

ORIGINAL
IN THE COURT OF CLAIMS OF OHIO

**TRANSAMERICA BUILDING COMPANY, :
INC., :**

Plaintiff/Counter Defendant :

v. :

**OHIO SCHOOL FACILITIES
COMMISSION, nka Ohio Facilities
Construction Commission, :**

Defendant/Counter Plaintiff/
Third-Party Plaintiff/Counter
Defendant :

v. :

**LEND LEASE (US) CONSTRUCTION,
INC., :**

Third-Party Defendant/Counter
Plaintiff/Fourth-Party Plaintiff :

and :

STEED HAMMOND PAUL INC., etc., :

Third-Party Defendant/Fourth-
Party Plaintiff :

v. :

BERARDI PARTNERS, INC., et al., :

Fourth-Party Defendants. :

Case No. 2013-00349

Judge McGrath

Referee Wampler

2015 APR 14 AM 10:47

FILED
COURT OF CLAIMS
OF OHIO

**PLAINTIFF TRANSAMERICA BUILDING COMPANY, INC.'S
MOTION IN LIMINE AS TO OSFC DELAY DAMAGES**

Plaintiff TransAmerica Building Company, Inc. ("TransAmerica") hereby makes this Motion in Limine pursuant to Ohio Rules of Evidence for an Order precluding the Ohio School Facilities Commission ("OSFC") and its agents from putting forth evidence in support of its delay

ON COMPUTER

damages (including liquidated damages) against TransAmerica. The OSFC should be precluded from putting on such evidence due to its failure to provide a schedule analysis, critical path method or otherwise, showing TransAmerica delayed the Project Schedule's critical path. Lacking such analysis, any evidence the OSFC may present is either not relevant or speculative. The reasons for granting this Motion are set forth in the attached Memorandum in Support.

Respectfully submitted,



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MEMORANDUM IN SUPPORT

I. INTRODUCTION.

TransAmerica seeks an Order in Limine prohibiting the OSFC from putting forth evidence regarding its delay claims against TransAmerica that is either irrelevant or speculative and whose probative value is exceeded by its potential prejudice to TransAmerica. “A motion in limine is commonly used as a tentative, precautionary request to limit inquiry into a specific area until its admissibility is determined at trial.” *Gable v. Village of Gates Mills*, 103 Ohio St.3d 449, 2004-Ohio-5719, 816 N.E.2d 1049, at p. 65 (citing *Riverside Methodist Hosp. Assn. v. Guthrie* (1982), 3 Ohio App.3d 308, 310). The purpose of a motion in limine is to permit the Court to decide evidentiary issues in advance of trial in order to avoid delay and ensure an evenhanded and expeditious trial. *Indiana Insurance Co. v. General Electric Co.* (N.D. Ohio 2004), 326 F.Supp.2d 844, 846 (citing *Jonasson v. Lutheran Child & Family Services*, 115 F.3d 436, 440 (7th Cir.1997)). Decisions on motions in limine may also save the parties time and cost in preparing for trial and presenting their cases. In this case, TransAmerica requests this Court to issue an Order precluding the OSFC from the following inquiries during the trial:

1. Providing Evidence Regarding Its Delay Damages When Such Evidence is Not Relevant and Speculative Without A Schedule Analysis Showing TransAmerica Delayed the Project’s Critical Path;
2. Providing Lay Witness Testimony Purporting To Be A Schedule Analysis or Attempting To Show TransAmerica Delayed The Project’s Critical Path; and
3. Precluding OSFC’s Expert, Andy Englehart, From Offering New Expert Opinions Not Previously Disclosed.

By granting this Motion in Limine, the trial will be properly focused on evidence that is based on recognized schedule analysis methods, rather than anecdotal evidence that cannot be linked to the Project’s critical path, which will only unnecessarily prolong the trial and potentially prejudice

TransAmerica.

Throughout the duration of this dispute, the OSFC has incorrectly asserted liquidated damages against TransAmerica and presently is wrongfully withholding \$824,000. (*See* Amended Complaint, ¶56). Additionally in its Counterclaim, the OSFC asserted that TransAmerica is responsible for the delay damages arising from the following:

- Increased A/E and C/M fees; and
- Paying claims of other contractors due to [TransAmerica's] impacts.

OSFC claims for (1) liquidated damages, (2) increased A/E/ C/M fees, and (3) paying other contractor claims all arise from various Project delays that resulted in missed milestones and an extended Project duration (collectively referred to as the “delay damages”).

Without making any determination with respect to the Project Schedule's critical path in response to TransAmerica's time extension requests, the OSFC should be precluded from simply claiming the extended Project duration is all it needs to justify its delay damages, including its liquidated damages claim. Any antidotal evidence put forth by the OSFC supporting its delay damages is either not relevant or speculative when the OSFC has no legitimate way of showing TransAmerica delayed the Project's critical path.

Alternatively and at a minimum, the Court should preclude the OSFC and its agents from introducing any type of schedule analysis at this late stage from any of its witnesses due to the technical complexities involved with properly performing a schedule analysis. This is especially true here where courts require expert testimony for such an analysis and the OSFC's expert Mr. Englehart has testified he has not performed a critical path analysis and has no opinions as to the legitimacy of the OSFC's delay damages against TransAmerica.

II. There is No Dispute The OSFC Has Failed To Perform Any Schedule Analysis To Support Its Delay Damages Against TransAmerica

For reasons only the OSFC can explain, it has failed to perform any type of schedule analysis supporting its delay damages, including its claim for liquidated damages. In fact, no schedule analysis was ever performed by the OSFC. When asked through an Interrogatory to “identify the amount and time frame as to when liquidated damages [were to be assessed],” the OSFC responded simply by pointing to correspondence from itself and its Construction Manager sent to TransAmerica.¹ None of the documents cited resemble any type of schedule analysis establishing that TransAmerica is responsible for the Project delays.

Furthermore, both the OSFC’s Project Administrator and its designated expert (Andy Englehart) conceded in depositions that neither performed a critical path analysis, despite the fact the OSFC has had over three (3) years to do so from the time it assessed liquidated damages in December of 2011. When asked directly whether he had performed “any schedule analysis to determine if liquidated damages should or should not be assessed and in what amount against TransAmerica,” the OSFC’s Project Manager, Madison Dowlen, testified during his deposition, **“I did not. We just followed what was in the contract”**² **“I personally did not do a schedule analysis.”**³ When pushed on the subject, Madison Dowlen revealed that the liquidated damages withheld from TransAmerica are not the product of a detailed schedule analysis, but rather a product of conversations about the “best course of action,”⁴

When asked to explain further the basis for withholding liquidated damages from TransAmerica, Madison Dowlen agreed with counsel for TransAmerica that he relied at least in

¹ See OSFC Responses to TransAmerica’s Interrogatory 2 (excluding pay applications), attached hereto as Exhibit A.

² See Deposition Transcript of Madison Dowlen, 144:4-8.

³ *Id.* at 26:7-8.

⁴ *Id.* at 145:6-23.

part on the advice of Lend Lease.⁵ But when counsel for TransAmerica asked Madison Dowlen, “Did you ever see an additional schedule analysis from Lend Lease with respect to the TransAmerica claim or the Jutte claim, for that matter?,” Madison Dowlen again responded, “I don’t recall off the top of my head.”⁶ In fact, no such schedule analysis exists. And the OSFC has now sued Lend Lease for indemnity and contribution arising from TransAmerica’s alleged scheduling errors.⁷

Even more telling is the lack of a critical path method schedule analysis from the OSFC’s expert, Andy Englehart. The OSFC retained Mr. Englehart for the sole and exclusive purpose of criticizing the expert analysis of Don McCarthy, TransAmerica’s expert. Mr. Englehart admitted this limited role in his May 19, 2014 deposition.⁸

10	Q.	Now, you didn’t do a schedule analysis
11		on this -- for this project, did you?
12	A.	I did not perform a critical path
13		schedule analysis, no.
14	Q.	So whatever issues TransAmerica has
15		raised with respect to the plans for the project,
16		you didn’t look at the schedule to determine
17		whether or not there was an impact to the critical
18		path based on what TransAmerica was saying about
19		the status of the plans?
20	A.	I looked at what Mr. McCarthy did in
21		order to assess whether he performed that
22		analysis.

When asked whether Mr. Englehart had “any criticisms of TransAmerica that you identified yourself with how [TransAmerica] ran the project?,” Mr. Englehart responded that while he had some “observations of things that more likely than not had an effect upon TransAmerica’s efforts

⁵ *Id.* at 145:6-23.

⁶ *Id.* at 189:6-10.

⁷ See OSFC’s Third-Party Complaint, Second Claim for relief, ¶¶22-23.

⁸ See Deposition Transcript of Andy Englehart, Vol. 1, 59:10-24.

on the project,” “**I have not quantified that.**”⁹ Mr. Englehart also admitted he had not performed a schedule analysis to “establish what activities impacted the project’s completion date” and whether or not TransAmerica’s roofing activities affected the project’s critical path.¹⁰

On March 19, 2015, Mr. Englehart was again asked whether he had performed an analysis of the OSFC’s delay damages. While over eight (8) months had passed since his first deposition, Mr. Englehart’s answer had not substantively changed with respect to his review and opinions as to the OSFC’s delay damages.¹¹

7	Q.	So you haven't been instructed to look
8		at the OSFC's liquidated damages claim against
9		TransAmerica and give an opinion on that?
10	A.	Well, there's two questions there.
11		I've looked at it, but I don't have an opinion in
12		that regard.
13	Q.	And same question with respect to
14		whether or not you have an opinion as to -- as to
15		the merits of the OSFC's back charge claim against
16		TransAmerica for the costs of the other prime
17		contractors.
18	A.	Correct; the same -- the same response.

Mr. Englehart testified that he still has not performed a critical path schedule analysis.¹²

During Mr. Englehart’s second deposition, counsel for the OSFC insisted that Mr. Englehart not answer the following question, “. . . is there any type of analysis included in the documents referenced in [Interrogatory No. 2] that would be a schedule analysis for the OSFC’s liquidated damages claim?”¹³ Counsel for the OSFC responded, “I’m telling [Mr. Englehart]—I’m telling you, I’m telling him we’re not going to answer those questions . . . You’re not going to get

⁹ *Id.* at 60:8-20.

¹⁰ *Id.* at 42:13-18 and 43:1-6.

¹¹ *See* Deposition Transcript of Andy Englehart, Vol. 2, 211:7-212:2.

¹² *Id.* at 212:3-12.

¹³ *Id.* at 312:5-314:11.

one.”¹⁴ However, even a cursory review of the OSFC’s Interrogatory Response reveals that none of the documents referenced therein include a schedule analysis. Apart from conclusory statements that TransAmerica missed important milestone dates on the Project, the OSFC has failed to produce any evidence reliably showing TransAmerica delayed the critical path.

III. Under Ohio Rules of Evidence, OSFC Should Be Precluded From Providing Testimony Regarding Its Delay Damages When Such Testimony Is Not Relevant and Speculative Without A Schedule Analysis Showing TransAmerica Delayed The Project’s Critical Path.

The OSFC’s failure to perform any type of schedule analysis alleging that TransAmerica delayed the Project’s critical path renders any evidence either not relevant or speculative. Evid. R. 402 states that “evidence which is not relevant is not admissible.” And Evid. R. 401 defines relevant evidence as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would without the evidence.” Evid. R. 403 provides the authority to preclude the OSFC’s evidence regarding its delay damages from being admitted into evidence. Under Evid. R. 403(A), evidence is not admissible if its probative value is substantially outweighed “by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury.” Evid. R. 403(A) provides that otherwise relevant evidence should be excluded if “its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury.” In this case the only evidence the OSFC can present regarding its delay damages has no basis to the Project’s critical path, therefore such evidence has limited probative value and will only serve to confuse and mislead as to whether or not TransAmerica is responsible for any portion of the OSFC’s delay damages.

¹⁴ *Id.* at 313:7-14.

Additionally, the testimony of a lay witness under Evid. R. 701 is limited to those opinions or inferences which are:

- (1) rationally based on the perception of the witness, and
- (2) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

Without a schedule analysis to support its delay damages, any testimony or evidence provided by the OSFC (or its agents) is not rationally based nor would it be helpful to a determination as to whether TransAmerica delayed the Project. In other words, the evidence is purely speculative.

Ohio courts, including the Tenth District, have held that a trial court has the discretion to limit or exclude evidence that is speculative and not based on personal knowledge. *See Mantle v. Sterry*, 10th Dist. Franklin No. 02AP-286, 2003-Ohio-6058, ¶¶22-24 (trial court within its discretion to limit or exclude evidence that is speculative and not based on personal knowledge); *State v. McCaleb*, 11th Dist. Lake No. 2002-L-157, 2004-Ohio-5940, ¶39 (“[s]peculative testimony is any testimony given by a witness which is not based upon the personal knowledge of such witness or facts in evidence.”). Moreover, any “opinion or inference” testimony offered by a lay witness regarding the OSFC’s delay damages without establishing whether TransAmerica delayed the Project’s critical path would not be “helpful to a clear understanding of the witness’s determination of fact in issue,” and thus must be precluded.

a. Case Law Supports That Testimony Regarding The OSFC’s Delay Damages Is Either Not Relevant or Speculative Without A Schedule Analysis Showing TransAmerica Delayed The Critical Path.

From a practical standpoint and supported by the case law noted below, the OSFC has an obligation to justify its delay damages, especially its liquidated damages, based on delays to the Project Schedule’s critical path. An owner seeking to assess liquidated damages against a contractor (or a contractor against a subcontractor) must submit sufficient evidence of causation

of the delay and of the damages sought. *See U.S. ex rel. W.W. Gay Mechanical Contractor, Inc. v. Walbridge Aldinger Co.*, 543 Fed. Appx. 937 (11th Cir. 2013) (rejecting a contractor's liquidated damage offset, where the contractor failed to produce more than a “scintilla of evidence” that the subcontractor caused the alleged delays for which liquidated damages were sought to be assessed). *See also A.G. Cullen Const., Inc. v. State System of Higher Educ.*, 898 A.2d 1145, 2006 WL 625255 (Pa. Commw. Ct. 2006) (the government has the ultimate burden of persuasion . . . to show that the contract was not completed by the agreed contract completion date and that liquidated damages were due and owing.); *PCL Const. Services, Inc. v. U.S.*, 53 Fed. Cl. 479, 484 (2002) (same); *George Sollitt Const. Co. v. U.S.*, 64 Fed. Cl. 229 (2005) (rejecting government's claim for liquidated damages due to failure to causally apportion).

In its own Motion of Summary Judgment, the OSFC has acknowledged this obligation to provide a schedule analysis when it argued that in order for TransAmerica to recover it needed to show the cause of those damages.¹⁵ The OSFC contended that without such an analysis, TransAmerica “cannot prove that Defendant OSFC is the cause of any damages [TransAmerica] may have incurred and its claims should be dismissed.” Unlike the OSFC, TransAmerica performed a schedule analysis to support its damages.¹⁶

Without a schedule analysis in support, any opinion or inference testimony attempting to support the OSFC’s delay damages would be nothing more than a “best-guess.” This is particularly true for a witness like Madison Dowlen, who admitted in his deposition that he performed no analysis before assessing liquidated damages. Such testimony would be speculative and not credible or “helpful” in resolving issues in this case. Ohio courts will not “indulge in speculation”

¹⁵ *See* OSFC’s Motion for Summary Judgment, pgs. 12-13.

¹⁶ *See* McCarthy Reports Dated January 17, 2014 and October 24, 2014 referenced in TransAmerica’s October 31, 2014 Memorandum in Opposition to OSFC’s Motion for Continuance.

to award liquidated damages. *See, e.g., Six Indus. v. Price Bros. Co.*, 2nd Dist. Montgomery No. 7420, 1982 Ohio App. LEXIS 13688, 18-19 (“[w]here several subcontractors cause delay, there will be no apportionment of liquidated damages between them, because the court will not indulge in speculation, and any liquidated damage assessment will be annulled.”). Without a schedule analysis to rely on, there is simply no rational basis for a witness to testify that TransAmerica delayed the critical path and ultimately is responsible for the Project’s extended duration costs or liquidated damages.

b. Testimony In Support of the OSFC’s Liquidated Damages Claim Is Either Not Relevant or Speculative Because the OSFC Failed To Determine Whether TransAmerica Delayed The Project’s Critical Path As Required By The Contract.

In order to properly assess its liquidated damages, the contract required the OSFC to determine whether the critical path had been affected in response to TransAmerica’s extension requests. This requirement starts with paragraph 3.3 of the Contract, which required the OSFC to evaluate TransAmerica’s requests for extension of time “in accordance with the Contract Documents.”¹⁷

3.3 The Contractor's failure to complete all Work within the period of time specified, or failure to have the applicable portion of the Work completed upon any Milestone date, shall entitle the Commission to retain or recover from the Contractor, as Liquidated Damages, and not as a penalty, the applicable amount set forth in the following table for each and every day thereafter until Contract Completion or the date of completion of the applicable portion of the Work, unless the Contractor timely requests, and the Commission grants an extension of time in accordance with the Contract Documents.

<u>Contract Amount</u>	<u>Dollars Per Day</u>
\$1 to \$50,000	\$150
More than \$50,000 to \$150,000	\$250
More than \$150,000 to \$500,000	\$500
More than \$500,000 to \$2,000,000	\$1,000
More than \$2,000,000 to \$5,000,000	\$2,000
More than \$5,000,000 to \$10,000,000	\$2,500
More than \$10,000,000	\$3,000

On this Project, TransAmerica on at least three (3) occasions provided written requests for an extension of time. As early as February 17, 2011, before even mobilizing, TransAmerica

¹⁷ See Contract, Article 3.3, attached to TransAmerica’s Complaint.

provided written notice under Article 8 that its ability to execute per the schedule was being hindered due to the lack of updated drawings and suggested “adjusting the Contract Schedule to reflect the delay.”¹⁸ As this Court has recognized, the OSFC (through Lend Lease) prematurely rejected TransAmerica’s notice of claim with its March 1, 2011 letter even before TransAmerica was required, or had an opportunity, to submit additional information in the form of its certified claim.¹⁹ Keep in mind that with its premature rejection,²⁰ the OSFC (through Lend Lease) promised that TransAmerica would receive an updated set of plans, which never happened. Despite rejecting TransAmerica’s claim without providing it with an opportunity to provide additional information or allowing TransAmerica to review the updated drawings, the OSFC nevertheless assessed delay damages against TransAmerica without any schedule analysis establishing that the OSFC was warranted in rejecting TransAmerica’s extension requests due to the lack of updated drawings.

Almost six (6) months later, TransAmerica again provided written notice on October 7, 2011 and stated the contract dates would need to be adjusted due to the delays cited in the letter.²¹ Finally, on February 7, 2012, TransAmerica again provided notice and requested a schedule extension, which again was not provided.²²

When evaluating whether TransAmerica was entitled to an extension request, the OSFC was required to review the request through the lens of the critical path of the Construction Schedule. The OSFC cannot simply assess liquidated damages without making this determination

¹⁸ See February 17, 2011 TransAmerica Article 8 Notice, attached as Exhibit B and previously referenced in the OSFC’s Motion for Summary Judgment.

¹⁹ See Lend Lease March 1, 2011 response, attached as Exhibit C.

²⁰ OSFC has waived its rights under Article 8 regarding TransAmerica’s claim for a variety of reasons, including its premature rejection, failure to provide the updated drawings, and payment of other contractor claims that failed to strictly follow the Article 8 provisions.

²¹ See October 7, 2011 TransAmerica Notice of Delay attached as Exhibit D.

²² See February 7, 2012 (incorrectly dated 2011) Notice/Delays and Request for extension of Time attached as Exhibit E.

required under GC Article 6.3.1 after TransAmerica requested time extensions. Paragraph 6.3.1 of the General Conditions provides:²³

6.3 CRITICAL PATH

6.3.1 Notwithstanding any other provision of the Contract Documents, time extensions shall depend upon the extent to which the Work on the critical path of the Construction Schedule is affected, if applicable.

As shown above, the OSFC failed to perform *any* analysis of the critical path—expert or otherwise—as required under Article 6.3.1 of the General Conditions. Instead, the OSFC’s assessment of liquidated damages simply hinged upon internal discussions about the “best course of action” and reliance on its Construction Manager, Lend Lease. In fact, OSFC Project Administrator could not recall when asked in his deposition whether he had addressed TransAmerica’s extension requests.²⁴ The OSFC was required to assess the appropriateness of TransAmerica’s extension requests by determining whether the Project’s critical path was delayed, but has failed to do so despite the length of this dispute. Accordingly, the OSFC should be precluded from offering testimony or evidence in support of its liquidated damages claim when it cannot show TransAmerica delayed the critical path. Any testimony attempting to support its liquidated damages assessment would be speculative and only serve to delay the trial.²⁵

²³ See General Conditions, Article 6.3.1, attached to Bill Koniewich’s “Affidavit in Support of Plaintiff TransAmerica Building Company’s Objections to the Referee’s Decision Denying TransAmerica’s Motion to Separate.”

²⁴ See Deposition Transcript of Madison Dowlen, 145:24 and 146:1-4.

²⁵ The OSFC’s failure to follow paragraph 3.3 of the Contract is even more apparent based on the fact it initially assessed liquidated damages in the wrong amount. Commencing in December 2011, the OSFC assessed liquidated damages at a per diem rate of \$3,000 despite the fact TransAmerica’s contract amount of \$3,975,000 should have resulted in a \$2,000 per day rate based on the table contained in paragraph 3.3 of the Contract. The \$3,000 rate that the OSFC initially assessed only applied to contracts in excess of \$10,000,000, which was far in excess of TransAmerica’s contract amount. It was not until May 2013 when the OSFC conceded its mistake and released \$240,000.00.

IV. Due to the Technical Nature of Performing A Schedule Analysis, the OSFC Should Be Prohibited From Providing Lay Witness Testimony Purporting To Be A Schedule Analysis or Attempting To Show TransAmerica Delayed The Project's Critical Path

In accordance with the Court's initial scheduling order, Plaintiff's Expert Reports were due January 17, 2014. As this Court is aware, TransAmerica complied with that deadline when it issued a ninety-page report from its expert Mr. McCarthy. TransAmerica later supplemented that report on October 24, 2014 providing further detail and support that the OSFC and its agents delayed the Project.

In contrast, the OSFC issued a four page "report" on January 17, 2014 that was authored by Lend Lease's Project Manager.²⁶ It remains unclear whether the OSFC intends to designate Lend Lease's Project Manager as its expert when the report is labeled "Confidential," does not resemble a typical expert report, and the OSFC did not identify Lend Lease's Project Manager as an expert in its Pretrial Statement filed on October 16, 2014. Furthermore, the OSFC now has filed third party claims against Lend Lease for, at least in part, its shabby scheduling of the Project. Regardless, the Lend Lease "report" received on January 17, 2014 contains no schedule analysis and only addresses Lend Lease's alleged additional costs. Importantly, the report says nothing about the liquidated damages, the claims of the other prime contractors, and the alleged additional costs of SHP.

Lacking any expert schedule analysis in support of its delay damages, this Court should issue an order precluding the OSFC from offering lay witness testimony from either its own Project Administrator, Lend Lease's Project Manager or anyone else to support the OSFC's delay damages. Such testimony is well beyond the limits of a lay witness as described under Evid. R.

²⁶ See email attaching Report provided by OSFC on January 17, 2014, attached as Exhibit F.

701, due to the complexities inherent with performing an accurate schedule analysis. The Ohio Supreme Court has explained,

Unless a matter is within the comprehension of a layperson, expert testimony is necessary. Evid. R. 702 and 703. Experts have the knowledge, training, and experience to enlighten the jury concerning the facts and their opinions regarding the facts.

Ramage v. Central Ohio Emergency Serv., Inc., 64 Ohio St.3d 97, 100, 592 N.E.2d 828, 833 (1992).

The evolution of Federal Evidence Rule 701 provides guidance regarding the improper presentation of expert testimony previously not disclosed under the guise of lay witness testimony.

Rule 701, as amended in 2000, states as follows:

“If the witness is not testifying as an expert, the witness’ testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness’ testimony or the determination of a fact in issue, and (c) **not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.**” (Emphasis added)

The Committee Notes to the 2000 amendment references Joseph, *Emerging Expert Issues Under the 1993 Disclosure Amendments to the Federal Rules of Civil Procedure*, 164 F.R.D. 97, 108 (J.P.M.L.) (1996) and specifically states “there is no good reason to allow what is essentially surprise expert testimony,” and that “the Court should be vigilant to preclude manipulative conduct designed to thwart the expert disclosure and discovery process.” In *State v. Brown*, 836 S.W. 2d 530, (Tenn. 1992), the court reasoned that lay testimony “results from a process of reasoning familiar in everyday life,” whereas “an expert’s testimony results from a process of reasoning which can be mastered only by specialists in the field.”

Should the OSFC attempt to designate Lend Lease’s Project Manager or any other individual involved with the construction of the Project as an expert regarding its delay damages, TransAmerica objects to this late disclosure. Additionally, TransAmerica should have an

opportunity to voir dire such a witness to demonstrate that he is unqualified to testify as an expert in accordance with Evid. R 702, which requires at a minimum the following:

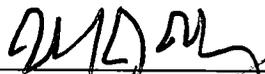
- The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony (Evid. R. 702(B)); and
- The witness' testimony is based on reliable scientific, technical, or other specialized information. (Evid. R. 702(C))

V. OSFC's Expert, Andy Englehart, Should Be Precluded From Offering New Expert Opinions Not Previously Disclosed.

As explained above, Mr. Englehart was retained by the OSFC for the exclusive purpose of criticizing Mr. McCarthy's analysis of the delays and disruptions on the Project and the resulting damages incurred by TransAmerica. Given his prior deposition testimony, Mr. Englehart is presumably not planning to offer an opinion in support of the OSFC's delay damages. Any opinion attempting to justify the OSFC delay damages, including its claim for liquidated damages, would far exceed anything Mr. Englehart has said to this point in the litigation—either in his depositions or his expert report. An Order *in Limine* will clarify that point by providing clear guidance that the OSFC is precluded from providing undisclosed expert testimony from Mr. Englehart on these issues.

In conclusion, in the absence of a scientific and rational schedule analysis, utilizing the critical path method, the liquidated and other delay damages asserted by the OSFC are unsupportable and should be excluded at trial. The time for disclosing such an analysis or expert opinion testimony to that effect have long since passed. Any ruling otherwise simply extends the trial unnecessarily and potentially prejudices TransAmerica.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Plaintiff TransAmerica Building Company, Inc.'s Motion in Limine as to Liquidated Damages* was sent via e-mail and by regular U.S. mail, postage prepaid, this 4th day of April, 2015 to:

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IN THE COURT OF CLAIMS OF OHIO

TRANSAMERICA BUILDING
CO., INC.

Plaintiff,

v.

OHIO SCHOOL FACILITIES
COMMISSION

Defendant.

Case No. 2013-00349

Judge McGrath

Referee Wampler

**DEFENDANT OHIO SCHOOL FACILITIES COMMISSION'S
RESPONSES TO PLAINTIFF TRANSAMERICA BUILDING COMPANY'S
FIRST REQUEST FOR INTERROGATORIES**

Now comes Defendant Ohio School Facilities Commission ("OSFC") and makes the following responses to Plaintiff TransAmerica Building Company's First Request for Interrogatories.

Interrogatory No. 1: Identify the total amount of damages the OSFC is seeking against TransAmerica.

RESPONSE: Please refer to the letter and attachments authored by Clay Keith, and sent to TransAmerica counsel via email on January 17, 2014, entitled "Counterclaim Report on Costs Incurred." Please refer to the SHP Contract Amendments and additional punch list items sent to TransAmerica counsel by email on April 24, 2014, Bates-stamped OSFC-006983- 007083. Please see the attached document "8.14.14 Roof Replacement Rpt" Bates-stamped OSFC007184-007187.



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Interrogatory No. 2: To the extent the OSFC is seeking liquidated damages against TransAmerica, identify the amount and the time frame as to when such liquidated damages are being assessed.

RESPONSE: Please consult Pay Applications in the possession of TransAmerica, Bates-stamped LEND003461-LEND003666 and mailed to TransAmerica counsel on February 26, 2014. Additionally, please refer to correspondence from Clay Keith dated December 6, 2011, (Bates-stamped TRANS057383-057385). OSFC obtained this document through an on-site review of TransAmerica's paper files, and is providing a copy of this document as a courtesy, Bates-stamped OSFC007188-007190. Please see attached documents Bates-stamped OSFC007188-OSFC7209 for additional documentation regarding liquidated damages.

Interrogatory No. 3: As alleged in paragraph 2 of the OSFC's counterclaim, describe and identify the amount of damages attributable to "correcting defective work."

RESPONSE: Please see Deduct Change Orders #38 - 53, Bates-stamped LEND001280-001467, previously provided to TransAmerica. OSFC may supplement this response as more information becomes available.

Interrogatory No. 4: As alleged in paragraph 2 of the OSFC's counterclaim, describe and identify the amount of damages attributable to "[i]ncreased operating costs."

RESPONSE: Please see attached documents Bates-stamped OSFC007099-007101. OSFC may supplement this response as more information becomes available.

Interrogatory No. 5: As alleged in paragraph 2 of the OSFC's counterclaim, describe and identify the amount of damages attributable to "[i]ncreased AE and C/M fees and costs."

RESPONSE: OBJECTION: This interrogatory is vague and not understandable. Without waiving objections, OSFC responds that if the question pertains to damages which the Owner

paid to both the AE and CM due to TransAmerica's actions, see the responses identified in Interrogatory No. 1 above.

Interrogatory No. 6: As alleged in paragraph 2 of the OSFC's counterclaim, describe and identify the amount of damages attributable to "paying claims of other contractors due to Plaintiffs impacts."

RESPONSE: Please see Deduct Change Order #42 issued to TP Mechanical in the amount of \$68,631.48, and Deduct Change Order #43 issued to Vaughn Industries in the amount of \$79,000, previously provided to TransAmerica and Bates-stamped LEND001311-001380. Also see response to Interrogatory No. 1.

Interrogatory No. 7: Identify the contracts and the respective contract amount that the OFCC (previously known as the OSFC) has entered into with Lend Lease (or Bovis Lend Lease) since January 1, 2010.

RESPONSE: Please see the third amendment for CM services, Bates-stamped OSFC007084-007090 and provided to TransAmerica counsel by email on 4/28/14.

Interrogatory No. 8: Identify the contracts and the respective contract amount that the OFCC (previously known as the OSFC) has entered into with SHP since January 1, 2010.

RESPONSE: Please see the attached documents Bates-stamped OSFC007210-007235: SHPs 1st Amendment to Agreement 3, dated 6/23/11 in the amount of \$487,000; SHPs 2nd Amendment to Agreement 3, dated 4/24/13, in the amount of \$612,000; OSFC SHP Contracts AE Spreadsheet; and SHP Proposed Contract Amendments (6-7-11).

Interrogatory No. 9: Identify the document that represents the latest budget for the Project, which includes the amount of actual costs.

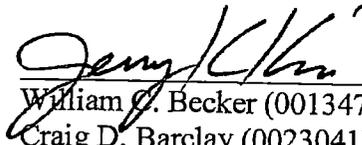
RESPONSE: OBJECTION. "Latest budget" is undefined and vague. Without waiving objections, OSFC refers Plaintiff to excel spreadsheets and PDF documents provided with these responses. Excel spreadsheets have been produced in their native format where possible. All responsive budget documents are included in the Bates ranges "OSFC007097-OSFC007103."

Interrogatory No. 10: Identify the delta, to the extent it exists, between the amount of committed costs and the overall budget amount for the Project, including any unspent contingency.

RESPONSE: Please see response to Interrogatory No. 9 above.

Respectfully submitted,

MICHAEL DeWINE
Ohio Attorney General



William C. Becker (0013476)

Craig D. Barclay (0023041)

Jerry Kasai (0019905)

Assistant Attorneys General

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jerry.kasai@ohioattorneygeneral.gov

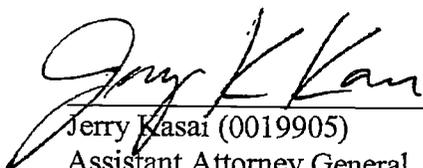
COUNSEL FOR DEFENDANT
OHIO SCHOOL FACILITIES COMMISSION

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Defendant OSFC's Response to Plaintiff's First Request for Interrogatories was sent by electronic mail and regular U.S. mail, postage prepaid, this 20th day of October 2014 to:

Donald W. Gregory
Michael J. Madigan
65 East State Street, Suite 1800
Columbus, Ohio 43215
dgregory@keglerbrown.com
mmadigan@keglerbrown.com

Counsel for Plaintiff Transamerica


Jerry Kasai (0019905)
Assistant Attorney General



December 6, 2011

Mr. Josh Wilhelm
TransAmerica Building Co., Inc.
2000 West Henderson Road
Columbus, OH 43226

RE: Ohio State School for the Blind and Ohio School for the Deaf -- Residential Dorm Buildings
BP#023R -- General Trades
Notification of Non-Conformance / Notice of Liquidated Damages / 5 Day Notification

Dear Josh:

This letter shall serve as your 5 Day Notification regarding the Ohio State School for the Blind and Ohio School for the Deaf Residential Dorms Project. We have previously issued notification regarding your roofing activities that were not meeting the schedule requirements. Lend Lease has also sent various e-mail correspondence regarding the schedule and TransAmerica's responsibility to work overtime, weekends and additional shifts per the Contract requirements in order to meet the Project Schedule.

Recovery Schedule 3 was issued and signed off by all Contractors on November 10, 2011. This Schedule was created with TransAmerica's input that was provided with your plan to meet the schedule with a ten day duration. The ten day duration was added due to additional work that was added to your scope via change order. Per Recovery Schedule 3, you are now significantly behind the schedule and are not meeting the dates agreed to. Consequently, per Article 3.3 of your Contract, money will be withheld until the Recovery Schedule dates are met and the Project is on schedule for all buildings to complete within the scheduled timeframe.

The following milestones have not been completed due to roofing activities not being 100% complete, which is the predecessor to this milestone:

- A10402 OSSB Dorm 5 Roof and Window Enclosure Completion Date July 14, 2011
- A10403 OSSB Dorm 1 Roof and Window Enclosure Completion Date August 4, 2011
- A10404 OSSB Dorm 6 Roof and Window Enclosure Completion Date August 18, 2011
- A10405 OSSB Dorm 2 Roof and Window Enclosure Completion Date September 1, 2011
- A10406 OSSB Dorm 7 Roof and Window Enclosure Completion Date September 15, 2011
- A10407 OSSB Dorm 3 Roof and Window Enclosure Completion Date September 30, 2011
- A10427 OSD Dorm 7 Roof and Window Enclosure Completion Date July 28, 2011
- A10430 OSD Dorm 3 Roof and Window Enclosure Completion Date August 11, 2011
- A10433 OSD Dorm 6 Roof and Window Enclosure Completion Date August 25, 2011

Lend Lease (US) Construction Inc. Telephone 614 732-5245
Ohio State School for the Blind and Ohio School for the Deaf Facsimile 614 732-5295
Project Site
502 Morse Road www.lendlease.com
Columbus, OH 43214

TRANS057383
OSFC007188

Lend Lease

- A10437 OSD Dorm 2 Roof and Window Enclosure Completion Date September 8, 2011
- A10439 OSD Dorm 5 Roof and Window Enclosure Completion Date September 22, 2011
- A10442 OSD Dorm 1 Roof and Window Enclosure Completion Date October 7, 2011

Additional delays to Recovery Schedule 3 are causing impacts to the project due to drywall hanging and finishing that is falling behind schedule. Please keep in mind that drywall activities were used as the tool of measurement when we put Recovery Schedule 3 together.

The status of drywall activities are noted below:

- OSSB 5 Drywall Punchlist Scheduled Completion November 23, 2011
 - Actual Start December 5, 2011 (-10 days)
- OSSB 1 Finish Interior Drywall Scheduled start date November 22, 2011
 - Actual Start December 5, 2011 (-9 Days)
- OSSB 6 Hang Interior Drywall Scheduled Start November 28, 2011
 - Projected start December 8, 2011 (-8 days)
- OSSB 2 Framing closing Inspection Scheduled start November 29, 2011
 - Projected start December 12, 2011 (-9 days)
- OSSB 7 Hang Interior Drywall Scheduled Start December 6, 2011
 - Projected start December 27, 2011 (-6 days)
- OSSB 3 Hang Interior Drywall Scheduled start December 29, 2011
 - Projected start January 10, 2011 (-6 days)
- OSD 7 Finish Interior Drywall Scheduled completion November 28, 2011
 - Projected Completion December 8, 2011 (-8 days)
- OSD 3 Finish Interior Drywall Scheduled Start November 29, 2011
 - Projected Start December 10, 2011 (-8 days)
- OSD 6 Hang Interior Drywall Scheduled Start December 1, 2011
 - Projected Start December 12, 2011 (-6 days)
- OSD 2 Hang Interior Drywall Scheduled Start December 14, 2011
 - Projected Start December 23, 2011 (-7 days)
- OSD 5 Hang Interior Drywall Scheduled Start December 22, 2011

Land Lease

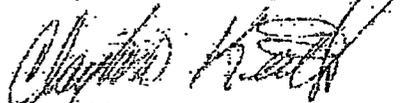
- Projected Start January 6, 2012 (-9 days)
- OSD 1 Hang Interior Drywall Scheduled Start January 4, 2012
 - Projected Start January 17, 2012 (-9 days)

The Owner is now exercising their right to withhold funds as part of Liquidated Damages per Section 3.3 of your Contract. Liquidated Damages will be assessed to the milestones associated with the roof completion dates listed above and will be withheld at a rate of \$2,000 per day starting with scheduled activity A10402 OSSB Dorm 5 Roof and Window Enclosure, Completion Date July 14, 2011. The funds will be withheld starting with Pay Application #9 submitted November 30, 2011. The amount of Liquidated Damages adds up to 103 days at a rate of \$2,000 per day which totals \$206,000. TransAmerica will have the opportunity to complete the work per the above roofing dates and have portions of the Liquidated Damages released. In order for the activity to be completed, TransAmerica must complete all work associated with the roof and rectify the issues with the roofing warranty.

TransAmerica must also come into schedule compliance with the drywall activities listed above within the next five days or the Owner will exercise their rights to proceed with the work by others with the costs being the responsibility of TransAmerica.

The goal is to complete the project within the approved time frames. The hope is that the above issues can be rectified quickly and that no further action will need to take place. Feel free to contact me with any questions.

Yours sincerely,



Clayton Koith
Sr. Project Manager
Land Lease (US) Construction Inc.

clayton.koith@landlease.com

cc: Jerry Kasal, OSFC
Madison Dowlin, OSFC
Josh Predovich, SHP
Jim Swartzmiller, Land Lease
Bill Koniewich, TransAmerica
Ohio Farmer's Insurance Company (Contractor's Surety)
Willis of Ohio, Inc. (Contractor's Surety Agent)

From: Keith, Clayton <Clayton.Keith@lendlease.com>
Sent: Friday, August 29, 2014 10:54 AM
To: Westerman, Matthew
Cc: Dowlen, Madison; Swartzmiller, Jim
Subject: FW: TA last payment
Attachments: Transamerica Disbursements OFCC.xlsx

Matt

In regards to our conversation yesterday.

TA Final Contract Amount with deductive change orders issued \$3,830,263.92
TA Payments to date (Per report received from Karen Kirk) \$3,361,558.52

Remaining funds available to TA \$468,705.40

Thanks

Clay Keith

-----Original Message-----

From: Kirk, Karen [mailto:karen.kirk@ofcc.ohio.gov]
Sent: Thursday, August 21, 2014 1:09 PM
To: Keith, Clayton
Cc: Dowlen, Madison
Subject: RE: TA last payment

Clay,

Below are the Pay Apps associated with the payments on the attached spreadsheet. I noticed the BI report didn't capture that so if you need it, here's the listing:

00013199 Appl No.(1) Period To: 3/10/11
00013543 Appl (2) Period to 4/10/11"
00013779 Appl No 3 Period to 5/10/11
00013951 Appl No. 4 Period To: 6/10/11
00014185 Appl No. 5 Period to 7/10/11
00014434 Appl No.(6) Period to: 8/10/11
00014667 Appl No (7) Period to: 9/10/11
00014798 Appl No 8 Period to 10/10/11
00015138 Appl No (9) 11/10/2011
00015837 Appl No 11 Period 1/10/12
00015935 App No (12) Period to 2/10/12
00016115 Appl 14 Period to 4/10/2012
00016116 Appl No 13 Period to 3/10/2012
00018563 PA #17 LD Release

Please let me know if I can be of further assistance!

Karen Kirk