

IN THE COURT OF CLAIMS OF OHIO 2015 MAY 12 PM 4:02

**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 :

Case No. 2013-00349

v. :

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

Judge McGrath

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

Referee Wampler

and :

STEED HAMMOND PAUL INC., etc., :

Third-Party Defendant/Fourth- :
Party Plaintiff :

v. :

BERARDI PARTNERS, INC., et al., :

Fourth-Party Defendants. :

TRANSAMERICA'S MEMORANDUM IN OPPOSITION
TO STATE OF OHIO'S MOTION *IN LIMINE*

Plaintiff TransAmerica Building Company, Inc. ("TransAmerica") hereby submits its Memorandum in Opposition to the State of Ohio's Motion *in Limine* ("Motion") filed by the Ohio School Facilities Commission's ("OSFC") on May 8, 2015. The OSFC argues that certain

demonstrative evidence should be excluded because “the State of Ohio had no notice of this last minute, eve of trial exhibit” nor, in the OSFC’s view, was the exhibit part of TransAmerica’s “original or supplemental report from Plaintiff’s expert.” (OSFC’s Motion, pg. 1). Both of the OSFC’s assertions are factually incorrect. As shown below, TransAmerica submitted this evidence to the OSFC for its review over a year-and-a-half ago in its response to the OSFC’s discovery requests, and the same information was referenced in Don McCarthy’s January 2014 Expert Report. As such, the OSFC’s Motion should be denied.

The demonstrative evidence at issue here itemizes costs to address discrete changes on the Project, which TransAmerica was forced to incur as a result of the OSFC’s inability to produce a “full and accurate” set of construction plans despite its duty to do so under R.C. 153.01. Contrary to the OSFC’s argument, the costs to address discrete changes were part of TransAmerica’s formal discovery responses submitted to the OSFC on **September 19, 2013**.¹ Specifically, TransAmerica responded to the OSFC’s interrogatories by referencing its Claim PowerPoint which included the slide to which the OSFC objects, as shown below.

<p style="text-align:center"><u>FIRST SET OF INTERROGATORIES AND REQUEST FOR PRODUCTION OF DOCUMENTS</u></p> <p>1. State all facts, produce all documents, and identify all witnesses by name, address, and relationship to the Plaintiff which and who support the allegations contained in Paragraphs 29-32, 55, 57, 58, 62-64, 67-68, 71-72, 74, 80, 84, 86, 91-92, 94-97, 99, 102, 106 and 108 of your Amended Complaint.</p> <p>RESPONSE:</p> <p>See TransAmerica’s, March 8, 2012 Certified Claim, November 7, 2012 Supplemental Claim, and the supporting documentation referenced in its Claim PowerPoint, which attached to these responses. TransAmerica reserves the right to supplement this response as discovery is still on-going.</p>

¹ TransAmerica’s Responses to Defendant OSFC’S First Set of Interrogatories and Request for Production of Documents are attached hereto as Exhibit A. The costs to address discrete changes were produced as a part of TransAmerica’s “Claim Presentation” referenced in TransAmerica’s Responses No. 1 and 2 therein.

2. Produce your written claim in this case.

RESPONSE:

See TransAmerica's March 8, 2012 Certified Claim, November 7, 2012 Supplemental Claim and the supporting documentation referenced in its Claim PowerPoint, which are both attached to these responses. TransAmerica reserves the right to supplement this response as discovery is still on-going.

3. Produce the documents, including emails and correspondence, which support this claim.

RESPONSE:

See TransAmerica's March 8, 2012 Certified Claim, November 7, 2012 Supplemental Claim and the supporting documents referenced in its Claim PowerPoint, which are both attached to these responses. TransAmerica reserves the right to supplement this response as discovery is still on-going.

A copy of the OSFC's Exhibit A, included in TransAmerica's discovery response to the OSFC's First Set of Interrogatories and Request for Production of Documents, is attached hereto as Exhibit B marked as "TA001849."² As is clearly shown, the OSFC's Exhibit A is identical to the document marked as "TA001849" except for colored dots which were subsequently added simply to illustrate how discrete changes multiply over the entire Project. Of course, simply adding colored dots does not alter the substance of the document. In short, TransAmerica provided this evidence to the OSFC almost twenty months ago; it is by no means a "last minute, eve of trial exhibit." TransAmerica's witnesses should not be precluded from testifying as to this Exhibit.

² Because TransAmerica's Response to the OSFC's Requests for Production is voluminous, TransAmerica has submitted its entire discovery response in electronic format on CD-ROM filed with the Court simultaneously with TransAmerica's Memorandum in Opposition. The CD-ROM disc is labeled "Exhibits C & D to TransAmerica's Memo In Opposition To State of Ohio's Motion *In Limine*." The "Exhibit C" folder included thereon comprises all documents that were produced as a part of TransAmerica's discovery response submitted to the OSFC on September 19, 2013. "TA001849" can be found within the PDF labeled "TRANS001668 1-Sept Discovery Responses."

Moreover, the OSFC's suggestion that this evidence was not part of TransAmerica's original or supplemental expert report is also factually incorrect. Mr. McCarthy's original expert report, submitted to the OSFC on January 17, 2014, states explicitly that TransAmerica had "pointed out" "\$600,000 in discrete changes not included in a formal Change Order"—the same discrete changes mentioned in the OSFC's Exhibit A.³ Because Mr. McCarthy disclosed this, Mr. McCarthy should not be prohibited from testifying as to his review of those costs at trial.

Perhaps the OSFC overlooked this evidence—perhaps due in part to the generality of the OSFC's discovery requests, or perhaps due even to the OSFC's limited attention to this issue until the eve of trial. Bear in mind, the OSFC has deposed Mr. McCarthy twice in this case, and has previously deposed all of TransAmerica's witnesses. The OSFC had plenty of opportunity to address this evidence directly. Nonetheless, the evidence the OSFC seeks to exclude through its Motion has been available to both parties for over a year-and-a-half, and the OSFC is by no means unfairly prejudiced by its introduction at trial. As such, the OSFC's Motion should be denied.

Respectfully submitted,



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*Attorneys for Plaintiff TransAmerica Building
Company, Inc.*

³ This is shown on Pg. 95 of Mr. McCarthy's report. Because Mr. McCarthy's original expert report is voluminous, it is included in the CD-ROM submitted with the Court labeled "Exhibits C & D to TransAmerica's Memo In Opposition To State of Ohio's Motion *In Limine*." The expert report can be found in the folder labeled "Exhibit D."

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *TRANSAMERICA'S MEMORANDUM IN OPPOSITION TO STATE OF OHIO'S MOTION IN LIMINE* was sent via e-mail and by regular U.S. mail, postage prepaid, this 12th day of May, 2015 to:

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IN THE COURT OF CLAIMS OF OHIO

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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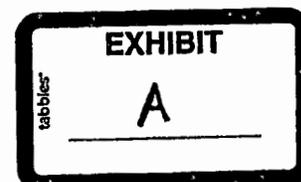
: Referee Wampler
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**PLAINTIFF TRANSAMERICA BUILDING COMPANY, INC.'S RESPONSES TO
DEFENDANT OSFC'S SECOND SET OF INTERROGATORIES AND
REQUEST FOR PRODUCTION OF DOCUMENTS
TO PLAINTIFF TRANSAMERICA**

Plaintiff TransAmerica Building Company, Inc. (hereinafter referred to as "TransAmerica") hereby responds to Defendant Ohio School Facilities Commission, nka Ohio Facilities Construction Commission (hereinafter referred to as "OFCC") Second Set of Interrogatories and Request for Production of Documents as follows. TransAmerica makes the following answers and objections based upon information known as of the date of service hereof. TransAmerica reserves the right to supplement and amend these answers and objections as discovery proceeds.

GENERAL RESPONSES AND OBJECTIONS

1. TransAmerica objects to OFCC's Requests to the extent that they seek the disclosure of information or documents which are (i) protected by the attorney-client privilege; (ii) protected by the attorney work-product doctrine and documents that are privileged under Rule 26(B)(3) of the Ohio Rules of Civil Procedure. All reference to privileged communications or materials are deleted from the responses set forth herein.



2. TransAmerica objects to the definitions and instructions contained in OFCC's Requests to the extent that they seek to impose obligations in excess of those required by Ohio Civ. R. 26.

3. TransAmerica objects to the scope of OFCC's Requests to the extent they seek information that is neither relevant to the subject matter involved in the pending action, nor reasonably calculated to lead to the discovery of admissible evidence.

4. TransAmerica states that it is responding to OFCC's Requests to the best of its knowledge, information and belief, and with the right to supplement its responses herein.

5. The above-described general responses and objections apply and are asserted as to all responses to OFCC's Requests. Subject to and without waiving these general objections, TransAmerica responds as follows:

**OSFC'S SECOND SET OF INTERROGATORIES AND
REQUEST FOR PRODUCTION OF DOCUMENTS
TO PLAINTIFF TRANSAMERICA**

1. State all facts, identify all witnesses, and produce all documents that support the defense asserted in Paragraph 4 of your answer – that OSFC's Counterclaim fails to state a claim upon which relief may be granted.

RESPONSE:

Objection to the extent such Interrogatory is overly broad. Without waiving such objection, the OSFC's fails to state a claim upon which relief may be granted for reasons that include, but are not limited to, the following:

- Failing to provide complete and accurate plans as required under R.C. 153.01;
- Directing TransAmerica to proceed with construction without having fully resolved all of the permit issues raised by the plan examiner;
- Repeatedly representing to TransAmerica that a complete and accurate set of plans would be provided, which never was;
- Mandating and expecting that TransAmerica proceed with work not as described in the Contract;
- Not responding to TransAmerica's Article 8 correspondence within the time limits described in Article 8;

- Wrongfully asserting liquidated damages and withholding TransAmerica's contract balance;
- Delaying the Project; and
- Failing to properly schedule and administer

For additional support see TransAmerica's March 8, 2012 Certified Claim, November 7, 2012 Supplemental Claim, and the supporting documentation referenced in its Claim PowerPoint, which was attached to TransAmerica's responses to OSFC's Set of First Interrogatories. (See Trans001668-2008)

TransAmerica's lay witnesses that support the asserted defense, include, but are not limited to the following:

Bill Koniewich
Brad Koniewich
Alan Starr
Josh Wilhelm

2. State all facts, identify all witnesses, and produce all documents that support the defense asserted in Paragraph 5 of your answer – that OSFC is barred from recovery by reason of its own breach of warranty and contributory negligence.

RESPONSE:

Objection to the extent such Interrogatory is overly broad. Without waiving such objection, the OSFC's claims are barred due to its own breach of warranty and contributory negligence for reasons that include, but are not limited to, the following:

- Failing to provide complete and accurate plans as required under R.C. 153.01;
- Directing TransAmerica to proceed with construction without having fully resolved all of the permit issues raised by the plan examiner;
- Repeatedly representing to TransAmerica that a complete and accurate set of plans would be provided, which never was;
- Mandating and expecting that TransAmerica proceed with work not as described in the Contract;
- Not responding to TransAmerica's Article 8 correspondence within the time limits described in Article 8;
- Wrongfully asserting liquidated damages and withholding TransAmerica's contract balance;
- Delaying the Project; and
- Failing to properly schedule and administer

For additional support see TransAmerica's March 8, 2012 Certified Claim, November 7, 2012 Supplemental Claim, and the supporting documentation referenced in its Claim PowerPoint, which was attached to TransAmerica's responses to OSFC's Set of First Interrogatories. (See Trans001668-2008)

TransAmerica's lay witnesses that support the asserted defense, include, but are not limited to the following:

Bill Koniewich
Brad Koniewich
Alan Starr
Josh Wilhelm

3. State all facts, identify all witnesses, and produce all documents that support the defense asserted in Paragraph 6 of your answer – that OSFC's claims are barred by accord and satisfaction.

RESPONSE:

Objection to the extent such Interrogatory is overly broad. Without waiving such objection, the OSFC's claims are barred by reason of accord and satisfaction for reasons that include, but are not limited to, the following:

- Failing to provide complete and accurate plans as required under R.C. 153.01;
- Directing TransAmerica to proceed with construction without having fully resolved all of the permit issues raised by the plan examiner;
- Repeatedly representing to TransAmerica that a complete and accurate set of plans would be provided, which never was;
- Mandating and expecting that TransAmerica proceed with work not as described in the Contract;
- Not responding to TransAmerica's Article 8 correspondence within the time limits described in Article 8;
- Wrongfully asserting liquidated damages and withholding TransAmerica's contract balance;
- Delaying the Project; and
- Failing to properly schedule and administer

For additional support see TransAmerica's March 8, 2012 Certified Claim, November 7, 2012 Supplemental Claim, and the supporting documentation referenced in its Claim PowerPoint, which was attached to TransAmerica's responses to OSFC's Set of First Interrogatories. (See Trans001668-2008)

TransAmerica's lay witnesses that support the asserted defense, include, but are not limited to the following:

Bill Koniewich
Brad Koniewich
Alan Starr
Josh Wilhelm

4. State all facts, identify all witnesses, and produce all documents that support the defense asserted in Paragraph 7 of your answer – that OSFC's claims are barred by waiver, laches or estoppel.

RESPONSE:

Objection to the extent such Interrogatory is overly broad. Without waiving such objection, the OSFC's claims are barred by the doctrine of waiver, laches or estoppel for reasons that include, but are not limited to, the following:

- Failing to provide complete and accurate plans as required under R.C. 153.01;
- Directing TransAmerica to proceed with construction without having fully resolved all of the permit issues raised by the plan examiner;
- Repeatedly representing to TransAmerica that a complete and accurate set of plans would be provided, which never was;
- Mandating and expecting that TransAmerica proceed with work not as described in the Contract;
- Not responding to TransAmerica's Article 8 correspondence within the time limits described in Article 8;
- Wrongfully asserting liquidated damages and withholding TransAmerica's contract balance;
- Delaying the Project; and
- Failing to properly schedule and administer the Project.

For additional support see TransAmerica's March 8, 2012 Certified Claim, November 7, 2012 Supplemental Claim, and the supporting documentation referenced in its Claim PowerPoint, which was attached to TransAmerica's responses to OSFC's Set of First Interrogatories. (See Trans001668-2008)

TransAmerica's lay witnesses that support the asserted defense, include, but are not limited to the following:

Bill Koniewich
Brad Koniewich
Alan Starr
Josh Wilhelm

5. State all facts, identify all witnesses, and produce all documents that support the defense asserted in Paragraph 8 of your answer – that OSFC failed to mitigate its damages.

RESPONSE:

Objection to the extent such Interrogatory is overly broad. Without waiving such objection, the OSFC failed to mitigate its damages for reasons that include, but are not limited to, the following:

- Failing to provide complete and accurate plans as required under R.C. 153.01;
- Directing TransAmerica to proceed with construction without having fully resolved all of the permit issues raised by the plan examiner;
- Repeatedly representing to TransAmerica that a complete and accurate set of plans would be provided, which never was;
- Mandating and expecting that TransAmerica proceed with work not as described in the Contract;
- Not responding to TransAmerica's Article 8 correspondence within the time limits described in Article 8;
- Wrongfully asserting liquidated damages and withholding TransAmerica's contract balance;
- Delaying the Project; and
- Failing to properly schedule and administer the Project.

For additional support, see TransAmerica's March 8, 2012 Certified Claim, November 7, 2012 Supplemental Claim, and the supporting documentation referenced in its Claim PowerPoint, which was attached to TransAmerica's responses to OSFC's Set of First Interrogatories. (See Trans001668-2008)

TransAmerica's lay witnesses that support the asserted defense, include, but are not limited to the following:

Bill Koniewich
Brad Koniewich
Alan Starr
Josh Wilhelm

6. State all facts, identify all witnesses, and produce all documents that support the defense asserted in Paragraph 9 of your answer – that OSFC's waived its rights and remedies under the contract, including the rights and remedies provided for in Article 8.

RESPONSE:

Objection to the extent such Interrogatory is overly broad. Without waiving such objection, the OSFC waived its right and remedies under Article 8 for reasons that include, but are not limited to the following:

- Failing to provide complete and accurate plans as required under R.C. 153.01;

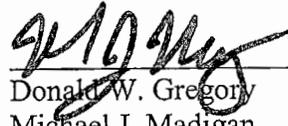
- Directing TransAmerica to proceed with construction without having fully resolved all of the permit issues raised by the plan examiner;
- Repeatedly representing to TransAmerica that a complete and accurate set of plans would be provided, which never was;
- Mandating and expecting that TransAmerica proceed with work not as described in the Contract;
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- Delaying the Project; and
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For additional support, see TransAmerica's March 8, 2012 Certified Claim, November 7, 2012 Supplemental Claim, and the supporting documentation referenced in its Claim PowerPoint, which was attached to TransAmerica's responses to OSFC's Set of First Interrogatories. (See Trans001668-2008)

TransAmerica's lay witnesses that support the asserted defense, include, but are not limited to the following:

Bill Koniewich
Brad Koniewich
Alan Starr
Josh Wilhelm

Respectfully submitted,



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Michael J. Madigan (0079377)
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dgregory@keglerbrown.com
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*Attorneys for TransAmerica Building Company,
Inc.*

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent regular U.S. mail, postage prepaid, this 31st day of December, 2013 to:

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Jerry Kasai, Esq.
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craig.barclay@ohioattorneygeneral.gov
jerry.kasai@ohioattorneygeneral.gov



Michael J. Madigan (0079377)

AFFIDAVIT

STATE OF OHIO)
) SS:
COUNTY OF _____)

I, William J. M. Koniewick, having first been duly sworn and cautioned, do hereby state that I provided the answers to these Interrogatories and that the answers which I provided are true to the best of my knowledge, information and belief.

William J. M. Koniewick
AFFIANT

Sworn to before me and subscribed in my presence this 31 day of December, 2013

Patricia H. Bidwell
NOTARY PUBLIC

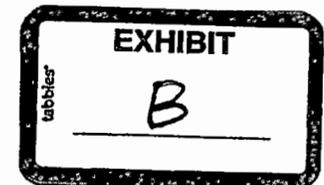


TA Has Already Identified \$603,392.71 In Discrete Changes Not Included In A Change Order

AVERAGE BUILDING ANALYSIS

<i>Partial List of Inefficient Activities/Remobilization</i>	<i>Average Crew Size</i>	<i>Average Hours</i>	<i>Average Inefficiency Factor</i>	<i>Average Revised Hours</i>
Corner Blocking	2	16	30%	21
Fire Blocking	2	32	30%	42
Baffle Blocking	2	32	30%	42
General Blocking	2	40	30%	52
Rated Ceiling Framing	3	90	30%	117
Rated Wall Framing	3	90	30%	117
Shower Stall Reconstruction	2	32	30%	42
Medicine Cabinet Relocations	2	32	30%	42
Draft Walls	2	32	30%	42
Bulkhead Diffusers/Fire Dampers	2	40	30%	52
Gable End Wall Framing	3	90	30%	117
Unsupported Gable Ends	3	72	30%	94
Wall Plumbness Issues	4	120	30%	156
Entertainment Walls	2	32	30%	42
Kitchen Walls	2	32	30%	42
Closet Walls	2	32	30%	42
Exterior Wall Panel Caulking	2	32	30%	42
Miscellaneous Damage/Repairs	4	80	30%	104
Totals		926		1,204

1,204 \$41.77 \$50,282.73
 12 Building Average \$603,392.71



**KEGLER
BROWN
HILL+
RITTER**

TransAmerica v. OSFC, et al.
Ohio Court of Claims Case No. 2013-00349
*Exhibits C&D to TransAmerica's Memo In Opposition
To State of Ohio's Motion In Limine*