

(b) OSFC's own expert failed to observe or quantify the re-roofing costs of Blind 1 and instead testified to what he (and his subcontractor) estimated versus presenting actual costs.

(c) OSFC self performed the re-roof of Blind 1 and yet failed to produce evidence as to the actual costs it supposedly incurred.

453. The OSFC failed to provide evidence that it will indeed incur costs to re-roof the dorms, including for Blind 1. The OSFC should not be entitled to recover re-roofing costs from TransAmerica if the work has been and will be performed internally by forces through the Department of Administrative Services at no additional cost to the OSFC or a reduction in Project funds.

454. The OSFC failed to provide evidence that it intends to proceed with re-roofing any additional roofs.

N. OSFC's Criticisms of TransAmerica's Work Do Not Limit TransAmerica's Recovery

455. Prior to submitting its bid, TransAmerica issued an RFI asking thirteen questions prior to submitting its bid. (TA-0134 and TA-0137)

456. At the time of the second rounds of bid, SHP acknowledged the heightened scrutiny due the removal of the project labor agreement and was looking for "insanely good bids." (TA-0107)

457. LL investigated TransAmerica and recommended they be awarded the Project as the lowest, responsive and responsible bidder. (TA-0145)

458. OSFC found TransAmerica to be a responsible prime contractor and awarded it the General Trades package for the dormitory. In making the determination that TransAmerica was a responsible contractor, the OSFC was fully aware of the following:

(a) TransAmerica's association with the Hadler Companies. (TA-0147)

(b) TransAmerica's uncertainty regarding whether it would subcontract or self perform its carpentry activities. (TA-0145)

459. TransAmerica assembled a team to construct the Project, which included Josh Wilhelm and Alan Starr, who both had considerable experience with public construction. (Bill Koniewich)

460. TransAmerica had considerable experience and knew the Columbus construction market. This included projects for Ohio Dominican University and Kingsdale Condominiums. (Bill Koniewich)

461. Bill Koniewich has served as President for TransAmerica for over thirty (30) years and was significantly involved during construction. (Bill Koniewich)

462. Josh Wilhelm served as Project Manager for TransAmerica throughout the entire construction period. (Josh Wilhelm)

463. Criticisms regarding TransAmerica's turnover ignores that its President and Project Manager stayed consistent throughout, unlike the OSFC who went through two Project administrators and three executive directors.

464. Criticisms regarding carpentry subcontractors that pulled their bids has no bearing when TransAmerica established it had bought out the Project within its overall bid using a fabricated wall panel system. (Bill Koniewich and TA-0592-C (TRANS001196))

465. Criticism that TransAmerica somehow underbid the rough carpentry based on how it transferred its figures from its Estimate/Schedule of Values sheet to its job cost report ignores that the original estimate amount of \$1,010,243.00 for cost code 06-010 Rough Carpentry on its September 2012 Job Cost Report (TA-659-044) is the exact sum of the rough carpentry (\$663,494.00) and Exterior Trim (\$346,749.00) figures shown on its Estimate/Schedule of Values. (TA-0592C)

466. Criticism that TransAmerica under bid its rough carpentry ignores that its forecast to perform such work after buyout was \$663,494.00, which is nearly identical to the LL's budget of \$658,290.00. (Alan Starr, Don McCarthy, TA-0050 and TA-0592C)

467. TransAmerica's decision to not pursue those subcontractors that pulled their numbers is common, and in fact the OSFC permitted low bidder Summit Construction to rescind its bid. (Don McCarthy and TA-0144)

468. TransAmerica explained its "buy-out" process and how it still had a viable plan to construction the Project within in its bid of \$3,975,000. (Bill Koniewich, Alan Starr, and TA-729, TA-592-C (TRANS001196)

469. TransAmerica's decision to use a fabricated wall system was reasonable and would have provided for efficient construction, but for the numerous dimensional problems and fire rating changes, which were concealed from TransAmerica until after the wall panels started to be delivered. (Josh Wilhelm and Bill Koniewich)

470. The decision to self-perform carpentry did not alter TransAmerica's reasonable bid for the Project or reasonable carpentry budget line-item. (Rick Koehler, Don McCarthy, and TA-0050)

471. While TransAmerica changed its Superintendents during the job, those changes were justified under the circumstances and its turnover was less than the other Project participants, including the OSFC.

472. While AAA Roofing did not perform well, the other prime contractors were not delayed due to the roof beyond the days quantified by TransAmerica. Pictures from the OSFC's September 2011 core meeting minutes showing interior work was proceeding during the

month of September and during that period of time there were no complaints about TransAmerica's roofing progress. (JX-H-40)

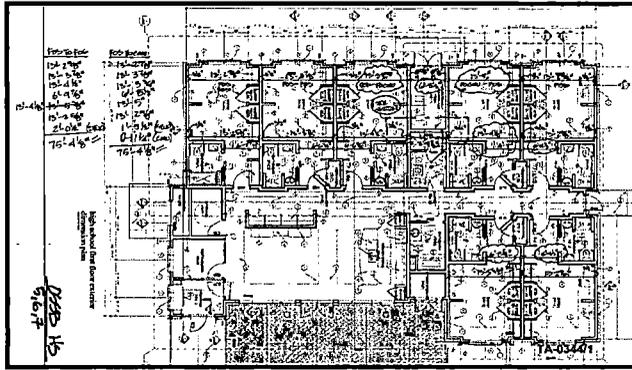
<p><u>OSSB#5 UPDATE:</u></p> <ul style="list-style-type: none"><li>- Permanent enclosure complete</li><li>- HVAC rough-in approved</li><li>- Plumbing rough-in is approved</li><li>- Electrical rough-in inspection 9/21</li><li>- Drywall ceilings ongoing</li><li>- Fire rating changes started</li></ul>	<p><u>OSD#7 UPDATE:</u></p> <ul style="list-style-type: none"><li>- Permanent enclosure complete</li><li>- Roofing complete</li><li>- HVAC inspection approved</li><li>- Plumbing inspection approved</li><li>- Electrical inspection Monday</li><li>- High ceiling drywall installed</li><li>- Ceiling drywall to start next week</li></ul>
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473. TransAmerica's loan to its drywall and painting subcontractor, Sammie Walker, has no bearing on TransAmerica's recovery when it was established that TransAmerica has received minimal payments on such loan (less the \$5,000). (Bill Koniewich)

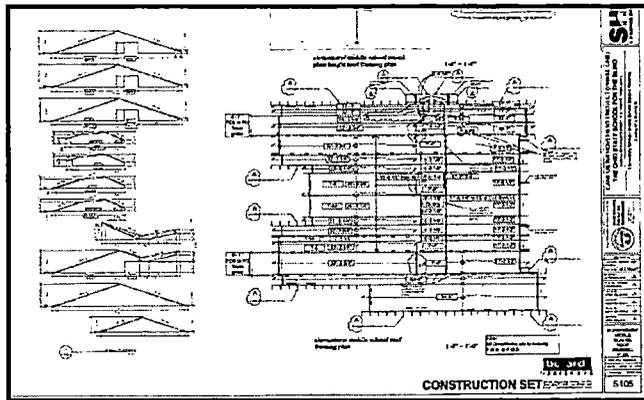
474. The loan between TransAmerica and Sammie Walker precludes any double recovery on behalf of TransAmerica as it expressly states that if TransAmerica recovers costs associated with the drywall and painting delays, those amounts shall be applied to the principal amount of the Note. (OSFC Exhibit F)

475. Criticisms that TransAmerica "had all the information necessary" to construct the Project and that it caused the delays, ignores the substandard and flawed set of plans (acknowledged by everyone) used for construction, which is supported by the following:

- (a) The dimensions on the architectural plans were constantly changing, which resulted in TransAmerica having to pass out binders to its carpentry foreman containing sketches instead of simply working from the architectural set as was reasonably expected at bid time. An example of the extensive changes to the dimensions, which are documented on the as-built drawings, are noted below (TA 0344 and TA-919):



(b) Without an accurate set of architectural plans, TransAmerica had no way of checking the various sketches and red line markups received from SHP, including the significant changes made to the truss drawings. (TA-0265)



(c) The structural plans were not coordinated with the architectural plans resulting in the buildings have to be laid out from the truss drawings. (Josh Wilhelm)

476. Criticism that TransAmerica is “double dipping” for labor already included in executed change orders needs to take into account that TransAmerica has not received full payment for its adjusted contract, which includes the executed change orders, and that the total labor cost included in the change orders is relatively nominal, as it totals \$41,690.00.

477. The OSFC’s criticism that TransAmerica had all the information necessary ignores that its agents, SHP and LL, failed to provide an updated set of plans previously promised. Instead, the OSFC, LL, and SHP withheld the updated sets after still

finding errors, which prompted concerns that releasing them to the prime contractors would just add to more confusion and costs on a Project that had no opportunity to obtain additional funding.

478. TransAmerica's decision to loan money to Sammie Walker allowed the same work force to continue on the Project and mitigated the additional costs that arose due to the delays and disruptions of the OSFC and its agents. The alternative would have been to engage other drywall and painting subcontractors, which would have further increased the costs.

479. To address the compressed and out-of-sequence interior work resulting from the flawed plans, which increased the labor needs on the Project beyond those reasonably anticipated at the time of the October 2011 bid or subcontracting, TransAmerica had no choice but to supplement Sammie Walker's crew with additional workers, at considerable expense.

480. The OSFC failed to conduct its own schedule analysis or quantify the delay days it asserted were caused by TransAmerica. Instead the OSFC, through its expert Mr. Englehart, simply criticized Mr. McCarthy's fourteen (14) day "self-inflicted wounds" quantification.

481. The OSFC failed to prove TransAmerica's self-inflicted wounds, notably its roof activities, delayed the Project's critical beyond the fourteen (14) days already quantified by Don McCarthy.

482. After inspecting the walls with TransAmerica in March of 2012, SHP's Josh Predovich acknowledged that TransAmerica's walls were in conformance with the specification, but that he still wrote a nonconformance letter regarding TransAmerica's work. (Josh Predovich and TA-0565)

483. As late as February 2012, SHP and LL were discussing the wall tolerance and SHP noted “NABP is referenced in the spec., but it is written by home builders and is biased.” (Josh Wilhelm and TA-0553)

484. LL’s Superintendent Jim Smith blamed TransAmerica for virtually all of the problems associated with the Project and turned TransAmerica into a scape goat without being properly informed about the status of the defective plans and delayed permits. (Jim Smith)

485. Criticisms from LL’s Superintendent, Jim Smith, were unreliable in many respects, including when he:

- (a) Testified there were no fire rating changes during the Project.
- (b) Acknowledged receiving complaints from LL’s Project Manager about failing to timely complete his daily reports. (TA-0739)
- (c) Misspoke in his deposition when he stated he did not request Brad Miller be removed from the Project.
- (d) Misspoke in his deposition that TransAmerica, and all of the prime contractors, signed off on the Posted Set of Plans.
- (e) Testified all dimensional problems should have been resolved after the first building, which is inconsistent with his May 25, 2011 email where he stated:
  - (i) “Bid set of drawings are not correct at this time and I’m sure there will be several changes once we receive the new set and again more changes will have to be made.” (TA-0352)
  - (ii) “I’m tired of sticking my foot in my mouth because of drawings, spec, RFI’s and submittal changes after the answer have been given.” (TA-0352)

486. Criticisms from Jim Smith based upon his daily reports are not credible when LL’s Project Manager reprimanded him for not being more timely with his updates and other LL staff personnel were involved in updating the reports. (Jim Smith and TA-0739)

487. The state of the design and the evolving “design on the fly” made performance difficult for TransAmerica’s subcontractors who would have had no significant problems on a normal project with a complete design.

488. With respect to the roofing activities during construction, TransAmerica took appropriate steps to remedy the problems with its first roofer (AAA) and minimized the delays to the Project and other prime contractors. (Josh Wilhelm and Bill Koniewich)

489. However, TransAmerica could not remedy the ice and water shield nonconformance with code as this was unknown to TransAmerica. SHP failed to communicate or otherwise follow through on its representation to DIC that it would remedy the design flaw during construction.

490. Criticisms that TransAmerica has failed to establish the OSFC’s shortcomings are the proximate cause of its damages ignores the acknowledgements from the OSFC and its agents during the Project, for example:

(a) **“When it is determined that we got the permit review comments in July and [were] unable to turn them around in 5 months, we will be paying the claim. And by we, I mean BPI.** (Josh Predovich and TA-176)

(b) **“I now have one more e-mail from you that I have to delete from my mailbox** before the inevitable public records request that will be coming for each phase of this project.” (Josh Predovich and TA-0236)

(c) **“TransAmerica has also submitted correspondence to cover themselves if there is a field issue or error.”** (Clay Keith and TA-0304)

(d) **“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.”** (Clay Keith and TA-0325)

(e) **“This is getting old. Lend Lease is getting fed up.** The Contractor have been complaining and sending letters that **the lack of the construction set is delaying the job.**” (Josh Predovich, TA-0359)

(f) **“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 drawing and if they pass your approval issue them. **My fear is they are like previous versions it will cause more confusion than is currently on site.**" (Clay Keith, TA-0380)

(g) "Today is July 17 and drawings and specifications for the Campus Wide Bid Packages have not been received. The scope within the campus wide bid package is critical to completing this project. **Please note if contractors submit delay claims as a result of drawings and specifications being received late, SHP will be expected to pay those costs.** (Madison Dowlen and TA-0393)

## II. TRANSAMERICA'S PROPOSED CONCLUSIONS OF LAW

### A. OSFC Failed to Comply with R.C. §153.01

491. R.C. §153.01 requires the OSFC to produce through its agent architect, "full and accurate plans" suitable for use in construction "so drawn and represented as to be easily understood" with definite and complete specifications of the work that would "enable a competent mechanic or other builder to carry them out and afford bidders all needful information." R.C. §153.01.

492. In so providing, R.C. §153.01 establishes minimum standards by which the OSFC must comply when administering a school construction project. R.C. §153.01; *Valentine Concrete, Inc. v. Ohio Dep't of Adm. Serv.*, 62 Ohio Misc. 2d 591, 601, 609 N.E.2d 623, 629 (Ct. Cl. 1991)("owner is required to furnish sufficient plans and specifications to enable the contractor to perform"), citing *Bates & Rogers Constr. Co. v. Cuyahoga Cty. Bd. of Commrs.*, 274 F. 659 (N.D.Ohio 1920)); *Julian Speer Co. v. Ohio State Univ.*, 83 Ohio Misc. 2d 93, 95 (Ct. of Cl. 1997)("[a]s the owner of a project, the state has the obligation to furnish sufficient plans and specifications to enable a plumbing contractor to prepare a bid and perform any resulting contract.").

493. Where the OSFC fails to comply with R.C. §153.01, the OSFC is liable for additional costs and delay incurred by a contractor. *Mason Tire & Rubber Co. v. Cummins-Blair Co.*, 116 Ohio St. 554, 157 N.E. 367 (1927)(owner liable for delay caused by inadequacy of engineering design and other inefficiencies caused by engineer); *Valentine Concrete, Inc. v. Ohio Dept. of Adm. Serv.*, 62 Ohio Misc.2d 591, 600–601, 609 N.E.2d 623, 628–629 (Ct.Cl. 1991)(awarding extra costs to contractor where “drawings and specifications were very inadequate and created many problems and delays in the course of [the] project.”); *Sherman R. Smoot Co. v. State*, 136 Ohio App. 3d 166, 176, 736 N.E.2d 69 (10th Dist. 2000)(government impliedly warrants accuracy of affirmative indications regarding job site conditions); *Central Ohio Joint Voc. Sch. Dist. Bd. of Educ. v. Peterson Constr. Co.*, 129 Ohio App. 3d 58, 64, 716 N.E.2d 1210 (12th Dist. 1998)(owner impliedly warrants the accuracy of its plans); *Julian Speer Co. v. Ohio State Univ.*, 83 Ohio Misc. 2d 93, 98, 680 N.E.2d 254 (Ct. of Cl. 1997); *Conti Corp. v. Ohio Dept. of Admin Servs.*, Ohio Ct. Cl. No. 88-14568, 1992 WL 12009509 (Nov. 30, 1992).

494. Under their respective contracts with the OSFC, LL and SHP were agents of the OSFC throughout the design and construction of the Project. (JX-M-01 thru 03, JX-N-01 thru 03, and March 24, 2015 Order of Referee)

495. Under well-established rules of agency, the OSFC is liable for the errors, omissions, and mismanagement of its agent architect and design professional, SHP, and its agent construction manager advisor, LL. *See, e.g., Valentine Concrete, Inc. v. Ohio Dep't of Administrative Services*, 62 Ohio Misc. 2d 591, 601 (Ohio Ct. Cl. 1991)(“[t]he architect is the agent of the owner and the owner is liable for any omissions that created extra cost.”); citing *Mason Tire & Rubber Co. v. Cummins-Blair Co.*, 116 Ohio St. 554, 157 N.E. 367 (1927); *Wagner-Smith Co. v. Ruscilli Constr. Co.*, 139 Ohio Misc. 2d 101, 112 (Ohio C.P. 2006)

(construction manager treated as agent of owner); *Constr. Sys. v. Garlikov & Assocs.*, 10th Dist. Franklin No. 11AP-802, 2012-Ohio-2947, ¶41 (same).

496. As agents of the OSFC, statements made by representatives of SHP, including statements of Josh Predovich and Andrew Maletz, are admissions by the OSFC. Further, as agents of the OSFC, statements made by representatives of LL, including those of Clay Keith, Jim Smith, and Joe Rice, are admissions by the OSFC. *See* Ohio Evid. R. 801(D)(2) (“statements by the party’s agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship” are treated the same as admissions by the party opponent itself); *see also Sleeper v. Casto Mgmt. Servs.*, 10th Dist. Franklin No. 12AP-566, 2013-Ohio-3336, ¶18 (“[f]or a statement to qualify as an admission of a party-opponent, the agency relationship need not encompass authority to make damaging statements, but requires only the authority to take action concerning the subject matter of the statements”), citing *Mowery v. Columbus*, 10th Dist. No. 05AP-266, 2006 Ohio 1153, ¶59.

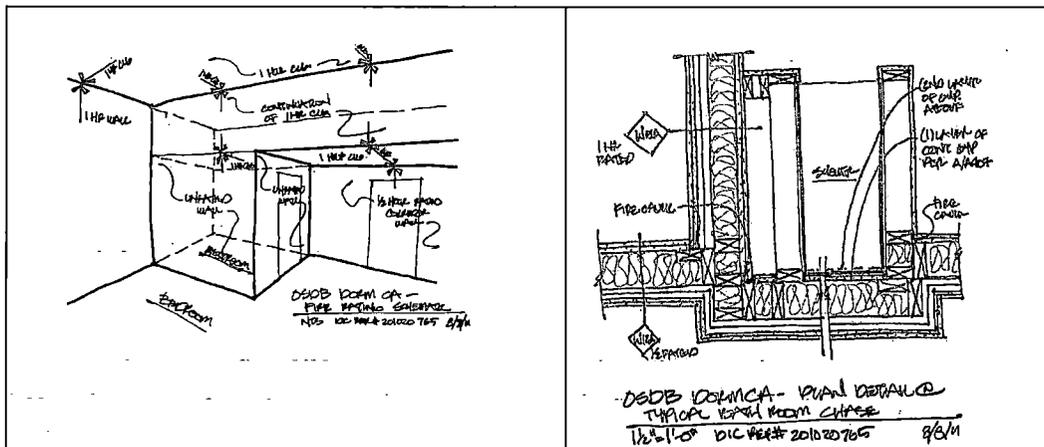
497. By failing to comply with R.C. §153.01 throughout the course of the project, and through the actions and inactions of its agents, SHP and LL, the OSFC materially breached its Contract. Because of the OSFC’s material breach, the OSFC is liable to TransAmerica for its additional costs and damages. *Valentine Concrete, Inc. v. Ohio Dept. of Adm. Serv.*, 62 Ohio Misc.2d 591, 600–601, 609 N.E.2d 623, 628–629 (Ct. of Cl. 1991); *Julian Speer Co. v. Ohio State Univ.*, 83 Ohio Misc. 2d 93, 98 (Ct. of Cl. 1997); *Mason Tire & Rubber Co. v. Cummins–Blair Co.*, 116 Ohio St. 554, 157 N.E. 367 (1927).

498. SHP’s failure to obtain the OSFC’s approval for the changes made to the life safety design of the dormitories after the first bid in July of 2010 violated 153.10, which states:

(a) “After the plans, bills of material, specifications of work, estimates of cost in detail and in the aggregate, life-cycle cost analysis, form of bid, bid guaranty, and other data that may be required are approved and filed with the owner as defined in section 153.01 of the Revised Code, **no change of plans, details, bills of material, or specifications shall be made or allowed unless the same are approved by the owner** as defined in section 153.01 of the Revised Code. When so approved, the plans of the proposed change, with detail to scale and full size, specifications of work, and bills of material shall be filed with the original papers. **If such change affects the price, the amount thereof shall likewise receive such approval.**”

499. The changes to the Project’s fire rating and life safety design were not done in conformance with §153.10 when the OSFC, through LL and SHP, directed TransAmerica to proceed with such changes prior to receiving an approved change order.

500. Under §153.10, the changes were to include “detail to scale and full size, specifications of work, and bills of material.” The change orders initiated by the OSFC, through its agents, failed to satisfy §153.10 when the change orders only included cryptic sketches (as noted below) that lacked key dimensional information that should have been noted on a revised architectural floor plan:



**B. OSFC’s Superior Knowledge, Misrepresentations and Cover-Up**

501. Where an owner possesses superior knowledge not available to a contractor, which is material to the performance of the contractor’s contract, the owner has an

affirmative duty to disclose such knowledge to the contractor; the owner cannot remain silent with impunity. *R.J. Wildner Contracting Co. v. Ohio Turnpike Comm'n*, 913 F. Supp. 1031, 1042 (N.D. Ohio 1996)(“Ohio courts have consistently recognized a cause of action for breach of contract where the government failed to provide necessary information that it had in its possession, or provided inaccurate information.”), citing *Pitt Construction Co. v. City of Alliance*, 12 F.2d 28, 30 (6th Cir. Ohio 1926) and *Valentine-Concrete v. Department of Admin. Serv.*, 62 Ohio Misc. 2d 591, 609 N.E.2d 623, 629 (Ohio Ct. Cl. 1991) and *Condon-Cunningham, Inc. v. Day*, 22 Ohio Misc. 71, 258 N.E.2d 264, 268-69 (Ohio Ct. C.P. 1969); see also *Romanoff Elec. Corp. v. Ohio Dep't of Admin. Servs.*, 10th Dist. Franklin Nos. 92AP-1667 and 92AP-1668, 1994 Ohio App. LEXIS 2835, \*14 (June 30, 1994)(upholding Court of Claims ruling as not contrary to the manifest weight of the evidence where “Court of Claims found that the state had knowledge of the inadequacy of the sewer [design] and, therefore, a duty to disclose such information to the contractors.”).

502. If an owner is in a better position to obtain material information, but fails to provide that information to contractors, or provides inaccurate information, the owner’s failure may amount to a breach of contract. *R.J. Wildner Contracting Co. v. Ohio Turnpike Comm'n*, 913 F. Supp. 1031, 1042 (N.D. Ohio 1996); *Romanoff Elec. Corp. v. Ohio Dep't of Admin. Servs.*, 10th Dist. Franklin Nos. 92AP-1667 and 92AP-1668, 1994 Ohio App. LEXIS 2835, \*14 (June 30, 1994).

503. In *Romanoff Elec. Corp.*, the Court of Claims found that because the public owner was “fully aware” of the need for a better sewer system at the project location and “chose not to include this requirement in the plans and specifications,” the contractor was “entitled to any extra costs as a result of the damages caused by discrepancies in the plans and

specifications.” Ct. of Cl. Nos 91-02567, 91-11922-PR, 1992 WL 12007033, at \*4 (Oct. 26, 1992). In *R.J. Wildner Contr. Co.*, the court held that if the government is in a better position to obtain material information than the contractors, and fails to provide it, or provides inaccurate information, the failure to provide that information may be a breach of contract. 913 F.Supp. 1031 (N.D. Ohio 1996).

504. Courts across the country have adopted this same theory of failure to disclose superior knowledge to award damaged contractors damages against the government. For example, in *Department of General Services v. Pittsburgh Bldg. Co.*, the government’s failure to disclose an internal memorandum providing a candid, in-house assessment of site soil conditions actually encountered by contractor constituted active interference with the contractor’s performance and was a material breach of contract. 920 A.2d 973 (Pa. Commw. Ct. 2007), appeal denied, 595 Pa. 712, 939 A.2d 890 (2007). In *P.T. & L. Const. Co., Inc. v. State of N.J., Dept. of Transp.*, the city materially breached its contract where it withheld information from the contractor about site conditions. 108 N.J. 539, 531 A.2d 1330, 1339–40 (1987). In *Warner Constr. Corp. v. City of Los Angeles*, the owner’s nondisclosure of cave-ins “transformed the logs into misleading half-truths” and amounted to breach of contract. 2 Cal. 3d 285, 85 Cal. Rptr. 444, 449, 466 P.2d 996 (1970). In *Alpert v. Com.*, the owner’s failure to disclose all boring information in its possession amounted to a breach of warranty and entitled the contractor to damages. 357 Mass. 306, 258 N.E.2d 755 (1970). In *Pat J. Murphy, Inc. v. Drummond Dolomite, Inc.*, the owner’s withholding of information about the hardness of material to be excavated amounted to a breach of contract. 232 F. Supp. 509 (E.D. Wis. 1964), judgment aff’d, 346 F.2d 382 (7th Cir. 1965). See also *Baldi Bros. Constructors v. U.S.*, 50 Fed. Cl. 74 (2001);

*Jacksonville Port Authority v. Parkhill-Goodloe Co., Inc.*, 362 So. 2d 1009 (Fla. Dist. Ct. App. 1st Dist. 1978); *Ragonese v. U. S.*, 128 Ct. Cl. 156, 120 F. Supp. 768 (1954).

505. Material misrepresentations also give rise to a breach of contract claim. *See, e.g., Pitt Const. Co. v. Alliance*, 12 F.2d 28, 30 (6th Cir. Ohio 1926) (owner liable for material misrepresentations upon which contractor reasonably relied).

506. In failing to disclose material information to TransAmerica and in misrepresenting material facts, the OSFC materially breached its Contract. *R.J. Wildner Contracting Co. v. Ohio Turnpike Comm'n*, 913 F. Supp. 1031, 1042 (N.D. Ohio 1996); *Romanoff Elec. Corp. v. Ohio Dep't of Admin. Servs.*, 10th Dist. Franklin Nos. 92AP-1667 and 92AP-1668, 1994 Ohio App. LEXIS 2835, \*14 (June 30, 1994); *Valentine Concrete, Inc. v. Ohio Dept. of Adm. Serv.*, 62 Ohio Misc. 2d 591, 609 N.E.2d 623, 629 (Ct. of Cl. 1991).

C. OSFC Breached Its Duty of Good Faith and Fair Dealing

507. Every contract includes a covenant of good faith and fair dealing. *National/Rs, Inc. v. Huff*, 10th Dist. Franklin No. 10AP-306, 2010-Ohio-6530, ¶18 (“every contract includes an implied duty of good faith”), citing *Ed Schory & Sons, Inc. v. Society Natl. Bank*, 75 Ohio St. 3d 433, 443-44, 1996-Ohio-194, 662 N.E.2d 1074; *see also Pertoria, Inc. v. Bowling Green State Univ.*, 10th Dist. Franklin No. 13AP-1033 and 14AP-63, 2014-Ohio-3793, ¶22; *Am. Contractor's Indem. Co. v. Nicole Gas Prod., Ltd.*, 10th Dist. No. 07AP-1039, 2008-Ohio-5056, ¶14; *Myers v. Evergreen Land Dev. Ltd.*, 7<sup>th</sup> Dist. Mahoning No. 07MA123, 2008-Ohio-1062, ¶27; *Metcalf Const. Co., Inc. v. United States*, 742 F.3d 984 (Fed.Cir.2014); *Kiewit-Turner v. Department of Veterans Affairs*, C.B.C.A. 3450 (December 9, 2014).

508. The implied duty of good faith and fair dealing prohibits both parties to a contract from taking opportunistic advantage of the other in a manner inconsistent with the parties' expectations at the time of contracting. *National/Rs, Inc. v. Huff*, 10th Dist. Franklin No.

10AP-306, 2010-Ohio-6530, ¶18, citing *Ed Schory & Sons, Inc. v. Society Natl. Bank*, 75 Ohio St. 3d 433, 443-44, 1996-Ohio-194, 662 N.E.2d 1074; *Myers v. Evergreen Land Dev. Ltd.*, 7<sup>th</sup> Dist. Mahoning No. 07MA123, 2008-Ohio-1062; see also *Metcalf Const. Co., Inc. v. United States*, 742 F.3d 984 (Fed.Cir.2014); *Kiewit-Turner v. Department of Veterans Affairs*, C.B.C.A. 3450 (December 9, 2014).

509. The implied duty of good faith also prohibits both contracting parties from acting to destroy or injure the right of the other party to receive the fruits (or benefit) of its contract. *Pertoria, Inc. v. Bowling Green State Univ.*, 10th Dist. Franklin No. 13AP-1033 and 14AP-63, 2014-Ohio-3793, ¶22, citing with approval *Kirke La Shelle Co. v. Paul Armstrong Co.*, 263 N.Y. 79, 87, 188 N.E. 163 (N.Y.App.1933); *In re Progressive Medina Real Estate, L.L.C.*, 10th Dist. No. 11AP-141, 2012-Ohio-1071, ¶ 23; *Littlejohn v. Parrish*, 163 Ohio App.3d 456, 2005-Ohio-4850, ¶ 26, 839 N.E.2d 49 (1st Dist.); see also *Metcalf Const. Co., Inc. v. United States*, 742 F.3d 984 (Fed.Cir.2014); *Kiewit-Turner v. Department of Veterans Affairs*, C.B.C.A. 3450 (December 9, 2014).

510. In a contract for construction, the owner impliedly warrants that it “will not obstruct, hinder, or delay the contractor, but, on the contrary, will in all ways facilitate the performance of the work to be done by him.” *Craft Gen. Contractors, Inc. v. City of Urbana*, 10th Dist. No. 81AP-346, 1982 Ohio App. LEXIS 13164, at \*21-22 (Feb. 2, 1982) quoting *M. L. Ryder Building Company v. City of Albany*, 187 App. Div. 868, 176 N.Y. Supp. 456 (1919).

511. While contractual relationships are generally governed by the language of the written contract, because written contracts cannot address every possible action or omission by a party, the duty of good faith and fair dealing “fills the gaps” and ensures each contracting party honors the reasonable expectations of the other. *National/Rs, Inc. v. Huff*, 10th Dist.

Franklin No. 10AP-306, 2010-Ohio-6530, ¶18 (the implied duty of good faith is “[a] compact reference to an implied undertaking not to take opportunistic advantage in a way that could not have been contemplated at the time of drafting, and which therefore was not resolved explicitly by the parties.”), quoting *Ed Schory & Sons, Inc. v. Society Natl. Bank*, 75 Ohio St. 3d 433, 443-44, 1996-Ohio-194, 662 N.E.2d 1074; see also *Myers v. Evergreen Land Dev. Ltd.*, 7<sup>th</sup> Dist. Mahoning No. 07MA123, 2008-Ohio-1062; *Metcalfe Const. Co., Inc. v. United States*, 742 F.3d 984 (Fed.Cir.2014).

512. Put another way, “[t]he implied duty of good faith and fair dealing is limited by the original bargain: it prevents a party’s acts or omissions that, though not proscribed by the contract expressly, are inconsistent with the contract’s purpose and deprive the other party of the contemplated value.” *Metcalfe Const. Co., Inc. v. United States*, 742 F.3d 984, 991 (Fed.Cir.2014), citing *First Nationwide Bank v. United States*, 431 F.3d 1342, 1350 (Fed.Cir.2005).

513. In *Metcalfe Const. Co., Inc. v. United States*, the United States Court of Appeals made clear that what matters when assessing a good-faith-and-fair-dealing claim under a construction contract are the parties’ actions with respect to their original bargain. 742 F.3d 984, 991 (Fed. Cir. 2014). In general, “what the duty entails depends in part on what [the] contract promises or disclaims . . . what is promised or disclaimed in a contract helps define what constitutes lack of diligence and interference with or failure to cooperate in the other party’s performance.” *Id.* Where a party interferes with the other party’s performance, or acts to destroy the reasonable expectations of the other party regarding the fruits of the contract, that party has breached the implied duty of good faith and fair dealing and, is so acting, has materially

breached its contract. *Id.*, citing *Centex Corp. v. United States*, 395 F.3d 1283, 1304 (Fed.Cir.2005).

514. In *Kiewit-Turner v. Department of Veterans Affairs*, the United States Civilian Board of Contract Appeals held that the Department of Veterans Affairs did not comply with the implied duty of good faith and fair dealing where it (1) failed to provide a design that could be built for the estimated construction cost, (2) paid no heed to the contractor's value engineering suggestions, (3) delayed progress of construction, (4) disregarded the contractor and engineer's cost estimates, (5) adopted a "independent" cost estimate that was neither independent nor an estimate in that it "was so far below any previous estimate as to be of dubious accuracy," and (6) ultimately directed the contractor to continue work even though the Department refused to appropriately fund the work. C.B.C.A. 3450, 16 (December 9, 2014). Viewing those actions, the Board concluded that the Department had not (1) avoided actions that unreasonably caused delay or hindrance to the contractor's performance or (2) done whatever was necessary to enable the contractor to perform, and that it was "beyond doubt" that the Department's breach of contract was material. *Id.*

515. Failure to comply with the implied duty of good faith amounts to a breach of contract. *National/Rs, Inc. v. Huff*, 10th Dist. Franklin No. 10AP-306, 2010-Ohio-6530, ¶18; *Pertoria, Inc. v. Bowling Green State Univ.*, 10th Dist. Franklin No. 13AP-1033 and 14AP-63, 2014-Ohio-3793, ¶22; *Am. Contractor's Indem. Co. v. Nicole Gas Prod., Ltd.*, 10th Dist. No. 07AP-1039, 2008-Ohio-5056, ¶14; *Myers v. Evergreen Land Dev. Ltd.*, 7<sup>th</sup> Dist. Mahoning No. 07MA123, 2008-Ohio-1062, ¶27; *Metcalf Const. Co., Inc. v. United States*, 742 F.3d 984 (Fed.Cir.2014); *Kiewit-Turner v. Department of Veterans Affairs*, C.B.C.A. 3450 (December 9, 2014)(all addressing implied duty of good faith in the context of a breach of contract claim).

D. OSFC's Numerous Changes and Chaotic Construction Administration Resulted in a Cardinal Change

516. The OSFC breached its contract under the doctrine of cardinal change.

517. Where the government requires a change in the work so drastic "that it effectively requires the contractor to perform duties materially different from those originally bargained for," the government is liable for breach of contract under the doctrine of cardinal change. *See Allied Materials & Equipment Co. v. U.S.*, 215 Ct. Cl. 406, 569 F.2d 562 (1978).

518. Courts across the country use the doctrine of cardinal change to make a wronged contractor whole. In *Air-A-Plane Corp. v. United States*, the Federal Court of Claims held that a "[f]undamental alteration which is drastic modification beyond scope of government contract or which constitutes cardinal change is contract breach entitling contractor to breach damages." 408 F.2d 1030 (Ct. Cl. 1969). In *L.K. Comstock & Co. v. Becon Constr. Co.*, the District Court for the Eastern District of Kentucky explained that the cardinal change doctrine "allows a contractor in a losing contract, where the owner has abused its power, to bring an action for material breach of contract." 932 F. Supp. 906, 910 (E.D. Ky. 1992). In *Exec. Business Media v. United States Dep't of Def.*, the Fourth Circuit explained a "cardinal change occurs when the government alters contract work so drastically that it effectively requires the contractor to perform duties materially different from those originally bargained for." 3 F.3d 759, f.n. 3 (4th Cir. Va. 1993). *See also In re Boston Shipyard Corp.*, 886 F.2d 451, 456 (1st Cir. 1989); *JJK Group, Inc. v. VW Int'l, Inc.*, 2015 U.S. Dist. LEXIS 40961, \*14 (D. Md. Mar. 27, 2015); *Delta Metals, Inc. v. R. M. Wells Co.*, 497 F. Supp. 541, f.n. 1 (S.D. Ga. 1980); *J.A. Jones Const. Co. v. Lehrer McGovern Bovis, Inc.*, 120 Nev. 277, 293, 89 P.3d 1009, 1020 (2004); *Housing Authority of Texarkana v. E.W. Johnson Constr. Co.*, 264 Ark. 523, 573 S.W.2d 316 (Ark. 1978); *Hensel Phelps Construction Co. v. King County*, 57 Wash. App. 170, 787 P.2d

58 (1990); *Watt Plumbing, Air Conditioning and Electric, Inc. v. Tulsa Rig, Reel & Mfg. Co.*, 533 P.2d 980, 982 (Okla. 1975); *Rudd v. Anderson*, 153 Ind. App. 11, 285 N.E.2d 836, 840 (Ind. 1972); *United States ex rel. Sun Constr. Co. v. Torix Gen. Contrs., LLC*, 2009 U.S. Dist. LEXIS 96039, \*7 (D. Colo. Oct. 15, 2009) (all acknowledging cardinal change doctrine).

519. At least one Ohio court has recognized the doctrine of cardinal change in the context of a State construction contract. See *Tony Zumbo & Son Construction v. Ohio Dept. of Transportation*, 22 Ohio App.3d 141, 490 N.E.2d 621 (10th Dist.1984)(allowing contractor to recover reasonable costs of performance created by unanticipated changed conditions).

520. A change amounts to a material breach of contract, and becomes a “cardinal” change, where it “fundamentally alters” the contractor’s original undertaking. *Allied Materials & Equip. Co. v. U.S.*, 215 Ct. Cl. 406, 569 F.2d 562, 563 (Ct. Cl. 1978) (“a cardinal change is so profound that it is not redressable under the contract, and thus renders the government in breach.”); *L.K. Comstock & Co. v. Becon Constr. Co.*, 932 F. Supp. 906, 937 (E.D. Ky. 1992) (“theory of cardinal change allows a contractor in a losing contract, where the owner has abused its power, to bring an action for material breach of contract.”).

521. There is no precise formula for determining when an owner-caused change is “cardinal” and thus amounts to a material breach of contract; instead, each case must be analyzed in light of the totality of the circumstances. *Air-A-Plane v. United States*, 187 Ct. Cl. 269, 408 F.2d 1030, 1033 (Ct. Cl. 1969).

522. A change that causes the contractor to incur great delay and expense can also amount to a “cardinal” change. For example, in *Oberer Constr. Co. v. Park Plaza, Inc.*, 18 Ohio Op. 2d 198, 179 N.E.2d 168 (C.P.1961), an owner materially breached its contract by ordering an earth-moving contractor to deviate significantly from the plan included in its original

contract. *Id.* at 6-7. The change required significantly more excavation and the redrafting of an entirely new grade on a project site causing the contractor significant delay and additional cost. *Id.* The court held the owner's change was "wrongful," amounted to a breach of contract, and entitled the contractor to restitution. *Id.* at 6-10.

523. A "cardinal" change can result from delay in providing adequate construction drawings. For example, in *Westinghouse Electric Corp. v. Garrett Corp.*, 437 F. Supp. 1301 (D. Md. 1977) aff'd 601 F.2d 155 (4th Cir. 1979), a general contractor fundamentally altered a subcontractor's undertaking, and thus materially breached its contract, where it delayed in furnishing plans needed to efficiently complete the contract. *Id.* at 1333. Without adequate drawings, the subcontractor incurred substantial additional costs trying to overcome deficiencies while maintaining a tight completion schedule. *Id.* at 1333. The District Court reasoned, "[h]aving [accurate drawings] to work from was in some sense the basis of [the subcontractor's] bargain." *Id.* As part of its undertaking, "[the subcontractor] was entitled to the ease of working from a single source of information and to the facilitation of incorporating otherwise disruptive changes that come from having such a source or 'base line.' On a contract with a delivery schedule as tight as that at issue, source control drawings become critical . . . it goes to the heart of the vendor's undertaking." *Id.*

524. An owner-caused change can be "cardinal" when it unduly increases the cost of the work. *See, e.g., Peter Kiewit Sons' Co. v. Summit Const. Co.*, 422 F.2d 242, 255 (8th Cir. 1969) (cardinal change found where cost of backfilling operation increased from \$600,000 to approximately \$2 million); *Edward R. Marden Corp. v. U. S.*, 194 Ct. Cl. 799, 442 F.2d 364, 369, 370 (1971) (cardinal change found where cost of construction more than doubled due to structural design errors); *Employers Ins. of Wausau v. Construction Management Engineers of*

*Florida, Inc.*, 297 S.C. 354, 377 S.E.2d 119 (Ct. App. 1989) (cardinal change releasing surety company from obligations under bond where contract value increased from \$2.3 million to \$6.2 million).

525. A series of owner-caused changes can amount to a “cardinal” change when such changes fundamentally alter a contractor’s undertaking under its original contract. For example, in *Air-A-Plane*, 187 Ct. Cl. 269, 408 F.2d 1030, 1033 (Ct. Cl. 1969), the United States Court of Claims held a contractor was entitled to a trial on cardinal change when the government’s numerous changes caused a fixed price production contract to resemble a design or development contract. *Id.* at 273-274. The government’s numerous changes significantly disrupted the plaintiff’s production process and “fundamentally altered” the contractor’s original undertaking. *Id.*

526. When determining if a change is “cardinal,” courts assess the impact on the contractor’s entire undertaking, not just impacts on the final product. *Rumsfeld v. Freedom NY, Inc.*, 329 F.3d 1320 (Fed. Cir. 2003) adhered to on denial of reh’g en banc, 346 F.3d 1359 (Fed. Cir. 2003) (“[c]ardinal change, whereby government breaches contract, can occur even when there is no change in final product, because it is the entire undertaking of the contractor, rather than the product, to which court looks”); see also *J.A. Jones Const. Co. v. Lehrer McGovern Bovis, Inc.*, 120 Nev. 277, 295, 89 P.3d 1009, 1021 (2004) (lower court was to look to what impact the change had on the contractor’s entire undertaking).

527. Because a cardinal change amounts to a breach of contract, a cardinal change excuses a contractor from strict compliance with notice provisions under the “changes” provision in its contract. For example, in *Nat Harrison Assoc., Inc. v. Gulf State Utilities Co.*, 491 F.2d 578 (5th Cir. 1974), the government argued the contractor’s suit was barred because it

failed to comply with notice requirements under its contract. After acknowledging the purpose and enforceability of notice provisions, the Fifth Circuit held, “[t]here is a point, however, at which changes in the contract are to be considered beyond the scope of the contract and inconsistent with the ‘changes’ section.” *Id.* at 583. The Fifth Circuit held, “[d]amages can be recovered without fulfillment of the written notice requirement where the changes are outside the scope of the contract and amount to breach.” *Id.*

528. Executed change orders do not limit a contractor’s recovery where the owner causes a cardinal change. *Atlantic Dry Dock Corp. v. United States*, 773 F. Supp. 335 (M.D. Fla. 1991)(court refused to bar cardinal change claim as matter of law on grounds of accord and satisfaction despite presence of 130 change orders providing that each change was "in full and final settlement of all claims arising out of this modification including all claims for delays or disruptions resulting from, caused by, or incident to such modifications or change orders"); *Jack Cooper Constr. Co.*, 84-3 BCA (CCH) P 17,703 (V.A. 1984) (contractor’s execution of 20 modifications to a contract did not prevent Board of Contract Appeals from considering applicability of cardinal change doctrine); *In re Boston Shipyard Corp.*, 886 F.2d 451 (1st Cir. 1989) (even though the contractor executed a contract modification which "settled all contractor's claims," the court still examined the overall scope of the contractor's changed obligations to determine whether a cardinal change occurred); *Nat Harrison Assoc., Inc. v. Gulf State Utilities Co.*, 491 F.2d 578, 584-85 (5th Cir. 1974) (contractor's release of claims for additional compensation "for extra work of any nature" did not preclude a recovery under a cardinal change analysis).

529. The OSFC’s obligation set forth in O.R.C. §153.01 to furnish buildable plans goes to the heart of TransAmerica’s undertaking. *See, e.g., Westinghouse Electric Corp. v.*

*Garrett Corp.*, 437 F. Supp. 1301 (D. Md. 1977) aff'd 601 F.2d 155 (4th Cir. 1979)(sufficient plans went to heart of contractor's undertaking).

530. Because the OSFC materially breached its Contract, any alleged failures by TransAmerica to strictly comply with Article 8 notice requirements do not limit TransAmerica's recovery. *See, e.g., Nat Harrison Assoc., Inc. v. Gulf State Utilities Co.*, 491 F.2d 578 (5th Cir. 1974).

531. Executed change orders do not limit TransAmerica's recovery under the doctrine of cardinal change. *See Nat Harrison Assoc., Inc. v. Gulf State Utilities Co.*, 491 F.2d 578, 584-85 (5th Cir. 1974); *Atlantic Dry Dock Corp. v. United States*, 773 F. Supp. 335 (M.D. Fla. 1991).

E. OSFC Cannot Insist On Strict Compliance When It Was the First to Breach

532. Once there has been a material breach of the contract, the non-breaching party is not required to fulfill the remaining terms of the contract, and the breaching party is not entitled to collect damages from the non-breaching party. *See Brakefire, Inc. v. Overbeck*, 144 Ohio Misc. 2d 35, 58 (Ohio C.P. 2007)(“[u]nder Ohio law, a non-breaching party to a contract is excused from complying with conditions of the contract, when the party for whose benefit the condition operates has already materially breached the contract”), citing *Waste Mgt., Inc. v. Rice Danis Indus. Corp.*, 257 F.Supp.2d 1076, 1084 (S.D.Ohio 2003); *N.L. Constr. Corp. v. Ohio Dep't of Admin. Servs.*, Ct. of Cl. No. 2011-08318, 2012-Ohio-6328, ¶27 (owner's premature termination of contract was a material breach which excused contractor from future performance), citing *Software Clearing House, Inc. v. Intrak, Inc.*, 66 Ohio App.3d 163, 583 N.E.2d 1056 (1st Dist. 1990) and *Kersh v. Montgomery Dev. Ctr.*, 35 Ohio App.3d 61, 62, 519 N.E.2d 665 (10th Dist.1987).

533. Courts in Ohio and across the country have applied the doctrine of first breach in construction disputes. *See Anvil Min. Co. v. Humble*, 153 U.S. 540, 552, 14 S. Ct. 876, 38 L. Ed. 814 (1894); *Centex Constr. v. Acstar Ins. Co.*, 448 F. Supp. 2d 697 (E.D. Va. 2006) (“[a]s a general rule, a party who commits the first material breach of a contract is not entitled to enforce the contract.”); *Murphy Oil USA, Inc. v. Wood*, 438 F.3d 1008 (10th Cir. 2006) (“[w]ho prevents or hinders performance thereof cannot seek performance by the other contracting party. This is the so-called ‘first breach’ defense.”); *James Talcott Const., Inc. v. Mississippi Power Co. v. Water and Power Technologies, Inc.*, 2006 WL 3457026 (S.D. Miss. 2006) (excusing a contractor's further performance following the owner's material breach); *Enron Federal Solutions, Inc. v. U.S.*, 80 Fed. Cl. 382, 398 (2008) (“a party who materially breaches a contract relieves the non-breaching party from all of the non-breaching party's contract obligations to the breaching party.”); *Emerson Const. Co., Inc. v. Ranger Fire, Inc.*, 2013 WL 4817551 (Tex. App. Austin 2013)(contractor could not recover damages for a subcontractor's breach of contract, where the contractor committed the first material breach and thus discharged or excused the subcontractor's further performance); *RMDG Const., LLC v. Oakwood Custom Homes Group, LTD*, 2014 WL 2566484 (Tex. App. Waco 2014); *P & D Land Enterprises*, 2006 MT 188, 333 Mont. 107, 141 P.3d 1200 (2006); *Commonwealth Const. Co. v. Cornerstone Fellowship Baptist Church, Inc.*, 2006 WL 2567916 (Del. Super. Ct. 2006); *Jay Dee/Mole Joint Venture v. Mayor and City Council of Baltimore*, 725 F. Supp. 2d 513 (D. Md. 2010); *1.9 Little York, Ltd. v. Alice Trading Inc.*, 2012 WL 897776 (Tex. App. Houston 1st Dist. 2012).

534. Because the OSFC materially breached its contract, TransAmerica was excused from complying with strict notice and certification requirements which might otherwise limit TransAmerica's claim. *See N.L. Constr. Corp. v. Ohio Dep't of Admin. Servs.*, Ct. of Cl.

No. 2011-08318, 2012-Ohio-6328, ¶27 (“[d]amages can be recovered without fulfillment of the written notice requirement where the changes are outside the scope of the contract and amount to breach.”).

535. Because the OSFC materially breached its contract previously, the OSFC’s counterclaims for liquidated damages and roof repairs are barred.

F. Under the Doctrine of Prevention of Performance, OSFC Cannot Insist On Strict Compliance with the Contract, including GC Article 8

536. The OSFC cannot rely on alleged failures to strictly comply with Article 8 notice requirements when the OSFC, through the mismanagement and misrepresentations of its architect and construction manager, prevented TransAmerica’s from submitting notice and from certifying its claim earlier. *Steel Serv. Corp. v. City of Cincinnati*, No. 1:05-CV-504, 2007 WL 782175, at \*8 (S.D. Ohio Mar. 13, 2007)(“Ohio law excuses the non-breaching party to a contract from complying with conditions of the contract when the party for whose benefit the condition operates has already materially breached the contract”).

537. A party who prevents performance of another cannot take advantage of such noncompliance or nonperformance. *Suter v. Farmers Fertilizer Co.*, 100 Ohio St. 403, 126 N.E. 304 (1919); *see also Wajda v. M&J Auto., Inc.*, 7th Dist. No. 10-MA-7, 2010-Ohio-2583 at ¶22; *Walsh v. Patitucci*, 8th Dist. No. 93717, 2009-Ohio-6829, ¶31; *Blake Homes, Ltd. V. FirstEnergy Corp.*, 173 Ohio App.3d 230, 2007-Ohio-4604, 877 N.E.2d 1041 (6th Dist.); *First Energy Solutions v. Gene B. Glick Co.*, 9th Dist. No. 23646, 2007-Ohio-7044, at ¶35; *Lakes v. Mayo*, 12th Dist. No. CA-2006-01-003, 2006-Ohio-6072, at ¶7; *Tucker v. Young*, 4th Dist. No. 04CA10, 2006-Ohio-1126, at ¶25; *Stone Excavating, Inc. v. Newmark Homes, Inc.*, 2nd Dist. No. 20307, 2004-Ohio-4119; *Nious v. Griffin Constr., Inc.*, 10th Dist No. 03AP-980, 2004-Ohio-4103, at ¶16; *Thorn v. Schneiderman-Welch*, 5th Dist. Stark No. 98-CA-00261, 1999 Ohio App.

LEXIS 3674, \*17 (Aug. 2, 1999); *Gary Crim, Inc. v. Rios*, 114 Ohio App. 3d 433, 436, 683 N.E.2d 378 (7th Dist. 1996); *Dynes Corp. v. Seikel, Koly & Co., Inc.*, 100 Ohio App. 3d 620, 654 N.E.2d 991 (8th Dist. 1994); *Wittrock v. Paragon Paper Co.*, 1st Dist. App. No. C-840883, 1985 Ohio App. LEXIS 9676, at \*11 (Dec. 18, 1985).

538. Ohio courts universally apply the rule that where a party prevents occurrence of a condition, the condition is excused. *See Fort Saginaw Plaza, Inc. v. Hyon Kil Shin*, 7th Dist. Mahoning No. 12 MA 59, 2013-Ohio-429, ¶15; *Whitaker v. Advantage RN, LLC*, 12th Dist. Butler, No. CA2012-04-082, 2012-Ohio-5959, ¶30 (Ohio Ct. App., Butler County Dec. 17, 2012); *Landis v. William Fannin Builders, Inc.*, 193 Ohio App. 3d 318, 334, 2011-Ohio-1489, 951 N.E.2d 1078 (10th Dist.); *Goodman Bev. Co. v. Kerr Bev. Co.*, 9th Dist. Lorain No. 02CA008142, 2003-Ohio-2845, ¶29; *Crawford v. By Lamb Builders, Inc.*, 10th Dist. Franklin No. 93AP-282, 1993 WL 303684, at \*5 (Aug. 10, 1993).

539. The OSFC prevented TransAmerica from more fully complying with Article 8 requirements by prematurely denying TransAmerica's claim on March 1, 2011, when LL advised TransAmerica that it considered TransAmerica's February 17, 2011 notification "closed at this time," thereby rejecting TransAmerica's claim before it was submitted. *See J&H Reinforcing & Structural Erectors, LLC v. Ohio Sch. Facilities Comm'n*, Ct. of Cl. No. 2010-07644, 2012-Ohio-5298, affirmed *J&H Reinforcing & Structural Erectors, Inc. v. Ohio Sch. Facilities Comm'n*, 10th Dist. No. 12AP-588, 2013-Ohio-3827 (OSFC waived notice provisions where construction manager directed contractor to stop writing notice letters).

540. As the OSFC misrepresented the state of the design and what would be done to redress the problem, the OSFC prevented TransAmerica from taking earlier action to mitigate its damages or perfect its claim.

541. As the OSFC prevented TransAmerica's performance, strict notice and certification requirements in TransAmerica's Contract were excused, and alleged failures to comply with those provisions do not limit TransAmerica's claim.

G. TransAmerica Complied with All Aspects of the Contract, including GC Article 8

542. To the extent notice and certification requirements were important to put the OSFC on notice of TransAmerica's claim, TransAmerica substantially complied with those requirements by submitting numerous letters to the OSFC, SHP, and LL, throughout the project, thereby timely notifying the OSFC of impacts TransAmerica was incurring and of TransAmerica's potential claim. *See Stonehenge Land Co. v. Beazer Homes Invs., LLC*, 177 Ohio App. 3d 7, 11, 2008-Ohio-148, 893 N.E.2d 855 (10th Dist.) (“[w]here there is evidence of actual notice, a technical deviation from a contractual notice requirement will not bar an action for breach of contract brought against a party that had actual notice.”), citing *Interstate Gas Supply, Inc. v. Calnex Corp.*, 10th Dist. Franklin No. 04AP-980, 2006-Ohio-638; *see also Roger J. Au & Son, Inc. v. Northeast Regional Sewer Dist.*, 29 Ohio App.3d 284, 504 N.E.2d 1209 (8<sup>th</sup> Dist.1986)(failure to give formal notice of claim did not bar the claim because responsible officials were aware of the facts giving rise to the claim), citing *Appeal of Nelson Bros. Const.*, AGBCA No. 393, 77-2 B.C.A. (CCH) ¶12660 (July 27, 1977); *Craft Gen. Contractors, Inc. v. City of Urbana*, 10th Dist. No. 81AP-346, 1982 Ohio App. LEXIS 13164, at \*23 (Feb. 2, 1982)(boilerplate notice provision did not defeat contractor's claim where owner had “independent knowledge of the condition complained of and . . . [was] not prejudiced by lack of earlier notice”).

543. The OSFC, through its agents SHP and LL, had actual notice of TransAmerica's claim and thus cannot rely on technical deviations to avoid liability for its breach of contract. *Stonehenge Land Co. v. Beazer Homes Invs., LLC*, 177 Ohio App. 3d 7, 11,

2008-Ohio-148, 893 N.E.2d 855 (10th Dist.); *Roger J. Au & Son, Inc. v. Northeast Regional Sewer Dist.*, 29 Ohio App.3d 284, 504 N.E.2d 1209 (8<sup>th</sup> Dist.1986); *Craft Gen. Contractors, Inc. v. City of Urbana*, 10th Dist. No. 81AP-346, 1982 Ohio App. LEXIS 13164, at \*23 (Feb. 1982).

544. OSFC's assertion that TransAmerica failed to exhaust its administrative remedies is an affirmative defense upon which OSFC bears the burden of proof. *Cleveland Constr. Inc. v. Kent State Univ.*, 10th Dist. No. 09AP-822, 2010-Ohio-2906.

H. R.C. §4113.62 Precludes OSFC From Applying the Contract, including Article 8 and Change Orders, in a Manner that Precludes Liability For The Delays It Caused

545. The Ohio Fairness in Construction Contracting Act, O.R.C. §4113.62, prohibits the OSFC from relying on boilerplate contract terms to preclude TransAmerica's recovery when delay was caused by the OSFC and/or its agents. *Cleveland Constr., Inc. v. Ohio Public Emps. Retirement Sys.*, 10th Dist. Franklin App. No. 07AP-574, 2008-Ohio-1630 (pursuant to R.C. 4113.62(C)(1) "an owner cannot cause a delay, and then avoid the natural consequences for causing the delay by using boilerplate contract language."); *see also J&H Reinforcing & Structural Erectors, LLC v. Ohio Sch. Facilities Comm'n*, Ct. of Cl. No. 2010-07644, 2012-Ohio-5298, ¶53.

546. The OSFC's "no damages for delay" provisions contained in the General Conditions (i.e. GC paragraphs 4.1.2) are void and unenforceable as against public policy. R.C. §4113.62(C)(1).

547. In this case, the OSFC failed to properly administer the Article 8 process and its wrongful application violates R.C. §4113.62.

548. To the extent the OSFC's **application** of Article 8 notice or certification requirements prevents any remedy for the delays the OSFC has caused, such **application** is void and unenforceable by operation of R.C. §4113.62, and thus do not limit or preclude

TransAmerica's claim. *Cleveland Constr., Inc. v. Ohio Public Emps. Retirement Sys.*, 10th Dist. Franklin App. No. 07AP-574, 2008-Ohio-1630; *J&H Reinforcing & Structural Erectors, LLC v. Ohio Sch. Facilities Comm'n*, Ct. of Cl. No. 2010-07644, 2012-Ohio-5298, ¶53.

549. §4113.62(C)(1) precludes the OSFC from applying the provisions of Article 8 in a manner that precludes its liability for the delay damages caused by its actions or inactions. §4113.62(C)(1) provides:

(a) **“Any provision of a construction contract . . . 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.”**(emphasis provided).

550. OSFC failed to properly apply its Article 8 provisions in conformance with §4113.62(C)(1) when it:

- (a) Failed to provide the updated construction set it promised multiple times, including in response to TransAmerica's February 2011 Article 8 notice.
- (b) Prematurely denied TransAmerica February 2011 Article 8 notice and request for extension of time.
- (c) Failed to grant or even evaluate TransAmerica's requests for extension of time.
- (d) Denied TransAmerica's requests for time in various change orders.
- (e) Represented the added time would be resolved through the Article 8 process.
- (f) Acknowledged the OSFC's liability for delaying the Project by requesting pricing for Recovery Schedule 3, but then denying such pricing.
- (g) Allowed LL to deny TransAmerica's claim asserting that TransAmerica did not comply with Article 8 nor provided sufficient documentation to justify its claim.

(h) Failed to provide any type of schedule analysis or attempted to quantify any alleged TransAmerica delay to the Project.

551. §4113.62(C)(1) precludes the OSFC from denying TransAmerica's multiple requests for extensions of time (without justification) but then avoiding liability for TransAmerica delay damages by arguing:

- (a) TransAmerica failed to comply with the Article 8 provisions; or
- (b) TransAmerica released its claims for delay damages through boiler plate change order language.

552. Based on its misapplication of the Article 8 process and its insistence that TransAmerica now strictly comply, OSFC seeks to be released from all liability for the six (6) month delay caused by its actions and inactions, which is exactly what §4113.62(C)(1) precludes an owner from doing.

I. OSFC Waived Strict Compliance with the Contract, Including Articles 7 and 8

553. While it is well-established that waiver is a voluntary relinquishment of a known right, the doctrine of waiver by estoppel allows a party's inconsistent conduct, rather than a party's intent, to establish a waiver of rights. *Aggressive Mech., Inc. v. Ohio Sch. Facilities Comm'n*, Ct. of Cl. No. 2010-12745, 2012-Ohio-6332, ¶23-25 (OSFC waived 10-day notice requirement by acting in a manner inconsistent with an intent to claim strict compliance), citing *Lewis & Michael Moving and Storage, Inc. v. Stofcheck Ambulance Serv., Inc.*, 10th Dist. No. 05AP-662, 2006-Ohio-3810, ¶29-30.

554. Waiver by estoppel exists when the acts and conduct of a party are inconsistent with an intent to claim a right, and have been such as to mislead the other party to his prejudice and thereby estop the party having the right from insisting upon that right. *Aggressive Mech., Inc. v. Ohio Sch. Facilities Comm'n*, Ct. of Cl. No. 2010-12745, 2012-Ohio-

6332, ¶23, citing *Lewis & Michael Moving and Storage, Inc. v. Stofcheck Ambulance Serv., Inc.*, 10th Dist. No. 05AP-662, 2006-Ohio-3810, ¶29-30.

J. Change Orders Are Not Enforceable When Signed By An Unlicensed Architect Contrary To the Terms of the OSFC/SHP Agreement

555. The Agreement for Professional Design Services between the OSFC and SHP required a licensed architect to perform construction administration, as noted below:

**6. SHP Leading Design (lead design professional) shall provide and maintain a licensed architect to oversee Contract Administration and Close-out Phases. The designated professional contract administrator shall remain assigned to project until completion of entire project.**

Appendix D in the SHP/OSFC Agreement No. 3 for Professional Design Services (JX-N-03/40))

556. SHP/OSFC Agreement No. 3, paragraph 1.1.5 designated Andrew Maletz “as a key person to provide on-going services consistent with the responsibilities set forth in this Agreement” and that if Mr. Maletz “ceases to perform on-going services” SHP agrees to a reduction of \$50,000. (JX-N-03)

557. Mr. Predovich and not Mr. Maletz was the SHP contact person for the construction of the dormitories and yet the OSFC failed to reduce SHP’s contract amount. (Josh Predovich)

558. On February 28, 2011, SHP amended its agreement with Berardi based on “SHP taking on a proportionally greater amount of time and responsibilities thru this phase.” (TA-0249)

559. Josh Predovich was not a licensed architect during the design and construction of the dormitories. (Josh Predovich)

560. Josh Predovich was not a licensed architect when he signed numerous changes orders, including Change Orders 25 and 26. (Josh Predovich and JX-F-25, and JX-F26)

561. As supported by the following cases, those change orders signed by Josh Predovich are not enforceable and do not limit TransAmerica's claim.

(a) In the contract, the architect warranted it was properly licensed to carry out the items of the agreement. The court held the contract for architectural services was unenforceable and that the architect's lien was invalid since the architect was not registered or licensed in Florida. (*O'Kon and Co., Inc. v. Riedel*, 588 So. 2d 1025 (Fla. 1<sup>st</sup> DCA 1991)).

(b) A person practicing a profession without a license cannot recover for services provided. Moreover, to allow the architect to keep the fees already paid would have allowed it to reap rewards against public policy. *Ransburg v. Haas*, 224 Ill. App. 3d 681, 167 Ill. Dec. 23, 586 N.E.2d 1295 (3d Dist. 1992).

(c) The legislative prohibition against unregistered engineering services necessarily made the contract unenforceable. *Wheeler v. Bucksteel Co.*, 73 Or. App. 495, 698 P.2d 995 (1985).

K. OSFC Precluded TransAmerica from Further Investigating and Defending Itself When It Replaced the Roof at Blind 1 Without Allowing TransAmerica Access to the Replacement Operation

562. Ohio law recognizes the sanction of exclusion of evidence as a remedy for a party's spoliation of evidence. *See, e.g., Loukinas v. Roto-Rooter Svc. Co.*, 167 Ohio App.3d 559, 2006-Ohio-3172, 855 N.E.2d 1272 (1st Dist)(affirming trial court's exclusion of evidence as a sanction where spoiling party ignored repeated requests of moving party to be present at time of an excavation); *Watson v. Ford Motor Co.*, 6th Dist. Erie No. E-06-074, 2007-Ohio-6374, ¶51 (affirming trial court's exclusion of expert testimony where car was destroyed before moving party had an opportunity to examine it); *RFC Capital Corp. v. EarthLink, Inc.*, 10th Dist. Franklin No. 03AP-735, 2004-Ohio-7046, ¶90 (explaining that spoliation can be used as a defense but reversing trial court's exclusion of evidence where employee purged documents after litigation began but presumption of prejudice was rebutted by admission that no relevant documents existed and, thus, employee's purge of documents "did not deprive RFC of favorable evidence.").

563. The proponent of a motion for exclusion of evidence based on spoliation must establish (1) that the spoiled evidence is relevant; (2) that the plaintiff's expert had an opportunity to examine the unaltered evidence; and (3) that, even though the plaintiff was contemplating litigation against the defendant, this evidence was intentionally or negligently destroyed or altered ("spoiled") without providing an opportunity for inspection by the defense. *Watson v. Ford Motor Co.*, 6th Dist. Erie No. E-06-074, 2007-Ohio-6374, ¶51; *Loukinas v. Roto-Rooter Svc. Co.*, 167 Ohio App.3d 559, 2006-Ohio-3172, 855 N.E.2d 1272 (1st Dist); *RFC Capital Corp. v. EarthLink, Inc.*, 10th Dist. Franklin No. 03AP-735, 2004-Ohio-7046, ¶90.

564. Once the proponent establishes those three things, the proponent enjoys a rebuttable presumption that it is was prejudiced by the destruction of relevant evidence, and the burden shifts to the plaintiff (counterclaimant OSFC here) to persuade the trial court that "there is no reasonable possibility that lack of access to the unaltered or intact product deprived the proponent of favorable evidence." *Watson v. Ford Motor Co.*, 6th Dist. Erie No. E-06-074, 2007-Ohio-6374, ¶51; *Loukinas v. Roto-Rooter Svc. Co.*, 167 Ohio App.3d 559, 2006-Ohio-3172, 855 N.E.2d 1272 (1st Dist); *RFC Capital Corp. v. EarthLink, Inc.*, 10th Dist. Franklin No. 03AP-735, 2004-Ohio-7046, ¶90.

565. The OSFC did not meet its burden to show that "there is no reasonable possibility that lack of access [to the underlayment of the roof before the repair] deprived [TransAmerica] of favorable evidence." *Watson v. Ford Motor Co.*, 6th Dist. Erie No. E-06-074, 2007-Ohio-6374, ¶51; *Loukinas v. Roto-Rooter Svc. Co.*, 167 Ohio App.3d 559, 2006-Ohio-3172, 855 N.E.2d 1272 (1st Dist); *RFC Capital Corp. v. EarthLink, Inc.*, 10th Dist. Franklin No. 03AP-735, 2004-Ohio-7046, ¶90.

566. The OSFC spoiled evidence relevant to TransAmerica's defense. Therefore the OSFC shall not be entitled to an off-set for allegedly defective roof work. *Watson v. Ford Motor Co.*, 6th Dist. Erie No. E-06-074, 2007-Ohio-6374, ¶51; *Loukinas v. Roto-Rooter Svc. Co.*, 167 Ohio App.3d 559, 2006-Ohio-3172, 855 N.E.2d 1272 (1st Dist); *RFC Capital Corp. v. EarthLink, Inc.*, 10th Dist. Franklin No. 03AP-735, 2004-Ohio-7046, ¶90.

L. OSFC Wrongfully Imposed Liquidated Damages Against TransAmerica

567. The Contract did not condition TransAmerica's recovery of wrongfully-withheld liquidated damages on TransAmerica's provision of ten days' notice.

568. There is no mention anywhere in TransAmerica's Contract of a requirement that TransAmerica provide notice of its objection to the OSFC's wrongful withholding of liquidated damages as a condition precedent to its recovery of wrongfully-withheld amounts.

569. GC Section 8.7 of the General Conditions of the Contract leaves the issue of recovering wrongfully-withheld liquidated damages completely unmentioned, and does not condition TransAmerica's recovery on its provisions of notice.

570. Section 3.3 of the Contract Form also does not condition TransAmerica's recovery of wrongfully-withheld liquidated damages on its provision of notice.

571. GC Article 8 does not condition TransAmerica's recovery of wrongfully-withheld liquidated damages on TransAmerica's provision of notice.

572. Unlike cases previously brought before the Ohio Court of Claims, the Contract here **does not** condition TransAmerica's recovery of wrongfully withheld liquidated damages on TransAmerica's provision of notice. *See Dugan & Meyers Constr. Co. v. Ohio Dep't of Admin. Servs.*, 113 Ohio St. 3d 226, 2007-Ohio-1687, ¶41, 864 N.E.2d 68 (contract unambiguously made Dugan & Meyers' ability to mitigate liquidated damages contingent on its

provision of written notice); *see also Tritonservices, Inc. v. Univ. of Cincinnati*, Ct. of Cl. Nos. 2009-02324, 2011-Ohio-7010, ¶22 (contract precluded from mitigating liquidated damages where its contract unambiguously conditioned the contractor's recovery of wrongfully withheld liquidated damages on its provision of notice).

573. Insistence that TransAmerica failed to strictly follow the Article 8 process for the OSFC's wrongful imposing of liquidated damages ignores the fact that TransAmerica provided numerous written requests for extension of time, which were acknowledged by the OSFC but not properly evaluated, due in part to the flawed critical path, nor granted as required under GC paragraph 6.3.1.

574. The ten-day notice requirement contained in GC Article 8 applies only to "Claims," a *term-of-art* which refers only to events or acts that directly "impact" construction. The act of withholding liquidated damages does not give rise to a "Claim" under Article 8. Examining GC Article 8 proves the point: (1) GC paragraphs 8.1.1.1, 8.1.1.2 and 8.1.1.3 require ten-days' notice of a "Claim" in three particular circumstances, all three of which would **directly "impact"** construction (unlike an owner's wrongful withholding of liquidated damages); and (2) Article 8 required TransAmerica to substantiate its "Claim" directly in terms of the "impact" the event or action giving rise to the "Claim" would have on construction underway, creating an unintended result if the owner's wrongful withholding of liquidated damages actually gave rise to a "Claim."

575. To the extent the ten-day notice provision in Article 8.1.1 of TransAmerica's Contract is open to multiple interpretations, that ambiguity must be construed against the OSFC. *See, e.g., Albert v. Shiells*, 10th Dist. No. 02Ap-354, 2002-Ohio-7021, ¶20 ("where the meaning of a contract is ambiguous, the ambiguity should be construed against the

drafting party”), citing *Central Realty Co. v. Clutter*, 62 Ohio St.2d 411, 413, 406 N.E.2d 515 (1980).

576. If the OSFC’s withholding of liquidated damages gave rise to a “Claim” under Article 8, unreasonable and unintended results would occur. A Contractor would also need to initiate a “Claim” under Article 8 every time additional monies were due, including draws only slightly late, small change orders, or any other time nominally amounts were wrongfully withheld. Contracts are construed to avoid wherever possible absurdities or other consequences clearly not intended by the contracting parties. *See, e.g., Medicilincs Family Practice, Inc. v. Village Med. Ctr.*, 1986 Ohio App. LEXIS 6006, \*5 (10th Dist. Mar. 18, 1986)(rejecting interpretation that produced “absurd” consequences); *Wolfer Enters. V. Overbrook Dev. Corp.*, 132 Ohio App. 3d 353, 356-357 (1st Dist. 1990) (rejecting interpretation that rendered contract “internally inconsistent, [did] not harmonize all of its provisions, and allow[ed] for [an] absurd result.”).

577. The OSFC cannot rely the application of boilerplate provisions in GC Article 8 to avoid its responsibility for causing delay on the Project or to shift that responsibility to TransAmerica. *Cleveland Constr. Inc., v. Ohio Pub. Emples. Ret. Sys.*, 10th Dist. Franklin No. 07AP-574, 2008-Ohio-1630, ¶19.

M. TransAmerica Properly Supported Its Damages, Including Its Loss of Productivity for Rough Carpentry Using the Measured Mile

578. Under Ohio law, once a plaintiff establishes a right to damages, that right will not be denied because damages cannot be calculated with mathematical certainty; rather, a plaintiff must only show entitlement to damages in an amount ascertainable with reasonable certainty. *See Bauer v. Georgeff*, 10th Dist. Franklin No. 97APE03-313, 1998 Ohio App. LEXIS 4144, \*11 (Sept. 1, 1998); *Tri-State Asphalt Corp. v. Ohio Dep't of Transp.*, 10th Dist. Franklin

No. 94API07-986, 1995 Ohio App. LEXIS 1554, \*14 (Apr. 11, 1995); *Allied Erecting Dismantling Co. v. City of Youngstown*, 151 Ohio App. 3d 16, 32, 2002-Ohio-5179, 783 N.E.2d 523 (7th Dist); *M.L. Simmons v. Bellman Plumbing*, 1995 Ohio App. LEXIS at \*18 (8th Dist).

579. When proving loss of productivity, the measured mile approach is the preferred method of computing damages. *J&H Reinforcing & Structural Erectors, Inc. v. Ohio Sch. Facilities Comm'n*, 10th Dist. Franklin No. 12AP-588, 2013-Ohio-3827, ¶112 (upholding referee's analysis of labor inefficiencies using measured mile).

580. The measured mile approach has been adopted by courts across the country when calculating labor efficiency damages. *See James Corp. v. North Allegheny School Dist.*, 938 A.2d 474, 495 (Pa. Commw. 2007)(measured mile approach is the preferred method of computing inefficiency damages), citing *Aetna Cas. Surety Co. v. The George Hyman Constr. Co.*, No. 93-CV-4570, 1998 U.S. Dist. Lexis 22627 (E.D.Pa. May 15, 1998) and *Angelo Iafrate Constr. Co., Inc. v. Pa. Tpk. Comm'n*, 2006 Pa. Bd. Cl. Lexis 3 (Dkt. No. 3654, Pa.Bd.Cl.2006); *Central Ceilings Inc. v. Suffolk Construction Company, Inc.*, 2013 Mass. Super. LEXIS 230 (Dec. 19, 2013)(measured mile generally the preferred method of computing damages); *Contract Management Inc. v. Babcock & Wilson*, 2013 U.S. Dist. LEXIS 1673 (E.D. Tenn. Jan. 4, 2013)(measured mile upheld in Tennessee as a reasonable method for proving lost productivity damages); *In re Electric Machinery Enterprises, Inc. v. The Hunt Construction Group*, E.N.G.B.C.A. Nos. 6348, 6386-6391, 00-2 B.C.A. (CCH) ¶31,000 (implicit endorsement of measured mile approach as preferred method).

581. The measured mile compares the cost of completing work not subject to delay or acceleration with costs of completing work during a period of impact, the difference

representing the measure of damages. *James Corp. v. North Allegheny School Dist.*, 938 A.2d 474, 495 (Pa. Commw. 2007).

582. The work compared need not be exactly the same, as the ascertainment of damages for labor inefficiency is not susceptible to absolute exactness. *James Corp. v. North Allegheny School Dist.*, 938 A.2d 474, 495 (Pa. Commw. 2007), citing *Clark Concrete Contractors, Inc. v. Gen. Servs. Admin.*, 91-1 Bd. Contract Appeals ¶ 30280, 1999 WL 143977 (Gen. Servs. Bd. Contract Appeals 1999).

583. Under Ohio law, a plaintiff does not need to prove damages were a “proximate cause” of a breach of contract—proximate cause is a tort concept not applicable in the context of a breach of contract action.

(a) To recover damages for a defendant’s breach of contract, a plaintiff must establish that damages resulted from the defendant’s failure to fulfill its contractual obligations. *See, e.g., Nious v. Griffin Constr., Inc.*, 10th Dist. Franklin No. 03AP-980, 2004-Ohio-4103, ¶15, citing *Powell v. Grant Med. Ctr.*, 148 Ohio App.3d 1, 10, 2002-Ohio-443, 771 N.E.2d 874 (10th Dist.2002).

(b) Damages are designed to place the non-breaching party in the same position it would have been in had the contract not been violated. *Alternatives Unlimited-Special, Inc. v. Ohio Dep’t of Educ.*, 10th Dist. Franklin No. 12AP-647, 2013-Ohio-3890, ¶29, citing *State ex rel. Stacy v. Batavia Local Dist. Bd. of Edn.*, 105 Ohio St.3d 476, 2005 Ohio 2974, ¶ 26, 829 N.E.2d 298.

(c) Delay, inefficiencies, and additional costs incurred by a contractor “result” from an owner’s failure to furnish sufficient plans or specification for use in construction of a project. *See, e.g., Valentine Concrete, Inc. v. Ohio Dep’t of Adm. Serv.*, 62 Ohio Misc. 2d 591, 601, 609 N.E.2d 623, 629 (Ct. Cl. 1991); *Julian Speer Co. v. Ohio State Univ.*, 83 Ohio Misc. 2d 93, 95 (Ct. of Cl. 1997).

(d) Under R.C. 4113.62(C)(1), “delay is a proximate result of the owner’s act or failure to act” when that delay is caused by the actions and inactions of the owner’s agents. For example, in *J&H Reinforcing & Structural Erectors, Inc. v. Ohio Sch. Facilities Comm’n*, this court held that rather than “caused by or between contractors or their agents and

employees” the delay in *J&H Reinforcing* was primarily caused by the conduct of the owner “including improper and misleading scheduling that involved ‘project override’ methodology.” Ct. of Cl. No. 2010-07644, 2012-Ohio-5298, ¶ 84, affirmed 10th Dist. No. 12AP-588, 2013-Ohio-3827.

N. TransAmerica’s Claim is Not Limited to the Amount of Original March 2012 Certified Claim

584. OSFC provides no authority or contractual reference to support its argument that TransAmerica is precluded from increasing the damages sought due to the OSFC’s delays and disruptions from the amount stated in its March 8, 2012 Certified Claim. (October 1, 2014 Decision of Referee)

585. Damages that arise from delays caused by the Owner are not subject to the provisions that preclude or waive liability for such damages, i.e. some or all of the provisions of Article 8. (October 1, 2014 Decision of Referee)

586. The contract is 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)).

587. 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)).

588. 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.

589. The OSFC cannot point to any loss or prejudice caused by the fact that TransAmerica supplemented its claim, especially when its Director, Rick Hickman, indicated there was no possible way to obtain additional Project funding for reasons unrelated to TransAmerica's supplemental claim.

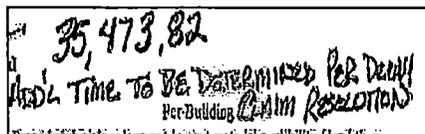
O. TransAmerica's Lawsuit Was Timely Filed

590. TransAmerica could not know, or have reason to know, of the OSFC's misrepresentations until July 18, 2011 at the earliest when it was informed that the updated drawings would not be provided.

591. Upon learning on July 18, 2011 that the updated construction set would not be provided, TransAmerica reasonably relied on the representations during that same Progress Meeting that any changes would be handled through the pricing request and change order process.

592. Reasonably relying on those representations, TransAmerica submitted change order pricing, which included requests for additional time. In response, the OSFC

represented that such requests would be addressed through the "Delay Claim Resolution" process. (Bill Koniewich, Josh Wilhelm, JX-F-25)



35,473,82  
ADDL TIME TO BE DETERMINED PER DECISION  
PER BUILDING CLAIM RESOLUTIONS

593. It was not until September 5, 2012 when TransAmerica received LL's recommendation and analysis rejecting all of its claims that TransAmerica first understood that the OSFC and its agents had made material misrepresentations, would not comply with the terms of the Contract, and had acted in bad faith.

594. Under any of the following scenarios, TransAmerica timely filed suit within the two year period required under R.C. 2743.16(A):

(a) Applying the provisions of R.C. 153.12(B) and 153.16(B) to TransAmerica's February 17, 2011 letter as triggering TransAmerica's obligation to provide a certified claim, TransAmerica's claim could accrue no earlier than July 18, 2011. The July 18, 2011 date takes into account the thirty (30) days TransAmerica had to file its Certified Claim under 8.3.1 plus the 120 days to exhaust the administrative remedies since no decision was issued by the OSFC. Thus TransAmerica complied with the two-year time period when it filed suit on June 14, 2013. (October 1, 2014 Referee Decision page 15)

(b) Based on the prior representations of the OSFC and its agents, TransAmerica's cause of action against the OSFC for not providing an updated set of plans arose no earlier than July 18, 2011, which is when TransAmerica first became aware such an updated set would not be provided as repeatedly promised. Based on its claim accruing no earlier than July 18, 2011, TransAmerica complied with the two-year time period when it filed suit on June 14, 2013.

(c) Applying the provisions of R.C. 153.12(B) and 153.16(B) to TransAmerica's March 8, 2012 certified claim (its first), TransAmerica's claim (including time) accrued no earlier than July 10, 2012 or 120 days later. Based on its claim accruing no earlier than July 10, 2012, TransAmerica complied with the two-year time period when it filed suit on June 14, 2013.

(d) On September 5, 2012, TransAmerica received LL's written analysis and recommendation which rejected TransAmerica's claim in its entirety. At this point, TransAmerica first became aware that the prior representations made by the OSFC and its agents – summarized below – were false:

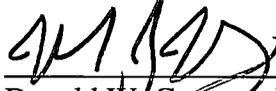
- (i) TransAmerica would be compensated through the change order process after it was revealed on July 18, 2011 that an updated construction set would not be provided.
- (ii) TransAmerica's requests for additional time would be resolved through the Article 8 process.

Under the above scenario, TransAmerica's claim accrued on September 5, 2012 when it learned of these misrepresentations, TransAmerica complied with the two-year time period when it filed suit on June 14, 2013.

595. TransAmerica's Article 8 claim against the OSFC only accrued after the administrative remedies have been exhausted, either by way of the 120 day time period prescribed in 153.16(B) or through a decision by the Commission prior to that point, which did not occur (through no fault of TransAmerica).

596. 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). *Painting Co. v. Ohio State Univ.*, 10th Dist. No. 09AP-78, 2009-Ohio-5710. See also *R.E. Schweitzer Constr. Co. v. Univ. of Cincinnati*, 10th Dist. No. 10AP-954, 2011-Ohio-3703 (finding the administrative remedies were exhausted 120 days after contractor filed its claim).

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing TransAmerica Findings of Fact and Conclusions of Law was sent via e-mail and by regular U.S. mail, postage prepaid, this 20<sup>th</sup> day of July, 2015 to:

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