EFiled: May 26 2020 04:30PM EDT
Filing ID 65657541
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 REPLY BRIEF

POTTER ANDERSON & CORROON LLP

Brian C. Ralston (I.D. No. 3770)
Aaron R. Sims (I.D. No. 6073)
Hercules Plaza – 6th Floor
1313 N. Market Street
P.O. Box 951
Wilmington, Delaware 19801
(302) 984-6000

Attorneys for Defendant-Below, Appellant Tutor Perini Corporation

OF COUNSEL:

Robert Nida
David Romyn
NIDA & ROMYN, P.C.
1900 Avenue of the Stars,
Suite 650
Los Angeles, CA 90067
(310) 286-3404

Dated: May 26, 2020

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PRELIMINARY STATEMENT

In its Opening Brief, Appellant Tutor Perini Corporation ("TPC") demonstrated that the trial court erred and that its Opinion[1] should be reversed. Section 2 of the Holdback Agreement provides that cash collections on Exhibit C claims count toward the Bogey only to the extent the collections result in "additional net profit" for Greenstar or its subsidiaries. (A250.) Plaintiffs would have this Court believe that, despite its clear application to all Exhibit C claims, the "additional net profit" requirement only applies to ***three out of the 30 claims*** listed on Exhibit C. This interpretation is patently unreasonable. The trial court erred by adopting Plaintiffs' flawed construction of this "additional net profit" requirement.

Specifically, the trial court erred by concluding that the term "additional net profit" in the Holdback Agreement does not really mean what it says. According to the court, any and all cash collections on Exhibit C claims count dollar for dollar against the Bogey without any evaluation of the effect the collection had on Five Star's or WDF's "net profit" as established by an accounting review of their financial books and records. In effect, under the trial court's construction, cash collections on Exhibit C claims resulted in "additional net profit" because any cash recovered would improve WDF's and Five Star's financial position *as compared to their*

[1] Any capitalized terms not defined herein have the same meanings as given in TPC's Opening Brief.

financial position if they did not collect the cash at all. (Op. 35-36.) Under this construction, one is left to wonder whether the "additional net profit" requirement has any meaning at all—according to the trial court and Plaintiffs, it is nothing more than a mechanism to prevent double counting of collections on the minority of claims that spill over from Exhibit B to Exhibit C. This is unreasonable and contrary to the language of the Holdback Agreement.

As TPC demonstrated in its Opening Brief, the trial court's tautological construction renders the "additional net profit" language superfluous; ignores the Holdback Agreement's distinction between cash collections for Exhibit B claims and "additional net profit" required for Exhibit C claims; gives the "additional net profit" language an application divorced from the dictionary meaning of the term "net profit"; ignores the commercial context of the Holdback Agreement; and leads to unreasonable results. The trial court's construction is not reasonable. Accordingly, even setting aside whether TPC's proposed construction is reasonable (which, for the reasons explained in TPC's Opening Brief, it is), Plaintiffs failed their initial burden to prove a reasonable interpretation of the "additional net profit" language necessary to prevail on their breach of contract claim. *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).

In their Answering Brief ("AB"), Plaintiffs attempt to distract this Court from the central error of law raised in TPC's appeal—the trial court's unreasonable construction of the Holdback Agreement's "additional net profit" language. First, Plaintiffs misdirect the Court with a long factual narrative peppered with irrelevant facts. Plaintiffs spill ink discussing: "discovery sanctions" (AB 5); Plaintiffs' "promissory estoppel" theory (AB 20); TPC's assumption in the Merger Agreement of the risk associated with Gary Segal's alleged criminal activities (AB 24); and Ron Tutor's purported desire to "punish" Gary Segal (AB 4). None of these supposed "facts" are relevant to any of the issues pending in this appeal.

Additionally, Plaintiffs' contention that TPC earned "pure profit" on cash collections on "un-booked" Exhibit C claims is not only unsupported by the record, it is also false. "Net Profit" means revenues net of expenses. *Grandview Mines v. Commissioner*, 32 T.C. 759, 769 (1959) ("[N]et profits" is not the same as total proceeds but rather "requires the subtraction of expenses prior to arriving at the 'net profit' figure."), *aff'd*, 282 F.2d 700 (9th Cir. 1960). Obviously, Five Star and WDF incur costs performing the added work that is the subject of pending change orders and claims whether or not they book "CIE" (anticipated revenue) for these claims. These costs of performing pending change orders and claims must be accounted for or "booked" as expenses (*i.e.*, "red-entries" on Greenstar's balance sheet) even if Greenstar does not offset those expenses by "booking" revenue for those costs as

"CIE" (*i.e.*, "black-entries" on Greenstar's balance sheet). Admittedly, collecting any amount on claims for which CIE is not booked improves "*profitability*" by reducing unreimbursed expense on a "dollar for dollar" basis, but the collection does not by itself necessarily cause WDF or Five Star to achieve positive "net profit," let alone "pure profit" as Plaintiffs insist. The trial court's and Plaintiffs' construction of "additional net profit" in the Holdback Agreement ignores these realities.

Plaintiffs also seek to mislead when they state TPC secured a financial "windfall" on cash collections on Exhibit C claims because, as largely "unbooked" claims, TPC did not pay for them in the Merger as part of Greenstar's "book value" purchase price. (AB 14.) As the evidence established, *after the Merger*, TPC infused Greenstar with over $160 million in cash to finance Five Star's and WDF's ongoing operations, which necessarily included the cost of performing some of the work that became the subject of the pending change orders and claims included on Exhibit C. (A755 (Tutor); A818 (Bennett); A316-21.) At a minimum, Plaintiffs do not provide record citations to establish that the Exhibit C claims were intended to reimburse WDF and Five Star exclusively for the cost of performing claim work pre-existing the Merger or whether these claims were the result of extra work performed post-Merger that became part of TPC's financial burden as the new owner of these subcontractors. Obviously, TPC secures no windfall when its subsidiaries collect on "un-booked" claims for the cost of work that TPC paid for.

TPC focused its Opening Brief on examining the "additional net profit" language in the Holdback Agreement and how the trial court's construction expunges this language from the contract. As will be demonstrated below, Plaintiffs largely avoid responding head-on to the arguments presented in TPC's Opening Brief and merely seek to distract this Court from the fatal errors in the trial court's Opinion.

ARGUMENT

I. PLAINTIFFS OFFER NOTHING TO REBUT TPC'S CONTENTION THAT PLAINTIFFS FAILED THEIR BURDEN TO ESTABLISH A REASONABLE CONSTRUCTION OF THE HOLDBACK AGREEMENT'S "ADDITIONAL NET PROFIT" REQUIREMENT FOR EXHIBIT C CLAIMS.

Even before this Court considers TPC's construction of the Holdback Agreement's "additional net profit" language, it must evaluate whether Plaintiffs satisfied their initial burden at trial to proffer a reasonable construction of the Holdback Agreement supporting Plaintiffs' breach of contract claim. *See Zimmerman v. Crothall*, 62 A.3d 676, 691 (Del. Ch. 2013).

As TPC demonstrated in its Opening Brief, Plaintiffs' construction of the Holdback Agreement is patently unreasonable. Plaintiffs fail to overcome TPC's demonstrated contention that Plaintiffs failed to carry their burden of offering a reasonable construction of the Holdback Agreement supporting their breach of contract claim.

A. The Trial Court's Construction of the "Additional Net Profit" Language Is Flawed Because it Renders this Language Surplusage for the Majority of Exhibit C Claims.

The trial court concluded the "additional net profit" requirement was added to the Holdback Agreement to prevent the *infrequent* scenario when a portion of an Exhibit B claim spilled over onto Exhibit C and thereby created a potential "double counting" problem. (Op. 30-33, 40-41.) In its Opening Brief, TPC demonstrated this construction was unreasonable because it rendered the additional net profit language surplusage for most of the claims listed on Exhibit C. It is undisputed that a majority of the claims listed on Exhibit C did not spill over from Exhibit B and, thus, posed no conceivable overlap problem. Indeed, many of the projects listed on Exhibit C did not even appear on Exhibit B. Nonetheless, the parties to the Holdback Agreement expressly made the "additional net profit" requirement applicable to all of the Exhibit C claims without exceptions. (OB 22-23.)

In response, Plaintiffs adopt an even more restrictive reading of the "additional net profit" requirement than did the trial court. Plaintiffs argue that the net profit language only applies to ***three of the 30 Exhibit C claims***—Freedom Tower, Jamaica 2E, and Jamaica 2G. (AB 34.) Plaintiffs assert the trial "court's ruling honors that limitation," but Plaintiffs grossly mischaracterize the court's reasoning. (*Id.*) Specifically, the court interpreted (albeit incorrectly) the additional net profit language as applying to the Exhibit C claims that "overlapped" with Exhibit B or, in other words, approximately 13 of the 30 Exhibit C claims. (Op. 30.)

Plaintiffs argue that the trial court's construction does not render the net profit requirement surplusage as to the majority of Exhibit C claims because this language is like a typical provision in a loan agreement establishing a higher interest rate for late payments. (AB 33-34.) Such a default interest provision, according to Plaintiffs, "applies [a higher interest rate] to ***all*** payments but may have import only to certain payments (those that are not timely made)." (AB 34; emphasis in original.)

Plaintiffs attempt to draw an analogy from this hypothetical default interest provision by arguing that the court's construction of the "additional net profit" requirement applies to all Exhibit C claims but "has the effect of reducing the permitted credit only for those claims as to which revenue was previously booked." (AB 34.)

First, a typical "late payment interest rate provision" in a loan agreement does not apply to all loan payments as Plaintiffs suggest, but instead only applies to a subset of payments identified in the loan agreement—late payments. In contrast, the Holdback Agreement makes the additional net profit language applicable to all Exhibit C claims *without exception*, and not just to a subset of claims. Thus, the analogy fails.

Second, contrary to the analogy Plaintiffs attempt to draw, nowhere in the Holdback Agreement does it say that the additional net profit requirement applies to all Exhibit C claims but it only has the impact of eliminating a purported double counting problem as to claims that overlap as between Exhibits B and C. If the parties intended for the net profit requirement to operate in any way other than being fully applicable to all Exhibit C claims, they could have drafted the provision to say that, as a default interest clause states that it applies only to late payments. They did not. Plaintiffs ignore this issue altogether in their AB.

At the time the Holdback Agreement was entered the parties were aware that most of the Exhibit C claims were not, and never would be, subject to a double counting problem. Despite this reality, the parties still made the "additional net profit" requirement unconditionally applicable to all Exhibit C claims, including those for which there was not a double counting problem. This is powerful evidence the parties did not intend to relegate the net profit requirement to nothing more than a mechanism to avoid a double counting problem that affected only a minority, or according to Plaintiffs a super-minority (3), of Exhibit C claims.

B. Plaintiffs Ignore TPC's Argument That the Trial Court's Construction Is Inconsistent With the Different Standards Imposed by Section 2 for Counting Collections on Exhibit B And C Claims Against The Bogey.

Section 2 of the Holdback Agreement sets forth 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. (A249-50.) For Exhibit C claims to count against the Bogey, they must result in "additional net profit." (*Id.*) "[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 and chose not to replicate that same standard for Exhibit C claims. (OB 25.) The trial court's construction of the phrase "additional net profit" simply collapses the separate standards applicable to Exhibit B and C claims into a single pure collections standard contrary to Section 2 of the Holdback Agreement.

In response, Plaintiffs do not address the different standards imposed by Section 2 of the Holdback Agreement, but instead focus on the "structural differences" of Exhibits B and C. (AB 34.) The issue, which Plaintiffs completely sidestep in their AB, is not how Exhibits B and C are structured, it is what the language of Section 2 of the Holdback Agreement says. Regardless of how the Exhibits are purportedly structured, Section 2 imposes two separate standards for when collections on the Exhibit B and C claims may be counted against the Bogey. The constructions adopted by the trial court and Plaintiffs eviscerate these different standards and, therefore, are unreasonable.

C. Plaintiffs Do Not Rebut TPC's Contention that the Trial Court's Construction Was Unreasonable Because it Eliminated All Accounting Evaluation Required for Determining Whether Cash Collections on Exhibit C Claims Resulted in "Additional Net Profit."

In its Opening Brief, TPC established that the trial court's construction of the "additional net profit" standard was unreasonable because it ignored the obvious accounting evaluation necessary to ascertain whether a cash collection on a claim resulted in additional net profit. TPC also argued that the trial court's construction was divorced from accounting principles because the court found that whether the

Exhibit C claims had been booked was irrelevant in ascertaining whether a cash collection on the claim resulted in "additional net profit." (OB 29.)

In response, Plaintiffs again seek to distort and simplify TPC's argument by asserting that TPC's own witnesses admitted that "'additional net profit' results if revenue is collected on "previously-unbooked claims" (citing to the testimony of TPC's employees, Soroka and Bennett). (AB 35.) Plaintiffs' contention is both factually inaccurate and inapposite.

First, Plaintiffs do not respond at all to TPC's argument that the trial court's construction ignores the accounting evaluation that is necessary to determine "additional net profit." Plaintiffs' non-response speaks for itself.

Second, TPC's employees did not admit that collections on unbooked claims necessarily result in positive "additional net profit" measured either on a project or a "company-wide" basis. Rather, they answered hypothetical questions establishing that, all things being equal, and when costs are not ongoing for claimed work (Bennett), profitability increases when collections are made. This is hardly proof that Exhibit C claims were unbooked when collections were made on them, that costs for the pending change order or claim work were not increasing, or that Greenstar or its subsidiaries generated "additional net profit" by collecting cash on unbooked claims.

Third, Plaintiffs' implicit suggestion that the term "additional net profit" did not require any kind of accounting evaluation whatsoever, and instead just meant pure cash collections, is belied by business reality and by the testimony of its own witness. The common meaning of "net profit" is revenue minus costs.[2] Just because Greenstar collected cash on a claim that was purportedly unbooked does not automatically mean that it necessarily generated "net profit." Indeed, the experienced transactional attorney charged with drafting the Holdback Agreement on behalf of Plaintiffs, and who inserted the phrase additional "net" profit into the contract, confirmed that this phrase was intended to be interpreted in accordance with its common meaning. (A495-95.)

Plaintiffs also argue that the trial court did not conclude that a collection on a claim would result in additional net profit automatically whether the claim was booked or unbooked. (AB 35.) Plaintiffs are wrong. As evidenced by the excerpt from the Opinion that Plaintiffs quote in their AB, whether collections on Exhibit C claims generate additional net profit and therefore count against the Bogey depends, according to the trial court, on whether the claim overlaps on Exhibits B and C, not on whether a claim was booked or unbooked before cash collections were made.

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[2] *Atmosphere Hospitality Mgmt., LLC v. Shiba Invs., Inc.*, 158 F. Supp. 3d 837, 873 (D.S.D. 2016) ('[N]et profit' . . . is commonly understood as a business's resulting profit after subtracting its expenses from its revenue.").

(AB 35-36.) Indeed, the trial court expressly declined to make any findings as to whether the Exhibit C claims were booked or unbooked because, according to the court, "the main purpose of the net profit requirement is to avoid double counting." (Op. 33 n.132.) However, whether a claim on Exhibit B overlaps with Exhibit C has nothing to do with whether collections on that claim generate additional "net profit"—rather, that determination requires an accounting evaluation. Plaintiffs' counterarguments are again unavailing.

D. Plaintiffs Ignore the Commercial Context of the Holdback Agreement.

In its Opening Brief, TPC argued that the trial court's exclusive focus on cash collections ignored the broader commercial context of the Holdback Agreement which explained why the parties chose different standards for crediting cash collections on Exhibit B and C claims against the Bogey. TPC explained that the parties imposed the "additional net profit" requirement for cash collections on Exhibit C claims precisely because TPC wanted to ensure that any shortfall in collections on Exhibit B claims in achieving the Bogey—the claims on which TPC paid "book value" for in the Merger—would only be "offset" by cash collections on Exhibit C claims that generated "additional net profit." (OB 31-33.) By ignoring these distinct standards, the trial court did not properly consider this additional commercial context in construing the "additional net profit" requirement, which was error.

In response, Plaintiffs cite to a lengthy excerpt of Ron Tutor's testimony, but fail to explain why it is relevant apart from concluding that his testimony "could not have been clearer: the commercial context of the Holdback Agreement was that Sellers would get credit for collection of Exhibit C amounts." (AB 37-38.) But, Plaintiffs mischaracterize Mr. Tutor's testimony. His testimony merely confirms a point on which the parties agree—Exhibit C claims were included in the Holdback Agreement so that Plaintiffs would have the opportunity to offset any collection shortfalls on the Exhibit B claims that TPC had paid for in the Merger. He did not testify, as Plaintiffs now suggest, that any cash collections on Exhibit C claims were intended to count dollar for dollar against the Bogey as collections on Exhibit B claims do, or that the Exhibit C claims were unbooked at the time the parties executed the Holdback Agreement (as opposed to when they executed the Merger Agreement, years earlier).

The issue is not, as Plaintiffs argue, whether the "Sellers would get credit for collection of Exhibit C amounts" (A38); the issue is *under what circumstances* they would get that credit for collections on Exhibit C claims. In sum, Plaintiffs merely seek to distract from TPC's valid point—the full commercial context of the Holdback Agreement supports TPC's, and refutes the trial court's, construction of the "additional net profit" requirement for Exhibit C claims.

II. TPC'S CONSTRUCTION OF THE "ADDITIONAL NET PROFIT" REQUIREMENT FOR EXHIBIT C CLAIMS WAS THE ONLY REASONABLE CONSTRUCTION OFFERED IN THE TRIAL COURT.

TPC's construction of the "additional net profit" requirement for collections on Exhibit C claims was the only reasonable interpretation offered in the trial court because it: (1) gave this language an application to all Exhibit C claims and not just a minority of them; (2) was consistent with the dictionary meaning of the accounting terminology used; (3) was consistent with the broader commercial context for the Holdback Agreement; (4) and recognized the separate standards set forth in Section 2 of the Holdback Agreement for how collections on Exhibit B and C claims would count against the Bogey. In response, Plaintiffs again ignore TPC's arguments and offer flawed counterpoints refuted by TPC in its Opening Brief.

A. Plaintiffs' Contention That TPC's Construction Adds Limitations to Exhibit C Collections Not Found in the Holdback Agreement is Meritless.

Plaintiffs argue that "[t]he Holdback Agreement, by its express terms, requires only that the ***collection*** of the amounts listed on Exhibit C 'results in additional net profit recognized by [Greenstar] after March 31, 2013' [or is expected to do so]." (AB 30; emphasis in original; footnote omitted.) By focusing on the term "collection" in the quoted passage, Plaintiffs again seek to write out the pertinent standard—that collection on Exhibit C claims had to result in "additional net profit" in order to count against the Bogey. This is precisely why Plaintiffs' construction of this passage is unreasonable.

Plaintiffs also argue that TPC's construction is unreasonable because Section 2 "says nothing about the overall job being more profitable." (OB 30.) This criticism, however, is a red herring. Obviously, profit must be measured on the financial performance of some business unit or enterprise/project. TPC chose to measure the effect of collections on a project level because a claim collection could have a demonstrated positive causal effect on a project profit and loss ("P&L") statement, whereas the effect of a collection on WDF's or Five Star's financial statements would be more attenuated and difficult to demonstrate. Accordingly, TPC's methodology was more favorable to Plaintiffs. In any event, TPC's construction was the only one that sought to measure the P&L impact of collections at all. Plaintiffs and the court chose to ignore the "net profit" language and conclude that all collections on Exhibit C claims increased "profits" axiomatically either (i) because collections on Exhibit C claims were completely "unbooked" with three exceptions (Plaintiffs), or (ii) because cash collections are always better than no cash collections regardless of whether a claim was booked or not (the court).

B. TPC's Construction is Not Inconsistent with Comments on Exhibit C.

Plaintiffs also argue that TPC's construction is "directly contrary to the express terms of Exhibit C, which is entitled 'Offset Claims' and describes the amount of the 'Offset Claims' that may be credited pursuant to Section 2 of the Holdback Agreement." (*Id*.) Plaintiffs then identify the comments on Exhibit C for the Jamaica 2E and Freedom Tower projects which provide: "Claim amount settled less [amount] previously recognized will be offset amount (see Exhibit B)." (*Id*. at 16; citation omitted.)

TPC's construction is not contrary to these Exhibit C comments. These comments merely instruct that the full amount collected on these two offset claims will ***not be*** the offset "claim amounts" (as referenced in Section 2) that is subject to Section 2's "additional net profit" requirement; rather, the amounts collected, minus the amount attributable to Exhibit B, would be the offset "claim amounts" subject to further evaluation under the "additional net profit" requirement.[3] These comments were intended to eliminate "double counting" on two Exhibit C claims that incorporated Exhibit B amounts, but not to exempt collections on these two claims from Section 2's "additional net profit" requirement. Additionally, because these comments were meant to address double counting, it would have been superfluous if, as the trial court held and Plaintiffs now argue, the only purpose of "the

[3] ". . . 'Offset Claims' that may be credited . . . shall only apply to . . . ***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 . . .)" (A250; emphasis added.)

"additional net profit" requirement was also to address the same double counting issue dealt with by these two Exhibit C comments.

At best, these comments create an ambiguity as to how Section 2's "additional net profit" requirement applies to ***these two Exhibit C claims***. But, there is nothing in the Holdback Agreement indicating that the parties intended for these two comments to apply indiscriminately to all the other 28 Exhibit C claims—indeed, by including these comments on only two of the Exhibit C claims but not the others, the parties definitively expressed their intent that these comments would ***not apply*** to the other Exhibit C claims.

C. TPC's Construction Is Consistent With Exhibit D.

Plaintiffs argue that TPC's construction is "directly contrary to Exhibit D" because Exhibit D "supports the premise that any Exhibit B and C cash collections should be added together" against the Bogey. (AB 31.) But, as TPC argued in its Opening Brief, 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. (OB 36.) Exhibit D does not purport to erase Section 2's separate requirement that Exhibit C "offset claims" must generate "additional net profit" to count against the Bogey. Plaintiffs ignore these points in their AB.

III. THE TRIAL COURT ERRED WHEN IT FOUND THAT PLAINTIFFS PROVED A RIGHT TO CREDIT ON CERTAIN PROJECTS.

The trial court's factual findings can only be sustained if they are sufficiently supported by the record and are the result of orderly and logical reasoning. *Delphi Petroleum, Inc. v Magellan Terminal Holdings, L.P.*, 177 A.3d 610 (Del. 2017) (TABLE).

In their AB, Plaintiffs overstate the deference this Court must give to the trial court's factual findings. When relying on deposition transcripts or other paper evidence (as opposed to live trial testimony) to support its factual findings, a court cannot simply ignore contradictory evidence from the same sources. *See Seaford Golf & Country Club v E. I. duPont de Nemours & Co.*, 925 A.2d 1255, 1264 (Del. 2007).

As to the John Jay project, Plaintiffs and the trial court relied exclusively on the deposition transcript of Larry Roman. Accordingly, the trial court was required to consider and address the portions of the deposition transcript that contradicted the selective portions on which it relied to support its findings. Its failure to do so warrants reversal. *Id.* ("[T]he trial court did not assess or take into account the facts undercutting the conclusion that the court ultimately reached. Nor did the trial court set forth reasons why the equally reasonable contrary inference permitted by those facts should be rejected.").

As to the Freedom Tower and Jamaica 2G projects, the trial court merely adopted Plaintiffs' inaccurate characterizations of the evidence presented. When Plaintiffs' self-serving characterizations are pushed aside and the relevant evidence is actually examined, it is clear that Plaintiffs failed to meet their burden of proof.

A. Plaintiffs Failed Their Burden to Show the "John Jay Counterclaim" was Resolved.

In finding that the John Jay counterclaim should not count against Plaintiffs' Exhibit B collections and any Exhibit C net profits, the trial court relied exclusively on a statement by Roman in his deposition that the counterclaim is "gone." (Op. 51-52, citing A414.) However, the trial court neither acknowledged nor addressed other testimony from Roman during his deposition in which he stated that the counterclaim was still pending (A414) and that he did not know the status of the counterclaim. (A414-15.) Indeed, despite being asked whether anyone was pursuing the counterclaim, Roman testified, "You would have to check with [WDF's general counsel]." (A414.) When asked further whether any counterclaims reflected on Exhibit C had been settled or paid, Roman could not answer ***as to any claim*** specifically. (A413-15.)

Roman's deposition testimony is equivocal, and the court erred in ignoring conflicting evidence from the same source on which it relied to support its finding. *See Seaford Golf*, 925 A.2d at 1264. Plaintiffs have failed to meet their burden of proof that the counterclaim is no longer pending and, accordingly, no less than $10.9 million must be offset against the collections.

B. Plaintiffs Failed to Prove Entitlement to Credit for the Freedom Tower Claim.

None of the sources to which Plaintiffs cite in their AB establish that they are entitled to credit for the $5 million in dispute on the Freedom Tower project. (AB 43.)

First, Segal's testimony was merely a recitation of a conversation with Ron Tutor wherein he stated (at that time) "[w]e collected $5 million on Freedom Tower…." (A642-43.) Segal's testimony is hearsay and, furthermore, does not tie the purported collection to the specific $5 million identified on Exhibit B of the Holdback Agreement. Neither the trial court nor Plaintiffs addressed these realities.

Second, Ron Tutor's testimony is not an admission of collection. Tutor stated, "I think I heard testimony that we received [$5 million]." (A782.) Tutor testified later that he did not have personal knowledge that the Freedom Tower collections were made. (A782, and A782-83.) Tutor further testified that the collections on which Plaintiffs were attempting to use to meet the Bogey were not tied to the specific claims identified in the Holdback Agreement. (A782-83; A783.) Neither the trial court nor Plaintiffs addressed this testimony.

Third, Soroka did not admit that $5 million was paid on the Exhibit B claim. (A737.) Soroka stated, "I can't specify that that specific $5 million was included in the $12 million which was the ultimate settlement." (A691, A737, A738.) Elsewhere, he 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.) Plaintiffs ignore this testimony.

Fourth, Therien testified that he "believed" that the $5 million was collected. (A665.) However, Therien later testified:

> Q. ***You don't know whether those amounts relate to the amounts listed on Exhibits B and C of the holdback agreement; correct?***
>
> A. ***No. I would just be making an assumption.***

(A671.) Plaintiffs and the trial court ignored this testimony.

Finally, the fact that TPC afforded Plaintiffs credit for the $5 million in its post-trial answering brief was not an admission. Instead, TPC was merely demonstrating *arguendo* that, even with the inclusion of the $5 million, Plaintiffs were still not even close to reaching the Bogey. (A907.) Respectfully, the trial court cannot rely on this purported "admission," but then ignore the reason why TPC afforded the collection credit to Plaintiffs.

In sum, Plaintiffs failed their burden and the court erred in crediting $5 million toward the Bogey for the Exhibit B delay claim on the Freedom Tower project.

C. Plaintiffs Failed To Prove A Credit For The Jamaica 2G Claim.

Exhibit B reflects a delay claim of $13.541 million on Jamaica 2G. (A264-65.) At trial, Plaintiffs produced no evidence of collections on this claim. Indeed, there have been no collections of amounts "related to delay claim" because ***it is undisputed that the claim remains open***. (A697; A750 (Soroka); A776 (Tutor).)

In finding that Plaintiffs were entitled to credit for this claim, the trial court relied exclusively on A349-53.[4] However, the email states, "is not possible to calculate what has been collected on change orders outstanding as [of] March 31, 2013" and that TPC "is unaware of any amounts collected on the [Jamaica 2G] delay claim." (A350.) The actual letter from Ron Tutor on which the trial court purported to rely *revised* Segal's own spreadsheet and did not delete the credit that Segal gave himself on the Jamaica 2G project in order to show *arguendo* that, even if Plaintiffs were given credit for such collections, they would still not be able to meet the Bogey. (A354-58.)

Finally, Plaintiffs' citation to Roman's deposition fails. (AB 45-46.) Roman testified that ***he did not know*** whether the amounts collected on the Jamaica 2G project related to pending change orders existing as of March 31, 2013. And, Plaintiffs pointed to no document that shows that they collected any pre-March 2013

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[4] A349-53 is an email authored by Mike Kershaw. Ron Tutor's similar letter on the same topic is A354-58.

change orders on Jamaica 2G. Accordingly, under no circumstances were any amounts collected related to the Exhibit B amount. (A379.)

Based on Plaintiffs' failure to show collections and that a counterclaim was not pending on these three projects, Plaintiffs' collections must be reduced by at least $29,441,000. Thus, Plaintiffs fell far short of meeting the Bogey, and the trial court erred in concluding otherwise.

CONCLUSION

For all of the foregoing reasons, and the reasons set forth in TPC's Opening Brief, this Court should reverse the judgment below.

POTTER ANDERSON & CORROON LLP

OF COUNSEL:

Robert Nida
David Romyn
NIDA & ROMYN, P.C.
1900 Avenue of the Stars,
Suite 650
Los Angeles, CA 90067
(310) 286-3404

Dated: May 26, 2020

By: *\/s/ Brian C. Ralston*
Brian C. Ralston (I.D. No. 3770)
Aaron R. Sims (I.D. No. 6073)
Hercules Plaza – 6th Floor
1313 N. Market Street
Wilmington, Delaware 19899
(302) 984-6000

Attorneys for Defendant-Below, Appellant Tutor Perini Corporation

6737831

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of May, 2020, a copy of the foregoing document was served via *File & ServeXpress* upon the following attorneys of record:

Kenneth J. Nachbar, Esquire
Lauren Neal Bennett, Esquire
MORRIS NICHOLS ARSHT & TUNNELL LLP
1201 North Market Street
P.O. Box 1347
Wilmington, DE 19899

/s/ Aaron R. Sims
Aaron R. Sims (I.D. No. 6073)