG Land further alleged that Capital One's "improper actions" had "impaired and otherwise undermined and devalued Plaintiff's property interests and development opportunities." WG Land then asserted that "Capital One should be declared in breach" of the Agreement and Declaration, and requested that the FAR related provisions of the Agreement and Declaration be declared "valid and enforceable by the Plaintiff."

[4] **[5]** **[6]** As this Court has made clear, "[t]he General Assembly created the power to issue declaratory judgments to resolve disputes 'before the right is violated.' " *Charlottesville Area Fitness Club Operators Ass'n v. Albemarle County Bd. of Sup'rs,* 285 Va. 87, 98, 737 S.E.2d 1, 7 (2013) (quoting *Patterson v. Patterson*, 144 Va. 113, 120, 131 S.E. 217, 219 (1926)). In other words, "[t]he intent of the declaratory judgment statutes is not to give parties greater rights than those which they previously possessed, but to permit the declaration of those rights before they mature." *Cherrie v. Virginia Health Servs.*, 292 Va. 309, 317-318, 787 S.E.2d 855, 859 (2016) (quoting *Charlottesville Area Fitness Club Operators Ass'n*, 285 Va. at 99, 737 S.E.2d at 7). Accordingly, "where claims and rights asserted have fully matured, and the alleged wrongs have already been suffered, a declaratory judgment proceeding ... is not an available remedy." *Charlottesville Area Fitness Club Operators Ass'n,* 285 Va. at 99, 737 S.E.2d at 7 (quoting *Board of Supervisors v. Hylton Enters.*, 216 Va. 582, 585, 221 S.E.2d 534, 537 (1976)).

WG Land's contention on appeal that its claim for declaratory judgment under Count I was not based on a "matured disputed issue" belies the central allegation, once again, upon which its entire complaint was grounded: Capital One breached the Agreement and Declaration by acquiring and using a certain percentage of FAR that it should have allocated to WG Land under the FAR formula. Indeed, WG Land sought an injunction or alternatively $120 million in damages under Counts II and III, respectively, based on those same alleged wrongful actions that Capital One had already taken.

***282** We also reject WG Land's assertion that it was entitled to declaratory relief based on the circuit court's finding, when addressing ****825** WG Land's objection to Capital One's request for attorney's fees, that the FAR formula was rendered only "temporarily impossible" to perform. In its letter opinion awarding attorney's fees to Capital One, the court stated:

> Here, when Fairfax County lifted the cap on the FAR associated with the affected properties, it rendered performance by either party of the density provisions temporarily impossible .... Thus, Capital One's obligation to share FAR with WG Land is suspended, not discharged. If a cap or limitation is later imposed by governmental regulations, the duty to share additional FAR under the Agreement may be reinstated depending on the circumstances ....

To the extent WG Land sought declaratory judgment to resolve rights for a theoretical scenario under a future County Plan, it was improperly requesting an advisory opinion. *See Martin v. Garner*, 286 Va. 76, 83, 745 S.E.2d 419, 422 (2013) ("[T]he question involved [in a declaratory judgment action] must be a real and not a theoretical question." (quoting *Patterson*, 144 Va. at 120, 131 S.E. at 219); *see also Charlottesville Area Fitness Club Operators Ass'n*, 285 Va. at 107, 737 S.E.2d at 12 (Kinser, J., concurring) ("[R]endering a declaratory judgment in the absence of an actual controversy constitutes an advisory opinion."); *Liberty Mut. Ins. Co. v. Bishop*, 211 Va. 414, 418, 177 S.E.2d 519, 522 (1970) (explaining, in the context of a declaratory judgment, that "the rendering of advisory

opinions is not a part of the function of the judiciary in Virginia" (citations omitted)).

B. Counts II & III

We now turn to WG Land's challenges to the circuit court's construction of the FAR formula and related application of the impossibility doctrine as grounds for sustaining Capital One's Plea in Bar and granting its Motion for Summary Judgment as to both Counts II and III.

***283** 1.

The parties dispute the "plain meaning" of the FAR formula. Thus, we must determine if the FAR formula has "a meaning discernible from the words alone, and if so, whether the trial court correctly interpreted [it]." *Babcock & Wilcox Co. v. Areva NP, Inc.*, 292 Va. 165, 178, 788 S.E.2d 237, 243 (2016). This presents an issue of law subject to de novo review. *Id.*

[7] **[8]** **[9]** **[10]** The fundamental question before us in construing a contract is "what did the parties agree to as evidenced by their contract," and the "guiding light" for such construction is "the intention of the parties as expressed by them in the words they have used." *Schuiling v. Harris*, 286 Va. 187, 192, 747 S.E.2d 833, 836 (2013) (quoting *Wilson v. Holyfield*, 227 Va. 184, 187, 313 S.E.2d 396, 398 (1984)). In other words, "[w]e construe [a contract] as written, without adding terms that were not included by the parties. When the terms in a contract are clear and unambiguous, the contract is construed according to its plain meaning. Words that the parties used are normally given their usual, ordinary, and popular meaning." *City of Chesapeake v. Dominion SecurityPlus Self Storage, L.L.C.*, 291 Va. 327, 335, 785 S.E.2d 403, 406 (2016) (quoting *Squire v. Virginia Hous. Dev. Auth.*, 287 Va. 507, 516, 758 S.E.2d 55, 60 (2014)).

[11] **[12]** "An instrument will be deemed unambiguous if its provisions are capable of only one reasonable construction. Conversely, [it] will be deemed ambiguous ... if its language admits of being understood in more than one way or refers to two or more things at the same time." *Wetlands America Trust, Inc. v. White Cloud Nine Ventures, L.P.*, 291 Va. 153, 161-62, 782 S.E.2d 131, 136 (2016) (citations and internal quotation marks omitted). [9]

[13] Furthermore, when the disputed term of a written instrument is a restrictive covenant imposing an encumbrance on land, as with the FAR formula, [10] to the extent it ****826** "suffer[s] from any ***284** 'substantial doubt or ambiguity' " it is to be "strictly construed against the party seeking to enforce [it]." *Id.* at 162, 782 S.E.2d at 136 (quoting *Friedberg v. Riverpoint Bldg. Comm.*, 218 Va. 659, 665, 239 S.E.2d 106, 110 (1977)). [11]

The dispute between the parties over the construction of the FAR formula centers on whether FAR should be allocated (a) by reference to the development density allowed under the County Plan's Metro Overlay, as Capital One contends, or (b) by reference to FAR actually received by Capital One through a rezoning application, as WG Land contends. We conclude that the FAR formula, when read in the light of the governing rules of construction, can only reasonably be construed as requiring the allocation of FAR in reference to the County Plan's Metro Overlay, as the circuit court correctly concluded.

[14] **[15]** That determination is then the predicate for our further conclusion that, with the County's removal of the cap on FAR under the 2010 Plan, the FAR formula became impossible to calculate and perform. This Court has long recognized an impossibility defense in contract actions. *See Hampton Rds. Bankshares, Inc. v. Harvard*, 291 Va. 42, 53-54, 781 S.E.2d 172, 177-178 (2016); *Long Signature Homes v. Fairfield Woods*, 248 Va. 95, 98-99, 445 S.E.2d 489, 491 (1994); *Housing Auth. of Bristol v. East Tenn. Light & Power Co.*, 183 Va. 64, 72, 31 S.E.2d 273, 276 (1944). As we recently explained in *Hampton Rds. Bankshares, Inc.*:

> The defense of impossibility of performance is an established principle of contract law. In Virginia, it is "well settled that where impossibility is due ... to the fortuitous destruction or change in the character of something to which the contract related, or which by the terms of the contract was made a necessary means of performance, the promisor will be excused, unless ***285** he either expressly agreed in the contract to assume the risk of performance, whether possible or not, or the impossibility was due to his fault."

291 Va. at 53-54, 781 S.E.2d at 177-178 (quoting *Housing Auth. of Bristol*, 183 Va. at 72, 31 S.E.2d at 276; and citing Restatement (Second) of Contracts §§ 261 & 264

(1981)) (footnotes omitted). The County's removal of the cap on FAR presented such a change relative to the performance of the FAR formula. Thus, the circuit court was also correct in sustaining Capital One's impossibility defense, as asserted in its Plea in Bar and Motion for Summary Judgment, to WG Land's claims that Capital One breached the FAR formula. [12]

2.

[16] It is undisputed that the parties to the Agreement executed in 2000 included the FAR formula in § 28.7(b) of the Agreement in anticipation of the extension of the Metro rail system to Tysons Corner. They anticipated that this extension would result in an increase in the development density, i.e., FAR, permitted by the County when properties like the Capital One Property and ****827** Neighboring Properties located near a new Metro rail station would be included within a Metro Overlay district. Without an agreement to share in such increased development rights, however, either party could have effectively monopolized such rights by being the first to ***286** take the greatest advantage of them through a prompt plan of development. Accordingly, the parties provided in § 28.7(b) of the Agreement as follows: [13]

> If, as a direct result of the funding, design, potential extension and/or extension of Metro service to the Tysons Corner area, additional FAR is ever available to the [Capital One] Property as a result of either (i) the portion of the Fairfax County Comprehensive Plain entitled "Transit Station Areas" and attached hereto as Exhibit T (the "Existing Metro Overlay") or (ii) any amendment to the Existing Metro Overlay or any similar overlay district in the Fairfax Comprehensive Plan based on Metrorail (each, an "Amended Metro Overlay"), then [that FAR is to be fractionally shared by the parties, subject to the Capital One Property retaining the first 200,000 square feet, through an allocation determined under mathematical equations set forth thereafter in subsections A through D of § 28.7(b)].

The plain text of § 28.7(b) thus addresses FAR that becomes available to the Capital One Property under the County Plan. It specifically covers "additional FAR [that] is ever available to the [Capital One] Property *as a result of* either (i) ... the Existing Metro Overlay ... or (ii) ... an Amended Metro Overlay." (Emphasis added.) Further, there can be no question that the parties clearly understood what a Metro Overlay consisted of in relation to FAR under the County Plan because they attached and incorporated the 2000 Metro Overlay to the Agreement as an exhibit, referring to it as the "Existing Metro Overlay." By doing so, they provided an example of how additional FAR could become "available" to the Capital One Property by its inclusion within a Metro Overlay district. If that turned out to be the Existing Metro Overlay, then the share of FAR that the owner of the Capital One Property would be required to allocate to West*Group or its successor would be determined by a mathematical equation set forth in the FAR formula using the Existing Metro Overlay's fixed ***287** numerical caps on FAR ranging from 1.0 to 1.5. [14] Otherwise, the numerical caps set forth in "any amendment to the Existing Metro Overlay or any similar overlay district in the Fairfax Comprehensive Plan based on Metrorail (each, an 'Amended Metro Overlay')" would be equally applicable, as provided in the FAR formula. In this way, each party's interest in the fractional share of the "additional FAR" would be established.

The FAR formula thus depends on the existence of the FAR set forth on the face of the Existing Metro Overlay or an Amended Metro Overlay as a mathematical variable for calculating the amount of "available" FAR to be allocated to West*Group or its successor by the owner of the Capital One Property. Utilizing the numerical cap on FAR from a Metro Overlay is therefore the only way to calculate the mathematical equations for that determination under the FAR formula's express design.

Ten years later, the County passed the Amended Metro Overlay under the 2010 Plan, and, for the first time, removed the FAR cap for the area in which the Capital One Property and Neighboring Properties were located. This Amended Metro Overlay expressly stated, "no individual site within [1/4 mile of a Metro station in Tysons Corner] should be subject to a maximum FAR." Instead, pursuant to this Amended Metro Overlay, "the intensity of redevelopment

projects within 1/4 mile of [those] Metro stations should be determined through the rezoning process." Without a numerical cap on FAR, the Amended Metro Overlay provided no ****828** numerical variable necessary for calculating the amount of "available" FAR to be fractionally shared under the FAR formula. As the circuit court characterized it, absent a cap on FAR, the numerical value of the "additional FAR" that was then "available" under the terms of the Amended Metro Overlay was "infinity," which is not "a numerical value capable of being multiplied." In this context, as Capital One aptly states on brief, "[f]ractions of infinity, or any unlimited quantity, are mathematical nonsense."

***288** The Amended Metro Overlay thus "change[d] ... the character of [the "available" FAR] to which the [Agreement] related [and] by the terms of the [Agreement] was made a necessary means of performance," rendering the FAR formula under the Agreement impossible to calculate and perform. *Hampton Rds. Bankshares, Inc.*, 291 Va. at 53-54, 781 S.E.2d at 178.

Challenging this construction of the FAR formula under § 28.7(b) and conclusion as to the Amended Metro Overlay's effect upon it, WG Land proposes a reading of the FAR formula that is simply unsupported by its plain language. WG Land asserts that the additional FAR available to the Capital One Property contemplated by the parties under the FAR formula was that which might become available through a rezoning application submitted to the County by the owner of the Capital One Property. But the FAR formula says nothing about additional FAR becoming available in such a manner. The FAR formula is, instead, based on additional FAR that might become available under a Metro Overlay, through an increase in the cap on FAR—which cap, again, was eliminated by the Amended Metro Overlay in 2010 and thereby rendered the FAR formula impossible to perform.

The Agreement specifically addresses an increase in FAR for the Capital One Property based on a rezoning application not in § 28.7(b), but rather in § 28.7(c). After setting forth the FAR formula in § 28.7(b) as an exception to the eight-year limitation on the right of the owner of the Capital One Property to seek additional FAR (as set forth in the first paragraph of § 28.7), the Agreement provides in § 28.7(c) that such owner "shall have the right to seek a re-zoning ... for additional FAR to take effect following the expiration of the eight (8) year period." As the circuit court correctly reasoned in rejecting WG Land's reading of § 28.7, "if, as WG Land argues, seeking approval [of a rezoning application] is the only practicable way to obtain additional FAR, there would be no need to have two separate paragraphs addressing the density limitation."

Furthermore, as the circuit court also accurately observed, grafting § 28.7(c)'s rezoning application procedure onto § 28.7(b) under GW Land's view of these provisions would yield an irrational procedural quagmire for obtaining County approval for new development. That procedure would require Capital One to ***289** create a development plan, submit it for County approval, gain approval, and then immediately go back to the drawing board to give up to some other entity a portion of whatever development rights Capital One was seeking to implement with its initially approved development plan. Capital One would then have to return to the County a second time just to obtain approval to build some partial version of its original plan, and then a third time, and so on, after giving up a portion of the approved development rights each time. That is surely not what the parties intended. *See Mount Aldie, LLC v. Land Trust of Va., Inc.*, 293 Va. 190, 200, 796 S.E.2d 549, 555 (2017) ("Our presumption is always that the parties 'were trying to accomplish something rational. Common sense is as much a part of contract interpretation as is the dictionary or the arsenal of canons.' " (quoting *Fishman v. LaSalle Nat'l Bank*, 247 F.3d 300, 302 (1st Cir. 2001))).

[17] WG Land also disputes that the Amended Metro Overlay actually removed the cap on FAR for the Capital One Property despite the fact it expressly states that "no" such property, with its proximity to one of the new metro rail stations in Tysons Corner, is any longer "subject to a maximum FAR." WG Land's assertions that this provision is contradicted and superseded by other criteria in the Amended Metro Overlay that effectively equate to a site-specific cap on FAR is without merit.

Finally, we reject WG Land's argument that the Amended Metro Overlay, in effecting a change in zoning, should not be allowed ****829** to nullify or abrogate private contract rights by rendering the FAR formula unenforceable. Citing *Ault v. Shipley*, 189 Va. 69, 75-76, 52 S.E.2d 56, 59 (1949), WG Land relies here on the legal principle that when a restrictive covenant limits property to a certain use, a later zoning change that makes the property eligible for a different use will not, in most cases, destroy the covenant. That is not what occurred in the present case. Here, the Agreement specifically incorporated the Metro Overlays in the County Plan, i.e., the existing one in 2000 and future ones. By design, changes in the Metro Overlays would change the FAR available to

each party. The impossibility arose when the Amended Metro Overlay removed the cap on FAR from the FAR formula, leaving it unworkable, and therefore unenforceable.

***290** C. Attorney's Fees

[18] WG Land makes three arguments challenging the circuit court's award of attorney's fees to Capital One under the Agreement's fee-shifting provision at § 32. [15] First, WG Land asserts that the fact Capital One prevailed on its impossibility defense as to the FAR formula means that § 32 was rendered unenforceable. In this assertion, WG Land is mistaken. WG Land relies on the legal principle that when a contract is held impossible to perform, it is voided. [16] That principle, however, is completely inapposite to § 32. As the circuit court correctly determined, citing *Osler Inst., Inc. v. Forde*, 386 F.3d 816, 818 (7th Cir. 2004), where the provision at issue, which is rendered impossible to perform, is not the "basic purpose" of the contract, only that provision may be voided—not the entire contract. *Id.*; *see also* *Carabetta Enters. v. United States*, 482 F.3d 1360, 1365 (Fed. Cir. 2007) (explaining doctrine of partial impossibility); *Daburlos v. Commercial Ins. Co.*, 521 F.2d 18, 23 n.7 (3rd Cir. 1975) (same); *see generally*, James P. Nehf, 14-75 Corbin on Contracts § 75.7 (Joseph M. Perillo ed., rev. ed. 2017). Here, the basic purpose of the Agreement was the sale of the Capital One Property, including the transfer of 1.1 million square feet of FAR, from West*Group to Capital One Financial, which occurred nearly 15 years prior to WG Land's institution of the present suit against Capital One arising from the dispute over enforcement of the FAR formula. While the FAR formula—with its allocation of density development rights that may or may not have become available in the future as of the time of the execution of the Agreement—was certainly significant, it was not the basic purpose of the Agreement; and WG Land, of course, has not sought to unwind the Agreement. Furthermore, the Agreement's fee-shifting provision is saved under the Agreement's severability clause at § 22, which provides that "[t]he provisions of [the Agreement] shall be deemed severable, and the invalidity or unenforceability of any one or more provisions hereof shall not affect the validity or enforceability of the other provisions hereof." *See* *Reistroffer v. Person*, 247 Va. 45, 49-50, 439 S.E.2d 376, 379 (1994) (holding that ***291** contractual fee-shifting provision survived under severability clause); *Vega v. Chattan Assocs.*, 246 Va. 196, 199-202, 435 S.E.2d 142, 143-45 (1993). (holding that contractual "deposit-refund and cost-reimbursement provision" survived under severability clause).

[19] **[20]** Second, WG Land argues Capital One was not entitled to an award of attorney's fees because Capital One, through its lobbying efforts with the County, "actively worked to create the impossibility" of contract enforcement upon which it relies. WG Land cites to *Appalachian Power Co. v. John Stewart Walker, Inc.*, 214 Va. 524, 534-35, 201 S.E.2d 758, 766 (1974) as support for the proposition that a party who created or contributed to the circumstances giving rise to the impossibility is generally not allowed to rely upon it. The rule, accurately stated, is that the "defense of impossibility of performance ... is not available to a promisor when 'the impossibility was due to his fault.' " *Id.* (quoting *Housing Auth. of Bristol*, 183 Va. at 72, 31 S.E.2d at 276); *see also* ****830** *Hampton Rds. Bankshares, Inc.*, 291 Va. at 53-54, 781 S.E.2d at 177-178. To apply this principle here as WG Land urges, we would have to hold that Capital One was not entitled to attorney's fees because it was Capital One's "fault" that the County removed the cap on FAR, which resulted in the impossibility of the FAR formula's calculation and performance. We refuse to do so. It cannot be said that Capital One was at "fault" for the legislative action taken by the County's governing board. "Fault" in the context of the impossibility doctrine implies the violation of a tort or contract duty, which WG Land has failed to either allege or establish with regard to Capital One's lobbying efforts. *See* *Appalachian Power Co.*, 214 Va. at 534-35, 201 S.E.2d at 766 (assessing "fault" in this context as an issue of whether a party had committed a "breach of contractual duty which contributed to impossibility of performance"). Indeed, as Capital One argues on brief, it "had no tort or contract duty to stay silent as the County created a plan that would affect its property. Additionally, the lifting of the FAR cap in the 2010 County Plan benefited *all* entities that own or control land within 1/4 mile of a Metro station—including WG Land itself." (Emphasis in original.)

[21] Third, WG Land argues that Capital One was not the "prevailing party" under § 32 of the Agreement based on the circuit court's observation that the impossibility of the FAR formula's ***292** enforcement could be temporary in light of the fact that the County might re-impose a cap on FAR at some point in the future. While that is certainly a possibility, Capital

One was nevertheless unmistakably the prevailing party in this case. WG Land brought three claims against Capital One, the circuit court granted judgment in Capital One's favor on all three, and we are affirming that judgment. Thus, Capital One "prevail[ed]" in "[an] action ... brought by either party against the other" under the plain meaning of § 32.

III.

For the above reasons, we affirm the judgment of the circuit court in sustaining Capital One's demurrer as to Count I, sustaining its plea in bar and granting its motion for summary judgment as to Counts II and III, and awarding attorney's fees, costs and expenses to Capital One.

Affirmed.

All Citations

295 Va. 268, 811 S.E.2d 817

Footnotes

1 This resulted in a total of 4.9 million square feet of approved FAR on the Capital One Property.

2 This argument was based on the fact that WG Land admitted that "the nature of its damages is unquantifiable" in terms of any loss of value to the Neighboring Properties as a result of the development of the Capital One Property. WG Land sought, instead, to offer as its measure of damages the appraised value of the density rights related to the Capital One Property in the sum of $120 million which Capital One contended was improper.

3 As authority for this ruling, the circuit court cited *Mid-State Equip. Co. v. Bell*, 217 Va. 133, 141, 225 S.E.2d 877, 884 (1976), and *Old Dominion Iron & Steel Corp. v. Virginia Elec. & Power Co*., 215 Va. 658, 663, 212 S.E.2d 715, 719-20 (1975).

4 According to the circuit court, "the only difference in outcome in terms of whether WG Land can enforce the contract or the covenant running with the land [i.e., the Declaration] would have been WG Land's ability to seek recovery of attorney's fees under [the] Declaration [as originally executed and recorded]. Otherwise, the potential relief is the same, whether an action is brought under the Purchase Agreement or the Declaration."

5 As an additional reason for dismissing Count II, the circuit court concluded from its reading of the FAR formula and related provisions that the removal of the cap on FAR rendered the purpose of the FAR formula unnecessary—which purpose was "to require the parties to 'share' additional FAR, rather than 'limit' Capital One's use of its FAR rights" as WG Land contended. Section 28.7(b) of the Agreement, the court explained, addresses circumstances in which "the available FAR changes due to amendments in the existing ordinances"; and in the event of such changes "the parties agreed to apply a Formula, the purpose of which is not to restrict Capital One's development rights, but to require the parties to share the FAR amongst the sites within the parcel." An exception to this sharing arrangement, the court further explained, was the Agreement's express eight-year limitation on Capital One's right to seek additional FAR (which had expired and was not at issue).

The circuit court then ruled, as an additional reason for dismissing Count III, that WG Land's theory of damages based upon the value of the Capital One Property was an improper measure of contract damages. In short, the court explained, "[e]vidence of Capital One's gains is not evidence of WG Land's pecuniary loses."

6 Section 32 of the Agreement states: "To the extent permitted by law, in any action or proceeding brought by either party against the other under the Agreement, the prevailing party shall be entitled to recover from the other party the professional fees incurred by the prevailing party ... [including] attorney's fees ... and other legal expenses and court costs. The provisions of this Section 32 shall survive Closing and termination of this Agreement."

7 WG Land made a number of other arguments to the circuit court challenging Capital One's claim for attorney's fees that are not asserted on appeal, including WG Land's argument that the requested fees were not reasonable and necessary.

8 As a threshold matter, we need not address WG Land's assignment of error challenging the circuit court's ruling that, while it had standing to enforce the Agreement, it did not have standing to enforce the Declaration. For the reasons discussed in Part II.B., *supra*, we agree with the circuit court's construction of the FAR formula and conclusion that the removal of the FAR cap under the Amended Metro Overlay rendered the FAR formula impossible to calculate and perform. We thus hold that Capital One did not breach the FAR formula by not allocating FAR to WG Land. Accordingly, even if we assume WG Land had standing to enforce the Declaration, as well as the Agreement, the result would be the same because the FAR formula is identical in both the Agreement and Declaration. *See Rastek Constr. & Dev. Corp. v. Gen. Land Commercial Real Estate Co.*, 294 Va. 416, 423, 806 S.E.2d 740, 744 (2017) ("[T]he doctrine of judicial restraint dictates that we decide cases 'on the best and narrowest grounds available.' " (quoting *Commonwealth v. White*, 293 Va. 411, 419, 799 S.E.2d 494, 498 (2017)).

9 We note that "[a] contract is not ambiguous simply because the parties to the contract disagree about the meaning of its language." *Babcock & Wilcox Co.*, 292 Va. at 179, 788 S.E.2d at 244 (quoting *Pocahontas Mining L.L.C. v. Jewell Ridge Coal Corp.*, 263 Va. 169, 173, 556 S.E.2d 769, 771 (2002)).

10 After setting forth the FAR formula, the Agreement expressly describes the Declaration, in which the FAR formula "shall [also] be reflected," as "a covenant encumbering the [Capital One] Property."

11 *See also Anderson v. Lake Arrowhead Civic Ass'n*, 253 Va. 264, 269-70, 483 S.E.2d 209, 212 (1997) (explaining that restrictive covenants are not favored under Virginia law and must be strictly construed against the restrictions and in favor of the free use of property where there is substantial doubt or ambiguity as to their meaning (citing *Friedberg*, 218 Va. at 665, 239 S.E.2d at 110)).

12 Because, for the reasons discussed *infra*, we agree with the circuit court's construction of the FAR formula and application of the impossibility doctrine, which negates WG Land's allegations of breach of contract in Counts II and III, we need not address WG Land's assignments of error directed at the circuit court's rulings setting forth additional grounds for dismissing Counts II and III.

In addition, WG Land failed to preserve the argument, asserted in this appeal as part of its challenge to the circuit court's application of the impossibility doctrine, that evidence of Capital One's lobbying efforts showed that Capital One caused or contributed to the County's removal of the FAR cap, and this should preclude the impossibility doctrine's application. At trial, WG Land only argued, after the dismissal of its claims, that Capital One's lobbying efforts caused or contributed to the impossibly of performance of the FAR formula, and this should preclude Capital One from receiving attorney's fees. Accordingly, pursuant to Rule 5:25, we will only consider WG Land's argument directed at Capital One's lobbying efforts in that context, as discussed in our review of the circuit court's award of attorney's fees to Capital One in Part II.C., *infra*.

13 Because the FAR formula in § 28.7(b) of the Agreement is identical to its recitation in ¶ 4 of the Declaration, our analysis of § 28.7(b) is equally applicable to ¶ 4.

14 More specifically, the County's 2000 Metro Overlay attached to the Agreement as Exhibit T and referred to in the FAR formula as the "Existing Metro Overlay" capped the FAR for property like the Capital One Property, in terms of proximity to the expected location of one of the new Metro stations, at 1.5 within 1000 feet of a Metro station and 1.0 between 1000 and 1600 feet away.

15 *See* note 6, *infra*.

16 *See, e.g.*, *Smith v. McGregor*, 237 Va. 66, 75, 376 S.E.2d 60, 65 (1989) (holding an executory real estate contract to be void where sellers could not perform a material condition precedent to contract's execution and purchaser did not agree to waive it) (cited in WG Land's opening brief).

2012 WL 1109030
United States District Court, E.D. Virginia, Norfolk Division.

UNITED STATES of America and Commonwealth of Virginia, Plaintiffs,
v.
HAMPTON ROADS SANITATION DEPARTMENT, Defendant.

Civil No. 2:09–cv–481.
|
April 2, 2012.

Attorneys and Law Firms

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Frank Paul Calamita, III, Aqualaw PLC, Richmond, VA, for Defendant.

OPINION AND ORDER

ARENDA L. WRIGHT ALLEN, District Judge.

"It's raining, it's pouring ..."

***1** This phrase, the start of an old nursery rhyme describing a rainstorm and the consequences of unfortunate injury, is an appropriate introduction to this work. The questions that the Court is called upon to determine concern the proper consequences for certain environmental injuries, including the unintended discharge of sewage following heavy rainfall in March 2010, across the southeast region of the Commonwealth of Virginia.

Before this Court is a Motion for Judicial Review of Dispute Under Consent Decree from Defendant Hampton Roads Sanitation Department ("HRSD" or "Defendant"). Doc. 21. After conducting this review and carefully considering the pleadings and oral argument, a demand for stipulated penalties against Defendant is granted.

I. BACKGROUND

Defendant petitioned this Court to review the possible assessment of penalties arising under an Amended Consent Decree ("Consent Decree"). The Consent Decree was entered via Court Order to remedy violations of the Clean Water Act ("CWA") and the State Water Control Law ("SWCL") allegedly caused by Defendant's operation of its complex sanitary sewer conveyance system and wastewater treatment plants. Pursuant to the Consent Decree's remediation terms, stipulated penalties can be assessed against Defendant when sanitary sewer discharges ("SSDs") occur.

In this case, the Plaintiffs United States of America, represented by the Environmental Protection Agency ("EPA"), and the Commonwealth of Virginia, represented by the Department of Environmental Quality ("DEQ") (referred collectively as "Plaintiffs"), contend that HRSD has illegally discharged pollutants into the waters of Virginia and the United States, and that these discharges were in violation of the Decree, and in violation of the federal and state water laws.

II. PROCEDURAL HISTORY

Plaintiffs filed a lawsuit against HRSD on September 29, 2009, asserting that HRSD violated Section 301 of the federal Clean Water Act, 33 U.S.C. § 1311(a), and Section 62.1–44.5 of the State Water Control Law, Va.Code §§ 62.1–44.2, *et. seq.* (1950). Plaintiffs sought immediate and long-term injunctive relief measures.

On February 23, 2010, Senior District Court Judge Jerome B. Friedman entered an Amended Consent Decree to resolve the dispute. *See* Doc. 19.

On September 30, 2010, the EPA issued a letter on behalf of the Plaintiffs demanding payment of penalties for thirteen SSDs that occurred between February 23, 2010 and June 30, 2010. Pls. Mem. Opp. re Mot. for Jud. Review ("Pls.Mem.Opp.") 8–9, Doc. 22. This triggered the Consent Decree's informal dispute resolution process. Three SSDs were resolved.

On June 20, 2011, Defendant filed the pending Motion for Judicial Review. Doc. 21. Defendant requested that this Court deny Plaintiffs' demand for stipulated penalties for the

remaining ten SSDs at issue. The parties subsequently agreed to extensions in the briefing schedule, and the action was reassigned to the undersigned. Oral argument was presented to the Court on February 8, 2012.

III. STATEMENT OF FACTS

***2** Hampton Roads Sanitation Department is a political subdivision of the Commonwealth of Virginia that owns and operates a sanitary sewer conveyance system and thirteen wastewater treatment plants. Consent Decree para. 1. This system is a part of an interconnected regional sewer system in southeastern Virginia. The system collects and treats wastewater from the cities of Chesapeake, Norfolk, Hampton, Newport News, Poquoson, Portsmouth, Suffolk, Virginia Beach, and Williamsburg, the counties of Gloucester, Isle of Wright, James City, and York, and the town of Smithfield (hereinafter referred to as the "Localities").

In a sanitary sewer system, sewage and wastewater are transported by one set of pipes and storm water is transported in a different set of pipes. Ex. 1 to Pls. Mem. Opp., Attach. C, Aff. of Mark Klingenstein ("Klingenstein Aff.") para. 7, Doc. 28–2. The design is intended to separate sewage from storm water regardless of weather conditions. *Id.* Sanitary sewer discharges can occur when the system experiences a capacity limitation. *Id.* at para. 8. These occurrences are defined as "any discharge to waters of Virginia, or the United States from the HRSD [separate sewer] system through a point source not authorized in any Permit." Consent Decree para. 13. A discharge consists of untreated wastewater containing sewage, industrial waters, oil, pesticides, herbicides, and other pollutants. These contaminants are required to be treated before discharge. The CWA and permits issued pursuant to the National Pollutant Discharge Elimination System ("NPDES") prohibit discharges from the collection system.

Capacity-related SSDs generally occur during wet weather, when rainwater or groundwater enters the separate sewer system. Klingenstein Aff. para. 8. An increasing flow that exceeds the capacity of the separate sewer system causes sewage and wastewater to be discharged at unintended points, including manholes and basement drains. *Id.*

Equipment-related SSDs occur when a structural or mechanical failure occurs in the separate sewer system and results in a discharge. *Id.* at para. 9.

There is no dispute that HRSD's system has adequate dry weather sewage capacity. Ex. 6 to Def. Mem. in Supp. of Mot. for Jud. Review ("Def.Mem."), Aff. of Richard Stahr ("Stahr Aff.")paras. 4–5, Doc. 22–6. However, the sewage capacity of HRSD's system during severely wet weather is disputed. *Id.* at para. 5. Because of the system's alleged inadequacy, Plaintiffs commenced a coordinated effort to address SSDs in the southeastern Virginia in 2006. As a result of this effort, the Localities entered into a Special Order of Consent in state court, requiring the Localities to design and implement system improvements. The Special Order also required the Localities to participate in the Regional Wet Weather Management Plan ("RWWMP"), a regional plan designed to attain capacity that is sufficient to maintain weather-related separate sewer overflows and discharges. Consent Decree para. 8.

***3** Plaintiffs and HRSD subsequently entered into the Consent Decree, resolving claims alleging over 350 violations of HRSD's NPDES permits, as well as numerous violations of the CWA and the SWCL for unpermitted sanitary sewer overflows from the HRSD sewer system and sewage treatment plants. [1] The Consent Decree required HRSD to implement programs to provide immediate and long-term improvements in its separate sewer system. *Id.* at paras. 8–10. The Consent Decree imposes penalties if HRSD fails to comply with the Consent Decree. Consent Decree para. 110.

As noted above, on September 30, 2011, Plaintiffs demanded penalties for thirteen SSDs occurring between February 23, 2010 and June 30, 2010. The parties then entered into the informal dispute resolution process triggered by the Consent Decree and resolved three of the thirteen claims.

Of the remaining ten SSDs, six occurred on March 29, 2010, when a rainstorm soaked the Hampton Roads region. This storm brought 2.6 to 3.7 inches of rain in the region over a twenty-four hour period. Ex. 6 to Def. Mem., Letter from Counsel F. Paul Calamita to Judy Hykel on March 25, 2011 ("Calamita Letter"), Doc. 22–6.

As a result of the storm, six capacity-related overflows occurred, releasing over 146,000 gallons of wastewater in violation of federal and state water laws. Calamita Letter, Attach. Aff. of Phillip Hubbard ("Hubbard Aff.") para. 14.

The remaining four SSDs at issue in this litigation were caused by equipment failures. The first equipment-related SSD occurred on March 8, 2010 at the Independence

Boulevard Pumping Station when an electrical component caused a pump to fail, triggering an illegal discharge. *Id.* at para. 15.

A second equipment-related discharge occurred on March 25, 2010 at 3824 Virginia Beach Boulevard. *Id.* at para. 16. This discharge was caused by the deterioration of a buried riser pump on the air release vent. *Id.*

Another equipment-related discharge occurred at the Suffolk Pump Station on March 29, 2010, when a standby pump developed a small hole in its discharge fitting. *Id.* at para. 17.

The final discharge at issue occurred on April 11, 2010 at the "Shell Road Force Main," when internal corrosion created a three-to-four inch hole in the top of a twenty-four inch ductile iron force main pipe. *Id.* at para. 18.

IV. JURISDICTION

This court has jurisdiction to hear this matter pursuant to Section XXVII of the Consent Decree, which states that this Court "shall retain jurisdiction over this case until the termination of the Consent Decree, for the purpose of resolving disputes arising under this Decree." Consent Decree para. 165.

The Consent Decree requires the parties to first enter into an informal dispute resolution process before bringing their dispute to federal court. *Id.* The parties engaged in the process, and three claims for stipulated penalties were resolved. Ten claims remain for this Court to address.

V. LEGAL STANDARD

***4** A consent decree is a judicial act. It is not a contract, although some principles governing consent decrees overlap with the laws of contracts. *Gibson v. Allen,* Civil Action No. 2:78–2375, 2011 WL 2214919, at *6 (S.D. W. Va. June 3, 2011).

Consent decrees are interpreted as contracts. *Johnson v. Robinson,* 987 F.2d 1043, 1046 (4th Cir.1993) (citations omitted). "[T]he scope of a consent decree must be discerned within the four corners, and not by reference to what might satisfy the purposes of one of the parties to it." *Willie M. v. Hunt,* 657 F.2d 55, 60 (4th Cir.1981). "The circumstances surrounding the formation of the consent order or any technical or specialized meaning understood by the parties for words in the order may properly inform a court while it yet adheres to the 'four corners rule.' " *Id.* at 60 (quoting *United States v. ITT Cont'l Baking Co.,* 420 U.S. 223, 238, (1975)). "When interpreting a consent decree, words must be read in context, each of its provisions being interpreted together with its other provisions. Absent ambiguity in terms of the consent judgment, the intent of the parties must be ascertained solely from the instrument itself and extrinsic evidence will not be admitted." *Gibson,* 2011 WL 2214919, at *6 (internal quotation and citation omitted). "A court's ability to modify a consent decree or other injunction springs from the court's inherent equitable power over its own judgments." *Thompson v. U.S. Dep't. of Hous. & Urban Dev .,* 404 F.3d 821, 830 (4th Cir.2005) (citations omitted).

The Consent Decree governs terms for payment of stipulated penalties. Consent Decree para. 136.

VI. ANALYSIS

The primary question presented is whether HRSD is required to pay stipulated penalties as a result of the ten sanitation sewage discharges occurring between February 23, 2010 and June 30, 2010. In addressing this, the Court must turn to the *force majeure* provision of the Consent Decree to determine if it is applicable to SSDs. The role of the *force majeure* provision in this litigation is complex and dispositive. First, the Court must resolve whether the provision can be invoked to excuse Defendant from paying stipulated penalties for the six weather-related SSDs and the four equipment-related SSDs.

Next, after concluding that the *force majeure* provision can be invoked, the Court must determine the proper standards for evaluating the provision's applicability to each SSD at issue.

Finally, the Court must resolve whether the Defendant is liable for stipulated penalties for each SSD in light of these standards.

A. Can Defendant invoke the *force majeure* provision of the Consent Decree to possibly preclude liability for

Stipulated Penalties for Sanitation Sewage Overflows or Sanitation Sewage Discharges?

The *force majeure* provision in the Consent Decree provides:

> 'Force Majeure' for purposes of this Consent Decree, is defined as any event arising from causes beyond the control of HRSD ... that delays or prevents the performance of any obligation under this Consent Decree despite HRSD's ... best efforts to fulfill the obligation.

***5** Consent Decree para. 130.

Plaintiffs contend that the *force majeure* provision of the Consent Decree cannot be invoked by HRSD to avoid liability for stipulated penalties for SSDs.[2] Plaintiffs argue that the *force majeure* provision should be interpreted as applying only to "construction schedules, and milestones and similar requirements for injunctive relief in the consent decree." Pls. Mem. Opp. at 13. Plaintiffs also contend that applying the *force majeure* clause to the stipulated penalties is contrary to United States and Virginia law.

After careful consideration, the Court concludes that the *force majeure* provision may be invoked to possibly preclude liability for stipulated penalties for SSDs. Plaintiffs' construction of the *force majeure* provision is unsupported by the language of the Consent Decree. The *force majeure* provision has no limiting language relating to SSDs, and its invocation here does not circumvent federal and state laws. Plaintiffs will be able to assert future actions against HRSD regardless of the Court's decision on this matter. The possibility of claims remains as an incentive for HRSD to comply with the Consent Decree to avoid Stipulated Penalties and enforcement actions. Further, this interpretation of the *force majeure* provision, as it applies to SSDs, is consistent with other provisions of the Consent Decree. *See* Consent Decree at para. 108 (describing a violation of the Consent Decree); para. 110 (delineating scenarios regarding stipulated penalties); para. 129 (describing the accounting of the stipulated penalties when a violation of the Consent Decree is also a violation of federal and state law); and para. 154 (describing Plaintiffs' right to file additional claims against HRSD).

Plaintiffs begin their challenge to Defendant's proposed invocation of the *force majeure* provision to SSDs by offering an interpretation of the provision's phrase "*that delays or prevents the performance of any obligation under this Consent Decree.*" *Id.* at para. 133. Plaintiffs suggest that this phrase indicates that the *force majeure* provision should be limited to the Consent Decree's compliance program, injunctive relief deadlines, and procedures that are set forth in Sections V–XVIII of the Consent Decree. Plaintiffs argue that the emphasized language forecloses the application of the *force majeure* provision to SSDs.

Plaintiffs' argument is unpersuasive. "When interpreting a consent decree, words must be read in context, each of its provisions being interpreted together with its other provisions." 46 Am.Jur.2d Judgments § 195 (2012). The Consent Decree states that "HRSD shall be liable for stipulated penalties to the United States and State for violations of the Consent Decree as *specified below,* unless excused under ... Section XXI (Force Majeure)." *Id.* at para. 108 (emphasis added). A violation of the Consent Decree is defined as "including failing to perform satisfactorily any obligation required by the terms of this Decree, including any work plan or schedule approved under this Decree and within the specified time schedules established by or approved under the Decree ." *Id.*

***6** The obligations "required by the terms of this Decree" are not limited to work plans of the Consent Decree. Instead, the parties defined the types of violations subject to the stipulated penalties provision, and included SSDs. *See* Consent Decree paras. 108–29. The penalties provision for SSDs, and other unauthorized discharges, states that HRSD will be subject to a stipulated penalty for each SSD, "Prohibited Bypass or unauthorized discharge from the HRSD SS System or the HRSD STP that occur after the date of entry of the Consent Decree." Consent Decree para. 110. There is no indication that the *force majeure* provision cannot be invoked for SSDs. The only language that limits the applicability of *the force majeure* provision is found in paragraph 130, which states that "*[f]orce [m]ajeure* does not include HRSD's financial inability to perform an obligation under the Consent Decree."

Plaintiffs next assert that the *force majeure* provision cannot be invoked for SSDs because the provision "is inconsistent with the general scheme of liability in the federal and state water laws." Pls. Mem. at 15. Specifically, Plaintiffs contend that applying the *force majeure* provision to SSDs would allow HRSD to circumvent the law, because the Clean

Water Act and Virginia State Water Control laws should be construed as strict liability regimes. *See* *American Canoe Ass'n. v. Murphy Farms, Inc.,* 412 F.3d 536, 540 (4th Cir.2005); *see also* *Stoddard v. W. Carolina Reg'l Sewer Auth.,* 784 F.2d 1200, 1208 (4th Cir.1986) (citations omitted).

In the cases relied upon by Plaintiffs, the courts addressed limiting the statutory enforcement power of the EPA, and the decisions support Plaintiffs' assertion that the CWA is a strict liability regime. However, Plaintiffs are unpersuasive in their contentions that invoking the *force majeure* provision with respect to possible liability for SSDs would be inconsistent with the CWA's strict liability regime. The liability scheme remains valid. Enforcement actions under federal and state law are not precluded regardless of whether the *force majeure* is applied to the SSDs. *See* Consent Decree paras. 152–59.

Accordingly, the Court concludes that the provision the *force majeure* provision can be invoked under circumstances presented here. The Court must next determine the standards for evaluating whether the provision is applicable to any of the SSDs at issue.

B. What are the standards for determining the possible applicability of the *force majeure* provision to the Sanitary Sewer Discharges at issue?

As already provided, the Consent Decree defines a *force majeure* occurrence "as any event arising from causes beyond the control of HRSD, of any entity controlled by HRSD, or HRSD's contractors, that delays or prevents the performance of any obligation under this Consent Decree despite HRSD's ... best efforts to fulfill." *Id.* at para. 130. The Consent Decree also states that "HRSD's financial inability to perform any obligations under this Consent Decree" does not constitute a *force majeure* event. *Id.*

***7** The Court has considered the parties' arguments regarding the applicable standards here. The primary dispute regarding the standard for evaluating the *force majeure* provision is foreseeability.

Defendant contends that "foreseeability" should not be a part of the Court's calculus when determining the meaning of the *force majeure* provision. Defendant argues that foreseeability was "not bargained for language" in the Consent Decree, and relies on two decisions to support its proposition that "foreseeability" should be inapplicable. Def. Mem. at 13–14 (citing *Perlman v. Pioneer Ltd P'ship,* 918 F.2d 1244, 1248 (5th Cir.1991), *Vinegar Hill Zinc Co. v. United States,* 276 F.2d 13, 15–16 (Cl.Ct.1960)) (other citations omitted).

In *Perlman,* the Fifth Circuit concluded that the district court's adoption of a general *force majeure* doctrine that included foreseeability was erroneous because "foreseeability" was absent from the parties' contract. *Perlman,* 918 F.2d at 1248. The appellate court stated that the *force majeure* doctrine is "not a fixed rule of law that regulates the content of all *force majeure* clauses but instead is a term that describes a particular type of event, *i.e.,* an 'Act of God' which may excuse performance under the contract." *Id.*

In *Vinegar Hill,* the United States Court of Claims held that the "so entitled *Force Majeure* article of the contract was very broad," but did not include unforeseen conditions of an unusual nature. 276 F.2d at 15–16.

The decisions in *Perlman* and *Vinegar Hill* demonstrate that language contained in a consent decree is critical when interpreting a *force majeure* provision. In this case, two operative phrases in the *force majeure* provision are dispositive: "any event arising beyond the control of HRSD" and "despite HRSD's ... best efforts to fulfill the obligation." Consent Decree para. 130.

The "despite HRSD's best efforts" phrase includes foreseeability. The provision provides that the requirement that HRSD exercise best efforts to fulfill the obligation *includes using best efforts to anticipate any potential force majeure event* and best efforts to address the effects of any such event (a) as it is occurring and (b) after it has occurred to prevent or minimize any resulting delay "to the greatest extent possible." *Id.* The provision uses the term "anticipate," and this speaks to foreseeability. "Anticipate" is defined as "to lake up or deal with (a thing), or perform (an action), before another person or agent has had time to act, so as to gain an advantage; to deal with beforehand, forestall (an action)." Oxford English Dictionary (2d.1983; online version March 2012), *available at* http:// www.oed.com/view/Entry/8552.

Therefore, this Court concludes foreseeability is bargained-for-language of the *force majeure* provision, and must be a part of the court's analysis in determining whether the *force majeure* provision precludes liability for stipulated penalties for SSDs. With this in mind, and after considering the parties' arguments and applicable case law, this Court concludes

that before the *force majeure* provision can be applied to preclude liability, HRSD must show by a preponderance of the evidence that the discharge at issue was caused by an event beyond its control.

C. Can Defendant establish by a preponderance of the evidence that any of the six weather-related sanitation sewer discharges on March 29, 2010 were *force majeure* events?

***8** For stipulated penalties to be excused for the six wet weather-related SSDs, HRSD must show by the preponderance of the evidence that the SSDs related to the storm on March 29, 2010 were caused by an event beyond Defendant's control despite using its best efforts. The Court concludes that "best efforts" here requires HRSD to demonstrate that it anticipated a weather event such as the one occurring on March 29, 2010, and addressed the event during and after the occurrence to mitigate the discharge.

The Court also concludes that HRSD has failed to demonstrate by the preponderance of evidence that the six storm-related SSDs were caused by an event beyond its control. This conclusion turns on the evaluation of expert opinion testimony presented by the parties.

Primarily, HRSD asserts that it could not prepare for and prevent SSDs when the March 29, 2010 storm occurred because the storm created more water flow than its system could handle. HRSD alleges that the March 29 storm-related SSDs were a result of an unforeseeable combination of tidal conditions, groundwater levels, wastewater, and heavy rainfall. Richard Stahr ("Stahr"), Senior Vice President in the engineering firm of Brown and Caldwell, testified on behalf of Defendant and acknowledged that HRSD has the capacity to manage wastewater during dry weather conditions, but not during wet weather conditions. Stahr Aff. paras. 4–5. Stahr averred that the March 29, 2010 storm created a high peak flow beyond the "finite capacity" of HRSD's current infrastructure. *Id.* at paras. 14–16. Stahr also asserted that "[u]ntil the RWWMP is developed and a level of service is approved, any interim solutions are speculative and risky expenditures." *Id.* at para. 10.

Relatedly, HRSD claims that it cannot make unilateral improvements to its infrastructure to address SSDs caused by excessive water flow because of its interdependency with the Localities' sanitary sewer and interceptor systems. Ex. 7 to Def. Mem., Attach. Aff. of Maria Nold, Acting Regional Director of DEQ, at para. 10, Doc. 22–7.

Defendant's argument that the weather-related SSDs were caused by a wet-weather event beyond its control is unpersuasive in light of the record before the Court. Mark Zolandez, EPA Environmental Scientist ("Zolandez"), opined on behalf of Plaintiffs that the storm event experienced in southeastern Virginia on March 29, 2010 was not unusual. Zolandez described the storm on March 29, 2010 as an event comparable to an annual to bi-annual storm throughout the region. Ex. 1 to Pl. Mem. Opp., Attach. A Dccl. of Mark Zolandez, para. 24 ("Zolandez Decl."). This fact is not challenged by HRSD. The Court finds that the March 29, 2010 storm was not of the magnitude and frequency that meets the definition of an "event beyond HRSD's control."

Defendant was responsible for implementing a plan to limit SSDs when its service area experiences an annual to bi-annual storm that will bring more water flow than its known limited system capacity. [3]

***9** This is especially true given the known history of storm-related discharges at each of the locations of the six disputed SSDs. Klingenstein Aff. para. 19F. Mark Klingenstein, a professional engineer retained by the Department of Justice, states that the tidal conditions, groundwater level and Localities' wastewater were not atypical on March 29, 2010. *Id.* at para. 4. This fact undercuts HRSD's argument that weather-related SSDs were not preventable because of the confluence of storm and tidal conditions.

Stahr's opinion that "any interim solutions are speculative and risky expenditure" is unpersuasive. *See* Stahr Aff. paras. 9–10. The Court has considered the fact that HRSD has "acknowledged several early action projects identified in the Consent Decree [that] would ameliorate the six [capacity-related] overflows." Ex. 7 to Def. Mem., HRSD Statement of Position on March 25, 2011, Doc. 22–7. [4] This evidence suggest that possible interim solutions are less speculative and risky than stated by the expert retained by HRSD for this litigation.

Defendant's contention that the tidal conditions made this storm unforeseeably worse is not supported by the record. In light of the weight of persuasive expert testimony compelling the conclusion that the storm on March 29, 2010 was comparable to an annual to bi-annual storm in the region, and that the circumstances that contributed to the SSDs were insufficiently extraordinary to trigger the *force majeure*

provision, HRSD has failed to establish that the provision applies to the six weather-related SSDs.

As noted, the Consent Decree requires HRSD to anticipate these kinds of events and to use its best efforts to address the effects of each event (a) as it is occurring and (b) after it has occurred to prevent or minimize any delay to the greatest extent possible. Consent Decree para. 130. The Court concludes HRSD has failed to do so. For these reasons, the *force majeure* provision is inapplicable and does not preclude HRSD's liability for stipulated penalties arising from the six weather-related SSDs.

D. Docs invocation of the *force majeure* provision also fail to preclude liability for penalties for the equipment-related sanitation sewer discharges?

Next, the Court must determine whether HRSD is liable for stipulated penalties for the four sanitation sewer discharges that were caused by equipment failures. HRSD argues that mechanical breakdowns may qualify as *force majeure* events because it had no control over the breakdowns.

Defendant relies upon the decision in *Phibro Energy, Inc. v. Empresa De Polimeros De Sines Sarl,* 720 F.Supp. 312, 319 (S.D.N.Y .1989), for the proposition that equipment failures can constitute a *force majeure* events. The Court agrees with the decision in *Phibro Energy* to the extent that it recognizes the principle that language in the consent decree at issue is controlling. *Phibro Energy,* 720 F.Supp. at 319. In the case at bar, the Consent Decree defines a *force majeure* event as "any event arising beyond the control of HRSD[.]" Consent Decree para. 130. Equipment failures are not explicitly excluded. An equipment failure may be a *force majeure* event, therefore, if HRSD can prove that the failure at issue was beyond its control. The Court must examine the record to determine whether each equipment-related SSD was caused by an event beyond HRSD's control.

1. *Discharge at Independence Boulevard*

***10** It is undisputed that on March 8, 2010, an SSD occurred at Independence Boulevard Pressure Reducing Station due to an electrical component malfunction (the "Independence SSD"). Hampton Roads Sanitation Department responded to the malfunction within thirty-eight minutes to mitigate the discharge. Phillip Hubbard, HRSD Special Assistant for Compliance Assurance and Professional Engineer, opined that despite proper maintenance, "an unexpected malfunction of an electrical component caused the pumps inside the station to trip out," which resulted in the SSD. Hubbard Aff. para. 15.

Despite HRSD's response, 200 gallons of untreated sewer water flowed into a creek. *Id.* This discharge was not permitted under federal and state law. However, HRSD asserts that the Independence SSD is not subject to a stipulated penalty because it was caused by the electrical component malfunction, an event beyond its control. Hampton Roads Sanitation Department argues that it could not have anticipated the electrical malfunction or have responded in a manner as to prevent the discharge. Hubbard opined that the pump station was properly maintained and that HRSD performed preventative maintenance and proactively replaced the mechanical timer on the pumps with electric timers in 2009. *Id.*

The Court finds that HRSD has not shown by the preponderance of the evidence that the Independence SSD was beyond its control. Hubbard stated that the Independence SSD was started by an unexpected failure of an internal electrical component. However, HRSD knew or should have known that the equipment used at the Independence Pumping Station had outlived its usefulness. *See* Klingenstein Aff. para. 15. Klingenstein opined that HRSD's operation of "equipment beyond its useful life ... has increased the likelihood of mechanical and electrical failures and resultant sanitation sewer discharges." *Id.* Klingenstein's opinion was based on HRSD's published design standards that state electrical power equipment has a useful design life of twenty years and that the instrument and electrical control equipment has a useful design of ten years. *Id.*

The record shows that in 2006, HRSD took notice "that 41% of its pump stations were 'beyond the end of useful life' (*i.e.,* over 50 years old)." *Id.* Furthermore, Klingenstein referred to documentation drafted by HRSD that proposed making upgrades "to this pump station [that] included the replac [ment] [of] the existing unreliable liquid rheostat controls with frequency drives and associated equipment (pumps, generators) motor drives to ensure reliability." *Id.* This suggests that HRSD knew about the potential risks inherent in maintaining a system beyond its useful and intended design life.

Defendant's argument that the equipment failure was beyond its control is based upon unsupported speculation. It is in within HRSD's control to maintain and upgrade its infrastructure to ensure compliance with the federal and state

laws. Excusing HRSD for this equipment-related SSD despite its knowledge of its eroding system, and its apparent practice of "wait and see" maintenance protocol, would be violative of the letter and spirit of the parties' Consent Decree.

2. *Discharge at 3284 Virginia Beach Boulevard*

***11** On March 29, 2010, an SSD occurred at 3824 Virginia Beach Boulevard as a result of the deterioration of a buried riser pipe on an air release vent (the "Virginia Beach SSD"). Hubbard Aff. para. 16. Riser pipes vent corrosive gases to protect the force mains. Previously, HRSD performed preventive maintenance on the air release vent in May 2009 and the valve worked properly. Hubbard Aff. para. 16.

Defendant contends that the Virginia Beach SSD was caused by an event beyond its control. In support, HRSD relies on Hubbard's expert opinion that the riser pipe was properly maintained and that no further maintenance was necessary. *Id.* at para. 17. Hampton Roads Sanitation Department also notes that the pipe's underground location made it difficult to inspect. [5]

Plaintiffs correctly refute HRSD's claim that the Virginia Beach SSD was caused by an event beyond Defendant's control. Additional maintenance was warranted, especially because Defendant knew that the riser pipe was forty years old.

Klingenstein opined that more frequent maintenance and inspections should have been performed and that HRSD's "Interceptor System Preventive Maintenance Manual" directed that a manual vent (air riser), should be checked every six months. Klingenstein Aff. para. 17. There is no dispute that HRSD's last check of the vent was at least eight months before the SSD occurred.

Furthermore, Klingenstein noted that a simple material upgrade of the galvanized steel riser pipe (which was installed in 1967) to a newer corrosive-resistant material was warranted. *Id.*

For these reasons, the Court finds HRSD did not met its burden to demonstrate that the Virginia Beach SSD was caused by an event beyond its control. The Court also finds that HRSD did not use its best efforts to prevent the Virginia Beach SSD.

3. *Discharge at Suffolk Pump Station*

On March 29, 2010, a discharge occurred after a small hole developed in the standby pump located at the Suffolk Pumping Station ("Suffolk SSD"). Hubbard Aff. para. 17. The Suffolk SSD was discovered during the March 29, 2010 storm when a standby pump became operational to augment the normal pumping. *Id.* This alerted HRSD to dispatch a crew to the Suffolk station. The response team arrived to Suffolk Pumping Station and replaced the damaged discharge fitting. *Id.* HRSD recovered 200 of the 300 gallons of untreated water released because of the SSD. *Id.*

Defendant contends that equipment failure was caused by an unforeseeable event. Hampton Roads Sanitation Department relies on Hubbard's opinion that the small hole in the discharge fitting of the standby pump was "an unforeseeable failure of the fitting." *Id.* Hubbard further opined that given the large number of fittings throughout the system, an "occasional failure that results in a small release from the system is simply unavoidable." *Id.*

This opinion is conclusory and his testimony is unpersuasivc. The record establishes that the Suffolk SSD was a result of HRSD's failure to maintain its aging sewer system. Defendant provides insufficient reason for why the equipment failure could not be avoided.

***12** The Court is instead persuaded that HRSD failed to perform the maintenance as directed by its own manuals, and failed to follow its own regulations regarding standby pumps. As Klingenstein noted, HRSD's Interceptor Systems Preventive Maintenance Manual directs that a technician should perform daily inspections and services on electrical portable pumps used at stations on a temporary or semi-permanent basis. Klingenstcin Aff. para. 19M. There is insufficient evidence that HRSD followed this procedure.

For these reasons, the Court finds that the cause of the Suffolk SSD was within HRSD's control.

4. *Discharge at Shell Road Force Main*

On April 11, 2010, the force main pipe located at Shell Road failed and caused a sanitation discharge (the "Shell SSD"). It is undisputed that the Shell SSD was caused by a "three to four inch hole from internal corrosion in top of the twenty-four inch ductile iron force main pipe." Hubbard Aff. para. 18. Hampton Roads Sanitation Department stopped the leak temporarily by evacuating the pipe, and installed a full clamp to limit the damage of the Shell SSD. *Id.* Later, HRSD

executed an emergency capital improvement project to create a permanent solution to the problem. *Id.*

Defendant contends that the Shell SSD was a result of an event beyond its control because it performed an inspection of the Shell Road main pipe "around 2003" and determined that it was in good condition. Ex. 6 to Def. Mem. (Calamita Letter). Defendant relies upon Hubbard's statement that "the failure of the [main pipe] could not have been anticipated or controlled." Hubbard Aff. para. 18.

Defendant's knowledge of its aging separate sewer system and its limited force main inspection program created the opportunity to prevent the Shell Road force main failure that resulted in the SSD. The implementation of the emergency plans in response to SSDs, regardless of the effectiveness of the response, fails to excuse the responsibility that exists for the SSD and the liability for stipulated penalties that are triggered by the SSD. This is especially true given that "HRSD relies on force mains to convey sewage to a much greater degree than most sewer systems...." Klingenstein Aff. para. 21. The Court agrees with this expert's opinion that "HRSD should have developed an aggressive force main inspection program[.]" *Id.*

Significantly, the means existed for HRSD to prevent this SSD. The EPA expert opined that the force main failure was caused by extreme corrosion that could have been detected if HRSD used a hydrogen sulfide monitoring program. Zolandz Decl. para. 37. Zolandz testified that in December 2008 "[he] suggested that HRSD improve its force maintenance program by performing regular force main inspections on more of HRSD's force mains based upon, among other things, pipe age, pipe material, and pipe maintenance history." *Id.*

This evidence undercuts HRSD's claim that it was unaware of the likelihood of this equipment failure, and that the failure was not within its control. Instead, HRSD disregarded the EPA's recommendation that it should develop a more effective main pipe inspection program. Defendant cannot now evade its responsibility for penalties triggered by the Shell SSD.

VII. Conclusion

***13** The Court finds as a matter of law that the *force majeure* provision may apply to Stipulated Penalties for Sanitation Sewage Overflow or Discharges. Under the terms of the Consent Decree, the *force majeure* provision may be invoked regarding these violations when considering Defendant's potential liability for stipulated penalties.

However, the Court also finds that the ten sanitation sewer discharges at issue were not caused by events beyond HRSD's control. Therefore:

IT IS HEREBY ORDERED that Defendant's Motion for Judicial Review of Dispute under Consent Decree, Doc. 21, is **GRANTED IN PART** and **DENIED IN PART** as follows: Judicial review has been undertaken, and results in the conclusion that Plaintiff's demand for stipulated penalties for the ten sanitary sewer discharges at issue must be **GRANTED.** The parties shall confer to ensure compliance with this Court's conclusion that HRSD shall pay stipulated penalties for these discharges in a manner consistent with the terms of the Consent Decree.

IT IS REQUESTED that the Clerk of the Court send a copy of this Order and Opinion to all counsel of record.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2012 WL 1109030, 75 ERC 1842

Footnotes

1 HRSD is liable only for the separate system because it is the only portion of the sewer system in the Hampton Roads region over which HRSD exercises complete control. The other systems are intertwined with other local water agencies.

2 Defendant argues that Plaintiffs' position during the informal proceeding was different, and that Plaintiffs' current interpretation of the *force majeure* provision is an attempt to revise the Consent Decree. HRSD argues that during the informal dispute resolution proceedings, Plaintiffs agreed that the *force majeure* provision

applied. Even if Plaintiffs failed to raise this argument during the informal dispute process, they are not precluded from doing so now. Rule 408 of the Federal Rules of Evidence provides that "evidence ... when offered ... to impeach through a prior inconsistent or contradiction [is inadmissible if] ... (2)[the] conduct or statement [was] made in *compromise negotiations* regarding the claim." Fed.R.Evid. 408 (emphasis added). Compelling Plaintiffs to adhere to commentary shared during the informal dispute resolution is barred by Rule 408(2) and would weaken the Consent Decree's informal dispute resolution process. Limiting the parties to positions they considered during the informal dispute resolution process could chill the frank exchange of information. Fed.R.Evid. 408 Advisory Committee's Notes at 307.

3 Plaintiffs cite to several cases considering a claim of *force majeure* in the commercial context, where the courts held that a two-year storm was not unusual, extraordinary or unprecedented. These cases interpret New York state law. *See e.g.,* *Longview Fibre Co. v. CSX Transp., Inc.,* 526 F.Supp.2d 332, 338 (N.D.N.Y.2007)(othcr citations omitted). The Court declines to apply these cases to this matter.

4 Subsequent remedial measures may be admit into evidence when offered "for another purpose such as impeachment, or—if disputed—proving ownership, control, or feasibility of precautionary measures." Fed.R.Evid. 407.

5 This contention is rejected. Defendant's decision to bury its pipes should compel more effective and conscientious inspection rather than excuse its neglect.

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