STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO.: 2019-CP-10-01108
Balfour Beatty Construction, LLC	)	
Plaintiff,	)	**ORDER**
v.	)	
Library Associates, LLC; and Metropolitan Life Insurance Company, a New York Corporation.	)	
Defendants.	)	
Library Associates, LLC,	)	
Third-Party Plaintiff,	)	
v.	)	
Lithko Contracting, LLC, Watson Electrical Construction, Co., LLC, Old North State Masonry, LLC,	)	
Third-Party Defendants.	)	

This matter was tried before this Court on non-consecutive days beginning on September 13, 2021 and concluding on December 3, 2021[1] and filed by Plaintiff Balfour Beatty Construction, LLC (hereinafter "Contractor") against Library Associates, LLC (hereinafter "Owner"). Owner answered, counterclaimed, and filed a third-party complaint against various subcontractors and material suppliers. Numerous additional actions were filed by subcontractors and material

[1] The Court's Order was delayed in obtaining the completed transcript. The Court wishes to acknowledge the parties and counsel's patience in awaiting the transcript – which the Court finds to be well-prepared.

suppliers to Contractor that were consolidated with the above captioned case. Most of those subcontractors and material suppliers are no longer parties hereto.[2]

Contractor pursued the following causes of action (1) foreclosure of a mechanic's lien against Owner's Property; (2) breach of contract against Owner; (3) quantum meruit/quasi contract; (4) attorneys' fees pursuant to S.C. Code Section 27-1-15; (5) abandonment, waiver, and/or estoppel; (6) cardinal change; (7) indemnity; (8) breach of implied warranty of plans and specifications; (9) first to breach; and (10) breach of contract accompanied by a fraudulent act.

Owner pursued the following causes of action against Contractor (1) breach of contract; (2) breach of contract accompanied by a fraudulent act; (3) indemnification; (4) declaratory relief; (5) unfair trade practices; and (6) civil conspiracy.

Owner additionally pursued causes of action against Third Party Defendants Lithko Contracting, LLC ("Subcontractor Lithko"), Old North State Masonry, LLC ("Subcontractor ONSM") and Watson Electrical Construction, LLC ("Subcontractor Watson") for (1) declaratory relief and (2) civil conspiracy.

Prior to the scheduled presentation of their cases in chief, Subcontractors Lithko, ONSM, and Watson dismissed their claims against Owner. Subcontractors Lithko and ONSM dismissed their respective mechanic's liens. As such, Owner is hereby deemed the prevailing party and is entitled to attorneys' fees and costs, pursuant to S.C. Code Ann. Section 29-5-10, et seq, as to those parties.

Based upon all the evidence and weighing the credibility of the witnesses, this Court makes the following findings of fact and conclusions of law.

[2] Some of these subcontractors have summary judgment orders in their favor that are subject to pending Rule 59(e), SCRCP motions filed by Contractor. This Order does not address those claims and rulings on those pending motions will be made by separate order. Each of those Subcontractors have dismissed any and all claims against Owner.

I. The Contract

This case arises out of the construction of a luxury hotel in downtown Charleston, South Carolina known as the Hotel Bennett ("Project"). The contract for the construction of the Project is what is known in the industry as a "Cost Plus with a Guaranteed Max" contract. It is on a form originally created by the American Institute of Architects "AIA". Plaintiff's Ex. 56. The underlying forms in this matter consist of AIA-A133 ("Agreement"), Exhibit A to the Agreement, and the General Conditions known as AIA-A201. Id. In addition to the Agreement and the General Conditions, the Contract Documents include "Drawings, Specifications, Addenda issued prior to the execution of the contract, other documents listed in the Agreement and Modifications issued after the execution of the Agreement. A Modification is (1) a written amendment to the Contract signed by both parties, (2) a Change Order, (3) a Construction Change Directive, or (4) a written order for a minor change in the work issued by the Architect." See Section 1.1.1 of the AIA-A201. These will sometimes be collectively referred to as the "Contract Documents."

At its essence, this contract provides that Contractor is entitled to be paid for eligible costs ("Costs of the Work") incurred for the work on the project plus a fee subject to a maximum amount ("GMP"). Section 2.2.1 of the AIA-A133. To be clear, the maximum amount is just that—it is not a minimum amount. Unlike a lump sum contract, Contractor is entitled only to the lesser of the "Cost of the Work" plus a fee or the "GMP". Section A.1.1 of Exhibit A to AIA-A133; Section 2.2.1 of the AIA-A133; Article 6 of the AIA-A133.

Owner, along with Owner's Representative Jim Clements, issued a request for proposal ("RFP") for this Project to interested bidders. Defendant's Ex. 103; Transcript, pp. 3142-3148. Contractor responded to the RFP. Defendant's Ex. 39. On September 22, 2014, Owner and Contractor entered into the Agreement-AIA-A133. Plaintiff's Ex. 56. Though the parties utilized

the AIA form, significant changes were made to the contract terms through extensive negotiations. Deposition Testimony of Mike Baumbach.

The AIA-A133 Agreement was broken down into two phases. The first phase was preconstruction phase to develop the GMP. Section 2.1 and 2.2 of AIA-A133; Transcript pp. 3154-3155. Contractor was paid a separate fee for the preconstruction phase. Article 4 of AIA-A133. The preconstruction portion stated that Contractor "shall, through preconstruction, review the constructability of the Architect's plans and specifications and shall notify the Owner and Architect in writing of any discovered defects, deficiencies, or recommended changes." Section 2.1.8.1 of the AIA-A133. Contractor, in fact, approached Owner and requested an additional $36,000.00 in preconstruction costs to further develop and evaluate the design development documents. Transcript, pp. 3166-3170. The Owner paid Contractor the additional preconstruction costs for "higher cost security." Id. Contractor and the Architect "worked in conjunction with each other" during the preconstruction period. Id.

The second phase of the AIA-133 Agreement was the construction phase. Section 2.3 of the AIA-A133. This phase began once the Contractor submitted the GMP and the Owner agreed to proceed. Section 2.2.1 of the AIA-A133. The GMP and the project schedule or duration are both created by Contractor. Transcript, pp. 3171-3173. Just prior to the submission of the GMP, Contractor informed Owner that it needed to add an additional $870,000.00 for general conditions to the GMP. Transcript, pp. 3175-3179. The Owner agreed to the additional sums. Id. In March of 2015, Exhibit A to the AIA-A133 was executed which included a GMP of $59,344,747.00 and a project duration of 28 months from the Notice to Proceed. Plaintiff's Ex. 56. Owner did not have any involvement in the creation of the schedule for the Project. Transcript, p. 3194. The Contractor was "solely responsible" for the schedule. Section 3.10.4.7 of the AIA-A201.

The Notice to Proceed was issued on March 19, 2015. Defendant's Ex. 2.

II. The Role of This Court

The Contract Documents expressly acknowledge that claims and disputes will arise during the construction of the Project. Section 4.3 of the AIA-A201. "A Claim is a demand or assertion by one of the parties seeking, as a matter of right, adjustment or interpretation of Contract terms, payment of money, extension of time or other relief with respect to the terms of the Contract." Section 4.3.1 of the AIA-A201. "The term 'Claim' also includes other disputes and matters in question between the Owner and Contractor arising out of or relating to the Contract." Id. "Claims must be initiated by written notice." Id. "The responsibility to substantiate Claims shall rest with the party making the Claim." Id.

There are two contractual time limitations on Claims. Claims must be initiated within thirty (30) days, except for claims involving a claimed delay, and a request for extension of time which must be initiated within twenty (20) days. Sections 4.3.2 and 8.3.4 of the AIA-A201.

An initial decision by the Architect on all timely Claims, arising prior to the date Final Payment is due, is a condition precedent to either party instituting litigation. Section 4.4.1 of the AIA-A201. After an initial decision by the Architect, this Court then has jurisdiction to review that decision. Section 9.2 of the AIA-A133.

III. Failure of Condition Precedent

Section 4.4 of the AIA-A201 deals with resolution of claims and disputes between Contractor and Owner. Plaintiff Ex. 56. Section 4.4.1 states in pertinent part as follows:

"Decision of the Architect. Claims, including those alleging an error or omission by the Architect[3] but excluding those arising under sections 10.3 through 10.5[4], shall be referred

[3] As more fully explained herein, the only architect to testify at the trial of this matter, James McAuliffe, was called by Contractor over the objection of Owner; however, Mr. McAuliffe testified that he was not, and could not, testify that the Architect for this project committed an error or omission. Transcript pp. 852-853.

[4] These sections relate to hazardous materials. No claims have been made related to hazardous materials in this action.

initially to the Architect for decision. An initial decision by the Architect shall be required as a condition precedent to mediation, arbitration or litigation of all Claims between the Contractor and Owner arising prior to the date final payment is due, unless 30 days have passed after the claim has been referred to the Architect with no decision having been rendered by the Architect."

On January 25, 2019, Contractor submitted a letter to Jim Clements that was identified as Contractor's "Consolidated Claim (Preliminary)." Plaintiff Exhibit 252. This will be referred to herein as the "four-page letter." The Architect was copied on the letter. Id. The four page letter contained no supporting documentation. Id. The letter stated, in part, that it was "based on a preliminary accounting of costs that have been incurred through the noted dates; however, because work on the Project continues a final accounting of costs presentable to the Owner cannot be done. Once the work by Balfour Beatty and its subcontractors is completed a full accounting of those additional costs will be provided by supplement or amendment." Id. There are no specific claims identified within the four page letter. Id. It does not refer to any specific requests for change order or unpaid certified pay applications. Id. The four page letter does, however, contain an "aggregate" amount of $22,452,282.51 for the claim.

Also on January 25, 2019, Contractor filed a mechanic's lien on Owner's property in the amount of $8,409,658.54. Defendant's Ex. 44. Contractor filed the mechanic's lien on the same day that it represented "work on the Project continues…". Plaintiff Ex. 252. Moreover, Mr. David Simonton testified on behalf of the Contractor that the last day of work on the project was April 26, 2019. Transcript, p. 1802.

To perfect and enforce a lien, one must timely complete the following three steps found in sections 29–5–90 and 29–5–120 of the South Carolina Code: (1) serve and file a notice or certificate of the lien, (2) commence a lawsuit to enforce the lien, and (3) file a lis pendens. *Ferguson Fire & Fabrication, Inc. v. Preferred Fire Prot., LLC,* 409 S.C. 331, 762 S.E.2d 561, 566-67 (2014). **"The trigger for determining when all three of these events must be performed**

is the date when the supplier ceases furnishing labor or materials." Id. (emphasis supplied). "Section 29–5–90 requires that, **within ninety days after he ceases to furnish labor or materials** for a building or structure, the party asserting a lien must serve upon the owner (or person in possession of the property) and file with the register of deeds or clerk of court a notice or a certificate that includes a statement of the amount due him, together with a description of the property intended to be covered by the lien, the name of the owner of the property, if known, and other required information." (emphasis supplied).

I find that Contractor failed to perfect its Mechanic's Lien pursuant to S.C. Code Ann. Section 29-5-90.

Section 4.4.2 of the AIA-A201 states in pertinent part as follows:

"The Architect will review Claims and within ten days of receipt of the claim take one or more of the following actions: (1) request additional supporting data from the claimant…"

Plaintiff Ex. 56.

Section 4.4.4 of the AIA-A201 states in pertinent part as follows:

"If the Architect requests a party to…furnish additional supporting data, such party shall respond within ten days after the receipt of such request, and shall either provide a response on the requested supporting data, advise the Architect when the response or additional supporting data will be furnished or advise the Architect that no supporting data will be furnished. Upon receipt of the response or supporting data, if any, the Architect will either reject or approve the Claim in whole or in part."

Pursuant to Sections 4.4.1, 4.4.2, and 4.4.4, the Architect responded on February 4, 2019 and requested "additional supporting data." Plaintiff Ex. 253. Specifically, the Architect stated:

"We have thoroughly analyzed the content of the letter. In the absence of any detail supporting the claim, we can draw no conclusion as to the legitimacy of the claim, except to say it appears to be grossly overstated. The owner disputes the claim. We have a duty to render an initial decision on this disputed claim within 10 days of receipt. To exercise that duty, we request additional supporting data on the claim. Please provide complete and verifiable detail substantiating each and every element of the claim. We must have specificity concerning the detail of impact on contract time and amount that might be your basis of any component of the claim. You have a

duty to reply to this response to you [sic] claim within 10 days, however, given the serious nature and complexity of the claim, in this case only, we extend the deadline to 30 days."

Plaintiff Exhibit 253.

Contractor commenced this litigation on March 5, 2019,

(1) prior to the passage of 30 days from the Architect's February 4, 2019 letter;

(2) prior to the submission of the requested "additional supporting data";

(3) prior to any initial decision rendered by the Architect on the January 25, 2019 claim;

(4) prior to the submission of a "final claim" or "final accounting" by Contractor as identified in the January 25, 2019 letter;

(5) prior to the submission by Contractor of a final payment request or the documentation required pursuant to Section 7.2.1 of the AIA133[5];

(6) prior to the submission by BBC of a final accounting pursuant to Section 7.2.2 of the AIA133[6];

(7) while Contractor was still working on the Project;

(8) AFTER cutting off Owner's access to the project documents on the EGNYTE website (Transcript, pp. 2204-2207; Plaintiff's Ex. 258) and

(9) while there were no certified pay requests that required payment by the Owner (Transcript p. 2241; Transcript, p. 4316).

On March 6, 2019, subsequent to commencing the present litigation, Contractor submitted four volumes of additional documents "in response to the [Architect's] letter dated February 4, 2019." Defendant Ex. 11, 12, 13, and 14.

[5] Hadley testified a request for Final payment pursuant to Section 7.2.1 of the AIA133 has never been submitted. Transcript p. 3907.
[6] Hadley testified a request for Final accounting pursuant to Section 7.2.2 of the AIA133 has never been submitted. Transcript p. 3908.

On April 26, 2019, Contractor wrote to the Architect and stated that: (1) requesting further information is not a rejection of the claim; (2) Contractor considers the Architect to have rejected its claim on April 24, 2019 (which was 50 days after it commenced litigation); and (3) that it demanded mediation pursuant to Section 15.2.6.1 of the AIA-A201. Plaintiff Ex. 264.

"If a contract contains a condition precedent, that condition must either occur or it must be excused before a party's duty to perform arises." *McGill v. Moore*, 672 S.E.2d 571, 381 S.C. 179 (2009) see also *Worley v. Yarborough Ford, Inc.*, 317 S.C. 206, 210, 452 S.E.2d 622, 624 (Ct.App.1994) (recognizing that a condition precedent is a fact other than the lapse of time, which, unless excused, must exist or occur before a duty of immediate performance arises).

I find that Contractor failed to comply with the condition precedent of obtaining an initial decision from the Architect prior to commencing the present litigation. I find nothing to indicate that the condition precedent was excused by Owner. I further find, as will be discussed in more detail herein, that the "final claim" that was ultimately presented before this Court was submitted only in Contractor's reply case without any testimony from a witness authenticating, explaining, or swearing to the "final claim." Since the "final claim" was not created until sometime after November 4, 2021, the Architect did not and could not render an initial decision on the "final claim." Transcript pp. 4402-4410; Plaintiff's Exhibit 352. Furthermore, since the Contractor has never submitted a request for final payment, no final payment would be due and an initial ruling would still be required under the Contract Documents. Section 4.4.1 of the AIA-A201.

Though the failure of the condition precedent is fatal to the Contractor's claim, the Court will continue to make findings of fact and conclusions of law as additional and alternative support for the rulings contained herein.

IV. Hadley Audit

At the trial, Owner offered the testimony of Ms. Sandra "Sam" Hadley as an expert in "accounting and auditing, construction accounting and auditing, and damage compilation in construction projects." Transcript pp. 3901-3902. Hadley was qualified as an expert in those fields without objection. Id. Hadley was employed by Cotton and Company and CPMI—construction accounting firms that are hired to "evaluate costs incurred on a project to ensure they complied with contract terms" on both private and public construction projects. Transcript p. 3888. Hadley is a certified public accountant, a certified government financial manager, certified fraud examiner, and certified in financial forensics. Transcript pp. 3890-3893; Defendant's Ex. 150.

I find Hadley was qualified, prepared, reliable, present at virtually the entire trial, and credible for every aspect of the testimony she provided. Additionally, I find Hadley performed the only audit or accounting that was done on this Project. Contractor did not provide a final accounting or an audit for the Project—notwithstanding the mandatory, fundamental, and unambiguous requirements the Contract Documents required it to do. Plaintiff Ex. 56.

Section 6.11.1 of the AIA133 states as follows:

"The Construction Manager shall keep full and detailed records and accounts related to the cost of the Work and exercise such controls as may be necessary for proper financial management under this Contract and to substantiate all costs incurred. The accounting and control systems shall be satisfactory to the Owner. The Owner and the Owner's auditors shall, during regular business hours and upon reasonable notice, be afforded access to, and shall be permitted to audit and copy the Construction Manager's records and accounts, including complete documentation supporting accounting entries, books, correspondence, instructions, drawings, receipts, subcontracts, Subcontractor's proposals, purchase orders, vouchers, memoranda, and other data relating to this Contract. The Construction Manager shall preserve these records for a period of four (4) years after final payment, or for such longer period as may be required by law."

Moreover, Section 7.1.11 of the AIA133 states as follows:

"The Owner has the right, at its sole discretion, to perform periodic examinations, audits, and verifications of the Construction Manager's cost accounting records and other Project documentation. The Contractor shall make all its records available to the Owner upon reasonable

advance notice and shall provide the Owner with copies of specific records from time to time upon reasonable request."

See also Sections 7.2.2 and 7.2.3 of the AIA-A133.

Pursuant to the foregoing sections of Contract Documents, on April 22, 2019, Hadley wrote to Contractor requesting specific documentation required to perform an audit of the project costs or "cost of the work" as that term is defined at Article 6 of the AIA-A133. Transcript pp. 3923-3925. On April 30, 2019, Contractor responded that it was refusing to produce any documentation, data, or response to support the contractually required audit. Defendant's Ex. 50; Transcript p. 3926; Transcript p. 2274.

As a direct and proximate result of Contractor's refusal to produce documents, data or accountings, Hadley was forced to rely on anecdotal information available to Owner. Transcript pp. 3926-3927. At the time of Contractor's refusal to produce documents, Contractor had also shut down Owner's access to the Egnyte document repository for the Project. Transcript, pp. 2204-2207; Plaintiff's Ex. 258. Contractor's witness Alec Dooley testified that the Egnyte site was a shared folder service that contained "everything". Transcript, p. 392. Based solely upon that anecdotal information, Hadley concluded, as of June 11, 2019, that there was approximately $7,700,000.00 of duplicative and potentially excessive mechanic's lien amounts. Transcript pp. 3926-3927. At this time, Contractor and its subcontractors had filed mechanic's liens in the total amount of $26,341,655.00. Transcript pp. 3927-3928.

As of September 17, 2019, Hadley was able to conclude that approximately $13,800,000.00 of the mechanic's lien amounts were duplicative and potentially excessive. Transcript pp. 3929-3930. All the while, Contractor continued to refuse to comply with the contractually required audit procedures. Id.

On October 2, 2019, the Court[7] issued an order directing Contractor and certain subcontractors to produce specific documents related to the lien amounts. Transcript p. 3930. As a result of the October 2, 2019 Order, Hadley received responses from Contractor and subcontractors. Id. On November 27, 2019, Hadley was able to identify $17,400,000.00 in duplicative, potentially excessive, and uncorrelated mechanic's lien amounts. Transcript, p. 3931. Meanwhile, Contractor continued to refuse to comply with the audit provisions mandated by the Contract Documents. Id.

On March 17, 2020, upon motion of Owner, this Court entered an Order directing Contractor to comply with the audit provisions of the Contract Documents. March 17, 2020, Order Granting Owner's Motion for Affirmative Injunction; Transcript p. 3931.

On June 17, 2020, again upon motion of Owner, this Court issued an Order to Enforce which, for the second time, directed Contractor to comply with the audit provisions of the Contract Documents. June 17, 2020, Order to Enforce; Transcript, p. 3931. The Order to Enforce expressly found that the audit was a matter of "contract" and not "discovery" in litigation. Id.

During the month of July 2020, Hadley attempted to conduct the audit as required by the Contract Documents and twice ordered by this Court. Transcript pp. 3932-3939.

On August 3, 2020, Hadley again notified the Court and Contractor that Contractor was not allowing Hadley to perform the audit. Transcript, pp. 3939-3940. As of November 16, 2020, Hadley was unable to finish the audit work. Transcript, p. 3941. As of December 16, 2020, twenty (20) months after attempting to audit the records of Contractor, the only claim amount Hadley had from Contractor was the January 25, 2019, four-page claim letter in the amount of $22,452,287.00. Transcript, p. 3945.

[7] The Honorable Bentley Price issued this ruling prior to this action being referred to this Court.

On September 10, 2021, over two and a half years after the January 25, 2019 four page claim letter in the amount of $22,452,287.00 and three days prior to the trial, Contractor submitted a new claim[8] in the amount of $11,872,194.00. Transcript, pp. 3945-3946. Two days later, on Sunday, September 12, 2021 (the day before the trial began) Contractor submitted yet another new claim in the amount of $13,064,917.00 Transcript, pp. 3946-3947.

As of the first week of trial, Hadley testified that Owner still did not have sufficient information from the Contractor for the Contractor's claim. Transcript, pp. 3947-3948. On September 20, 2021, Contractor submitted another new claim in the amount of $13,569,659.00. Id.

The next day, on September 21, 2021, Contractor submitted its fourth (4th) claim in eleven (11) days in the amount of $13,896,742.00. Transcript, p. 3948. This was the last "claim" that was provided to Hadley for audit and testimony[9]. Id. The September 21, 2021, claim was NOT the final claim submitted by Contractor, however. The final claim submitted by Contractor was on November 29, 2021 in Contractor's case in reply. No witness was offered to testify about, authenticate, explain, or swear to the final claim documents. Transcript pp. 4402-4411. The November 29, 2021 final claim was in the amount of $13,631,888.60. Plaintiff's Ex. 352.

Section 7.2.1 of the AIA133 states as follows:

"Final payment, constituting the entire unpaid balance of the Contract Sum, shall be made by the Owner to the Construction Manager when

.1 the Construction Manager has fully performed the Contract except for the Construction Manager's responsibility to correct Work as provided in Section 12.2.2 of AIA Document A201-2007, and to satisfy other requirements, if any, which extend beyond final payment;

.2 the Construction Manager has submitted a final accounting for the Cost of the Work and a final Application for Payment; and

[8] Due and owing to the fact that the Contractor failed to provide a final accounting and failed to provide supporting documentation for the January 25, 2019 "claim" and the September 10, 2021 "claim" (as well as the four [4] subsequent "claims"), this Court does not draw a distinction between a "new claim" and a "new claim amount."

[9] Ms. Hadley testified on November 2-3, 2021 in the trial of this matter.

.3 all close-out documents as required by the Contract Documents, including but not limited to, as-built drawings in paper and electronic format, instructions to the Owner's representatives on all building systems, and completion of all punch list items outstanding: and

.4 a final Certificate for Payment has been issued by the Architect.

The Owner's final payment to the Construction Manager shall be made no later than 30 days after the issuance of the Architect's final Certificate for Payment, or as follows:
The Construction Manager's final accounting is a complete and full accounting of costs incurred by the Construction Manager in performance of the Work, organized according to the Construction Manager's schedule of values and cost codes and correlated to the costs to be reimbursed under Article 6 of this Agreement."

I find that Contractor NEVER submitted a final payment request or the documentation required pursuant to Section 7.2.1 of the AIA133, prior to the commencement of the trial. Transcript p. 3907.

Moreover, Section 7.2.2 of the AIA133 states as follows:

"The Owner's auditors will review and report in writing on the Construction Manager's final accounting within 60 days after delivery or the final accounting to the Architect by the Construction Manager. The Construction Manager's final accounting is a complete and full accounting of costs incurred by the Construction Manager in performance of the Work, organized according to the Construction Manager's schedule of values and cost codes and correlated to the costs to be reimbursed under Article 6 of this Agreement Based upon such Cost of the Work as the Owner's auditors report to be substantiated by the Construction Manager's final accounting, and provided the other conditions of Section 7.2.1 have been met, the Architect will, within seven days after receipt of the written report of the Owner's auditors, either issue to the Owner a final Certificate for Payment with a copy to the Construction Manager, or notify the Construction Manager and Owner in writing of the Architect's reasons for withholding a certificate as provided in Section 9.5.1 of the AIA Document A20l-2007. The time periods stated in this Section supersede those stated in Section 9.4.1 of the AIA Document A201-2007. The Architect is not responsible for verifying the accuracy of the Construction Manager's final accounting."

I find that Contractor NEVER submitted a final accounting or the documentation required pursuant to Section 7.2.2 of the AIA133. Transcript p. 3908.

This Court has been perplexed as to why the Contractor refused and failed to perform the accounting or provide the documentation for the audit. Transcript p. 4008.[10] Owner has incurred $530,000.00 in costs from Cotton and Company to perform an audit of a contractually required final accounting that the Contractor failed to do. Transcript, pp. 3954-3955. In fact, during the trial, Hadley sat in the rear of the courtroom and continued to try and audit the Project and the numerous iterations of the new claims submitted by Contractor during trial. Transcript, pp. 3955-3957; Transcript pp. 4149-4150.

After two and a half years of attempting to audit the Contractor's records, Hadley, who this Court found both impressive and credible, concluded and testified to a reasonable degree of accounting and auditing certainty as follows:

(1) There were two guaranteed maximum price ("GMP") portions of this contract. Transcript, pp. 3910-3911. A GMP contract is a cost reimbursable contract that allows a contractor to get reimbursed for eligible costs of the work subject to the GMP. Id. The first GMP in this contract relates to the general conditions for Contractor. Transcript, p. 3911. The second GMP in this contract relates to the primary portion of the work which is the bulk of the costs paid to the subs. Id.
(2) The final reconciliation of the eligible costs of the work and the GMP for the general conditions is $3,319,212.00. Transcript, pp. 4109-4110.
(3) The final reconciliation of the eligible costs of the work and the GMP for the primary portion is $55,544,734.00. Transcript, pp. 4107-4108.
(4) Contractor was also due $66,779.00 for preconstruction services. Transcript, pp. 4110-4111.
(5) Contractor was entitled to a fee of 2.5 percent of the GMP. Transcript, pp. 4110-4111. The Contractor's fee would be in the amount of $1,483,090.00. Id.
(6) The total of the final reconciliations of the eligible costs of the work and the GMP for the general conditions and the primary portion of the contract as well as the preconstruction and construction fees is $60,413,815.00. Transcript, pp. 4110-4111.
(7) The Contractor has been paid $59,994,390.00 to date. Transcript, p. 4111.

[10] One of this Court's concerns stated during the trial was that Contractor's actions during the construction indicated to this Court that they had either not read the Contract or chose to follow their usual procedures rather than follow the express terms of the written Contract.

(8) Therefore, prior to the award of any set off amounts for liquidated or other damages, there remains a "delta" or maximum balance potentially owed to the Contractor of $419,425.00. Transcript, p. 4111; Transcript, pp. 4120-4121.

I find Hadley's conclusions to be credible, reasonable and consistent with the terms of the Contract Documents. I further find that, due and owing to the Contractor's failure to perform a final accounting for the Project and its repeated obfuscation of the auditing process, Hadley's conclusions are adopted as this Court's findings by the greater weight of the evidence.

V. Contractor's Requests for Change Order

At the outset, to the extent the costs contained in these requests for change orders ("RCO") are properly "costs of the work" as defined by the Contract Documents, Ms. Hadley has already included the costs of the RCO in her audit conclusions which have been adopted by this Court. Notwithstanding the foregoing, the Court herein considers the terms of the RCOs as additional support for its ruling or, as alternative findings of amounts due, in the event that a subsequent review of this Court's findings is required.

Article 7 of the AIA-A201 provides that the Contract Sum and Contract Time can only be adjusted by Change Order, Construction Change Directive or minor changes by Architect.

Contractor submitted two exhibits related to requests for change orders ("RCO") on the Project-Plaintiff's Ex. 329 and Plaintiff's Exhibit 12. Plaintiff's Ex. 329 is an excel spreadsheet that contains no supporting documentation or data. It simply contains an "RCO" column in the amount of $2,306,397. Plaintiff's Ex. 12 is a notebook containing numerous RCOs with some supporting documentation and data. However, the amounts for RCOs in Plaintiff's Ex. 12 and Plaintiff's Ex. 329 do not correlate to one another. Transcript pp. 3598-3600. Since Plaintiff's Ex. 329 contains no supporting documentation, the Court considers Plaintiff's Ex. 12 and the RCO's contained therein.

RCO 27: This RCO is dated on January 13, 2016 in the amount of $124,089.00. It purports to relate to the "1000 Year Storm Delay & Recovery Cost". It is unexecuted. The RCO has no supporting documentation or subcontractor invoices. Owner, however, produced the actual executed change order 27 dated January 26, 2016 in the amount of $0.00 for the same "1000 year Storm Delay." Defendant's Ex. 144. Moreover, the $115,969.21 contained in the unexecuted RCO 27 was actually already paid by the Owner. Transcript, pp. 3602-3607.

Ruling: Contactor is not entitled to resubmit an RCO that predates an executed change order for the same work. Section 7.2.1 of the AIA-A201. Moreover, Contractor is not entitled to be paid twice. RCO 27 is denied. However, had Contractor followed the terms of the Contract, Contractor would have been entitled to be paid and this RCO would be granted.

RCO 75: This RCO is undated in the amount of $5,989.93. It contains no supporting documentation or subcontractor invoices. It is unexecuted. Transcript, p. 3607.

Ruling: Contractor must submit all claims for RCOs within thirty (30) days after the events giving rise to such claim. Section 4.3.2 of the AIA-A201. Since this RCO is undated, Contractor cannot meet its burden to show that it complied with the contractual time limitations. Contractor also failed to show that the Architect gave an initial ruling on RCO 75 as required. Section 4.4.1 of the AIA-A201. Additionally, Contractor must provide sufficient information to support the RCO. Section 7.1.2 of the AIA-A201; Section 7.2.2 of the AIA-A201. RCO 75 is denied.

RCO 88R1: This RCO is dated March 7, 2019—two days after this action was filed by Contractor—in the amount of $56,414.30. It is unexecuted. It does contain supporting documentation from Subcontractor Lithko. However, the supporting documentation is dated from 2015-2016—in excess of three (3) years prior to the date of RCO 88R1. Moreover, RCO 88R1 does not include any back charges to Subcontractor Lithko as recognized by Contractor. Transcript, pp. 3608-3622; Defendant's Exhibit 28. Finally, Subcontractor Lithko withdrew its claims at the trial of this action.

Ruling: The RCO postdates the filing of this action by the Contractor. It necessarily follows that the Architect could not and did not give an initial ruling on RCO 88R1 as required. Section 4.4.1 of the AIA-A201. Contractor must submit all claims for RCOs within thirty (30) days after the events giving rise to such claim. Section 4.3.2 of the AIA-A201. Based upon the supporting documentation, this claim is in excess of three (3) years old. RCO 88R1 is also not proper due and owing to the internal change order (Defendant's Ex. 28) where the back charges that were for the Owner's benefit were "internally" deleted by Contractor and Subcontractor Lithko. Section 6.7.3 of the AIA-A133. The deleted back charges exceed the amount of RCO 88R1. Finally, Lithko no longer has a claim, and, therefore, the amounts claimed in RCO 88R1 could never be "costs of the work" as defined by the Contract Documents. Section 6.3 of the AIA-A133. RCO 88R1 is denied.

RCOs 103R1 and 118: These RCOs are dated December 16, 2017 and June 6, 2017. They are in the amounts of $290,257.91 and $21,036.56, respectively. They are unexecuted. They both relate to invoices from Subcontractor BMCC. Subcontractor BMCC dismissed its claim in this action, and was actually paid directly by Owner. Transcript, pp. 3622-3630.

Ruling: Subcontractor BMCC dismissed its claim after being paid directly by the Owner; therefore, the amounts claimed in RCOs 103R1 and 188 could never be "costs of the work" as defined by the Contract Documents. Section 6.3 of the AIA-A133. Contractor also failed to show that the Architect gave an initial ruling on RCOs 103R1 and 118 as required. Section 4.4.1 of the AIA-A201. However, had Contractor followed the terms of the Contract, Contractor would have been entitled to be paid and these RCOs would be granted.

RCO 122R1: This RCO is dated November 27, 2017. It states it is for a "structural delay claim." The RCO is in the amount of $1,012,042.00. It is unexecuted. The breakout of the RCO has Contractor "General Conditions" in the amount of $321,255.00. There is no supporting documentation for this General Conditions amount. It contains $119,277.00 for "hoisting, staging and logistics." The remainder of the RCO is for Subcontractors Watson Electrical, PASCO, BMCC, and Lithko. All of these subs have dismissed their claims. Watson Electrical was granted Summary Judgment against Contractor; however, Watson Electrical's attorney swore under oath that the amounts awarded for Summary Judgement did not involve the Owner. See September 9, 2021 Affidavit of Don Terry, Esq.; see also September 13, 2021 Order (citing to Section 10.D. of Watson's Subcontract); see Defendant ONSM Ex. 2 (containing Section 10.D. and only providing for attorneys' fees on "claims not involving the Owner"). With regard to PASCO, Contractor's Subcontractor Status Report shows that PASCO is owed nothing on this Project and, in fact, owes Contractor $107,261.19 for back charges. Defendant's Ex. 63; Transcript, pp. 3633-3635. With regard to BMCC, Owner has paid that subcontractor directly. Transcript, pp. 3635-3636. Finally, Lithko's back up documentation for their portion of RCO122R1 is inadequate and predates a lien waiver it executed for September 30, 2016 saying there were no claims outstanding as of that date and all were waived. Defendant's Ex. 69; Transcript pp. 3638-3648.

Ruling: Subcontractors Watson Electrical, Lithko, PASCO, and BMCC dismissed their claims; therefore, the amounts claimed in RCO 122R1 could never be "costs of the work" as defined by the Contract Documents. Section 6.3 of the AIA-A133. Additionally, Contractor must provide sufficient information to support the RCO. Section 7.1.2 of the AIA-A201; Section 7.2.2 of the AIA-A201. There is no back up documentation for the "General Conditions" or "hoisting, staging and logistics." Finally, the extended "General Conditions" could only be recoverable if it was shown that the requested changes "directly impact the critical path." Section 5.3.1 of the AIA-A133. Contractor did not provide any testimony related to RCO 122R1's impact on the critical path. There are no actual dates even listed on the RCO. Contractor failed to even attempt to enter into evidence any project schedules for that rough time period in 2016. However, had Contractor followed the terms of the Contract, Contractor would have been entitled to be paid in the amount of $487,321.00 and this RCO would be granted.

RCO 159: This RCO is August 21, 2017. It is in the amount of $242,633.32. It is unexecuted. It states it is for FFE changes. The Subcontractor involved is Westley Contracting; however, Westley Contracting has never made a claim. Indeed, Plaintiff's Ex. 329 does not show any RCO money going to Westley. Transcript, p. 3652. Moreover, of the nineteen (19) entries on the cover letter, the work for sixteen (16) of them was never done. Transcript, p. 3652. None of the attachments purportedly backing up RCO 159 are attached to the copy in Plaintiff's Ex. 12. Transcript, pp. 3653-3655.

Ruling: Subcontractor Westley Contracting never made a claim; therefore, the amounts claimed in RCO 159 could never be "costs of the work" as defined by the Contract Documents. Section 6.3 of the AIA-A133. Moreover, it is undisputed that the vast majority of the claims work was never done. Additionally, Contractor must provide sufficient information to support the RCO. Section 7.1.2 of the AIA-A201; Section 7.2.2 of the AIA-A201. It failed to even attempt to include the attachments outlined in the cover letter. Contractor also failed to show that the Architect gave an initial ruling on RCO 159 as required. Section 4.4.1 of the AIA-A201. However, had Contractor followed the terms of the Contract, Contractor would have been entitled to be paid and RCO would be granted.

RCO 161: This RCO is dated August 26, 2017. It is unexecuted. It is in the amount of $17,376.00. The subcontractors involved are Subcontractor BMCC and Subcontractor Precision Walls. Both subcontractors have dismissed their claims after being paid directly by the Owner. Transcript, pp. 3655-3656. The supporting documentation dates from 11 months to 20 months prior to the date of the RCO.

Ruling: Subcontractors Precision Walls and BMCC dismissed their claims; therefore, the amounts claimed in RCO 161 could never be "costs of the work" as defined by the Contract Documents. Section 6.3 of the AIA-A133. Moreover, Contractor must submit all claims for RCOs within thirty (30) days after the events giving rise to such claim. Section 4.3.2 of the AIA-A201. This claim is untimely. Contractor also failed to show that the Architect gave an initial ruling on RCO 161 as required. Section 4.4.1 of the AIA-A201. However, had Contractor followed the terms of the Contract, Contractor would have been entitled to be paid and this RCO would be granted.

RCO 178: This RCO is dated October 10, 2017 in the amount of $2,142.00. It is unexecuted. The subcontractor involved is Subcontractor Westley Contracting; however, Westley Contracting has never made a claim. Indeed, Plaintiff's Ex. 329 does not show any RCO money going to Westley Contracting. Transcript, p. 3658.

Ruling: Subcontractor Westley Contracting never made a claim; therefore, the amounts claimed in RCO 178 could never be "costs of the work" as defined by the Contract Documents. Section 6.3 of the AIA-A133. Contractor also failed to show that the Architect gave an initial ruling on RCO 178 as required. Section 4.4.1 of the AIA-A201. However, had Contractor followed the terms of the Contract, Contractor would have been entitled to be paid and this RCO would be granted.

RCO 184: This RCO is dated November 9, 2017 in the amount of $57,467.82. It is unexecuted. It states that it is for Hurricane Irma Prep and Recovery. The subcontractor's involved are Subcontractor Premier Exteriors and Subcontractor First Choice Glass. Both of those subcontractors have dismissed their claims. BBC claims direct expenses and an increase in the contract sum in the amount of $15,515.00. However, even if this were a delay under the Contract Documents, it would be a Class 2 delay for weather and no increase in the contract price is recoverable when a delay is a Class 2 delay. See Sections 8.3.2 and 8.3.3 of the AIA-A201.

Ruling: Subcontractors Premier Exteriors and First Choice Glass have dismissed their claims; therefore, the amounts claimed in RCO 184 could never be "costs of the work" as defined by the

Contract Documents. Section 6.3 of the AIA-A133. Moreover, a Class 2 delay can never result in an increase in contract price. See Sections 8.3.2 and 8.3.3 of the AIA-A201. Contractor also failed to show that the Architect gave an initial ruling on RCO 184 as required. Section 4.4.1 of the AIA-A201. However, had Contractor followed the terms of the Contract, Contractor would have been entitled to one (1) day extension and for Contractor's cost of work.

RCO 212R1: This RCO is dated October 19, 2018 in the amount of $21,253.00. It is executed by the Owner. The subcontractor involved is Subcontractor Robert Thomas. The Owner paid Subcontractor Robert Thomas directly, and Subcontractor Robert Thomas dismissed its claim. Transcript, pp. 3660-3664.

Ruling: Because the Owner paid Subcontractor Robert Thomas directly, in RCO 212R1 could never be "costs of the work" as defined by the Contract Documents. Section 6.3 of the AIA-A133. RCO 212R1 is denied.

RCO 215: This RCO is dated August 14, 2018 in the amount of $14,937.63. It is unexecuted. It states that it is for "Lutron Lighting Control Revision." The subcontractor involved is Subcontractor Watson Electrical. Plaintiff's Ex. 329 does not show any RCO money going to Watson Electrical. Transcript, p. 3664. Further, Subcontractor Watson Electrical has dismissed its claims in this action. Watson Electrical was granted Summary Judgment against Contractor; however, Watson Electrical's attorney swore under oath that the amounts awarded for Summary Judgement did not involve the Owner. See September 9, 2021 Affidavit of Don Terry, Esq.; see also September 13, 2021 Order (citing to Section 10.D. of Watson's Subcontract); see Defendant ONSM Ex. 2 (containing Section 10.D. and only providing for attorneys' fees on "claims not involving the Owner"). Finally, the supporting documentation is dated thirteen (13) months before the RCO.

Ruling: Subcontractor Watson Electrical has dismissed their claims; therefore, the amounts claimed in RCO 215 could never be "costs of the work" as defined by the Contract Documents. Section 6.3 of the AIA-A133. Contractor must submit all claims for RCOs within thirty (30) days after the events giving rise to such claim. Section 4.3.2 of the AIA-A201. This claim is untimely. Contractor also failed to show that the Architect gave an initial ruling on RCO 215 as required. Section 4.4.1 of the AIA-A201. However, had Contractor followed the terms of the Contract, Contractor would have been entitled to be paid for cost of work and this RCO would be granted.

RCO 221: RCO 221 is dated February 6, 2018 in the amount of $846.12 for window tinting. The subcontractor involved is Subcontractor Koch/Strongtower. They are no longer pursuing claims against the Owner. Subcontractor Koch/Strongtower was granted summary judgment for claims against Contractor not involving the Owner. See Koch/Strongtower December 1, 2021 Memorandum (adopting Low Country Case & Millwork's explanation of Section 10.D. of Subcontracts that only provide for attorneys' fees on "claims not involving the Owner").

Ruling: Subcontractor Koch/Strongtower has dismissed their claims; therefore, the amounts claimed in RCO 221 could never be "costs of the work" as defined by the Contract Documents. Section 6.3 of the AIA-A133. Contractor also failed to show that the Architect gave an initial ruling on RCO 221 as required. Section 4.4.1 of the AIA-A201. RCO 221 is denied.

RCO 223: This RCO is undated and unsigned by the Contractor in the amount of 3,304.78. It is unexecuted. It contains no supporting documentation.

Ruling: Contractor must submit all claims for RCOs within thirty (30) days after the events giving rise to such claim. Section 4.3.2 of the AIA-A201. Since this RCO is undated, Contractor cannot meet its burden to show that it complied with the contractual time limitations. Contractor also failed to show that the Architect gave an initial ruling on RCO 223 as required. Section 4.4.1 of the AIA-A201. Additionally, Contractor must provide sufficient information to support the RCO. Section 7.1.2 of the AIA-A201; Section 7.2.2 of the AIA-A201. RCO 223 is denied.

RCO 227: This RCO is dated April 19, 2018 in the amount of $9,169.01. It states it is for "warehousing and handling-mirrors for a period beginning on May 22, 2017. The Contract Documents say that installation of the Owner provided mirrors is included in the original contract sum. Plaintiff Ex. 56; Transcript, pp. 3668-3669.

Ruling: Contractor must submit all claims for RCOs within thirty (30) days after the events giving rise to such claim. Section 4.3.2 of the AIA-A201. This RCO is untimely. Further, the Contractor failed to meet its burden that this was a change. Plaintiff Ex. 56; Transcript, pp. 3668-3669. Contractor also failed to show that the Architect gave an initial ruling on RCO 223 as required. Section 4.4.1 of the AIA-A201. However, had Contractor followed the terms of the Contract, Contractor would have been entitled to be paid for cost of work and this RCO would be granted.

RCO 246: This RCO is dated September 4, 2018 in the amount of $31,157.12. It is unexecuted. It states it is for "elevator cab finishes." The subcontractors involved are Subcontractor Low Country Case & Millwork and Subcontractor Watson Electrical. They are no longer pursuing claims against the Owner. Subcontractor Low Country was granted summary judgment for claims against Contractor not involving the Owner. See October 19, 2021 Memorandum of Low Country Case & Millwork with explanation of Section 10.D. of Subcontracts that only provide for attorneys' fees on "claims not involving the Owner"). Subcontractor Watson Electrical has dismissed its claims in this action. Watson Electrical was granted Summary Judgment against Contractor; however, Watson Electrical's attorney swore under oath that the amounts awarded for Summary Judgement did not involve the Owner. See September 9, 2021 Affidavit of Don Terry, Esq.; see also September 13, 2021 Order (citing to Section 10.D. of Watson's Subcontract); see Defendant ONSM Ex. 2 (containing Section 10.D. and only providing for attorneys' fees on "claims not involving the Owner"). The change was also necessitated due and owing to an error in the shop drawings that was the responsibility of the Contractor. Transcript, pp. 3670-3671.

Ruling: Subcontractors Low Country and Watson have dismissed their claims; therefore, the amounts claimed in RCO 246 could never be "costs of the work" as defined by the Contract Documents. Section 6.3 of the AIA-A133. Contractor also failed to show that the Architect gave an initial ruling on RCO 246 as required. Section 4.4.1 of the AIA-A201. Further, the Contractor failed to meet its burden that this was a change. Contractor also failed to show that the Architect gave an initial ruling on RCO 223 as required. Section 4.4.1 of the AIA-A201. However, had Contractor followed the terms of the Contract, Contractor would have been entitled to be paid for cost of work and this RCO would be granted.

RCO 249: This RCO is dated August 10, 2018 in the amount of $5,129.09. It is unexecuted. The subcontractor for this RCO is Subcontractor Premier Exteriors. They have dismissed their claims in this action.

Ruling: Subcontractor Premier Exteriors has dismissed their claims; therefore, the amounts claimed in RCO 249 could never be "costs of the work" as defined by the Contract Documents. Section 6.3 of the AIA-A133. Contractor also failed to show that the Architect gave an initial ruling on RCO 249 as required. Section 4.4.1 of the AIA-A201. RCO 249 is denied.

RCO 250: This RCO is dated August 13, 2018 in the amount of $1,462.80. It is unexecuted. The subcontractor involved in this RCO is Subcontractor First Choice Glass. They have dismissed their claims in this action. The supporting documentation is from 2016. Transcript, pp. 3672-3673.

Ruling: Subcontractor First Choice Glass has dismissed their claims; therefore, the amounts claimed in RCO 250 could never be "costs of the work" as defined by the Contract Documents. Section 6.3 of the AIA-A133. Contractor also failed to show that the Architect gave an initial ruling on RCO 250 as required. Section 4.4.1 of the AIA-A201. Contractor must submit all claims for RCOs within thirty (30) days after the events giving rise to such claim. Section 4.3.2 of the AIA-A201. This RCO is untimely. RCO 250 is denied.

RCO 251: This RCO is dated August 31, 2018 in the amount of $22,305.58. It is unsigned by Contractor. It is unexecuted. It states it is for "Dining Room Millwork Change." The subcontractor involved is Subcontractor Low Country Case & Millwork. They are no longer pursuing claims against the Owner. Subcontractor Low Country was granted summary judgment for claims against Contractor not involving the Owner. See October 19, 2021 Memorandum of Low Country Case & Millwork with explanation of Section 10.D. of Subcontracts that only provide for attorneys' fees on "claims not involving the Owner").

Ruling: Subcontractor Low Country has dismissed their claims; therefore, the amounts claimed in RCO 251 could never be "costs of the work" as defined by the Contract Documents. Section 6.3 of the AIA-A133. Contractor also failed to show that the Architect gave an initial ruling on RCO 251 as required. Section 4.4.1 of the AIA-A201. However, had Contractor followed the terms of the Contract, Contractor would have been entitled to be paid and this RCO would be granted.

RCO 253: This RCO is dated August 14, 2018 in the amount of $10,055.16. It is unexecuted. It states it is for "Add Crown at Dome Rotundas." The subcontractor involved is Subcontractor Low Country Case & Millwork. They are no longer pursuing claims against the Owner. Subcontractor Low Country was granted summary judgment for claims against Contractor not involving the Owner. See October 19, 2021 Memorandum of Low Country Case & Millwork with explanation of Section 10.D. of Subcontracts that only provide for attorneys' fees on "claims not involving the Owner").

Ruling: Subcontractor Low Country has dismissed their claims; therefore, the amounts claimed in RCO 253 could never be "costs of the work" as defined by the Contract Documents. Section 6.3

of the AIA-A133. Further, Contractor failed to meet its burden of proof that this was a change. Transcript, pp. 3674-3675. RCO 253 is denied.

RCO 254: This RCO in the amount of $41,082.30 was withdrawn at trial by Contractor. Transcript, pp. 1224-1225.

Ruling: RCO 254 is WITHDRAWN.

RCO 255: This RCO is dated August 31, 2018 in the amount of $11,789.32. It is unexecuted. It states it is for "Add Trim to Conceal Pocket Door Header" The subcontractor involved is Subcontractor Low Country Case & Millwork. They are no longer pursuing claims against the Owner. Subcontractor Low Country was granted summary judgment for claims against Contractor not involving the Owner. See October 19, 2021 Memorandum of Low Country Case & Millwork with explanation of Section 10.D. of Subcontracts that only provide for attorneys' fees on "claims not involving the Owner"). The supporting documentation for the RCO is nine (9) months prior. Moreover, the reason given for the change was to conceal faulty work. Transcript, p. 3677.

Ruling: Subcontractor Low Country has dismissed their claims; therefore, the amounts claimed in RCO 255 could never be "costs of the work" as defined by the Contract Documents. Section 6.3 of the AIA-A133. Contractor also failed to show that the Architect gave an initial ruling on RCO 255 as required. Section 4.4.1 of the AIA-A201. Contractor must submit all claims for RCOs within thirty (30) days after the events giving rise to such claim. Section 4.3.2 of the AIA-A201. This RCO is untimely. Finally, Contractor failed to meet its burden of proof that this was a change. RCO 255 is denied.

RCO 258: This RCO is dated March 28, 2019—three weeks after this action was filed by Contractor—in the amount of $65,782.09. It is unexecuted. It states it is for additional mock-up revisions. Each of the subcontractors involved in the RCO have either made no claims or have dismissed their claims. Moreover, the back-up documentation 2017 and 2018. Finally, the Owner actually performed the demolition of the mock-up with its own contractor. Transcript, p. 3680.

Ruling: The RCO postdates the filing of this action by the Contractor. It necessarily follows that the Architect could not and did not give an initial ruling on RCO 258 as required. Section 4.4.1 of the AIA-A201. Contractor must submit all claims for RCOs within thirty (30) days after the events giving rise to such claim. Section 4.3.2 of the AIA-A201. Based upon the supporting documentation, this claim is untimely. Further, because the subcontractors have dismissed their claims, the amounts claimed in RCO 258 could never be "costs of the work" as defined by the Contract Documents. Section 6.3 of the AIA-A133. Contractor failed to meet its burden that it even performed the work. Contractor also failed to show that the Architect gave an initial ruling on RCO 258 as required. Section 4.4.1 of the AIA-A201. However, had Contractor followed the terms of the Contract, Contractor would have been entitled to be paid and this RCO would be granted.

RCO 259: This RCO is dated August 30, 2018 in the amount of $33,398.68. It is unexecuted. It states it is for "Hudson Street Storm Repair." The Subcontractor involved is Gulf Stream. They have dismissed their claims.

Ruling: Because Gulf Stream have dismissed their claims, the amounts claimed in RCO 259 could never be "costs of the work" as defined by the Contract Documents. Section 6.3 of the AIA-A133. Contractor also failed to show that the Architect gave an initial ruling on RCO 259 as required. Section 4.4.1 of the AIA-A201. RCO 259 is denied.

RCO 260: This RCO is dated March 1, 2019 in the amount of $5,586.12. It is unsigned by the Contractor. It is unexecuted. The subcontractor involved is Subcontractor Quantum. They have dismissed their claims. The supporting documentation is from November 27, 2018.

Ruling: Because Quantum has dismissed their claims, the amounts claimed in RCO 260 could never be "costs of the work" as defined by the Contract Documents. Section 6.3 of the AIA-A133. Contractor also failed to show that the Architect gave an initial ruling on RCO 260 as required. Section 4.4.1 of the AIA-A201. Contractor must submit all claims for RCOs within thirty (30) days after the events giving rise to such claim. Section 4.3.2 of the AIA-A201. Based upon the supporting documentation, this claim is untimely. RCO 260 is denied.

RCO 261: This RCO in the amount of $71,723.42 was withdrawn by Contractor at the trial of this matter. Transcript, pp. 1230-1231.

Ruling: RCO 261 is WITHDRAWN.

RCO 262: This RCO is dated August 31, 2018 in the amount of $15,635.00. It states it is for "TV wall revisions." It is unexecuted. The subcontractors involved are Subcontractor Precision Walls and Subcontractor Watson Electrical. Each has dismissed their claims in this action. The supporting documentation is dated August 2017 and January 2018.

Ruling: Subcontractors Precision Walls and Watson Electrical have dismissed their claims; therefore, the amounts claimed in RCO 262 could never be "costs of the work" as defined by the Contract Documents. Section 6.3 of the AIA-A133. Contractor also failed to show that the Architect gave an initial ruling on RCO 262 as required. Section 4.4.1 of the AIA-A201. Contractor must submit all claims for RCOs within thirty (30) days after the events giving rise to such claim. Section 4.3.2 of the AIA-A201. This RCO is untimely. However, had Contractor followed the terms of the Contract, Contractor would have been entitled to be paid for GMP and cost of work and this RCO would be granted.

RCO 264: This RCO is dated September 4, 2018 in the amount of $14,390.21. It is unsigned by the Contractor. It is unexecuted. It states it is for "sprinkler heads in TV walls." The subcontractor involved is Subcontractor PASCO. They were responsible for the selection of the sprinkler head locations. Transcript, pp. 3693-3694. Subcontractor PASCO has dismissed its claims in this action. The supporting documentation is from January 8, 2018. Contractor's Subcontractor Status Report shows that PASCO is owed nothing on this Project and, in fact, owes Contractor $107,261.19 for back charges. Defendant's Ex. 63; Transcript, pp. 3633-3635.

Ruling: Subcontractor PASCO dismissed their claims; therefore, the amounts claimed in RCO 264 could never be "costs of the work" as defined by the Contract Documents. Section 6.3 of the AIA-

A133. Contractor also failed to show that the Architect gave an initial ruling on RCO 264 as required. Section 4.4.1 of the AIA-A201. Contractor must submit all claims for RCOs within thirty (30) days after the events giving rise to such claim. Section 4.3.2 of the AIA-A201. This RCO is untimely. Contractor failed to meet its burden that the Owner is responsible for this work. RCO 264 is denied.

RCO 266: This RCO is dated September 7, 2018 in the amount of $2,203.74. It is unexecuted. It states that it is for "additional framing and sheetrock requests." The subcontractor involved in Subcontractor Precision Walls. They have dismissed their claims in this action. The supporting documentation is dated April 2017.

Ruling: Subcontractor Precision Walls has dismissed their claims; therefore, the amounts claimed in RCO 266 could never be "costs of the work" as defined by the Contract Documents. Section 6.3 of the AIA-A133. Contractor also failed to show that the Architect gave an initial ruling on RCO 266 as required. Section 4.4.1 of the AIA-A201. Contractor must submit all claims for RCOs within thirty (30) days after the events giving rise to such claim. Section 4.3.2 of the AIA-A201. This RCO is untimely. RCO 266 is denied.

RCO 267: This RCO is dated September 7, 2018 in the amount of $7,922.44. It is not signed by the Contractor. It is not executed. It states it is for "Rooftop Bar Millwork." The subcontractor involved is Subcontractor Low Country Case & Millwork. The supporting documentation is from June 14, 2017.

Ruling: Subcontractor Low Country has dismissed their claims; therefore, the amounts claimed in RCO 267 could never be "costs of the work" as defined by the Contract Documents. Section 6.3 of the AIA-A133. Contractor also failed to show that the Architect gave an initial ruling on RCO 267 as required. Section 4.4.1 of the AIA-A201. Contractor must submit all claims for RCOs within thirty (30) days after the events giving rise to such claim. Section 4.3.2 of the AIA-A201. This RCO is untimely. RCO 267 is denied.

RCO 268: This RCO is dated September 24, 2018 in the amount of $51,979.21. It is unexecuted. It states it is for "allowance reconciliation." The subcontractors involved in this RCO are Subcontractors Low Country, SEAS, and First Choice Glass. They have all dismissed their claims in this action. Transcript, pp. 3701-3702. The supporting documentation is from July of 2018.

Ruling: Subcontractors Low Country, SEAS, and First Choice Glass have dismissed their claims; therefore, the amounts claimed in RCO 268 could never be "costs of the work" as defined by the Contract Documents. Section 6.3 of the AIA-A133. Contractor also failed to show that the Architect gave an initial ruling on RCO 268 as required. Section 4.4.1 of the AIA-A201. Contractor must submit all claims for RCOs within thirty (30) days after the events giving rise to such claim. Section 4.3.2 of the AIA-A201. This RCO is untimely. However, had Contractor followed the terms of the Contract, Contractor would have been entitled to be paid and this RCO would be granted.

RCO 270: This RCO is dated March 12, 2019—a week after this action was filed by Contractor—in the amount of $49,885.72. It is unexecuted. It states it is for "framing and drywall change

orders." The subcontractor involved is Subcontractor Precision Walls. They have dismissed their claims. Moreover, the supporting documentation is from 2017 and 2018.

Ruling: Subcontractor Precision Walls has dismissed their claims; therefore, the amounts claimed in RCO 270 could never be "costs of the work" as defined by the Contract Documents. Section 6.3 of the AIA-A133. Contractor also failed to show that the Architect gave an initial ruling on RCO 270 as required. Section 4.4.1 of the AIA-A201. Contractor must submit all claims for RCOs within thirty (30) days after the events giving rise to such claim. Section 4.3.2 of the AIA-A201. This RCO is untimely. However, had Contractor followed the terms of the Contract, Contractor would have been entitled to be paid and this RCO would be granted.

RCO 271: This RCO is dated March 12, 2019—a week after this action was filed by Contractor—in the amount of $41,394.11. It is unexecuted. It states it is for "painting change orders." The subcontractor involved is Subcontractor Quantum. They have dismissed their claims. Moreover, the supporting documentation is from 2018. Finally, the supporting documentation references back charges to other subcontractors and defective work of other subcontractors. Transcript, pp. 3705-3710.

Ruling: Subcontractor Quantum has dismissed their claims; therefore, the amounts claimed in RCO 271 could never be "costs of the work" as defined by the Contract Documents. Section 6.3 of the AIA-A133. Contractor also failed to show that the Architect gave an initial ruling on RCO 271 as required. Section 4.4.1 of the AIA-A201. Contractor must submit all claims for RCOs within thirty (30) days after the events giving rise to such claim. Section 4.3.2 of the AIA-A201. This RCO is untimely. Finally, Contractor failed to meet its burden of proof to show that the work in RCO 271 was the responsibility of the Owner. However, had Contractor followed the terms of the Contract, Contractor would have been entitled to be paid and this RCO would be granted.

RCO 272: This RCO is dated March 7, 2019—two days after this action was filed—in the amount of $19,286.37. It is unexecuted. It states that it is for "ornamental metal change orders". The subcontractor involved is Subcontractor Tate Ornamental. They have never made a claim. The supporting documentation is from 2017- 2018.

Ruling: Subcontractor Tate Ornamental has never made a claim for these costs; therefore, the amounts claimed in RCO 272 could never be "costs of the work" as defined by the Contract Documents. Section 6.3 of the AIA-A133. Contractor also failed to show that the Architect gave an initial ruling on RCO 272 as required. Section 4.4.1 of the AIA-A201. Contractor must submit all claims for RCOs within thirty (30) days after the events giving rise to such claim. Section 4.3.2 of the AIA-A201. This RCO is untimely. However, had Contractor followed the terms of the Contract, Contractor would have been entitled to be paid and this RCO would be granted.

RCO 273: This RCO is undated, unsigned and is addressed to and from the same person at Contractor. It is in the amount of $111,644.29. The subcontractor involved is Subcontractor David Allen. They have dismissed their claims in this action. It contains insufficient supporting documentation to understand when the alleged costs were incurred or how they may have been a or who is responsible for the change.

Ruling: Contractor failed to meet its burden in all regards on RCO 273, including all notice provisions in the Contract Documents. Subcontractor David Allen has dismissed their claims; therefore, the amounts claimed in RCO 273 could never be "costs of the work" as defined by the Contract Documents. Section 6.3 of the AIA-A133. Contractor also failed to show that the Architect gave an initial ruling on RCO 273 as required. Section 4.4.1 of the AIA-A201. Contractor must submit all claims for RCOs within thirty (30) days after the events giving rise to such claim. Section 4.3.2 of the AIA-A201. This RCO is untimely. Finally, Contractor failed to meet its burden of proof to show that the work in RCO 273 was the responsibility of the Owner. However, had Contractor followed the terms of the Contract, Contractor would have been entitled to be paid and this RCO would be granted.

RCO 274: This RCO is undated, unsigned and is addressed to and from the same person at Contractor. It is in the amount of $30,537.68. The subcontractor involved is Subcontractor Quantum. They have dismissed their claims in this action. The supporting documentation is from 2018.

Ruling: Contractor failed to meet its burden in all regards on RCO 274, including all notice provisions in the Contract Documents. Subcontractor Quantum has dismissed their claims; therefore, the amounts claimed in RCO 274 could never be "costs of the work" as defined by the Contract Documents. Section 6.3 of the AIA-A133. Contractor also failed to show that the Architect gave an initial ruling on RCO 274 as required. Section 4.4.1 of the AIA-A201. Contractor must submit all claims for RCOs within thirty (30) days after the events giving rise to such claim. Section 4.3.2 of the AIA-A201. This RCO is untimely. Finally, Contractor failed to meet its burden of proof to show that the work in RCO 274 was the responsibility of the Owner. However, had Contractor followed the terms of the Contract, Contractor would have been entitled to be paid and this RCO would be granted.

RCO 275: This RCO is dated April 12, 2019—five weeks after this lawsuit was filed. It is in the amount of $67,384.91. It is not signed by the Contractor. It is unexecuted. The subcontractors involved are Subcontractors David Allen, Quantum, Precision Walls, BMCC, and Low Country. All have dismissed their claims. The supporting documentation for the RCO is from late 2017 to early 2018. Finally, the supporting documentation reveals that the costs claimed in RCO 275 is related to defective work. Transcript, pp. 3714-3724.

Ruling: Subcontractors David Allen, Quantum, Precision Walls, BMCC, and Low Country have dismissed their claims; therefore, the amounts claimed in RCO 275 could never be "costs of the work" as defined by the Contract Documents. Section 6.3 of the AIA-A133. Contractor also failed to show that the Architect gave an initial ruling on RCO 275 as required. Section 4.4.1 of the AIA-A201. Contractor must submit all claims for RCOs within thirty (30) days after the events giving rise to such claim. Section 4.3.2 of the AIA-A201. This RCO is untimely. Finally, Contractor failed to meet its burden of proof to show that the work in RCO 275 was the responsibility of the Owner. However, had Contractor followed the terms of the Contract, Contractor would have been entitled to be paid and this RCO would be granted.

RCO 276: This RCO is dated March 13, 2019—eight (8) days after this lawsuit was filed by Contractor. It is in the amount of $78,632.10. It is unexecuted. The subcontractor involved is

Subcontractor Low Country Case & Millwork. They have dismissed their claims against the Owner. Subcontractor Low Country was granted summary judgment for claims against Contractor not involving the Owner. See October 19, 2021 Memorandum of Low Country Case & Millwork with explanation of Section 10.D. of Subcontracts that only provide for attorneys' fees on "claims not involving the Owner"). The supporting documentation is from 2017-2018. Finally, RCO 276 contains amounts previously paid by the Owner and amounts contained in other RCOs. Transcript, pp. 3724-3731.

Ruling: Subcontractor Low Country dismissed their claims; therefore, the amounts claimed in RCO 276 could never be "costs of the work" as defined by the Contract Documents. Section 6.3 of the AIA-A133. Contractor also failed to show that the Architect gave an initial ruling on RCO 276 as required. Section 4.4.1 of the AIA-A201. Contractor must submit all claims for RCOs within thirty (30) days after the events giving rise to such claim. Section 4.3.2 of the AIA-A201. This RCO is untimely. Contractor failed to meet its burden of proof to show that the work in RCO 276 was the responsibility of the Owner. Contractor has already been paid for costs it claims in the RCO. However, had Contractor followed the terms of the Contract, Contractor would have been entitled to be paid and this RCO would be granted.

RCO 277: This RCO is dated March 13, 2019—eight (8) days after this lawsuit was filed by Contractor. It is in the amount of $138,304.56. It is unexecuted. The subcontractor involved is Subcontractor Miscellaneous Steel Industries. They have never made a claim for any of these amounts. The supporting documentation is dated 2015-2017.

Ruling: Subcontractor Miscellaneous Steel Industries has never made a claim for these costs; therefore, the amounts claimed in RCO 277 could never be "costs of the work" as defined by the Contract Documents. Section 6.3 of the AIA-A133. Contractor also failed to show that the Architect gave an initial ruling on RCO 277 as required. Section 4.4.1 of the AIA-A201. Contractor must submit all claims for RCOs within thirty (30) days after the events giving rise to such claim. Section 4.3.2 of the AIA-A201. This RCO is untimely. However, had Contractor followed the terms of the Contract, Contractor would have been entitled to be paid and this RCO would be granted.

RCO 278: This RCO is dated March 29, 2019—three (3) weeks after this lawsuit was filed by Contractor. It is in the amount of $8,511.80. It is unexecuted. The subcontractor involved is Subcontractor Koch/Strongtower. They are no longer pursuing claims against the Owner. Subcontractor Koch/Strongtower was granted summary judgment for claims against Contractor not involving the Owner. See Koch/Strongtower December 1, 2021 Memorandum (adopting Low Country Case & Millwork's explanation of Section 10.D. of Subcontracts that only provide for attorneys' fees on "claims not involving the Owner"). The supporting documentation is from June 25, 2018.

Ruling: Subcontractor Koch/Strongtower has dismissed their claims; therefore, the amounts claimed in RCO 278 could never be "costs of the work" as defined by the Contract Documents. Section 6.3 of the AIA-A133. Contractor also failed to show that the Architect gave an initial ruling on RCO 278 as required. Section 4.4.1 of the AIA-A201. Contractor must submit all claims for RCOs within thirty (30) days after the events giving rise to such claim. Section 4.3.2 of the

AIA-A201. This RCO is untimely. However, had Contractor followed the terms of the Contract, Contractor would have been entitled to be paid and this RCO would be granted.

RCO 279: This RCO is undated and unsigned by the Contractor. It is unexecuted. It is in the amount of $228,811.20. In the cover letter there is a chart with 43 line entries. Attached to the cover letter are tabs A through X. Transcript, p. 3735-3736. All of the subcontractors identified on Tabs A through X have dismissed their claims. This RCO was never submitted to the Owner. Transcript, p. 3738.

Ruling: Contractor failed to meet its burden in all regards on RCO 279, including all notice provisions in the Contract Documents. All subcontractors involved dismissed their claims; therefore, the amounts claimed in RCO 279 could never be "costs of the work" as defined by the Contract Documents. Section 6.3 of the AIA-A133. Contractor also failed to show that the Architect gave an initial ruling on RCO 279 as required. Section 4.4.1 of the AIA-A201. Contractor must submit all claims for RCOs within thirty (30) days after the events giving rise to such claim. Section 4.3.2 of the AIA-A201. This RCO is untimely. Finally, Contractor failed to meet its burden of proof to show that the work in RCO 279 was the responsibility of the Owner. However, had Contractor followed the terms of the Contract, Contractor would have been entitled to be paid and this RCO would be granted.

For all the reasons stated herein, I find that Contractor is NOT contractually entitled to recover for any of the RCOs contained in Plaintiff's Ex. 12. I further find that the Contractor submitted forty-one (41) requests for change orders, totaling in excess of $2.3 million,[11] for which it had no entitlement due to its failure to follow the Contract terms. This is particularly true given:

(1) Contractor refused to perform a final accounting. Transcript p. 3908;

(2) Contractor refused to comply with the contractually required audit for the entirety of this action. Defendant's Ex. 50; Transcript p. 3926; Transcript p. 2274;

(3) Contractor purposefully shut down Owner's access to the Egnyte site. Transcript, pp. 2204-2207; Plaintiff's Ex. 258;

(4) Contractor came into this Court and sought to recover amounts it had previously been paid by Owner, but it had not in turn paid to subcontractors as it certified that it had paid and as was required by law to do so. See Testimony of Kim Brown and Sam Hadley;

(5) Every single subcontractor that filed a mechanic's lien dismissed it and withdrew their claims prior to or during the trial of this action; and

(6) Balfour failed to put up a single subcontractor witness to explain the forty-one (41) RCOs, notwithstanding the fact that the subcontractors that either never made a claim or dismissed their claims made up in excess of 90% of the RCO amounts.

[11] As stated above the amounts for RCOs contained in Plaintiff's Ex. 12 and Plaintiff's Ex. 329 do not match. Therefore, the Court does not have an exact number.

Contractor's Critical Path Schedule

The Contract Documents expressly require what is known as a "Critical Path Method" or "CPM" schedule. Section 3.10.4.2 of the AIA-A201. The Contractor is "solely responsible" for the schedule. Section 3.10.4.7 of the AIA-A201. Contractor must show that any changes "directly impact the critical path." Section 5.3.1 of the AIA-A133. On this Project, Contractor employed Joe Lauricella, an in-house scheduling manager to create and manage the CPM schedule. Transcript, pp. 384-385. This Court notes that Mr. Lauricella was not presented as a witness by Contractor at trial and was informed he was no longer employed by the Plaintiff.

Contractor was required to submit an initial schedule that, if followed, would allow Contractor to complete the work by the substantial completion date of July 2017. Section 3.10.4.1 of the AIA-A201; Transcript pp. 4248-4249. This initial schedule was required to be submitted to the Architect and Owner within fourteen (14) days of the Notice to Proceed. Section 3.10.4.1 of the AIA-A201. This initial CPM schedule is referred to as the "as-planned schedule." Transcript, p. 4250. In Contractor's "as-planned schedule," there was a four (4) month bust because it failed to include the removal of the tower crane required to set the ninth-floor pool in place. Transcript pp. 4250-4251; Transcript pp. 2671-2674. This bust in the as-planned schedule by Contractor impacted all portions of the Contractor's updated schedules that were required by Section 3.10.4.5 of the AIA-A201; Transcript, pp. 2673-2674. In fact, it took Contractor nineteen (19) months—over two-thirds of the as-planned project duration of twenty-eight (28) months—before they inserted it into the logic of an updated schedule. Id.[12] This practice of changes in the logic of the CPM schedules, removal of restraints and the reduction and increases in durations by the

[12] The Court further finds this project delay accounted for the Contractor's decision to recall David Simonton from retirement in December 2017 to try and put the Project back on track to completion by taking over as its Project Manager.

Contractor - without notice to the Owner - was systemic on this Project and will be discussed more specifically below.

In the absence of Lauricella, Contractor offered the testimony of Mark Doran—a scheduling expert. Doran testified that the Project was originally scheduled to be completed by July 30, 2017. Transcript, p. 724. He testified that the Project was not complete until December 28, 2021—a difference of 516 days. Id. He concluded that, of the five hundred and sixteen (516) days of delay to the Project, Owner was responsible for four hundred and ninety-four (494) days, neither party was responsible for twenty-one (21) days, and Contractor was responsible for a single (1) day of delay. Transcript, pp. 808-814.

Owner offered the testimony of Mark Boe, who was qualified as an expert in the field of scheduling, delay claims, and construction claims. Transcript, pp. 2607-2609. Boe gave several opinions.

1. He concluded that the "four notebooks" submitted on March 6, 2019 were essentially useless. Transcript, pp. 2615-2662; Plaintiff's Ex. 261.
2. Boe concluded that Doran used the wrong CPM methodology. Transcript, p. 2665. The methodology utilized by Doran to essentially conclude that the Contractor was not responsible for any delay on this Project failed to meet industry standards for CPM scheduling as recognized in learned treatises. Transcript, pp. 2667-2705; Defendant's Exs. 89-90.
3. Boe concluded that Doran made a significant error even when employing a rejected methodology as Doran ignored the Contractor's own critical path as identified by the Contractor's own employees and schedulers contemporaneously with the work itself. Transcript, pp. 2666-2669. Doran was forced to ignore or reject the Contractor's actual schedules in order to reach his conclusion. Id.
4. Boe concluded that, like Contractor's as-planned schedule, Doran failed to consider the removal of the tower crane in his conclusions of the critical path and delay analysis. Transcript, pp. 2669-2674. This was a significant error because Doran had the tower crane on his critical path. Id.
5. Boe concluded that even with Doran's improper methodology he failed to identify any cause and effect for any of his delay claim. Transcript, pp. 2674-2675.

6. And finally, Boe concluded that Doran ignored significant delays and manpower problems caused by the Contractor's subcontractors. Transcript, pp. 2675-2676; 2716-2768; Defendant's Ex. 91; Transcript, pp. 2794-2871.

Owner also offered the testimony of Grady Query, III, who was also qualified as an expert in scheduling, delay claims, and construction claims. Transcript, p. 2949. Query actually dealt with Lauricella during the Project. Transcript, p. 2950. Unlike Doran, Query analyzed Contractor's actual contemporaneous CPM schedules and gave several opinions.

1. Contractor deleted activities and actual dates from its schedules which hindered the ability to review Contractor's schedules. Transcript pp. 2968-2969.
2. He concluded that the Contractor's schedule "has such significant fatal flaws that it is neither an effective forecasting or coordination tool." Transcript, pp. 2970-2971.
3. Query explained how predecessor and successor activities worked on a CPM schedule. Transcript, pp. 2973-2978. He explained how Contractor manipulated the predecessor and successor activities with "restraints" or "constraints." Transcript, pp. 2978-2982. Query concluded that Contractor's use of inappropriate constraints on one-third of all its activities gave false information and makes an activity appear critical when it is not. Id. Query testified that the use of even a single inappropriate constraint on a federal project would lead to the rejection of the schedule. Id. He concluded that Contractor used an exorbitant amount of restraints or constraints that inappropriately dictated logic and gave false data on the scheduled activities. Transcript, pp. 2989-2992. These inappropriate changes in the logic of the schedule violated the terms of the Contract Documents. Id; Section 4.10.4.1 of the AIA-A201.
4. Query concluded that Contractor was changing activity ID codes in the schedule. Transcript, pp. 3002-3004. This practice changes how a given activity appears on the critical path and it is a "serious problem." Id.
5. He concluded that critical milestones listed in the schedule were inaccurate. Transcript, pp. 3008-3009.
6. Query concluded that the schedules the Contractor employed could never "accurately predict" when the Contractor was going to finish the job. Transcript, pp. 3010-3012.
7. And finally, Query concluded that the failure to accurately schedule the completion of the Project directly impacted the Owner's ability to hire staff and supply services for the opening of the Project. Id.

I find that the Contractor failed to comply with its scheduling obligations under Section 3.10 of the AIA-A201. I find that, as a direct result of the Contractor's failure to schedule the

Project in accordance with the terms of the Contract Documents, the only witness who testified as to scheduling for Contractor, Doran, ignored all the Contractor's schedules. [13] I further find that the methodology utilized by Doran violated industry standards and contained numerous errors that significantly impacted any weight this Court could give to Doran's conclusions. As such, I find that the Contractor failed to meet its burden of proof to support an extension of Contract Time. I find the testimony of Boe and Query to be more credible, informative and supported by the greater weight of the evidence. Finally, I find the Contract Time extension was not included in the RCOs submitted to this Court and was not ruled upon by the Architect as required by Section 4.4.1 of the AIA-A201.

Section 2.3.1.3 of the AIA-A133 provides "In the event the Construction Manager does not achieve Substantial Completion of the Work within the Contract Time, including approved extensions, the Contractor shall pay to the Owner as liquidated damages and not as a penalty the (*sic*) Nine Thousand Five Hundred Dollars ($9,000.00)[14] per day for each calendar day the actual time of performance to achieve Substantial Completion exceeds the authorized contract time, which amount shall not exceed the amount of the Contractor's stated Fee."

The Project had an initial Substantial Completion date of July 30, 2017. Plaintiff's Ex. 56. The Contract Time was extended by twenty (20) days to August 19, 2017. Defendant's Ex. 144. Contractor did not achieve Substantial Completion until February 15, 2019. Plaintiff's Ex. 260. This is a period of Five Hundred and Forty-Five Days. Given the duration of the delay and the

[13] Doran analogized the initial critical path schedule to the cooking of the turkey and preparation of Thanksgiving dinner – a good analogy but apparently not followed by the Contractor on this project.

[14] The Court notes the $9,500.00 difference between the written amount and the numerical amount. However, because the Contract contained a cap on the amount of liquidated damages and the cap is reached due to the duration of the delay, the discrepancy need not be resolved.

cap on liquidated damages, Hadley did the calculation of liquidated damages in the amount of $1,483,090.00. Transcript, pp. 4120-4121.

I find that the amount of liquidated damages is $1,483,090.00. While entitlement to liquidated damages was disputed, the record contains no contradictory calculation of the amount.

VI. Contractor's Claims

I find that the Contractor failed to meet its burden of proof on any of its causes of action. This failure, coupled with Hadley's audit conclusions, demonstrates that Contractor is not entitled to any additional payments under the Contract Documents.

A. Damages

In addition to the RCO Notebook (Plaintiff's Ex. 12) discussed above, Contractor submitted two damage claims into evidence—both over the objection of the Owner. The first were Plaintiff's Exs. 329[15], 330 and 331 excel spreadsheets produced to the Defendant during the trial on September 21, 2021 ("September 21, 2021 Claim"). Transcript, p. 3948. The documents contain no supporting documentation. Plaintiff's Ex. 329 contains the most information; however, the testimony offered by Contractor regarding Plaintiff's Ex. 329 was very limited. Transcript, pp. 2378-2400. No testimony was offered as to how the Plaintiff's Ex. 329 related to any requests for change orders or any of the testimony of Contractor's other witnesses. It was simply described by Contractor's comptroller as a total cost claim plus interest.[16] Transcript, pp. 2378-2379; Transcript, pp. 2456-2459.

On the contrary, Hadley spent a considerable amount of time and effort evaluating the September 21, 2021 Claim within the context of her audit. Transcript, pp. 3958-4104. Hadley discovered duplication, accounting irregularities, double charges, deletion of back charges that

[15] Contractor's Project manager for the entire Project had no role in the preparation of Plaintiff's Ex. 329.
[16] As this is a GMP Contract, the Court allowed this Exhibit into evidence, but discounts its weight as evidence.

were for the Owner's benefit, payments made to Contractor by Owner that were not paid to Subcontractors and were claimed again before this Court, failure of documentation, and inconsistencies with documentation that was provided when she performed her audit in the courtroom during trial. Id. At the conclusion of her review of the September 21, 2021 claim and her audit, Hadley concluded, to a reasonable degree of accounting and auditing certainty:

> "So given the magnitude of errors and the fact that there's a lot of money on there that Library [Owner] has already paid, and there is a significant amount of money that's duplicative of other amount on there, you can't rely on this document to make payments to BBC [Contractor] because I have identified duplication errors and unsupported documents that are too significant to rely on it in part or in whole."
>
> Transcript, p. 4104.

I find by a greater weight of the evidence that the September 21, 2021 claim is unreliable. I find, given the lack of supporting documentation, the magnitude of errors, and the fact that there is no proximate causation for Contractor's submission of "total costs," this Court gives no weight to the September 21, 2021 claim. As such, Contractor failed to meet its burden of proof for its claim. Section 4.3.1 of the AIA-A201.

The second damage claim submitted into evidence, over the Owner's objection, was offered in Contractor's reply case on November 29, 2021. Plaintiff's Exs. 352-353. "Any Plaintiff in a civil action must first produce and disclose the entire evidence in support of his case; after the defendant has offered all of his evidence, the plaintiff may reply. Reply testimony should be limited to rebuttal of matters raised in defense; it should not be used to complete plaintiff's case in chief." *McGaha v. Mosley*, 283 S.C. 268, 322 S.E.2d 461 (S.C. App. 1984). There was not a witness offered to explain it, authenticate it, swear to its accuracy, or to be cross-examined on it. It was simply handed up to the Court by the attorney for Contractor. Transcript, pp. 4402-4411. Owner had no ability or opportunity to compare it to the September 21, 2021 claim.

I find, given the unreliability of Contractor's September 21, 2021 claim, the submission of the November 29, 2021 claim in reply and without any testimony to explain it, and the fact that there is no proximate causation for Contractor's submission of "total costs," this Court gives no weight to the November 29, 2021 claim. As such, Contractor failed to meet its burden of proof for its claim. Section 4.3.1 of the AIA-A201.

I further find that Contractor's failure to perform the contractually required final accounting, failure to submit a final pay application, and failure to comply with the audit provisions of the contract for over two years supports the Court's conclusion that the spreadsheet claims are unreliable.

This Court is unable to determine that any of the amounts on the September 21, 2021 and November 29, 2021 claims constitute "costs of the work" due to the lack of supporting documentation for the two claims. See Article 6 of the AIA-A133.

This litigation started with the January 25, 2019 "four page letter" claim in the amount of $22,452,287.00 that had no supporting documentation. Notwithstanding the fact that the Contractor filed this action prior to submitting what it contended was the supporting documentation to the Architect as contractually required, the only supporting data for any of the claims is the "four notebooks." Defendant's Exs. 11, 12, 13, 14. Contractor testified in its SCRCP Rule 30(b)(6) deposition that everything anyone needed to analyze the claim was in the "four notebooks" Contractor 30(b)(6) Deposition, pp. 107-109. However, the Contractor failed to put up a witness to adequately explain, describe or show any causal connection between any of the claims and the "four notebooks." Neither Jim Clements, Hadley, or Boe gave the "four notebooks" any weight. Likewise, this Court is unable to make a correlation or proximate causation of any

kind between the "four notebooks" and the Contractor's September 21, 2021 and November 29, 2021 claims.

Finally, I find that the existence and terms of the Joint Prosecution and Defense Agreements between Contractor and certain subcontractors make difficult any determination that any of the amounts claimed in the September 21, 2021 and November 29, 2021 claims could be "costs of the work." Plaintiff Ex. 209.

B. Lien Foreclosure

Due and owing to the fact that the Contractor is not owed any amounts under the Contract, it follows that Contractor's foreclosure action must be dismissed. The Court does not ignore however that, for over two years, over $26,341,655.00 of mechanic's liens were filed on Owner's property. Transcript pp. 3927-3928. The testimony is that the mechanic's liens were excessive and duplicative. Transcript, p. 3931.

Owner is hereby deemed the prevailing party and is entitled to attorneys' fees and costs pursuant to S.C. Code Ann. Section 29-5-10, et seq.

C. Breach of Contract

"The elements for breach of contract are the existence of the contract, its breach, and the damages caused by such breach." *Branche Builders, Inc. v. Coggins*, 386 S.C. 43, 48, 686 S.E.2d 200, 202 (Ct. App. 2009).

Here, the only element met by Contractor is the existence of the contract. Owner is not in breach of the contract as no breach has been shown. In fact, Contractor's representative, David Simonton testified that all certified payment applications were paid. Transcript, p. 4316. Moreover, Contractor failed to demonstrate that it is owed any sums under the contract. Contractor's breach of contract cause of action is dismissed.

D. Quantum Meruit/Quasi Contract

"Absent an express contract, recovery under quantum meruit is based on quasi-contract, the elements of which are: (1) a benefit conferred upon the defendant by the plaintiff; (2) realization of that benefit by the defendant; and (3) retention by the defendant of the benefit under conditions that make it unjust for him to retain it without paying its value." *Webb v. First Federal Savings and Loan Ass'n.*, 300 S.C. 507, 388 S.E.2d 823 (Ct.App.1989). "If the tasks the plaintiff is seeking compensation for under a quantum meruit theory are encompassed within the terms of an express contract which has not been abandoned or rescinded, the plaintiff may not recover under quantum meruit." *Swanson v. Stratos*, 564 S.E.2d 117, 350 S.C. 116 (S.C. App. 2002).

Here, we have an express contract under which no money is owed. Contractor may not then recover under a theory of quantum meruit/quasi contract. Otherwise, the terms of a cost plus contract with a guaranteed maximum price could never be enforceable. Accordingly, Contractor's quantum meruit/quasi contract cause of action is dismissed.

E. Section 27-1-15 Claim

S.C. Code Section 27-1-15 states as follows:

> Whenever a contractor, laborer, design professional, or materials supplier has expended labor, services, or materials under contract for the improvement of real property, and where due and just demand has been made by certified or registered mail for payment for the labor, services, or materials under the terms of any regulation, undertaking, or statute, it is the duty of the person upon whom the claim is made to make a reasonable and fair investigation of the merits of the claim and to pay it, or whatever portion of it is determined as valid, within forty-five days from the date of mailing the demand. If the person fails to make a fair investigation or otherwise unreasonably refuses to pay the claim or proper portion, he is liable for reasonable attorney's fees and interest at the judgment rate from the date of the demand.

Here, there is no evidence that Owner failed to "reasonably" and "fairly" investigate the merits of Contractor's claims. In fact, the evidence is that Owner attempted to investigate and audit the claims for over two years. This effect was undertaken by Owner despite Contractor's

contractual duty to perform the audit. Contractor's S.C. Code Section 27-1-15 cause of action is dismissed.

F. Waiver

"A waiver is the intentional relinquishment of a known right." *Laser Supply & Servs., Inc. v. Orchard Park Assocs.*, 382 S.C. 326, 338, 676 S.E.2d 139, 145 (Ct. App. 2009).

There was no evidence in this case the Owner intentionally waived any rights. In fact, the Contract Documents specifically do not allow for waiver unless there is a signed writing, which I do not find in the record. Section 13.4.2 of the AIA-A201. Contractor's waiver cause of action is dismissed.

G. Cardinal Change

Cardinal Change is not a cause of action. See Rule 12(b)(6), SCRCP. Moreover, out of the forty-one (41) RCOs submitted by Contractor it could not prove entitlement to a single one. Contractor's Cardinal Change cause of action is dismissed.

H. Indemnity

The only indemnity provision in the Contract Documents is found at Section 3.18 of the AIA-A201. However, none of the language of that section applies to any of the damages sought by Contractor. Moreover, due and owing to the fact that Contractor has not proven entitlement to any damages, there necessarily could NOT be any amounts to recover for indemnification. Contractor's indemnification cause of action is dismissed.

I. Breach of Warranty of Plans and Specifications

In South Carolina, there exists an implied warranty of fitness of plans and specifications. *Hill v. Polar Pantries*, 219 S.C. 263, 64 S.E.2d 885 (1951). Here, however, none of the plans and specifications were entered into evidence by the Contractor. The Contractor did not provide any

expert testimony that the Architect's plans or specifications fell below the standard of care. In fact, the only witness offered by the Contractor testified that he was NOT going to testify the Architect's plans fell below the standard of care. Transcript pp. 852-853.[17] Further, Contractor's failure to prove any damages is also fatal to this cause of action. Contractor's breach of implied warranty of fitness of plans and specifications is dismissed.

J. First To Breach

There is not a cause of action in South Carolina for "First to Breach." See Rule 12(b)(6), SCRCP. Additionally, the evidence is that Contractor first breached the contract within fourteen (14) days of the Notice to Proceed by submitting a busted as-planned schedule that omitted the removal of the tower crane. Transcript, pp. 4246-4251. Contractor's first to breach cause of action is dismissed.

K. Breach of Contract Accompanied by A Fraudulent Act

The elements of a claim for breach of contract accompanied by a fraudulent act as "(1) a breach of contract; (2) fraudulent intent relating to the breaching of the contract and not merely to its making; and (3) a fraudulent act accompanying the breach." *Conner v. City of Forest Acres*, 348 S.C. 454, 465-66, 560 S.E.2d 606, 612 (2002). In the present case, Contractor has failed to prove even a breach of the contract. There is also no evidence that Owner engaged in any fraudulent acts at any time. Contractor's breach of contract accompanied by a fraudulent act is dismissed.

[17] While Contractor complained at length that the Architect's plans were neither "100% +" nor were they "Bimmed," Contractor had reviewed the plans in the pre-construction phase before proceeding and further acknowledged that the Contract did not require the plans to be "Bimmed."

VII. Owner's Claims Against Contractor and Subcontractors

In addition to the liquidated damages to be awarded to the Owner in the amount of $1,483,090.00, I find that Owner met its burden of proof as follows:

A. Breach of Contract

"The elements for breach of contract are the existence of the contract, its breach, and the damages caused by such breach." *Branche Builders, Inc. v. Coggins*, 386 S.C. 43, 48, 686 S.E.2d 200, 202 (Ct. App. 2009).

I find that Owner and Contractor entered into a valid and enforceable contract. I find that Contractor breached the following provisions of the Contract:

1. Contractor "accepted the relationship of trust and confidence" and "covenant[ed] with the Owner to cooperate with the Architect and exercise [Contractor's] skill and judgment in furthering the interests of the Owner; to furnish efficient construction administration, management services and supervision; to furnish and supply at all times an adequate supply of workers and materials; and to perform the work in an expeditious and economical manner consistent with the Owner's interests. Section 1.2 of the AIA-A133.
2. Contractor was to be "solely responsible for the acts and omissions of its subcontractors." Section 2.1.6 of the AIA-A133. Contractor was to make the Owner an intended third party beneficiary of "all agreements" between Contractor and subcontractors. Id. I find that Contractor breached this provision.
3. Contractor is solely responsible for scheduling, phasing and coordination of the work. Section 2.3.1.4 of the AIA-A133; Section 3.10 of the AIA-A201. I find that Contractor breached this provision.
4. Contractor "shall develop a system of cost control for the Work, including regular monitoring of actual costs for activities in progress and estimates for uncompleted tasks and proposed changes." I find Contractor breached this provision.
5. Contractor was required to account for back charges to be assessed between its subcontractors for the benefit of the Owner. Section 6.7.3 of the AIA-A133. I find Contractor breached this provision.
6. Contractor was required to keep "full and detailed accounting records" and to "substantiate all costs incurred." Section 6.11.1 of the AIA-A133. I find the Contractor breached this provision.
7. Contractor was required to submit to an audit of its books and records. Sections 6.11.1 and 7.1.11 of the AIA-A133. I find the Contractor breached this provision.

8. Contractor was required to summarize its cost records and maintain complete "back up documentation." Section 7.1.4 of the AIA-A133. I find the Contractor breached this provision.
9. Contractor was required to submit a final accounting for the Project. Section 7.2 of the AIA-A133. I find the Contractor breached this provision.
10. Contractor was required to provide all "management staff with whatever additional supervisory personnel are required to ensure that the Work will be completed by the Contractual date of Substantial Completion. Section 3.3.4 of the AIA-A201.
11. Contractor was required to employ a competent superintendent and necessary assistants. Section 3.9.1 of the AIA-A201.
12. Contractor was required to be solely responsible for all of the scheduling requirements. Section 3.10.1 of the AIA-A201. I find Contractors breached these provisions.
13. Contractor was required to bond-off subcontractor liens. Section 9.3.1.2 of the AIA-A201. I find Contractor breached this provision.
14. Contractor was required to promptly, and at its own expense, correct defective work. Section 12.2.1 of the AIA-A201. I find the Contractor breached this provision.

Section 2.4 of the AIA-A201 states, in pertinent part, that "If the Contractor defaults or neglects to carry out the work in accordance with the Contract Documents" and the Owner provides notice to the Contractor of such failure, Owner may proceed to perform the work itself. Owner put Contractor on notice of the defective work. Defendant's Exs. 104 and 105. Owner then performed the work through other contractors. Transcript, pp. 3819-3827. Owner incurred costs performing work or self-performing work that Contractor was contractually required to perform, but Contractor either failed to perform the work or the work was defective and not in compliance with the Contract Documents. Defendant's Ex. 146B; Transcript, p. 3817. This work included warranty work, laundry costs, labor, cleaning fees, repair work, painting work, punch list repair work, fixtures, and pool repairs. Transcript, pp. 3819-3827; Transcript pp. 3247-3255; Transcript, pp. 3267-3272. Defendant's Exhibit 146B contains proper and complete supporting documentation. The total amount of the Owner supplied work is $2,256,764.00.

I find the Owner was required to perform work that the Contractor failed to perform. I find that the amount of $2,256,764.00 is reasonably supported and directly and proximately caused by the Contractor's failure to perform the contractually agree to work.

B. Breach of Contract Accompanied by a Fraudulent Act

The elements of a claim for breach of contract accompanied by a fraudulent act as "(1) a breach of contract; (2) fraudulent intent relating to the breaching of the contract and not merely to its making; and (3) a fraudulent act accompanying the breach." *Conner v. City of Forest Acres*, 348 S.C. 454, 465-66, 560 S.E.2d 606, 612 (2002).

I find Contractor's failure to perform its own accounting and repeated obfuscation of the accounting and audit process constituted not only a breach of the contract but that it was accompanied by fraudulent intent. I find that the true purpose of trying to avoid the audit was not for the reasons stated by Contractor in Defendant's Ex. 50, but instead to avoid, for as long as possible, the discovery that Contractor's claim was not $22,452,287.00 or any of the iterations of Contractor's spreadsheets. The actual claim, once Hadley was finally able to perform her work, is determined to be $419,425.00. Transcript, p. 4111; Transcript, pp. 4120-4121. This amount is prior to the award of any amounts of set off for liquidated damages or other damages.

Ultimately, I find that the Contractor is owed nothing. I find that Contractor breached this Contract, and the breach was accompanied by a fraudulent act. The Court asks:

What is the purpose of filing duplicative and excessive liens? What is the legitimate purpose of refusing to do an accounting or allow one's books and records to be audited?

The Court concludes that there is not a legitimate one. The only purpose would be to attempt to force an Owner into submission. This is especially true given Contractor's repeated

assertions that the Owner did not have sufficient funds to pay their claim. See Paragraph 52 of Plaintiff's Second Amended Complaint.

I further find the Contractor's undisclosed internal change orders violate the express terms of the Contract Documents and the essence of a cost-plus contract to be further evidence of fraudulent intent.

This Court, therefore, orders a bifurcated hearing on punitive damages pursuant to S.C. Section 15-32-510 et seq. for Contractor's breach of contract accompanied by a fraudulent act.

C. Declaratory Relief/Indemnification

I find and do declare, pursuant to S.C. Code Sections 15-53-30 and -40, based upon the accounting work and audit performed by Hadley, the mechanic's liens filed by Contractor and Subcontractors Lithko, Watson and ONSM are or were duplicative and excessive. The only remaining mechanic's lien is the Contractor's lien which is dismissed pursuant to the Court's rulings herein. As such, I order, pursuant to S.C. Code Ann. Section 15-53-100, Contractor and Subcontractors Lithko, Watson and ONSM to pay all costs incurred by Owner for the services of Hadley. At the trial, Ms. Hadley stated that her costs incurred were in the approximate amount of $530,000.00. Transcript, pp. 3954-3955. Owner shall prepare and file an affidavit of Hadley's costs within thirty (30) days from the entry of this Order.

D. Unfair Trade Practices

To recover in an action under the UTPA, the claimant must show: (1) the opposing party engaged in an unfair or deceptive act in the conduct of trade or commerce; (2) the unfair or deceptive act affected the public interest; and (3) the claimant suffered monetary or property loss as a result of the opposing party's unfair or deceptive act(s). S.C. Code Ann. §§ 39-5-10 to -560; *Wright v. Craft*, 640 S.E.2d 486, 372 S.C. 1 (Ct. App. 2006).

I find that Contractor engaged in acts which were unfair and deceptive in the conduct of trade or commerce. I find that these acts which were capable of repetition, were in fact repeated; however, I find that this is a private contract dispute between these parties which does not affect the public interest. Accordingly, this cause of action is dismissed.

E. Civil Conspiracy

"[A] plaintiff asserting a civil conspiracy claim must establish (1) the combination or agreement of two or more persons, (2) to commit an unlawful act or a lawful act by unlawful means, (3) together with the commission of an overt act in furtherance of the agreement, and (4) damages proximately resulting to the plaintiff." *Paradis v. Charleston Cnty. Sch. Dist*., 433 S.C. 562, 861 S.E.2d 774 (S.C. 2021).

I find that Contractor combined with Subcontractors Lithko, ONSM, and Watson entered into a Joint Defense and Prosecution Agreement. Owner contends the Agreement, by itself, was lawful, but sought to achieve an unlawful purpose of extorting money from the Owner.

The Court finds the communications undertaken through this Agreement to be privileged under the Common Interest Rule. Transcript pp. 5036-5043. Because the defense and prosecution of claims among co-Defendants is recognized as a legitimate legal process, I find no overt act in furtherance of the Agreement, in this instance, will support a recovery under the civil conspiracy cause of action. See *Tobaccoville USA v. McMaster*, 387 S.C. 287, 692 S.E.2d 526 (2010). Also *Paradis v. Charleston Cnty. Sch. Dist.,* supra.

IT IS THERFORE ORDERED AS FOLLOWS:

I. Judgment is to be entered in favor of Library Associates, LLC on its breach of contract cause of action against Balfour Beatty Construction, LLC in the amount of **$3,320,329.00.** This amount is arrived at by adding the liquidated damages sum ($1,483,090.00) and the cost to complete damages ($2,256,764.00) for a subtotal of

$3,739,854.00. The contract balance of $419,425.00 is then subtracted for a setoff to arrive at the judgment amount of $3,320,329.00.

II. Judgment is to be entered in favor of Library Associates, LLC on breach of contract accompanied by a fraudulent act cause of action against Balfour Beatty Construction in the amount of $**3,320,329.00**.

III. A hearing on punitive damages will be set by future Order of this Court.

IV. Library Associates, LLC is hereby instructed to submit its attorneys' fees and costs petition as the prevailing party against Balfour Beatty Construction, LLC, Lithko Contracting, LLC, Watson Electrical Construction, Co., LLC and Old North State Masonry, LLC under the mechanic's lien statute, S.C. Code Section 29-5-10, et seq., within thirty (30) days of the date of this Order.

V. Library Associates, LLC is further instructed to submit an affidavit of Hadley's costs pursuant to S.C. Code Ann. Section 15-53-100 within thirty (30) days of this Order.

IT IS SO ORDERED!

_____
Mikell R. Scarborough
Charleston County Master-In-Equity

_____, 2023

Charleston Common Pleas

Case Caption: Balfour Beatty Construction LLC VS Library Associates LLC , defendant, et al

Case Number: 2019CP1001108

Type: Master/Order/Other

So Ordered

s/Mikell R. Scarborough 3062