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**TRANSAMERICA BUILDING COMPANY,  
INC.,**

**Plaintiff,**

v.

**OHIO SCHOOL FACILITIES  
COMMISSION,  
nka Ohio Facilities Construction Commission,  
Defendant.**

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: Case No. 2013-00349  
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: Judge McGrath  
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: Referee Wampler  
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**TRANSAMERICA BUILDING COMPANY'S  
MEMORANDUM IN OPPOSITION TO OHIO SCHOOL FACILITIES COMMISSION'S  
MOTION FOR SUMMARY JUDGMENT**

**I. INTRODUCTION AND STATEMENT OF THE FACTS**

This dispute between TransAmerica Building Company, Inc. ("TransAmerica") and the Ohio School Facilities Commission ("OSFC") arises from the construction of the dormitory portion for the Ohio School for the Deaf and Ohio State School for the Blind Project (the "Project"). The Project involved the construction of twelve (12) dormitories that were wood framed and closely resembled separate residential structures.<sup>1</sup> The construction of the dormitories was part of the overall Campus Project that included the construction of two separate academic buildings and the campus wide packages.<sup>2</sup> The academic buildings and campus wide packages were separately bid packages awarded to other contractors a substantial period of time after the dormitory packages were awarded.<sup>3</sup>

Unlike most OSFC Projects, there was no Co-Owner relationship and instead the OSFC served as the lone owner entity. TransAmerica submitted its bid on October 28, 2010 in the amount of \$3,975,000 and was awarded the contract in the same amount only after the low

<sup>1</sup> See ¶3 Bill Koniewich Affidavit, attached as Exhibit A.

<sup>2</sup> See ¶4 Bill Koniewich Affidavit.

<sup>3</sup> See ¶5 Bill Koniewich Affidavit.

bidder withdrew.<sup>4</sup> TransAmerica's bid was just under 2% of the published budget and within 5.6% of the next highest (third) bidder.<sup>5</sup> TransAmerica was issued its Notice to Proceed on December 10, 2010, where a 13-month construction duration was expected with completion scheduled for January 2012.<sup>6</sup> After enduring a host of problems on the Project, construction was not complete as of August 2012 for reasons beyond TransAmerica's control.<sup>7</sup>

The crux of this dispute involves the flawed set of plans provided by the OSFC that did not comply with the OSFC's obligations under R.C. 153.01, which required public projects to be built from **"full and accurate plans"** and **"details to scale and full-sized, so drawn and represented as to be easily understood."** In fact, when the Project began there was only a partial building permit in place with a correction letter noting "incomplete plans" and a full building permit was not received until nearly two years later. This resulted in the Project being "designed on the fly" as construction was on-going.<sup>8</sup> The failure of the OSFC to comply with R.C. 153.01 and provide an accurate set of plans was readily acknowledged in the email below where Lend Lease ("LL"), the Construction Manager, referred to the drawings as **"useless trash"** and **"garbage"** after TransAmerica had been awarded the Project<sup>9</sup>:

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<sup>4</sup> See ¶6 Bill Koniewich Affidavit.

<sup>5</sup> See ¶7 Bill Koniewich Affidavit.

<sup>6</sup> See ¶8 Bill Koniewich Affidavit.

<sup>7</sup> See ¶ 9 Bill Koniewich Affidavit.

<sup>8</sup> See ¶10 Bill Koniewich Affidavit.

<sup>9</sup> See December 29, 2010 E-mail from Joe Rice with LL, attached as Exhibit B.

**From:** Rice, Joe <Joe.Rice@bovislendlease.com>  
**Sent:** Wednesday, December 29, 2010 3:50 PM  
**To:** Keith, Clayton <Clayton.Keith@bovislendlease.com>  
**Cc:** Kirlangitis, Karin <Karin.Kirlangitis@bovislendlease.com>;  
Pattillo, Patrick <Patrick.Pattillo@bovislendlease.com>; LeMar,  
Lisa <Lisa.LeMar@bovislendlease.com>  
**Subject:** New drawings

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Clay,

Although I find the mistakes in these new drawings amusing it's a complete waste of my time to continue. Title blocks are changed, incorrect delta numbers being used, few if any changes clouded and on page A106 half of drawing is missing. If GBCI audits our paper usage for printing these useless drawings we'll never be LEED certified. At this rate we'll have to plant a forest to make up for the senseless killing of trees to print this garbage. Just to make sure you understand how I really feel about these drawings I would like to request that no additional drawings are allowed to be produced or issued for this project. Berardi needs to answer the RFI's with sketches and stop creating more work for us with this useless trash.

Happy New Year!!!

The following facts also support that the drawings were far from “full and accurate” at bid time, or during construction, as required under R.C. 153.01:

1. Before the bids were received, the OSFC’s Project Administrator indicated the bid set was **flawed**.<sup>10</sup>
2. Recognizing that the plans at bid time were not full and accurate, both the Project Architect (“SHP”), and LL made **multiple representations** that an updated set of construction plans would be provided.<sup>11</sup>
3. SHP attempted to issue the updated construction sets on at least three occasions but was denied by LL because the plans were still **not adequate**.<sup>12</sup>
4. A complete construction set was later created and used to obtain approvals from the Department of Industrial Compliance (“DIC”), but that same complete construction set was **never provided** to TransAmerica during construction.<sup>13</sup>
5. After receiving the initial approval to start foundations and the shell, SHP (and its consultant) took **five months** to provide its initial response to DIC’s comments and **two years** to obtain full plan approval for the dormitories.<sup>14</sup>

<sup>10</sup> See October 6, 2010 E-mail from OSFC Project Administrator, Rob Grinch, attached as Exhibit C.

<sup>11</sup> See ¶11 Bill Koniewich Affidavit.

<sup>12</sup> See Josh Predovich Deposition Transcript at page 97 line 16-24, and page 98 at lines 1-20, attached as Exhibit D.

<sup>13</sup> See ¶12 Bill Koniewich Affidavit.

<sup>14</sup> See ¶13 Bill Koniewich Affidavit.

In addition to the problems with the plans, OSFC, LL, and SHP struggled with constructing the overall Project (the dormitory, academic and campus wide packages) for the prescribed budget and allotted funds. This Project was unique from other school projects as it was funded under separate legislation from the OSFC's school program. At one point in time during the construction of the dormitory portion, there was an overall Project budget overrun in excess of \$7,766,734.<sup>15</sup> These budget problems, aggravated by the implementation and then removal of a project labor agreement, led to significant public scrutiny as demonstrated by the attached Columbus Dispatch Articles prior to the 2010 Ohio gubernatorial election.<sup>16</sup>

All told, the lack of full and accurate plans, combined with well-publicized budget problems, resulted in a troubled Project with the following symptoms:

- The Project finished over six months behind schedule.<sup>17</sup>
- The electrical prime contractor filed for bankruptcy.<sup>18</sup>
- Two lawsuits were filed, the first by TransAmerica and the second by the electrical prime contractor's surety.<sup>19</sup>

The internal communications between the OSFC, LL, and SHP demonstrate that they concealed both the design and budget problems throughout construction. Instead of informing TransAmerica and stopping construction until these problems were resolved, the OSFC, LL, and SHP instead looked for ways to blame the contractors for the delays and difficulties encountered and to finance the budget shortfall. All of this caused TransAmerica to incur significant additional costs, most of which were not its fault and in no way foreseeable. TransAmerica's recovery of those additional costs caused by the actions or inactions of the OSFC and its agents

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<sup>15</sup> See Jim Swartzmiller Deposition Transcript at page 64 lines 16-23, attached as Exhibit E.

<sup>16</sup> See Columbus Dispatch Articles, attached as Exhibit F.

<sup>17</sup> See ¶14 Bill Koniewich Affidavit.

<sup>18</sup> See Affidavit of LL's Project Manager Clay Keith, attached as Exhibit G.

<sup>19</sup> See Court of Claims Case No. 2013-00349 and 2014-00318.

is the aim of the equitable adjustment sought in this litigation.

## **II. LAW AND ARGUMENT**

### **A. Standard for Summary Judgment.**

Summary judgment is appropriate where the court determines that: (1) no genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, such party being entitled to have the evidence construed most strongly in his or her favor. *Martin v. Drew*, 10th Dist. No. 03-AP-734, 2004-Ohio-2520, ¶ 7 (citing *State ex rel. Grady v. SERB*, 78 Ohio St.3d 181, 183, 1997-Ohio-221).

### **B. TransAmerica Filed this Lawsuit Within the Two-Year Period Set Forth in R.C. 2743.16.**

The OSFC wants to argue that TransAmerica filed suit too soon (without exhausting administrative remedies) and too late (beyond statute of limitations). Neither is correct.

Under 2743.16(A), TransAmerica was required to file suit no later than two (2) years after its claim accrued. However, the OSFC makes the flawed argument, both legally and factually, that the two-year statutory period began to run on February 17, 2011 – even before TransAmerica mobilized on the job! The OSFC's statute of limitation argument is flawed legally in view of TransAmerica's statutory requirement to exhaust the administrative remedies under R.C. 153.12(B) and the 120-day time period to exhaust those remedies mandated by R.C. 153.16(B). Factually, the argument is flawed in view of the fact that TransAmerica had not mobilized as of February 17, 2011 and its first certified claim was submitted on March 8, 2012, which was four (4) months before the plans examiner issued its full approval and five (5) months before the occupancy permit was issued for this portion of the Project.

**1. TransAmerica Had Not Mobilized To the Site as of February 17, 2011 and its Letter Simply Provided Notice of Anticipated Impacts and Delays.**

TransAmerica had not even mobilized to the site when it provided its initial February 17, 2011 letter.<sup>20</sup> Closer review of that letter demonstrates that TransAmerica was simply putting the OSFC on notice that the previously promised updated set of construction drawings had not been provided.<sup>21</sup> TransAmerica made it known that the failure to receive the updated plans “would prevent us from performing as required” and that “our ability to execute the project per the contract schedule is being hindered.” Importantly, the letter goes on to state that “we are unable to anticipate costs” and that the “anticipated duration is unknown at this point.” Under GC 8.1, TransAmerica was just required to provide a forward-looking assessment of potential impacts and costs as GC 8.1 uses the term “**anticipated**” throughout:

8.1.2.1 – Nature and **anticipated amount of the impact**, including all costs for any interference, disruption, hindrance, or delay which shall be calculated in accordance with GC paragraph 7.6 and be a fair and reasonably accurate assessment of the damages suffered or **anticipated by the Contractor**.

8.1.2.4 – **Anticipated impacts and anticipated duration** of any delay, impact, interference, hindrance, or disruption any remobilization period.

The OSFC wants to construe TransAmerica’s initial notice as when it actually began to accrue damages, which is not what TransAmerica wrote in 2011, not what occurred, nor what is required under the General Conditions.

In response to TransAmerica’s first notice letter, LL responded with a letter dated March 1, 2011.<sup>22</sup> In this letter, LL promised that the updated drawings would be available later that day. LL went on to state that any additional costs would need to be justified based on a comparison of the information available at bid time versus the updated plans. Furthermore, those additional

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<sup>20</sup> See ¶15 Bill Koniewich Affidavit.

<sup>21</sup> See ¶16 Bill Koniewich Affidavit.

<sup>22</sup> See LL March 1, 2011 letter and SHP February 28, 2011, attached as Exhibit H.

charges would be handled individually through the contract provisions. The key portions of that letter are noted below - where any future action is conditioned upon receipt of the updated construction drawings:

These updated drawings, when received do not unconditionally expose the Owner to any additional costs, unless they can be identified and justified above and beyond the information provided on bid day.

**The project team does not see any justification for costs or time extension to the current project schedule due to the updated drawings provided they are available as noted on March 1, 2011. If there are additional changes above and beyond the items included in this response those items will have to be handled individually per the contract specifications with proper notification and documentation. **Please consider this notification closed at this point in time.****

Based on the promised future release of the updated construction drawings, LL stated the notification was “closed.” In turn, TransAmerica understood LL’s letter to mean that the issues raised in the February 17, 2011 letter would be addressed once the updated drawings were issued and reviewed.<sup>23</sup> Those updated drawings – while repeatedly promised - were not provided to TransAmerica on March 1, 2011 **or at any point during construction.**<sup>24</sup> Without the updated drawings and prior to starting actual construction, any additional costs or impacts had not accrued on February 17, 2011 as now claimed by the OSFC.<sup>25</sup>

It is important to point out that just because a contractor provides written notice or even a certified claim does not automatically mean damages against the State have accrued because there are various points in the Article 8 process where the parties can mutually agree to a change order. Before the administrative remedies are deemed exhausted, Article 8 provides two (2) opportunities where the parties may later agree on a change order, such that a claim against the State does not accrue.

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<sup>23</sup> See ¶17 Bill Koniewich Affidavit.

<sup>24</sup> See ¶18 Bill Koniewich Affidavit.

<sup>25</sup> See ¶19 Bill Koniewich Affidavit.

8.8.5 – If the parties agree with the Construction manager’s written analysis and recommendation, they shall enter into a Change Order, otherwise, they shall proceed with the dispute resolution process set forth in GC paragraph 8.9 and 8.10.

8.9.4 – If the Contractor agrees with the Commission’s decision, the decision shall be incorporated into a Change Order.

A “cause of action accrues” when the actual injury occurs or damage ensues. *See Velotta v. Leo Petronzio Landscaping, Inc.*, 69 Ohio St.2d 376, 23 O.O.3d 346, 433 N.E.2d 147 (1982). “Ordinarily, a cause of action does not accrue until actual damage occurs; when one’s conduct becomes presently injurious, the statute of limitations begins to run.” *Children’s Hosp. v. Ohio Dept. of Public Welfare*, 69 Ohio St.2d 523, 526, 433 N.E.2d 187 (1982). A cause of action for money wrongfully withheld accrues when it is actually withheld. *Id.*, paragraph two of the syllabus; *Osborn Co. v. Dept. of Admin. Servs.*, 80 Ohio App.3d 205, 208, 608 N.E.2d 1149 (10th Dist. 1992). In this case, TransAmerica’s claim against the OSFC could not accrue on February 17, 2011 because it had not yet mobilized or started construction and had not yet incurred additional costs, therefore no money was being wrongfully withheld at that time.

**2. TransAmerica’s Claim Accrued On July 8, 2012 And No Suit Was Required Until July 8, 2014.**

There is no dispute that TransAmerica filed its first certified claim on March 8, 2012. This means that TransAmerica’s claim would accrue against the State upon the earlier of (i) when a final administrative decision was issued or (ii) the expiration of the 120-day time period required to exhaust all administrative remedies under R.C. 153.16(B). In this case, a final administrative decision was never issued as the parties instead agreed to proceed to mediation. This means that TransAmerica’s claim accrued on July 8, 2012, which is 120 days after submitting its March 8, 2012 claim.

The OSFC fails to address the requirements of R.C. 153.12(B) to exhaust all administrative remedies and the corresponding time period under R.C. 153.16(B). R.C. 153.12(B) requires that a contractor can only bring an action in the Court of Claims “after administrative remedies provided for in such contract and any alternative dispute resolution procedures provided in accordance with guidelines established by the director of administrative services are exhausted.” R.C. 153.16(B) provides that “any **claim** submitted under a public works contract...shall be resolved within one hundred twenty days,” and at the end of this time period, “the contractor shall be deemed to have exhausted all administrative remedies for purposes of division (B) of R.C. 153.12 of the Revised Code.” (Emphasis added.) It is important to point out that R.C. 153.16(B) uses the term “claim” to trigger when the 120-day clock starts rather than initial notice. While TransAmerica provided its first **notice** on February 17, 2011 about potential future impacts and delays, it was not until March 8, 2012 when it was clear that the repeated promises of the State and its agents would not be met, and those impacts had manifested themselves, where TransAmerica could quantify its damages and submit its **claim**.

The OSFC fails to cite a single case in support of its position that a contractor’s first written notice regarding anticipated impacts is when a claim against the State accrues. However, at least two Ohio cases support the principle that a contractor’s claim against the State only accrues after the administrative remedies have been exhausted in response to a **claim** submitted by the contractor. In *Painting Co. v. Ohio State Univ.*, 10th Dist. No. 09AP-78, 2009-Ohio-5710, the court analyzed a contractor’s claim under the State’s Article 8 provisions and the statutory requirements of R.C. 153.12(B) and 153.16(B) and found:

Any claim submitted under a public works contract with the state necessarily will accrue, at the latest, by the end of the 120–day statutory period when, by operation of law, all administrative remedies are deemed exhausted under R.C. 153.16(B), the claim is deemed rejected, and money the state allegedly owes is deemed withheld.

*Id.* at ¶ 14.

Two years later, the Tenth District Court of Appeals again was faced with construing when a claim accrues under the Article 8 provisions. In *R.E. Schweitzer Constr. Co. v. Univ. of Cincinnati*, 10th Dist. No. 10AP-954, 2011-Ohio-3703, the State argued the contractor's claim accrued on November 24, 2004, which is when the work was deemed to be substantially complete. The court disagreed, and determined that the contractor's claim accrued on April 12, 2005, which was 120 days after the contractor filed its Article 8 claim. Because no administrative decision was ever made regarding the validity of the claim, the court determined:

[B]y operation of R.C. 153.16(B), appellee's administrative remedies were deemed exhausted **120 days after appellee filed its claim**, or April 12, 2005. At that point, appellee's claim was deemed rejected, and the money appellant allegedly owed was deemed withheld. Pursuant to R.C. 2743.16(A), appellee had two years from that date, or until April 12, 2007, to file its complaint in the Court of Claims.

*Id.* at ¶ 25. Similar to *Painting Co.*, the contractor in *R.E. Schweitzer* provided prior correspondence regarding its request for additional compensation. However, no resolution at the field level was ever reached and the contractor submitted an Article 8 claim in December of 2004. The court deemed the administrative remedies to be exhausted 120 days **after submitting this Article 8 claim** (rather than the previous correspondence between the parties) when no final administrative decision had been previously issued. *Id.* The expiration of this 120 day period triggered the running of the two-year statutory period. *Id.*

Likewise in this case, TransAmerica provided multiple notices regarding the failure to provide an updated set of construction drawings, beginning with the February 17, 2011 letter.<sup>26</sup> However, when it became apparent that the updated set of drawings was never going to be provided and much of the rough framing was already constructed, TransAmerica issued its

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<sup>26</sup> See ¶20 Bill Koniewich Affidavit.

Certified Claim on March 8, 2012 when it was finally able to identify (at least in part) its damages.<sup>27</sup> Keep in mind that TransAmerica provided its March 8, 2012 Certified Claim four (4) months before SHP obtained the complete approval from the plans examiner and five (5) months before the occupancy permit was issued.<sup>28</sup> Based on the holding of *Painting Co.* and *R.E. Schweitzer Constr. Co., supra*, TransAmerica's claim against the State would accrue 120 days after providing its March 8, 2012 claim since no final administrative decision had been issued. Accordingly, TransAmerica exhausted its administrative remedies on July 8, 2012 and was required to file suit no later than July 8, 2014.

**3. The OSFC Does Not Account For The Contract Provision As To When The Statute of Limitations Runs and the Required 120-Day Statutory Period To Exhaust All Administrative Remedies.**

The OSFC also fails to address GC 8.3.2, which states:

The date the Contractor is required to file its substantiated Certified Claim with the Commission shall begin the statute of limitations to file a lawsuit related to the Claim.

Even construing the February 17, 2011 letter as triggering TransAmerica's obligation to provide a certified claim (which it does not for reasons provided further in this Memorandum), TransAmerica's claim could accrue no earlier than July 17, 2011. The July 17, 2011 date takes into account the thirty (30) days Transamerica had to file its Certified Claim under 8.3.1<sup>29</sup> plus the 120 days to exhaust the administrative remedies since no decision was ever issued by either LL or the OSFC. Thus TransAmerica still complied with the two-year limitation when it filed suit on June 14, 2013, even based on the OSFC's flawed argument.

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<sup>27</sup> See ¶21 Bill Koniewich Affidavit.

<sup>28</sup> See ¶22 Bill Koniewich Affidavit.

<sup>29</sup> Even if the thirty (30) days added for TransAmerica to file its Certified Claim are removed, TransAmerica still would have to wait 120 days before filing suit. Therefore, TransAmerica's claim could accrue no earlier than June 17, 2011. Thus, TransAmerica would have to file suit no later than June 17, 2013, which it did.

#### **4. OSFC Ignores How The Parties Proceeded Through The Article 8 Process And Its Previous Representations As To When The Administrative Remedies Were Exhausted.**

The OSFC's argument that TransAmerica should have filed suit sooner is in conflict with how the parties proceeded through the Article 8 process and the representations of the OSFC's in-house counsel. Upon providing its March 8, 2012 Certified Claim, TransAmerica provided 445 documents during the next couple of months, including its bid and job cost report.<sup>30</sup> A jobsite resolution meeting was eventually held on July 19, 2012.<sup>31</sup> While GC 8.8.4 requires that LL issue its recommendation within 14 days of the meeting, it took LL 48 days to release its September 5, 2012 recommendation where it rejected all of TransAmerica's claims.<sup>32</sup> In response, TransAmerica appealed that recommendation on September 18, 2012 in accordance with GC 8.9.1 and then provided a Supplemental Certified Claim on November 7, 2012.<sup>33</sup> Thereafter, counsel for TransAmerica and the OSFC – by agreement - proceeded towards mediation in lieu of the remaining Article 8 steps.<sup>34</sup>

After the OFSC again postponed the mediation date to May 3, 2013, TransAmerica issued its February 15, 2013 letter where it expressed frustration in the delay and requested the remaining Article 8 process be completed.<sup>35</sup> While TransAmerica still agreed to proceed with the May 3, 2012 mediation, it also indicated that it was prepared to file suit within thirty (30) days, because by that time more than 130 days would have elapsed since it submitted its Supplemental November 7, 2012 claim and more than one year had elapsed since its March 8, 2012 claim. In response, OSFC's in-house counsel indicated the OSFC was under no obligation to proceed with the May 3, 2013 mediation if TransAmerica insisted on the OSFC completing

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<sup>30</sup> See ¶23 Bill Koniewich Affidavit.

<sup>31</sup> See ¶24 Bill Koniewich Affidavit.

<sup>32</sup> See ¶25 Bill Koniewich Affidavit.

<sup>33</sup> See ¶26 Bill Koniewich Affidavit and Exhibit BB for November 7, 2012 Supplemental Certified Claim.

<sup>34</sup> See ¶27 Bill Koniewich Affidavit.

<sup>35</sup> See TransAmerica February 15, 2013 letter, attached as Exhibit I.

the remaining Article 8 steps, which included the requirement that the Commission render its decision.<sup>36</sup> OSFC's counsel went on to say that as of March 7, 2013, TransAmerica had failed to exhaust its administrative remedies in response to TransAmerica's threat to file suit. Ultimately, counsel for TransAmerica and the OSFC agreed that the May 3, 2013 mediation would serve as the substitute for the remaining Article 8 provisions and that TransAmerica was free to file suit after the mediation.<sup>37</sup>

It is troubling that the OSFC conditioned its participation in the May 3, 2013 mediation on TransAmerica's agreement not to proceed further with the Article 8 process and file suit, but now turns around and claims that TransAmerica should have filed suit sooner. Equally troubling is the fact that the OSFC has apparently forgotten its commitment to have the mediation substitute for the balance of the Article 8 process.

**C. OSFC's Arguments Regarding Article 8 Compliance Fail and Multiple Reasons Exist for TransAmerica's Claim to Be Heard on Its Merits.**

Setting its baseless statute of limitations argument aside, the crux of OSFC's Motion for Summary Judgment is that TransAmerica waived its claim for an equitable adjustment by failing to strictly comply with the provisions of Article 8 of the General Conditions. This argument—that TransAmerica waived and/or failed to exhaust its administrative remedies—is an affirmative defense, the burden of proof of which is ultimately borne by the OSFC. *See Cleveland Constr., Inc. v. Kent State Univ.*, 10th Dist. No. 09-AP-822, 2010-Ohio-2906, ¶¶ 47-48.

In support of its position, the OSFC relies upon the Ohio Supreme Court's decision in *Dugan & Meyers Constr. Co., Inc. v. Ohio Dep't Admin. Servs.*, 113 Ohio St.3d 226, 2007-Ohio-

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<sup>36</sup> See OFCC March 7, 2013 letter, attached as Exhibit J.

<sup>37</sup> See March 14, 2013 E-mail exchange between counsel for TransAmerica and OFCC, attached as Exhibit K.

1687, and its progeny.<sup>38</sup> The OSFC claims this case law stands for the proposition that strict compliance with—and exhaustion of—contractually-mandated administrative remedies is a prerequisite for recovery of an equitable adjustment. However, these decisions do not abrogate the long-standing and fundamental principle that a public owner such as the OSFC can, through its conduct, **waive** strict compliance with Article 8. See *Dugan & Meyers, supra*, at ¶ 41; *Stanley Miller*, 2010-Ohio-6397, at ¶ 17; *J&H Reinforcing & Structural Erectors, Inc. v. Ohio Sch. Fac. Comm.*, 10th Dist. No. 12AP-588, 2013-Ohio-3827, ¶ 87. In such instances, a contractor's substantial compliance with the administrative remedies provision will be deemed sufficient to preserve a claim.

As shown below, TransAmerica fulfilled its obligations under Article 8 when considering the OSFC's failure to deliver complete plans (and thus the information necessary for TransAmerica to submit a certified claim). Moreover, through its own action and inaction, the OSFC waived any right it may have had to insist on strict compliance with the requirements of Article 8. Finally, to the extent Article 8 acts as a bar to damages caused by delays that are the fault of the public owner OSFC, it is unenforceable in violation of the public policy set forth in R.C. 4113.62.

**1. The Parties Mutually Agreed To Extend The 30 Day Requirement For TransAmerica To Submit and Substantiate Its Certified Claim.**

From the inception of the Project and throughout, TransAmerica provided constant written notice to the OSFC (and its agents) that the failure to provide accurate completed plans—the same plans the OSFC was required to provide under R.C. 153.01—would result in significant delays and increased costs. Prior to mobilizing on-site in early March 2011, TransAmerica

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<sup>38</sup> See *Cleveland Constr., Inc. v. Kent State Univ.*, 10th Dist. No. 09AP-822, 2010-Ohio-2906; *Stanley Miller Construction Co. v. Ohio School Facilities Commission*, 192 Ohio App.3d 676, 2011-Ohio-909, 950 N.E.2d 218 (10th Dist.) *Painting Co. v. Ohio State Univ.*, 10th Dist. No. 09AP-78, 2009-Ohio-5710; *Tritonservices, Inc. v. University of Cincinnati*, Ct. of Claims Case No. 2009-02324, 2011-Ohio-7010.

provided written notice on February 17, 2011 and the OSFC does not dispute that such notice was sufficient and timely. LL responded with its March 1, 2011 letter and promised that an updated set of drawings would be available that same day. Based on those drawings being issued, any additional costs or time would need to be based on identified changes beyond the information available at bid time. LL even attached a letter from SHP representing that an updated set of plans would be made available by March 1, 2011.<sup>39</sup> While SHP stated that the updated set was not a contractual requirement, SHP acknowledged **“that the issuance of this set will help to eliminate confusion; to that end, we are willing to complete this work at our cost.”**

The OSFC claims that TransAmerica failed to substantiate its claim within the 30 day time period prescribed under GC 8.2.1 and its claim is thereby waived. However, the OSFC fails to address that GC 8.3.4 allows the parties to agree to extend the 30-day period to submit a certified claim. GC 8.3.4 provides:

The Commission and Contractor may agree, in writing, to reasonably extend the thirty (30) day period for substantiation of a Claim required under GC subparagraph.

Through its conduct and as it made clear in writing, the OSFC agreed to extend the thirty (30) day period on at least two occasions.<sup>40</sup> The first occurred on March 1, 2011, when the OSFC, through LL, promised to provide TransAmerica with a complete set of buildable construction plans.<sup>41</sup> In direct response to TransAmerica’s notice for additional time and money, LL indicated that any justification for additional time or money would need to be based on the identified changes that had taken place when comparing the bid documents to the forthcoming plans. Accordingly, the March 1, 2011 letter reflected the parties’ mutual understanding that

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<sup>39</sup> See LL March 1, 2011 letter and SHP February 28, 2011, attached as Exhibit H.

<sup>40</sup> ¶28 Bill Koniewich Affidavit.

<sup>41</sup> ¶29 Bill Koniewich Affidavit.

TransAmerica would not—and indeed, could not—submit its certified claim under Article 8 or any other information pertaining to additional costs or time until it received the promised updated set of plans. In other words, the March 1, 2011 letter was a clear expression of the parties’ mutual agreement under GC 8.3.4 that TransAmerica’s time to submit was being extended until such time as TransAmerica received the updated set of construction plans necessary to justify the additional costs.

After receiving LL’s March 1, 2011 letter, TransAmerica proceeded with construction as expected by the OSFC and LL, with the understanding that an updated set of construction plans would be provided shortly. However, no such plans were ever provided, which precluded TransAmerica from identifying the post bid changes as mandated in LL’s March 1, 2011 letter until much later in the Project when much of the framing and blocking had been installed.

After the drawings were not provided – as promised – in the spring of 2011, TransAmerica continued to provide written notice, as noted below, of the impact this was having on the Project:<sup>42</sup>

April 4, 2011	TransAmerica provides notice of major costly errors due to the multiple changes that have occurred that render the bid set obsolete for dimensions.
April 15, 2011	TransAmerica provides notice that the construction set of drawings have not been produced to minimize future coordination issues.
May 6, 2011	TransAmerica again informs LL that they have not seen the construction set of drawings. LL acknowledges that <b>“we are going to get hit with costs for every wall that is wrong on OSSB 5 and it will come back to confusion on the drawings.”</b>
May 16, 2011	TransAmerica provides notice of lost time and impacts to schedule.
July 26, 2011	TransAmerica provides list of issues that need to be resolved.
August 30, 2011	TransAmerica requests additional time for the various change orders and notes the previous change orders will need to be re-priced if additional time is not provided.

<sup>42</sup> See referenced notices attached as Exhibit L.

During this period when TransAmerica was providing notice of the impacts due to the lack of updated plans, LL acknowledged those same impacts to SHP. The first was on March 28, 2011, when LL's Project Manager indicated that SHP had four months to get the promised set of Construction Drawings in a form that is "close to correct and coordinated but has failed to do so."<sup>43</sup>

On Mon, Mar 28, 2011 at 10:06 AM, Keith, Clayton <[Clayton.Keith@lendlease.com](mailto:Clayton.Keith@lendlease.com)> wrote:

We have also noticed in the "Construction set" that the building orientation is not correct in the Architectural drawings, that you have directed the contractors to use numerous times, in relation to the civil and structural drawings. SHP has had 4 months to get the promised set of "Construction Drawings" into a form that is close to correct and coordinated and has failed to do so. On top of that we spent DAYS going through the drawings to do YOUR quality control and have marked up the drawings which have been sitting in our trailer for at least three weeks. You had requested that we do this work for you so that you could come out and review our red lines and then take our marked up set back to Rolando to attempt to get them corrected. This has not happened to date and this issue continues to cause problems on site. We are now referencing pieces from structural, pieces from Architectural and also now orientations from civil? SHP needs to take control of this situation and give us and the contractors the information needed to proceed with faith in your drawings.

The second was on July 7, 2011, when LL's Project Manager again indicated the problems with the drawings and that this "is going to bite us in the you know what" and that the Project needs to "get back on track" with "clear and accurate drawings."<sup>44</sup>

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<sup>43</sup> See March 28, 2011 E-mail from LL Project Manager attached as Exhibit M.

<sup>44</sup> See July 7, 2011 E-mail from LL Project Manager attached as Exhibit N.

**Joshua L. Predovich**

**From:** Keith, Clayton <Clayton.Keith@lendlease.com>  
**Sent:** Thursday, July 07, 2011 1:22 PM  
**To:** 'jpredovich@shpinc.com'  
**Subject:** Fw: OSDB Dorm CA - PR16 kitchen island and pantry dims

Josh

See message below. I am only sending this to you.

The email correspondence and passing back and forth of information between you and TA has to stop. There is no focus in getting the drawings correct in what we need looking forward, or correctly showing what the "intent" of the design is. It appears the only focus on the construction set is the as-built of all the issues and deficiencies that have been pointed out since DD. It makes it even more frustrating when Jim Smith and Myself are afraid to address deficiencies due to the situation just being reviewed by either structural, MEP or yourself and find out it is OK not to build per the plans and specs. This is not how we should be managing this construction and it is going to bite us in the you know what.

I have concerns on the soffit framing that you put on my desk yesterday. It appears we have added a lot of unnecessary weight with the 2x10's, there are no truss hangers or structural framing supports and we did not do the gussett design. I know design is in your court, but to have the contractor questioning my super with a design he has not seen is crazy. I also reviewed your kitchen mark ups and do not think your dimensions are correct.

We also have the roofing issue that is going to bite us because of your request for pricing as soon as TA yaps. I am not happy with the fact that they are now scheduling everything as EPDM dependent. They did not get complete color samples in by the deadline, therefore color selections were delayed and then waited until the week the material is needed to find out it is discontinued. They still have not completed the submittal with the manufacturer written approval that the design meets the warranty requirements. How with all this said should the Owner pay for this issue? I feel we need to get this train back on the track and it needs to start with clear and accurate drawings. We are not reviewing drawings anymore to give you correction list after correction list. You need to do a thorough review of your consultants drawings and if they pass your approval issue them. My fear is if they are like previous versions it will cause more confusion than is currently on site.

I would call you on this, but I am not available until 3:00.

Ultimately, the updated construction drawings were never provided to TransAmerica because LL found them not to be complete enough and refused to have them issued to TransAmerica. The Project Architect for SHP confirmed this in his deposition when referring to the updated construction set as the "conforming set":

Q. And there are at least three conforming sets that were issued on the project, one being in January 2011 which you had reviewed and believed was not sufficient to issue out to the contractors.

A. Correct.

Q. The second set was in March of 2011, and you had provided that set to Lend Lease and Lend Lease believed that set was not sufficient to provide to the contractors?

A. Approximately March, yes.

Q. And then the third set was in May of 2011 and at that point in time Lend Lease said that set was not sufficient to be provided to the contractors?

A. Approximately around May yes.

Q. And if I understand you correctly, what was actually provided to the contractors was Lend Lease's posted set of plans, correct?

A. That's correct, a CD with-- containing the PDF's.

Q. And that posted set of plans basically consisted of the bid, the October 2010 bid set plus attachments of RFI's, PRs, and questions and answers that had been--that had taken place up until that point in time that the Leas Lease posted set was issued.

A. Plus the addendums, yes.<sup>45</sup>

Q. So at the end of the day the concern was, by issuing the construction set, it could expose the OSFC to additional costs, whether they're legitimate or not, is that fair?

A. I think there was concern that it could potentially lead to confusion.<sup>46</sup>

As noted above, the Project was constructed from RFI's responses and sketches rather than "full and accurate" drawings mandated by R.C. 153.01. Some of the RFI responses and sketches were encompassed in change orders limited to the discrete scope of work reflected in a particular response or sketch.

It is important to note that LL directed and expected most of these changes to be constructed before a change order was issued and executed.<sup>47</sup> This course of conduct is demonstrated by Change Orders 25 and 26, which were executed by the OSFC in December, 2011, months after the work was completed in August. These Change Orders relate to significant changes implemented to satisfy the plans examiners' requirements relating to the proper fire rating of the ceilings and walls. These issues relating to rating of the walls and ceilings should have been resolved by SHP prior to issuing the documents for bidding and not while the buildings were being framed.

SHP was aware of all these impending changes as early as January 2011, but TransAmerica was not notified of them until July of that year. Between January and July of 2011, SHP provided the plans examiner a complete set of plans labeled as "Construction Set" but, as explained earlier, that same complete set was never provided to TransAmerica at any

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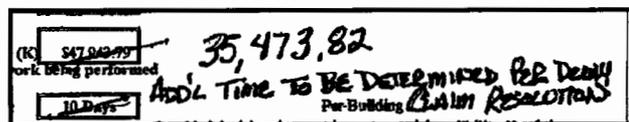
<sup>45</sup> See Josh Predovich Deposition Transcript at page 97 line 16-24, and page 98 at lines 1-20, attached as Exhibit D.

<sup>46</sup> See Predovich Deposition Transcript at page 339 line 22-24, and page 340 at lines 1-2, attached as Exhibit O.

<sup>47</sup> See ¶30 Bill Koniewich Affidavit.

point in time during construction. Instead, TransAmerica received sketches and discrete sheets from the complete set to base its pricing on. During this period when TransAmerica was proceeding with changes to the work before a final change order had been agreed upon, TransAmerica made it known that its pricing components included nothing for the time related impacts of these changes. In particular, on October 7, 2011, TransAmerica again provided Article 8 notice of the impacts that had taken place due to the various changes and that TransAmerica had proceeded with these changes based on the direction of LL prior to final approval.<sup>48</sup> TransAmerica expressly noted that its request for the time related impacts of these changes had not been resolved.

Shortly thereafter, the OSFC (through LL) expressly and affirmatively represented on Change Order 25 that TransAmerica preserved its claim for additional compensation “per delay claim resolution.” As shown below, pursuant to Change Order 25<sup>49</sup> TransAmerica requested an additional ten (10) days per building. In response, LL crossed out that reference but added the note that additional time would be determined per “delay claim resolution.”



Through this change order, the OSFC acknowledged the additional time component requested by TransAmerica would be resolved later through the claim process. Likewise in Change Order 26, TransAmerica also requested an additional ten (10) days per building.<sup>50</sup> Importantly, Change Order 26 was executed by TransAmerica after LL’s acknowledgment in Change Order 25 that the additional time request would be addressed in the subsequent claim resolution. However, no

<sup>48</sup> See TransAmerica October 7, 2011 Article 8 notice, attached as Exhibit P.

<sup>49</sup> See Change Order 25, attached as Exhibit Q.

<sup>50</sup> See Change Order 26, attached as Exhibit R.

additional time was granted for any of these changes and Project completion remained set at February 14, 2012.

The bottom line is that the parties agreed to extend the time period for TransAmerica to substantiate its claim on multiple occasions. Therefore, TransAmerica fully satisfied the requirements of Article 8 when it submitted its certified claim.

## **2. The OSFC Fails To Acknowledge That A New Set of Events Arose After Pricing Request No. 35 Was Issued For A Revised Schedule.**

After Change Order 25 and 26 were fully executed, the Project continued to experience delays. In response, LL issued a pricing request for a revised schedule that extended the Project completion by ten (10) days through Pricing Request No. 35.<sup>51</sup> TransAmerica submitted pricing as requested on January 6, 2012<sup>52</sup> and LL responded on January 17, 2012.<sup>53</sup> In its response, LL questioned much of what TransAmerica asserted and requested that TransAmerica's pricing be revised accordingly. Shortly thereafter it became apparent to TransAmerica that its pricing for the revised schedule would not be accepted. In response, and based on the conditions of the dormitories, TransAmerica provided another Article 8 notice on February 7, 2012 where it noted the inability to complete its work and requested an extension of time, notably because the dormitories were not sufficiently enclosed.<sup>54</sup> In addition, the concrete slabs were still releasing significant moisture that precluded the flooring from taking place.

Under GC 8.1.1.1, TransAmerica was obligated to provide written notice within ten (10) days after the event giving rise to the Claim. In this case the events giving rise to TransAmerica claim include the rejection of its pricing for a revised schedule and the problems associated with

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<sup>51</sup> See Price Request No. 35, attached Exhibit S.

<sup>52</sup> See TransAmerica January 6, 2012 (mistakenly dated January 6, 2011) pricing submission, attached as Exhibit T.

<sup>53</sup> See LL January 17, 2012 response, attached as Exhibit U.

<sup>54</sup> See TransAmerica Article 8 Notice submitted on February 7, 2012 (mistakenly dated February 7, 2011), attached as Exhibit V.

dormitories environmental control. TransAmerica provided its February 7, 2012 Article 8 notice based upon these events and then followed up thirty days later with its March 8, 2012 Certified Claim as required GC 8.2.1. Even putting aside the prior promises to provide an updated set of plans and the subsequent agreement to resolve the remaining issues via the “claim resolution” process, TransAmerica still satisfied Article 8 based on its March 8, 2012 certified claim that was submitted after the rejection of its pricing for a revised schedule extension and its February 7, 2012 Article 8 notice.

**3. The OSFC Waived Strict Compliance with Article 8 by Failing to Provide Complete and Accurate plans, and by Its Own Failure to Strictly Comply with Article 8.**

It is well-settled that a party to a contract can, through its own action or inaction, waive contractual rights. Waiver is a voluntary relinquishment of a known right. *Chubb v. Ohio Bureau of Workers' Compensation*, 81 Ohio St.3d 275, 278-79 (1998). The waiver of a contract provision may be express or implied, *Natl. City Bank v. Rini*, 162 Ohio App.3d 662, 668 (11th Dist. 2005), and may be enforced by the person who had a duty to perform and who changed his or her position as a result of the waiver. *Chubb*, 81 Ohio St.3d at 278-79. Waiver by estoppel exists when the acts and conduct of a party are inconsistent with an intent to claim a right, and therefore misleads the other party. *Natl. City Bank*, 162 Ohio App.3d at 668. Waiver by estoppel allows a party's inconsistent conduct to establish a waiver of contractual rights. The doctrines of affirmative and implied waiver are relevant when determining whether a public owner is entitled to enforce strict compliance with contractual notice and claim provisions. *See Dugan & Meyers*, 2007-Ohio-1687, at ¶ 41 (suggesting that evidence of “affirmative or implied” waiver of change-order procedures will excuse strict compliance); *Stanley Miller*, 2010-Ohio-6397, at ¶¶ 17-18.

In a recent case regarding a contractor’s delay claim in a public works contract, the Tenth District Court of Appeals found that a public owner—through its own actions and those of its agents—waived strict compliance with the notice and claim provisions of Article 6 and Article 8. That case, *J&H Reinforcing & Structural Erectors, Inc. v. Ohio Sch. Fac. Comm.*, 10th Dist. No. 12AP-588, 2013-Ohio-3827, is indicative of the type of conduct by a public owner (or its agents) that may constitute such waiver. In *J&H*, the OSFC, through its construction manager, manipulated the project schedule in order to prevent the contractor from fully ascertaining and quantifying the project’s delays. *Id.* at ¶ 86. The court of appeals affirmed the trial court and found that the public owner’s conduct “demonstrate[d] a lack of good faith and fair dealing, and that insistence upon strict compliance with Article 6 was merely a strategy employed by Bovis and OSFC to prevent J&H from filing a claim.” *Id.*<sup>55</sup> Furthermore, the court agreed that by refusing to participate in - or comply with - the Article 8 dispute resolution process, the OSFC waived strict compliance with Article 8. Quoting the trial court, the court found it “ironic that OSFC asserts a contract defense based upon the alleged failure of J&H to strictly comply with the requirements of Article 8, when the evidence establishes that OSFC completely failed to comply with the Article 8 meeting requirement and claims process notwithstanding eleven such requests by J&H.” *Id.* at ¶ 87.

In this case, the OSFC waived<sup>56</sup> its right to strictly enforce Article 8 by refusing to do

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<sup>55</sup> The Court may be interested to learn that the very same Bovis-Lend/Lease employees – Jim Swartzmiller and Clay Keith – found to have engaged in bad faith conduct in the *J&H* case were the OSFC’s agents, responsible for overseeing TransAmerica’s work here.

<sup>56</sup> Similarly, the OSFC is not entitled to strict enforcement of Article 8 because of its superior knowledge of the Project problems. Under the doctrine of superior knowledge, “[w]hen an owner has knowledge of conditions which are material to the performance of the contract, it has an affirmative duty to disclose such information.” *Romanoff Elec. Corp. v. Ohio Dept., of Adm. Servs.*, Ct. of Cl. Nos. 91-02567, 91-11922-PR, 1992 WL 12007033 (Oct. 26, 1992) \*4 (citing *Helene Curtis Industries, Inc. v. U.S.*, 312 F.2d 774 (Ct. Cl. 1963)). Generally, a public owner will be subject to the doctrine of superior knowledge when (1) the owner has information that constitutes vital knowledge of a fact that affects performance costs or direction; (2) the owner is aware the contractor has no knowledge of and has no reason to obtain such information; and (3) any contract specification supplied misled the contractor, or did

what is required under Ohio law: to provide “full and accurate” construction plans to TransAmerica. R.C. 153.01 is unequivocal on this point.<sup>57</sup>

The OSFC continued to waive the Article 8 provisions when its consultants, LL and SHP, promised on multiple occasions (as explained in Section C.1, *supra*) that an updated set of plans would be provided in response TransAmerica’s initial Article 8 notice.<sup>58</sup> Instead of issuing those updated plans as promised, the plans were withheld for fear they would just create more confusion and expose the OSFC to additional costs. Thus, the OSFC, through the actions of its agents SHP and LL, waived reliance on the thirty-day (30) time period under paragraph 8.3.1 of the General Conditions for a contractor to submit its certified claim.<sup>59</sup> The initial unfulfilled promises followed by the decision to withhold the plans precluded TransAmerica from even starting to quantify its damages and submitting a certified claim within the thirty-day (30) time period. It was not until March 8, 2012 that TransAmerica had enough information to submit its first certified claim in the amount of \$2,170,800.75. Even as of March 2012, there was no possible way for TransAmerica to realize the full magnitude of the design problems when the Project Team was withholding plans and the true status of the plan review process.

It was only after TransAmerica received responses to a series of public records requests that it fully realized the substandard state of the design. As a result, TransAmerica issued its Supplemental Certified Claim on November 7, 2012 in the amount of \$3,048,294.13, which also

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not put it on notice to inquire. *See La Gloria Oil and Gas Co. v. U.S.*, 72 Fed. Cl. 544 (2006). This Court expressly adopted this doctrine as a basis for a public owner’s breach of contract in *Romanoff Elec. Corp.*, as did the Northern District of Ohio in *R.J. Wildner Contr. Co., Inc. v. Ohio Turnpike Comm’n. R.J. Wildner Contracting Co., Inc. v. Ohio Turnpike Comm.*, 913 F. Supp. 1031 (N.D. Ohio 1996). In *R.J. Wildner*, the public owner’s failure to disclose superior knowledge invalidated an exculpatory clause of the contract. *Id.* at 1042. Similarly, in *Potasnick v. United States*, 123 Ct. Cl. 197 (1952), the United States Court of Claims found because of the public owner’s “knowledge and concealment from plaintiff of facts and information relating to the true character” of the worksite, the contractor was not required to follow the administrative procedure outlined in the “Changed Conditions” clause in the contract. *Id.* at 218-19.

<sup>57</sup> ¶31 Bill Koniewich Affidavit.

<sup>58</sup> ¶31 Bill Koniewich Affidavit.

<sup>59</sup> ¶31 Bill Koniewich Affidavit.

included additional delay damages beyond those stated in the initial claim. Moreover, while the OSFC argues it is entitled to strict compliance in an attempt to preclude TransAmerica's claim from going forward, the OSFC paid the delay costs of two other prime contractors when neither contractor submitted a certified claim, let alone within the thirty (30) day time period.<sup>60</sup> Many facts concerning waiver by the OSFC and its agents remain in dispute for trial.

**4. Contractual Language Designed to Restrict TransAmerica's Request for Equitable Adjustment Due to the OSFC's Actions or Inactions is Unenforceable under R.C. 4113.62.**

R.C. 4113.62 also provides support that the OSFC will not be able to escape liability for the delays it (and those under its control) caused by simply relying on the "boiler plate" notice provisions. This is especially true in this case when both SHP and LL, as the agents for the OSFC, (1) made misrepresentations regarding issuing an updated set of plans, (2) spent a considerable amount of time creating an updated set of plans that was issued to the DIC plans examiner, (3) but then withheld that set from TransAmerica. The pertinent section of R.C. 4113.62(C)(1) provides:

Any provision of a construction contract, agreement, or understanding, or specification or other documentation that is made a part of a construction contract, agreement, or understanding, that waives or precludes liability for delay during the course of a construction contract when the cause of the delay is a proximate result of the owner's act or failure to act, or that waives any other remedy for a construction contract when the cause of the delay is a proximate result of the owner's act or failure to act, is void and unenforceable as against public policy.

When interpreting how broadly to apply R.C. 4113.62(C)(1), the Tenth District Court of Appeals found that "an owner cannot cause a delay, and then avoid the natural consequences for causing the delay by using boilerplate contract language." See *Cleveland Constr., Inc. v. Ohio Public Emps. Retirement Syst.*, 10th Dist. No. 07AP-574, 2008-Ohio-1630, ¶ 19. Similarly, in *J&H Reinforcing & Structural Erectors, Inc. v. Ohio Sch. Fac. Comm.*, *supra*, the Tenth District found

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<sup>60</sup> See ¶32 Bill Koniewich Affidavit.

that by virtue of R.C. 4113.62, no damages for delay provisions such as those found in Articles 6 and 8 “apply to limit a contractor’s remedies only where a contractor’s delay is caused by another contractor.” *Id.* at ¶ 84. Continuing, the *J&H* court found that “R.C. 4113.62 invalidates contractual provisions that preclude liability for delay when the delay is caused by the owner’s act or failure to act.” *Id.* Therefore, because in *J&H* the “primary cause” of the delay in the contractor’s work was the public owner’s agent’s own actions (i.e., the use of project override scheduling), the trial court did not err in permitting the contractor to pursue (and prove) its delay damages against the OSFC notwithstanding the lack of strict compliance with contractual notice provisions. *Id.*

The OSFC will not be able to avoid liability for TransAmerica’s damages when it was the OSFC (and those under its control) that first caused the delays by failing to issue a full and accurate set of plans when the Project was bid, or as promised repeatedly throughout the job. Accordingly, any perceived flaws with TransAmerica’s notices and Article 8 compliance were waived by the OSFC when it acquiesced to SHP’s and LL’s numerous shortcomings, including those relating to the decision not to issue a properly updated construction set of plans, as required under R.C. 153.01.

R.C. 4113.62 was enacted to avoid the unfairness of “no damage for delay” clauses and expressly provides that any such agreement is void and unenforceable as against public policy “when the cause of delay is a proximate result of the owner’s act or failure to act.” And the evidence here is “that the primary cause of the delay was the conduct of the owner ....” Further, it is worth noting that the OSFC’s primary authority, *Dugan & Meyers v. Ohio Dept. of Adm. Servs.*, was decided before the application of R.C. 4113.62<sup>61</sup> and has limited application here,

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<sup>61</sup> It should be noted further that in *Dugan & Meyers* the Court expressly recognized that through R.C. 4113.62 the “General Assembly also declared void and unenforceable any other contractual provision that ‘waives any other

particularly when the record in *Dugan & Meyers* (unlike here) “lacks evidence of either an affirmative or implied waiver [by the owner] of the change order provisions in the contract.” *Id.* at ¶ 41.

In contrast, the case of *Cleveland Constr., Inc. v. Ohio Public Emps. Retirement Sys.*, was decided after the effective date of R.C. 4113.62 and found that the contractor, who admittedly failed to seek a time extension in writing, was still entitled to acceleration damages because that (Article 6) provision in the contract was unenforceable.<sup>62</sup> The OSFC’s contract clauses in G.C. § 6.1-6.4, and similar provisions like G.C. § 8.1, are unenforceable to the extent they attempt to waive or preclude the contractor’s recovery of delay and acceleration damages associated with the owner’s acts or failures to act.

If the Tenth District Court of Appeals properly upholds a verdict where there was no evidence of a single time extension request, then certainly the reasonable efforts of TransAmerica to seek time extensions and put the OSFC and its agents on notice as to its delay and acceleration impacts are adequate here.

**D. The State is Not Entitled to Sovereign Immunity on TransAmerica’s Claims for Fraud and Fraudulent Inducement.**

The OSFC next argues that TransAmerica’s claims for fraud and fraudulent inducement (Counts Four and Five of the Amended Complaint)<sup>63</sup> fail because (1) a state agency is entitled to blanket sovereign immunity for intentional torts, and (2) the OSFC’s agents SHP and LL were not expressly permitted by contract to commit fraud against TransAmerica. Both of these

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remedy for a construction contract when the cause of the delay is a proximate result of the owner’s act or failure to act.” 113 Ohio St.3d 226 at ¶ 32. However, since the contract at issue was executed before the passage of the act, the Court was forced to uphold the no-damages-for delay clause. *Id.* at ¶ 33.

<sup>62</sup> *Cleveland Constr., Inc. v. Ohio Public Emps. Retirement Sys.*, 10th Dist. No. 07AP-574, 2008-Ohio-1630, ¶ 10 (finding that the “boilerplate” notice provision of article 6 had been declared “void and unenforceable as against public policy” by the General Assembly through the passage of R.C. 4113.62).

<sup>63</sup> The OSFC has not moved for summary judgment on TransAmerica’s claim for negligent misrepresentation.

arguments are premised upon an incorrect articulation of the law, and thus fail to preclude counts Four and Five of the Amended Complaint.

TransAmerica's claims for fraud and fraudulent inducement are based on the OSFC and its agents' false and material representations to TransAmerica concerning the state of the plans and specifications, and the status of building permit as part of the bidding process and throughout the Project.<sup>64</sup> To the extent TransAmerica's claim for fraud and fraudulent inducement concern conduct taken by employees of OSFC, rather than the conduct of OSFC itself, the distinction does not matter. Through R.C. 9.86 and 2743.02(A), the state accepted responsibility for the acts of its employees taken within the scope of employment and in furtherance of the interests of the state. *See Conley v. Shearer* (1992), 64 Ohio St.3d 284, 287, 595 N.E.2d 862, 866. By putting the Project out for bid, OSFC was representing that the plans and specifications were complete, accurate and constructable pursuant to R.C. 153.01 when the OSFC and its agents knew, or should have known, otherwise.<sup>65</sup> Additionally, during an eight month period, the OSFC, through its consultants, repeatedly represented or promised that an updated and coordinated set of plans would be provided to TransAmerica, but never provided an updated and coordinated set of plans to TransAmerica and instead withheld those plans due to concerns it would create additional confusion and costs.<sup>66</sup>

### **1. Revised Code Chapter 2743 Does Not Grant a State Agency Sovereign Immunity against Intentional Tort Claims.**

First, the OSFC states—relying upon R.C. 2744.02(B)(5), *Wilson v. Stark Cty. Dept. of Human Serv.*,<sup>67</sup> and *Hubbard v. Canton City Sch. Bd. of Educ.*<sup>68</sup>—that “government entities like

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<sup>64</sup> See ¶33 Bill Koniewich Affidavit.

<sup>65</sup> See ¶34 Bill Koniewich Affidavit.

<sup>66</sup> See ¶35 Bill Koniewich Affidavit.

<sup>67</sup> 70 Ohio St.3d 450 (1994).

<sup>68</sup> 97 Ohio St.3d 451, 2002-Ohio-6718.

OSFC” are immune from claims of intentional torts. The fundamental flaw of this position is that the OSFC, which of course is a state agency and *not* a political subdivision, cites the wrong statute as the basis for its sovereign immunity.

R.C. 2744.02 applies only to “political subdivisions,” which are generally defined as a “municipal corporation, township, county, school district, or other body corporate and politic responsible for governmental activities in a geographic area smaller than that of the state.” R.C. 2744.01(F). Likewise, the *Wilson* and *Hubbard* cases cited by the OSFC apply and interpret R.C. 2744.02 as it pertains to the sovereign immunity of political subdivisions against claims of intentional torts.

There should be no dispute that the OSFC is not a political subdivision, but rather an agency of the State of Ohio.<sup>69</sup> As such, the sovereign immunity of the OSFC is governed by R.C. 2743.02, which—unlike R.C. 2744.02—acts as a general *waiver* of the State’s sovereign immunity, pursuant to which the State consents to be sued “in accordance with the same rules of law applicable to suits between private parties.” R.C. 2743.02(A)(1).

The statutes are distinct, and a government entity may not pick and choose which statute controls its sovereign immunity. *See generally Fediaczko v. Mahoning Cty. Children Servs.*, 7th Dist. No. 11 MA 199, 2012-Ohio-6095, ¶¶ 22-28 (explaining the distinction between R.C. 2743.02 and R.C. 2744.02, and declining to apply the provisions of R.C. 2743.02 in an action against a political subdivision). The statute applicable to political subdivisions (and upon which the OSFC erroneously relies) operates by *conferring* sovereign immunity upon any governmental

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<sup>69</sup> Revised Code Section 2743.01(A) defines “State” as “the State of Ohio, including, but not limited to, the general assembly, the Supreme Court, the offices of all elected state officers, and **all departments, boards, offices, commissions, agencies, institutions, and other instrumentalities of the state.** ‘State’ does not include political subdivisions.” The OSFC’s successor, the Ohio Facilities Construction Commission, is defined by statute as “a body corporate and politic, an agency of state government and an instrumentality of the state, performing essential government functions of this state.”

or proprietary function of a political subdivision. See R.C. 2743.02(A)(1) (“[A] political subdivision is not liable in damages in a civil action for injury, death, or loss to person or property allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function.”) The statute then sets forth five specific exceptions to a political subdivision’s blanket sovereign immunity. See R.C. 2744.02(B)(1)-(5).<sup>70</sup> Interpreting the plain language of this statute, the *Wilson* and *Hubbard* courts cited by the OSFC determined that there is no exception set forth in R.C. 2744.02 for the **intentional** conduct of a political subdivision, and as such the blanket immunity granted to political subdivisions precludes claims for intentional torts. See *Wilson*, 70 Ohio St.3d at 452; *Hubbard*, 2002-Ohio-6718 at ¶ 8.

By contrast and as mentioned above, R.C. 2743.02—which the OSFC declines to cite but which **actually applies** to its invocation of sovereign immunity—operates as a *waiver* of immunity: “The state hereby waives its immunity from liability...and consents to be sued, and have its liability determined, in the court of claims created in this chapter in accordance with the same rules of law applicable to suits between private parties....” R.C. 2743.02(A)(1). While R.C. 2743.02 proceeds to identify exceptions to this broad waiver of immunity (see Section D.2, *infra*), the plain language of the statute does not preclude or otherwise limit the State’s liability for intentional torts, and no court of this State has interpreted R.C. 2743.02 to have such an effect. Rather, Ohio courts (including this Court of Claims) have **expressly recognized that the State may be held liable for intentional torts**. See *e.g. Bennett v. Ohio Dep’t of Rehab. &*

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<sup>70</sup> The exceptions to a political subdivision’s sovereign immunity include claims for: (1) death, loss or injury caused by the negligent operation of a motor vehicle by an employee of the political subdivision; (2) death loss or injury caused by the negligent performance of acts by employees of a political subdivision with respect to the proprietary functions of the political subdivision; (3) death, loss or injury caused by the political subdivision’s negligent failure to keep public roads in repair; (4) death, loss or injury caused by the negligence of employees of a political subdivision and relating to physical defects within or on the grounds of government buildings used by the political subdivision; and (5) any other claim expressly authorized by another statute.

*Corr.*, 60 Ohio St.3d 107, 110 (1991) (holding that pursuant to R.C. 2743.02(A)(1), the state may be held liable for the intentional tort of false imprisonment); *Letso v. Ohio Dep't of Rehab. & Corr.*, Ct. of Cl. No. 2002-03759-AD, 2002-Ohio-4835, ¶ 7 (“Pursuant to R.C. 2743.02(A)(1), the state may be held liable for the false imprisonment of its prisoners in situations where the state intentionally continues to confine a prisoner despite knowledge the privilege justifying that confinement no longer exists.”). *See also Cristino v. Ohio Bureau of Worker’s Comp.*, 10th Dist. No. 13AP-722, 2014-Ohio-1383, ¶ 16 (“[I]n the present case, there was no dispute that appellant’s claims for breach of contract and fraud were permitted by the state’s waiver of immunity, and the Court of Claims had subject-matter jurisdiction over them.”).

It is abundantly clear that the proper statute under which a State agency such as the OSFC may assert immunity does not limit State liability for intentional torts. As such the OSFC is not entitled to summary judgment on Counts Four and Five of the Amended Complaint.

**2. The OSFC’s Fraudulent Representations and Concealments regarding Its Obligation to Provide “Full and Accurate” Construction Plans Was Not A Basic Policy Decision Entitled to Discretionary Immunity.**

TransAmerica concedes that the State’s waiver of immunity under R.C. 2743.02 is not unlimited. In *Reynolds v. State*, 14 Ohio St.3d 68 (1984), the Ohio Supreme Court explained the doctrine of “discretionary immunity,” under which the State is not liable for “legislative or judicial functions or the exercise of an executive or planning function involving the making of a basic policy decision which is characterized by the exercise of a high degree of official judgment or discretion.” *Id.* at 70. The court also made clear the limited nature of this exception: “However, once the decision has been made to engage in a certain activity or function, the state may be held liable, in the same manner as private parties, for the negligence of the actions of its employees and agents in the performance of such activities.” *Reynolds*, 14 Ohio St.3d at 70.

The rationale of discretionary immunity is based upon the plain language of R.C. 2743.02(A)(2), which requires that suits against the state be governed under the same rules applicable to private parties. As the Supreme Court explained, because R.C. 2743.02(A)(2) mandates the State shall have its liability determined “in accordance with the same rules of law applicable to suits between private parties,” immunity should extend “to essential acts of governmental decisionmaking.” *Wallace v. Ohio Dep’t of Comm.*, 96 Ohio St.3d 266, 2002-Ohio-4210, ¶¶ 34-35 (citing *Reynolds*, 14 Ohio St.3d at 70 and paragraph one of the syllabus). In other words, because private parties do not engage in essential acts of governmental decision-making, there are no rules of law that can be applied to govern such governmental decision-making by the State. Or as stated in the inverse, **conduct by the State which is subject to the rules of law applicable to suits between private parties is not entitled to discretionary immunity.**

Ohio courts frequently recognize the distinction between “essential acts of governmental decision making” that are entitled to immunity, and the implementation of those basic policy decisions that are not entitled to immunity. For example, in *Reynolds, supra*, the Supreme Court found that the State’s decision to furlough a particular prisoner qualified as a basic policy decision entitled to immunity. 14 Ohio St.3d at 70. However, once that decision was made, the State’s failure to properly confine the prisoner during non-working hours was *not* discretionary, *not* immune, and could be the proper subject of a lawsuit. *Id.*

The Tenth District’s decisions with respect to Ohio Department of Transportation projects illustrate how the basic “policy decision versus implementation” distinction is applied to State-owned construction projects. For example, in *Burns v. Ohio Dep’t of Transp.*, 39 Ohio App.3d 126 (10th Dist. 1987), the estate of three individuals killed in a car accident filed suit

against ODOT, alleging that the negligent design of State Route 7 allowed rocks to fall into the path of the roadway, proximately causing the accident at issue. *Id.* at 125. The Court of Claims found that the “design, construction and maintenance of State Route 7 was in whole a discretionary function of ODOT and that ODOT had not abused its discretion.” *Id.* at 127. Recognizing the limited extent of sovereign immunity provided in *Reynolds*, the Court of Appeals disagreed. *Id.* at 128. The court found that while the decision to expand State Route 7 into a four-lane highway was discretionary and therefore subject to immunity, “the implementation of that decision, including the design and construction of State Route 7, was a ministerial function for which the defendant may be held liable for its negligence.” *Id.* Because the plaintiff had “clearly presented evidence from which reasonable minds could conclude that the defendant was negligent both in the design and the construction of State Route 7,” the court remanded to the Court of Claims for a determination of ODOT’s liability. *Id.* See also *Kirk v. Ohio Dep’t of Transp.*, 10th Dist. No. 97API04-458, 1997 Ohio App. LEXIS 4594, at \*4 (Oct. 7, 1997) (“[P]ursuant to R.C. 2743.02, the state can be held liable for its negligence in the design, construction, or maintenance of a state route); *Rhodus v. Ohio Dep’t of Transp.*, 67 Ohio App.3d 723, 731-32 (10th Dist. 1990) (“[S]overeign immunity does not provide protection for the negligent implementation of a decision....such as the design, placement, repair, and maintenance of traffic control devices.”).

As these cases make clear, the basic policy decision of a State Agency to engage in a construction project is discretionary and entitled to immunity. However, once that decision has been made, the State Agency’s conduct in implementing the project is subject to liability in accordance with the laws applicable to suits against private parties. Similarly in the case *sub judice*, the OSFC’s decision to build the Project was a basic policy decision entitled to

discretionary immunity. The acts of the public owner and its agents *after* the decision was made, however, were merely part of the implementation of the basic policy decision, and are subject to liability as if the conduct was by any other private party. This includes the repeated failure by the OSFC and its agents to provide TransAmerica with full and accurate construction plans, as well as their repeated misrepresentations to TransAmerica that such plans would be timely provided. As such, the fraudulent representations and concealments of the OSFC and its agents are subject to liability under R.C. 2743.02.

### **3. The OSFC is Liable for Fraud Committed by Its Agents SHP and LL.**

The OSFC's remaining argument is that because its contract with its agents did not expressly authorize SHP and LL to commit fraud on its behalf, the agency cannot be held liable for fraud. (*See* Motion at 10.) The OSFC fails to cite any legal authority for this novel proposition, and furthermore the OSFC's circular and self-serving logic is not a correct articulation of Ohio law.

It is well-established in Ohio that a principal is held liable for fraud committed by its agents in the course and scope of the agency. *See Davis v. Montenery*, 173 Ohio App.3d 740, 2007-Ohio-6221, ¶ 56 (7th Dist.); *Fahey Bank Co. v. Adams*, 98 Ohio App.3d 214, 218 (3d Dist. 1994). So long as the agent acts within the scope of its agency, a principal need not be aware of, or even *benefit* from the agent's fraudulent act, in order to be held liable. *See Maple v. Railroad Co.* (1883), 40 Ohio St.313 ("when the agent acts 'within the scope' of his agency, the facts that the principal was ignorant of the fraud; did not receive and profit therefrom; and never ratified it do not relieve him from liability for the fraud."); *see also McMahon v. Spitzer*, 29 Ohio App. 44, 49-50 (6th Dist. 1928); *Fahey Bank Co.*, 98 Ohio App.3d at 218 (citing *DeSantis v. Smedley*, 34 Ohio App.3d 218 (8th Dist. 1986) at paragraph two of the syllabus). The fraudulent conduct of

an agent acting under *apparent* authority is imputed to the principal. *Fahey Bank Co.*, 98 Ohio App.3d at 218 (citing *Agosto v. Leisure World Travel, Inc.*, 36 Ohio App.2d 213, 216-17 (10th Dist. 1973)). Moreover, a principal's liability is not limited to what the parties intended in the creation of the agency. **If that were the case, the principal would never be liable for negligence or fraud of its agent, "as no agent is appointed for the purpose of being negligent [or to commit fraud]."** *Buckeye Union Ins. Co. v. SCOA Indus., Inc.*, 74AP-247, 1975 WL 181145 (Ohio Ct. App. Feb. 4, 1975)(citing 3 Corpus Juris Secundum, Agency, Section 424, 281, at pages 283-284). Rather, a principal is liable for *any* tortious act taken by an agent while "endeavoring to promote his principal's business within the scope of the actual or apparent authority conferred upon him for that purpose." *Id.*

In this case, the OSFC conferred both **actual** and **apparent** authority to both SHP and LL to engage in the conduct that constituted fraud. Moreover, SHP and LL's fraudulent conduct in this case was taken with the purpose of promoting the interests of the State.

TransAmerica concedes that there is no language in the respective contracts between the OSFC and its agents specifically authorizing SHP or LL to commit fraudulent acts against contractors. However, these contracts do grant SHP and LL broad authority and discretion to act as the OSFC's agents and representatives in the design, management and administration of the Project. For example, Section 2.7.2 of the construction management contract between the OSFC and LL authorizes LL to "provide administration of the Project, scheduling of Work and coordination of the Contractors and any other persons on the Project." (CM Agreement at 2.7.2.) Further, the construction management contract clearly authorizes LL to be the OSFC's mouthpiece for the Project: "All instructions of the Commission or the Architect to Contractors shall be through, or in consultation with, the Construction Manager, with notice to the Architect."

(CM Agreement at 4.2.) Similarly, SHP was authorized by the OSFC to prepare the Construction Documents related to the Project, including all Drawings and Specifications.<sup>71</sup> Moreover, during the construction phase of the Project, SHP was granted the ultimate authority over interpretation of the Contract Documents: “The Architect shall render interpretations of the Contract Documents necessary for the proper execution or progress of the Work on the Project.”

Importantly—and as particularly relevant for the purposes of the OSFC’s post hoc attempt to disclaim the fraudulent conduct of its agents—the OSFC reserved the right to disapprove any decision made by either SHP or LL.<sup>72</sup> For example, the Construction Management Agreement provided as follows:

**1.1.12 ~~Approval or Disapproval of Construction Manager’s Services.~~ The Commission shall have the right to reasonably disapprove, by written notice stating the reasons for the disapproval, any portion of the Construction Manager’s services for the Project. In the event that any of the Construction Manager’s services are disapproved by the Commission, the Construction Manager shall proceed, when directed by the Commission, with corrections to the services to attempt to satisfy the objections. The Construction Manager acknowledges that any review or approval by the Commission of any services performed by the Construction Manager pursuant to this Agreement shall not relieve the Construction Manager of the Construction Manager’s responsibility to properly and timely perform such services.**

There is no evidence in the record that the OSFC disapproved of the fraudulent conduct committed by its agents SHP or LL. In fact, the evidence at trial will support the inference that the misrepresentations that defrauded TransAmerica were made to further the interests of the OSFC.

Through these broad, explicit grants of authority to design and manage the Project on behalf of the OSFC—as well as the OSFC’s express reservation of rights to approve or disapprove of *any* decision made its agents—it is clear that both SHP and LL had the **actual**

<sup>71</sup> See Agreement No. 3 for Professional Design Services, attached as Exhibit W.

<sup>72</sup> See Final Agreement for Construction Management Services, attached as Exhibit X.

**authority** to engage in its course of conduct during the Project *including* the repeated false representations made to TransAmerica that a full and complete set of construction plans would be provided. Accordingly, the OSFC can be held liable as principal for this fraudulent conduct.

In the alternative, even if the A/E and CM Agreements did not bestow OSFC's agents with actual authority to commit the fraudulent misrepresentations at issue, SHP and LL acted with the apparent authority of the OSFC when it fraudulently represented to TransAmerica that a completed construction set of plans would be delivered. "Generally, apparent authority may arise from a course of business or from a principal's spoken or written words or conduct which causes or permits a third person to act." *Fahey Bank. Co.*, 98 Ohio App.3d at 218 (citing 3 Ohio Jur.3d, Agency, Section 55 (1978)). Apparent authority is premised upon "some act of the principal which clothed the agent with apparent authority." *Id.* (quoting *Elder-Beerman v. Nagucki*, 55 Ohio App.3d 10, syllabus (6th Dist. 1988)). By entering into contracts granting SHP and LL broad discretion and authority to act on its behalf in the design and management of the Project, and by holding out SHP and LL in such a manner to TransAmerica, the OSFC "clothed" its agents with apparent authority. When SHP and LL falsely represented to TransAmerica that a complete set of buildable plans would be forthcoming, they were acting in this clothed apparent authority on behalf of the OSFC with respect to the design, management, and administration of the Project. As recently as May 12, 2014, OSFC Executive Director Richard Hickman in deposition testimony confirmed that a contractor should be able to rely upon the representations of the OSFC's architect and construction manager.

Based upon the foregoing, and at a minimum, genuine issues of material fact exist as to whether SHP and LL were acting with actual or apparent authority of the OSFC when they committed the fraudulent conduct as alleged in the Amended Complaint. As such the OSFC is

not entitled to summary judgment on Counts Four or Five of the Amended Complaint.

**E. There is Substantial Evidence Supporting TransAmerica's Claim for Damages.**

TransAmerica has provided significant amounts of information to prove causation for its damages, which the OSFC fails to address in its brief. In particular, TransAmerica provided a 96 page expert report authored by one of its experts, Don McCarthy.<sup>73</sup> Mr. McCarthy was charged with reviewing the Project and determining whether TransAmerica incurred additional costs outside of its control and then quantifying those damages. TransAmerica's second expert, former State Architect Lee Martin, was charged with reviewing the performance of SHP, whether that performance fell below the standard of care, and how that impacted TransAmerica's ability to perform its contract. Mr. McCarthy was the charged with quantifying the damages arising from the OSFC's conduct, which would include errors and omissions attributable to SHP and LL.

With respect to the causal link between the Project events and TransAmerica damages, that link is first established through TransAmerica's loss of productivity for its rough framing, which was based on the generally accepted "measured mile" method and further explained in Mr. McCarthy's report. When asked during his deposition to explain the loss of productivity calculation, Mr. McCarthy testified how the calculation is based on multiple sources of project information, including the schedule, time sheets, job cost report and pay applications.<sup>74</sup>

A second link is established where TransAmerica calculated its time-based costs due to the fact it was on the Project six months after the forecasted finish of February 14, 2012.<sup>75</sup> TransAmerica attributes much of that delay to the work that was still on-going in the dorms

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<sup>73</sup> See Don McCarthy Expert Report, attached as Exhibit Y.

<sup>74</sup> See Don McCarthy Deposition Transcript page 36 lines 11-24, page 37 lines 1-24, and page 38 lines 1-11, attached Exhibit Z.

<sup>75</sup> See ¶38 Bill Koniewich Affidavit.

outside by other prime contractors, notably for the campus wide packages that included fire alarm and casework related work.<sup>76</sup> This in turn caused an extended punch list process due to the fact multiple prime contractors were in the dormitories and contributed to TransAmerica being on the Project for an additional six months.<sup>77</sup>

All told, Mr. McCarthy's report, which was the subject of his deposition, explains the factors that caused the Project delays and then goes on to calculate TransAmerica's damages based on contemporaneous project information.<sup>78</sup> The OSFC ignores this report and remaining deposition testimony where he further explained his methodology. Instead, the OSFC is critical of Mr. McCarthy for not designating damages directly attributable to its construction manager or its architect. However, there is no requirement on TransAmerica's part to do so -- because its contractual partner is the OSFC, which is liable to TransAmerica for any of the Project delays and impacts caused by their consultants. It should also be pointed out that the lead architect for SHP testified that he agreed that TransAmerica was owed something but could not say the amount:

Q. Okay. What I want to understand is is it your testimony that TransAmerica's entitled to zero on its claim or is it your testimony that TransAmerica is entitled to something, but you just don't know what?

A. My testimony would that I think that TransAmerica is probably owed something, but that to date I have not seen any documentation that proves what they're owed.<sup>79</sup>

At a minimum, there is a genuine issue of material fact raised by the methodology TransAmerica used to prove its damages based on the events of the Project, which precludes summary judgment from being rendered. "It is not nonmoving party's duty to prove its case on summary judgment, it is moving party's responsibility to establish that no genuine issue of

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<sup>76</sup> See ¶39 Bill Koniewich Affidavit.

<sup>77</sup> See ¶40 Bill Koniewich Affidavit.

<sup>78</sup> See ¶41 Bill Koniewich Affidavit.

<sup>79</sup> See Predovich Deposition Transcript at page 21 lines 7-15, attached as Exhibit AA.

material fact exists and that he is entitled to judgment as matter of law.” *Maust v. Palmer*, 94 Ohio App.3d 764, 769, 641 N.E.2d 818, 821 (1994).

**F. TransAmerica’s Recovery is Not Limited to the Amount of the Original Certified Claim.**

In its last argument, the OSFC fails to cite a single contract provision that precludes TransAmerica from supplementing its claim. The contract is simply silent on whether TransAmerica is permitted to supplement its first claim and any ambiguity should be resolved in favor of the non-drafter, which in this case is TransAmerica. “[W]here the meaning of a contract is ambiguous, the ambiguity should be construed against the drafting party.” *Albert v. Shiells*, 10th Dist. No. 02AP-354, 2002-Ohio-7021, ¶ 20 (citing *Central Realty Co. v. Clutter*, 62 Ohio St.2d 411, 413 (1980)).

Additionally, there is no limitation of liability provision in the contract that would further limit TransAmerica from typical breach of contract damages, which are generally defined as “losses that are reasonably to be expected as a probable result of the breach.” *Roesch v. Bray*, 46 Ohio App.3d 49, 51 (6th Dist. 1988) (citing *Roegge v. Wertheimer*, 1 Ohio Law Abs. 834 (Super. Ct. 1923)). “Generally, a party injured by a breach of contract is entitled to his expectation interest or ‘his interest in having the benefit of his bargain by being put in as good as a position as he would have been in had the contract been performed.’” *S.H.Y., Inc. v. Garman*, 3d Dist. No. 14-04-04, 2004-Ohio-7040, ¶ 35 (quoting *Rasnick v. Tubbs*, 126 Ohio App.3d 431, 437 (1988)). Courts have permitted an award for damages in excess of the amount sought in the complaint in a breach of contract case. In *Versatile Helicopters, Inc. v. City of Columbus*, Ohio 548 Fed. App’x 337, 343-44 (6th Cir. 2013), the 6th Circuit Court of Appeals ruled it was an abuse of discretion to reduce the jury’s damages to the amount sought in the pleadings after the trial court had rejected the plaintiff’s motion to amend the pleadings to increase its damages

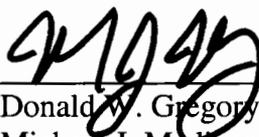
on the eve of trial. If a plaintiff is not limited to the damages sought in its Amended Complaint, a contractor like TransAmerica certainly should be able to supplement its claim seven (7) months prior to filing its lawsuit.

From a practical standpoint, the argument that a contractor cannot amend its claim leads to a “catch 22” where the contractor is required (as here) to provide its Article 8 claim early in the project before it has any idea of the financial impact. In this case, TransAmerica provided its initial certified claim five (5) months before the building obtained its occupancy permit. And yet the OSFC expects TransAmerica to stand by his original claim regardless of what unforeseen impacts took place on the balance of the job or what additional information was made available after the March 8, 2012 claim was submitted. For example, TransAmerica could not foresee the extended time period needed for other prime contractors to complete their work, including the campus wide packages that were acknowledged to be bid and awarded late in the construction process. Additionally, TransAmerica had no knowledge of the significant delays in obtaining the necessary building permit approvals, nor the internal communications between SHP and LL where the serious adverse impacts of the failure to provide clear and accurate drawings were acknowledged on multiple occasions. TransAmerica had no way of learning this information until it received responses to its public records requests, which occurred months after its March 8, 2012 claim was submitted. It is important to note that the OSFC cannot point to any loss or prejudice caused by the fact that TransAmerica supplemented its claim. In this case, LL denied TransAmerica’s March 8, 2012 claim in its entirety on September 5, 2012.

### **III. CONCLUSION**

For all the foregoing reasons, the OSFC’s Motion for Summary Judgment should be denied in its entirety and this case should proceed to trial on the merits.

Respectfully submitted,



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### **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was served via regular U.S. mail, postage prepaid, this 14<sup>TH</sup> day of May, 2014 to:

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