No. 24-

IN THE

Supreme Court of the United States

COVENANT CONSTRUCTION SERVICES, LLC AND NORTH AMERICAN SPECIALTY INSURANCE CO.,

Petitioners,

v.

FIVE RIVERS CARPENTERS DISTRICT COUNCIL HEALTH AND WELFARE FUND, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does the Miller Act modify the contractual exception to the American Rule governing attorney fees to allow their recovery against a contractor who is not a party to the contract containing the attorney-fee provision?

2. If a Miller Act claimant provides untimely written notice under 40 U.S.C. Section 3133(b)(2), can it avoid dismissal of its claim by assigning it to an assignee who aggregates it with other assigned Miller Act claims from other claimants who provided timely notice? Put another way, does the Miller Act allow an assignee of Miller Act claims to have greater claim rights than the assignors through a claim-aggregation theory?

LIST OF PARTIES TO THE PROCEEDING

1. Five Rivers Carpenters District Council Health and Welfare Fund. Respondent/Plaintiff.

2. Royce Peterson, Trustee. Respondent/Plaintiff.

3. Mike Novy, Trustee. Respondent/Plaintiff.

4. Five Rivers Carpenters District Council Educational Trust Fund. Respondent/Plaintiff.

5. David Unzeitig, Trustee. Respondent/Plaintiff.

6. Robert Doubek, Trustee. Respondent/Plaintiff.

7. Covenant Construction Services, LLC. Petitioner/Defendant.

8. North American Specialty Insurance Company. Petitioner/Defendant.

CORPORATE DISCLOSURE STATEMENT

Covenant Construction Services, LLC

1. The two members of Covenant Construction Services, LLC, which are artificial entities, are:

    a. Garner Enterprises, Inc.; and

    b. Divergent Resources, Inc.

North American Specialty Insurance Co.

1. North American Specialty Insurance Company, a Missouri corporation, is 100% owned by SR Corporate Solutions America Holding Corporation.

2. SR Corporate Solutions America Holding Corporation, a Delaware corporation, is 100% owned by Swiss Re Corporate Solutions Holding Company Ltd.

3. Swiss Re Corporate Solutions Holding Company Ltd, a Swiss company, is 100% owned by Swiss Reinsurance Company Ltd.

4. Swiss Reinsurance Company Ltd, a Swiss company, is wholly owned by Swiss Re Ltd., a publicly traded Swiss company listed in accordance with the International Reporting Standard on the SIX Swiss Exchange. No publicly traded company owns 10% or more of the stock of Swiss Re Ltd.

LIST OF ALL PROCEEDINGS IN STATE AND FEDERAL COURTS

Federal Trial Courts

1. United States District Court for the Northern District of Iowa

    a. Docket Number: C22-25-LTS-KEM

    b. Caption: Five Rivers Carpenters District Council Health and Welfare Fund; Royce Peterson, Trustee; Mike Novy, Trustee; Five Rivers Carpenters District Council Educational Trust Fund; David Unzeitig, Trustee; and Robert Doubek, Trustee v. Covenant Construction Services, LLC; and North American Specialty Insurance Company.

    c. Judgment Date: Order granting Defendants' Motion to Transfer Venue, filed on June 7, 2022.

2. United States District Court for the Southern District of Iowa

    a. Docket Number: 3:22-cv-00036-RGE-HCA

    b. Caption: Five Rivers Carpenters District Council Health and Welfare Fund; Royce Peterson, Trustee; Mike Novy, Trustee; Five Rivers Carpenters District Council Educational Trust Fund; David Unzeitig, Trustee; and Robert Doubek, Trustee v.

Covenant Construction Services, LLC; and North American Specialty Insurance Company.

c. Judgment Date:

i. Order Re: Cross-Motions for Summary Judgment, filed on August 24, 2023.

ii. Judgment in a Civil Case, filed on August 31, 2023.

3. United States District Court for the Southern District of Iowa

a. Docket Number: 3:22-cv-00036-RGE-HCA

b. Caption: Five Rivers Carpenters District Council Health and Welfare Fund; Royce Peterson, Trustee; Mike Novy, Trustee; Five Rivers Carpenters District Council Educational Trust Fund; David Unzeitig, Trustee; and Robert Doubek, Trustee v. Covenant Construction Services, LLC; and North American Specialty Insurance Company.

c. Judgment Date:

i. Order Denying Defendants' Motion to Deposit Check in Satisfaction of Judgment, filed on November 18, 2024.

ii. Order Regarding Defendants' Motion to Reconsider November 18, 2024, Order,

and Alternative Supplemental Motion for Relief from Judgment, filed on December 13, 2024.

iii. Partial Satisfaction of Judgment, filed on December 16, 2024.

Federal Appellate Courts

4. United States Court of Appeals for the Eighth Circuit

   a. Docket Number: 23-3183

   b. Caption: Five Rivers Carpenters District Council Health and Welfare Fund; Royce Peterson, Trustee; Mike Novy, Trustee; Five Rivers Carpenters District Council Educational Trust Fund; David Unzeitig, Trustee; and Robert Doubek, Trustee v. Covenant Construction Services, LLC; and North American Specialty Insurance Company.

   c. Judgment Date:

      i. Opinion, filed on August 20, 2024.

      ii. Judgment, filed on August 20, 2024.

      iii. Order Denying Petition for Rehearing by Panel and En Banc, filed on September 24, 2024.

      iv. Mandate, filed on October 1, 2024.

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Federal Trial Courts

1. United States District Court for the Northern District of Iowa

    a. Order granting Defendants' Motion to Transfer Venue, 2022 WL 21304888 (N.D. Iowa June 7, 2022)

2. United States District Court for the Southern District of Iowa

    a. Order Re: Cross-Motions for Summary Judgment, 2023 WL 6370779 (S.D. Iowa Aug. 24, 2023)

Federal Appellate Courts

3. United States Court of Appeals for the Eighth Circuit

    a. Opinion, 114 F.4th 957 (8th Cir. 2024), and 2024 WL 3869512 (8th Cir. Aug. 20, 2024)

    b. Order Denying Petition for Rehearing by Panel and En Banc, 2024 WL 4271482 (8th Cir. Sept. 24, 2024)

STATEMENT OF THE BASIS OF JURISDICTION

1. The United States Court of Appeals for the Eighth Circuit filed its Opinion and Judgment on August 20, 2024.

2. The United States Court of Appeals for the Eighth Circuit filed its Order Denying Petition for Rehearing by Panel and En Banc on September 24, 2024, and filed its Mandate on October 1, 2024.

3. Respondents' claim is brought under the Miller Act, 40 U.S.C. Sections 3131-3134. The district court had federal-question subject-matter jurisdiction under 28 U.S.C. Section 1331 and the Miller Act, 40 U.S.C. Section 3133(b)(3)(B). The court of appeals had federal-question subject-matter jurisdiction under 28 U.S.C. Sections 1291, 1294(1), and 1331, and the Miller Act, 40 U.S.C. Section 3133(b)(3)(B).

4. The Supreme Court has jurisdiction to review on a writ of certiorari the Opinion and Judgment of the United States Court of Appeals for the Eighth Circuit under 28 U.S.C. Section 1254(1), Supreme Court Rule 12, and the Miller Act, 40 U.S.C. Section 3133(b)(3)(B). This Petition for Writ of Certiorari was timely filed within 90 days of the Eighth Circuit's September 24, 2024, Order Denying Petition for Rehearing by Panel and En Banc, per Supreme Court Rules 13.1 and 13.3.

STATUTES INVOLVED IN THE CASE

40 U.S.C. Section 3131(b)(2)

> **(b) Type of bonds required.**—Before any contract of more than $100,000[1] is awarded for the construction, alteration, or repair of any public building or public work of the Federal Government, a person must furnish to the Government the following bonds, which become binding when the contract is awarded:
>
> . . .
>
> **(2) Payment bond.**—A payment bond with a surety satisfactory to the officer for the protection of all persons supplying labor and material in carrying out the work provided for in the contract for the use of each person. The amount of the payment bond shall equal the total amount payable by the terms of the contract unless the officer awarding the contract determines, in a writing supported by specific findings, that a payment bond in that amount is impractical, in which case the contracting officer shall set the amount of the payment bond. The amount of the payment bond shall not be less than the amount of the performance bond.

1. This amount has been increased to $150,000.00 by 48 C.F.R. Section 28.102-1(a).

40 U.S.C. Section 3133(b)(1) & (2)

(b) Right to bring a civil action.—

(1) In general.—Every person that has furnished labor or material in carrying out work provided for in a contract for which a payment bond is furnished under section 3131 of this title and that has not been paid in full within 90 days after the day on which the person did or performed the last of the labor or furnished or supplied the material for which the claim is made may bring a civil action on the payment bond for the amount unpaid at the time the civil action is brought and may prosecute the action to final execution and judgment for the amount due.

(2) Person having direct contractual relationship with a subcontractor.—A person having a direct contractual relationship with a subcontractor but no contractual relationship, express or implied, with the contractor furnishing the payment bond may bring a civil action on the payment bond on giving written notice to the contractor within 90 days from the date on which the person did or performed the last of the labor or furnished or supplied the last of the material for which the claim is made. The action must state with substantial accuracy the amount claimed and the name of the party to whom

> the material was furnished or supplied or for whom the labor was done or performed. The notice shall be served—
>
> > **(A)** by any means that provides written, third-party verification of delivery to the contractor at any place the contractor maintains an office or conducts business or at the contractor's residence; or
> >
> > **(B)** in any manner in which the United States marshal of the district in which the public improvement is situated by law may serve summons.

STATEMENT OF THE CASE

Petitioner Covenant Construction Services, LLC was the prime contractor on the federal Correct Life Safety Deficiencies construction project owned by the U.S. Department of Veteran Affairs and located in Iowa City, Iowa ("Project"). Covenant furnished Payment and Performance Bonds for the Project through petitioner North American Specialty Insurance Co. ("NAS"), as required by the Miller Act. Calacci Construction Company, Inc. was one of Covenant's subcontractors on the Project. Calacci was a signatory to a Collective Bargaining Agreement ("CBA") with various unions, and those unions were accepted for participation with respondents Five Rivers Carpenters District Council Health and Welfare Fund, and Five Rivers Carpenters District Council Educational Trust Fund (collectively "Funds"). The CBA required Calacci to make contributions to the Funds based

on work performed by Calacci's union employees, and it allowed the Funds to recover from Calacci liquidated damages for late contribution payments and attorney fees incurred in collecting overdue contribution payments.

Calacci failed to make $125,739.95 in required contributions for work performed on the Project by twenty-one of Calacci's union employees. The union employees assigned their Miller Act claims to the Funds through the CBA. The Funds sued Covenant and NAS under the Miller Act for those unpaid contributions. Covenant was not a signatory to the CBA, and it had no direct contractual relationship with the Funds or any of Calacci's twenty-one individual union employees.

Because neither Calacci's union employees nor the Funds had a direct contractual relationship with Covenant, they were subject to the Miller Act's written notice requirement at 40 U.S.C. 3133(b)(2). The Act requires the written notice be delivered to a contractor no later than 90 days from the claimant's last date of work on the project. On September 16, 2021, the Funds delivered to Covenant the required written Miller Act notice. Of the twenty-one Calacci union employees whose work makes up the Funds' assigned claims, the written notice was untimely for eighteen of them (more than 90 days from those eighteen employees' last dates of work). The written notice was timely only for three of the employees (within 90 days from those three employees' last dates of work).

The Funds' claims are brought under the Miller Act, 40 U.S.C. Sections 3131-3134. The district court had federal-question subject-matter jurisdiction under 28 U.S.C. Section 1331 and the Miller Act, 40 U.S.C. Section

3133(b)(3)(B). The court of appeals had federal-question subject-matter jurisdiction under 28 U.S.C. Sections 1291, 1294(1), and 1331, and the Miller Act, 40 U.S.C. Section 3133(b)(3)(B). The district court filed its Order Re: Cross-Motions for Summary Judgment on August 24, 2023, and its Judgment in a Civil Case on August 31, 2023. Petitioners filed their Notice of Appeal with the district court on September 19, 2023, which is within the 30-day appeal period in Federal Rule of Appellate Procedure 4(a)(1)(A).

ARGUMENT

In the Miller Act's 89-year history, this Court has decided nine Miller Act cases. The last one was 46 years ago in 1978. *J.W. Bateson Co., Inc. v. U.S. ex rel. Bd. of Trustees of Nat'l Automatic Sprinkler Pension Fund*, 434 U.S. 586 (1978). The time is ripe for this Court to decide another Miller Act case, and this should be that case.

On the first question presented for review, there are two circuit splits. One split is between Miller Act and non-Miller Act cases. The other split (which also includes district courts) is within the Miller Act cases. The question is also an important one of federal law, specifically the scope of the contractual exception to the American Rule governing awards of attorney fees in the Miller Act context.

On the second question presented for review, the Eighth Circuit Court of Appeals' decision conflicts with the Miller Act assignment principles established by this Court in *U.S. of the Benefit and on Behalf of Sherman v.*

Carter, 353 U.S. 210, 217-220 (1957). It is also a decision on an important question of federal law, specifically the scope of federal-contractor liability for assigned Miller Act claims with untimely Miller Act notices.

First Question Presented for Review

The first question presented for review is whether the Miller Act modifies the contractual exception to the American Rule governing attorney fees to allow their recovery against a contractor who is not a party to the contract containing the attorney-fee provision. There is a circuit split between Miller Act and non-Miller Act cases on this issue.

Outside the Miller Act context, the federal courts are uniform in holding that, under the American Rule, a prevailing party can recover attorney fees from its opponent only if their contract contains a prevailing-party attorney-fee provision. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247-257 (1975); *McGuire v. Russell Miller, Inc.*, 1 F.3d 1306, 1312-1313 (2d Cir. 1993); *Ames v. Westinghouse Elec. Corp.*, 864 F.2d 289, 293 (3d Cir. 1988); *Parkway 1046, LLC v. U.S. Home Corp.*, 961 F.3d 301, 313 (4th Cir. 2020); *Meinek Discount Muffler v. Jaynes*, 999 F.2d 120, 126 n.12 (5th Cir. 1993); *Norfolk &Western Ry. Co. v. Greater Cleveland Regional Transit Auth.*, 1997 WL 599561, at *5-*6 (6th Cir. 1997); *Matter of Sheridan*, 105 F.3d 1164, 1166 (7th Cir. 1997); *Jet Midwest Int'l Co., Ltd. v. Jet Midwest Group, LLC*, 93 F.4th 408, 416-417 (8th Cir. 2024); *U.S. v. Real Prop. Located at 41741 Nat'l Trails Way, Daggett, Cal.*, 989 F.2d 1089, 1092 (9th Cir. 1993); *Bennett v. Coors Brewing Co.*, 189 F.3d 1221, 1238 (10th Cir. 1999); *Tang How v. Edward*

J. Gerrits, Inc., 961 F.2d 174, 179 (11th Cir. 1992); *Horn & Hardart Co. v. Nat'l Rail Passenger Corp.*, 843 F.2d 546, 548 (D.C. Cir. 1988).

In contrast, inside the Miller Act context, at least five circuit courts hold that the Miller Act modifies the American Rule to allow a claimant to recover attorney fees against a contractor even when the contractor is not a party to the contract containing the attorney-fee provision. *Five Rivers Carpenters Dist. Council Health & Welfare Fund v. Covenant Constr. Servs., LLC*, 114 F.4th 957, 963 (8th Cir. 2024) (case below); *U.S. ex rel. Maddux Supply Co. v. St. Paul Fire & Marine Ins. Co.*, 86 F.3d 332, 336 (4th Cir. 1996); *U.S. for Use and Benefit of Carter Equip. Co., Inc. v. H.R. Morgan, Inc.*, 554 F.2d 164, 166 (5th Cir. 1977); *Travelers Indem. Co. v. U.S. for Use and Benefit of Western Steel Co.*, 362 F.2d 896, 899 (9th Cir. 1966); *U.S. for Use and Benefit of Southeastern Municipal Supply Co., Inc. v. Nat'l Union Fire Ins. Co of Pittsburg*, 876 F.2d, 92, 93 (11th Cir. 1989) (per curiam),

In *F.D. Rich Co. Inc. v. U.S. for the Use of Indus. Lumber Co., Inc.*, this Court held that the Miller Act does not provide for the recovery of attorney fees, and that the American Rule governs their award under the Act. 417 U.S. at 130 ("Miller Act suits are plain and simple commercial litigation. In effect then, we are being asked to go the last mile in this case, to judicially obviate the American Rule in the context of everyday commercial litigation, where the policies which underlie the limited judicially created departures from the rule are inapplicable. This we are unprepared to do. The perspectives of the profession, the consumers of legal services, and other interested groups should be weighed in any decision to substantially

undercut the application of the American Rule in such litigation. Congress is aware of the issue. Thus whatever the merit of arguments for a further departure from the American Rule in Miller Act commercial litigation, those arguments are properly addressed to Congress.") (footnote omitted). Therefore, the *F.D. Rich* Court explained, attorney fees are unrecoverable under the Act unless, for example, there is an "enforceable contract." *Id.* at 126 ("The so-called 'American Rule' governing the award of attorneys' fees in litigation in the federal courts is that attorneys' fees 'are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor.'") (citations omitted).

According to the Eighth Circuit, the Miller Act version of the American Rule does not require the contractor to be a party to the "enforceable contract" before attorney fees may be awarded against it. So long as the Miller Act *claimant* is a party to an "enforceable contract," attorney fees may be awarded against the non-privity contractor. *Five Rivers*, 114 F.4th at 963 ("Here, Calacci is obligated to pay attorneys' fees and liquidated damages to the Funds under the terms of the CBA; and, by subcontracting with Calacci, Covenant is liable for the amount due under that obligation.").

The Eighth Circuit's decision is part of another divide between the lower federal courts, this one within the Miller Act context. *Compare Five Rivers*, 114 F.4th at 963 (decision below); *Maddux Supply*, 86 F.3d at 336; *Carter Equip.*, 554 F.2d at 166; *Western Steel*, 362 F.2d at 899; *Southeastern*, 876 F.2d at 93, *with U.S. for Use of C.J.C., Inc. v. Western States Mech. Contractors, Inc.*, 834 F.2d 1533, 1543, 1545, 1548 (10th Cir. 1987) (stating that a prevailing Miller Act claimant may not recover

attorney fees "[a]bsent a provision in the contract or payment bond awarding attorneys' fees"); *U.S. for Use of L.K.L. Associates v. Crockett & Wells Constr., Inc.*, 730 F. Supp. 1066, 1067-1068 (D. Utah 1990) (concluding that "LKL is not entitled to attorneys' fees under the Miller Act because the general contract between Crockett & Wells and Finnegan did not contain an express attorneys' fees provision on LKL's behalf," and stating, "This court interprets *C.J.C., Inc.* as holding that the attorneys' fees provision must be included in either the *general* contract or the payment bond."); *U.S. ex rel. Ragghianti Foundations III, LLC v. Peter R. Brown Constr., Inc.*, 49 F. Supp.3d 1031, 1054 (M.D. Fla. 2014) (denying subcontractor's request for attorney fees because there was no attorney fee provision "in the Subcontract or payment bond" providing for attorney fees, and citing to *Crockett & Wells* for support); *Transamerica Premier Ins. Co. v. Ober*, 894 F. Supp 471, 485 (D. Me. 1995) (same, stating that "[f]ederal courts after *F.D. Rich* permit recovery of attorneys' fees from a surety where the contract between the contractor and subcontractor expressly permits such recovery," and citing to *C.J.C., Inc.* and *Krupp I* for support).

This Miller Act attorney-fee issue has even created intra-circuit confusion. *See U.S. for Use and Benefit of Krupp Steel Products, Inc. v. Aetna Ins. Co.*, 831 F.2d 978, 983-984 (11th Cir. 1987) (*Krupp I*) (refusing to award attorney fees to Miller Act claimant because the contractor was not a party to the contract with the attorney-fee provision), *repudiated as dicta by* 923 F.2d 1521, 1527 (11th Cir. 1991) (*Krupp II*) *and by Southeastern*, 876 F.2d at 93. *Compare Five Rivers*, 114 F.4th at 963 (decision below), *with Owners Ins. Co. v. Fidelity & Deposit Co. of Md.*, 41 F.4th 956, 959 (8th Cir. 2022) ("Several Miller Act cases have presented issues like

the one presented here—whether the phrase 'justly due' includes things like costs and attorneys' fees. And in those cases, courts consistently held that, though the Miller Act did not explicitly provide for the recovery of attorneys' fees or interest, subcontractors were nonetheless entitled to those items *if the underlying contract between the subcontractor and the general contractor permitted their recovery*.") (emphasis added).

The American Rule is "the bedrock principle" and "'basic point of reference' when considering the award of attorney's fees." *Peter v. Nantkwest, Inc.*, 589 U.S. 23, 28 (2019). It has "'roots in our common law reaching back to at least the 18th century,'" and "'has been consistently followed for almost 200 years.'" *Id.* (citations omitted). The Court should hear this case and bring clarity and consistency to the application of this "bedrock principle" in the Miller Act context.

Second Question Presented for Review

The second question presented for review is, if a Miller Act claimant provides untimely written notice under 40 U.S.C. Section 3133(b)(2), can it avoid dismissal of its claim by assigning it to an assignee who aggregates it with other assigned Miller Act claims from other claimants who provided timely notice? Put another way, does the Miller Act allow an assignee of Miller Act claims to have greater claim rights than the assignors through a claim-aggregation theory?

In *U.S. of the Benefit and on Behalf of Sherman v. Carter*, 353 U.S. 210, 217-220 (1957), this Court approved of union-trust-fund assignees pursuing Miller Act claims on behalf of union-employee assignors because the funds

"stand in the shoes of the employees and are entitled to enforce their rights" to recover the "unpaid contributions [that are] . . . part of the compensation for the work to be done by [the] . . . employees." The *Carter* Court explained, "If the assignee of an employee can sue on the bond, the trustees of the employees' fund should be able to do so. Whether the trustees of the fund are, in a technical sense, assignees of the employees' rights to the contributions need not be decided. Suffice it to say that the trustees' relationship to the employees, as established by the master labor agreements and the trust agreement, is closely analogous to that of an assignment." *Id.* at 219-220. Here, the Funds are the assignees pursuing the assigned claims of Calacci's twenty-one union-employee assignors.

It is undisputed that the Miller Act written notice furnished by the Funds is timely for only three of the twenty-one employees. *Five Rivers*, 114 F.4th at 962 ("According to Defendants, however, the 90-day deadline for timely filing notice under § 3133(b)(2) is to be judged individually for each laborer. And, if that is correct, only three of the 21 Calacci union employees' last day of labor on the VA project falls within the 90-day window."). Yet the Eighth Circuit held that the employees' union status and assignment of their Miller Act claims to the Funds transformed all twenty-one individual claims into one "collective claim" so that the Miller Act notice "must be given within 90 days of the last day of the collective labor." *Id.* Because the notice was timely for three of the twenty-one employees, the untimely notice for the other eighteen became timely too. *Id.*

The Eighth Circuit's decision violates the Miller Act assignment principles established by the *Carter* Court.

The *Carter* Court permitted union trust funds (like the Funds) to pursue Miller Act claims on behalf of union employees under assignment-law principles. 353 U.S. at 217-220. One of those fundamental principles is that an assignee can have no greater rights than the assignor. *Carpenter v. Providence Wash. Ins. Co.*, 41 U.S. 495, 496 (1842) ("[T]he rights of the assignee under the policy cannot be more extensive than the right of the assignor."); *Scott v. Shreeve*, 25 U.S. 605, 608 (1827) ("The next inquiry is, whether Scott, the assignee of Janney, has acquired any greater right or interest in these bonds than Janney himself had. So far as relates to the question, whether the consideration had failed, the assignee stands precisely in the situation of the original party. He took the bonds subject to all existing equities. This is the settled rule in chancery. . . ."); *Nash Finch Co. v. Rubloff Hastings, LLC*, 341 F.3d 846, 850 (8th Cir. 2003) ("Nash's arguments follow basic assignment theory—that an assignee gets no greater rights than the assignor had."); *James Talcott, Inc. v. Associates Discount Corp.*, 302 F.2d 443, 447 (8th Cir. 1962) ("But 'a stream can rise no higher than its source. . . .'") (citation omitted); *see Withers v. Greene*, 50 U.S. 213, 220 (1850) ("[T]he assignee can sue in his own name. But in such suit, the defendant shall be allowed the benefit of all payments, discounts, and set-offs, made, had, or possessed against the same, previous to notice of the assignment."); Restatement (Second) of Contracts §340 cmt. a ("An assignment transfers to the assignee the same right held by the assignor, with its advantages and disadvantages. . . ."). The Eighth Circuit's decision directly conflicts with the *Carter* decision and the Miller Act assignment principles it established.

This issue is of substantial importance for contractors on federal construction projects. If a union subcontractor's work on a federal project spans several years, the Eighth Circuit's decision subjects the contractor to almost limitless Miller Act liability for all of the subcontractor's non-payment of employee trust-fund contributions, even for those employees who left the project years prior to the contractor receiving a Miller Act notice. According to the Eighth Circuit, so long as one of the subcontractor's employee's last date of work is within 90 days of the Miller Act notice, then the notice is timely for all of the subcontractor's employees who ever worked on the project, even those who have not stepped foot on the project in years.

It is true that the Miller Act "is highly remedial in nature" and "is entitled to a liberal construction and application in order properly to effectuate the Congressional intent to protect those whose labor and materials go into public projects." *Five Rivers*, 114 F.4th at 963 (citation omitted). But its remedial nature and liberal construction should not be extended so far to eviscerate the Miller Act notice requirement and the protection it provides to contractors. *See Pepper Burns Insulation, Inc. v. Artco Corp.*, 970 F.2d 1340, 1343-1344 (4th Cir. 1992) ("[T]he notice provisions of section 2(a) should be strictly enforced in to order to carry out the design of the statute, that is: 'to give contractors . . . ninety days after completion of their work within which to assert a claim against the general contractor and its surety. If it does not do so within that period, the contractor may make final payment to the subcontractor with impunity. It would be quite unfair to the general contractor to expose it to stale claims of which it had no notice during

the ninety day period.' Likewise, our ruling here provides contractors with a date certain after which they are no longer at risk of liability to second-tier subcontractors. Certainty facilitates payments to first-tier subcontractors and closure of the project finances. Any alternative ruling, it seems, could potentially extend liability for an indefinite period of time and thus defeat the purpose of the ninety-day requirement.") (citation omitted); *U.S. for Use of John D. Ahern Co., Inc. v. J.F. White Contracting Co.*, 649 F.2d 29, 31 (1st Cir. 1981) ("The purpose of the notice requirement is to establish a time after which the principal contractor can pay its subcontractor, certain that it will not be exposed subsequently to the claims of those who have supplied labor and materials to the subcontractor."); *U.S. for Use of Gen. Elec. Co. v. H.I. Lewis Constr. Co.*, 375 F.2d 194, 201 (2d Cir. 1967) ("[T]he proviso in the statute requiring that notice be given to the prime contractor within ninety days is for the benefit of the prime contractor and not for the benefit of the supplier."). This Court should hear this case and settle this important question of Miller Act assignment jurisprudence that has a substantial impact on federal contractors throughout the country.

CONCLUSION

For the reasons stated herein, the petition should be granted.

Respectfully submitted,

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APPENDIX

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT, FILED AUGUST 20, 2024

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 23-3183

FIVE RIVERS CARPENTERS DISTRICT COUNCIL HEALTH AND WELFARE FUND, AND ROYCE PETERSON AND MIKE NOVY AS TRUSTEES; FIVE RIVERS CARPENTERS DISTRICT COUNCIL EDUCATIONAL TRUST FUND, AND DAVID UNZEITIG AND ROBERT DOUBEK, TRUSTEES,

Plaintiffs-Appellees,

v.

COVENANT CONSTRUCTION SERVICES, LLC; NORTH AMERICAN SPECIALTY INSURANCE COMPANY,

Defendants–Appellants.

Appeal from United States District Court
for the Southern District of Iowa—Eastern.

Submitted: May 8, 2024
Filed: August 20, 2024

Appendix A

Before SMITH, KELLY, and KOBES, Circuit Judges.

KELLY, Circuit Judge.

Covenant Construction Services, LLC and its surety, North American Specialty Insurance Company (collectively Defendants), appeal the district court's[1] grant of summary judgment in favor of the Five Rivers Carpenters Health and Welfare Fund and Education Trust Fund, and their respective trustees (collectively, the Funds) on their claim seeking unpaid fringe-benefit contributions under the Miller Act, 40 U.S.C. §§ 3131-3133 (2006). We have jurisdiction under 28 U.S.C. § 1291, and affirm.

I.

Covenant was the prime contractor on a federal construction project for the U.S. Department of Veterans Affairs (VA) facility in Iowa City, Iowa. Because this was a federal construction project, Covenant was required to obtain a "payment bond" under the Miller Act. *See* § 3131(b)(2). The Miller Act is intended "to provide security for payment of those who supply work or materials for the prosecution of federal projects to which state law lien rights do not attach." *United States ex rel. Olson v. W.H. Cates Constr. Co.*, 972 F.2d 987, 989 (8th Cir. 1992) (citing 40 U.S.C. § 270a, now codified at §§ 3131-3132). A payment bond ensures that suppliers of

1. The Honorable Rebecca Goodgame Ebinger, United States District Judge for the Southern District of Iowa.

labor and material on federal projects are fully protected in carrying out contracted-for work. *See* § 3131(b)(2). In this case, Covenant obtained surety for its payment bond obligation from North American Specialty Insurance Company.

In September 2018, Covenant subcontracted with Calacci Construction Company, Inc. to supply carpentry labor and materials necessary to complete the VA project. Calacci entered into a collective bargaining agreement (CBA) with two regional unions representing the majority of its laborers—North Central States Regional Council of Carpenters and the United Brotherhood of Carpenters & Joiners. As the signatory employer to the CBA, Calacci agreed to pay fringe-benefit contributions based on each hour that its laborers worked, to be directly deposited to the Funds.[2]

Under both the CBA and trust agreements with the unions, the Funds had the express authority to receive, collect, and demand payment of any delinquent fringe-benefit contributions owed by Calacci.[3] Calacci also agreed

2. The Funds are multiemployer employee fringe-benefit funds, as defined under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1002(3), (37), and organized under the Labor Management Relations Act of 1947 (LMRA), 29 U.S.C. § 186(c)(5).

3. The district court correctly concluded that the Funds have standing to bring this suit. *See United States ex rel. Sherman v. Carter*, 353 U.S. 210, 214, 77 S. Ct. 793, 1 L. Ed. 2d 776 (1957) ("The trustees had the sole power to demand and enforce prompt payment of employer contributions," consistent with the

in the CBA that if it failed to pay benefit contributions owed "for the duration of all work to be performed," then it must "pay all attorney fees and costs incurred in collecting such sums that are due" to the Funds. In addition, Calacci would "bear the accounting costs incurred by the Trustees or the Union" in the collections process, including a 10 percent late fee.

Despite multiple demands, Calacci, refused to remit the benefit contributions owed to the Funds through June 18, 2021, the last day of Calacci's union employees' labor on the project. On September 10, 2021, counsel for the Funds emailed an employee of Covenant to inform them that the Funds "[would] be filing a Miller Act Notice." The Funds requested a copy of Covenant's Miller Act "payment bond and surety's contact information." That same day, Covenant's attorney responded, saying he "represent[s] Covenant Construction on this matter" and that all future correspondence should be directed to him.

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trust agreement, and thus "have an even better right to sue on the bond."); *United States ex rel. Int'l Bhd. of Elec. Workers, Loc. Union 692 v. Hartford Fire Ins. Co.*, 809 F. Supp. 523, 526 (E.D. Mich. 1992) ("Under ERISA, the trustees not only have a *contractual* right to enforce payment of contributions to trust funds, they have a statutory right and duty to do so. They are not dependent on an assignment, either actual or constructive."); 29 U.S.C. §§ 1104(a), 1132 (obligating trustees, as fiduciaries of a multiemployer benefit plan within the meaning of ERISA, to "discharge [their] duties with respect to a plan" and empowering them to bring suit on behalf of beneficiaries to recover any unpaid contributions).

After the Miller Act notice was delivered to Covenant's attorney as instructed, he emailed the Funds' counsel to confirm that he received the documents and had "stamped the receipt date on each page to confirm [they] received them [on] Sept. 16, 2021." He also requested "a detailed breakdown of the amounts claimed" and supporting documentation to evaluate the claim, which the Funds provided to him.

Covenant and its surety, however, never paid the delinquent contributions from their payment bond on behalf of Calacci. As a result, the Funds filed suit under the Miller Act to collect from Defendants the unpaid contributions plus liquidated damages, interest, costs, and reasonable attorneys' fees. Defendants and the Funds filed cross-motions for summary judgment. The district court denied Defendants' motion, granted the Funds' motion, and entered judgment in the Funds' favor. Defendants now appeal.

II.

"We review the district court's resolution of cross-motions for summary judgment *de novo*." *Owners Ins. Co. v. Fid. & Deposit Co. of Md.*, 41 F.4th 956, 958 (8th Cir. 2022) (citation omitted). Defendants argue that the district court erred in determining that the Funds properly served notice on Covenant under the Miller Act, in deciding that the notice was timely as to all 21 laborers on the project, and in awarding the Funds liquidated damages and attorneys' fees. We address each argument in turn.

Appendix A

A.

Under § 3133(b)(2) of the Miller Act, "[a] person having a direct contractual relationship with a subcontractor but no contractual relationship, express or implied, with the contractor furnishing the payment bond may bring a civil action on the payment bond on giving written notice to the contractor." Written notice of a Miller Act claim must be given "within 90 days from the date on which the person did or performed the last of the labor or furnished or supplied the last of the material for which the claim is made." *Id.* Notice must be served "by any means that provides written, third-party verification of delivery to the contractor at any place the contractor maintains an office or conducts business or at the contractor's residence." § 3133(b)(2)(A). The purpose of the notice provision is "to assure receipt of the notice, not to make the described method mandatory so as to deny right of suit when the required written notice within the specified time had actually been given and received." *Fleisher Eng'g & Constr. Co. v. United States ex rel. Hallenbeck*, 311 U.S. 15, 19, 61 S. Ct. 81, 85 L. Ed. 12 (1940). "Congress intended to provide a method which would afford sufficient proof of service when receipt of the required written notice was not shown." *Id.*

Defendants claim "the Funds never mailed or delivered any Miller Act notice to Covenant" because they sent it to Covenant's attorney rather than to Covenant directly. Defendants do not allege Covenant was unaware of the Miller Act notice. Instead, they assert the Funds were noncompliant with the requirements of § 3133(b)(2)

and that Covenant's attorney was neither "the contractor" nor expressly authorized to accept service on Covenant's behalf. Defendants further contend that the district court erroneously concluded that "[t]hrough his correspondence with the Funds' counsel, Covenant's attorney held out he had authority to accept the Miller Act notices on Covenant's behalf. He did nothing to recant this apparent authority."

It is undisputed that Defendants received the Funds' written Miller Act notice, which lessens the need for strict adherence to the method of service under § 3133(b)(2), because the purpose of the notice provision is ensuring receipt. *See Fleisher*, 311 U.S. at 18-19. Covenant's attorney went out of his way to confirm that he received the written notice on behalf of both Covenant and North American, going so far as to time-stamp the date of receipt. *Cf. United States ex rel. Am. Radiator & Standard Sanitary Corp. v. Nw. Eng'g Co.*, 122 F.2d 600, 602 (1941) (holding that merely sending invoices to a subcontractor does not put the contractor on notice of the Miller Act claim and could not substitute as actual written notice to the contractor). The challenge raised here is limited to whether—as a matter of law—the notice complied with § 3133(b)(2) when it was sent to Covenant's attorney, rather than directly to Covenant or an authorized agent of Covenant.

We conclude that the Funds sufficiently complied with the Miller Act. Defendants analogize to service of legal documents, but the initial notice requirement under § 3133(b)(2) is distinct from service of a civil summons or legal process. As Defendants acknowledge,

it is a jurisdictional "condition precedent" to filing a lawsuit under the Miller Act, not a method-of-service requirement. *See Am. Radiator*, 122 F.2d at 602. Not only was the mailed notice sufficient because Covenant had "actually been given and received" it, *see Fleisher*, 311 U.S. at 19, but Covenant's attorney intervened, represented that he had authority on behalf of Covenant to receive notice, and instructed the Funds to communicate directly with him. The district court did not err in concluding that notice was properly provided.

B.

Defendants next argue that the Funds' written notice was untimely. The last day of labor on the VA project was June 18, 2021, and the Miller Act notice was received and time-stamped by Covenant's attorney on September 16, 2021. The notice alleged delinquent benefit contributions based on the collective carpentry labor of 21 Calacci employees between April 20, 2020, through June 18, 2021.

According to Defendants, however, the 90-day deadline for timely filing notice under § 3133(b)(2) is to be judged individually for each laborer. And, if that is correct, only three of the 21 Calacci union employees' last day of labor on the VA project falls within the 90-day window. Defendants contend that the Funds can recover damages for only those three employees.

As noted above, Miller Act notice must be provided "within 90 days from the date on which the person did or performed the last of the labor or furnished or supplied

the last of the material for which the claim is made." § 3133(b)(2). The Funds' claim against the bond is based on damages "common to the entire membership" of the Fund participants and "shared by all in equal degree." *See U.S. ex rel. United Bhd. of Carpenters & Joiners Loc. Union No. 2028 v. Woerfel Corp.*, 545 F.2d 1148, 1152 (8th Cir. 1976) (observing that there, relief sought was neither). And while the statute references the last date of labor based on a singular "person," it is reasonable to conclude that laborers collectively provide labor for purposes of fringe-benefit fund contributions. *See Hartford Fire*, 809 F. Supp. at 526. In this sense, a claim for fund contributions—a collective claim—is distinguishable from a claim for individual wages, which are "peculiar to the individual member concerned." *Woerfel*, 545 F.2d at 1152 (citation omitted).

Notice of delinquent fund contributions, therefore, must be given within 90 days of the last day of the collective labor on the VA project. And as such, the Funds' "'claim' may cover more than a single employee or incident—it may cover several employees over a period of time." *Hartford Fire*, 809 F. Supp. at 526. So long as notice "was made within 90 days after the last of the labor was performed for that 'claim'"—as occurred here—it is timely. *Id.* The district court did not err by concluding that Plaintiffs timely filed their Miller Act notice within 90 days of the last day of labor performed on the project and the Funds are thus entitled to the past-due fringe-benefit contributions for all 21 laborers.

C.

Finally, Defendants contend that the court erred in awarding the Funds liquidated damages and attorneys' fees. Under the Miller Act, plaintiffs may recover "the amount unpaid at the time [their] civil action is brought and may prosecute the action to final execution and judgment for the amount due." § 3133(b)(1).[4] As we have recognized, this statutory language does "not explicitly provide for the recovery of attorneys' fees or interest." *Owners*, 41 F.4th at 959; *see also F.D. Rich Co. v. United States ex rel. Indus. Lumber Co.*, 417 U.S. 116, 126, 94 S. Ct. 2157, 40 L. Ed. 2d 703 (1974) (determining that the Miller Act does not "explicitly provide for an award of attorneys' fees to a successful plaintiff"); *cf.* 29 U.S.C. § 1132(g) (giving courts discretion to award "reasonable attorney's fees and costs" to fiduciaries in an action *brought under* ERISA for the collection of delinquent benefit contributions). And, generally, "the American Rule"—"that each party should bear the costs of its own legal representation" and thus, attorney's fees are not recoverable as damages absent an express directive from Congress—applies to Miller Act claims. *See F.D. Rich*, 417 U.S. at 130-31.

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4. Before it was amended in 2002, "the Miller Act provided that a subcontractor could sue on a payment bond after failing to receive payment for labor or material and 'prosecute said action to final execution and judgment for the *sum or sums justly due him*.'" *Owners Ins. Co. v. Fid. & Deposit Co. of Maryland*, 41 F.4th 956, 959 (8th Cir. 2022) (emphasis added) (citing 40 U.S.C. § 270b(a) (2001)). The above italicized language was amended to "the amount due," *see* § 3133(b)(1), but that "was not intended to work a substantive change." *Id.* (citation omitted).

We have, however, upheld an attorneys' fee award on a claim similar to a Miller Act claim, but brought under the Capehart Act, 42 U.S.C. § 1594a. There, the claim was based on the express language in a bond contract between a subcontractor and its supplier that attorneys' fees were "part of the purchase price of the materials and are sums justly due." *See D&L Const. Co. v. Triangle Elec. Supply Co.*, 332 F.2d 1009, 1012-13 (8th Cir. 1964); *see also Owners*, 41 F.4th at 959 (citing *United States ex rel. Maddux Supply Co. v. St. Paul Fire & Marine, Ins. Co.*, 86 F.3d 332, 336 (4th Cir. 1996) (per curiam) as a Miller Act case that presented similar attorneys' fees questions); *Sherman*, 353 U.S. at 220-21 (upholding the award of attorneys' fees and liquidated damages on a payment bond based on collective bargaining, which obligated the supplier to make benefit contributions to the union's trust fund and, pursuant to the trust fund agreement, to pay any attorneys' fees and costs necessary to recover delinquent contributions).

Defendants do not dispute that the CBA obligated Calacci, as signatory employer, to pay the Funds' attorneys' fees and liquidated damages in connection with collection of benefits contributions owed to the Funds. Rather, they argue that the CBA does not obligate them to pay the Funds' attorneys' fees or liquidated damages from the payment bond because Covenant is not a signatory employer to the CBA. Defendants contend that without an express agreement that Covenant would use its payment bond to pay for the Funds' attorneys' fees and costs in the recovery of Calacci's delinquent benefit contributions, the Miller Act does not otherwise obligate Covenant to pay them.

Even assuming Covenant is not statutorily obligated to pay attorneys' fees and liquidated damages from its payment bond under the Miller Act, Calacci, as signatory to the CBA and the supplier of labor, expressly agreed with the union and its Funds to pay them. "The obligation of the surety and contractor includes amounts owed by subcontractors to their suppliers." *Maddux*, 86 F.3d at 334 (citation omitted). As such, "[s]everal circuits have held . . . that interest and attorney's fees are recoverable if they are part of the contract between the subcontractor and supplier." *Id.* at 336 (collecting cases). Here, Calacci is obligated to pay attorneys' fees and liquidated damages to the Funds under the terms of the CBA; and, by subcontracting with Calacci, Covenant is liable for the amount due under that obligation. *See D&L*, 332 F.2d at 1013. Defendants never allege that the terms of their payment bond agreement reflect otherwise. Moreover, granting the recovery of attorneys' fees and liquidated damages from the payment bond compensates the Funds in full for the "amount due" to them for their agreed-upon work on the VA project, and is consistent with the purpose of the Miller Act. *See* § 3133(b)(1); *D&L*, 332 F.2d at 1012-13; *see also Sherman*, 353 U.S. at 216 ("The Miller Act . . . is highly remedial in nature. It is entitled to a liberal construction and application in order properly to effectuate the Congressional intent to protect those whose labor and materials go into public projects." (internal citations omitted) (quoting *Clifford F. MacEvoy Co. v. United States ex rel. Calvin Tomkins Co.*, 322 U.S. 102, 107, 64 S. Ct. 890, 88 L. Ed. 1163 (1944)).

We affirm the judgment of the district court.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA, DAVENPORT DIVISION, FILED AUGUST 24, 2023

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

No. 3:22-cv-00036-RGE-HCA

FIVE RIVERS CARPENTERS DISTRICT COUNCIL HEALTH AND WELFARE FUND AND ROYCE PETERSON AND MIKE NOVY AS TRUSTEES, *et al.*

FIVE RIVERS CARPENTERS DISTRICT COUNCIL EDUCATIONAL TRUST FUND AND DAVID UNZEITIG AND ROBERT DOUBEK AS TRUSTEES, *et al.*

UNITED STATES BY AND FOR THE BENEFIT OF FIVE RIVERS CARPENTERS DISTRICT COUNCIL HEALTH AND WELFARE FUND AND FIVE RIVERS CARPENTERS DISTRICT COUNCIL EDUCATIONAL TRUST FUND,

Plaintiffs,

v.

COVENANT CONSTRUCTION SERVICES, LLC AND NORTH AMERICAN SPECIALITY INSURANCE CO.,

Defendants.

Appendix B

Filed: August 24, 2023

ORDER RE: CROSS-MOTIONS FOR SUMMARY JUDGMENT

I. INTRODUCTION

This case arises under the Miller Act. Plaintiffs Five Rivers Carpenters District Council Health and Welfare Fund and Royce Peterson and Mike Novy as Trustees; Five Rivers Carpenters District Council Educational Trust Fund and David Unzeitig and Robert Doubek as Trustees; and the United States by and for the benefit of Five Rivers Carpenters District Council Health and Welfare Fund and Five Rivers Carpenters District Council Educational Fund sue Defendants Covenant Construction Services, LLC and North American Specialty Insurance Co. The Health and Welfare Fund and the Educational Trust Fund's (collectively, "the Funds") dispute arises from work performed on a federal construction project in Iowa City, Iowa. Covenant, as the prime contractor, and North American Specialty, as the surety, provided a payment bond for the project. The Funds seek to recover on the bond for unpaid contributions owed by Covenant's subcontractor, Calacci Construction Company. The Funds also request liquidated damages, attorneys' fees, costs, and interest. The parties' filed cross-motions for summary judgment.

The Court grants the Funds' motion for summary judgment and denies Defendants' motion for summary judgment. As set forth below, the Court concludes the

Funds provided timely notice to Defendants and are entitled to recover the full amount of their claim as well as liquidated damages, attorneys' fees, costs, and interest.

II. BACKGROUND

The following facts are uncontested. *See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986).

The Funds are multi-employer fringe benefit funds organized pursuant to the Labor Management Relations Act. Defs.' Resp. Pls.' Statement Additional Material Facts Supp. Cross-Mot. Summ. J. ¶¶ 1-2, ECF No. 50-1. Covenant was the prime contractor on a federal construction project in Iowa City, Iowa. Pls.' Resp. Defs.' Statement Material Facts ¶ 1, ECF No. 47-2. Covenant furnished a payment bond for the project, as required by the Miller Act. *Id.* ¶ 2; *see also* 40 U.S.C. § 270b(a). North American Specialty is the surety on the bond. See ECF No. 47-2 ¶ 2. Covenant subcontracted with Calacci to perform work on the project. *Id.* ¶ 3.

Calacci was a signatory to a collective bargaining agreement with various unions that required it to make contributions to the Funds based on the number of hours of work performed by Calacci's union employees. *Id.* ¶¶ 4-5. Calacci failed to pay contributions to the Funds for work performed by twenty-one Calacci employees between April 20, 2020, and June 18, 2021. *Id.* ¶¶ 6, 9; *see also* ECF No. 50-1 ¶ 12. Calacci failed to pay $115,855.58 to the Health and Welfare Fund and $9,884.37 to the Education Fund. ECF No. 50-1 ¶¶ 13-14.

Appendix B

On September 10, 2021, counsel for the Health and Welfare Fund informed Covenant of the Funds' intent to file Miller Act notices in the following days. ECF No. 47-2 ¶ 17; *see* Pls.' App'x Supp. Cross-Mot. Summ. J. at PL APP. 0678, ECF No. 47-4. Approximately one hour later, counsel for Covenant contacted counsel for the Health and Welfare Fund to ask that "all correspondence" be "directed" to him. ECF No. 47-4 at PL APP. 0677. The Funds mailed Miller Act notices to Covenant's attorney—in accordance with Covenant's attorney's instruction—and North American Specialty on September 15, 2021. *See id.* at PL APP. 0680-0685; *see* ECF No. 50-1 ¶ 19. The notices set forth Calacci's delinquent contributions and indicated the Funds were making a claim against the applicable Miller Act payment bond. See ECF No. 47-4 at PL APP. 0680-0685. Covenant's attorney contacted counsel for the Funds to confirm receipt of the Miller Act notices the following day and requested additional information about the Funds' claims. ECF No. 47-2 ¶ 10; *see also* ECF No. 47-4 at PL APP. 0686.

The Funds brought this action in the United States District Court for the Northern District of Iowa. Compl., ECF No. 1. The case was transferred to this Court in June 2022. See Order Granting in Part and Den. in Part Defs.' Mot. Dismiss, ECF No. 19. The parties filed cross-motions for summary judgment. Defs.' Mot. Summ. J., ECF No. 46; Pls.' Cross-Mot. Summ. J., ECF No. 47. The Court heard oral argument regarding the motions. Hr'g Mins., ECF No. 53. Attorney Brandon Wood appeared for the Funds. *Id.* Attorneys Stephen Marso and Bryn Hazelwonder appeared for Defendants. *Id.*

Having considered the parties' oral arguments and supporting briefs and exhibits, the Court grants the Funds' motion for summary judgment and denies Defendants' motion for summary judgment. Additional facts are set forth below as necessary.

III. LEGAL STANDARD

Under Federal Rule of Civil Procedure 56, the Court must grant a party's motion for summary judgment if no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). A genuine issue of material fact exists where the issue "may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Id.* at 248.

When analyzing whether a party is entitled to summary judgment, a court "may consider only the portion of the submitted materials that is admissible or useable at trial." *Moore v. Indehar*, 514 F.3d 756, 758 (8th Cir. 2008) (internal quotation marks omitted) (quoting *Walker v. Wayne Cnty.*, 850 F.2d 433, 434 (8th Cir. 1988)). The nonmoving party "receives the benefit of all reasonable inferences supported by the evidence, but has 'the obligation to come forward with specific

facts showing that there is a genuine issue for trial.'" *Atkinson v. City of Mountain View*, 709 F.3d 1201, 1207 (8th Cir. 2013) (quoting *Dahl v. Rice Cnty.*, 621 F.3d 740, 743 (8th Cir. 2010)). "In order to establish the existence of a genuine issue of material fact, a plaintiff may not merely point to unsupported self-serving allegations." *Anda v. Wickes Furniture Co., Inc.*, 517 F.3d 526, 531 (8th Cir. 2008) (cleaned up). "The plaintiff must substantiate [the] allegations with sufficient probative evidence that would permit a finding in [the plaintiff's] favor." *Smith v. Int'l Paper Co.*, 523 F.3d 845, 848 (8th Cir. 2008) (internal quotation marks and citation omitted). "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial," and the moving party is entitled to judgment as a matter of law. *Torgerson v. City of Rochester*, 643 F.3d 1031, 1042-43 (8th Cir. 2011) (en banc) (internal quotation marks omitted) (quoting *Ricci v. DeStefano*, 557 U.S. 557, 586, 129 S. Ct. 2658, 174 L. Ed. 2d 490) (2009)).

IV. DISCUSSION

Defendants seek summary judgment on two grounds. First, they argue the Funds failed to provide sufficient written notice to Covenant, as required by the Miller Act. Defs.' Br. Supp. Defs.' Mot. Summ. J. 4-7, ECF No. 46-1; *see also* 40 U.S.C. § 3133(b)(2). Defendants argue the Funds "should have mailed the [Miller Act n]otice directly to Covenant," rather than to Covenant's attorney. ECF No. 46-1 at 7. Defendants next argue the Funds' notice was untimely as to eighteen of the twenty-one Calacci union employees who performed work on the project. *Id.* at 7-8.

As such, Defendants argue the Funds are not entitled to recover contributions based on work performed by these eighteen employees. *Id.* The Funds contend notice was sufficient and timely as to all twenty-one Calacci union employees who performed work on the project. ECF No. 47 ¶¶ 1-7. They ask the Court to grant summary judgment on their full claim against the payment bond and award liquidated damages, costs, attorneys' fees, and interest on Calacci's delinquent contributions. Pls.' Br. Supp. Pls.' Cross-Mot. Summ. J. 21, ECF No. 47-1.

For the reasons stated on the record during the hearing, the Funds' notice to Covenant is sufficient. Through his correspondence with the Funds' counsel, Covenant's attorney held out he had authority to accept the Miller Act notices on Covenant's behalf. He did nothing to recant this apparent authority once it was clear notice was not delivered directly to Covenant. Under these circumstances, the Funds' notice to Covenant's attorney was sufficient to advise Covenant the Funds were looking to Defendants for payment.

As set forth below, the Court determines the Funds' notice was timely. Accordingly, the Funds are entitled as a matter of law to recover all unpaid contributions due from April 20, 2020, to June 18, 2021. The Funds are also entitled as a matter of law to liquidated damages, costs, attorneys' fees, and interest.

A. Timeliness of Notice

The Miller Act requires most general contractors to furnish a payment bond, through a surety, "to protect the

payment of those persons who supply labor or materials to the general contractor on a federal project." 40 U.S.C. § 3131(b)(2); *see also United States ex rel. Olson v. W.H. Cates Constr. Co., Inc.*, 972 F.2d 987, 989 (8th Cir. 1992). "The purpose of the Miller Act is to provide security for payment of those who supply work or materials for the prosecution of federal projects to which state law lien rights do not attach." *W.H. Cates Constr. Co., Inc.*, 972 F.2d at 989 (internal citation omitted); *see F.D. Rich Co., Inc. v. United States ex rel. Industrial Lumber Co., Inc.*, 417 U.S. 116, 122, 94 S. Ct. 2157, 40 L. Ed. 2d 703 (1974). To accomplish this purpose, the Miller Act is entitled to a liberal interpretation. *See United States ex rel. Sherman v. Carter*, 353 U.S. 210, 216, 77 S. Ct. 793, 1 L. Ed. 2d 776 (1957); *see also United States ex rel. Hopper Bros. Quarries v. Peerless Cas. Co.*, 255 F.2d 137, 143-45 (8th Cir. 1958).

The Miller Act authorizes every person who carries out work pursuant to a federal contract to "bring a civil action on the payment bond for the amount unpaid at the time the civil action is brought." 40 U.S.C. § 3133(b)(1). Where—as here—a claimant has a direct contractual relationship with a subcontractor, but no such relationship with a prime contractor, notice is required to be given to the prime contractor "within 90 days from the date on which the person did or performed the last of the labor or furnished or supplied the last of the material for which the claim is made." *Id.* § 3133(b)(2). This notice requirement "serves an important purpose: it establishes a firm date after which the general contractor may pay its subcontractors without fear of further liability to the

materialmen or suppliers of those subcontractors." *United States ex rel. Water Works Supply Corp. v. George Hyman Constr. Co.*, 131 F.3d 28, 32 (1st Cir. 1997); *see also Hopper Bros. Quarries*, 255 F.2d at 144-45. "Failure to comply with the ninety-day notice requirement is fatal to a Miller Act claim." *Ramona Equip. Rental, Inc. ex rel. United States v. Carolina Cas. Ins. Co.*, 755 F.3d 1063, 1067 (9th Cir. 2014).

The parties dispute whether the Funds' notice to Defendants was timely. Defendants argue notice must be given within ninety days of each employee's last day of work on the project. ECF No. 46-1 at 7-9. Of the twenty-one Calacci union employees who performed work on the project, only three employees' last day of work on the project was within ninety days of September 16, 2021—the date on which Defendants received notice. *See* ECF No. 47-2 ¶¶ 9-10, 13; ECF No. 50-1 ¶ 19. Defendants argue notice was timely only as to these three employees. ECF No. 46-1 at 7-9; ECF No. 50 at 6-15. They ask the Court to limit the Funds' recovery to contributions owed for the hours of work performed only by those employees. EF No. 46-1 at 8.

The Funds argue notice is measured from the last date on which any Calacci union employee performed work on the project. ECF No. 47-1 at 15. June 18, 2021, was the last date any Calacci union employee performed work on the project. *See* ECF No. 47-2 ¶ 9. Defendants received Miller Act notice on September 16, 2021, exactly ninety days from the date on which the last of any Calacci union employee's labor was furnished. *Id.* ¶ 10. As such,

the Funds contend notice was timely as to all twenty-one Calacci employees and they are entitled to recover the full amount of their claim. ECF No. 47-1 at 15.

The Funds identify *United States ex rel. International Brotherhood of Electrical Workers, Local Union 692 v. Hartford Fire Insurance Company* as supportive authority. *See id.* at 17 (citing 809 F. Supp. 523 (E.D. Mich. 1992)). The Court finds *Hartford Fire* persuasive. The facts of *Hartford Fire* are analogous in many respects to the facts in the present case. There—like here—a subcontractor on a federal government project was a signatory to a collective bargaining agreement with a local union. *Hartford Fire*, 809 F. Supp. at 524. Some of the subcontractor's employees were members of the local union. *Id.* As in the present case, the subcontractor failed to make contributions to several employee fringe benefit funds, as required by the collective bargaining agreement. *Id.* The subcontractor also failed to remit union dues and Committee on Political Education (COPE) contributions to the local union. *Id.* The local union and the trustees of the fringe benefit funds filed suit under the Miller Act against the prime contractor's surety to collect the sums owed to them. *Id.* at 525. The surety moved for partial summary judgment, arguing notice was untimely as to six of the subcontractor's employees who had ceased working on the project more than ninety days before the date on which notice was issued. *Id.*

The *Hartford Fire* court analyzed the union's and trustees' claims separately. As to the trustees' claims, the court held notice was timely with respect to all

fringe benefits contributions due to the trustees, even though notice was not provided within ninety days of some employees' last day of work. *Id.* at 525-26 The court construed each trustee's "claim" as a single claim covering "several employees over a period of time." *Id.* at 526. The court determined notice was timely because it was provided within ninety days of the last date of the last labor for which the claim as a whole was made. *Id.* The court concluded its interpretation was faithful to the plain text of the Miller Act, which states notice is timely if given "within 90 days from the date on which the person did or performed the last of the labor . . . for which the claim is made." 40 U.S.C. § 3133(b)(2). The court also reasoned its determination was consistent with the general remedial purpose of the Miller Act. *See Hartford Fire*, 809 F. Supp. at 526; *see also Carter*, 353 U.S. at 216 (explaining the Miller Act is "highly remedial in nature" and "entitled to a liberal construction and application in order to properly effectuate the Congressional intent to protect those whose labor and materials go into public projects").

As to the union's Miller Act claim, the *Hartford Fire* court found the surety was not liable on claims arising out of work performed by the six employees who failed to give "notice within [ninety] days of the time [they] last worked on the project." *Id.* at 525. The *Hartford Fire* court concluded the union's claim, unlike the trustees' claims, was dependent on assignments from the individual employees who performed work on the project. *See id.* (citing *United States ex rel. United Brotherhood Carpenters & Joiners Loc. Union No. 2028 v. Woerfel Corp.*, 545 F.2d 1148 (8th Cir. 1976)). As such, the union's

claim was "coextensive with and no greater than" each employee's claim. *Id.* The union's claim could not cover a claim that an individual employee could not pursue on their own due to untimeliness. *See id.*

Defendants argue *Hartford Fire* was wrongly decided as to the trustees' Miller Act claims. Defs.' Reply Supp. Defs.' Mot. Summ. J. 11-15, ECF No. 50. They contend the court should have analyzed the trustees' claims in the same manner it analyzed the union's claim. *Id.* They ask the Court to treat each Fund's claim as "twenty-one different claims" asserted on behalf of the Calacci employees who performed work on the project and assess the timeliness of all twenty-one "claims." *See* ECF No. 46-1 at 8; *see also* ECF No. 50 at 9-20. Defendants' argument is unconvincing.

Defendants rely on *United States ex rel. Sherman v. Carter* to suggest the Funds' claims are dependent on assignment. ECF No. 50 at 7-9 (citing 353 U.S. at 219-20 (finding the relation between the trustees of an employee fringe benefit fund and the employees was "closely analogous to that of an assignment")). But *Carter* was decided before the enactment of the Employee Retirement Income Security Act of 1974 (ERISA). As explained in *Hartford Fire*:

> ERISA did not change the Miller Act, but it did change the relationship between the subcontractor and the trustees of the trust funds. . . . Under ERISA, the trustees not only have a contractual right to enforce payment

> of *contributions* to trust funds, they have a statutory right and duty to do so. They are not dependent on an assignment, either actual or constructive.

809 F. Supp. at 526 (emphasis in original); *see also* 29 U.S.C. §§ 1104, 1132. The Funds have a statutory right under ERISA to enforce the payment of all outstanding contributions owed directly to them. *Cf. Hartford Fire*, 809 F. Supp. at 525-26. Unions, by contrast, have no such right. See Woerfel, 545 F.2d at 1150 ("The unions have cited no authority . . . permitting unions to sue under the Miller Act absent assignments from the employees who performed the services."). Defendants' suggestion the Funds are asserting the claims of the Calacci employees under a theory of assignment therefore fails. *See* ECF No. 50 at 10. Rather, the Funds are pursuing their own single claims for contributions owed directly to them for the hours worked by Calacci union employees on the project. Notice is properly measured from the last date on which any Calacci union employee provided labor to the project.

The Court's determination is consistent with a similar body of case law finding Miller Act notice given within ninety days of the last delivery on a project involving multiple purchase orders is timely as to all deliveries in the series. For example, in *Noland Company v. Allied Contractors, Inc.*, the Fourth Circuit considered a Miller Act claim for six unpaid shipments sent by Noland to a subcontractor on an open account. *Noland Co. v. Allied Contractors, Inc.*, 273 F.2d 917, 918 (4th Cir. 1959). Noland sent written notices under the Miller Act within ninety

days of the last shipment. *Id.* The notice included claims for several shipments that were delivered more than ninety days before the notice. *Id.* The Fourth Circuit held the notice was timely as to all shipments, concluding that where there are multiple deliveries of contracts, "the measuring date will be the last date when the last material is furnished under the last contract." *Id.* at 920. The First, Fifth, and Ninth Circuits have all followed Noland's approach. *See Water Works Supply Corp.*, 131 F.3d at 34 ("Where claims are based on an open account theory, the ninety-day notice period for all of the deliveries begins on the date of the last delivery to the project"); *United States ex rel. A&M Petroleum, Inc. v. Santa Fe Eng'rs, Inc.*, 822 F.2d 547, 548 (5th Cir. 1987) (Miller Act "notice need only be given within 90 days of the last delivery of materials or rendition of service"); *Ramona Equip. Rental, Inc.*, 755 F.3d at 1067-68 ("[I]f all the goods in a series of deliveries by a supplier on an open book account are used on the same government project, the ninety-day notice is timely as to all of the deliveries if it is given within ninety days from the last delivery."); *but see Ramona Equip. Rental, Inc.*, 755 F.3d at 1070-71 (Erickson, J., dissenting) (finding notice must be provided to general contractor within ninety days of each unpaid delivery of materials under open account).

Courts considering the issue of timeliness found this interpretation of the Miller Act's notice provision consistent with the plain text and overall purpose of the statute. *See*, *e.g.*, *Noland*, 273 F.2d at 920-21. As stated by one district court:

> The Miller Act contemplates one such notice within 90 days from the furnishing of the last material furnished in the prosecution of the prime contract from which claim is made. If the material is so furnished pursuant to one entire contract, obviously the measuring date will be the date from when the last material is so furnished. If the material is furnished pursuant to a series of separate contracts, the measuring date will be the date when the last material is furnished under the last contract. This is the internal sense of the Miller Act. It should be construed sensibly and its plain purposes should not be defeated by narrow interpretation.

United States ex rel. J.A. Edwards & Co., Inc. v. Bregman Constr. Corp., 172 F. Supp. 517, 522 (E.D.N.Y. 1959). The above reasoning applies with equal force in the present case. The text of the Miller Act states that the notice period runs from the date of the last of the labor performed "for which the claim is made." 40 U.S.C. § 3133(b)(2). Nothing in the plain language of the statute suggests a "claim" is limited to a single provision of labor or materials. Such a strict reading of the statute is at odds with the Miller Act's general purpose to "protect those whose labor and material go into public projects." Carter, 353 U.S. at 216.

The Court finds notice was timely as to all twenty-one Calacci union employees whose labor makes up the Funds' claims. The ninety-day notice period began to run on the last date any Calacci union employee provided labor

to the project. It is undisputed the last date any Calacci union employee provided labor to the project was June 18, 2021. ECF No. 47-2 ¶ 9. The Funds provided notice within ninety days of this date. *Id.* ¶ 10. Accordingly, notice was timely. The Funds are entitled to recover the full amount of contributions owed for the period between April 20, 2020, and June 18, 2021.

B. Liquidated Damages, Attorneys' Fees, Costs, and Interest

1. Liquidated damages, attorneys' fees, and costs

The Funds argue they are entitled to liquidated damages, as provided for by ERISA and the collective bargaining agreement signed by Calacci. ECF No. 47-1 at 13-14 (citing 29 U.S.C. § 1132(g)(2)(c)(ii)). They also contend they are entitled to recover attorneys' fees and costs pursuant to the terms of the collective bargaining agreement. *Id.* at 14. Defendants argue the Funds are not entitled to recover liquidated damages or attorneys' fees. ECF No. 50 at 15. They argue the collective bargaining agreement provides no basis for recovery because it allows only the unions, not the trustees, to recover attorneys' fees and Covenant is not a signatory to the agreement. ECF No. 50 at 15.

The Funds are entitled to recover liquidated damages, attorneys' fees, and costs, as set forth in the collective bargaining agreement and incorporated trust agreements. The collective bargaining agreement provides

for liquidated damages in the amount of ten percent of the total contributions due on all late payments. ECF No. 47-4 at PL APP. 0092. It also provides for "all attorney fees and costs incurred in collecting such sums that are due." *Id.* at PL APP. 0093. Defendants' argument that liquidated damages and attorneys' fees are recoverable only by unions signatory to the collective bargaining is without merit. The trust agreements provide the Funds are entitled to "take such steps, including the institution and prosecution of or the intervention in any proceedings at law, in equity or in bankruptcy, as may be necessary or desirable to effectuate the collection of such Employer contributions" set forth in the collective bargaining agreement. *Id.* at PL APP. 0020.

Defendants' argument that they are not liable for liquidated damages or attorneys' fees because they are not a signatory to the collective bargaining agreement also fails. Prime contractors and their sureties are obligated to pay the amounts owed by their subcontractors to suppliers. *See D&L Constr. Co. v. Triangle Elec. Supply Co.*, 332 F.2d 1009, 1012-13 (8th Cir. 1964). Courts have consistently held that the amounts general contractors and sureties are obligated to pay may include attorneys' fees and other costs if they are part of the contract between the subcontractor and supplier. *See*, *e.g.*, *U.S. ex rel. Maddux Supply Co. v. St. Paul Fire & Marine Ins. Co.*, 86 F.3d 332, 336 (4th Cir. 1996) (per curiam) (collecting cases). Because the Funds are entitled to liquidated damages, attorneys' fees, and costs under the collective bargaining agreement to which Covenant's subcontractor, Calacci, is a signatory, the Funds may recover from Covenant and

North American Specialty liquidated damages as set forth below, and attorneys' fees and costs.

As to the Funds' request for attorneys' fees and costs, the Court finds $8,072.33 in attorneys' fee and costs supported by the record.[1]

2. Interest

The parties do not dispute that the Funds are entitled to pre-judgment interest but disagree on the applicable interest rate. See ECF No. 50 at 19; ECF No. 47-1 at 14. The Funds rely on ERISA to argue they are entitled to recover pre-judgment interest on the unpaid contributions at a rate of 7.21 percent per annum.[2] ECF No. 47-1 at

1. The Funds request $9,030.33 "for legal services rendered and billed." ECF No. 47-4 at PL APP. 0734. The amount sought is not supported by the materials counsel attached to his affidavit supporting the request for attorneys' fees and costs. *See id.* at PL APP. 0734-0738. The requested amount of $9,030.33 included 0.9 hours billed by an unidentified third person at an hourly rate of $97.50 and $770.25 related to five hours of unexplained "[n]on-billable" time. *Id.* at PL APP. 0736-0737. Neither of these amounts were requested in counsel's affidavit. *See id.* at PL APP. 0734. The Court declines to award them.

2. The Funds' brief supporting their cross-motion for summary judgment argues for an interest rate of 7.12 percent per annum. ECF No. 47-1 at 14. They then provide a calculation using an interest rate of 7.21 percent per annum. *Id.* Their statement of additional undisputed material facts states "[t]he current federal short-term rate plus three (3) percentage points is 7.21 [percent]." ECF No. 47-3 ¶ 32. Likewise, the Funds' appendix indicates an interest rate of 7.21 percent per annum. ECF No. 47-4 at PL

14. Defendants contend the Funds are entitled to prejudgment interest at a rate of five percent per annum. ECF No. 50 at 19 (citing Iowa Code § 535.2(1)). The Funds bring this action under the Miller Act, not ERISA. Therefore, the Court must look to the Miller Act to determine the proper prejudgment interest rate.

"The Miller Act provides a federal cause of action, and the scope of the remedy as well as the substance of the rights created thereby is a matter of federal not state law." *F.D. Rich Co.*, 417 U.S. at 127. Under the Miller Act, "the federal law incorporates the state law on the subject of the proper interest rate and the time at which it begins to accrue." *United States ex rel. Confederate Constr. Co. v. U.S. Fidelity & Guaranty Co. of Baltimore, Md.*, 644 F.2d 747, 749 n.2 (8th Cir. 1981). Applying Iowa law, the Court finds the Funds are entitled to prejudgment interest at a rate of five percent per annum. *See* Iowa Code § 535.2(1). The interest shall accrue from the date of commencement of this action. *See* Iowa Code § 668.13(1).

V. CONCLUSION

For the foregoing reasons, **IT IS ORDERED** that Defendants Covenant Construction Services, LLC and North American Specialty Insurance Company's Motion for Summary Judgment, ECF No. 46, is **DENIED**.

APP. 0740. Therefore, the Court construes the Funds' argument as advocating for an interest rate of 7.21 percent per annum, and considers the "7.12" percent listed in the brief a scrivener's error.

IT IS FURTHER ORDERED that Plaintiffs Five Rivers Carpenters District Council Health and Welfare Fund and Royce Peterson and Mike Novy as Trustees; Five Rivers Carpenters District Council Education Trust Fund and David Unzeitig and Robert Doubek as Trustees; and United States by and for the benefit of Five Rivers Carpenters District Council Health and Welfare Fund and Five Rivers Carpenters District Council Educational Trust Fund's Cross-Motion for Summary Judgment, ECF No. 47, is **GRANTED**.

IT IS FURTHER ORDERED that the Clerk of Court shall enter judgment against Defendants Covenant Construction Services, LLC and North American Specialty Insurance Company and in favor of Plaintiff Five Rivers Carpenters District Council Health and Welfare Fund and Royce Peterson and Mike Novy as Trustees in the amount of $115,855.58, plus prejudgment interest at a rate of five percent per annum from March 9, 2022, until today and $11,585.56 in liquidated damages.

IT IS FURTHER ORDERED that the Clerk of Court shall enter judgment against Defendants Covenant Construction Services, LLC and North American Specialty Insurance Company and in favor of Five Rivers Carpenters District Council Education Trust Fund and David Unzeitig and Robert Doubek as Trustees in the amount of $9,884.37, plus prejudgment interest at a rate of five percent per annum from March 9, 2022, until today and $988.44 in liquidated damages.

IT IS FURTHER ORDERED that the Clerk of Court shall enter judgment against Defendants Covenant Construction Services, LLC and North American Specialty Insurance Company and in favor of Plaintiffs Five Rivers Carpenters District Council Health and Welfare Fund, and Royce Peterson and Mike Novy as Trustees, and Five Rivers Carpenters District Council Education Trust Fund, and David Unzeitig and Robert Doubek as Trustees in the amount of $8,072.33 for attorneys' fees and costs.

IT IS SO ORDERED.

Dated this 24th day of August, 2023.

/s/ Rebecca Goodgame Ebinger
REBECCA GOODGAME EBINGER
UNITED STATES DISTRICT JUDGE

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT, FILED OCTOBER 1, 2024

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 23-3183

FIVE RIVERS CARPENTERS DISTRICT COUNCIL HEALTH AND WELFARE FUND, AND ROYCE PETERSON AND MIKE NOVY AS TRUSTEES AND FIVE RIVERS CARPENTERS DISTRICT COUNCIL EDUCATIONAL TRUST FUND, AND DAVID UNZEITIG AND ROBERT DOUBEK AS TRUSTEES,

Appellees,

v.

COVENANT CONSTRUCTION SERVICES, LLC AND NORTH AMERICAN SPECIALTY INSURANCE COMPANY,

Appellants.

Appeal from U.S. District Court for the
Southern District of Iowa—Eastern
(3:22-cv-00036-RGE)

Filed: October 1, 2024

Appendix C

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

September 24, 2024

Order Entered at the Direction of the Court:
Acting Clerk, U.S. Court of Appeals, Eighth Circuit.

_____
/s/ Maureen W. Gornik