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Case Number 35,2020

IN THE SUPREME COURT OF THE STATE OF DELAWARE

TUTOR PERINI CORPORATION,

Defendant-Below, Appellant,

v.

GREENSTAR IH REP, LLC and
GARY SEGAL,

Plaintiffs-Below, Appellees.

No. 35,2020

Court below: Court of Chancery of the State of Delaware, C.A. No. 12885-VCS

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

NATURE OF PROCEEDINGS

This appeal is from a judgment entered following a three-day trial. The dispute centers on the proper interpretation of a settlement agreement that intended but failed to resolve a prior dispute arising out of Tutor Perini Corporation's ("TPC") acquisition of Greenstar Services Corporation ("Greenstar") in 2011 (the "Merger"). This appeal will demonstrate that the Court of Chancery erred in interpreting key terms of this settlement agreement (known as the "Holdback Agreement"), which led the court to conclude erroneously that TPC had breached the Holdback Agreement by refusing to release to Plaintiff Greenstar IH Rep, LLC ("IH Rep"), which represents the former stockholders of Greenstar, an $8 million holdback relating to the Merger. Greenstar's largest stockholder was co-Plaintiff Gary Segal.

TPC is a general engineering contractor that builds major public infrastructure such as airports, bridges, and subways, and private improvements such as casinos and hotels. In July 2011, the parties consummated the Merger through execution of the "Merger Agreement," under which TPC acquired Greenstar, including its wholly owned subsidiaries, WDF, Inc. ("WDF"), a mechanical and plumbing subcontractor, and Five Star Electric Corporation ("Five Star"), an electrical subcontractor.

The purchase price for Greenstar was based on its estimated "book value" or net worth. During negotiations for the Merger, WDF and Five Star were in the process of performing numerous subcontracts ("work in progress"). In calculating

Greenstar's book value, Generally Accepted Accounting Principles ("GAAP") allowed Greenstar to count as assets on its balance sheet (i) the profit that WDF and Five Star expected to earn in the future through billings on their respective subcontract work in progress, and (ii) certain costs incurred by WDF and Five Star in performing contract work in excess of allowed contracts billings ("CIE" or "costs in excess of billings") which they had booked as revenue, even though they had not yet billed for or collected them, because they eventually expected to collect cash for such CIE. In setting Greenstar's book value and purchase price in the Merger, Greenstar was credited with more than $32 million dollars of CIE based on Plaintiffs' representations that WDF and Five Star would collect this amount in the future from their customers through pending change orders and claims.

Although the parties agreed that CIE could be used to establish Greenstar's book value and purchase price, TPC questioned whether Greenstar had overestimated the cash it would eventually collect for the CIE through WDF's and Five Star's pending change orders and claims. To address TPC's concerns, the parties agreed in the Merger Agreement that TPC could withhold a portion of the Merger consideration in the form of two holdbacks, the release of which would be tied to Greenstar's ability post-closing to secure cash collections on pending change orders and claims from WDF's and Five Star's customers.

Disputes arose, however, on whether Greenstar had met the conditions for release of the holdbacks. Undisputed evidence showed that, even though Greenstar's booked revenues continued to grow, Greenstar was unable to collect cash on many of its pending claims, forcing TPC to infuse tens of millions of dollars into Greenstar just to allow it to stay afloat. Consequently, Greenstar was not entitled to release of either of the two holdbacks under the Merger Agreement.

Nonetheless, in March 2013, in an attempt to salvage its acquisition of Greenstar, TPC agreed to release one of the holdbacks ($17.5 million) to Plaintiffs. In exchange, however, the parties agreed that TPC would retain the other holdback, worth $8 million (the "Special Holdback"), to compensate for the risk that Greenstar's cash collection problems would continue, rendering it unable to deliver on the promised value that comprised part of the Merger price. The parties agreed that release of the Special Holdback would be subject to new and more exacting conditions than those imposed by the Merger Agreement.

Specifically, the Holdback Agreement afforded Plaintiffs two different ways to secure release of the Special Holdback. First, they could collect the cash associated with the specific unpaid claims identified on Exhibit B to the Holdback Agreement totaling $60.529 million (the "Bogey"), many of which had also been identified in the Merger Agreement, had CIE booked for them, and were used dollar for dollar in increasing Greenstar's book value and purchase price in the Merger

Agreement. Second, if Plaintiffs were unsuccessful in collecting all of the cash on the Bogey, Plaintiffs could offset any such shortfall if resolution of the claims identified on Exhibit C to the Holdback Agreement resulted in "additional net profit" on those WDF and Five Star projects. Thus, the Holdback Agreement established different accounting standards for determining when collections on Exhibit B and C claims counted toward the Bogey—in short, cash collections for Exhibit B claims and "additional net profit" for Exhibit C claims. Additionally, any alleged or previously paid counterclaims against Greenstar, WDF, or Five Star on the specified projects would effectively increase the amount required for Plaintiffs to meet the Bogey and secure release of the Special Holdback.

In 2015, the parties again disputed whether Plaintiffs had satisfied the strict requirements for release of the Special Holdback. The parties were unable to resolve their disputes and this litigation followed. At trial, Plaintiffs argued (i) that all cash collections on the Exhibit B and C claims counted against the Bogey, effectively gutting the distinctive "additional net profit" requirement applicable to the Exhibit C claims, (ii) that Greenstar had collected the Bogey, and (iii) that TPC had therefore breached the Holdback Agreement by not releasing the Special Holdback. TPC argued (i) that the Holdback Agreement's separate standards for determining whether collections on Exhibit B and C claims counted against the Bogey must be respected, (ii) that Greenstar had not collected the Bogey, and (iii) that TPC had therefore not breached the Holdback Agreement. It was not until after trial that Plaintiffs first seized on the argument that the "additional net profit" requirement had no function except to prohibit double-counting when an Exhibit C claim is inclusive of an Exhibit B claim. Under this argument, all cash collections of the Exhibit B and C amounts count against the Bogey, except when a portion of an Exhibit C claim also appears on Exhibit B.

On December 4, 2019, the Court issued its post-trial Memorandum Opinion ("Opinion" or "Op.") (Exhibit A hereto). The trial court agreed with the Plaintiffs' newly-minted, post-trial construction of the Holdback Agreement. According to the court, the parties inserted the "additional net profit" requirement in the Holdback Agreement solely to avoid "double[-]counting," or counting a cash collection twice (once on Exhibit B and again on Exhibit C). (Op. 33-34, 35-36, 40-41.) Hence, according to the court, all cash collections on the Exhibit B and C claims count against the Bogey (minus duplication). (*Id*. 30-33, 40-41.) This was error.

Employing this erroneous standard for crediting Exhibit C collections against the Bogey, the court determined that Plaintiffs had collected enough cash against the Bogey to mandate release of the Special Holdback. In reaching this conclusion, the court determined that approximately $45 million in purportedly undisputed collections counted against the Bogey assuming its flawed construction of the "additional net profit" requirement was correct. Additionally, the court determined that Plaintiffs carried their burden of proving that an additional approximately $20 million of collections should count against the Bogey and that a $10.9 million counterclaim was no longer outstanding and therefore did not offset Plaintiffs' collections. (*Id*. 48-52.)

TPC timely appeals from the Opinion and the Final Order and Judgment entered on December 26, 2019. As will be explained in more detail below, the court erred in construing the Holdback Agreement's "additional net profit" language as nothing more than a procedural mechanism to avoid double-counting because doing so (1) rendered it meaningless surplusage as to a majority of the Exhibit C claims, (2) ignored the distinctive standards set forth in the Holdback Agreement for ascertaining whether collections on Exhibits B and C counted against the Bogey, (3) likewise ignored the parties' decision to break out the Exhibit B and C claims into separate schedules to track these distinctive standards, (4) discarded the accounting analysis required by the Holdback Agreement, and (5) ignored the full commercial context in which the Holdback Agreement was entered. This error of law in construing the Holdback Agreement led the Court to inappropriately credit tens of millions of dollars against the Bogey. And, even if Plaintiffs' and the court's construction was correct, it was not the only reasonable interpretation of the Holdback Agreement.

Additionally, as explained below, the court erred in finding Plaintiffs carried their burden of proof that certain amounts were collected against the Bogey and that a counterclaim was no longer outstanding. These errors in factual findings alone resulted in a more than $30 million swing in Plaintiffs' favor on the Bogey.

SUMMARY OF ARGUMENT

1. The trial court erred as a matter of law in adopting Plaintiffs' construction of the "additional net profit" requirement. According to Plaintiffs and the court, the "additional net profit" requirement is nothing more than a procedural mechanism to avoid double-counting of cash collections. Under this construction, the "additional net profit" requirement only applies to less than half of the Exhibit C claims for which there is purportedly a double-counting problem, rendering it meaningless surplusage to the remaining majority of Exhibit C claims. This reading is directly contrary to the language of Section 2 of the Holdback Agreement, which imposes no such limitation on the "additional net profit" requirement's reach and, instead, makes clear that it applies to all Exhibit C claims.

The trial court likewise erred in concluding that all cash collections on Exhibit B and C claims count against the Bogey. This construction negates the parties' decision in Section 2 to impose different standards for determining whether collections on Exhibit B and C claims count against the Bogey. Pursuant to the express language of Section 2, any cash collections of the Exhibit B amounts count against the Bogey, but cash collections of the Exhibit C amounts only count against the Bogey if they generate "additional net profit." The court's construction that all cash collections count against the Bogey also ignores the parties' decision to break out the Exhibit B and C claims into two separate schedules with the dividing line being the different collection standards applicable to each. The court's conclusion that all cash collections on the Exhibit B and C claims count against the Bogey, and the ensuing conclusion that the "additional net profit" requirement was only intended to preclude double-counting, is also inconsistent with the accounting constructs that the parties included in the Holdback Agreement. By importing accounting terminology and principles into the Holdback Agreement, the parties intended for the determination of "additional net profit" to be an accounting evaluation that required looking beyond the static numbers on Exhibits B and C to consider, among other things, a claim's booked position. The court recognized these basic accounting principles, but elected to ignore them in interpreting the "additional net profit" requirement. In focusing exclusively on cash collections, the court also failed to consider the full commercial context in which the Holdback Agreement was executed. Specifically, the full commercial context in which the Holdback Agreement was executed showed that the distinction between cash collections and additional net profit originated in the Merger Agreement and that the parties intended to increase the importance of additional net profit in the Holdback Agreement to ensure that settlement of an Exhibit C claim had to cause a net profit increase in the same way that non-collection of an Exhibit B claim would necessarily reduce profit assumed and paid for by TPC in connection with the Merger.

Plaintiffs failed to carry their burden of proving that their construction was reasonable. But, even if it was reasonable, the court still erred by not determining that the contractual language was ambiguous. TPC's construction, under which the determination of whether an Exhibit C claim has generated "additional net profit" is assessed by calculating the profit and loss ("P&L") impact that the resolution of the claim has on the project, is reasonable and gives meaning to all pertinent provisions of the Holdback Agreement.

2. The trial court erred by finding that Plaintiffs satisfied their burden of proving that certain amounts identified on Exhibits B and C had been collected in accordance with the Holdback Agreement and that a counterclaim on Exhibit C was no longer pending. First, Plaintiffs did not present sufficient evidence to prove that the cash collected on the Freedom Tower project related to the specific claim identified on Exhibit B. Second, Plaintiffs did not present sufficient evidence to prove that the cash collected on the Jamaica 2G project related to the delay claim on the project and, in finding otherwise, the court ignored key contrary evidence. Third, the sole evidence that Plaintiffs submitted in an attempt to prove that the Exhibit C claim on the John Jay project had settled—one sentence of speculative and unsubstantiated deposition testimony—was insufficient to carry their burden of proof. Fourth, the court erred in finding that the counterclaim on the John Jay project was no longer outstanding because the only evidence presented by Plaintiffs—

equivocal and conclusory deposition testimony that the counterclaim was “gone”—was insufficient to carry their burden of proof.

STATEMENT OF FACTS

A. The Merger Agreement.

On July 1, 2011, TPC, Greenstar, Greenstar Rep, and a merger subsidiary executed the Merger Agreement pursuant to which TPC acquired all of the shares of Greenstar, which wholly owned Five Star and WDF. (A61-A144.) The Merger Agreement designates Plaintiff IH Rep as the post-closing representative of the former stockholders of Greenstar. (*Id.*) Co-Plaintiff Gary Segal is the largest former stockholder of Greenstar. At the time of the Merger, Segal was the CEO of Greenstar and the President and CEO of Five Star. Larry Roman, who was WDF's CEO at the time of the Merger and continues in that role presently, is also one of Greenstar's former stockholders represented by IH Rep.

The Merger price was based on Greenstar's estimated "book value" or net worth. (A70 §1.01.) Establishing Greenstar's book value required valuation of Greenstar's primary assets: accounts receivable and billings, projected fees and profits on work in progress, and estimated collections on pending change orders and claims. (A84 §2.13(a).)

The value of Greenstar's work in progress was set based on the sellers' representations of the total revenue including gross margins (profit) WDF and Five Star would realize on completion of their respective work in progress. (A84-A85 §2.13(b), A114-A116 §6.07; A145-A168.) The sellers also disclosed their estimates of the additional compensation (above original contract amount) Greenstar eventually would collect on WDF's and Five Star's outstanding change orders and claims. (A116-A118 §6.08; A158). Greenstar's sellers indicated there was $34.2 million in pending change orders and claims that Greenstar had booked as revenue (increasing Greenstar's book value) as of the Merger Agreement. (*Id.*)

The total purchase price for Greenstar was comprised of a cash payment at closing, earn-out payments, a $17.5 million "Indemnity Holdback," and the $8 million Special Holdback. The holdbacks were structured to incentivize Greenstar and its former stockholders to collect cash related to unapproved change orders and claims existing as of the Merger and to realize profits on the projects. (A114-A118 §§607-08; A840 (Burk); A774 (Tutor).) Under the holdback structure, Greenstar and its subsidiaries agreed to forfeit the escrow holdbacks to TPC if they failed to collect at least 90 percent of the projected gross margin (profit) on their work in progress as of the Merger closing or if they failed to collect the booked amounts associated with certain pending change orders and claims. (A755 (Tutor); A840-A841 (Burk); A114-A118 §§6.07-08.)

B. Greenstar's Cash Generation Problems Lead To Disputes On The Release Of The Holdbacks.

Following the Merger, cash generation at Five Star and WDF was an ongoing challenge. (A815 (Bennett).) Instead of decreasing the cash flow problems through resolving outstanding change orders and claims, Five Star's and WDF's unbilled cost and claim balances continued to rise. Ultimately, TPC was forced to infuse Five Star and WDF with hundreds of millions of dollars in cash simply to allow both companies to meet basic expenses such as payroll, despite the fact that Five Star and WDF were simultaneously booking significant revenues. (A316-A321; A324-A325; A359-A362; A755 (Tutor); A841 (Burk).)

In April 2013, Segal began pressing for payment of all $25.5 million in holdbacks under the Merger Agreement. TPC was resistant to releasing any of the holdbacks because Five Star and WDF had made little to no progress post-Merger collecting on pending claims. (A316-A321; A324-A325; A359-A362.) As a compromise in order to salvage its acquisition of Greenstar, TPC agreed to release the $17.5 million Indemnity Holdback, but would continue to withhold the $8 million Special Holdback. (A757, A758 (Tutor); A841 (Burk).) TPC made clear, however, that in exchange for releasing the Indemnity Holdback it would require very specific, restrictive conditions for release of the Special Holdback. (A169-A171; A172-A187; A188-A199; A842-A843 (Burk).) Following negotiations and exchange of drafts, on May 3, 2013, the parties entered into the Holdback Agreement. (A169-A171; A188-A199; A247-A277.)

C. Overview Of Construction Contracts And Accounting.

To understand certain terminology used in the Holdback Agreement and in this case in general, a brief description of construction contracts and accounting is in order. Contractors (such as Five Star and WDF) enter into contracts with construction managers, general contractors, property owners, or other counterparties. These construction contracts establish the scope of work to be performed by the contractor in exchange for a contract price. (Op. 10.) As a contractor performs work under the contract, it incurs costs and often encounters unexpected delays or other complications. (*Id.*) Disputes often arise between the contractor and its contractual counterparty as to whether such costs, delays, or complications were contemplated in the original scope of the contract. (*Id.*) When a contractor is asked to do something different than what was in the original contract, it seeks a change order. (*Id.*) A pending change order is one that has not been approved by the contractual counterparty. When a contractor performs extra work to address a condition that surfaces on the job beyond the contractor's control and increases the contractor's costs, it asserts a claim. (*Id.*)

Costs incurred by the contractor for work performed outside the scope of the original contract on a pending change order or claim are called unbilled costs. (*Id.* 11.) GAAP permit a contractor to book (or recognize as revenue) unbilled costs, which are reflected as an asset on the contractor's balance sheet as costs in excess of billings or CIE. (*Id.*) However, a contractor cannot bill for CIE and convert them into an account receivable until its contractual counterparty approves the change order or settles the claim. (*Id.*)

D. The Holdback Agreement.

The former Greenstar stockholders had two ways to meet the Bogey and cause the release of the $8 million Special Holdback. First, they could convert the $60.529 million in specific claims and unbilled costs listed on Exhibit B to the Holdback Agreement into actual cash collections. (A249-A250 §2.) Second, if Plaintiffs failed to convert the full amount of Exhibit B claims into cash, they could offset that shortfall by the amount of any "additional net profit" that was generated on projects as a result of the resolution of certain claims listed on Exhibit C. (A250 §2; A200-A246; A843 (Burk).) Indeed, counsel for Segal and Greenstar Rep made clear in their revisions to the draft Holdback Agreement that offsets were only available to the extent net profit was recognized on the Exhibit C claims. (A206; A495-A496.) Segal also testified that he understood that the Exhibit C claims had to generate additional net profits to be counted against the shortfall. (A652 (Segal).)

Consistent with the concept that the Exhibit C claims had to generate net profit on the projects to offset any collection shortfalls on the Exhibit B claims, the Holdback Agreement also provided that the amount of any Exhibit C offset claims would be reduced to the extent that any counterclaims had been alleged, existed, or had been paid on the corresponding Exhibit C projects. (A249-A250 §2.)

The operative language in the Holdback Agreement is as follows:

> [T]he pending claims set forth on Exhibit B hereto (the "Pending Claims") are the remaining outstanding

> claims that could have been made under (and in accordance with) Sections 6.08 and 6.09 of the Merger Agreement . . . . [I]f the amounts set forth under "Cash Collection Required" with respect to the Pending Claims are not collected in full by [Greenstar] on or prior to July 31, 2014 (or which [TPC] believes in good faith will not eventually be collected in full in accordance with [Greenstar's] customary business practices) (the "Pending Claims Uncollected Amounts"), [TPC] shall be entitled to offset such Pending Claim[s] Uncollected Amounts solely against the [Special Holdback] . . . . [A]ny "Offset Claims" that may be credited against the Pending Claims Uncollected Amounts shall only apply to the projects and claim amounts with respect to such projects set forth on Exhibit C hereto (and only to the extent that such "Offset Claim" results in additional net profit recognized by [Greenstar] after March 31, 2013 (or which [TPC] believes in good faith will result in additional net profit recognized in accordance with [Greenstar's] customary business practices)) (the "Revised Offset Claims"); provided, further, that the amount of any Revised Offset Claims to be credited against the Pending Claims Uncollected Amounts shall be reduced to the extent that any counterclaim related to the projects set forth on Exhibit C (the "Counterclaims") remains outstanding on, has been alleged as of, or has otherwise been paid by [Greenstar] prior to, the date of the applicable calculation.

(*Id*.)

The Holdback Agreement also included an Exhibit D, entitled "Example of Escrow Holdback Calculation." (A269.) In creating Exhibit D, Jordan Bennett, the then-CFO of Five Star, imported into Exhibit D terminology used in Exhibits B and C—"Pending Claims/Unbilled Costs" and "Offset Claims," respectively. (A825 (Bennett).) The term "Offset Claim" was understood by Bennett to mean the "net profit associated with that claim." (*Id.*) Bennett did not intend to change any of the express provisions of the Holdback Agreement in drafting Exhibit D. (*Id.*)

E. Despite Greenstar's Continued Cash Flow Problems, Segal Nonetheless Presses for Release of the Special Holdback.

Five Star's and WDF's inability to convert claims and unbilled costs into actual cash collections continued following entry into the Holdback Agreement. (A652 (Segal); A756 (Tutor); A846 (Burk); A280-A283; A312-A313; A314-A315.) As of September 30, 2014, the cumulative gap between earnings recognized and cash collected exceeded $114 million. (A316-A321.) Indeed, although Five Star and WDF had recognized in excess of $167 million in earnings from the closing of the Merger to September 2014, TPC infused cash in excess of $156 million in that same time period simply to permit Five Star and WDF to meet their basic financial obligations. (A755 (Tutor); A818 (Bennett); A316-A321; A324-A325.) A major component of the deficit at Five Star and WDF was the lack of cash collection on revenues previously recognized on allegedly supportable unapproved change orders and claims, which had been recorded onto the balance sheet in CIE. (A847 (Burk); A278-A279; A316-A321; A324-A325; A359-A362.)

Despite Five Star's and WDF's cash collection problems, beginning in the Fall of 2014, Segal nonetheless began actively seeking release of the $8 million Special Holdback. (A322-A323.) Segal enlisted Bennett to generate updated Exhibits B and C to support Segal's demand for release of the entire Special

Holdback. (A826 (Bennett).) Although Bennett recognized he was acting inconsistent with the terms of the Holdback Agreement, at Segal's instruction Bennett submitted calculations that included all cash collections and executed change orders relating to any project listed on Exhibits B and C since the closing of the Merger, regardless of whether they were for the specific pending claims and unapproved change orders on Exhibit B or generated additional net profit as to the Exhibit C Offset Claims. (A826-A827 (Bennett); A284-A311; A326-A337; A338-A341; A347-A348.) When challenged by TPC Chief Accounting Officer Ryan Soroka regarding the inclusion of all cash receipts or all change orders associated with the Exhibits B and C projects, Bennett expressed doubt regarding its compliance with the Holdback Agreement and explained that he was merely following instructions from Segal regarding what information to provide to TPC. (A678-A679 (Soroka).) Ron Tutor, TPC's founder and CEO, testified that he had suspicions that Plaintiffs were attempting to meet the Bogey by using cash collections that had nothing to do with the Exhibit B and C claims. (A775 (Tutor).)

TPC thus denied release of the Special Holdback on the grounds that Segal had disregarded the express terms of the Holdback Agreement. (A342-A346; A354-A358.) At best, a total of $17.815 million had been collected on the Exhibit B claims and unbilled costs towards the Bogey, and the total allowable offset amount under Exhibit C was **negative** $29.716 million, based on $9.784 million in permissible offsets, reduced by $39.5 million in counterclaims. (A354-A358.) Although discussions continued for a time, the parties were unable to resolve their disputes relating to the Special Holdback and this suit followed.

ARGUMENT

I. THE TRIAL COURT ERRED AS A MATTER OF LAW IN ADOPTING PLAINTIFFS' CONSTRUCTION OF THE "ADDITIONAL NET PROFIT" REQUIREMENT AND, ACCORDINGLY, PLAINTIFFS DID NOT SATISFY THEIR BURDEN TO PROFFER A REASONABLE CONSTRUCTION

A. Question Presented: Did the trial court err by adopting Plaintiffs' interpretation of the Holdback Agreement's "additional net profit" requirement as a reasonable construction?[1]

B. Scope Of Review: This Court "review[s] questions of contract interpretation *de novo*." *Salamone v. Gorman*, 106 A.3d 354, 367 (Del. 2014).

C. Merits:

For a breach of contract claim, a plaintiff bears the burden of proffering a reasonable construction of the contractual language at issue. *See Zimmerman v. Crothall*, 62 A.3d 676, 691 (Del. Ch. 2013) ("As the party seeking enforcement of his interpretation of the Adhezion Operating Agreement, Zimmerman bears the burden to prove his breach of contract claim by a preponderance of the evidence."); *see also Freeman Invs., L.P. v Pac. Life Ins. Co.*, 704 F.3d 1110, 1115 (9th Cir. 2013) (plaintiff has burden of proof as to meaning of contract term). The key issue below and on appeal centers around the meaning of the phrase "additional net profit"

[1] This question was presented below at A881-A884, A885, A889-A892, A893-A896, A899, A901-A902; A611-A614, A619-A621, A622-A623.

in the Holdback Agreement. Specifically, Section 2 of the Holdback Agreement expressly provides that the claims listed on Exhibit C only reduce the $60.529 million balance on Exhibit B (or the Bogey) if those Exhibit C claims "result[] in additional net profit" on the projects. (A250 §2.) Plaintiffs argued (A1014-A1015), and the trial court agreed, that "the purpose of the 'net profit' requirement for Exhibit C is to avoid double[-]counting" when an Exhibit C claim is inclusive of an Exhibit B claim. (Op. 33, 40-41.)

For the reasons discussed below, the construction urged by Plaintiffs and adopted by the court is unreasonable.

1. Plaintiffs' And The Trial Court's Construction Is Unreasonable Because It Renders The "Additional Net Profit" Language Meaningless Surplusage.

Section 2 of the Holdback Agreement provides that the Exhibit C claims must generate "additional net profit" in order to offset collection shortfalls on the Exhibit B amounts against the Bogey. (A250 §2.) According to the court, the parties inserted the "additional net profit" requirement in Section 2 of the Holdback Agreement solely to avoid "double[-]counting," or counting a cash collection twice (once on Exhibit B and again on Exhibit C). (Op. 33-34, 35-36, 40-41.) The trial court thus concluded: The Holdback Agreement purportedly contemplated that all cash collections of the Exhibit B and C amounts would be counted against the Bogey, except when a portion of an Exhibit C claim also appears on Exhibit B. (*Id*. 30-33, 40-41.) Under the construction advanced by Plaintiffs and adopted by the court, the "additional net profit" requirement only applies at best to 13 of the 30 claims on Exhibit C (those claims that arguably also include claims on Exhibit B), and does not apply to the remaining 17 claims on Exhibit C, rendering the "additional net profit" requirement mere surplusage as to those 17 claims. (*Id*. 33-34.) This interpretation is patently unreasonable. *See Sonitrol Holding Co. v. Marceau Investissements*, 607 A.2d 1177, 1183 (Del. 1992) ("Under general principles of contract law, a contract should be interpreted in such a way as to not render any of its provisions illusory or meaningless."); *see Estate of Osborn v Kemp*, 991 A.2d 1153, 1159 (Del. 2010).

Nothing in Section 2 or any other provision of the Holdback Agreement provides or even suggests that the express "additional net profit" requirement only applies to a subset of Exhibit C claims and is inapplicable to the Exhibit C claims that do not overlap with Exhibit B claims. Furthermore, it is unreasonable to suggest that the parties would use such a vague and round-about method of addressing a minor double-counting problem that could have been easily fixed through targeted contractual language. Had the parties intended for the "additional net profit" requirement to apply to only a subset of the Exhibit C claims (indeed, a minority of the claims) in order to avoid a double-counting problem, they could have easily drafted the Holdback Agreement to say so—they did not. *See, e.g.*, *MicroStrategy*

Inc. v. Acacia Res. Corp., 2010 WL 5550455, at *7 (Del. Ch.) ("The use of different language in the two sections shows the parties knew how to cover patents beyond the Licensed Patents when that was their intent. The absence of such broad language in § 2.2, therefore, suggests the release was not meant to cover patents such as the '842 Patent."). The court erred by adding a limitation to the "additional net profit" requirement that appears nowhere in the Holdback Agreement. *Nw. Nat'l Ins. Co. v. Esmark, Inc.*, 672 A.2d 41, 44 (Del. 1996) (Delaware courts will not "add[] a limitation not found in the contract language").

2. Plaintiffs' And The Trial Court's Construction That All Cash Collections (Minus Duplication) Count Against The Bogey Is Unreasonable.

The court's interpretation of the "additional net profit" requirement as nothing more than a procedural mechanism to avoid a double-counting problem affecting a minority of Exhibit C claims was driven by its erroneous construction of a separate provision in the Holdback Agreement. Specifically, the court interpreted the Holdback Agreement as permitting all cash collections of the Exhibits B and C amounts to be counted against the Bogey, except in the limited scenario when a portion of an Exhibit B claim spilled over onto Exhibit C and thereby purportedly created a double-counting problem. (Op. 30-33, 40-41.) In support of this construction, the court relied primarily on (i) the "commercial context" of cash collections in which the Holdback Agreement was purportedly executed, (ii) Exhibit

D to the Holdback Agreement, and (iii) comments on two of the Exhibit C claims. (*Id*. 30-33, 35, 36.) As explained below, the court erred.

(a) The Court's Construction Is Inconsistent With Section 2, Which Imposes Different Standards For Determining Whether The Collection Of Exhibit B And C Claims Count Against The Bogey.

First, Section 2 of the Holdback Agreement imposes different standards for determining whether the collection of Exhibit B and C claims count against the Bogey. To count against the Bogey, Exhibit B amounts just have to be collected. (A249-A250 §2.) For Exhibit C claims to count against the Bogey, they have to result in "additional net profit recognized by [Greenstar]." (*Id.*) These are two different standards. "[A]dditional net profit" does not mean mere cash collections, particularly in the context of Section 2 where the parties had already applied a pure cash collection standard to Exhibit B claims. If the parties wanted to impose a mere cash collection requirement on Exhibit C claims, they knew how to do so. For example, the parties could have simply stated in Section 2 that collections on Exhibit B and C claims would count against the Bogey equally, unless a portion of an Exhibit C claim spilled over onto Exhibit B, in which case such amount would only be counted once. The parties did not do this. They instead opted to use a different "additional net profit" standard to apply to Exhibit C claims. *See, e.g.*, *MicroStrategy Inc.*, 2010 WL 5550455, at *7. By interpreting Section 2 to mean that all cash collections (minus duplication on a minority of the claims) count against the Bogey, the court ignored this distinction and rendered "additional net profit" meaningless. *Delta & Pine Land Co. v. Monsanto Co.*, 2006 WL 1510417, at *4 (Del. Ch.) ("[C]ontracts must be interpreted in a manner that does not render any provision 'illusory or meaningless.'") (citations omitted).

Exhibit D to the Holdback Agreement does not support Plaintiffs' or the court's conclusion that any cash collected on Exhibit C claims counted against the Bogey. Exhibit D imported the terms "pending claims/unbilled cost" and "offset claim" from Section 2 and Exhibits B and C, capturing the different standards applicable to the two sets of claims. (A269.) Hence, the court erred in relying on Exhibit D to support its construction of the Holdback Agreement.

The court's construction also appeared to be premised on the notion that any cash collected on the Exhibit C claims is better than if no collection had occurred. (Op. 35-36.) But, that is not "additional net profit"—that is pure cash collections, which was the standard for Exhibit B, but not for Exhibit C. As stated above, the court's reliance on this premise was error because it fails to recognize the distinction that the parties drew between the standards for Exhibit B and C claims.

(b) The Court's Construction Is Inconsistent With The Parties' Decision To Separate The Claims Into Two Exhibits.

Second, and relatedly, the court's construction also contradicts the parties' decision to break out the Exhibit B and C claims into two separate schedules. The court reasoned that the claims were divided into two schedules solely to separate the claims that were still outstanding from the 2011 Merger Agreement. (Op. 34 n.136.) However, this construction contradicts the language of Section 2, which indicates that the parties grouped the Exhibit B and C claims in accordance with the different cash collection and "additional net profit" standards applicable to the two groupings. (A250 §2.) If the court's interpretation of "additional net profit" and its construction that all cash collections (minus duplication on a minority of the Exhibit C claims) were correct, the parties would have separated the claims into (i) one list that contained all of the claims that did not have overlap as between Exhibits B and C (for which pure cash collections would count against the Bogey), and (ii) a second list of the 13 claims for which there was overlap (to which the court's erroneous "additional net profit" requirement would be applicable to avoid double-counting).

3. The Court's Interpretation Is Inconsistent With The Accounting Constructs Included In The Holdback Agreement.

Third, the court's conclusion that all cash collections on the Exhibit B and C claims (minus duplication) count toward the Bogey, and the ensuing conclusion that the "additional net profit" requirement was only intended to preclude double-counting, ignore the construction accounting terminology, norms, and principles that the parties included in the Holdback Agreement. (*See, e.g.*, *id.* & A264-A267 ("additional net profit recognized in accordance with . . . customary business practices," "offset," "unbilled costs").)

(a) The Determination Of "Additional Net Profit" Contemplated An Accounting Evaluation That Required Looking Beyond Exhibits B And C.

To count against the Bogey, collections on Exhibit C claims had to result in the recognition by Greenstar or its subsidiaries of "additional net profit." (A250 §2.) By using this accounting language in the Holdback Agreement, it is reasonable to conclude that the parties contemplated that an accounting evaluation of financial records beyond the static figures on Exhibits B and C would be necessary to ascertain whether "additional net profit" had been or would be recognized by Greenstar or its subsidiaries as a result of collections on an Exhibit C claim. (A677 (Soroka); A845-A846 (Burk).)

However, the court rejected this accounting reality and concluded that, in determining whether "additional net profit" was realized on collections of Exhibit C claims, the Holdback Agreement precluded the parties from considering anything except the amounts collected and the static numbers on Exhibits B and C. In support of its conclusion, the court relied on comments on only two of the Exhibit C claims (on the Freedom Tower and Jamaica 2E projects), each of which provided that "[c]laim amount settled less $5M previously recognized will be offset amount." (Op. 32.) Even if the court's construction of these comments was reasonable, the court erred by indiscriminately applying comments on these two claims to the remaining 28 claims on Exhibit C. The parties evinced their ability to draft comments to the Exhibit C claims, but elected not to do so with respect to 28 of them. *See*, *e.g.*, *MicroStrategy Inc.*, 2010 WL 5550455, at *7. The court erred by supplying terms that were contrary to the parties' intentions and that disregarded the parties' reliance on accounting principles.

(b) The Accounting Constructs In The Holdback Agreement Require Consideration Of A Claim's Booked Position In Order To Ascertain "Additional Net Profit."

The court held that whether an Exhibit C claim was booked or unbooked is irrelevant to whether that claim could result in additional net profit. (Op. 46 n.193 ("I need not reach that question [of whether an Exhibit C claim was booked or unbooked] because I am persuaded the Holdback Agreement unambiguously allows the Sellers to credit their actual collections on the 156 Stations project to the extent they did not overlap with collections on claims listed on Exhibit B.").) This conclusion is contrary to the basic accounting principles that were included in the Holdback Agreement and that the court itself recognized. For example, the court recognized that "failure to *collect* a booked amount would cause a write-down and *corresponding reduction in profitability*." (*Id*. 36 (second emphasis added).) By logical extension, if Five Star or WDF collected on an Exhibit C claim in an amount that was less than the booked position on the claim, that would also result in a "corresponding reduction in profitability." (*Id.*) To be clear, although a booked position on a claim is not the only factor that affects whether collection of a claim generates additional net profit on a project, it is certainly a factor that must be considered in making a net profit determination, as the court recognized. (*Id.*) Despite recognizing these accounting realities and despite purporting to adopt a "common" and "ordinary" meaning of the term "net profit" (*id.* 35 & n.139), the court divorced its interpretation of Section 2 of the Holdback Agreement from these principles.

The court's construction of the "additional net profit" requirement for Exhibit C claims also leads to absurd results—Plaintiffs are permitted to offset shortfalls in collections of Exhibit B amounts by use of cash collections on Exhibit C that not only fail to result in "net profit," but further still, result in massive "write-down[s]" to net profitability. (*Id.* 36.) The court's decision to ignore these accounting realities and principles, which were contemplated by the parties in the Holdback Agreement, was unreasonable and inconsistent with the "ordinary" and "common" meaning of net profit. *See Penton Bus. Media Holdings, LLC v Informa PLC*, 2018 WL 3343495, at *12 (Del. Ch.) ("Unless there is ambiguity, Delaware courts interpret contract terms according to their plain, ordinary meaning.") (citation omitted). This was error.

4. The Court's Construction Ignored Important Commercial Context For The Holdback Agreement, Including Its Foundations In The Merger Agreement And The More Stringent Requirements Applicable To Offset Claims.

In reaching its conclusion that the Holdback Agreement was unambiguous, the court relied on the "commercial context" in which the contract was executed, specifically, that the parties were focused on cash collections. (Op. 30-32, 35, 36, 40.) Although cash collections were an important part of the Holdback Agreement's commercial context, the court erred by ignoring other equally important aspects of the commercial context in which the contract was executed.

The Holdback Agreement provides that the Exhibit B claims were "the remaining outstanding claims that could have been made under (and in accordance with) Sections 6.08 and 6.09 of the Merger Agreement," which were two of the Merger Agreement's "holdback provisions." (A249 §2.) These were the claims credited on Greenstar's balance sheet when Greenstar's book value and purchase price were negotiated in connection with the Merger. Thus, all other factors affecting Greenstar's profitability being equal, if Greenstar did not collect on these Exhibit B claims, Greenstar would not achieve the revenue and profits on its work in progress anticipated and booked at the time of the Merger and on which the purchase price of Greenstar had been established in the Merger Agreement. (A755, A758 (Tutor).) Given that any shortfall in collections on Exhibit B claims was equivalent to lost profits and value paid for by TPC in the Merger, it is not surprising that the Holdback Agreement continues to focus on Greenstar's cash collections *on these Exhibit B claims*. (A249-A250 §2.)

However, that is only half of the commercial context. For collections on Exhibit C claims to qualify as offsets to losses on the Exhibit B claims, the Exhibit C claims had to generate additional net profit for WDF and Five Star on the Exhibit C projects involved. (*Id.*) This concept of using "additional net profit" to offset collection shortfalls on the claims that were used to calculate Greenstar's book value originated in the Merger Agreement. (A116-A117 §6.08(b) "[o]ffset Claims that have been settled and collected . . . after the Effective Time and such Offset Claims settlement results in additional profit recognized in respect of costs incurred by the Company . . . .")

However, although this "additional net profit" concept originated in the Merger Agreement, the generation of additional net profit was not the only way that shortfalls on booked claims could be offset under the Merger Agreement. Specifically, the Merger Agreement allowed the sellers to offset collection shortfalls on booked claims by merely *asserting* other claims or unapproved change orders. (A116 §6.08(a) ("[Greenstar] shall be able to offset Unapproved or Pending Change Orders and Claims with claims and unapproved or pending change orders that reflect claims and unapproved or pending change orders that have been documented and have or will be submitted in a timely manner.") The parties agreed in the Holdback

Agreement to a much more stringent standard for how claims could be used to offset collection shortfalls on booked claims—specifically, that they had to generate “additional net profit.” (A250 §2; *see also* A169-A171; A172-A187; A188-A199.)

When considered against this additional commercial context, the court’s conclusion that any cash collections on Exhibit C claims could offset shortfall in collections on the Bogey ignores both (i) the Merger Agreement’s and the resulting Holdback Agreement’s focus on Greenstar’s cash collections on claims the Greenstar sellers had received credit for in setting Greenstar’s book value and purchase price in the Merger (the claims on Exhibit B), and (ii) the parties’ understanding that shortfall in Greenstar’s collections on the claims that had been booked in the merger and credited as generating profit in setting Greenstar’s purchase price would not be subject to offset by mere cash collections on other projects, but only by the generation of additional net profit. The difference between cash collections and additional net profit was important commercial context that the court disregarded in interpreting the Holdback Agreement. *See Chi. Bridge & Iron Co. N.V. v. Westinghouse Elec. Co. LLC*, 166 A.3d 912, 926-28 (Del. 2017). This was error.

5. The Trial Court Erred In Holding That Plaintiffs' Construction Of The "Additional Net Profit" Requirement Was The Only Reasonable Interpretation Of The Holdback Agreement.

For the reasons discussed above, the court's construction of the Holdback Agreement was not reasonable and Plaintiffs did not meet their evidentiary burden of proffering a reasonable interpretation of the contract. *See Zimmerman*, 62 A.3d at 691; *see also Freeman Invs.*, 704 F.3d at 1115. Accordingly, the court's ruling should be reversed and judgment should be entered in favor of TPC on the breach of contract claim.

However, even if Plaintiffs' construction of the Holdback Agreement was reasonable, which it was not, the court still erred by determining that it was the only reasonable construction, and that the contractual language was unambiguous. *See Kaiser Aluminum Corp. v. Matheson*, 681 A.2d 392, 395 (Del. 1996) (stating that, if "the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings[,]" then the contract is ambiguous).

TPC's construction of the "additional net profit" language is reasonable. Specifically, TPC argued that "[w]hether an Exhibit C Offset Claim has generated 'additional net profit' is determined by calculating the P&L impact that the resolution of the claim has on the project." (A899.) First, TPC's interpretation gives meaning to Section 2's language that Exhibit C claims must generate "additional net profit" in order to offset collection shortfalls on Exhibit B against the Bogey because TPC's interpretation applies to all of the Exhibit C claims and not just a minority of those claims. (A250 §2.) Although the court held that TPC's "net profit formulation is missing" from the Holdback Agreement, it was the court, respectfully, that applied a limitation to the "additional net profit" requirement that was missing from the contractual language. (Op. 38.) TPC's interpretation recognizes that Section 2 does not impose any limiting language on the "additional net profit" requirement. (*Supra* pp. 22-24.)

Second, TPC's construction preserves (i) the distinction between cash collections and "additional net profit" set forth in Section 2 and (ii) the parties' decision to break out the claims into two separate exhibits based upon the different standards for determining whether collections count against the Bogey. (*Supra* pp. 24-27.) Third, TPC's interpretation acknowledges the accounting principles and constructs that the parties included in the Holdback Agreement, recognizes that the "additional net profit" determination required an accounting determination made from Greenstar's financial books and records, and gives the term "net profit" a meaning ordinarily used for such accounting terms. (*Supra* pp. 27-30.) Fourth, TPC's construction incorporates the full commercial context in which the Holdback Agreement was executed, pursuant to which the parties increased the importance of additional net profit, as compared to its treatment in the Merger Agreement, to ensure that settlement of an Exhibit C claim had to cause a net profit increase in the same way that non-collection of an Exhibit B claim would necessarily reduce profit assumed and paid for by TPC in connection with the Merger. (*Supra* pp. 31-33.)

In rejecting TPC's proposed construction, the court held that the "parties gave no indication that [TPC] had been granted unchecked discretion as an 'arbiter' of net profit." (Op. 39.) The court ignored that Section 2 grants TPC discretion to determine "in good faith [whether an Exhibit C claim] will result in additional net profit . . . in accordance with . . . customary business practices." (A250 §2.) Section 4 of the Holdback Agreement also contemplated that TPC would present its net profit calculations first, suggesting that TPC was familiar with the calculation methods required by the Holdback Agreement. (A251 §4(a).)

The court also determined that the calculation examples provided in Exhibit D to the Holdback Agreement confirmed that pure cash collections on Exhibit C claims counted against the Bogey and refuted TPC's construction. (Op. 39.) As discussed above, however (*supra* p. 26), Exhibit D imported the terms "pending claims/unbilled cost" and "offset claim" from Section 2 and Exhibits B and C, capturing the different standards applicable to the two sets of claims. (A269.) Exhibit D contains calculation examples that do not replace the formula established by Section 2 of the Holdback Agreement that is applicable in all circumstances.

The court also concluded that TPC's construction "ignores the commercial context" of the Holdback Agreement. (Op. 40.) As explained above, the court erred by selectively relying on only a fragment of the commercial context in which the Holdback Agreement was executed. (*Supra* pp. 31-33.)

The court also appeared to reject TPC's interpretation on the basis that it required that the "projects themselves," and not just the Exhibit C claims, "generate net profit." (*Id*. 36-37.) A claim is not profitable, only a project is profitable. The only way to determine whether a claim has generated "additional net profit" is to assess the claim's impact *on the project*. The court erred to the extent it relied on this reasoning.

II. THE TRIAL COURT ERRED IN CONCLUDING THAT PLAINTIFFS SATISFIED THEIR BURDEN OF PROVING THAT THE AMOUNTS FOR CERTAIN CLAIMS LISTED ON EXHIBITS B AND C HAD BEEN ACTUALLY COLLECTED

A. Question Presented: Did the trial court err by finding that Plaintiffs satisfied their burden of proving by a preponderance of the evidence that certain Exhibit B and C claims had been collected and that a counterclaim was no longer outstanding?[2]

B. Scope Of Review: This Court reviews factual findings for clear error. *Eagle Force Holdings, LLC v Campbell*, 187 A.3d 1209, 1228 (Del. 2018); *Estate of Osborn*, 991 A2d at 1158. "Where [factual] findings are not supported by substantial evidence, or are not the product of an orderly and logical reasoning process, then the decision under review cannot stand." *Boggerty v Stewart*, 14 A.3d 542, 550 (Del. 2011) (citation omitted). "Substantial evidence" means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Oceanport Indus. v Wilmington Stevedores, Inc.*, 636 A.2d 892, 899 (Del. 1994); *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981).

[2] This question was presented below at A902, A905-A907, A916-A920, A920-A921.

C. **<u>Merits</u>**:

1. The Trial Court Erred In Finding That Plaintiffs Were Entitled To Credit For The $5 Million Exhibit B Claim On The Freedom Tower Project.

The court found that Plaintiffs proved by a preponderance of the evidence that the $5 million reflected on Exhibit B for the Freedom Tower project was collected. (Op. 48-49.) In support of this finding, the court cited five sources. However, the court erred because Plaintiffs did not present sufficient evidence to prove that the cash collected on the project related to the specific claim identified on Exhibit B.

First, Segal's testimony that "[w]e collected the $5 million from Freedom Tower" was just him recounting what he remembered purportedly telling Tutor in a prior conversation and was not offered at trial to affirmatively prove that the $5 million Exhibit B claim on the Freedom Tower had been collected. (A643 (Segal).) Second, the portion of Tutor's testimony on which the court relied was simply Tutor repeating prior testimony that he believed he had heard during trial. (A782 (Tutor).) Tutor subsequently testified that he did not know whether that prior testimony was correct or whether the $5 million Exhibit B claim had been collected, making clear that cash collections unrelated to the specific items identified on Exhibits B and C could not be used to meet the Bogey. (*Id.*, A782-A783, A783 (Tutor).) Third, Soroka testified that he could not specify whether the $12 million settlement reached on the Freedom Tower project covered the $5 million Exhibit B claim and further testified that only a total of $12 million had been collected on the Freedom Tower claim, not $12 million plus another $5 million. (A691, A737, A738 (Soroka).) Fourth, the portion of the trial testimony from Matthew Therien, Five Star's current CFO, to which the court cited was Therien stating that he "believe[d]" the $5 million Exhibit B claim had been collected, but Therien later testified that he did not know "what the specific amounts listed on Exhibits B and C relate[d] to" and that his prior testimony regarding specific amounts being collected under the Holdback Agreement was solely speculation because he was not involved in the negotiation of the Holdback Agreement and was unfamiliar with the contract. (A665, A671 (Therien).) Fifth, and most importantly, TPC gave Plaintiffs credit for the $5 million Exhibit B claim in its post-trial briefing solely to show that, even best case scenario, Plaintiffs had not collected enough to mandate release of the Special Holdback and, accordingly, the court's reliance on TPC's decision *arguendo* to afford Plaintiffs this credit was misplaced. (A907; *see also* A737 (Soroka).)

Plaintiffs did not carry their burden of proving that the specific $5 million Exhibit B claim on the Freedom Tower project was collected. At best, the record evidence on this issue was "in equipoise, [meaning] Plaintiffs lose" because they are unable to satisfy their burden under the preponderance of the evidence standard. *OptimisCorp v Waite*, 2015 WL 5147038, at *55 (Del. Ch.), *aff'd*, 137 A.3d 970 (Del. 2016). Furthermore, to be clear, if the court's interpretation of the "additional net profit" language in the Holdback Agreement is correct (respectfully, it is not), Plaintiffs are entitled to full offset credit for the $12 million that was collected against the Exhibit C claim; however, they are not entitled to an additional $5 million credit against the Exhibit B claim, which (as explained above) the record evidence does not support. The court's decision to nonetheless give Plaintiffs $17 million in credit against the Freedom Tower project was error.

2. The Court Erred In Finding That Plaintiffs Were Entitled To Credit For $13.541 Million Of The Exhibit B Claim For The Jamaica 2G Project.

The court found that Plaintiffs proved by a preponderance of the evidence that they were entitled to $13.541 million of the amount reflected on Exhibit B for the Jamaica 2G project. (Op. 49-50.) In support of this finding, the court relied solely on a March 2015 letter prepared by TPC in which Plaintiffs were given credit for $13.541 million on Jamaica 2G for "[c]ollection on [p]reviously [o]utstanding UCO's/unbilled (less claim)." (A352.) The court committed clear error because this evidence was insufficient to support its finding and, furthermore, the court ignored key contrary evidence.

First, the parties agreed that the Exhibit B amount related to the delay claim on the Jamaica 2G project. (A916-A917; A969.) The evidence at trial showed that the delay claim on the project remains open and no amounts have been collected related to that claim. (A697, A750 (Soroka); A776 (Tutor).) Hence, Plaintiffs are entitled to no credit on Jamaica 2G against the Bogey. The court did not address this argument or consider this evidence in its Opinion. *See, e.g., Seaford Golf & Country Club v E.I. duPont de Nemours & Co.*, 925 A.2d 1255, 1264 (Del. 2007) (trial court ruling reversed because court did not assess or take into account facts undercutting the conclusion that the court ultimately reached, thus the decision was not the product of an orderly and logical reasoning process).

Second, the March 2015 letter on which the court relied afforded Plaintiffs the benefit of all doubts, giving them credit for change orders collected on the project that were unrelated to the delay claim, to make the point that, even under the best case scenario, Plaintiffs were not entitled to release of the Special Holdback. (A350.) Even assuming *arguendo* that the Exhibit B amount included change orders relating to the delay claim that existed prior to the execution of the Holdback Agreement, the letter made clear that it was "not possible to calculate what has been collected on change orders outstanding as [of] March 31, 2013." (*Id.*) The court erred by summarily dismissing this evidence as "not credible." (Op. 50.) To the contrary, this evidence showed that the purpose of the letter (on which the court relied exclusively to support its finding) was not to reflect amounts that TPC believed had been collected on the Exhibit B and C amounts, but rather, to show Plaintiffs that under no circumstances were they entitled to the Special Holdback.

Third, Roman also testified that he could not determine whether the amounts collected on the Jamaica 2G project related to pending change orders that existed as of March 31, 2013. (A379.) The court erred again by ignoring this evidence. *Seaford Golf*, 925 A.2d at 1264. Elsewhere in its Opinion, the court determined that Roman's testimony was more credible than testimony from personnel in TPC's corporate office because Roman was more familiar with WDF's day-to-day operations. (Op. 51, 52 n.216.) Here, however, the court adopted the hypothetical best-case-scenario assumptions in TPC's March 2015 letter over Roman's testimony on a matter for which Roman surely had superior knowledge. This was error.

3. The Court Erred In Finding That Plaintiffs Were Entitled To Credit For $1.6 Million For The Exhibit C Claim On The John Jay Project.

The court found that Plaintiffs proved by a preponderance of the evidence that they were entitled to credit for $1.6 million on the Exhibit C claim on the John Jay project. (*Id*. 50-51.) In support of this finding, the court relied exclusively on Roman's deposition testimony in which he stated: "We settled certain claims on John Jay, I checked yesterday, somewhere between 1.6 million and 1.7 million was settled." (A375.) The court characterized Roman's testimony as "precise and credible," and further stated that there was "nothing in the record to contradict it." (Op. 51.) This was error.

First, far from "precise and credible," Roman's testimony was speculative, uncorroborated by any documentation, and insufficient to satisfy Plaintiffs' burden to proffer "substantial evidence." Second, TPC cannot be expected to prove a negative (*i.e.*, that the Exhibit C claim was not settled), nor was it TPC's burden to prove that amounts were not collected; rather, it was Plaintiffs' burden to prove that amounts were collected. For the reasons stated above, Plaintiffs did not satisfy that burden. Accordingly, the court erred.

4. The Court Erred In Finding That The John Jay Counterclaim Was Not Outstanding.

The court found that Plaintiffs proved through "credible evidence" that the $10.9 million counterclaim identified on Exhibit C for the John Jay project was no longer outstanding and could therefore not be used to offset Greenstar's collections. (*Id*. 51-52.) The "credible evidence" on which the court relied was limited to testimony from Roman that, "[t]o the best of [his] knowledge," the counterclaim was "gone." (A414.) First, this testimony was, at best, equivocal and not "credible." *See OptimisCorp*, 2015 WL 5147038, at *55. Second, Roman subsequently testified that the case in which the counterclaim was asserted was still pending and that he did not know what the status of the counterclaim was. (A414.) In fact, when pressed to provide details about the counterclaim or the litigation more broadly, Roman was unable to do so. (A414-A415.) For these reasons, the court erred in finding that Roman's testimony was a sufficient basis on which to conclude that this counterclaim was no longer outstanding and could not be used to offset Plaintiffs' collections.

CONCLUSION

For all of the foregoing reasons, this Court should reverse the judgment below.

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of April, 2020, a copy of the foregoing document was served via *File & ServeXpress* upon the following attorneys of record:

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