No. 23-

IN THE

Supreme Court of the United States

HSU CONTRACTING, LLC,

Petitioner,

v.

HOLTON-ARMS SCHOOL, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE MARYLAND SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

AMBER WONG HSU
Counsel of Record
HSU CONTRACTING, LLC
6100 Executive Blvd., Suite 450
N. Bethesda, MD 20852
(301) 437-1000
amber@hsubuilders.com

Counsel for Petitioner

328270

QUESTIONS PRESENTED

In 2018, the Petitioner and Respondent entered into an AIA (American Institute of Architects) contract, a widely utilized construction industry standardized contract, for construction services. The plain language of the agreement would have barred damages where no remedial costs had actually been incurred by Respondent. Instead, the Maryland courts discarded the unambiguous plain language of the contract and allowed "any other rights or remedies" to support a multi-million-dollar judgment against Petitioner, in Respondent's favor.

In doing so, did the Maryland court:

1. Violate the Commerce Clause of the U.S. Constitution in its interpretation of the AIA contract, which serves to establish a common framework for construction project participants, using consistent terminology and legal principles, by directly contradicting interpretation of the same AIA contract by other states and federal courts?

2. Violate the Equal Protection Clause of the U.S. Constitution in its interpretation of the AIA contract, which serves to "level the playing field," by disproportionately impacting disadvantaged small businesses with limited access and opportunity to discern the universe of available rights and remedies outside the standard contract language?

THE PARTIES

Petitioner is HSU Contracting, LLC, a construction general contractor founded in 2009. It is located at 6100 Executive Blvd., Suite 450, North Bethesda, MD 20852. Respondent is the Holton-Arms School, Inc., an independent school for girls grades 3-12 located at 7303 River Road, Bethesda, MD 20817.

CORPORATE DISCLOSURE STATEMENT

Petitioner is a privately owned Maryland Limited Liability Company. It is 50% owned by Direct Management, Inc., a Maryland corporation owned by Amber Wong Hsu, and 50% owned by Amber Wong Hsu, individually.

RELATED PROCEEDINGS

HSU Contracting, LLC v. Holton-Arms School, et al., Case No. 472329-V, Montgomery County Circuit Court, Maryland. Judgment entered October 12, 2022.

HSU Contracting, LLC v. Holton-Arms School, et al., Case No. CSA-REG-1707-2022, Appellate Court of Maryland. Judgment entered September 28, 2023.

HSU Contracting, LLC v. Holton-Arms School et al., Case No. SCM-PET-0421, Maryland Supreme Court. Cert. Denied December 20, 2023.

TABLE OF CONTENTS

Table of Contents

TABLE OF APPENDICES

Page

TABLE OF CITED AUTHORITIES

Page

Cases:

Page

Page

Constitutional Provisions and Statutes:

Miscellaneous:

INTRODUCTION

This contractual dispute arises out of an interpretation of the American Institute of Architects (AIA) standard form agreements that were executed for the performance on a construction project in the State of Maryland. In the normal course of business, Respondent Holton-Arms School, Inc. presented Petitioner HSU Contracting LLC, a woman-owned, minority-owned small business, with an AIA 101-2007 (Standard Form of Agreement Between Owner and Contractor) and AIA 201-2007 (General Conditions of the Contract for Construction).[1] AIA form agreements, which were used between Petitioner and Respondent on a previous project in 2012,[2] reflect industry best practices and are commonly used by parties to construction transactions in all fifty states.

The $6.6M contract was executed on June 5, 2018.[3] Less than one year later, Respondent terminated its contract with Petitioner "for cause," pursuant to AIA 201-2007 §14.2, claiming breach of performance.[4] While there are innumerable disagreements regarding the Work performed, the following facts are undisputed: 1) Respondent resumed school operations in its fully renovated 40,000 square foot Lower School Building on September 6, 2018,[5] two days after the first day of school,

1. Appendix C, Page 63a.
2. Appendix C, Page 58a.
3. Appendix C, Page 62a
4. Appendix C, Pages 96a, 97a, 105a.
5. Appendix B, Page 30a.

and only ninety-three days after contract execution; and 2) Respondent undertook no further work, by the time of trial in 2022, thereby incurring no actual costs,[6] to remedy its so-claimed damages that were the basis of the alleged breach.[7]

The plain language of the form contract AIA 201-2007 §14.2 provided an express remedy for the calculation of damages in the event of a "Termination for Cause," permitting Owner [Respondent] to "complete and correct the Work in an expedient manner and then claim

6. Respondent claimed a singular untimely expense of $36,299 incurred on March 29, 2021 for the installation of a thermal barrier paint, however, it played no part in the Respondent's termination of Petitioner in 2019. (Defendant's Trial Ex. #1222, E355)

7. Appendix B, Page 49a. In acknowledging that Respondent expended no amounts to remedy the alleged breach (and declining the obligation to mitigate), the Appellate Court offered the following: 'Holton, being a non-profit, had limited funding. "The party who is in default may not mitigate his damages by showing that the other party could have reduced those damages by expending large amounts of money or incurring substantial obligations. Since such risks arose because of the breach, they are to be borne by the defaulting party." Wartzman v. Hightower Prods., Ltd., 53 Md. App. 656, 667, 456 A.2d 82 (1983) (citation omitted). In light of HSU's estimate that the cost to complete the work in 2019 would have been over $800,000, it would be unreasonable to require Holton to immediately expend such a large amount of money to mitigate its damages, *especially once it became clear that funds would be needed for litigation.*' (Emphasis added.) The Appellate Court failed to acknowledge that Respondent Holton had withheld approximately $1.5M (amounts earned and retained from Petitioner HSU, as well as the remaining contract balance), yielding a net judgment of $2.6M from the $4.1M award, and had sufficient funds to perform the remedial work.

any such amounts from the Contractor [Petitioner].[8] Despite not having performed any such remedial Work, Respondent was awarded a judgment of $4.1M based on the presentation of its 250-page expert witness report.[9] On appeal, the Appellate Court affirmed the award, and in its "Limitation of Damages" analysis, found authority in a separate "reservation of rights" provision, §13.4.1, and "cumulative rights" provision §2.6, to affirm the lower court's damages award based on Maryland case law.[10] The Maryland court held that the presence of these two provisions permitted Respondent to opt out of the plain and unambiguous contractual obligations and pursue any other remedies outside of the contract. Petitioner filed a Petition for Writ of Certiorari to the Maryland Supreme Court, which was denied.

OPINIONS BELOW

The Order of the Maryland Supreme Court Denying Certiorari (Appendix A, Pages 1a-2a) is reported at 486 Md. 245. The Opinion of the Appellate Court of Maryland (Appendix B, Pages 3a-50a) is reported at 23 WL 6304935. The Memorandum and Order of the Circuit Court for Montgomery County, Maryland (Appendix C, Pages 51a-141a) is unreported.

8. Appendix B, Page 40a.

9. Appendix C, Page 125a.

10. Appendix B, Page 40a.

JURISDICTION

The Order of the Maryland Supreme Court denying Petitioner's Petition for Writ of Certiorari was entered on December 20, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Commerce Clause: U.S. Constitution, Article I, Section 8, Clause 3

> [The Congress shall have the Power…] To regulate commerce with foreign nations, and among the several states …

Equal Protection Clause: U.S. Constitution, Article XIV, Section 1

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Small Business Act: 15 U.S.C. 631(a): "Declaration of Policy" - Aid, counsel, assistance, etc. to small business concerns:

> "The essence of the American economic system of private enterprise is free competition.

> Only through full and free competition can free markets, free entry into business, and opportunities for the expression and growth of personal initiative and individual judgment be assured. The preservation and expansion of such competition is basic not only to the economic well-being but to the security of this Nation. Such security and well-being cannot be realized unless the actual and potential capacity of small business is encouraged and developed. ...."

STATEMENT OF THE CASE

Petitioner and Respondent executed the standardized AIA contract (AIA 101-2007 and AIA 201-2007) for a two-phased construction project: to renovate the Respondent's Lower School Building and to simultaneously upgrade its central plant HVAC system.[11] Once the project was underway, multiple design changes were initiated and the cost for the construction rose from $6.6M to more than $8M.[12] Petitioner completed the first phase in only 93 days, renovating the entirety of the 40,000 square foot Lower School building so that Respondent could resume its operations by September 6, 2018.[13] The balance of the contract was carried out progressively during the school year and final completion was slated for the summer of 2019.[14]

---

11. Appendix C, Page 55a.

12. Appendix C, Page 125a.

13. Appendix B, Page 6a.

14. Appendix B, Page 93a, 96a, 138a.

On May 24, 2019, prior to completing the final 10% of the work, Respondent terminated Petitioner "for cause," pursuant to AIA 201-2007 §14.2, claiming breach of performance on the contract.[15] Petitioner's tenth and final invoice was unpaid. According to the formal and contemporaneous certifications by Respondent's own architect, 89% of the total contract had already been completed in accordance with the contract documents by early spring.[16]

Petitioner contested the characterization that it had breached performance on the contract, and filed a mechanics lien action on September 11, 2019 for $2,046,902, the amount of the unpaid final invoice, against Respondent.[17] Respondent initially counterclaimed unspecified damages "in an amount to be determined at trial."[18] Then, over the course of the next two years, Respondent developed a 250-page expert witness report utilizing contractor estimates as the basis to claim gross damages in excess of $4M.[19] Respondent's Director of Facilities testified at trial that it had not undertaken any effort to remedy the so-claimed defective work. Respondent has fully and continuously operated its activities without interruption since 2018.[20]

---

15. Appendix C, Page 105a.

16. Appendix C, Page 121a.

17. Appendix B, Page 6a.

18. "Holton-Arms' Counterclaims Against HSU Contracting," Case No. 472329-V, p. 15, filed November 27, 2019, Record Extract E109.

19. Appendix C, Page 127a.

20. Deferred Record Extract, Page E811, Lines 23-25. Trial

Six months after the conclusion of a fifteen-day trial, Montgomery County Circuit Court Judge Steven Salant issued a Memorandum Opinion on October 12, 2022 adopting Respondent's factual and legal claims *in toto*.[21] Despite having had full use of its school facilities[22] without paying the tenth and final invoice, Respondent was awarded a $4.1M judgment, netting the amounts unpaid to Petitioner, yielding a judgment of approximately $2.6M.[23] The damages awarded to Respondent were primarily: 1) costs to complete and correct the work in breach, and 2) liquidated damages.[24] Respondent then garnished and

---

Transcript, Testimony of Michael Joyce, March 14, 2022.

21. On January 22, 2024, Petitioner filed a Motion to Vacate the October 12, 2022 judgment based on newly-discovered evidence that Trial Court Judge Steven Salant, and his wife Sandra Gordon-Salant, had a personal kinship or affinity with the Respondent as donors and "Grandparents, Relatives or Friends." The relationship, spanning more than ten years, was revealed on pages 35, 39 and 42 of Respondent's fundraising brochure coincidentally published online (https://issuu.com/peapoddesign/docs/holton-arms_school_annual_report), which has now been removed from public access. At no time during the trial court proceedings was this relationship ever disclosed to Petitioner. The Motion to Vacate, based on the irregularity of process in failing to disclose this information or otherwise conduct a disqualification hearing pursuant to Md. Rule. 18-102.11(c), was summarily denied without hearing on March 5, 2024 and is subject to appeal. While this issue was brought before the Maryland Supreme Court, it is not addressed here and has no bearing on the instant Petition for Writ of Certiorari.

22. Deferred Record Extract, Page E808, Lines 21-25. Trial Transcript, Testimony of Michael Joyce, March 14, 2022.

23. Appendix C, Page 127a.

24. While Petitioner disagrees with the Appellate Court's

seized the entire balance of Petitioner's remaining assets, a commercial checking account, rendering the Petitioner unable to conduct any business except the continued litigation, including defense of the judgment collection[25] by Respondent and unpaid subcontractors.

On October 24, 2022, Petitioner then filed a Motion to Alter and Amend the Judgment, pursuant to Md. Rule. 2-534, on the basis that the plain language of the executed AIA contracts did not support an award where no remedial or completion work had ever been undertaken.[26] Because Respondent had terminated Petitioner's contract "for cause," pursuant to AIA 201-2007 §14.2, Respondent was permitted to: "Finish the Work by whatever reasonable method the Owner may deem expedient," AIA 201-2007 §14.2.2.3, which it did not.[27]

The AIA contract offered further detailed instruction that, upon Contractor's [Petitioner's] request, Owner [Respondent] was to provide a "detailed accounting of the costs incurred by the Owner in finishing the Work." In the event that such costs incurred by the Owner [Respondent]

---

interpretation of the liquidated damages provision, review of that decision does not *per se* implicate the Constitutional provisions at issue.

25. Upon Respondent's seizure of Petitioner's remaining assets, Petitioner's owner, a 1994 graduate of Georgetown University Law Center and former tax practitioner, has, where possible, represented the Petitioner without the assistance of outside legal representation.

26. Appendix B, Page 9a.

27. Appendix B, Page 40a.

exceed the unpaid balance, the Contractor [Petitioner] would have been responsible for paying the difference to Respondent. AIA 201-2007 §14.2.4.[28]

Petitioner's Motion to Alter and Amend the Judgment was denied and the appeal ensued.[29] This Petition seeks only a limited review of the Appellate Court's opinion with regard to "Limitation of Damages,"[30], affirming the lower court's damage award. The Appellate Court held that the existence of AIA 201-2007 §13.4.1, a "reservation of rights" provision, and AIA 201-2007 §2.6, a "cumulative rights" provision, rendered the plain language of A201 §14.2.2.3 a ***non-exclusive*** remedy that could simply be discarded. (Emphasis added.)

AIA 201-2007 §13.4.1:

> "Except as expressly provided in the Contract Documents, duties and obligations imposed by the Contract Documents and rights and remedies available thereunder shall be in addition to and not a limitation of duties, obligations, rights and remedies otherwise imposed or available by law."[31]

28. Appendix B, Page 40a.

29. Appendix B, Page 9a.

30. Appendix B, Pages 40a-42a.

31. Appendix B, Page 41a.

AIA 201-2007 §2.6:

> "The rights stated in this Article and elsewhere in the Contract Documents are cumulative and not in limitation of any rights of the Owner (1) granted in the Contract Documents, (2) at law, or (3) in equity."[32]

The Appellate Court specifically held that the above provisions allowed for multiple remedies, not only those expressly stated in the plain language of the contract, but allowed common law remedies[33] that, in this case, were not made known to the parties at the time of contract execution.

Petitioner filed its Petition for Writ of Certiorari to the Maryland Supreme Court, requesting review that the court's interpretation, based on the background of the AIA documents, would lead to inconsistency across jurisdictions in the interpretation of industry and legal standards, terminology and practices. The petition for writ of certiorari was denied on December 20, 2023.[34]

---

32. Appendix B, Page 41a.

33. Appendix B, Page 41a-42a.

34. Appendix B, Page 1a-2a.

BACKGROUND OF THE AIA CONTRACTS[35]

Since 1888, the American Institute of Architects (AIA) standard Contract Documents have been used to unify, shape and regulate the construction industry. AIA forms are revised nearly every decade to create uniformity in the law of construction contracts and address the diversity and disparity of size, economic power, and legal sophistication of the parties to a construction project. They are "carefully drafted to avoid inconsistencies that create ambiguities or call their meaning into question."[36]

> "If anything can be considered a unifying force in the construction industry, it is the standard contract forms and documents issued by the American Institute of Architects. They establish a common framework of roles and responsibilities for many of the project participants, using consistent terminology and legal principles. They tend to level the playing field between the large and the small, the rich and the poor, those who can afford lawyers to scrutinize every transaction and those who cannot. By reducing transaction costs, they promote transactional economy. They also save time, permitting projects to move forward much more quickly than they would otherwise could

35. The background of the AIA Contracts was presented to the Maryland Supreme Court in the Petition for Writ of Certiorari, which was denied.

36. The American Institute of Architects, *Official Guide to the 2007 AIA Contract Documents*, 2009, Chapter 1. *Standardization of Construction Contracts,* p. 7.

> if each participant had to come to agreement on new, unfamiliar terms with every project. The AIA documents make it possible for construction industry participants to engage in private law-making as a practical reality.[37]

These form documents reflect industry standards and best practices:

> 'The influence of the AIA documents extends well beyond the particular contracts in which they are used. While the documents reflect standard industry practices, they also embody "best practices" of the industry, and through their use, help to bring those practices into the mainstream. Because of the widespread acceptance of the AIA documents, their terms soon come to represent the standards of the industry. When a contract is silent on an issue that is before a court, the court will often look at normal trade practices.'[38]
>
> … Moreover, they "set legal standards that are reflected in thousands of cases."[39]
>
> "The widespread use of the AIA documents has resulted in a large body of law construing almost every one of their provisions."[40]

37. *Id.* at 3-4.

38. *Id.* at 9-10.

39. *Id.* at 10.

40. *Id.* at 11.

> "In order to assist the legal community in construction law cases, the AIA developed *The American Institute of Architects Legal Citator*, which has cataloged and digested thousands of legal decisions construing all of the principal AIA contract forms since it was introduced in the mid-1960s. (Since the mid-1980s, *The American Institute of Architects Legal Citator* has been published by Matthew Bender & Company, a member of the Lexis-Nexis Group, as part of its multi-volume *Construction Law* treatise.)[41]

According to the AIA's website,[42] the AIA documents are routinely used in all aspects of construction nationwide.

> When the first AIA contract document was created in 1888, there were only 38 states. Today, AIA users create more than 960 AIA documents per hour, and, at any point during the workday, an average of 500 contractors, architects, engineers and owners are using the AIA platform. AIA payment applications have been used in $1 trillion worth in construction projects. Notable projects constructed with the AIA contract include: Dallas Cowboys Stadium, New Orleans Louis Armstrong Airport, Los Angeles Dodger Stadium, and Seattle's Space Needle. Today, there are more than 100,000 AIA users in all fifty states.

---

41. *Id. See also,* footnote 4.

42. *See*, https://learn.aiacontracts.com/company-facts/

The significant and widespread use of these standardized documents has contributed to the growth and development of the construction industry nationwide.

REASONS FOR GRANTING THE PETITION

I. Undue Burden on Interstate Commerce

The Maryland State court's flawed ad hoc interpretation of the industry standard contract places an undue burden on interstate commerce. For more than 130 years, the AIA contracts, by establishing a common framework for construction project participants, using consistent terminology and legal principles, and reducing transaction costs, have promoted transactional economy in the construction industry.

The Commerce Clause grants Congress the power to "regulate Commerce . . . among the several States." Art. I, § 8, Cl. 3. This authority gives rise to the "Dormant Commerce Clause," a further negative command that prohibits discriminatory state action based on transactions or incidents that cross state lines and results in an advantage or burden based on commerce. Under the Dormant Commerce Clause, states may not discriminate "between transactions on the basis of some interstate element." *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, n. 12 (1977). A state "may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State." *Armco Inc.* v. *Hardesty*, 467 U. S. 638, 642 (1984). "Nor may a State impose a tax which discriminates against interstate commerce either by providing a direct commercial advantage to local business, or by subjecting

interstate commerce to the burden of 'multiple taxation.' " *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U. S. 450, 458 (1959) (citations omitted). See also, *Comptroller of Treasury of Md. v. Wynne*, 575 U.S. 542 (2015).

Under the Maryland court's interpretation of the AIA Contract, the parties may simply discard or opt out of the unambiguous plain language of the AIA contract that they have agreed upon and look to any and all rights and remedies that may exist. This interpretation imposes an undue and impermissible burden disadvantageous to parties to construction projects within the state of Maryland.[43] They may not simply rely on the plain language of their AIA contract, but must now anticipate any and all other rights and remedies available at law.

The AIA 101 and 201 Standard Contracts have been the subject of thousands of cases and have been litigated in state and federal courts in all fifty states. According to the *Legal Citator*, they have made their way to the U.S. Supreme Court on nine separate occasions, *Mercantile Trust Co. v. Hensey*, 205 U.S. 298 (1907), *Portuguese-American Bank v. Welles*, 242 U.S. 7 (1916), *United States v. Utah Construction & Mining Co.*, 384 U.S. 394 (1966), *Moses H. Cone Memorial Hospital v. Mercury Constr.*, 460 U.S. 1 (1983), *Volt Information Sciences, Inc. v. Board of Trustees*, 489 U.S. 468 (1989) recognizing that the AIA Contract is interstate commerce), *C&L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411 (2001).

---

43. Jurisdiction and choice of law is usually determined by the site of the project, or otherwise agreed upon by the parties, as offered in AIA 201-2007 §15.4.

The Maryland court's interpretation of the "reservation of rights provision," §13.4.1, is contrary to courts of other jurisdictions. The Maryland court is the only jurisdiction that allows unstated rights and remedies to supplant the plain language of the AIA contract if a party chooses to pursue an alternative remedy.

The Minnesota Court of Appeals held that AIA 201-2007 §13.4.1 permitted a separate claim for attorneys fees, even though it was not specifically indicated in the contract, after the parties resolved a mechanics lien through arbitration. The Court reviewed both the arbitration provision and the reservation of rights provision and concluded that the law required it to construe the contract as a whole, to ***harmonize*** all provisions, if possible, and avoid a construction that would render one or more provisions meaningless. *Stiglich Construction, Inc. v. Larson*, 621 N.W. 2d. 801, 803 (Minn. Ct. Appl. 2001), review denied, 2001 Minn. LEXIS 192 (Minn. Mar. 27, 2001). The court opined that it was improper to construe the contract in a way that would render one or more provisions meaningless.

In *Beaver Construction Co. v. Lakehouse*, LLC, 742 So. 2d 159 (Ala. 1999), the Owner's claim that §13.4.1 permitted non-exclusive remedies, i.e., in lieu of contractual remedies, was flatly rejected. The Owner had argued that the arbitration clause contract was not intended to be the exclusive means of redress because §13.4.1 provided that "duties and obligations imposed by the Contract Documents and rights and remedies available thereunder shall be in addition to and not a limitation of duties, obligations rights and remedies otherwise imposed or available by law." The Owner contended that this

"reservation of rights" provision allowed the Owner to pursue a jury trial through litigation. The Court held that if this were the case, the provision relating to arbitration setting in detail specific procedures to be followed in arbitration would have been negated by § 13.4.1. Because a construction contract cannot be construed in a manner such that one clause would nullify another, the Owner's claim was rejected.

Lastly, in *Stonehill-PRM WC LLP v. Chasco Constructors, Ltd., LLP,* 2009 Tex. Appl. LEXIS 1019 (Tex. App. Feb. 11, 2009), the court reviewed the "limitation of damages" clause in conjunction with the "reservation of rights" clause, with an outcome contrary to that offered by the Maryland Appellate Court. The limitation on damages clause, § 14.2.4 offered the following:

> "To the extent the costs of completing Work, including, without limitation, compensation for additional professional services and expenses, exceed those costs which would have been payable to Contractor to complete the Work except for Contractor's default, Contractor shall pay the difference to Owner, and this obligation for payment shall survive termination of the Contract. Such costs incurred by Owner will be determined by the Owner and confirmed by the Architect."

The reservation of rights provision, §13.4.1, provided that:

> "Duties and obligations imposed by the Contract Documents and rights and remedies available thereunder shall be in addition to and

> not a limitation of duties, obligations, rights and remedies otherwise imposed or available by law or in equity or by any other agreement, and any such rights and remedies shall survive the acceptance of the Work and/or termination of the Contract Documents." §13.4.1.

The Owner Stonehill argued on appeal that the above limitation on damages clause applied only if it had chosen to complete the project, i.e., that there would be another remedy available for the calculation of damages if it chose not to complete the project. The court held that this interpretation contradicted the plain language of the provision. Similar to the case at hand, the contractual provision entitled, "Termination by the Owner for Cause," was deemed to be the sole remedy in addressing the owner's claim for damages in a termination for cause. The Texas court further held that the owner's position was inconsistent with the presence of a waiver of consequential damages in another paragraph. "Binding the parties to the contractually agreed measure of damages in the event the contractor was terminated for cause was consistent with its waiver of the types of damages expressed in the consequential damages clause." *Id.* The waiver of consequential damages further supported its finding that 14.2.4 was the "sole remedy" that had been agreed upon in claiming damages in a termination for cause. The decision in *Stonehill* is entirely at odds with the Maryland Appellate Court's interpretation.[44]

---

44. Also concerning was the Maryland court's decision to disregard the existence of waiver of consequential damages as support for the limitation on remedies in a termination for cause claiming that its argument was insufficiently preserved for review, *See*, Appendix B, P. 41a, Footnote 10.

The Maryland court's decision places an undue burden on interstate commerce by offering inconsistent interpretations of identical provisions of the AIA Contracts. Although unreported, there is no reported Maryland precedent interpreting the effect of §13.4.1, and the decision may therefore be cited for its "persuasive value," see Appendix B, P. 3a. By its reading that AIA §13.4.1 renders the plain and unambiguous of the contract as "non-exclusive," it is the only jurisdiction to interpret the contract this way. Parties transacting business with the AIA contract within the state of Maryland will now be held to a completely different standard than those outside of Maryland. The result is a reverse effect on transactional economy in the construction industry and, instead of being able to rely on the plain language of the contract that reflects industry standards and the normal course of business, parties to an AIA contract may not ever be able to fully comprehend the magnitude of its transaction. The possibilities are endless and unduly burdensome.

II. Denial of Equal Treatment

The AIA standardized agreements not only establish a common framework of consistency and legal principles for its participants, but they also operate to:

> "level the playing field between the large and the small, the rich and the poor, those who can afford lawyers to scrutinize every transaction and those who cannot."[45]

---

45. The American Institute of Architects, *Official Guide to the 2007 AIA Contract Documents,* 2009, Chapter 1. *Standardization of Construction Contracts,* p. 3-4.

The AIA standardized forms are intended to promote freedom of contract. They recognize that "not everyone involved in the construction industry has the same ability to promote or protect his or her legal interests."[46] In doing so, they address "the diversity and disparity of size, economic power, and legal sophistication of the parties to a construction project."[47]

The Maryland court's interpretation, however, obliterates this concept of leveling the playing field. It makes optional the unambiguous plain language of the AIA contract agreed upon by the parties, and places a distinct disadvantage on the small, the poor and those who cannot afford lawyers to scrutinize every transaction.

By its interpretation of this standardized contract, the Maryland court's decision imposes a barrier that denies equal treatment provided by the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution.

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, after citizens of the United States and the State wherein they side. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, life or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

---

46. *Id*. at 3

47. *Id.*

The courts have interpreted this Constitutional provision to apply to corporations. *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 881 n.9 (1985). Petitioner, a woman-owned and minority-owned small business, is entitled to the same protections under the Nonetheless, the Maryland court's opinion disproportionately discriminates against ***all*** small businesses. It favors the party that has the greater capacity to engage the more capable legal team to scrutinize every aspect of a transaction to avoid its agreed upon obligations or pursue its claims wherever it may find support. The Maryland court's reading that AIA §13.4.1 renders the plain and unambiguous of the contract as "non-exclusive," and the party with greater resources may create whatever narrative it desires to suit any action at law that its team of legal experts is able to craft outside of the contract language.[48]

It is plainly evident in the case at hand, where the Respondent took occupancy of its renovated school facilities on September 6, 2018, then terminated Petitioner "for cause" several months later to avoid making payment on its tenth and final invoice. When Petitioner brought a mechanics lien action in 2019, Respondent's initial counterclaim offered unspecified damages "to be determined at trial."[49] By convincing the court to ignore

48. According to its own Internal Revenue Service records (IRS Form 990), Respondent reported expenditures of $1,927,489 (in 2021) and $881,140 (in 2020) for legal fees paid to Arent Fox, as well as an additional $200,021 paid to HKA Global, its expert witness firm in this litigation. *See,* https://apps.irs.gov/pub/epostcard/cor/530196507_202206_990_2023061221438830.pdf

49. Holton-Arms' Counterclaims Against HSU Contracting," Case No. 472329-V, p. 15, filed November 27, 2019, Record Extract E109.

the unambiguous plain language of the contract, it then, after two years, crafted a $4.1M damages claim in 2021, which was presented by its expert witness at trial, and only nominally supported only by 1950s case law. *M&R Contractors & Builders, Inc. v. Michael,* 215 Md. 340 (1958) and *Ray v. William G. Eurice & Brothers*, 201 Md. 115 (1952).[50] This was not the plain language remedy that was agreed upon by the parties, or even known to the parties, at the time of contracting, but a remedy artfully developed by the legal team of the party with the deeper pockets over the course of several years. Parties to the AIA Contract, or any contract, should be able to rely on the plain language of the contract, as executed, and not have to litigate or "determine at trial" the extent of their obligations.

While this Court has acknowledged, in the realm of government contracting, a right to compete on equal footing, *Adarand Constructors v. Pena*, 515 U.S. 200 (1995), Congress has also expressly mandated the need to protect small businesses through the Small Business Act, 15 U.S. C 631(a), which sets forth:

> "The essence of the American economic system of private enterprise is free competition. Only through full and free competition can free markets, free entry into business, and opportunities for the express and growth of personal initiative and individual judgment be assured. The preservation and expansion of such competition is basic not only to the

50. These cases, when read in their entirety, offer no support for Holton's damages claim.

> economic well-being but to the security of this Nation. Such security and well-being cannot be realized unless the actual and potential capacity of small business is encouraged and developed. ***It is the declared policy of the Congress that the Government should aid, counsel, assist, and protect, insofar as is possible, the interests of small business concerns*** in order to preserve free competitive enterprise, to insure that a fair proportion of the total purchases and contracts or subcontractors for property and services for the Government (including but not limited to contracts or subcontractors for maintenance, repair, and construction) to be placed with small-business enterprises…" (Emphasis added.)

The federal government has recognized the importance of promoting small business participation in the American economic system of private enterprise, and mandated their assistance and protection, while the Maryland court's interpretation serves as the antithesis. It denies Maryland small businesses equal protection of the laws by favoring those with greater resources and access, such as the Respondent.

CONCLUSION

Review should be granted because of the strong federal interest in promoting interstate commerce served by the standardized AIA agreements in that they create a reliable, common, and consistent framework that serves to level the playing field for small businesses. If left to stand, the Maryland court's decision will unreasonably burden interstate commerce by depriving contracting parties and others in the interstate construction industry, who have historically relied upon these forms as industry standard, of the confidence and certainty they require in their interstate business arrangements. Review is appropriate because the Maryland court departed from well-recognized principles of regularity and construction of the industry standard plain language, instead relying on Maryland common law to fashion a freewheeling post-hoc remedy resulting in a disproportionate impact on small, disadvantaged businesses that cannot afford the legal costs associated with negotiating or defending the plain language of the terms that were agreed upon.

Respectfully submitted,

Amber Wong Hsu
Counsel of Record
HSU Contracting, LLC
6100 Executive Blvd., Suite 450
N. Bethesda, MD 20852
(301) 437-1000
amber@hsubuilders.com

Counsel for Petitioner

APPENDIX

TABLE OF APPENDICES

Page

APPENDIX A — ORDER OF THE SUPREME COURT OF MARYLAND, FILED DECEMBER 20, 2023

IN THE SUPREME COURT OF MARYLAND

HSU CONTRACTING LLC,

V.

HOLTON-ARMS SCHOOL, INC.

Petition No. 241
September Term, 2023

(No. 1707, Sept. Term, 2022
Appellate Court of Maryland)

(Cir. Ct. No. 472329V)

ORDER

Upon consideration of the petition for a writ of certiorari to the Appellate Court of Maryland, the briefs of *amicus curiae* Associated General Contractors of Metropolitan Washington, DC and Associated General Contractors of Maryland, respondent's answer to the petition, petitioner's motion for leave to reply to the respondent's answer, and petitioner's reply to the answer, it is this 20th day of December 2023, by the Supreme Court of Maryland,

Appendix A

ORDERED that petitioner's motion for leave to file a reply to the answer to the petition is granted; and it is further

ORDERED that the petition for writ of certiorari is denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ Matthew J. Fader
Chief Justice

APPENDIX B — OPINION OF THE APPELLATE COURT OF MARYLAND, FILED SEPTEMBER 28, 2023

UNREPORTED*

IN THE APPELLATE COURT OF MARYLAND

No. 1707
September Term, 2022

Filed September 28, 2023

HSU CONTRACTING, LLC

v.

HOLTON-ARMS SCHOOL, INC., et al.

Berger,
Beachley,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned), JJ.

Opinion by Beachley, J.

HSU Contracting, LLC ("HSU") filed a complaint in the Circuit Court for Montgomery County against the Holton-Arms School, Inc. ("Holton") alleging breach of contract, conversion, and other related claims. Holton

* This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

filed a counter-complaint, also alleging breach of contract. After a fifteen-day bench trial, the circuit court awarded $2,579,366 to Holton on its breach of contract claim and $9,550 to HSU on its conversion claim.

HSU noted this timely appeal and presents the following questions for our review, which we have slightly rephrased and renumbered to set forth the questions as we shall address them:

I. Did the circuit court err in permitting the testimony of Holton's experts, whose reports were disclosed after the close of discovery?

II. Did the testimony of expert Lawrence Smith satisfy the requirements of *Daubert v. Merrell Dow Pharm., Inc.?*

III. Did the circuit court err in awarding liquidated damages in addition to actual damages and despite the contract provision that barred liquidated damages once the project had reached "Substantial Completion"?

IV. Did the circuit court err in awarding Holton's damages based on estimates of costs despite a contractual provision limiting damages to costs incurred?

V. Did the circuit court err in failing to require Holton to mitigate its damages?

As to the third question, we agree that a portion of the damages must be remitted. We answer the remaining four questions in the negative. Accordingly, we shall modify the damages award and affirm the judgment as modified.

FACTUAL AND PROCEDURAL BACKGROUND

On June 5, 2018, the parties entered into a contract for HSU to renovate one of Holton's classroom buildings (the "Lower School") and to upgrade Holton's HVAC system in all of its buildings. The contract required that HSU substantially complete the Lower School renovation by August 24, 2018, and substantially complete the HVAC work by January 18, 2019.[1] If substantial completion was not timely achieved, the contract provided for liquidated damages of $500 per day for the Lower School renovation, and a lump sum of $5,000 for the HVAC work.

Holton alleged that HSU did not substantially complete either the Lower School renovation or the HVAC work on time. Classes for the 2018/2019 school year began on September 4, 2018. Because the Lower School renovation was not completed by that time, Holton had to temporarily hold classes in "the library, the theater, a dance studio, and a couple of other classrooms and common spaces." On September 5, 2018, HSU notified Holton that it could begin holding classes in the Lower School. Holton hired movers to set up the classrooms for

1. The substantial completion deadline for the HVAC work was originally August 25, 2018, but the parties later agreed to change the deadline to January 18, 2019.

immediate use and began holding classes in the Lower School on September 6, 2018.

In September of 2018, Holton noticed warping and buckling in the newly installed bamboo flooring in the Lower School. Neither HSU nor its subcontractor, Capital City Flooring, attempted to repair the bamboo flooring during the winter or spring break, when the Lower School was not being used.

On May 31, 2019, Holton sent HSU a letter notifying HSU that Holton was terminating the contract for cause. The letter noted several material breaches of the contract, including failure to achieve substantial completion, failure to submit certain schedules as required by the contract, and defects in the work performed.

HSU filed a complaint on September 11, 2019, against Holton and Capital Projects Management, a company hired by Holton to act as its project manager.[2] HSU alleged, *inter alia*, that Holton breached the contract by failing to pay HSU for work it had performed, and alleged that Holton converted certain materials and tools belonging to HSU by not allowing HSU to enter the school grounds to retrieve the items after terminating the contract. Holton filed a counter-complaint alleging breach of contract against HSU for failing to complete the project and providing defective work.

---

2. The trial court entered judgment in favor of Capital Projects Management at the close of HSU's case-in-chief. HSU has not appealed that ruling.

Appendix B

The circuit court originally set the discovery deadline for May 21, 2020. After several agreements between the parties to extend the scheduling order, the final discovery deadline was set for February 28, 2021. However, the parties continued to conduct discovery after this date, including the taking of several depositions.

In April 2020, Holton requested that HSU produce the Daily Reports that were generated by HSU while the construction project was ongoing. HSU failed to provide the Daily Reports, despite its employees' deposition testimony that the Daily Reports existed. After further requests for the Daily Reports were unsuccessful, Holton filed a motion to compel HSU to produce the Daily Reports, or to explain why they could not be produced. In its motion, Holton alleged that HSU's failure to produce the reports "made it impossible for Holton's experts to complete their work." As a result of the circuit court's March 22, 2021 order granting the motion to compel, HSU produced "several hundred pages of Daily Reports." Holton provided HSU with expert reports on May 5, 2021, slightly more than a month before trial was scheduled to begin on June 14, 2021.

On May 25, 2021, HSU filed a motion seeking to continue the trial. Trial was originally scheduled for five days, but it had become apparent to both parties that it would require at least ten days to try the case. In addition to representing that trial "will require ten (10) days, if not more," HSU also sought a continuance based on the late disclosure of Holton's expert reports. HSU stated: "Because of [Holton's] production of expert reports

only weeks before the trial date, [HSU] has not had an opportunity to depose [Holton's] expert[s] regarding the substance of their reports, nor the opportunity to adequately review the report[s] and consult with [HSU's] expert." HSU further noted that "a postponement of the trial date in this matter will prevent further prejudice to [HSU] as a result of [Holton's] belated production of expert reports." The court granted the continuance, rescheduling the trial for ten days beginning December 6, 2021. After the continuance was granted, HSU never attempted to depose Holton's expert witnesses.

On October 13, 2021, Holton served deposition notices for two of HSU's witnesses. In an email exchange, HSU explained that it would not produce any witnesses for deposition, reasoning: "As the discovery deadline has long since passed and no party has moved for leave to reopen discovery, no further depositions are permitted." Holton filed an Emergency Motion to Compel HSU's Cooperation in Scheduling Depositions, which noted that Holton "also offered to produce their own experts for deposition." HSU filed an opposition to Holton's motion, in which it stated that Holton "had the option of requesting the scheduling of depositions at any time from late-May 2021 through the entire summer of 2021, or alternatively moving to reopen discovery during that period, but [Holton] elected not to do so." HSU additionally requested the court to "issue a protective order stating that no further discovery be had prior to the commencement of trial." On November 9, 2021, the court denied Holton's motion and granted HSU's motion, barring any further discovery.

After a second postponement, the trial began on February 28, 2022, and lasted fifteen days. HSU produced nine witnesses, including one expert witness and HSU's Director of Operations for this project, Steven Smith. Holton produced seven witnesses, including its two experts, the lead architect, and Holton's Director of Facilities. We shall recount relevant portions of the testimony of these witnesses as necessary to our analysis.

After closing arguments, the court requested that the parties file post-trial memoranda. On October 12, 2022, the court issued a written opinion, finding that HSU breached the contract, and awarding $2,579,366 in damages to Holton. The court also found that Holton converted certain property belonging to HSU and awarded $9,550 to HSU. Holton has not appealed the court's conversion award.

On October 24, 2022, HSU filed a motion to alter or amend, presenting many of the same arguments that it raises on appeal. The court denied the motion.

We shall provide additional facts as necessary to resolve the issues raised on appeal.

DISCUSSION

The issues HSU raises in this appeal can be grouped into two categories: 1) those concerning Holton's expert witnesses; and 2) those concerning the trial court's calculation of damages. Because the court relied heavily on expert testimony for its damages calculation, we shall first consider HSU's arguments concerning the expert witnesses.

Appendix B

Issues Related To Expert Witnesses

HSU raises two challenges related to Holton's expert witnesses. First, HSU argues that the trial court erred by denying its motion to preclude the testimony of both experts due to Holton's late disclosure of the expert reports. Second, HSU argues that the court erred by admitting the testimony of Lawrence Smith,[3] Holton's damages expert, because his methodology did not meet the *Daubert/Rochkind* standard. *See Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993); *Rochkind v. Stevenson*, 471 Md. 1, 236 A.3d 630 (2020). We shall discuss each argument in turn.

I. The Alleged Discovery Violation

Holton disclosed its two experts, Wayne Deflaminis and Expert Smith, on February 6, 2020, more than a year before the close of discovery on February 28, 2021. However, it did not provide HSU with copies of the experts' reports until May 5, 2021, after the discovery deadline. HSU argues that this late disclosure of the reports made it impossible for HSU to depose the experts, causing it prejudice that required preclusion of the experts' testimony.

Holton responds, first, that the reason for the late disclosure of the reports was HSU's own late disclosure of the Daily Reports needed by the experts to develop

3. To avoid confusion between witnesses Lawrence Smith and Steven Smith, we shall refer to Lawrence Smith as "Expert Smith."

their opinions. Second, Holton asserts that HSU was not prejudiced by the late disclosure because the experts' reports were disclosed nearly ten months before trial began, and HSU never attempted to depose the experts in that time. We agree with Holton that the court did not abuse its discretion in admitting the expert testimony because HSU was not prejudiced by the late disclosure of the expert reports.

The trial was originally scheduled for five days, starting on June 14, 2021. On May 25, 2021, HSU moved to continue the June 14 trial. In its motion, HSU stated that "[b]ecause of [Holton's] production of expert reports only weeks before the trial date, [HSU] has not had an opportunity to depose [Holton's] expert[.]" HSU further asserted that the parties needed at least ten days for trial. The court granted the motion and set the trial for December 2021. After a second postponement, the case was tried over fifteen days in late-February and early-March 2022.

A fair reading of HSU's motion for continuance reveals that HSU sought a postponement, in part, because it intended to depose Holton's experts. Nevertheless, at no point did HSU attempt to depose Holton's expert witnesses. HSU argues that it was unable to depose the experts because the discovery deadline had passed. HSU's argument is disingenuous for several reasons. First, HSU deposed several other witnesses after the discovery deadline without any resistance from Holton. Thus, there is nothing in the record to suggest that Holton would have objected to HSU deposing their experts even in the

absence of a formal extension of the discovery deadline. Second, to the extent that HSU believed the formal discovery deadline presented an impediment, HSU never requested the court to extend the discovery deadline. Third, in October 2021 Holton proposed deposition dates for several witnesses, but HSU refused to agree to the witness depositions, asserting that Holton "had the option of requesting the scheduling of depositions at any time from late-May 2021 through the entire summer of 2021," but elected not to do so. Indeed, HSU sought and was granted an order barring further discovery. Aside from the continuance, which was granted, the only cure HSU requested for Holton's discovery violation was preclusion of the expert testimony.

A trial court's decision on discovery sanctions is reviewed for abuse of discretion. In deciding whether to impose sanctions, the court should consider the *Taliaferro* factors: "(1) whether the disclosure violation was technical or substantial; (2) the timing of the ultimate disclosure; (3) the reason, if any, for the violation; (4) the degree of prejudice to the parties respectively offering and opposing the evidence; (5) whether any resulting prejudice might be cured by a postponement; (6) and, if so, the overall desirability of a continuance." *Watson v. Timberlake*, 251 Md. App. 420, 434, 253 A.3d 1094 (2021) (citing *Taliaferro v. State*, 295 Md. 376, 390-91, 456 A.2d 29 (1983)). Courts may also consider "any other relevant circumstances." *Thomas v. State*, 397 Md. 557, 571, 919 A.2d 49 (2007). "[I]n fashioning a sanction, the court should impose the least severe sanction that is consistent with the purpose of the discovery rules." *Id.* "[T]he more draconian

sanctions, of dismissing a claim or precluding the evidence necessary to support a claim, are normally reserved for persistent and deliberate violations that actually cause some prejudice[.]" *Admiral Mortg., Inc. v. Cooper*, 357 Md. 533, 545, 745 A.2d 1026 (2000).

Applying these factors to the present case, nearly every factor weighs heavily in Holton's favor. Although the disclosure was made only slightly more than a month before trial was originally scheduled to begin, the delay in disclosure was at least partially caused by HSU's refusal to provide the Daily Reports needed by Holton's experts. Any prejudice that may have existed when the reports were first produced was cured when the June 2021 trial was ultimately postponed to late February 2022, giving HSU ample time to conduct depositions. Indeed, in its motion to continue, HSU stated that "a postponement of the trial date in this matter will *prevent further prejudice* to [HSU] as a result of [Holton's] belated production of expert reports." (emphasis added). "Other relevant circumstances" include HSU's strong resistance to discovery after the trial was rescheduled, contrary to HSU's suggestion in its motion to continue that a continuance would afford HSU the opportunity to depose Holton's experts.

In two cases, *Giant Food Inc. v. Satterfield*, 90 Md. App. 660, 669-71, 603 A.2d 877 (1992), and *Thomas*, 397 Md. at 572-75, parties disclosed witnesses one week before trial and the opposing parties sought exclusion of those witnesses. In both cases, the opposing parties did not seek either to depose the witnesses or to continue the

trial. This Court and the Supreme Court of Maryland held that the trial courts did not abuse their discretion by allowing the witnesses to testify. In *Thomas*, the Supreme Court of Maryland noted that opposing counsel had "an opportunity to interview the witness and to prepare for crossexamination. Significantly, petitioner requested only that the trial court exclude the evidence. He was not interested in a continuance nor an opportunity to talk to" the witness. *Thomas*, 397 Md. at 572. Instead, he sought only the "windfall" of excluding the witness. *Id.* at 573, 75. The same is true in the present case.

It is apparent that in the nearly ten months between the May 2021 disclosure of the expert reports and the start of trial, HSU never showed an interest in deposing Holton's experts. Although the discovery deadline had passed, it is not true, as HSU seems to claim, that the deadline made deposition of the experts impossible. HSU acknowledged that expert depositions could be taken when it requested a postponement of the trial based in part on its need to depose the experts. Indeed, HSU deposed other witnesses after the discovery deadline. HSU's recognition that Holton "had the option" to take depositions between "late-May 2021 through the entire summer for 2021" applied equally to HSU. HSU simply chose not to depose Holton's experts. Moreover, Holton provided no resistance to any potential deposition, instead attempting to work with HSU to complete the outstanding depositions.

We reject HSU's argument that the court should have precluded Holton's experts where HSU was at least partially responsible for the delay and the record amply demonstrates that the experts could have been deposed

had HSU made a reasonable effort to do so. Under these circumstances, the trial court did not abuse its discretion in allowing Holton's experts to testify.

II. Challenges To Expert Smith's Testimony

HSU makes three discrete arguments concerning Expert Smith's testimony: 1) "Experts Cannot Merely Parrot the Statements of Others"; 2) "Experts Cannot Ambush Parties with New Opinions at Trial"; and 3) "Experts Cannot Provide 'Expert' Testimony on Subjects They Know Nothing About." We shall address each argument in turn.

A. "Parroting" opinions of others

Expert Smith was accepted by the court as an expert in "construction, construction bidding, construction cost management and construction cost estimating." HSU did not challenge Expert Smith's qualifications or the court's acceptance of him as an expert in the designated fields. Although we shall discuss Expert Smith's opinions in more detail below, he stated that he substantially formed his opinion concerning the "base damages" resulting from HSU's breach of contract by relying on 1) the architect's assessment of the scope of work necessary to complete the project, and 2) competitive bids Holton received from two contractors to complete the project in accordance with the architect's "scope of work" assessment. Expert Smith confirmed that the documents he relied on were "definitely" the type of data that an expert in his field would rely on to form an opinion as to construction costs.

Appendix B

HSU claims that Expert Smith's testimony should have been excluded because he merely "parroted" statements of others. On the fifth day of trial HSU argued for the first time that Expert Smith's opinion should be excluded because it did not satisfy the *Daubert/Rochkind* standard for the admissibility of expert testimony. Specifically, HSU argued that Expert Smith's opinion was "not reasonably limited to the remaining scope of work on the project," and "merely adopted the calculations and bids of the third-parties without any meaningful analysis." HSU next raised this issue on the thirteenth day of trial, shortly before Expert Smith's testimony began. HSU did not move to exclude Expert Smith's testimony at that time, but expressed its belief that "all we're basically having this expert do is parrot whatever it is that was contained" in bids Holton received to complete the work. HSU raised the issue again on the last day of trial, just before closing arguments. The entirety of HSU's argument at that time was that "the predicate for the opinion [was] based on work that was done apparently by somebody else."

On appeal, HSU reiterates that Expert Smith improperly "parroted" the opinions of others by unquestioningly relying on the architect's assessment of the work that needed to be done to complete the project and the two responsive competitive bids. In HSU's view, the trial court improperly admitted Expert Smith's testimony because his testimony did not satisfy the *Daubert/Rochkind* standard for admissibility.

In *Rochkind*, the Supreme Court of Maryland adopted the *Daubert* analysis for determining admissibility

of expert testimony, and added several factors from other cases. 471 Md. 1, 35-36, 236 A.3d 630 (2020). The factors for determining reliability of an expert witness's methodology are:

> (1) whether a theory or technique can be (and has been) tested;
>
> (2) whether a theory or technique has been subjected to peer review and publication;
>
> (3) whether a particular scientific technique has a known or potential rate of error;
>
> (4) the existence and maintenance of standards and controls; . . .
>
> (5) whether a theory or technique is generally accepted[;]
>
> [. . .]
>
> (6) whether experts are proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying;
>
> (7) whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion;

(8) whether the expert has adequately accounted for obvious alternative explanations;

(9) whether the expert is being as careful as he [or she] would be in his [or her] regular professional work outside his [or her] paid litigation consulting; and

(10) whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give.

Katz, Abosch, Windesheim, Gershman & Freedman, P.A. v. Parkway Neuroscience & Spine Inst., LLC, 485 Md. 335, 301 A.3d 42, 2023 Md. LEXIS 382, *36-*37, No. 30, Sept. Term 2022 (filed August 30, 2023) [hereinafter *Parkway Neuroscience*] (alterations in original) (quoting *State v. Matthews*, 479 Md. 278, 310-11, 277 A.3d 991 (2022)). "[T]he admissibility of expert testimony is a matter largely within the discretion of the trial court, and its action in admitting or excluding such testimony will seldom constitute ground for reversal." *Rochkind*, 471 Md. at 10 (alteration in original) (quoting *Roy v. Dackman*, 445 Md. 23, 38-39, 124 A.3d 169 (2015)).

In denying HSU's request to preclude Expert Smith's testimony, the court noted that "we didn't hear anything about" many of the *Daubert/Rochkind* factors, and that if the motion had been raised prior to trial, there would have been a full hearing on the issue.[4] As to the factors

4. Although we have not found any decisional law that mandates a pre-trial *Daubert* hearing, we agree with the trial court's observation that raising a *Daubert* issue "for the first time during

concerning testing of the methodology, peer review, and rate of error, the court noted that "neither side really question[ed] that witness about these matters." Instead, the only factor that HSU focused on was "whether there's an unjustifiable extrapolation," also known as an "analytical gap." The court concluded:

> In this case, we do have [Expert] Smith, who told us exactly what he did. He told us what he thought was reliable. He told us about the two bids that he reviewed, that two competitive bids, in his view, were a better standard of market value for costs than him just going out and doing it.
>
> Now [HSU], as they are able to and can, can attack some of the data that he received. In fact, that is a very viable challenge to an expert's opinion is to claim the data that you're relying on is faulty; but that does not mean that the analysis is the gap there; that means that you might have been operating from a bad premise initially.
>
> So, in this particular case, that goes more to the weight than whether it goes to the admissibility of the expert's opinion. So, for that reason, I am going to deny the motion of counsel to exclude the testimony of [Expert] Smith.

---

trial" is "generally not . . . the best practice." That HSU first raised *Daubert/Rochkind* on the fifth day of trial and substantively argued only one of the ten relevant factors evinces its feeble (and ultimately unpersuasive) attempt to preclude Expert Smith's testimony.

Appendix B

We begin our analysis with *State v. Matthews*, 479 Md. 278, 277 A.3d 991 (2022), our Supreme Court's first post-*Rochkind* decision applying the new standard. In *Matthews*, the State requested the FBI's assistance to determine the height of a suspect captured in a video carrying a shotgun. *Id.* at 288. An FBI scientist, using "reverse projection photogrammetry," determined that the suspect in the video was approximately 5'8" tall, plus or minus two-thirds of an inch. *Id.* That opinion was significant because Matthews was approximately 5'9" tall. *Id.* at 300. However, the forensic scientist's report noted that several variables could cause "the degree of uncertainty in this measurement" to be "significantly greater." *Id.* at 288-89. At a pre-trial hearing, the FBI scientist "acknowledged that she could not quantify the overall margin of error based on the variables that were not calculable." *Id.* at 295. The trial court admitted the scientist's testimony, and the jury convicted Matthews of murder. *Id.* at 297, 303-04.

This Court reversed Matthews's conviction, concluding that there was an "analytical gap" between the underlying data and the expert scientist's conclusion. *Id.* at 304. On *certiorari*, the Supreme Court reinstated Matthews's conviction, holding that the expert's methodology was reliable and that no analytical gap existed in the expert's opinion. *Id.* at 313. The Court concluded: "The unknown degree of uncertainty concerning the accuracy of [the FBI scientist's] height estimate went to the weight the jury should give to the expert testimony, not to its admissibility." *Id.* The Court held that the trial court acted within its discretion in determining that the expert

testimony would be helpful to the trier of fact under Rule 5-702. The Court reasoned:

> First, [the FBI scientist] explained in detail how she conducted her analysis, which allowed the trial court to assess the rigor and care with which [she] approached her work. . . .
>
> Second, [the FBI scientist] explained . . . why, despite the unknown degree of uncertainty attributable to certain variables, she nevertheless was comfortable with her height estimate of 5'8" plus or minus two-thirds of an inch. . . .
>
> Third, given [the FBI scientist's] known height of between 5'9" and a half and 5'10", and the fact that she ensured that she stood in the same spot and position as the subject in the questioned image, [the FBI scientist] was able to opine that the subject appeared to be slightly shorter than [the FBI scientist] herself.

Id. at 319-320. These factors allowed the trial court to reasonably conclude that the expert's opinion would assist the jury despite the expert's acknowledged uncertainty. *Id.* at 320.

The Supreme Court reaffirmed these principles recently in *Parkway Neuroscience*, Md. , 2023 Md. LEXIS 382, No. 30, Sept. Term 2022. That case involved an expert accountant's opinion as to a medical practice's

lost profits. In light of the trial court's specific, articulated concerns about the expert's "speculative, insufficiently substantiated judgment calls that were central" to the expert's methodology, the Court held that "it was within the trial court's discretion to admit or exclude" the expert's testimony.[5] 2023 Md. LEXIS 382 at *63. The Court made clear that the admissibility of expert testimony in the vast majority of cases will be left to the discretion of the trial court, stating that "[d]etermining whether a dispute concerning expert testimony implicates the soundness of data or soundness of methodology is precisely the type of matter that calls for the exercise of a trial court's discretion." 2023 Md. LEXIS 382 at *55.

Applying these principles to the case at bar, we conclude that the trial court here likewise did not abuse its discretion in admitting Expert Smith's testimony. Although Expert Smith's report was not entered into evidence, his testimony and an accompanying PowerPoint presentation indicated the methodology Expert Smith used to develop his opinion. Expert Smith testified that he reviewed all of the relevant contract documents and change orders, visited the site, and viewed photographs of the work. In addition, he reviewed two responsive bids Holton received in 2020 to complete the work, and a report from the architect as to the scope of the remaining work. As previously noted, he testified that these documents were "definitely" the type of data relied on by experts in his field to form an opinion.

---

5. The Court did send the case back to the circuit court for a limited remand involving a matter not relevant to the instant case.

Expert Smith testified that his calculations began with the 2020 competitive bids to complete the work. He focused almost exclusively on the lower of the two bids. He then "did a reconciliation" of the bid by comparing it to the higher bid and to the remaining scope of the work. He determined the scope of the remaining work by reviewing reports from the architect and Holton's Director of Facilities, as well as doing his own analysis. This reconciliation was done "for the comparison purpose of coming up with what [he] thought would be the best reasonable cost for the owner that would be a true reflection of the market cost at the time the proposal was tendered." Because his report was done a year after the bid was submitted, he adjusted the bid upward by 5% to account for inflation. He concluded that the fair market value of the portion of the work HSU failed to complete that was covered by the 2020 bid was $3,121,446.

Next, Expert Smith added the cost to complete the smaller tasks that were not included in the 2020 bids. These costs were based on quotes Holton received for the work. He then increased the cost by 5% to account for inflation. He also added to his damages calculation liquidated damages and money that Holton had already expended for services HSU should have rendered under the contract. The total cost to correct and complete the work, by Expert Smith's calculation, was $4,103,509. He then subtracted from these "gross damages" the amount HSU was owed for work it had completed, $1,524,142, to reach a "net damages" conclusion of $2,579,366.

In its cross-examination of Expert Smith, HSU tried to elicit testimony that Expert Smith's opinion merely

amounted to him accepting the costs reflected in the 2020 bid and adding 5% for inflation, but his testimony belies that assertion. Expert Smith testified:

> I took the two proposals, looked at the scope that they were quoted on, that they gave a guaranteed quote for, looked at the adjustments that needed to be made in order for them to conform to my interpretation of what remained to be done to correct and complete the work that was left by HSU, and I selected the low number of the two responsive bidders that have essentially at that time committed to entering into a contract to perform that work.

HSU's counsel questioned Expert Smith about why he did not calculate damages by assigning his own estimate of the fair market value of completing each item of remaining work. Expert Smith responded that HSU's suggested method could be valid, but countered, "I don't consider that to be the best way." Concerning his use of the lower of the two 2020 bids, Expert Smith testified, "[W]hen two contractors, two reputable contractors tender a proposal . . . and guarantee to stand behind that proposal to enter into a contract to perform the work, I consider that to be a true and clear indication of what the present market value is for that scope of work." He opined that using the 2020 bids, with adjustments, would be "the most accurate way of determining a fair market value to estimate the damages." He explained,

> if I sit down and come up with the cost, unless I'm going to do the work, it really has no value

> to compare with someone who has given a proposal to do the work and will stand behind the proposal and do it. That is . . . how you determine fair market value.

In *Rochkind*, the Supreme Court of Maryland noted that "[t]rained experts commonly extrapolate from existing data." 471 Md. at 36 (alteration in original) (quoting *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146, 118 S. Ct. 512, 139 L. Ed. 2d 508 (1997)). Moreover, the law is clear that experts "may give an opinion based on facts contained in reports, studies or statements from third parties if the underlying material is shown to be of a type reasonably relied upon by experts in the field." *Milton Co. v. Council of Unit Owners of Bentley Place Condo.*, 121 Md. App. 100, 120, 708 A.2d 1047 (1998) (quoting *U.S. Gypsum v. Baltimore*, 336 Md. 145, 176, 647 A.2d 405 (1994)), *aff'd*, 354 Md. 264, 729 A.2d 981 (1999). Here, Expert Smith prepared his own report and described the methodology he used to determine the fair market value of the remaining work. In admitting the testimony, the circuit court noted that Expert Smith "told us exactly what he did" and "what he thought was reliable." The court recognized that there was an alternative methodology, but credited Expert Smith's testimony that using "two competitive bids, in [Expert Smith's] view, were a better standard of market value for costs than him just going out and doing it." The trial court obviously found Expert Smith's opinion persuasive and helpful in its role as the trier of fact, and we discern no abuse of discretion in admitting the testimony.

B. "Ambushing" HSU with new opinion

HSU next argues that Expert Smith improperly "ambushed" HSU with a new opinion by adding $141,688 to his damages calculation. Expert Smith testified that he altered his calculations during the course of the trial by adding a $141,688 expense that he had mistakenly omitted from his report. Because HSU never objected to the admission of this evidence, it has waived this argument. *See Patriot Constr., LLC v. VK Elec. Servs., LLC*, 257 Md. App. 245, 268, 290 A.3d 1108 (2023) ("The failure to object as soon as the . . . evidence was admitted, and on each and every occasion at which the evidence was elicited, constitutes a waiver of the grounds for objection." (alteration in original) (quoting *Berry v. State*, 155 Md. App. 144, 172, 843 A.2d 93 (2004))).

C. Providing expert testimony on unfamiliar subject

Third, HSU argues that Expert Smith improperly provided expert testimony on a subject with which he was unfamiliar. Specifically, HSU argues that Expert Smith was unable to explain a $37,420 line item in his damages calculation for "Engenium expenses for HSU Failures." During cross examination, HSU asked Expert Smith "what components went into" that expense, and Expert Smith responded that he could not provide further information about that expense "without looking back further at backup documentation." We do not interpret Expert Smith's response as meaning that he was "unfamiliar" with that component of damages. In

any event, we note that HSU did not pursue this issue further during this lengthy trial. *See Concerned Citizens of Cloverly v. Montgomery Cnty. Plan. Bd.*, 254 Md. App. 575, 603, 274 A.3d 1144 (2022) ("[A] passing reference to an issue, without making clear the substance of the claim, is insufficient to preserve an issue for appeal, particularly in a case with a voluminous record.").

Issues Related To Damages

III. Liquidated Damages

HSU makes two separate arguments concerning the liquidated damages award. First, HSU argues that the court "failed to apply the contractual limitation on liquidated damages, which bars liquidated damages after the project reaches 'Substantial Completion.'" Second, HSU argues that "the court impermissibly awarded Holton redundant liquidated and actual damages" for the same loss. We shall address each argument in turn.

A.

The contract provided for liquidated damages of "Five Hundred Dollars ($500.00) for each calendar day that expires after the time specified for Substantial Completion until the Work is substantially complete for the Lower School Renovation Project." The "time specified for Substantial Completion" of the Lower School project was August 24, 2018. The court found that HSU never substantially completed the work, and calculated liquidated damages from August 24, 2018, to May 31, 2019,

the date Holton terminated the contract.[6] This 280-day delay resulted in a liquidated damages award of $140,000.

HSU argues that it achieved substantial completion of the Lower School project on September 6, 2018, thereby limiting a liquidated damages award to 13 days, totaling $6,500.

There are several contract provisions relating to substantial completion:

- § 8.1.3: "The date of Substantial Completion is the date certified by the Architect in accordance with Section 9.8."

- § 9.8.1: "Substantial Completion is the stage in the progress of the Work when the Work or designated portion thereof is sufficiently complete in accordance with the Contract Documents so that the Owner can occupy or utilize the Work for its intended use. As a condition precedent to Substantial Completion, the Owner shall receive all unconditional permits, approvals, licenses, and other documents from any governmental authority having jurisdiction over the Project. Under no circumstances shall the Work or any portion thereof be

6. The contract also provided for a lump sum of $5,000 in liquidated damages for delayed substantial completion of the HVAC project. HSU does not challenge the court's decision to award this amount to Holton.

deemed to be Substantially Complete unless and until unconditional certificates of occupancy and completion governing that portion of the Project have been issued by all appropriate governmental authorities having jurisdiction over the Project thereby allowing the intended use of the portion of the Work."

- § 9.8.1.1: "The Work will not be considered suitable for Substantial Completion review until all Project systems included in area of the Work are operational as designed and scheduled, all designated or required governmental inspections and certifications, including certificates of occupancy, have been made and posted, designated instruction of the Owner's personnel and the operation of systems and equipment completed, and all final finishes within the Contract Documents are in place. In general, the only remaining Work shall be minor in nature, so that the Owner can occupy the portion of the building on that date for its intended use and the completion of the Work the Contractor would not materially affect, or hamper the normal business operations or intended use of Owner."

- § 9.8.4: "When the Work or designated portion thereof is substantially complete, the Architect will prepare a Certificate

> of Substantial Completion that shall establish the date of Substantial Completion . . . . Warranties required by the Contract Documents shall commence on the date of Substantial Completion . . . ."

HSU avers that the only section of the contract relevant to a determination of whether substantial completion has been achieved is § 9.8.1. According to HSU, substantial completion is achieved under the contract when Holton is able to "occupy or utilize the Work for its intended use," with a singular precondition that Holton receive the necessary documents for occupancy from governmental authorities. Because Holton received a certificate of occupancy and began holding classes in the Lower School on September 6, 2018, HSU argues that it achieved substantial completion of the project on that date. HSU argues that the court improperly focused on the lack of an architect's certificate of substantial completion and failed to consider "the contract's actual definition of Substantial Completion," *i.e.* the first sentence of § 9.8.1.

The trial court found that HSU had not achieved substantial completion, stating in its written opinion:

> The Contract stated that the work would not be considered suitable for Substantial Completion review until "all Project systems included in area of the Work are operational as designed and scheduled." [§ 9.8.1.1]. The lighting control system is still not operational as designed. Further, [Holton's] personnel were not instructed on operating the system

> and the final finishes specified in the Contract documents were not in place. There is a substantial amount of work on the Project still outstanding.
>
> [HSU] completely ignored the Substantial Completion provisions of the Contract. The evidence established [HSU's] failure to achieve Substantial Completion. [HSU] never submitted a request to the architect for certification of Substantial Completion. It is a reasonable inference therefrom that [HSU] was aware that it had not achieved Substantial Completion.

The court made detailed findings of fact concerning HSU's defective performance and concluded that HSU "made little or no effort to cure the defects, complete the work or respond to the demands in the Second Cure Notice" dated May 1, 2019.

In support of its argument that the architect's certificate does not determine the date of substantial completion, HSU cites an Illinois case applying New Jersey law, *In re Liquidation of Lumbermens Mutual Cas. Co.*, 2018 IL App (1st) 171613, 431 Ill. Dec. 186, 127 N.E.3d 719 (Ill. App. Ct. 2018). *Lumbermens Mutual* involved three contracts between D&D Associates, Inc. and the North Plainfield Board of Education (the "Board") for the renovation of five schools.[7] *Id.* at 724. These projects were

7. Notably, the parties in *Lumbermens Mutual* used form contracts developed by the American Institute of Architects similar to the contracts in the present case. *See id.* at 730. In both

separated into three contracts: Contract 1A, Contract 1B, and Contract 1C. *Id.* The substantial completion issue only involved Contracts 1A and 1B. The architect issued a certificate of substantial completion for Contract 1A on December 8, 2004, and a certificate of substantial completion for Contract 1B on November 17, 2004. *Id.* at 730. The Board argued that these dates should be used to calculate liquidated damages for delayed completion of the project. *Id.* at 727. However, in April 2003, the Board applied for a state grant related to Contract 1A from the New Jersey Economic Development Authority ("EDA"), and submitted architect's certifications as part of that application that stated:

> A. The essential requirements of the Contracts have been fully performed so that the purpose of the Contracts is accomplished.
>
> B. The Punchlist has been created.
>
> C. There are no important or material omissions or technical defects or deficiencies regarding the School Facilities Project.
>
> D. The temporary certificate of occupancy, continued use or completion has been issued.
>
> E. The School Facilities Project is ready for occupancy in accordance with its intended purpose.

---

cases, § 9.8.1 is substantively identical. *See id.* However, there is no indication in *Lumbermens Mutual* that the contracts at issue there contained a provision similar to § 9.8.1.1.

Id. at 730-31. The Appellate Court of Illinois noted that "[t]he language of the EDA certification tracks the language of substantial completion in the contracts. Thus, the architect . . . at one point declared Contract 1A substantially complete well before the dates" in the 2004 certificates of substantial completion. *Id.* at 731. The court further held that "the architect's arbitrary conduct as to Contract 1A undermines the integrity of the architect's date of substantial completion for Contract 1B." *Id.* The Appellate Court of Illinois therefore agreed with the trial court's finding that the 2004 certificates of substantial completion were not a reliable measure of the date of substantial completion. *Id.* The trial court referred to the certificates of occupancy issued in September 2002 to determine the substantial completion date as defined in the contract, which the Appellate Court of Illinois noted "can be an appropriate benchmark for substantial completion." *Id.* "Because the Board could use the buildings for teaching children, it was not an abuse of discretion for the court to find that the buildings were substantially complete in September 2002." *Id.* The Board argued that use of the buildings in September 2002 "should be classified as 'partial occupancy,' which per the General Conditions 'may commence whether or not the portion [is] substantially complete.'" *Id.* The Appellate Court of Illinois rejected this argument:

> [T]he circuit court's written order indicates that the court considered the evidence of allegedly incomplete work that the Board points to on appeal. We see no error in the court's thorough analysis and its finding that there was no delay. The circuit court's conclusion was not

> unreasonable, and so the court did not abuse its discretion in denying liquidated damages for contracts 1A and 1B.

Id. at 731-32.

HSU's reliance on *Lumbermens Mutual* is unavailing. The trial court in *Lumbermens Mutual*, faced with a situation where there was no reliable architect's certificate to determine the date of substantial completion, instead looked to other relevant evidence to determine substantial completion. The Appellate Court of Illinois held that the trial court did not abuse its discretion in doing so and affirmed the trial court's "thorough analysis."

We likewise see no clear error in the trial court's detailed findings of fact in this case. Contrary to the argument HSU advances, the court did not focus solely on the lack of a certificate of substantial completion from the architect. The court noted that HSU "never submitted a request to the architect for a certificate of Substantial Completion," but also considered other contract language to conclude that HSU never achieved substantial completion. The court properly applied the restriction in § 9.8.1.1, which provides that "The Work *will not be considered suitable* for Substantial Completion review until all Project systems included in area of the Work are operational as designed and scheduled, . . . designated instruction of the Owner's personnel and the operation of systems and equipment completed, and all final finishes within the Contract Documents are in place." (Emphasis added). Relevant to this provision, the court found that

HSU did not ensure that the lighting control system was operational, did not instruct Holton's personnel on how to operate the system, and did not complete final finishes. The court also found that HSU "made little or no effort to cure the defects" or "complete the work," and "completely ignored the Substantial Completion provisions of the Contract." HSU does not challenge these findings of fact, and our independent review of the record confirms that the court's findings were not clearly erroneous. Thus, pursuant to § 9.8.1.1, HSU did not attain "substantial completion" of the Lower School, regardless of Holton's use of the building.[8]

We hold that the trial court did not err in its determination that HSU never achieved substantial completion. Accordingly, except for the $23,812.15 duplication of damages that we discuss in the next section, we conclude that the court did not err in assessing liquidated damages from August 24, 2018, to May 31, 2019.

---

8. HSU attempts to bolster its position by noting that § 9.8.4 provides that "[w]arranties required by the Contract Documents shall commence on the date of Substantial Completion." HSU points to several letters from subcontractors to Holton representing that warranties on their work began on September 6, 2018. Although HSU attached these letters to its motion to alter or amend, none of the letters were entered into evidence at trial. The only evidence produced at trial concerning when the warranties began was testimony from Steven Smith that the warranty from Capital City Flooring began on September 6, 2018. The circuit court found that Steven Smith "was not a credible witness." Even if further evidence about the warranties had been admitted at trial, the existence of warranties beginning on September 6, 2018, does not render meaningless the requirements of § 9.8.1.1.

Appendix B

B.

The liquidated damages clause of the contract provides: "Contractor and Owner recognize that time is of the essence and that Owner will suffer financial loss if the Work is not completed within the times specified for completion of the Work." The contract states that the liquidated damages are "for delay."

HSU argues that the court improperly awarded both liquidated damages for delay and also actual damages incurred because of delay. Specifically, HSU argues that the liquidated damages provision acted as an "impermissible penalty" because it overlapped with actual damages. HSU provides two examples of actual damages that the court improperly awarded because they are duplicative of liquidated damages for delayed performance: $63,687 listed in "Bulletin 26," and $168,473 in "escalation fees."

Generally speaking, "if a plaintiff receives liquidated damages, then a claim may not be made for actual damages." *Gonsalves v. Bingel*, 194 Md. App. 695, 714, 5 A.3d 768 (2010) (quoting *Ecology Servs., Inc. v. GranTurk Equip. Inc.*, 443 F. Supp. 2d 756, 773 (D. Md. 2006)). "Where the parties to a contract have included a reasonable sum that stipulates damages in the event of breach, that sum replaces any determination of actual loss." *Barrie Sch. v. Patch*, 401 Md. 497, 513, 933 A.2d 382 (2007). Because Holton's school year begins in September, the parties ostensibly included the liquidated damages provision to cover all costs the school might incur due to a delay in reopening the school.

First, we reject HSU's argument as to the escalation costs because these are not expenses related to Holton's inability to use the school as a result of HSU's failure to accomplish substantial completion on time. Rather, the escalation costs were adjustments made by Expert Smith to account for inflation in determining the fair market cost of the work necessary to complete the project as a result of HSU's breach.

This leaves us with HSU's argument concerning Bulletin 26, a document created by the architect that modified the contract by reducing the amount paid to HSU because of additional expenses incurred by Holton. The trial court included the entire amount reflected in Bulletin 26 in its damages calculation, in addition to awarding liquidated damages. Bulletin 26 lists $63,687.54 in expenses Holton incurred either because of HSU's delay in completing the project, or to prevent further delay. A large portion, $23,812.15, of Bulletin 26 is for "Moving Services," which is described:

> Moving services were to be provided by Owner and were arranged based on the contractor schedule for August 25, 28, and 29. Due to work not being completed additional moving time was required as work could not be completed in all areas. Owner contracted to have work done directly as base contract was with owner. i. Initial plan was for teachers to perform unpacking, but due to schedule teachers were teaching and could not perform unpacking concurrently, requiring additional assistance. . . .

Appendix B

Michael Joyce, the Director of Facilities at Holton, testified that the "Moving Services" charge came about "because we were late moving into the lower school and really didn't have a lot of time" to set up the classrooms. "[W]e expected to have time that the teachers could put things back where they wanted to . . . in their classrooms. And that didn't happen."

Julianna von Zumbusch, the principal architect for the project, testified about Bulletin 26: "So some of these had to do with costs that were not directly related to the repair of defective work, but due to schedule delays from the work. So the moving services would be one of those, where movers had to deploy for multiple days and the school wasn't able to get a refund due to short notice for their original scheduled move date."

The "Moving Services" described in Bulletin 26 are clearly expenses resulting directly from the delay. Ms. von Zumbusch's testimony conceded as much. The court's award should not have included the $23,812.15 for the moving services because that sum represents actual damages contemplated by the liquidated damages provision of the contract. We shall therefore reduce the court's award by that amount.

The remaining expenses listed in Bulletin 26 were not expenses that arose solely because of the delay. Rather, they primarily represent the cost for Holton to hire another company to expeditiously complete work that

HSU was obligated to perform.[9] Additionally, prior to its motion to alter or amend, HSU did not argue before the trial court that the remaining expenses listed in Bulletin 26 were duplicative of the liquidated damages; HSU's only argument concerned duplication of the moving services expense. HSU accordingly waived any argument concerning the expenses listed in Bulletin 26 other than for moving services. *See Morton v. Schlotzhauer*, 449 Md. 217, 232 n.10, 144 A.3d 592 (2016) ("A circuit court does not abuse its discretion when it declines to entertain a legal argument made for the first time in a motion for reconsideration that could have, and should have, been made earlier, and consequently was waived.").

While we otherwise affirm the circuit court's judgment, we shall modify the judgment to remove the $23,812.15 cost of moving services, thereby reducing the award from $2,579,366.00 to $2,555,553.85.

---

9. For example, the second-largest expense in Bulletin 26 is "Johnson Controls costs" totaling $11,626.38. This expense is described as: "HSU agreed for the Owner to have work performed directly due to the Electricians inability to perform work and in effort to maintain schedule and campus-wide fire alarm functioning." Unlike the moving services, an expense Holton would not have had if HSU had performed in a timely manner, the electrical work described as "Johnson Controls costs" is work that HSU was contractually obligated to perform and therefore had no relationship to the liquidated damages clause related to the delay in having the school ready for occupancy.

IV. Limitation of Damages

HSU next argues that the contract limited Holton's damages to costs Holton *actually incurred* to complete the work. HSU bases its argument on the following contractual provisions:

- §14.2.2, providing that, if there is cause to terminate the contract, Holton "may without prejudice to any other rights or remedies of the Owner . . . terminate employment of the Contractor and may, subject to any prior rights of the surety: . . . Finish the Work by whatever reasonable method the Owner may deem expedient. Upon written request of the Contractor, the Owner shall furnish to the Contractor a detailed accounting of the costs incurred by the Owner in finishing the Work."

- § 14.2.4, providing: "If such costs and damages incurred by the Owner exceed the unpaid balance, the Contractor shall pay the difference to the Owner. This obligation for payment shall survive termination of the Contract."

HSU first raised this "limitation of damages" argument in its Motion to Alter or Amend. "A circuit court does not abuse its discretion when it declines to entertain a legal argument made for the first time in a motion for reconsideration that could have, and should have, been made earlier, and consequently was waived." *Morton*, 449

Md. at 232 n.10. This well-established principle forecloses HSU's limitation of damages argument on appeal.[10]

Even if this argument were preserved, we fail to see how §§ 14.2.2 and 14.2.4 operate to limit Holton's damages. Another section of the contract, § 13.4.1, provides that, "[e]xcept as expressly provided in the Contract Documents, duties and obligations imposed by the Contract Documents and rights and remedies available thereunder *shall be in addition to and not a limitation of duties, obligations, rights and remedies otherwise imposed or available by law*." (Emphasis added). Furthermore, § 2.6 states, "[t]he rights stated in this Article and elsewhere in the Contract Documents are cumulative and not in limitation of any rights of the Owner (1) granted in the Contract Documents, (2) at law, or (3) in equity." We see nothing in §§ 14.2.2 and 14.2.4 that creates an express limitation on the remedies available to Holton. Indeed, consistent with §§ 2.6 and 13.4.1, § 14.2.2 gives Holton the right to terminate the contract and finish the work "without prejudice to any other rights or remedies." "[A] contract will not be construed as taking away a common-law remedy unless that result is imperatively required." *O'Brien & Gere Eng'rs, Inc. v. City of Salisbury*, 447 Md. 394, 408, 135 A.3d 473 (2016) (quoting *Mass. Indem. & Life Ins. Co. v. Dresser*, 269 Md. 364, 369-70, 306 A.2d 213 (1973)). The *O'Brien & Gere* Court further stated: "Reviewing our case law, we discern that the parties must

10. HSU also briefly argues that the court improperly awarded consequential damages, despite a provision in the contract expressly waiving consequential damages. Because HSU never made this argument before the circuit court, it has not been preserved for our review.

at least use clear language to show their agreement to limit available remedies." *Id.* at 407. Here, the express contractual provisions create a remedy that is "in addition to" the remedies available by law for breach of contract.

Under the common law, a party prevailing on a breach of contract claim "may recover the amount of damages 'which will place the injured party in the monetary position he would have occupied if the contract had been properly performed.'" *Yaffe v. Scarlett Place Residential Condo., Inc.*, 205 Md. App. 429, 445 n. 5, 45 A.3d 844 (2012) (quoting *Hall v. Lovell Regency Homes Ltd. P'ship*, 121 Md. App. 1, 12, 708 A.2d 344 (1998)). In this case, damages would include not only the amount that Holton has already spent as a result of HSU's breach, but also any additional funds reasonably necessary to complete the work required by the contract. *See Andrulis v. Levin Constr. Corp.*, 331 Md. 354, 371, 628 A.2d 197 (1993) (In cases involving breach of a construction contract, the proper measure of damages is the "reasonable cost of reconstruction and completion in accordance with the contract[.]" (quoting A. Corbin, *Corbin on Contracts* § 1089, at 485-87 (1964))). In conclusion, we reject HSU's argument that Holton's contractual damages were limited to amounts Holton had "actually incurred."

V. Mitigation of Damages

Finally, HSU argues that Holton "failed to present any evidence of properly mitigated damages." Holton initially responds that this argument was not raised below and is therefore waived. However, HSU briefly raised its

mitigation argument in the following two sentences in HSU's 45-page post-trial memorandum:

> One purpose of a liquidated damages provision is to obviate the need for the nonbreaching party to prove actual damages but was required [sic] to mitigate any damages resulting from the breach and minimize its losses prior to seeking any monetary relief in contract. Holton advanced no proof that it sought to mitigate its alleged damages, and because it failed to accept any of the proposals or perform any alleged remedial work since HSU's termination, it is limited at best to the liquidated damages provision.

(Citation omitted). Because HSU has minimally preserved this argument for our review, we shall address it.[11]

---

11. We note that the court did not explicitly discuss the mitigation issue in its written opinion. However, during closing arguments, the court questioned Holton's counsel about its obligation to mitigate. We can unequivocally state that mitigation was not at the forefront of HSU's defense—it never mentioned it at trial and raised the issue only in its post-trial memorandum. As mentioned above, HSU's entire mitigation argument consisted of two sentences in its 45-page memorandum. In light of (1) the minimal attention HSU gave to its mitigation argument, (2) the court's questioning during closing arguments concerning mitigation, and (3) the principle that judges are presumed "to know the law and apply it, even in the absence of a verbal indication of having considered it[,]" *Sinclair v. State*, 214 Md. App. 309, 325, 76 A.3d 442 (2013) (quoting *Wagner v. Wagner*, 109 Md. App. 1, 50, 674 A.2d 1 (1996)), we infer that the court was convinced that HSU fell far short of meeting its burden of proof on this issue.

To the extent that the mitigation of damages doctrine applies in this case, we note that HSU had the burden of proof on this issue. "When it is determined that the [mitigation of damages] doctrine applies, the burden is necessarily on the defendant to prove that the plaintiff failed to use 'all reasonable efforts to minimize the loss he or she sustained.'" *Cave v. Elliott*, 190 Md. App. 65, 96, 988 A.2d 1 (2010) (quoting *Schlossberg v. Epstein*, 73 Md. App. 415, 422, 534 A.2d 1003 (1988)). The burden is on the party alleging failure to mitigate "[b]ecause it is aimed primarily at benefitting" that party, and the damages were caused by that party's breach of contract. *Id.* (quoting *Schlossberg*, 73 Md. App. at 422). "Thus, it is clear that the doctrine does not place any duty on a plaintiff or create an affirmative right in anyone." *Id.* (quoting *Schlossberg*, 73 Md. App. at 422). HSU's argument that "Holton failed to present any evidence" on this issue is therefore misplaced, as Holton had no burden to produce such evidence.

On appeal, HSU specifically argues that Holton failed to mitigate its damages by either (1) making use of the warranties of the subcontractors, or (2) completing the work earlier, before the cost of construction significantly increased due to the Covid-19 pandemic. We shall discuss each of these arguments in turn.

A. Warranties

HSU argues that "nearly all the allegedly defective work was under warranty and could have been repaired or replaced at no expense to Holton." By failing to use the warranties, HSU argues that Holton "artificially inflat[ed]

the damage assessment." HSU first specifically discusses the warranty on the bamboo flooring, which it argues would have allowed Holton to have the flooring repaired at no cost. HSU then states: "The same is true of most of the remainder of Holton's alleged damages for 'cost to correct' work, all of which was covered by warranty[.]"

The only evidence produced at trial concerning subcontractor warranties was testimony from three witnesses about Capital City Flooring's one-year warranty on the bamboo flooring. Steven Smith, HSU's Director of Operations, who the circuit court found was not a credible witness, testified that the flooring warranty began on September 6, 2018. Ms. von Zumbusch testified that she could not recall any agreement that the warped flooring would be covered by the warranty. Holton's Director of Facilities testified that the subcontractor had taken the position that the warping of the flooring was not a warranty issue and would not be covered by the warranty, although he admitted that Holton never made a warranty claim for the flooring. On this record, we have no hesitation in concluding that HSU failed to demonstrate that the flooring warranty would have fully (or even partially) covered the damaged bamboo floors.

There was no evidence produced at trial concerning the other warranties that HSU mentions in passing in its brief. The letters that HSU references were not admitted into evidence, but were attached as exhibits to HSU's motion to alter or amend. The trial court did not abuse its discretion by refusing to consider these letters. *See Steinhoff v. Sommerfelt*, 144 Md. App. 463, 484, 798 A.2d

1195 (2002) ("With respect to the denial of a Motion to Alter or Amend, . . . the discretion of the trial judge is more than broad; it is virtually without limit. What is, in effect, a post-trial motion to reconsider is not a time machine in which to travel back to a recently concluded trial in order to try the case better with hindsight. The trial judge has boundless discretion not to indulge this all-too-natural desire to raise issues after the fact that could have been raised earlier but were not or to make objections after the fact that could have been earlier but were not.").

Furthermore, there was affirmative evidence that Holton attempted to mitigate its damages. The court found that Holton attempted to take an assignment of one of the subcontracts, a mechanism that should have been available under the contract, but that HSU's subcontractor agreement provided for assignment to Holton only upon termination for convenience. The contract between Holton and HSU provides that, when the Owner terminates for cause, the Owner has the option to "[a]ccept assignment of subcontracts." However, HSU's subcontract agreement with Kent Island Mechanical—the only subcontractor discussed at trial with relation to assignment—provides: "The Constructor's [sic] contingent assignment of this Agreement to the Owner, as provided in the Prime Contract, is effective when the Owner has terminated the Prime Contract for its convenience." Three witnesses testified that Holton sought an assignment of the Kent Island Mechanical contract after termination of its contract with HSU. Steven Smith, HSU's Director of Operations for the Holton project, testified that HSU's subcontract agreement with Kent Island Mechanical

did not match the assignment requirement in its prime contract with Holton. He further testified that Holton attempted to obtain an assignment of the Kent Island Mechanical subcontract. Kent Island Mechanical's president confirmed that Holton discussed the possibility of an assignment of the subcontract. Additionally, William Koch, a senior project manager for Kent Island Mechanical, testified that he received a letter from Holton attempting to accept assignment of the subcontract.

The evidence supports the trial court's finding that HSU's actions prevented Holton from exercising its right to assignment of the subcontracts, which may have allowed it to mitigate its damages. In short, the record is clear that HSU failed to satisfy its burden of proof on this issue.

B. Completing the Work in 2019

HSU argues that Holton should have mitigated its damages by having the remaining work completed before the Covid-19 pandemic caused construction prices to significantly increase.

Part of this argument involves issues related to HSU's "limitation of damages" argument, discussed above. HSU avers that "[u]nder Maryland law, 'contract damages are measured *at the time of breach*.'" (Quoting *CR-RSC Tower I, LLC v. RSC Tower I, LLC*, 429 Md. 387, 405, 56 A.3d 170 (2012)). This statement is not accurate in this context, as the Supreme Court of Maryland made clear in the very case HSU cites:

> Tenants would have us apply this "time of breach" rule across the board, to every kind of damages claim. Yet as Corbin explains, there cannot be one rule for every kind of breach, because different kinds of damages require different kinds of calculations. *See* [11 Corbin on Contracts] § 55.11 [(Rev. ed. 2005)] ("There are many rules of damages for particular kinds of contracts, such as contracts for the sale of goods, construction contracts, employment contracts, etc." (footnotes omitted)); *see also Great Atlantic & Pacific Tea Co. v. Atchison, T. & S. F. R. Co.*, 333 F.2d 705, 708 (7th Cir. 1964) ("Since the market value rule is merely a method, it is not applied in cases where it is demonstrated that another rule will better compute actual damages.").

CR-RSC Tower I, LLC, 429 Md. at 410. HSU has not cited a case for the proposition that damages are measured at the time of breach for construction contracts. In *Andrulis v. Levin Constr. Corp.*, the Supreme Court of Maryland stated that the proper measure of damages for breach of a construction contract is the "reasonable cost of reconstruction and completion in accordance with the contract, if this is possible and does not involve unreasonable economic waste." 331 Md. 354, 371, 628 A.2d 197 (1993).[12]

Concerning HSU's argument that Holton should have hired a new contractor to complete the work in 2019 before prices substantially increased, there was testimony that

12. HSU has not made an economic waste argument.

Holton, being a non-profit, had limited funding. "The party who is in default may not mitigate his damages by showing that the other party could have reduced those damages by expending large amounts of money or incurring substantial obligations. Since such risks arose because of the breach, they are to be borne by the defaulting party." *Wartzman v. Hightower Prods., Ltd.*, 53 Md. App. 656, 667, 456 A.2d 82 (1983) (citation omitted). In light of HSU's estimate that the cost to complete the work in 2019 would have been over $800,000, it would be unreasonable to require Holton to immediately expend such a large amount of money to mitigate its damages, especially once it became clear that funds would be needed for litigation.

Additionally, HSU did not present evidence indicating that Holton could have predicted the steep rise in the cost of construction a year before the Covid-19 pandemic. In *Blumenthal Kahn Elec. Ltd. P'ship. v. Bethlehem Steel Corp.* , this Court stated:

> It is axiomatic that, before the doctrine of mitigation of damages or avoidable consequences will operate to impose a duty upon a plaintiff to minimize a loss that he has incurred by virtue of the defendant's breach of contract, the plaintiff must be aware that he has sustained a loss; to require a plaintiff to mitigate damages that he does not know he has suffered would be patently unreasonable.

120 Md. App. 630, 644, 708 A.2d 1 (1998). We see nothing in the record to support any argument that Holton could have reasonably predicted that deferring corrective

work until the following summer would have resulted in a substantial increase in costs. Holton's delay in hiring another contractor to complete the work does not amount to a failure to mitigate.

CONCLUSION

For the reasons stated, we shall modify the judgment in favor of Holton by removing the cost of the moving services, thereby reducing the award to $2,555,553.85, and affirm the judgment as modified.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY MODIFIED IN ACCORDANCE WITH THIS OPINION AND AFFIRMED AS MODIFIED. CLERK OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY TO ENTER A REVISED JUDGMENT IN FAVOR OF APPELLEE IN THE AMOUNT OF $2,555,553.85. IN LIGHT OF THE RELATIVELY MINIMAL REDUCTION IN THE DAMAGES AWARD, COSTS ARE TO BE PAID BY APPELLANT.

APPENDIX C — TRIAL COURT OPINION OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND FILED OCTOBER 12, 2022

CIRCUIT COURT FOR
MONTGOMERY COUNTY, MARYLAND

50 Maryland Avenue
Rockville, Maryland 20850
Main: 240-777-9400

Case Number: 472329V

HSU CONTRACTING LLC VS. HOLTON-ARMS SCHOOL INC, ET AL.

MEMORANDUM AND ORDER

This construction contract matter was tried between February 28, 2022 and March 18, 2022 before the undersigned member of the bench. At the conclusion of Plaintiff's case, and upon the Defendants' motions, the Court entered judgment against Plaintiff on its claims for fraud, intentional misrepresentation, tortious interference with contract, tortious interference with prospective advantage, negligent misrepresentation, and unjust enrichment, which also discharged Capital Projects Management Firm, LLC as a defendant. At the conclusion of trial, three counts remained in dispute: (1) Plaintiff's claim for breach of contract; (2) Plaintiff's conversion claim; and (3) the Defendant Holton-Arms School's claim for breach of contract. At the conclusion of trial, the Court requested that counsel for each party

submit "Proposed Findings of Fact and Conclusions of Law" based upon the evidence presented. After review of the extensive testimony, admitted exhibits, credibility of the witnesses, arguments of counsel, and post-trial submissions, the court has chosen to adopt, in full or in part, with additions as necessary, many of the proposals submitted by counsel.

INTRODUCTION

A major construction project is a difficult and complex task that requires large amounts of manpower, equipment, supervision, coordination, and communication. To successfully complete the project in a timely manner, a general contractor is necessary to coordinate, supervise, evaluate, adapt to changes, and ensure quality performance. A good relationship between the owners of the property upon which the project is to be completed and the general contractor is crucial. That relationship is governed by a contract. The standard contract[1] incorporates many provisions used by the construction industry and familiar to experienced construction firms. The parties may negotiate or modify those terms as they reach the agreement that is ultimately executed by the parties. The contract may incorporate many other documents including but not limited to accepted bid proposals, specifications, and drawings to be used and relied upon by both parties. Recognizing the need for flexibility and modification, construction contracts provide

1. American Institute of Architects A101-2007 (Standard Form of Agreement Between Owner and Contractor).

a process by which the parties can communicate, consult, make changes to the scope of work and product selections, and deal with unforeseen circumstances. Communication under a contract or agreed protocol may occur through requests for information (RFI), submittals for equipment, submitted change orders, or bulletins issued by the architect, engineers or other agents engaged by the owners. Construction contracts may include "time is of the essence" provisions, set strict timelines for tasks to be completed and specify penalties for non-timely completion. However, as the result of communications between the parties or other circumstances during the construction process, there may be a delay that compromises the contractor's ability to meet the time requirements of the project. In that event, a contract may provide for the contractor to submit a "change order" as to the time requirements. Then a dialogue may ensue between the parties for the owner to approve or deny the requested change. Without such an opportunity for resolution initiated by an aggrieved party, frustrations fester and the relationship critical to success in a construction project sours. Once there is a loss of faith in either party's performance, conflict arises that may end the contractual relationship.

FINDINGS OF FACT

Project Background and Key People

1. The Holton-Arms School (Defendant) is an independent college-preparatory school which educates girls and young women in grades 3

through 12. It is located at 7303 River Road in Bethesda, Maryland.

2. Susanna Jones ("Jones") serves as the Head of School, Tracey Fudge ("Fudge") as the Director of Finance and Operations, Michael Joyce ("Joyce") as the Director of Facilities, Steve Bilyeu ("Bilyeu") as the Facilities Manager of Engineering, and Carlee Dietterick ("Dietterick") as the Assistant Director of Facilities.

3. In 2017, Defendant identified the need for capital improvements to its existing school buildings (the "Project"). The single Project had several components, including the "Lower School Renovation" and the "Middle and Upper School, Central Plant & HVAC Replacement."

4. Defendant engaged Capital Project Management Firm ("CPMF") as its project manager/owner's representative. CPMF was led by Robert "Bob" Waechter ("Waechter"). Cox Graae + Spack ("CGS") was engaged as the Architect (with the team of William Spack, Tom Wheeler, and Julianna von Zumbusch – "von Zumbusch"), and Engenium Group LLC as the mechanical, electrical, and plumbing ("MEP") Engineer (Architect and MEP, collectively, the "Design Team").

5. A general contracting company, HSU Contracting, LLC ("Plaintiff")[2], subsequently received a formal "Invitation to Bid" dated December 22, 2017, on Defendant's Request for Proposal "RFP". The RFP was for two (2) standalone projects: 1) a Lower School renovation; and 2) a modernization of the HVAC system and replacement of mechanical equipment. According to the RFP, Defendant was to obtain the construction building permit from Montgomery County Department of Permitting Services after a 70-day review process and would have the permit issued on or before March 30, 2018. The RFP construction documents/drawings dated December 12, 2017, and the Invitation to Bid (collectively the "RFP documentation"), called for two separate projects to be performed as "design-bid-build" during the summer of 2018. However, further discussion led to the understanding that it would be more efficient to have the two standalone projects be treated and worked as one project. Plaintiff was not to do any design work on either of these projects.

Pre-Contract Conduct of the Parties

6. In late 2017 and early 2018, the Defendant issued an RFP and obtained proposals from general contractors. Defendant sent the RFP to Plaintiff

2. HSU Development, HSU Contracting, LLC and DMI all exist under the umbrella of "HSU Builders".

based upon its extensive history with Plaintiff's principals. Also, members of Plaintiff's staff had children who attended Holton, were donors and legacies of Holton, and Plaintiff's principals had been instrumental on various Holton boards and committees. In 2012, Plaintiff had completed a similar summer work project for Defendant exceeding $4,000,000.

7. This RFP included bid documents such as detailed drawings and specifications prepared by the Design Team. Design development drawings were also provided to Plaintiff and other potential bidders in November of 2017. The RFP also included a preliminary milestone schedule.

8. Prior to submitting a proposal, Plaintiff requested, and was granted, access to the Lower and Middle/Upper School buildings to survey existing conditions and gather information to factor into its bid, and to evaluate the dates proposed in the RFP for Substantial Completion. Plaintiff and its Project Manager, Terry Edmondson ("Edmondson"), began inspecting the school in late 2017 and early 2018. This included inspecting concealed work and providing feedback to the Defendant for use in preparing drawings and specifications. The Design Team also responded to requests for information ("RFIs") from Plaintiff to address outstanding questions about the Project.

9. Plaintiff submitted a proposal dated January 22, 2018, signed by Sean Frazier ("Frazier"), Plaintiff's SVP of Commercial Interiors. Plaintiff's proposal included an organizational chart identifying Walter Hsu as the President of HSU Builders. The proposal also indicated that Plaintiff's executive team for the Project would include Frazier and Edmondson, and that the project team would include Scott Clegg (Senior Project Manager), Connor Sullivan ("Sullivan") (Assistant Project Manager), and Mark Johnson (Senior Superintendent).[3]

10. Plaintiff's proposal stated that it "provides the project and subcontractors with CPM scheduling (which becomes part of their contract)" and that Plaintiff would use both updated CPM schedules and 3-week lookahead schedules to manage the project. The proposal included a proposed construction schedule developed by Edmondson.

11. CPM refers to critical path method scheduling, which involves a mathematical representation of a construction project. The tasks in the schedule are linked together with logic and calculate the latest dates or time that an activity can finish based on all the subsequent activities. Expert testimony established that only construction work on the critical path has an impact upon the

3. Frazier and Edmondson both left HSU at the end of 2018, and neither Scott Clegg nor Mark Johnson worked on the Project.

time in which the project is completed. If work on the critical path is delayed, then the eventual completion date of the project is delayed. Delay involving work not on the critical path generally has no impact on the eventual completion date of the project.

12. CPM scheduling is in fact "critical" because it is the best way to determine the effects of delayed tasks upon the whole project. The process of determining such effects is "critical" to calculating damage to the project, both temporal and monetary. The CPM Schedule is "critical" in that it provides a clear view of the level of coordination required by the general contractor for all trades and sub-contractors to get the tasks completed timely.

13. Plaintiff represented in its bid proposal that because of its previous experience with Holton, Plaintiff was familiar with restrictions on when construction could be performed at the school due to the school schedule or students and teachers in the buildings.

14. Plaintiff represented that it would use Procore, "a cloud-based construction project management software" and provide its field teams with tablets "to access information when needed in real time." Much of the work for submittals, RFI (Requests for Information) and other communication during the Letter of Intent ("LOI") period (infra.) was

accomplished utilizing Plaintiff's subscription to Procore Project Management Software ("Procore"), with access provided to Plaintiff's subcontracting team, CPM (Defendant's agent), Defendant's employees, Defendant's AE Team, and Defendant's commissioning agent. This software provides real time project status and allows for facilitation of communication and access to information.

15. While negotiating the Contract, the parties executed a LOI on February 27, 2018, authorizing the release of up to $2 million to ensure that Plaintiff could start work on the project. The LOI authorized Plaintiff to proceed with the buyout of subcontractors, processing of submittals, preparing the contract schedule and establishing project logistical planning, and purchasing long lead equipment. Plaintiff agreed in the LOI that the work on the Lower School Renovation would be completed by August 24, 2018, before the start of the 2018-2019 school year.

16. On February 28, 2018, Plaintiff issued a Notice to Proceed ("NTP") to Kent Island Mechanical ("KIM"), its mechanical and plumbing subcontractor on the Project. The President of KIM is Mark Bowen ("Bowen"). Will Koch ("Koch") was assigned as KIM's project manager. The NTP provided for a limited release amount of $1. 1 million so that KIM could begin to furnish submittals and procure equipment. Shortly

thereafter, KIM began working onsite to survey the mechanical scope. KIM had unfettered access to the school over spring break, starting March 12, 2018, when students were not on campus. Despite the February NTP, KIM did not sign a contract with Plaintiff ($4,223,000) until August 2, 2018, almost two months after the parties' contract was signed.

17. In the spring of 2018, Plaintiff issued additional RFIs seeking clarification or additional information from the Design Team. The Design Team also issued pre-contract bulletins with revisions to the drawings based on comments from the County during the permitting process. *These bulletins were incorporated into the Contract that was later signed.*

18. Plaintiff hired Russell Fitzgerald ("Fitzgerald") to start May 1, 2018, as superintendent for the Project. Fitzgerald was not named in the organizational chart provided by Plaintiff in its bid proposal. Defendant was not consulted about this change in personnel and expressed concerns about having a superintendent without prior HSU experience.

19. In May 2018, Sullivan received a call from the project engineer informing him "that the first four submittals [from NOVA, Plaintiff's electrical contractor] he had reviewed were all rejected, one of which had already been rejected once

prior" and that the project engineer wanted to have a call with NOVA, to discuss submittal expectations.

20. The building permit for the Project was issued on June 4, 2018, prior to the Contract being signed. Defendant was supposed to have obtained the building permit by March 30, 2018. However, Montgomery County "denied" approval of the permit on 10 separate occasions. Denial of a permit is not unusual as many times the multiple levels of review request modifications to the original application. Therefore, the permit application is returned/denied for there to be modifications made to the application. Contrary to Plaintiff's argument that the delay by the Defendant in obtaining the building permit caused a significant delay in Plaintiff's going forward, Stephen Smith, Plaintiff's Director of Operations, admitted that the failure by the owner obtaining a building permit until June 5, 2018 did not delay their performance. Even though some trade permits were not obtained per the Plaintiff's schedule by June 8, 2018, Smith noted that trades can commence work without trade permits, even on HVAC.

21. Beginning in March 2018, after bid submission and prior to execution of the Contract, there were 30 RFIs submitted by Plaintiff and CGS issued 11 bulletins. These communications and the responses had some impact on scheduling, work

sequencing, and costs. According to Plaintiff, Defendant's bulletins and responses to RFIs resulted in major redesigns and represented significant construction changes. According to Plaintiff, Defendant's bulletins and responses to RFIs impacted project cost, permitting, and construction schedules to an extent that was beyond the ordinary course of a construction project and that indicates a deficiently designed and under-developed project. However, Plaintiff executed the Contract with full knowledge of Defendant's bulletins and responses to RFIs. Plaintiff, with the full ability to negotiate the yet unexecuted contract, did not seek to extend deadlines or Substantial Completion dates or alter the previously submitted schedules. Even after executing the Contract, which provides a formal procedure for requesting schedule adjustments, Plaintiff did not utilize that procedure to seek extensions of time from the Defendant.

Negotiation and Execution of the Contract[4]

22. Following months of negotiations and almost immediately after the building permit issued, the parties executed the Contract on June 5, 2018. The Contract defined the singular Project as the "Central Plant Equipment &

4. This opinion references 4 documents containing relevant provisions of the parties' agreement: Project Specifications (Appendix A), Modified A101-2007 (Appendix B), Modified A201-2007 (Appendix C), and Additional Provisions (Appendix C).

HVAC Systems Replacement and Renovation of the Lower School," with interim Substantial Completion Dates of August 24, 2018 for the Lower School Renovation and August 25, 2018 for the Middle and Upper School Central Plant & HVAC Replacement. The Overall Substantial Completion date for the Project was March 1, 2019.

23. The Contract was executed by the parties for the total stipulated sum of $6,522,722 ("Contract Sum") subject to adjustments for Alternates. With those approved adjustments, the Contract Sum increased to $6,928,309 subject to subsequent increases for approved change orders.

24. The Contract is a heavily modified form of American Institute of Architects A101-2007 (Standard Form of Agreement Between Owner and Contractor), together with a heavily modified form of A201-2007 (General Conditions). The Contract incorporated Plaintiff's RFP Revised Response dated January 30, 2018, Conditions of the Contract (General, Supplementary, and other Conditions), Drawings, Specifications, Addenda issued prior to execution of the Contract, and detailed schedules setting forth dates for Substantial Completion as defined by the Contract.

25. The Contract required Plaintiff, as the Contractor, to "furnish only skilled and properly trained

staff," and identified key personnel for the Project, which could not be changed without the written agreement of the Defendant. Appendix B §2.2. These personnel included Frazier (SVP/ Project Executive), Edmondson (SVP/Sr. Project Manager), Sullivan (Assistant Project Manager), Fitzgerald (Senior Superintendent), and a to-be-determined assistant project manager and area superintendent.

26. Fudge, Holton's Director of Finance and Operations, was designated as the Defendant's representative for purposes of legally binding the Defendant (Appendix B § 8.3) and CPMF was designated as the Defendant's representative for administering the Contract. *Id.* § 8.3.1.

27. Plaintiff was afforded early access to the school in connection with the RFP process and the LOI. Plaintiff signed the Contract with the representation that "Execution of the Contract by the Contractor is a representation that the Contractor has visited the site, become generally familiar with local conditions under which the Work is to be performed and correlated personal observations with requirements of the Contract Documents." APPENDIX C § 3.2.1.

28. Plaintiff, through Frazier, acknowledged it was already three months behind when it signed the Contract on June 5, 2018, because it had not been able to mobilize on site in March based on the preliminary schedule. Frazier testified that he

was aware that the contract schedule referenced in the LOI might vary from the preliminary schedule, and that he agreed to the Substantial Completion deadlines when he signed the Contract on June 5, 2018. *Also, Frazier agreed that the Contract time from June to August 24, 2018 was reasonable.*

Contract Provisions Relevant to Dispute[5]

Substantial Completion and Time of the Essence Schedule

29. The date of commencement was June 8, 2018 for the Lower School Renovation and August 4, 2018, for the Middle and Upper School, Central Plant & HVAC Replacement. APPENDIX B § 3. 1. Consistent with the LOI, Plaintiff agreed in the Contract that (1) the Lower School Renovation would need to reach Substantial Completion by August 24, 2018, (2) the Middle and Upper School, Central Plant & HVAC Replacement would need to reach Substantial Completion by August 25, 2018, (3) the overall Project would need to reach Substantial Completion by March 1, 2019, and (4) time was of the essence in meeting these dates.[6] By executing the Contract,

5. Complete language of the provisions appears in the Appendices attached hereto.

6. Because there were limited times during which work could be performed so as to not interfere with the operations of the school, the parties included a liquidated damages provision for failure to achieve Substantial Completion by the stated dates.

Plaintiff also confirmed that the Contract Time was "a reasonable period for performing the Work," (APPENDIX C § 8.2.1) and that it would "proceed expeditiously with adequate forces and *shall achieve Substantial Completion within the Contract Time.*" APPENDIX C §8.2.3. Plaintiff warranted that it was "*able to furnish the plant, tools, materials, supplies, equipment and labor required to complete the Work and perform its obligations hereunder and has sufficient experience and competence to do so.*"

30. "The Work w[ould] *not be considered suitable for Substantial Completion review until all Project systems included in area of the Work are operational as designed and scheduled, all designated or required governmental inspections and certifications, including certificates of occupancy, have been made and posted, designated instruction of the [School's] personnel and the operation of systems and equipment completed, and all final finishes within the Contract Documents are in place.* In general, the only remaining Work shall be minor in nature, so that the [School] can occupy the portion of the building on that date for its intended use and the completion of the Work would not materially affect, or hamper the normal business operations or intended use of [the School]." APPENDIX C § 9.8.1.1.

31. The date of Substantial Completion would be the date certified by the Architect in accordance with Section 9.8. APPENDIX C § 8.1.3.

32. At the time of Substantial Completion, Plaintiff was to assign all manufacturer's warranties related to materials and labor. APPENDIX C § 3.5.2.

33. Plaintiff was obligated to prepare and submit a construction schedule for the work to "be revised at appropriate intervals as required by the conditions of the Work and Project." APPENDIX C § 3.10.1.

34. Plaintiff was obligated to use a detailed CPM schedule showing the requisite interdependence of activities and sequence of work, with any "float" accruing to Defendant's benefit.[7] APPENDIX A Section 013216 - 4.04. Plaintiff was also obligated to submit an updated CPM schedule with each application for payment. APPENDIX D § B.2.10.

35. Plaintiff was required to prepare a *submittal schedule*[8] promptly after being awarded the

---

7. "Float" is the amount of days an activity may be delayed before the overall project is delayed. Usually activities on the critical path have zero float. Put another way, any delay to a critical activity will cause a delay to the project's end date.

8. A submittal schedule contains dates on which the submittals for the project will be issued and allows the architect to effectively

Contract and submit the schedule for the Architect's approval. "If [HSU] fails to submit a submittal schedule, [HSU] shall not be entitled to any increase in Contract Sum or extension of Contract Time based on the time required for review of submittals." APPENDIX C § 3.10.2.

36. *Plaintiff's sole and exclusive remedy for any delay was an extension of time in which to complete the work.* Direct out-of-pocket costs associated with the delay were only permissible when the delay was caused *solely b*y Defendant, with no other "remedy or compensation or recovery of any damages" permitted. APPENDIX C § 8.3.3. Claims relating to time were to be made in accordance with Article 15, with any extension of the contract time memorialized by change order. APPENDIX C § 8.3.2.

Change Orders and Claims Provisions Expressly Bar Alleged Course of Conduct Arguments

37. A change order required agreement among the Defendant, Plaintiff and the Architect. "[A] change in the Contract Sum or *Contract Time* shall only be accomplished by Change Order. Accordingly, no course of conduct or dealings between the parties, nor express or implied acceptance of alterations or additions to the

---

manage its work so it can handle and address the submittals and return those in accordance with the contractor's submittal schedule.

Work, and no claim that the [School] has been unjustly enriched by any alteration or addition to the Work, whether or not there is, in fact, any unjust enrichment, shall be the basis of any claim to an increase in any amounts due under the Contract Documents or a change in any time period provided for in the Contract Documents." APPENDIX C § 7.1.2.

38. The Change Order amounts were to be "inclusive of any and all General Conditions costs." APPENDIX C § 7.2.3.

39. A claim for additional money or *an extension of time h*ad to be made in writing within 21 days of the occurrence of the event giving rise to the claim. APPENDIX C § 15.1.2.

40. A claim for an increase in the contract sum required written notice before proceeding with the Work. APPENDIX C § 15.1.4.

Waiver Arguments Barred Under the Contract

41. The Contract contained multiple provisions addressing waiver, including the no waiver provision discussed above with regard to change orders. APPENDIX C § 7.1.2.

42. The Contract also stated that "[t]he failure of the either party to insist upon the strict performance of any provision of this Agreement,

or the failure of either party to exercise any right, option or remedy hereby reserved, shall not be construed as a waiver in the future of any such provision, right, option or remedy or as a waiver of a subsequent breach thereof. The consent or approval by the Owner of any act by the Contractor requiring the Owner's consent or approval shall not be construed to waive or render unnecessary the requirement for the Owner's consent or approval of any subsequent similar act by the Contractor. The payment by the Owner of any amount due hereunder with the knowledge of a breach of any provision of this Agreement shall not be deemed a waiver of such breach. No provision of this Agreement shall be deemed to have been waived unless such waiver is in writing signed by the party to be charged." APPENDIX B § 8.6.1.0.

43. "No action or failure to act by the Owner, Architect or Contractor shall constitute a waiver of a right or duty afforded them under the Contract, nor shall such action or failure to act constitute approval of or acquiescence in a breach there under, except as may be specifically agreed in writing." APPENDIX C § 13.4.2.

Plaintiff's Sole Responsibility for Means and Methods and Coordination

44. Plaintiff had sole responsibility for "construction means, methods, techniques, sequences and

procedures and for coordinating all portions of the Work under the Contract" and was responsible for supervising and directing the Work. APPENDIX C §§ 2.5, 3.3.1, 4.2.2.

45. Plaintiff was required "to provide professional services that constitute the practice of architecture or engineering" if "such services are specifically required by the Contract Documents for a portion of the Work or unless [HSU] needs to provide such services in order to carry out [HSU's] responsibilities for construction means, methods, techniques, sequences and procedures." APPENDIX C § 3.12.10.

46. Plaintiff was responsible for *preparing coordination drawings p*rior to the preparation of shop drawings.[9] The failure to submit coordination drawings waived "claims for additional costs associated with relocation of fixtures, equipment, and appurtenances." APPENDIX A Section 013100 - 1.02.B.1.

47. "By submitting Shop Drawings, Product Data, Samples and similar submittals, [HSU] represent[ed] to the [School] and Architect that [HSU] ha[d] (1) reviewed and approved them, (2) *determined and verified materials, field*

9. Koch testified that coordination drawings are used to uncover "potential conflicts between trades of installation and it's an effort to avoid conflicts."

measurements and field construction criteria related thereto, or will do so and (3) *checked and coordinated the information contained within such submittals with the requirements of the Work and of the Contract Documents.*" APPENDIX C § 3.12.6.

Plaintiff Substitutions

48. In making a request for a substitution, Plaintiff represented that it had investigated the proposed product and that it was equal or superior to that which was specified. APPENDIX C § 3.4.2.

49. A request for a substitution also constituted a representation that Plaintiff would "*coordinate installation of the substitute*" and "mak[e] such changes as may be needed for Work to be complete in all respects." It included a waiver of "claims for additional costs which subsequently become apparent." APPENDIX A Section 016300.

Quality of Work

50. Plaintiff was required to perform the work in accordance with the contract documents. APPENDIX C § 3.1.2.

51. Plaintiff warranted that the materials and equipment would be of good quality and that the work would conform to the contract documents and be free from defects. APPENDIX C § 3.5.

52. Plaintiff was responsible for all cutting, fitting, and patching and was obligated to restore all areas to the condition existing prior to the cutting, fitting, and patching. APPENDIX C § 3.14.1.

Site Maintenance

53. Plaintiff was obligated to keep the site in an orderly and clean state (APPENDIX C § 3.15.1, APPENDIX D §§ B.2.21, B.3.15) and protect the work and adjacent structures from damage until acceptance by Defendant. APPENDIX D § B.2.8.

54. All personnel working on site were required to undergo a background check. Extensions would not be granted for Plaintiff's failure to obtain background checks for any worker, which were estimated to take two weeks. APPENDIX D § B.3.2.

55. Plaintiff was required to maintain daily reports at the site that included specific information on manpower, weather, and work performed each day. APPENDIX D § B.3.7.

Payment Applications and Retainage

56. The issuance of a certificate for payment did not constitute "a representation that the Architect ha[d] ... made exhaustive or continuous on-site inspections to check the quality or quantity of

the Work." APPENDIX C § 9.4.2. A certificate for payment or partial or entire use or occupancy of the Project also did "not constitute acceptance of Work not in accordance with the Contract Documents." APPENDIX C § 9.6.6.

57. The payment applications contained language indicating that payment was made *without prejudice* to any rights of Defendant under the Contract.

58. Defendant had the right to withhold retainage of "ten percent (10%) of the Contract Sum as is necessary to protect [the School] against claims or if the Work is unsatisfactory or not progressing properly." APPENDIX B § 5.1.8.

Termination for Cause

59. Defendant could terminate the Contract for cause if Plaintiff (1) repeatedly refused or failed to supply enough properly skilled workers or proper materials; (2) failed to make payment to Subcontractors for materials or labor in accordance with the respective agreements between Plaintiff and the Subcontractors; (3) repeatedly disregarded applicable laws, statutes, ordinances, codes, rules and regulations, or lawful orders of a public authority; or (4) otherwise was guilty of substantial breach of a provision of the contract documents. APPENDIX C § 14.2.1.

60. After receiving certification from the Architect that sufficient cause existed to justify termination, Defendant could, upon seven days' written notice, terminate Plaintiff's employment and (1) exclude Plaintiff from the site and take possession of all materials, equipment, tools, and construction equipment and machinery thereon owned by Plaintiff; (2) accept assignment of subcontracts pursuant to Section 5.4 (APPENDIX C); and (3) finish the Work by whatever reasonable method the school may deem expedient. APPENDIX C § 14.2.2.

61. Upon a termination for cause, Plaintiff was not entitled to receive further payment until the work was finished. APPENDIX C § 14.2.3. If the costs and damages incurred by Defendant exceed the unpaid balance, Plaintiff must pay the difference to Defendant. APPENDIX C § 14.2.4.

Plaintiff's Performance During Summer 2018

62. From the start of demolition in June 2018, just days after the parties signed the Contract, Defendant encountered problems with Plaintiff's performance. At this time, Frazier was also overseeing multiple other projects for Plaintiff.

63. During this time, the issue of inadequate manpower to complete tasks was identified. Plaintiff's Senior Vice President (SVP), Edmondson, wrote to subcontractor Tammal

"Your trades need more manpower so we can try to stay on schedule." The SVP wrote to subcontractor Nova "As you know we failed the electrical ceiling inspection today because of lights not being tied up and open junction boxes. I asked Will about additional manpower after looking at our sign-in sheet and noticed 2 men less today..... We need more manpower. I was over at Holy Child and saw 6 of your men on that site working for Boland. Can you please get us a few men as Will [KIM] is saying unless he has more manpower, he won't be ready by this weekend."

64. Plaintiff's proposal represented that all of the workers on the project would be fingerprinted and have been background checked. Joyce testified that on the first day of demolition, many of the people who showed up to work had not gone through background checks or had to be turned away because their background checks were not approved. As a result, Plaintiff had less manpower than needed to meet the schedule, leading to delays which were a persistent issue throughout the summer.

65. Koch testified that Plaintiff did not submit coordination drawings for the DOAS[10] units, and that he did not know what Plaintiff did with the

10. DOAS stands for "dedicated outdoor air system." It is a type of heating, ventilation and air-conditioning system that consists of two parallel systems: a dedicated system for delivering outdoor air ventilation and a parallel system to provide heating and cooling.

shop drawings KIM prepared. He acknowledged that coordination drawings were required by the Contract, and that it was "concerning" that Plaintiff, as the general contractor, was not following the Contract procedures.

66. Plaintiff failed to coordinate installation of the fan coil units (FCUs), leading to conditions where "right-handed" units were connected on the left side (wrong side) and *vice versa,* requiring extra piping along the exterior wall. As with DOAS units 6 and 7, Plaintiff and KIM substituted Trane for the Daikin basis of design. No one informed Defendant that the units were smaller. These coordination issues were not isolated and continued throughout construction.

67. Both Joyce and Fudge testified about a significant lack of protection on the Project, which resulted in damage to the existing facilities. At one point, for example, a worker had placed a fan coil panel against the drinking fountain, causing water to run and flood into the library, where it caused mold in the carpet and wood panels. Furniture and books in the library were not adequately protected from dust and debris of construction as required by the Contract.

68. On July 3, 2018, Edmondson told Defendant that, in response to Defendant's concerns, they had "since put a full court press on protection and understand the importance of this activity as

well as staying on schedule." However, one month later, on August 7, 2018, Plaintiff's employee, Erich Millar (Millar), acknowledging manpower issues wrote: "I agree protection is needed but who, what army can we get to lay all this protection?????"

69. Plaintiff had significant performance problems over the summer of 2018 with its electrical subcontractor, NOVA, related to "Nova's inability to provide approved electrical submittals and failure to order the lighting package per the contract which will delay the schedule." As a result, Plaintiff sent a "Notice to Cure" to NOVA. The work performed by NOVA was non-conforming to the contract, defective and incomplete such that Plaintiff subsequently terminated its sub-contract with NOVA for cause.

70. These coordination issues impacted Plaintiff's ability to maintain the schedule. SVP Edmondson told KIM "We have zero chance of making this happen [re: the equipment pads needed to place the boilers and domestic hot water heaters]" because of late notice by Plaintiff. Koch told Plaintiff in an email that KIM could not complete its scope of work because Plaintiff had not yet completed necessary predecessor activities.

71. During this time, Waechter told Plaintiff to "do what they needed to do" to get the girls in school on time as required by the Contract schedule.

72. As the result of Plaintiff being three months behind at the execution of the Contract, Plaintiff stated there was a need to "compress time schedules and accelerate" the construction work to meet the August 24, 2018, Opening Day for Holton. However, compression and acceleration does not mean toleration or acceptance of poor workmanship and failure to meet contract specifications. Plaintiff did not maintain daily logs and manpower reports, nor did it maintain consistent records of the subcontractors on site.

73. KIM, Plaintiff's main sub-contractor, provided Defendant with a list documenting the deficiencies in Plaintiff's performance. Those deficiencies, which include lack of coordination, supervision, support staff, and protection for the job site, delayed KIM's work 3 weeks during the summer.

74. The "time crunch" to get the scheduled work done by Opening Day resulted in a suspension of the formal change order process, which was replaced by a temporary agreement between the parties. They agreed that if change requests were approved, then issues of "Extended General Conditions" (profit margin per contract allowed to Plaintiff) or credits would be worked out by the parties later. The 21-day deadline for submitting change orders/claims per the Contract was not enforced by Defendant until a series of disputes occurred in late 2018 into 2019.

75. Plaintiff contends that one of several long lead items (for example, door and door frames) caused delay during the summer due to Defendant's changing the doors from metal to wood as late as June 11, 2018. It could take as long as 15 weeks to fabricate the doors for use in the project. Defendant's architect admitted that a drawing error showed the doors as metal instead of wood. However, Plaintiff's submittals for such long lead items were supposed to be provided at least two months prior to the time Plaintiff submitted the item for approval in May 2018. Plaintiff paid to expedite the fabrication of the doors and Defendant accepted those costs.

76. To save time during this period, Plaintiff suggested using spray foam insulation in the attic area instead of batten insulation that required more time and manpower. Defendant approved the change. However, the submission included that a fire-retardant sealant be applied to the foam as a safety measure. Plaintiff never applied the sealant.

Opening of Holton-Arms School

77. Plaintiff failed to achieve Substantial Completion of the Lower School Renovation by August 24, 2018 and tum that portion of the school over to Defendant in time for the students' return from the 2018 summer recess. This forced Defendant to temporarily place the students in "the library,

the theater, a dance studio, and a couple of other classrooms and common spaces to house classes for the first three days" until Plaintiff made the Lower School provisionally accessible to students and faculty. Even in areas made provisionally accessible, Plaintiff's work remained defective and far from Substantially Complete as defined by the Contract.

78. In September 2018, a Certificate of Occupancy was issued to Defendant. The issuance of the Certificate of Occupancy to Holton-Arms School does not establish and is not a substitute for Substantial Completion as defined in the Contract.

79. On September 4, 2018 (the date classes began), Waechter contacted Edmondson and Fitzgerald to express concerns about the cleanliness of the Project site, the fact that classrooms were not ready for move-in, and a list of defective and incomplete work. He stated that "it is imperative that HSU to [sic] provide the coordination, management and sufficient manpower to complete the work in accordance with the schedule."

80. On September 5, 2018, Waechter contacted Walter Hsu telling him that "We need to talk as soon as possible, you have two cleaners, one electrician and seven mechanical contractors on site today. This is completely unacceptable. The classrooms have construction materials and dirt in them, the

school still cannot move in fully and the areas that were supposed to be turned over for move in today have not changed since Saturday. We need HSU to step up or step aside, the school can no longer continue with a consistent lack of performance." Walter forwarded this message to Edmondson, Frazier, and Smith.

81. Later that day, Waechter sent to Walter Hsu and the Plaintiff's team another email listing numerous issues related to the status of construction, including the incomplete storefront, the fact that construction materials and tools had been left in the courtyard, the wires hanging from the ceiling in the maintenance area, the incomplete offices. There were also electrical issues throughout the school. The incomplete storefront presented a "critical safety and security issue" because the front doors to the Lower School did not close properly, could not be locked, and could not be chained shut due to fire code.

82. Fudge testified about her concerns with the volume of work remaining by the end of summer. Her concerns included 1) the volume of work that was still to be completed and 2) the conditions of the project over the summer. She believed that a punch list would deal with minor issues but that there were major tasks that Plaintiff had to accomplish. The FCUs all had to be raised in the hallways to allow them to sit on the flooring per design. The lighting system didn't work. The

floor was cupping. There were other defects that needed to be addressed. Electrical breakers were tripping through the whole month of September, and Defendant had to replace breakers multiple times in September and October.

83. Plaintiff's lack of diligence and supervision over the project was called to Plaintiff's attention from its own employees. On September 13, 2018, Sarah Moore Herbst (Plaintiff's comptroller- "Moore Herbst") emailed Plaintiff's team with concerns. She stated that the "[o]riginal substantial completion date was 8/20" and that "[n]o updates have been made to schedule." She also stated that [m]anpower is also not being fully completed" and that Punch Plus had been "on site working for quite some time" but weren't listed in the manpower log "one time." She further indicated that American Cleaning "[n]ever returned a signed contract for $13,700 and have now billed over $30,000" and that Alonzo Ours had been on site working with "[n]o signed contract, no COI (Certificate of Insurance). This must stop happening."[11]

11. At trial, Moore Herbst was questioned about this email in which she indicated that Punch Plus had been on site according to invoices but did not appear on the manpower log once. She was then shown multiple manpower entries for August and early September 2018 made by Smith reflecting up to ten workers on site for Punch Plus and acknowledged that these entries would have been made after September 13, 2018.

84. Based upon Defendant's numerous concerns with the quality and timeliness of Plaintiff's work, Defendant began looking into potential replacement contractors because Defendant "needed to have a back-up if HSU wasn't able to get things together to address the deficient work, to complete the work that had been left undone, to fix things that weren't going well, and in case we decided we had to terminate." Defendant did not hide its concerns. Defendant told Plaintiff to resolve these problems ("We need HSU to step up or step aside, the school can no longer continue with a consistent lack of performance.")

85. Seeking a reliable alternative, if needed, Defendant had conversations with KIM. Mark Bowen, KIM's President, acknowledged the possibility that Plaintiff would "be cured from the project at some point" and that it was "unfortunate that this job has gotten to this point" but that KIM would "do everything possible to ensure we see it through to the end for the school; they deserve no less." Bowen testified that Defendant's personnel were good to work with on this project.

86. As previously noted herein, KIM was frustrated with Plaintiff's performance and provided Defendant with a list of concerns, including *Plaintiff's failure to provide adequate protection and manpower and its failure to timely complete predecessor work so that KIM could accomplish its scope.*

87. In addition those concerns, KIM believed that Plaintiff was not submitting most of KIM's change orders to Defendant. This pattern continued despite Plaintiff having added Erich Millar ("Millar") over the summer to manage the change order process. *Plaintiff decided to send in "just a handful of requests for change orders . . . each week," thus causing delays for KIM in completing construction tasks.* It strains credulity for Plaintiff to complain of the Defendant's delay in processing change orders when Plaintiff failed to submit or delayed timely submission of change orders from its main sub-contractor.

88. During this time, there were disputes regarding many change orders submitted by Plaintiff such that Plaintiff did not receive payment. Plaintiff contends that Defendant's failure to process these orders relieved their obligation of performance. There is no provision in the Contract or otherwise that permits such relief from performance. Plaintiff provided no proof that it was financially unable to complete work due to the non-resolution of the change order disputes. Plaintiff did not seek relief under the Contract.

The First Cure Notice

89. Defendant issued to Plaintiff a seven-day cure notice (the "First Cure Notice") on September 21, 2018, listing Plaintiff's defaults under the

Contract. The defaults included delays to the Project, substandard workmanship, significant lack of protection of portions of the school buildings at the Project site, failure to timely inform the Design Team of installation issues, issues with review and submission of submittals, non-conforming work, and several safety issues.

90. Based upon Fudge's observation that 1) there were times when there were not workers on the job when there were scheduled to be workers on the job, and 2) that the Defendant wanted to make sure that enough workers were being provided to complete the work, Defendant demanded an updated CPM schedule for the remaining work that included daily manpower commitments for both Plaintiff and its subcontractors. Plaintiff did not submit a CPM schedule. Contrary to Plaintiff's representation in its bid proposal that it would use a CPM schedule, and Plaintiff's specific request, Plaintiff submitted a revised P6 baseline schedule indicating that the Contract schedule did not have the proper logic. This schedule was retroactive and thus was not used to manage the work prospectively.

91. Defendant demanded that Plaintiff provide a detailed action plan and safe work plan for the installation of the new DOAS units, that Plaintiff immediately correct defective work and provide a schedule for any work that could not be completed within the cure period. Plaintiff did not provide

the requested plan or complete all corrective action detailed in the First Cure Notice.

92. The parties met in early October 2018. They met to discuss concerns that led to the cure letter and how Defendant wanted to work with Plaintiff going forward to complete the work and resolve outstanding matters.

93. Plaintiff did not accept responsibility for its deficiencies and sought to blame Defendant for its defaults. However, Plaintiff promised Defendant that it would repair defective work and complete significant portions of the remaining work over Holton's 2018-2019 Winter Break and 2019 Spring Break. Plaintiff failed to do so. Instead, Plaintiff responded by changing its project management team by replacing Fitzgerald with Ken House as superintendent and ending its employment of both Frazier and Edmondson.

94. After the First Cure Notice, Smith "became more hands-on" in response to a request from Amber Hsu. Prior to this time, he had discussed concerns over the progress of the project, working with Sean Frazier and Terry Edmondson. Smith testified that Plaintiff had an exhausted team, having struggles getting the project complete, as well as an upset client and concern about its controls. When asked about "the issues that had arisen during the course of the summer of 2018," Smith testified that the issues included

not maintaining a CPM schedule, concern about more accurate daily log reporting, and being able to keep up with the bulletins and getting change orders processed.

95. In response to the First Cure Notice, Edmondson emailed the subcontractor responsible for the school's storefront, Kensington Glass, attempting to coordinate and schedule the incomplete and defective storefront to the school. Lack of coordination due to glass size and framework replacement delayed completion. Plaintiff could not get Kensington glass to comply with its request for a schedule of work to present to Defendant such that it was compelled to issue Plaintiff's 72-hour Notice to Cure for Cause to Kensington for failure to complete the project within schedule and to comply with the specifications.

96. On September 24, 2018, Defendant received from JE Good, the electrical engineer, a detailed list of incorrect electrical work noting that the installed lighting controls had not been programed or commissioned. In early October, Plaintiff sent NOVA a cure notice, but by mid-October, there were still "issues with the lighting controls in almost every classroom" which was having negative impacts on teaching. These were not isolated issues.[12] NOVA had installed GE panels,

12. Three electrical panels being installed directly behind pipework; Edmondson stating that Nova was not compliant on submittals and had not been back on site, and noting that the installed

which were not specified on the job. Defendant rejected the panels. Plaintiff promised to replace the non-conforming panels, but never did. NOVA was later terminated for cause by Plaintiff.

97. On October 24, Bilyeu emailed Plaintiff that the school had lost power or communication with all the FCUs on the 2nd floor and all of the corridor FCUs on the first floor. He stated that he had asked Plaintiff several times when this would be corrected, and "to date, nothing has been done."

98. Two days later, Joyce emailed Plaintiff stating, "On October 9th we mentioned to HSU (Russ), and in our weekly meetings with all of you, that we lost the Siemens connection to 95% of the first floor and 30% of the second floor FCU's after you came in to raise the units as per the drawings.... It's now 2 ½ weeks later and KIM is ready to make the switch to running water from the Centennial Plant but all of the FCU's that can't be controlled are in cooling mode and won't tum on when the hot water flows. It's frustrating that we've been talking about the importance of this switch over for weeks and this problem hasn't been sorted out."

---

transformer was different than what was submitted; Sullivan indicating that HSU never verified the locations of the lights and that many were installed in the wrong locations; Waechter sending email stating "Not sure what can be done to instill confidence in the electrical system, it looks like the electrician followed his own path instead of the specifications and submittal process for the equipment installed."

99. Plaintiff's coordination issues with KIM persisted. In October, Edmondson reached out to Koch to say that Plaintiff's and KIM's schedules weren't matching and that they needed to be working off of the same one.

100. In September 2018, Defendant also began to notice that the bamboo flooring installed by Plaintiff's subcontractor, Capital City Flooring, was buckling and cupping. There were indications that the condition was caused by the failure to properly acclimate the product prior to installation and properly condition that space during installation. Defendant demanded that the floor be replaced over winter break to no avail. Plaintiff had persuaded the manufacturer that this issue would be covered under the warranty. But Plaintiff did not follow up and have the floor replaced.

101. There were problems in the school with noise transmission between classrooms. Defendant's architect hired an acoustical engineer who determined that Plaintiff had installed ceiling tiles that did not meet the specifications.[13] Defendant asked Plaintiff to correct the problem over winter break, but the correction was not done.

---

13. In an internal HSU email, Smith wrote about "our exposure of around 100k on the ceiling tile issue."

102. In October 2018, the parties met to work on outstanding issues. Plaintiff presented Defendant with three binders in response to Defendant's First Notice to Cure to show how it would resolve the issues and complete the work. However, Plaintiff did not produce a CPM schedule in response to the demand by Defendant. Plaintiff provided a P6 version of construction schedules. Plaintiff provided no explanation for its failure to provide the CPM version of the schedule that it represented it would provide in its bid proposal.

103. After the October 2018 meeting, the Defendant continued to work with Plaintiff and the Cure Notice issue did not appear in the minutes. However, the change order disputes between the parties continued. Deficiencies had not been cured by Plaintiff.

104. Plaintiff continued to be slow in addressing the Cure Notice. As of November 8, 2018, Plaintiff had not addressed and resolved all deficiencies noted in the Cure Notice. Plaintiff submitted a plan to proceed with work on the next phase of work without a plan for the completion of the contract work on the Lower School. Also, Defendant noted that there had not been "a significant effort to complete the Contract Scope of Work or to address the Punch List at the lower school during the past two weekends."

105. In late November, Waechter contacted Smith, Edmondson, and Fitzgerald about noxious fumes from the Project that were impacting Defendant. Fudge sent an email to Plaintiff advising that the work in the Central Plant was negatively affecting the personnel in the Infirmary and Advancement offices. Waechter emphasized that infirmary and advancement office personnel have complained multiple times about the fumes and noise from the central plant work. "The fumes have caused some personnel to leave the campus as they were getting sick." A few days later, Fudge met with Smith about the "notice the School needed to receive if this work was being done so that [they] could tell people not to come to work because of their concerns."

106. Plaintiff failed to address the problem quickly. Bilyeu had to contact Smith to shut down work in the boiler room after Fudge and Bilyeu were unable to track down Ken House, who had been assigned to supervise that day. Bilyeu notified Smith, "As a result from today's event regarding the haze and smell in the Advancement Center, I'm asking that all work is to be Stopped until the boiler room is thoroughly cleaned and the wielding pre-fab station is moved outside by the metal scrap container. The conditions of this boiler room are unacceptable and needs to improve before I allow any more work to take place."

107. Smith's reaction to the notification was shown in an internal email wherein Smith stated "I absolutely hate that it appears Steve Bilyeu is taking the high road here and telling us that our on-site management is lacking in both housekeeping and safety. This is not good at all. With the HSU's change in management, our overall customer experience is to improve, not get worse. I need to know the plan and response this morning to have a constructive discussion with Bob W. I can suggest a conference call today, but we have met multiple times to get better control of the project."

108. In late February 2019, Plaintiff added Chris Cahoon (Cahoon) to the Project. Cahoon immediately expressed concerns with the work, indicating that it did not appear that Plaintiff had "any coherent plan," that everything "has a lot of coordination and Im [sic] not seeing it," and that he hoped the budget was not accurate. In an email, Cahoon indicated that he wanted to put a CPM schedule together to avoid "continu[ing] down the same reactionary road." Rather than providing Defendant with a CPM schedule, Plaintiff provided a bulleted list of summer work to complete.

109. In February 2019, Smith wrote to Capital City demanding that it replace the bamboo flooring: "I feel I must weigh in on the importance of this issue to the project. Holton is now at the point where

patience is wearing extremely thin. We have had a problem with the flooring since September of last year. We held them off successfully from demanding it be corrected over the winter break. Spring break will be upon us 21 March and the flooring must be corrected during this time." The flooring was not replaced over spring break, and Plaintiff sent Capital City a notice to cure, given its refusal to "stand by their warranty." Capital City disputed responsibility, and the defective flooring has not been replaced.

110. In April of 2019, Defendant contacted Plaintiff about electricians working on the Project without supervision. This was not an isolated incident. Dietterick wrote to Smith that "We have two insulators working in the boiler room, but no one [supervising] from HSU. We will be asking them to leave since there is no supervision." Also, Koch testified that KIM sometimes had no one from HSU supervising their work.

111. On April 11, 2019, Joyce contacted Plaintiff to inform them that, since the replacement of the ceiling tiles, sprinkler covers were falling off. In early May 2019, Defendant reported that two of the air conditioning units were leaking water and had stained the ceiling tile.

112. Plaintiff's focus was on the unresolved change orders. Plaintiff told Defendant that Plaintiff had a 42-work-day compensable delay that

was compressed in order to deliver the school on September 2, 2018. Plaintiff had not filed a change order for this claim even though Defendant was not denying claims made after the 21-day deadline period under the terms of the Contract.

113. In response to the ongoing issues, Defendant hired a claims consulting firm to try to resolve the disputed claims/change orders.

114. The Project required the installation of DOAS units 6 & 7 into the school attic area. The installation was made complicated for many reasons including substitution of equipment by Plaintiff, inability to bring in the units through the building's window and stairways, a decision to bring the units into the attic through a roof hatch requiring use of scaffolding, finding the correct dunnage for the substituted equipment and the need to work when students were not present to protect their safety. Therefore, Plaintiff had to submit a number of plans to Defendant's architect and engineers to accomplish this task. Plaintiff claims that it could have completed this task in a timely manner but for Defendant denying Plaintiff access to the school. However, none of the plans submitted by Plaintiff were approved in their entirety by Defendant through its Architect and Engineer. Many of the "approvals" required verification of field conditions or follow up by Plaintiff that did not happen.

115. Denial of access to the site by the owner is appropriate if the contractor does not get approval of the installation plan. Plaintiff failed to argue or provide proof that Defendant's withholding of approval was unreasonable or unjustified. Plaintiff's claim of a pretextual denial of access by defendant to provide a basis to terminate plaintiff and substitute a new contractor is not persuasive based upon the evidence presented.

116. Plaintiff acknowledged that there was work to be done to complete the project. Work proposed to be done during the 2018-2019 Winter Break did not occur. Work proposed to be done during the 2019 Spring Break did not occur. At that point, with no resolution of change orders and both parties frustrated with the other party's performance, there was some discussion regarding a 2019 "Summer Work Plan" including many of the items from the Cure Notice e.g. the electrical panels and the wood flooring replacement. Although both sides, in email, referred to summer work, the plan was never agreed to by both parties.

The Second Notice to Cure

117. On May 1, 2019, CGS, provided Defendant with a Certification to Terminate Plaintiff for Cause, as required by the Contract. The certification indicated that Plaintiff had committed numerous breaches of section 14.2.1 by (1) repeatedly refusing or failing to supply enough properly

skilled workers or proper material; (2) installing substandard work that was not compliant with local codes and which had not been corrected; and (3) failing to maintain proper site safety. The Architect's "Certification of Sufficient Cause to Terminate Contractor for Cause," provided 39 examples of Plaintiff's improper performance under Contract provision 14.2.1.1 including "repeatedly refuses or fails to supply enough properly skilled workers or proper materials." The certification provided 9 examples of improper performance under Contract provision 14.2.1.3 such as "repeatedly disregards applicable laws, statutes, ordinances, codes, rules and regulations or lawful orders of a public authority.". The certification provided 9 examples of improper performance under contract provision 14.2.1.4 such as "substantial breach of a provision of the contract documents." APPENDIX C (All provisions cited above)

118. Instead of terminating Plaintiff upon receipt of the Certificate to Terminate for Cause, Defendant issued a Second Notice to Cure letter on May 1, 2019, to Plaintiff to cure its defaults. The Second Cure Notice reiterated that Plaintiff had failed to provide Defendant with the CPM schedule demanded in the First Cure Notice. Defendant noted that Plaintiff had promised to complete certain work over spring break (like replacing the bamboo floors) but had failed to do so. In addition to listing multiple defaults, the Second

Cure Notice indicated that many of the electrical deficiencies, such as the installation of incorrect panels and breakers, had not been addressed. In the Second Cure Notice, Defendant requested a CPM schedule yet again and that the electrical issues be addressed.

119. When Defendant issued the Second Cure Notice, Defendant already had made full payment on Payment Applications 1-8. On May 22, 2019, the Architect certified Payment Application 9, which reflected more than $350,000 in approved change orders throughout the Project. Defendant wanted to ensure that subcontractors were paid. Erich Millar, who was assigned to manage change orders for Plaintiff, purportedly assembled the documentation in support of payment applications but did not testify at trial.

120. On May 8, 2019, Amber Hsu responded to the Second Cure Notice, claiming that Plaintiff had performed diligently and had not been properly compensated. She included a daily log manpower report from Procore, and wrote that "[t]he report shows multiple skilled tradesmen in support were provided each day on the project, including double shifts and weekends. The summary of hours by subcontractor is pictured below. Note the values for the summer work." She then alleged that "these manpower increases were necessary to accelerate work in order to overcome what would have been project delays caused by an incomplete

and error-ridden design (including poor and defective drawings, unforeseen conditions, unanswered RFIs, owner-initiated change orders, and unanswered submittals)." Smith testified that he assisted Amber with putting this letter together.

121. Plaintiff made little or no effort to cure the defects, complete the work or respond to the demands in the Second Cure Notice.

122. Defendant noted that the manpower report included with Amber Hsu's May 8, 2019, letter was not consistent with its own experience with Plaintiff's insufficient manpower on the Project. Given this concern about the accuracy of the manpower report, Defendant reviewed it closely and questioned Smith about an entry originally made by Russell Fitzgerald on August 20, 2018, *showing three workers working 68 hours each in the attic (totaling 208 hours) over a 24-hour period.* Smith explained: "[I]t appears that he (Fitzgerald) fat fingered some numbers in there. I didn't even think you could go beyond 24 within Procore cells."

123. Smith was then directed to six other entries for KG Sheetmetal that he had made, repeating Fitzgerald's initial mistake of three workers working 68 hours each in a day, for a total of 208 hours. After being shown this, Smith admitted that his entries were tantamount to copy and

paste and were not accurate. Despite the admitted erroneous entries, Smith testified that the rest of the report was accurate.

124. In response to Smith's testimony about Procore's ability to track user access, the Defendant subpoenaed the Procore access reports. The access reports indicated that the first time Smith accessed Procore was on August 28, 2018, even though the daily manpower reports reflected a significant number of entries for work done prior to that time (August 28, 2018) period made by Smith.

125. When pressed on cross-examination about these entries, Smith admitted that he created them months after the fact and that they were a "copy and paste" of prior entries. He stated that Plaintiff did not keep and maintain reports to figure out what work had been done on a given day by a particular contractor. This statement conflicted with his prior statement that "the rest of the report is accurate."

126. Smith explained the copy and paste, repeatedly claiming that he went into Procore when he saw a missing day "so we could at least get a little bit more accurate than nothing." He was then directed to multiple dates which had already been completed by field staff and for which he made additional entries.

127. Defendant questioned Smith about a document dated April 19, 2019, showing manpower log entries for the subcontractor Blank and McKenzie between July 21, 2018 and August 13, 2018. The manpower report printed on *April 15, 2020,* reflected numerous entries that Smith made for Blank and McKenzie for July and August of 2018 *that did not appear on the document dated April 19, 2019.* Smith admitted that he made these entries after April 19, 2019, and that he was copying and pasting prior entries that were nearly a year old. He claimed to "only copy and paste [many months later] if the superintendent alerts me again that it was the same crew from a Monday to a Tuesday to a Wednesday" but admitted that the superintendent did not have any other records of manpower on the job that could provide this information. *These ephemeral entries subject to change were reflected in the hours shown on the manpower report included with Plaintiff's response to the Second Cure Notice on May 8, 2019.*

128. Smith was not a credible witness. Having admitted that he had cut and pasted entries on the manpower report for KG Sheetmetal reflecting more than 24 hours in a day, he testified that the remaining entries were accurate. When confronted with the Procore access logs produced in response to Defendant's trial subpoena, he acknowledged that he made his hundreds of manpower report entries months later and had

again, copied and pasted. His explanation was "so we could at least get a little bit more accurate than nothing" was not persuasive. Although he testified that the false records "were not meant to mislead," Plaintiff's manipulation of the records had that effect and were presented to Defendant in support of Plaintiff's demand for payment. Plaintiff sought full payment for Payment Application 10 . At best, Smith's actions demonstrated Plaintiff's lack of supervision, inadequate controls and poor management of the construction work. At worst, this was a fraudulent undertaking designed to make it appear that 1) Plaintiff had provided sufficient manpower contrary to the experience cited by Defendant; and 2) work had been performed by Plaintiff contrary to the experience cited by the Defendant.

129. During his testimony, Defendant's scheduling expert, Wayne DeFlaminis, testified to his analysis of the Smith entries. Initially, the manpower report from the daily log reflected 3,267 FTE (Full Time Employee) man-days. When Smith's "later entries" were removed, this number dropped to 1,676. Similarly, he noted that cumulative labor hours recorded dropped from 26,104 to 13,391 after removal of the Smith entries. The "summer hours" of work claimed by Amber Hsu to defend Plaintiff against the Second Cure Notice were significantly overstated.

130. Despite the May 1, 2019 Second Cure Notice and having received full payment on 9 submitted and approved payment applications and $350,000 in approved change orders, Plaintiff did not perform any additional work on the Project until May 17, 2019, more than two weeks after the Second Cure Notice, when one worker from KIM allegedly worked for two hours, five workers from KIM allegedly worked for ten hours, and one supervisor from HSU was allegedly present for one hour.

131. Plaintiff did not address the issues raised in the Second Cure Notice; instead, *Plaintiff indicated that it would pursue mediation* on some of the proposed change orders that Defendant had rejected. Subsequently, in an effort to settle the dispute without mediation, Fudge asked Plaintiff to provide the Defendant with a "number" to resolve the change orders Reacting to Fudge's request for a "number", Plaintiff sent Payment Application 10, signed by Controller Moore Herbst on May 21, 2019, and "certi[fying] that to the best of the Contractor's knowledge, information, and belief the Work covered by this Application for Payment has been completed in accordance with the Contract Documents."

132. Plaintiff's certification of Payment Application 10 made claims for extended general conditions including a summary sheet claiming that Plaintiff was entitled to payment for 2,657 hours dedicated

to the Project by five unnamed HSU personnel and for which time records were never produced.[14] This extended general conditions claim also included a handful of invoices from American Cleaning Services[15] for work within the scope of the base contract. Plaintiff had its CFO Barry Saffer testify to the costs in Payment Application 10 and claim that Plaintiff was entitled to $2,046,392 in damages, consisting of April 2019 work, retainage, proposed change orders, betterments, and unfunded change orders. Yet, Saffer acknowledged he had no personal knowledge of these charges or the work that was done, and that he relied on project management for the numbers.

Termination For Cause

133. Plaintiff failed to cure the deficiencies cited in the Second Cure Notice. Plaintiff acknowledged as much in a May 22, 2019 internal email to Chris Cahoon from Smith stating the Plaintiff was in a "contractual mess."

---

14. The cover letter claimed a delay of 42 days, yet one of the line entries alleges that an unnamed superintendent billed 945 hours for this delay. Like the manpower reports, these numbers are not worthy of belief.

15. American Cleaning is the same subcontractor referenced in Moore Herbst's September 13, 2018, email that had not returned a signed contract and had already billed more than double its subcontract.

134. By letter dated May 31, 2019, Defendant notified Plaintiff it was terminating the Contract for cause ("Termination for Cause Letter"). The Termination for Cause Letter was accompanied by an Architect's "Certification of Sufficient Cause to Terminate Contractor for Cause," dated May 1, 2019.

135. The Certification outlined Plaintiff's numerous material breaches under the Contract, which included:

    a. As of the May 31, 2019 termination date, Plaintiff had failed to achieve Substantial Completion of the Project despite the Lower School Renovation and Middle and Upper School, Central Plant & HVAC Replacement having contractual deadlines of August 24 and August 25, 2018, respectively.

    b. Plaintiff failed to prepare and submit an initial CPM Schedule or any updated versions each month in conformance with the Contract's schedule requirements. APPENDIX C § 3.10.1. Instead, Plaintiff submitted two-week "look-ahead" schedules that were inadequate substitutes for a CPM Schedule. Defendant learned that Plaintiff did not develop or utilize a proper schedule for the work when Smith admitted that the HSU team did not have a schedule when discussing "holes" in their case. Because

Plaintiff failed to maintain a CPM schedule, Defendant and its Design Team lacked a clear understanding of the Project's progress, as well as if and when Substantial Completion might occur.

c. Plaintiff failed to provide the contractually required Submittal Schedule. APPENDIX C § 3.10.2. A Submittal Schedule, among other things, accounts for the timing of purchases of necessary materials and equipment. Long-lead submittal items in particular could jeopardize contract milestones or the Project's Substantial Completion date. Instead, Plaintiff chose to prepare lists of submittals sporadically, but never developed the required Submittal Schedule. The absence of such a schedule caused delay and left unused a required time management and coordination mechanism.

d. Plaintiff installed defective and/or improper work, some of which created safety concerns, and then failed to cure the defective work. APPENDIX C §§ 3.2 and 3.3.

136. After terminating the Contract, Defendant attempted to take assignment of the KIM subcontract as allowed when there is termination for cause pursuant to Section 5.4 of the Contract. APPENDIX C. However, *Plaintiff's subcontract with KIM did not comply with this required*

provision of sub-contractors. Plaintiff, in violation of the contract provision, signed the KIM sub-contract that only permitted an assignment upon a *termination for convenience.* Plaintiff never notified the Defendant of this failure to comply with the Contract terms.

137. Defendant took possession of padlocked storage containers that were being used by Plaintiff and its subcontractor KIM. The storage containers, which were leased, contained tools and materials. Defendant then notified Plaintiff and KIM that they were not permitted to come on Defendant's property and that Defendant took actual control, custody and possession of the storage containers pursuant to Plaintiff's interpretation of Contract § 14.2.2.1. APPENDIX C. On February 28, 2022, immediately before the commencement of trial, Defendant advised Plaintiff and KIM that it had removed the material that Defendant believed was Plaintiff's or KIM's and that the trailers for which rent has been paid since May 31, 2019 were available to collect.

Experts

138. Scott A. Beisler (Beisler), an expert in Construction Management, Construction Scheduling and Delay Analysis, was presented by Plaintiff to establish the cause of the delay for the failure of Plaintiff to timely perform under the Contract. Considering the duration of construction and a total of 137

RFIs and 25 Bulletins, Beisler opined that "it's certainly going to be problematic for the general contractor to finish on time." He noted problems with Defendant's repsonse to submittals for long lead items and slow responses to RFIs posed by Plaintiff. Beisler blamed the failure to timely install DOAS 6 & 7 on Defendant's blocking access to the site. Ultimately, Beisler gave an opinion as to whether or not Plaintiff had the ability to complete the project within the timeframe set forth in any of the schedules. He stated that "He [Plaintiff] couldn't do it until he had permission." Beisler implied that Defendant denied Plaintiff permission to perform the Contract in a timely manner.

139. Beisler's opinion was substantially undermined on cross-examination. His analysis was based upon the period commencing with the Letter of Intent (LOI) in February 2018 before the Contract was executed. Therefore, 30 of the RFIs and 11 of the Bulletins upon which he bases his opinion existed and were known to Plaintiff when it executed the Contract and agreed that the timeframe was reasonable. For long lead items, Beisler agreed that Plaintiff failed to provide a submittal schedule within two weeks of contract execution to inform Defendant when request for such items would be forthcoming.

140. The Contract provided that if the contractor failed to submit a submittal schedule, "the

contractor shall not be entitled to any increase in contract sum or extension of time based on the time required for review of submittals."[16] Beisler agreed that Plaintiff had not provided Coordination Drawings as required under the Contract. Beisler opined that if coordination drawings been prepared by Plaintiff "it likely would have been picked up" that Plaintiff's proposed substitution of DOAS 6 & 7 units did not fit in the space available. The lack of coordination drawing contributed to the delay. He noted that the plans for installation of DOAS 6 & 7 were changing throughout the construction period. Plaintiff's "Roof Curb & Cap Plan" necessary to install DOAS 6 & 7 was first submitted on March 20, 2019. The owner's approval of the contractor's plans is a necessary part of the construction process. Beisler failed to address that "permission" for access to execute the plan comes after there is approval of the plan.

141. Beisler admitted that his conclusion regarding slow response to RFIs presented by Plaintiff was erroneously based upon the "Closing Date" entered by Plaintiff in the RFI Log as opposed to the actual "Answer Date" noted in the log. There were instances where Plaintiff did not enter a "Closing Date" until two weeks to thirty-three days after the actual "Answer Date."

---

16. The Court can only speculate whether Plaintiff chose not to seek an extension of time based upon that provision.

142. Beisler was aware of the contractual requirement and the requests for Plaintiff to provide a CPM schedule that was not provided. He agreed that if there had been a CPM schedule "it could tell us if the delay was critical [to completion of project]." Therefore, Beisler failed to identify (1) any specific work activity that allegedly caused critical delay, (2) the work activities that were critical, and (3) specific critical path impacts. He explained, "[W]hat 1 like to do in delay analysis is then show what impacts or events *could have caused* that as plan to grow from 78 to 90 days." Beisler admitted that he would need to look at a CPM schedule in order to truly know if something impacted the work. Beisler attempted to explain Plaintiff's failure by stating that Plaintiff wanted to do a CPM schedule, but that Waechter did not allow one. This assertion is contradicted by both cure notices requesting a CPM schedule, and by schedule requests in the meeting minutes. In further testimony, when asked why Plaintiff failed to provide a CPM schedule, Beisler stated that "No one was screaming for it."

143. Wayne DeFlaminis ("DeFlaminis"), an expert in construction project scheduling, construction project management and construction project controls, was presented by Defendant to (1) review Plaintiff's contemporaneous project schedules and formulate opinions of whether Plaintiff prepared its schedules and maintained its schedule in conformance with contractual

requirements; (2) analyze available project records and quantify the critical delays that occurred on the project; and (3) determine if Plaintiff, the architect, or Defendant or other parties may have caused significant delays to the project. He had previously visited the Project in October of 2018.

144. DeFlaminis noted that in this Contract "Time was of the essence." The expert outlined in detail Plaintiff's poor schedule quality, poor record keeping and poor schedule management performance. He stated that Plaintiff did not provide a submittal schedule, and failed to update the Project schedule, both Contract requirements. He also explained that Plaintiff had multiple deficiencies in its baseline schedule, which did not comport with Contract requirements. Among other things, the baseline schedule did not encompass the entire scope of work (i.e. activities for DOAS 1-5 were not included), included "hanging" activities not linked to anything (which, when delayed, will not reflect any impact), was not updated with start/finish dates, and did not reflect "float" (defined by the Contract as the delay in completion of certain task that should not affect project completion date). The Contract provided that the float "shall accrue to Holton-Arms School" meaning that the contractor cannot get a benefit from the delay and must recover the time from the delay to complete the project on schedule. DeFlaminis

cited an internal email from Plaintiff's Smith to Cahoon acknowledging that Plaintiff had a hole in its claim against Defendant as "We have them [holes] like lack of schedule."

145. DeFlaminis testified that Defendant and Waechter requested updated CPM schedules and failed to receive them. He noted that KIM maintained a separate schedule that "was divorced from the project schedule" so there was a lack of coordination between Plaintiff and its main sub-contractor.

146. Defendant's expert testified that Plaintiff's daily reports were deficient in failing to indicate the work performed each day and that more than fifty were missing, which was inconsistent with the standard expected of a reasonable general contractor. He compiled a database with all the information from the daily reports to try and "recreate the project from scratch and determine where it was that Plaintiff was working on each day, and actually compare that all the way back to the baseline schedule; and try and ascertain what the project's critical path was and what the delays that were, the critical delays that were encountered on the project."

147. DeFlaminis explained that he undertook to do a "very detailed analysis down to the daily level" to objectively identify and quantify the project's delays. He performed an "as-planned"

versus "as-built" delay analysis and a causation analysis, documenting pervasive deviations from the baseline schedule in tasks required for the project.

148. Defendant's expert opined that Plaintiff was responsible for all of the Project delays. The expert explained the delays resulted from, *inter alia,* Plaintiff's lack of a detailed and updated project schedule, poor project reporting and record keeping, lack of manpower, failure of sub-contractors such as Nova Electric, numerous punch list and rework issues, and poor staffing management. He further explained that the bulletins did not delay the Project and that nine were issued prior to the baseline schedule submitted by Plaintiff. Moreover, Plaintiff did not provide the requisite notice of delay under Section 15.1.2 of the Contract. APPENDIX C.

149. DeFlaminis testified that he had reviewed Beisler's report and disagreed with Beisler's contention that Plaintiff accelerated the progress of the work at the request of Waechter in the summer of 2018. He opined that Waechter telling Plaintiff to "do what it takes to open the school on time" was consistent with the baseline schedule submitted by Plaintiff. If Plaintiff believed it needed more time, it could have submitted a change order or in a less formal way, sent an email reserving its rights to claim additional time at a later point.

150. Contrary to Plaintiff's assertion, DeFlaminis opined that the circumstances did not demonstrate "constructive acceleration" in this project. He stated that in forensic schedule analysis, there are criteria to be met to find "constructive acceleration": 1) An excusable delay existed; 2) There was timely and proper notice of a request for an extension of time given; 3) The time extension request was improperly denied or refused; and 4) The contractor actually increased its efforts to accelerate the work." He noted that Plaintiff never requested an extension of time. DeFlaminis added that the poor record keeping by Plaintiff failed to adequately prove increased effort to accelerate the work.

151. On cross examination, DeFlaminis acknowledged that Plaintiff's Pay Applications 1-9 were paid by Defendant even though an updated CPM schedule with the application was not provided. However, he testified that submission of a CPM schedule is not required for payment to be made. He agreed that a revised baseline schedule was provided by Plaintiff in October of 2018 but that such a *schedule made after work allegedly performed* is subject to manipulation and may not accurately portray project circumstances.

152. Larry Smith (Expert Smith), an expert in construction, construction bidding, construction cost management and construction cost estimating, was presented by Defendant to opine

on Plaintiff's multiple breaches of the Contract and the amount of damages to Defendant resulting therefrom. Also, Expert Smith was asked to review Plaintiff's claim for damages contained in Payment Application 10.

153. Expert Smith opined that the quality of the drawings and specifications prepared by Defendant's Design Team for the project was "reasonable for identifying the scope of work as well as for identifying the risks that the contractor would be assuming as a result of tendering an offer for the work." He explained that both the drawings and specifications were "very specific in pointing out areas that the contractor would be responsible to evaluate and, ultimately, be responsible to deal with, either through designated engineering or through substitution or otherwise anticipate." Plaintiff did not provide persuasive testimony and/or evidence to the contrary. Instead, Plaintiff relies on the number of RFIs and Bulletins issued throughout construction to argue that the drawings were flawed when first issued.

154. Expert Smith reviewed the contract for this project and concluded that Plaintiff failed to perform by breaching the contract by, for instance, failing to achieve Contract milestones, failing to provide a submittal schedule, failing to provide and manage a CPM Schedule, delivering non-conforming (and defective) work, failing to

protect adjacent work and activities, and failing to coordinate the impact of its changes to the work.

155. Defendant's expert stated that the project had not achieved Substantial Completion as defined by the Contract at the time of termination. At the time of termination, many systems in the school were inoperable including the lighting control system and the HVAC system. Also, finishes throughout the building such as signage (including classroom identification signage) were not complete and operating instructions for systems were not provided to the owner.

156. Defendant's expert found that at the time of termination, there remained a multitude of "defects and deficiencies." The new electrical system did not comply with the Contract. Non-conforming and non-approved GE components were installed by NOVA, a sub-contractor for Plaintiff that was terminated for cause in September 2018. Plaintiff failed to replace the panels despite continuing problems with circuit breakers and numerous requests from Defendant. Expert Smith noted that the DOAS units in the Lower School do not start up properly and when they start up, they go into alarm mode and shut down within hours or a few days. He added that the lighting controls for the Lower School were not working properly and Plaintiff did not provide training for the system as required to achieve Substantial Completion.

157. As early as September 2018, the Bamboo flooring installed by Plaintiff had been buckling or cupping throughout the building and needed to be replaced. Plaintiff had arranged for the manufacturer to cover parts and labor to replace the flooring under its warranty, but Plaintiff never replaced it. Stephen Smith noted Plaintiff's part in delaying replacement in an internal email where he stated "We [Plaintiff] have held them [Defendant] off successfully from demanding it [flooring] be corrected during winter break." Stephen Smith noted that "Spring Break will be upon us 21 March and the floor must be corrected at that time." Although Defendant had paid the costs for the Bamboo Flooring materials (less retainage) to Plaintiff, Capital City, the manufacturer of the flooring, had not been paid in full by Plaintiff. Therefore, no repairs were performed. At the time of termination, the flooring was not replaced.

158. Expert Smith observed that Plaintiff had failed to plan for electrical power wiring for the newly installed HVAC Chiller and Cooling Tower. Plaintiff left in place non-compliant temporary wiring to allow the HVAC to operate and it left the wiring incomplete and defective.

159. Expert Smith found that Plaintiff had failed to coordinate the work from its multiple suppliers and sub-contractors by providing coordination drawings for submittal to the Architect per

the Contract. He notes that such coordination drawings are a "prerequisite" to the proper coordination and integration of project work by the contractor. Plaintiff was required to coordinate the new HVAC equipment with existing conditions, structural supports and access requirements. As noted earlier, Plaintiff's expert testified that the failure to provide coordination drawings impacted the installation of DOAS Unites 6 & 7.

160. With respect to Plaintiff's claim of delays caused by Defendant's failure to respond to RFIs, Expert Smith found that 70% (94 of 135) of the RFIs were formally responded to within the allotted time frame by the design team. He noted that most of the RFIs submitted were for purposes of documenting field coordination, clarifications, or variances approved as the work progressed. The expert found no direct link between the responses and specific delay of work, such that there was no basis to claim delay as a result thereof.

Plaintiff's Claim for Damages

Breach of Contract

161. Plaintiff presented Barry Saffer (Saffer) who is employed by the Lawrence Group and performs "outsourced" Chief Financial Officer (CFO) work. *He was not presented as an expert witness.* He has provided accounting services for Plaintiff and assisted in the preparation of the applications for

payment. He is not involved in the management of the project. He has taken the numbers given to him by the Plaintiff's project management team and prepared an analysis to determine Plaintiff's claim for damages.

162. Saffer testified that the damages claimed, that is, the money owed by Defendant to Plaintiff, is $2,046,392. He acknowledges that Payment Applications 1 through 9 were processed and paid. He agrees that the total already paid to Plaintiff by Defendant is $5,884,259. He stated that Payment Application 10 is being disputed. Saffer agreed that Payment Application 10 is the first time in the Holton-Arms School Project that a payment application contained disputed change orders, betterments and unfunded change orders. He has no knowledge of whether these change orders are matters within the base contract or if sufficient documentation was submitted with the change orders. He has no personal knowledge that the work for which money is claimed was actually performed and completed.

163. Plaintiff's claim for damages includes the sum of $228,700 for work allegedly preformed during the month of April 2019. Plaintiff offered no evidence to demonstrate that $228,700 in work was actually completed during April 2019. Plaintiff's manpower report reflected minimal work for the month of April, during which school was in session. There was no persuasive

evidence to demonstrate that $228,700 in work was completed during April 2019. There are unexplained discrepancies between the amounts claimed for this work as well as the nature of the work performed.

164. Plaintiff's claim for damages includes $648,635 in retainage. The Contract gives the Defendant the right to withhold retainage of "ten percent (10%) of the Contract Sum as is necessary to protect [the School] against claims or if the Work is unsatisfactory or not progressing properly." APPENDIX B § 5.1.8.

Conversion

165. Defendant took possession of padlocked storage containers that were being used by Plaintiff and its subcontractor KIM. The storage containers, which were leased by Plaintiff, contained tools and materials. Defendant notified Plaintiff and KIM that they were not permitted to come on Defendant's property. Defendant took actual control, custody and possession of the storage containers pursuant to their interpretation of Contract § 14.2.2.1. APPENDIX C. On February 28, 2022, immediately before the commencement of trial, Defendant advised Plaintiff and KIM that it had removed the material that Defendant believed was Plaintiff's or KIM's and that the trailers were available to collect.

166. Plaintiff was not the owner of the storage containers and was paying monthly rental fees to Mobile Mini Solutions. As the result of not being able to access and return the storage containers, Plaintiff presented invoices from the rental company totaling $9,800.23 from May 10, 2019 through January 24, 2022. With an adjustment for the time prior to termination, plaintiff incurred costs in the amount of $9,550.69 ($9,800.23-[115.98 + 133.56] = $9,550.69).

Defendant's Claim for Damages

167. Expert Smith testified that Defendant suffered damages in the amount of $2,579,366 plus interest as the result of Plaintiff's breach of contract.

168. As part of Expert Smith's analysis, he sought to determine the "project status at time of termination." There were ten payment applications made by Plaintiff to Defendant. Payment was made by Defendant on Payment Applications 1-9; Payment Application 9 noted that Plaintiff's percentage of completion was 89.18%. However, Expert Smith testified that the percentage of project completion had to be reduced based upon deficiencies in the work performed by Plaintiff that needed repair or completion.

169. Based on information provided by Defendant's architect, engineers, and other employees such as

Director of Facilities Mike Joyce, Expert Smith determined the reasonable amount to correct or complete those deficiencies.

170. Expert Smith calculated that $380,000 was needed to correct the prior work, thus reducing the 89.18% project completion to 83.98% project completion at time of termination. The expert made one correction from his report in that the $70,000 estimated to correct sprinkler heads/ceiling tile detail should have been $26,000, thus reducing the estimated cost to correct prior work to $336,000. Even with this adjustment, the percentage completion rate is significantly below that percentage shown on Payment Application 9. *Expert Smith emphasized that the specific amounts used for this part of his analysis were not the basis of calculating the damages sought by Defendant.*

171. To determine "gross damages," Expert Smith added 1) the contractor cost to correct and complete the Plaintiff's Scope of Work based upon an RFP issued by Defendant's architect (detailing the work to be completed), 2) professional fees to administer the remaining scope of work, 3) the costs to Defendant for items that were not included in the scope of work for which the new contractor would be responsible, and 4) back charges (owner-incurred expenditures during the Contract due to the failure of Plaintiff to comply with the Contract). Added to the Defendant's

claim are Liquidated Damages pursuant to the Contract. The "net damages" claim was calculated after deducting from the "gross damages" any outstanding amounts payable to Plaintiff by Defendant for work performed.

172. After an RFP was prepared by CGS identifying all the work that was incomplete, contractors were invited to tender bids for the project. Expert Smith explained that Defendant obtained estimates from two potential replacement contractors, Coakley Williams and Donohoe, with appropriate adjustments made by CGS to account for "scope of work" differences. Expert Smith testified that these bids were the best indication of what the work would cost. He stated that "when two contractors, two reputable contractors tender a proposal for an RFP and guarantee to stand behind that proposal to enter into a contract to perform the work, 1 consider that to be a true and clear indication of what the present market value is for that scope of work." Donohoe offered the lowest responsive bid, which Expert Smith deemed reasonable and used in his analysis. When adjusted for scope differences, this bid amounted to $3,121,446. Smith then factored in an escalation adjustment[17], professional fees to

17. The escalation adjustment was made necessary for the bid amounts (and other items claimed as damages) as the contractor bids were tendered in May 2021 but the expert's report was not prepared until March 2022. According to the expert the reasonable escalation of costs was 5%.

specify and administer the remaining scope of work, and expenses reimbursable to CGS for a total cost of $3,383,008.

173. He then reviewed line items of costs that Plaintiff failed to complete or correct that had *not been included in Donohoe's proposal s*uch as fireproofing the spray foam attic insulation, replacing the Bamboo flooring, completing the signage, installing automatic controls, and coordinating fire suppression sprinkler heads with ceiling. Also, the expert included $10,000 for commissioning of the lighting control system to be done after the corrections have been completed.[18] The total amount for these items including Bulletin 26 "owner incurred costs" was $575,501.

174. Defendant's expert calculated liquidated damages per the Contract to be assessed against the Plaintiff. For the failure of Plaintiff to complete the Central Plant Mechanical Modernization and HVAC Systems replacement by the Contract Substantial Completion date of January 18, 2019, the parties agreed to liquidated damages in the amount of $5,000. For the failure of Plaintiff to complete the Lower School project by the Contract Substantial Completion date of August

18. Commissioning is the process of planning, documenting, scheduling, testing, adjusting, verifying, and training, to provide a facility that operates as a fully functional system per the Owner's Project Requirements.

24, 2018, the parties agreed to liquidated damages in the amount of $500 per day. From August 24, 2018 until the May 31, 2019 termination date is 280 days. (280 x $500 = $140,000). The total liquidated damages claim totals $145,000 ($5,000 + $140,000).

175. Expert Smith testified that the total "gross damages" to the Defendant (including liquidated damages) amounted to $4,103,509. See Attachment #1

176. Expert Smith reviewed Payment Application 10 wherein the Plaintiff claimed that the sum of $2,046,392 was due. This claim was based upon total contract value, if completed, in the amount of $8,718,733 and included submitted proposed change orders, betterment change orders and unfunded change orders.

177. After a thorough review of the proposed change orders, Expert Smith determined that most of the change orders were without merit as the work was within the base contract amount and should not be added to the Contract value. Expert Smith determined that of the $642,167 claimed by Plaintiff, there was merit to claims in the amount of $90,108. None of the proposed change orders were found to be without merit *solely on the basis of being untimely filed* under the Contract provisions governing time limits on submission of claims.

178. With respect to "betterments" claimed by Plaintiff, Expert Smith explained that "betterments" are a form of change order where the owner is asking for something more than what is in the contract or asking for something that is not funded. He stated "I don't think I have ever seen it [betterments] done in a construction contract per se where it is added as a betterment. If something is a betterment, it would be handled as a change order during construction." In denying the merit of all betterments submitted by Plaintiff, Mr. Smith noted that although there was a problem with timely notice or identification of costs, "In most instances, there was just a lack of clarification as to why they [betterments] would be considered in excess of the base contract [amount]. As I said, they just simply did not seem to have enough documentation or if you want to use the word proof that entitlement was appropriate to these [betterments]."

179. With respect to the claim for unfunded change orders, Expert Smith opined that "I could not find any of those, in my opinion, had enough supporting documentation for me to consider them valid or appropriate for an award." Therefore, he denied adding these claims to the Contract value amount.

180. After consideration of Plaintiff's claims in Pay Application 10, Expert Smith adjusted the full contract amount to $7,364,248. However, the

court found a mathematical error on his exhibit such that the correct amount after adjustments is $7,408,403.[19]

181. Defendant has paid previously the undisputed sum of $5,884,261 to the Plaintiff for work performed. Therefore, Expert Smith determined that the balance on the remaining-but unperformed-work and the retainage was $1,524,142.[20] ($7,408,403 - $5,884,261). Plaintiff is entitled to a credit against gross damages in that amount ($1,524,142) as that amount was not paid to Plaintiff as would have been required had the Contract been completed. See Attachment #2

182. Expert Smith subtracted this balance of $1,524,142 from the gross damages to Defendant of$4,103,509 leaving "net damages" to Defendant of$2,579,366.

19. Defendant's chart "HSU Scope of Work- Pay App # 10 Adjusted" correctly calculates the "Balance [to Plaintiff] on Remaining Work", $1,524,142, but when deducting the sum of $1,310,330 from the total value of the contract, $8,718,733, the chart shows $7,364,248 instead of the correct amount $7,408,403. Clearly a mathematical error.

20. This figure also accounts for a deduction of $90,108.55 for the few Proposed Change Orders Expert Smith deemed meritorious.

Appendix C

CONCLUSIONS OF LAW

The Contract is Valid and Enforceable

After the parties negotiated a Letter of Intent in February 2018, they negotiated the Contract terms, ultimately executing the Contract in June 2018. The Contract was executed by the parties at a time when Plaintiff and Defendant were aware of numerous changes that were made to the project as the result of multiple RFIs that were propounded and answered as well as bulletins issued by Defendant's Design Team. Plaintiff represented that it is an experienced contractor with an understanding of the specific timetables and challenges in school construction. Plaintiff understood that the Contract included within its terms multiple documents including Specifications, Plaintiff's Baseline Schedule, and Bid documents. Defendant was represented by counsel. The Contract is a valid and enforceable agreement.

The Anti-Waiver Provisions of the Contract were Not Modified Except for the Time Limitation for Filing of Claims/Change Orders by the Contractor

"Maryland follows the objective law of contract interpretation and construction." *Owens-Illinois, Inc. v. Cook,* 386 Md. 468, 496 (2005). The contract must be construed "as a whole, giving effect to every clause and phrase, so as not to omit an important part of the agreement." *Id.* at 497 (internal citation omitted). "Words are to be given their ordinary meaning." *Mascaro v. Snelling & Snelling of Balt., Inc.,* 250 Md. 215, 229

(1968). "[W]hen the language of the contract is plain and unambiguous there is no room for construction, and a court must presume that the parties meant what they expressed." *Gen. Motors Acceptance Corp. v. Daniels,* 303 Md. 254, 261 (1985); *Cnty. Comm'rs for Carroll Cnty. v. Forty W. Builders, Inc.,* 178 Md. App. 328,376 (2008) (explaining that, "[i]n Maryland, the primary source for determining the intention of the parties is the language of the contract itself").

The Contract contained multiple provisions addressing waiver to wit:

> **Article 7** ***Changes in the Work***
>
> **§ 7.1.2** A Change Order shall be based upon agreement among the Owner, Contractor, and Architect; a Construction Change Directive requires agreement by the Owner and Architect and may or may not be agreed to by the Contractor; an order for a minor change in the Work may be issued by the Architect alone. Except as permitted in Paragraph 7.3 and 9.7.2, a change in the Contract Sum or the Contract Time shall be accomplished only by Change Order. Accordingly, no course of conduct or dealings between the parties, nor express or implied acceptance of alterations or additions to the Work, and no claim that the Owner has been unjustly enriched by any alteration or addition to the Work, whether or not there is, in fact, any unjust enrichment, shall be the basis

of any claim to an increase in any amounts due under the Contract Documents or a change in any time period provided for in the Contract Documents.

§ 8.6.10 NO WAIVER. The failure of the either party to insist upon the strict performance of any provision of this Agreement, or the failure of either party to exercise any right, option or remedy hereby reserved, shall not be construed as a waiver in the future of any such provision, right, option or remedy or as a waiver of a subsequent breach thereof. The consent or approval by the Owner of any act by the Contractor requiring the Owner's consent or approval shall not be construed to waive or render unnecessary the requirement for the Owner's consent or approval of any subsequent similar act by the Contractor. The payment by the Owner of any amount due hereunder with the knowledge of a breach of any provision of this Agreement shall not be deemed a waiver of such breach. No provision of this Agreement shall be deemed to have been waived unless such waiver is in writing signed by the party to be charged.

Article 13 *Miscellaneous Provisions*

§ 13.4.2 No action or failure to act by the Owner, Architect or Contractor shall constitute a waiver of a right or duty afforded them under

> the Contract, nor shall such action or failure to act constitute approval of or acquiescence in a breach there under, except as may be specifically agreed in writing.
>
> **Article 15** ***Claims and Disputes***
>
> **§ 15.1.2** Claims by either the Owner or Contractor must be initiated by written notice to the other party and to the Initial Decision Maker with a copy sent to the Architect. Claims by Contractor must be initiated within 21 days after occurrence of the event giving rise to such Claim or within 21 days after the claimant first recognizes the condition giving rise to the Claim, whichever is later.

Parties may modify a contract by mutual consent, which can be shown by the parties' conduct. *DirecTV, Inc. v. Mattingly,* 376 Md. 302, 318 (2003). This is so notwithstanding a written agreement that any change to a contract must be in writing." *Taylor v. University Nat'l Bank,* 263 Md. 59, 63 (1971) (citations omitted). "The parties to a contract may agree to vary its terms and enter into a new contract embodying the changes agreed upon and a subsequent modification of a written contract may be established by a preponderance of the evidence." *Cole v. Wilbanks,* 226 Md. 34, 38 (1961); *Freeman v. Stanbern Canst. Co.,* 205 Md. 71, 79 (1954). "Assent to an offer to vary, modify or change a contract may be implied and found from circumstances and the conduct of the parties showing acquiescence or agreement." *Id. Accord Myers v.*

Kayhoe, 391 Md. 188, 205 (2006) (parties to a contract may waive the requirements of a contract by their conduct); *Pumphrey v. Pelton,* 250 Md. 662, 670 (1968) ("The conduct of parties to a contract may be evidence of a subsequent modification of their contract."). It has long been held under Maryland law that

> Attempts of parties to tie up by contract their freedom of dealing with each other are futile. The contract is a fact to be taken into account in interpreting the subsequent conduct of the plaintiff and the defendant, no doubt. But it cannot be assumed, as matter of law, that the contract governed all that was done until it was renounced in so many words, because the parties had a right to renounce it in any way and by any mode of expression they saw fit. They could substitute a new oral contract by conduct and intimation, as well as by express words.

Hoffman v. Glock, 20 Md.App. 284, 288-289 (1974) (quoting *Bartlett v. Stanchfield,* 148 Mass. 394, 19 N. E. 549 (1889)). Whether subsequent conduct of the parties amounts to a modification or waiver of their contract is generally a question of fact to be decided by the trier of fact. *Id.* at 289.

Plaintiff contends that the failure by Defendant to insist on the requirements of the Contract despite Plaintiff's own representations that they would comply therewith amounts to abdication of Defendant's rights under the Contract and a wholesale modification of the Contract such that Plaintiff is relieved of strict compliance

with the contractual terms. Plaintiff takes this position even when Defendant clearly asserted its rights under the Contract for the Plaintiff to perform by demanding production of a CPM schedule, timely completion of performance, and production of documentation with change orders and substitutions. To prevail on Plaintiff's modification/waiver claim, Plaintiff must prove by a preponderance of the evidence that the Defendant had the specific intent to modify the anti-waiver provisions of the Contract and waive strict compliance under the Contract by the Plaintiff. The Court finds that the Plaintiff has failed to establish such a broad modification of the Contract. However, the Court finds that the 21-day time requirement of the contractual provision governing submission of change orders/claims was modified by the statements and conduct of the parties.

During the summer of 2018, pressure mounted for the school to be reopened per the Contract timetable. Defendant's agent, Bob Waechter, made it clear to Plaintiff that the change orders for the work to be performed to get the school open could be submitted after the work was done and thus not within the 21-day requirement for claims/change orders. After the school opened and continuing over 9 payment applications, Defendant never denied a claim for a 21-day violation. Although it has been asserted that Bob Waechter had no authority to remove the time requirement, the Defendant ratified the representation of its agent by its subsequent conduct and adoption of the change. The timeliness violation was not raised by Defendant until disagreements arose for the remaining proposed change orders that were included

in Payment Application 10 after Defendant's termination of Plaintiff. This conclusion does not benefit Plaintiff in this action as Defendant's calculation of money owed to Plaintiff for all change orders and betterments does not deny claims *solely for a timeliness violation.* Defendant's denial of Plaintiff's claims was based on Plaintiff's failure to submit sufficient documentation to show that the work was outside of the base amount of the Contract and to prove the claimed cost for that work.

Plaintiff asserts that strict compliance with the Contract was not required by Plaintiff based upon the failure of Defendant to strictly comply with the Contract. Plaintiff argues that Defendant "repeatedly and unjustifiably denied Plaintiff the ability to install [DOAS 6 & 7]." The Court does not agree. The Court finds that Plaintiff failed to prove by a preponderance of evidence that Defendant obstructed and unjustifiably prevented the installation of the DOAS Units. Defendant's architects and engineers reviewed the multiple plans submitted by Plaintiff and found deficiencies or lack of follow up such as lack of coordination and failure to verify field conditions. There was insufficient evidence presented to challenge the decisions of the architects and engineers. Failure to afford access for installation due to inadequate planning or unapproved plans does not equal unjustified obstruction. Moreover, if Defendant failed to strictly comply with the Contract thus delaying completion of the project, Plaintiff had recourse under the Contract to request extensions for time to perform. It did not do so.

Appendix C

Breach of Contract Claims

"To prevail in an action for breach of contract, a plaintiff must prove that the defendant owed the plaintiff a contractual obligation and that the defendant breached that obligation." *Taylor v. NationsBank, NA.,* 365 Md. 166, 175 (2001); *Kunda v. Morse,* 229 Md. App. 295, 304 (2016) (explaining that "a breach of contract is defined as a failure, without legal excuse, to perform any promise that forms the whole or part of a contract") (internal quotation marks and citation omitted). A material breach is one that renders further performance "different in substance from that which was contracted for." *Barufaldi v. Ocean City, Chamber of Com., Inc.,* 196 Md. App. 1, 23 (2010), *aff'd,* 434 Md. 381 (2013) (citation omitted). The Court may, as the trier of fact, evaluate the excuses offered by the breaching party for these failures and in so doing, the Court may find the excuses lacking. *See Blumenthal Kahn Elec. Ltd. P 'ship v. Bethlehem Steel Corp.,* 120 Md. App. 630, 639--40 (1998) (explaining that "[a]s a fact-finder, the court was free to accept or reject evidence, based upon its own determinations of credibility of the witnesses" and finding that the "exculpatory explanations for the [defective work] were not supported by the evidence" and that the subcontractor had "violat[ed] . . . the contract specifications").

Defendant has established, by a preponderance of the evidence, that Plaintiff committed multiple material and substantial breaches of the Contract. The evidence of Plaintiff's substantial and material breaches of Contract, which gave Defendant sufficient justification to terminate the Contract for cause, include, among others:

a. the failure to provide and use the CPM schedule required by the Contract; Defendant also did not waive the requirement that Plaintiff maintain a CPM schedule by making payments to Plaintiff. Plaintiff did not offer any evidence to demonstrate that Defendant agreed to forego a CPM schedule, a point which is also rebutted by both cure notices requesting a CPM schedule. As discussed supra., the CPM schedule that Plaintiff represented it would provide in its Bid Proposal, but never did, is an essential tool for construction management, supervision and coordination.

b. the failure to provide the coordination drawings required by the Contract;

c. the failure to correct defective work, such as the bamboo floor;

d. the failure to correct non-conforming work, such as the GE panels, which were discontinued and for which parts are difficult to locate;

e. the failure to have the lighting control system operational as designed;

f. the failure to coordinate the work of subcontractors, leading to delays in the work;

g. the failure to coordinate the changes required by the products substituted for those that were the basis of design, such as the Daikin DOAS units and the Daikin fan coil units;

h. the failure to provide sufficient manpower to complete the Project in accordance with the schedule; and

i. the failure to achieve Substantial Completion as defined in the Contract for both the Lower School Renovation and the Middle and Upper School, Central Plant & HVAC Replacement, and the failure to achieve Substantial Completion for the totality of the Project. Plaintiff's failure to timely achieve Substantial Completion disrupted the start of the school year. The Contract stated that the work would not be considered suitable for Substantial Completion review until "all Project systems included in area of the Work are operational as designed and scheduled." APPENDIX C § 9.8.1.1. The lighting control system is still not operational as designed. Further, Defendant's personnel were not instructed on operating the system and the final finishes specified in the Contract documents were not in place. There is a substantial amount of work on the Project still outstanding.

Plaintiff completely ignored the Substantial Completion provisions of the Contract. The evidence established Plaintiff's failure to achieve Substantial Completion. Plaintiff never submitted a request to the architect for certification of Substantial Completion. It is a reasonable inference therefrom that Plaintiff was aware that it had not achieved Substantial Completion.

Appendix C

Defendant's decision not to terminate Plaintiff after the First Notice to Cure, which notice was not required in the first instance, did not constitute a waiver of its right to enforce any of the provisions in the Contract. *See* APPENDIX B § 8.6.1.0; APPENDIX C § 13.4.2; *Cambridge Techs., Inc. v. Argyle Indus., Inc.*, 146 Md. App. 415, 433 (2002) (citation omitted) ("A party's reluctance to terminate a contract upon a breach and its attempts to encourage the breaching party to adhere to its obligation under the contract should not ordinarily lead to a waiver of the innocent party's rights.").

Similarly, Defendant's payment of Payment Application 9 did not constitute an acknowledgment that the work was performed in accordance with the Contract. Language on the payment certification plainly stated that payment was made without prejudice to any rights of Defendant under the Contract. This language was intended to protect the Defendant from such an admission.

Defendant terminated Plaintiff for cause only after making multiple good faith efforts to work with them. Defendant justifiably lost confidence in Plaintiff after it failed to respond adequately to Defendant's two requests in the Second Notice to Cure: (1) to provide a CPM schedule for the summer work and (2) to address the defective electrical work immediately. Neither of these occurred.

Prior to terminating Plaintiff, Defendant made total payments in the amount of $5,884, 261 including full payments on Payment Applications 1-9 and all approved change orders.

Plaintiff has not proved by a preponderance of evidence that Defendant has materially breached the Contract. Plaintiff claims that the Defendant's delay in acquiring permits, its multiple changes to design, its defective drawings, and unforeseen conditions constitute a material breach. Plaintiff asserts that the Defendant's termination of Plaintiff was without justification and in bad faith. However, the building permit for the lower school was obtained prior to the execution of the Contract. The parties agreed that due to the delay in getting the canopy permit, that part of the project would be delayed. As with construction projects generally, the Project saw changes to the drawings and design, unforeseen conditions, and even defective drawings that may have caused delay. These do not constitute material breaches of a contract. The Contract contemplates delays and extra costs to the contractor. It provides for submission of a change order to address extra costs and move timelines (even to move the Substantial Completion date). If a change order to extend time is denied wrongfully, unreasonably, without justification, or in bad faith, the Court could find a material breach by the owner. However, Plaintiff was operating as if there was no need for strict compliance with the Contract and never submitted a change order to extend time. Plaintiff's failure to act in accordance with the Contract created its own inability to complete performance in a timely manner.

The Court has determined that the Defendant had ample justification for issuing the Notice for Termination for Cause. Defendant has shown by the preponderance of the evidence that Plaintiff repeatedly refused to supply

enough skilled workers and proper materials, performed work non-conforming to the Contract specifications, failed to achieve Substantial Completion by the dates agreed in the Contract, failed to correct defective work, and failed to preform coordination of trades and submit coordination drawings per the Contract.

Plaintiff failed to establish a breach by Defendant, and is not entitled to damages, given that the Contract was properly terminated for cause. Per the Contract, upon a termination for cause, Plaintiff is not entitled to receive further payment until the work is finished. APPENDIX C § 14.2.3. If the costs and damages incurred by Defendant exceed the unpaid balance, Plaintiff must pay the difference to Defendant. APPENDIX C § 14.2.4.

Defendant Committed Conversion of the Plaintiff's Rental Containers

Conversion is an intentional tort consisting of two elements (a physical act combined with a certain state of mind) and defined as any distinct act of ownership or dominion exerted by one person over the personal property of another in denial of his right or inconsistent with it. *Lasater v. Guttmann,* 194 Md. App. 431, 446–47 (2010). Once Defendant terminated the Contract for cause, Defendant was authorized to "take possession of all materials, equipment, tools, and construction equipment and machinery thereon *owned by the Contractor.*" APPENDIX C § 14.2.2.1. However, Plaintiff was not the owner of the storage containers and was paying monthly rental fees to Mobile Mini Solutions. Defendant had no

authority to deny Plaintiff recovery of those containers. The fair market value of the right to use the containers is proven by the submitted invoice of fees for their rental. The adjusted cost for the rental of the units during the conversion period is $9,550.69.

CONCLUSION

Based upon the above facts and conclusions of law, it is this 6th day October 2022, by the Circuit Court for Montgomery County, hereby

ORDERED, that judgment is entered in favor of the Defendant and against the Plaintiff for Defendant's breach of contract claim in the amount of $2,579,366, plus interest from the date of judgment; and it is further;

ORDERED, that judgment is entered in favor of the Defendant and against the Plaintiff for Plaintiff's breach of contract claim against the Defendant; and it is further

ORDERED, that judgment is entered in favor of the Plaintiff and against the Defendant for Plaintiff's conversion claim against the Defendant in the amount of $9,550, plus interest from the date of judgment.

/s/_____
STEVEN G. SALANT, JUDGE
Montgomery County Circuit Court