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IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT AT NASHVILLE
DAVIDSON COUNTY

7th AVENUE NASHVILLE HOTEL OWNER, LLC,	)	
Plaintiff/Counter-Defendant,	)	
v.	)	**CASE NO: 22-1259-BC**
	)	****controlling case****
W.G. YATES & SONS CONSTRUCTION COMPANY,	)	**JURY DEMAND - CONSOLIDATED**
	)	**SUBORDINATE CASES**
Defendant/Counter-Plaintiff,	)	**No. 23-0061-II**
	)	**No. 23-0127-II**
and	)	**No. 23-0213-II**
W.G. YATES & SONS CONSTRUCTION COMPANY,	)	
Third-Party Plaintiff,	)	
v.	)	
FIDELITY AND DEPOSIT COMPANY OF MARYLAND,	)	
Third-Party Defendant.	)	

MEMORANDUM AND ORDER

This matter came to be heard in a multi-week bench trial, March 3-21, 2025, May 5-9, 2025, and August 18-21, 2025, for a total of twenty-four (24) days. This case was thoroughly litigated with 25 live witnesses, six witnesses presented solely through depositions, and 590 exhibits. The parties filed the transcript on September 10, 2025, and post-trial briefs on October 10, 2025. The Court has considered all the facts and evidence before it, as well as the applicable law, and is ready to rule.

Introduction and Status of Party Claims

This is a dispute between an owner, 7th Avenue Nashville Hotel Owner, LLC ("7th Avenue" or "Owner") and general contractor, W.G. Yates & Sons Construction Company ("Yates" or "Contractor") on a two hotel, multi-year construction project with actual site work from 2019 through 2022, although the original agreement between the parties was executed in 2017 for the commencement of pre-construction work. The project was plagued with issues, not the least of which was the COVID epidemic that impacted labor, supply chain, and on-site protocols. Ultimately, Owner terminated Contractor and hired a replacement contractor to finish the project. Owner initiated this lawsuit to seek damages for repair and completion work by the replacement contractor, as well as contractual liquidated damages for delay. Contractor counter-claimed for breach of contract based upon wrongful termination, and alternatively for unjust enrichment and quantum meruit, as well as entitlement to retainage being held pursuant to the Tennessee Prompt Pay Act (the "TPPA") and asserted a statutory mechanics and materialman's lien.

The Court resolved Yates's TPPA claim for retainage in its favor pursuant to an early dispositive motion in an Order dated January 24, 2023. That final order pursuant to Tennessee Rule of Civil Procedure 54.02 was not appealed and was satisfied, as was set out in Contractor's Notice of Satisfaction of Partial Judgment filed March 15, 2023.

After the case was initiated, various subcontractors hired by Contractor to work on the project either intervened or filed separate actions that were consolidated with this matter to participate as plaintiffs also asserting claims against Owner and Contractor. Those subcontractors are:

- Allegheny Millwork Inc. ("Allegheny") intervened pursuant to an Agreed Order dated February 10, 2023;

- Groove Construction, Inc. ("Groove") intervened pursuant to an Agreed Order dated February 24, 2023, and the separate action it filed, Case No. 23-0127-II, was consolidated pursuant to an Order dated April 11, 2023;
- Bernhard MCC, LLC, ("BMCC") intervened pursuant to an Agreed Order dated February 21, 2023;
- Feyen-Zylstra, LLC ("FZ") filed a separate action, Case No. 23-0213-II, which was consolidated pursuant to an Order dated April 11, 2023;
- Oneliance, LLC ("Oneliance") filed a separate action, Case No. 23-0061-II, which was consolidated pursuant to an Order dated April 11, 2023; and
- Civil Constructors LLC, ("Civil Constructors") filed a separate action, Case No. 23-0269-II, which was consolidated pursuant to an Agreed Order dated November 3, 2023.

(collectively the "Subcontractor Parties").

Oneliance and FZ included Meritz Security Co. Ltd. ("Meritz"), Owner's lender, as a defendant and the Court granted a motion via its April 20, 2023 Order allowing the addition of Yale Riley, Esq. as a party defendant given his status as Trustee of the subject deed of trust. They were added as defendants to the other, consolidated actions through numerous Orders allowing such amendments. Meritz was dismissed in an Order dated July 23, 2024.[1]

In October 2023, Owner recorded lien discharge bonds which had the effect of immediately discharging Yates's and the Subcontractor Parties' lien claims against the subject property. (Exh. 187). Fidelity and Deposit Company of Maryland ("Fidelity"), the surety for the bond, was added as a party defendant on July 15, 2024.

[1] The Court notes that Order did not dismiss Riley, who should have been dismissed as his only role was as Trustee on Meritz's Deed of Trust. The Court did not previously catch this oversight although Riley was removed from the style of the case. The Court therefore DISMISSES him in this Order, as set out herein.

Oneliance, Allegheny, and Civil Constructors subsequently dismissed their cases and assigned all their claims to Yates in Orders dated June 30, 2023, August 2, 2023 and December 13, 2023, respectively. FZ and Groove voluntarily dismissed their TPPA claims on August 10, 2023 and September 13, 2023, and then assigned their remaining claims to Yates on January 25, 2024 (Groove) and March 27, 2024 (FZ). On March 13, 2024, Yates and BMCC entered into a Liquidation, Pass-Through, and Joint Interest Agreement. (Exh. 461). BMCC subsequently dismissed its claims in an Order dated October 3, 2024. Oneliance and Civil Constructors notified the Court, via Yates's December 19, 2024 Notice, that they had no remaining claims being pursued by Yates or otherwise.

Findings of Fact

The Project and its Ownership

Owner is a single-purpose limited liability company that was established to own 710 Demonbreun Street, Nashville, Tennessee (the "Property") and construct two hotels, an Embassy Suites and 1 Hotel (generally the "Project" and the "Hotels"). The Owner entity was set up by Crescent Real Estate, LLC, a Dallas-based investor/owner in numerous commercial properties and projects throughout the United States that are used in various types of industries, including office, rental, retail, and hospitality ("Crescent RE"). Crescent Property Services is a subsidiary of Crescent RE that develops properties for special purpose entities such as Owner (collectively "Crescent"). Crescent's business is to acquire existing properties or develop properties by finding lenders and equity partners to finance the projects so that Crescent can limit its equity investment. As the developer, it coordinates designing and building the project to turn over to the operator to run the business.

Crescent originated the Project in 2016 through identification and acquisition of the Property, originally partnering with financing partners who exited prior to most of the events at issue in this litigation. The Property's downtown location and proximity to the Music City Center, Nashville's convention center, was a primary driver for Crescent. The size of the Property allowed for the construction of two hotels of dual brands capturing two markets and price points. The original concept was to build a 30-story Embassy Suites and an 18-story Curio Hotel, a Hilton luxury brand. Instead of Curio, the 1 Hotel became the identified luxury hotel when Crescent brought in Starwood Capital Group as the majority investment partner. Crescent saw Embassy Suites as a strong brand with a loyal following that appealed to travelers looking for larger rooms and amenities conducive to families. 1 Hotel is a luxury brand for travelers looking for amenities such as spas and high-end food and beverage options. Crescent knew other luxury brands were moving into the Nashville market; thus, when it began development of the Project, it was focused on moving toward opening as quickly as possible. The Project was Crescent's first one in Tennessee.

Starwood Capital Group ("Starwood") is a large real estate private equity firm that owns and operates properties worldwide in many different types of asset classes. It has about 20 offices and over 5,000 employees. Starwood owns several hospitality brands through its related entity Starwood Hospitality, including 1 Hotel. Starwood was founded by Barry Sternlicht, who was involved in the founding of many well-known hotel brands. 1 Hotel is a newer luxury brand for Starwood, established in 2015, with only about ten in existence and a focus on sustainability and cutting-edge design. The Project was going to be the first 1 Hotel that was built from the ground up rather than rebranding an existing property. The Project's 1 Hotel was, therefore, considered a flagship investment in a prominent market that was important to Starwood investors because it

was a Starwood brand. Starwood's plan was to own and operate the 1 Hotel and to use a third-party operator for the Embassy Suites.

Crescent and Starwood connected regarding the Project in August 2018. After a period of due diligence, in February 2019 the two entities agreed to invest in the Project together, with Starwood as the 70% investment partner and Crescent as the 30% investment partner and developer. Crescent was to manage the day-to-day construction, and Starwood would have oversight, make primary decisions regarding design, and be the primary contact for the lender, Meritz. Crescent and Starwood have proceeded in lockstep as Owner on the Project with aligned interests, although the proof at trial showed there was some tension between them as the Project progressed based upon their financial agreement. (Exh. 10).[2]

Meritz, the lender, is a Korean-based entity that initially loaned Owner $175,000,000 to fund the Project, with additional funds available as needed up to $229,000,000, pursuant to an April 1, 2019 agreement (the "Loan Agreement"). (Exh. 229). Owner made an equity contribution of up to 35% of the Project. The original maturity date on the Loan Agreement was April 1, 2023, which could be extended to April 1, 2024. The Loan Agreement required a completion date for the Hotels of September 1, 2022, or it would be an incident of default pursuant to Paragraph 4.1(f). (Exh. 229, 87, 27). "Completion Date" was defined as "the later to occur of (a) Substantial Completion of the Project and (b) the Hotel Opening." "Substantial Completion" was defined as the date on which all the following occurred:

> (i) issuance by the applicable Governmental Authority of a final certificate of occupancy for each phase of the Project or, if a final certificate of occupancy is not available until completion of any "punchlist" items, a temporary certificate of occupancy which permits full beneficial occupancy of each phase of the Project;

[2] Crescent leadership noted in emails dated March 16, 2022 (while the Project was ongoing) that "Starwood can be a difficult partner as we all know," and "I'm not ready to talk to Starwood about this and might never want to talk to Starwood again." (Exh. 10).

> and (ii) issuance by the Architect of a certificate stating that the each [sic] phase of the Project has been completed in accordance with the Plans.

(Exh. 229, Ex. B). As of January 25, 2022, Owner had requested or obtained $220,300,000 in funding for the Project. (*Id.*).

The Entities Contracted for the Project

Owner contracted with LK Architecture on November 1, 2016, to provide architectural services for the Project, including designing construction documents for all related site and building plans and providing consulting services throughout the construction process (the "LK Contract"). (Exh. 1). The design process was scheduled to occur between June 10, 2016 (prior to execution of the LK Contract) and February 17, 2017, when plans would be ready for a fully coordinated permit and bid process. (*Id.*, Exh. C). The LK Contract was executed prior to the identification of Starwood as an investment partner or 1 Hotel as the luxury hotel.

In addition to LK, Owner sought a local project manager with hotel experience to oversee the project as an owner representative from the pre-construction/design phase through construction and turnover to the operators. In March 2017, Owner contracted with Cumming Project Management, LLC ("Cumming"), owned and operated by Joe Saatkamp, for this role (the "Cumming Contract").[3] (Exh. 2). As the project manager, Cumming was responsible for managing the request for bid process to identify a general contractor, oversight of that entity's work including the scheduling of subcontractors and project progress, review and recommendations regarding construction change orders, overseeing punch list work, and the obtaining of necessary permits and certificates of occupancy. Owner contracted to pay Cumming $2,112,000 for thirty-six (36)

[3] During the Project, Cumming merged with CAPEX Group, a national owner's representative construction management company. Saatkamp remained on the Project pursuant to the Cumming Contract. The Court refers to this entity throughout as Cumming.

months of work and then additional fees for work beyond November 2021. Saatkamp was not on the Property daily but rather oversaw a team that was on site.

In early 2017, Owner initiated a request for bid process, with Cumming's help, to identify a general contractor with hospitality experience on large projects. It was looking for an entity with financial stability, experience in the Nashville market, and established relationships with subcontractors. Owner knew there were complicated site logistics because of the urban location, traffic flow issues, need for two tower cranes, and intention to do tunnel forming at an offsite location to be transported to and installed at the Property. Yates was one of three finalists identified and, ultimately, was hired as the general contractor. Yates submitted a detailed proposal for the Project dated June 29, 2017 (the "Yates Proposal"). (Exh. 3).

Yates is a family-owned general contractor based in Philadelphia, Mississippi, founded in 1964. Prior to the Project, Yates had worked on significant projects in Tennessee, across the United States, and in other countries. Yates had a Nashville office for approximately 20 years prior to its involvement in this Project. Many of its significant projects include hotels and resorts in Mississippi, Florida, New Jersey, and the Bahamas. It is ranked in the top five in industry ratings in terms of the volume of business it does in the hotel and resort space.

In the cover letter of the Yates Proposal, it highlighted three strengths it could bring to the Project: tunnel form experience, local offices and a strong foothold in the Nashville market, and an approach that allows it to deliver predictability in terms of schedule, cost, and quality. Prior to preparing the Yates Proposal, Yates did a site visit to the Property and reviewed the design documents that were close to finalization. The Yates Proposal included the resumes of the twenty-two-member team it intended to dedicate to the Project, including John Stull, its tunnel form expert, and Brad Davis, one of its Senior Project Managers. (Exh. 3).

On August 7, 2017, Cumming issued a Notice of Intent to Engage for General Contracting Services to Yates, notifying Yates it was being hired as the general contractor for the Project (the "Notice"). (Exh. 4). The Notice included reference to a proposed schedule of 865 days from October 2, 2017, through February 14, 2020, and engagement contingent upon execution of a negotiated contract and acceptance of a guaranteed maximum price ("GMP").

The parties negotiated a detailed contract dated December 15, 2017 (the "Construction Contract"). The Project had not been ready to start as planned, and the new commencement schedule was early 2018. (Exh. 5). Yates began having pre-construction meetings in the fall of 2017 based upon that proposed schedule, internally and with potential subcontractors. However, delays caused by Owner through a change in its investment partner to Starwood, with attendant changes in financing, and a change in concept from Curio to 1 Hotel, kept the Project from moving forward in 2018. Mechanical, electrical, and plumbing engineering ("MEP") had to be redesigned, and Owner replaced its engineer on the Project. New architectural plans were required. (Exh. 380, p. 58-61; Exh. 409). There had been price escalations, and subcontractors previously available were no longer available. Subcontractors had to rebid work, and notices of intent had to be sent to those who were to participate. These delays were caused by Owner and the restructuring of ownership and financing. Yates was able to keep many of the subcontractors, but it was a process to reestablish pricing and personnel on this new schedule. This created an additional basis for Owner to have a sense of urgency on the Project—the only pre-job work Yates had been able to do that was not impacted by the delay was office set up, pre-blasting drawings, and minor form work. Yates was unable to rely on most of the pre-Project planning it had done over a year earlier because of Owner's delay in getting the Project ready to proceed.

The parties to the Construction Contract are large, sophisticated organizations with experience working on complex projects who were represented by counsel. The Construction Contract consists of a thirty (30) page document with general terms and additional exhibits, and an eighty-four (84) page General Conditions section with more specific requirements, and exhibits. The Construction Contract also includes the eleven (11) page Guaranteed Maximum Price Amendment dated March 28, 2019 (the "GMP Amendment") setting the GMP at $189,808,276.77, which includes the General Conditions Amount of $6,272,254.00 and the Contractor's Fee of $5,219,728.00. The GMP Amendment includes, among other documents, a Schedule of Values (budget), a 30-month Construction Schedule (82 pages), a Schedule of Drawings, and Insurance Terms. (Exh. 6). In the 15-month gap between execution of the Construction Contract and the GMP Amendment, Crescent and Starwood solidified their agreement and decided to include 1 Hotel in the Project. The GMP Amendment revises and replaces some of the provisions in the Construction Contract and General Conditions, including changes from "Curio" to "1 Hotel."

Owner issued a Notice to Commence, agreed to by Yates, dated April 5, 2019, pursuant to the Construction Contract and GMP Amendment, authorizing Yates to proceed with construction on the Property and setting a substantial completion date of July 27, 2021, a span of 844 days. (Exh. 7).

Structure of On-Site Management and Party Communications

Although the titles and some of the roles shifted over the five years Yates was involved in the Project, Yates's consistent onsite Senior Project Manager was Brad Davis. Davis began working on the Project when it was bid in early 2017 and remained on the Project until Yates was terminated on September 22, 2022. Davis had a team working with him in Nashville, including a direct supervisor, Rocky Wooten, who was Yates's Division Manager. Wooten reported to Chet

Nadolski, Yates's Chief Operating Officer located in the home office.[4] Davis was involved in the Project all day, every day, during construction. Wooten was very involved until he left the company at some point during the Project and was replaced by Lyles Holifield. Nadolski was involved at a higher, corporate level until September of 2021, at which time he began directly communicating with Crescent representatives, both remotely and in person. In the almost two years between the Yates Proposal and Notice to Commence, some of Yates's original Project team left the company. (Exh. 11). Some, like Wooten, were still with Yates, although they left during COVID. Davis was there throughout the Project and testified at trial. Nadolski also testified, as well as Yates's Controller, Lawrence Dow, and a Project Manager, Pat Nash.

Cumming opened an office onsite, run by its employee, Clay Dillard. Dillard was not solely dedicated to the Project but rather was working on other Cumming projects in Nashville. Saatkamp was on site approximately once a month and testified at trial.

Architect LK had a representative, Nate Hinson, who was also on site about once a month. Hinson testified at trial via deposition. He became involved in the Project after the initial design phase toward the end of 2016. (Exh. 380). Hinson was primarily responsible for handling Requests for Information ("RFIs") from Yates if there were design conflicts with plans or questions about design, architect supplemental instructions ("ASIs") from Owner, and the architect approval of Yates's pay applications and change orders. (*Id.*).

Crescent had team members responsible for oversight and reporting on different aspects of the Project. Travis Jeakins, Crescent's VP and SVP over construction, was based in Dallas, but was the primary contact for Yates on all construction matters. He was on site from time to time, depending on Project needs, but was in daily contact with both Yates and his own team. Jeakins

[4] Davis was also referred to as "Project Executive" by Nadolski in his testimony, although his title was Senior Project Manager in the Yates Proposal. Rocky Wooten was listed as Project Executive. (Exh. 3).

reported to the construction and finance management team in Texas to Joseph Pitchford, Managing Director of Development. Pitchford had represented Crescent in putting together the deal with Starwood and was one of the few Starwood-approved signatories for financial matters related to the Project, including signing Owner Change Orders ("OCOs") after Starwood approved them.[5] He was involved in most of the financial decisions Crescent made as the Project progressed, especially in the last year when it became troubled, but relied on Jeakins for the details on the construction status and needs. Another member of Crescent's financial team was Noah Flabiano, Director of Development, who had oversight of budget, the change order process, retainage and monthly reports to the ownership team. Jeakins, Pitchford, and Flabiano all testified at trial.

Starwood's team was in California but was the primary investor on the Project and thus had ultimate authority over financial decisions. It also had the relationship with Meritz. The highest-ranking executive on the Starwood team was Kevin Tazalla, VP in the Asset Management Group. Tazalla oversaw the company's due diligence in deciding to get into the Project. He also testified at trial. Sternlicht was the Starwood Chair. His involvement was limited to design review, brand management, and general financial oversight—the amount of involvement varied depending on the stage of the Project and the subject of consideration. He did not testify at trial.

Among Owner entities, Crescent and Starwood had periodic "partnership calls" to discuss the progress of the Project, financing concerns, and other issues. There are a number of emails in evidence that show some fractures in that relationship as the Project progressed, delays continued, and increased pressure from the lender.

[5] This is compared to COs, which are change orders requested or initiated by Contractor but not yet approved by Owner.

Yates was responsible for scheduling and sequencing the work through its subcontractors and vendors and permitting with local regulators.[6] Yates held bi-weekly meetings with Owner and Architect representatives ("OAC Meetings") in which the Owner representative was usually someone from Cumming. Detailed notes were maintained from these OAC Meetings that help track the progress of the Project and the timing of when issues arose, what notice was given, and how they were addressed. (Exh. 13-14, 267, 380, 385-386, 480, 483).

Yates also had regular meetings with the primary subcontractors on the Project, the timing and frequency of which depended upon the status of and concerns about their work. (Exh. 300, p. 38-44; Exh. 319, p. 54-55). These subcontractors included:

- Fly & Form, the concrete and form subcontractor that also did excavation work, had a May 13, 2019 subcontract for $33,687,583. (Exh. 288). Its President, Allen Lindsey, testified via deposition at trial. (Exh. 300).

[6] Relevant portions of the Construction Contract to this effect were:

General Conditions 3.3.1 Contractor shall supervise and direct the Work, using Contractor's best skill and attention. Contractor shall be solely responsible for and have control over construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work under the Contract Documents or otherwise required by good construction practice or by any applicable code. Contractor understands and acknowledges that although certain construction means, methods, techniques, sequences and procedures necessary to the completion of the Project may be referenced in the Contract Documents, it shall remain responsible for and have control over the construction means, methods, and techniques necessary to comply with such sequences and procedures. Contractor agrees to review the construction means, methods and techniques specified in the Contract Documents, and to notify Owner, Development Manager, and Architect if Contractor objects to any of the means, methods and techniques, or determines that any of the specified means, methods and techniques would deviate from customary and accepted construction practices or violate any warranty.

General Conditions 3.7.1 Unless otherwise provided in the Contract Documents, Contractor shall secure and pay for the building permit and for other permits and governmental fees, licenses and inspections necessary for proper execution and completion of the Work which are legally required. Prior to Contractor's applications for a building permit, Contractor shall secure Owner's and Development Manager's approval of the Project value to be used for permit purposes. Contractor shall communicate the status of all building permits to Owner each Project meeting and provide Owner with copies of all permits obtained for the Project.

(Exh. 5-6).

- The Circle Group, the metal framing (interior and exterior), drywall, and scaffolding subcontractor. Its Regional Manager, Fred Rogers, who was the project manager on the Project, testified at trial.
- FZ, the electrical and fire safety systems subcontractor, had a January 24, 2019 subcontract for $235,223, which represented pre-construction work. (Exh. 366). Yates and FZ executed a change order on March 28, 2019, increasing the scope of the contract to $16,107,359 for the balance of the electrical work. An additional change order added $480,000. (Exh. 347). Its Chief Financial Officer, Bill Herington, and Senior Project Manager, Mark Dyer, testified at trial.
- BMCC, the mechanical and plumbing subcontractor, had a January 29, 2019 subcontract for $22,500, prior to knowledge of the entire scope. The amount was increased on March 22, 2019, through a change order, to $29,977,880.83. (Exh. 437-438). Its Senior Project Manager, Jerrod LeRock, and Senior Vice-President, Justin Thomas Wisor, testified at trial.
- NR Windows, Inc. ("NR Windows"), the window supplier and installer, including the exterior glass and metal "skin" of the Hotels, had a February 19, 2019 subcontract for $19,470,500. (Exh. 301). Its senior project manager, Felix Magdales, testified via deposition at trial. (Exh. 319).
- John J. Campbell, the roofer, had a February 26, 2019 subcontract. (Exh. 470). Its President, Tim Williams, testified at trial.

Yates used numerous subcontractors and vendors on the Project, but these were the subject of focus at the trial.

There were also vendors and subcontractors who were hired by Owner and were not part of Yates's obligation in the Construction Contract. Those included:

- Flood Brothers, the furniture, fixtures, and equipment ("FF&E") provider;
- First Finish, hired to do some of the last punch list items in the hotel rooms;
- Mobile Fixtures, the kitchen equipment provider;
- Jarvis, the interior sign provider; and
- The company providing the primary hotel signs.

Owner acknowledges that it was responsible for the work of these entities, although the expectation was that Yates would sequence its subcontractors to prepare for these providers' work as appropriate during the construction.

Relevant Construction Contract Terms

It is undisputed the Project was complex, large, and challenging to build. It was located on an urban job site which necessitated traffic control and road closures for construction work and material deliveries. Excavation through blasting was also another challenge. The size and scope required two tower cranes and two buck hoists. The Project ended up with some specialty features that presented particular difficulties, including a green wall (e.g. live plants) on the outside of 1 Hotel and a glass rooftop pool with a retracting cover at Embassy Suites that was difficult to install and complete.

The Construction Contract set forth the contract price either as the lesser of the GMP amount set forth in the GMP Amendment or "the total of (i) the Cost of the Work and (ii) Contractor's Fee, both as adjusted by Change Orders . . . plus Thirty percent (30%) of the amount, if any, by which the Guaranteed Maximum Price, as adjusted by Change Orders, if any, exceeds the total of (i) the Cost of the Work and (ii) Contractor's Fee at final Completion." (Exh. 5, ¶ 6.A).

The Contractor's Fee was defined as "a lump-sum amount set forth in the GMP Amendment, which shall not exceed [2.75%] of the anticipated Cost of the Work," and the GMP Amendment identified the Contractor's Fee as $5,219,728.00. (Exh. 5, ¶ 7, Exh. 6).

The Construction Contract anticipated Owner changes to the scope of work and potential adjustments to the GMP through OCOs, which may or may not increase the General Conditions Amount and/or Contractor's Fee. (Exh. 5, ¶¶ 4.A & C, G.C. 7-8). It provided for Yates to submit applications for payment using American Institute of Architects ("AIA") forms on the 25th of each month to Cumming. Pay applications would ultimately have to be approved by LK, as architect, and Owner. (*Id.* at ¶¶ 9.A, G.C. 9.3-9.5). Paragraph 6 of the Construction Contract sets forth the contract price through the GMP formula and included a 2% contingency fund for unanticipated costs. (Exh. 5).

It was also anticipated that Yates would have change orders, and the General Conditions has detailed provisions regarding how those were to be handled, depending on the source of the request. OCOs, except for a short list of exceptions, trigger the obligation and right of Yates to respond, within 15 days, regarding modifications to the GMP and Time(s) of Completion associated with the OCO. (Exh. 5, G.C. Art. 7.1). Generally, the Owner could either accept the Contractor's response and issue an OCO with those adjustments or issue a "Time and Materials Change Order" with a not-to-exceed price established therein and require the impact on price and time to be set out separately and applied for after the work was performed. (*Id.*). Claims for additional costs through Contractor-initiated change orders were to be submitted to the Owner as follows: 1) Contractor was to provide written notice of a claim within ten days[7] of the event and 2) provide a written price proposal identified as a "Proposed Change Order" within seven days of

[7] Initially, the time limit imposed was seven days, but this was lengthened by the GMP Amendment.

sending notice. Except in the case of an emergency, Contractor was not authorized to proceed with change order work without approval. If it did, it did so at the risk of not getting paid for the extra work. (Exh. 5, G.C. Art. 7.2, 7.5, Exh. 6, 10(j)). The General Conditions contain no timeline for Owner to respond to Contractor-initiated change orders. (*Id.*).

Contractor-initiated change orders were submitted to Cumming, and then were passed with a recommendation to Crescent. Crescent then reviewed them and made a recommendation to Starwood which had the final approval. Sometimes one of these approval steps initiated a question back to Yates before the change order request could proceed. The time this process took depended upon the complexity of the issue which, in turn, impacted how quickly the work could get done and the subcontractors could expect to receive payment. The process was cumbersome given the number of levels of approval.

The Construction Contract required Yates to warrant to Owner that its work and materials would be "of good quality and new, unless otherwise required or permitted by the Contract Documents, that Work will be free from defects not inherent in the quality required or permitted, and that the Work will conform with the requirements of the Contract Documents." (Exh. 5, ¶ 2.B and General Conditions ¶ 3.5.1). Yates provided a two-year warranty and agreed to correct all work rejected by Owner or Architect. (*Id.* at General Conditions ¶ 11.2). Yates was also required to provide a 20-year warranty for the roof. (Exh. 163). The Notice to Commence triggered Yates's obligation to perform on the Project and to "diligently proceed with the performance of the Work in order to achieve substantial completion of the Project within the time limits(s) identified in the GMP Amendment." (*Id.* at ¶ 5.A & B). Failure to reach substantial completion within the contracted-for period triggered liquidated damages, spelled out in the Construction Contract as:

Amount	Days After Substantial Completion
$0 per day	1-10
$10,000 per day	11-40
$15,000 per day	41-70
$20,000 per day	71+

Yates agreed these liquidated damages were a reasonable pre-estimate of Owner damages for delayed completion and were limited to two times Yates's fee. (*Id.* at ¶ 5.B(2)).

Regarding the timing of work, the Construction Contract stated:

> 3. If Contractor is delayed in the performance of the Work by reason of, and only by reason of (i) unusual and extreme weather, ii) war or national conflicts or terrorism or priorities arising therefrom, or (iii) acts of the Owner, then the Time(s) of Completion shall be extended for a period equal to the length of such delay, if, within ten (10) days after such delay, Contractor requests in writing a time extension for such delay… Extensions of Time(s) of Completion will be permitted hereunder only to the extent such delay is not caused by any of the Contractor Parties and could not have been reasonably anticipated by the Contractor… In the event of a continuing cause of delay Contractor shall be required to make only one such request with respect thereto. In the event of an extension of the Time(s) of Completion, no adjustment shall be made to the Guaranteed Maximum Price. In the event a time extension is granted pursuant to this paragraph 3, such time extension shall be Contractor's sole and exclusive remedy. In no event shall Contractor be entitled to any claim for damages for any delay in completion of the Work unless the delay was caused by acts constituting interference by Owner with the Contractor's performance of the Work (an "Owner Delay"), and then, only to the extent that such acts continue after the Contractor has provided written notice to Owner of such interference. The Owner's reasonable exercise of any of its rights or remedies under the Construction Contract, so long as it is in the specific timeframe identified in the Construction Contract, shall not under any circumstances be construed as an Owner Delay. In the event an Owner Delay continues after written notice, Contractor shall be entitled to all direct damages caused by the delay. In no event shall Contractor be entitled to any other compensation or recovery of any damage in connection with any delay.
>
> 4. In the event of any delay, it shall be Contractor's responsibility to prove to Owner that the delay in the Time(s) of Completion was caused specifically by a delay in a portion of the Work that was on the critical path of the Schedule.
>
> 5. Contractor recognizes it is imperative that the Work proceed uninterrupted and shall endeavor to prevent and shall promptly cure any work stoppage caused by any labor or jurisdictional dispute arising out of the assignment of work to be performed by Contractor or Contractor Parties.

(*Id.* at ¶ 5.B(3-5)). In addition, "Substantial Completion" was defined in the Construction Contract as:

> that point in the progress of the Work when the Work or designated portion thereof is sufficiently complete in accordance with the Contract Documents to enable Owner or its tenants to use and occupy the Project or the agreed, defined portion of the Project, for its intended use, and (i) only minor punch list items or similar minor corrective work remains to be completed that do not adversely affect the capability of the Project to operate and function safely in the ordinary course of business; and (ii) a temporary (or partial) certificate of use and occupancy and any other permits or approvals necessary to allow use and occupancy of the Project, or the agreed, defined portion thereof, have been issues; and (iii) the Architect and Development Manager have each certified that the Project, or the agreed, defined portion thereof, is substantially complete.

(Exh. 5, General Conditions ¶ 9.7.1). It was later supplemented in the GMP Amendment as less than $500,000 in punch list items remaining. (Exh. 6, ¶ 10(b)).

Yates was also required to submit and maintain a detailed "critical path method" schedule and submit revisions that reflected changes. Overtime or holiday work to meet schedules was also anticipated. (Exh. 5, ¶ 5.C). Generally, the "critical path method" is a project management technique identifying certain work as "critical work" that, if delayed, will extend project duration. Non-critical work can be delayed and is often referred to as "float" or "slack" time.

Owner had the right to declare default and terminate the Construction Contract in certain circumstances. Those provisions were as follows:

> General Condition 2.3.1 If Contractor fails to correct Work which is not in accordance with the requirements of the Contract Documents as required by Article 11.2 of these General Conditions or persistently fails to carry out Work in accordance with the Contract Documents or fails to complete the Work on time as required by the Contract Documents or is in default of any of its obligations under the Contract Documents, Owner, by written notice, may without prejudice to any other right or remedy Owner may have, order Contractor to stop the Work, or any portion thereof, until the cause for such order has been eliminated; however, the right of Owner to stop the Work shall not give rise to a duty on the part of Owner to exercise this right for the benefit of Contractor or any other person or entity, and shall not relieve Contractor of any of its duties or obligations under the Contract Documents.

General Condition 2.4.1 If Contractor defaults or fails to carry out any of its obligations under the Contract Documents, regardless of whether or not an Event of Default has occurred, Owner, upon seventy-two (72) hours written notice to Contractor, without prejudice to any other remedy Owner may have, may carry out any or all of the obligations of Contractor, either directly or through others, and charge the cost thereof, including without limitation the resulting additional expenses of the Architect, Development Manager, and Owner's other consultants, to Contractor. The performance of such obligations by Owner shall not relieve Contractor of any obligation or liability for the Work and shall not operate to waive any right or claim of Owner.

14.A.2 **Termination by Owner in Event of Default**. Owner may terminate this Construction Contract in the event Contractor commits a material breach of its obligations under this Construction Contract. A material breach occurs if the Contractor allows or commits any of the following events of default:

…

b. abandons the Project;

c. repeatedly fails to prosecute the Work to completion thereof in a diligent, efficient, workmanlike, skillful and careful manner and in accordance with the Schedule and the provisions of this Construction Contract;

…

e. repeatedly fails to use an adequate amount or quality of personnel or equipment to complete the Work without delay;

…

h. fails to perform any other obligation under this Construction Contract and does not correct such failure or breach within ten (10) days (or such shorter period of time if commercially reasonable under the circumstances) after receipt of written notice from Owner or Development Manager directing Contractor to cure such breach.

14.A.3. **Termination by Owner for Default**. Owner shall have the right in the event of any material breach or any continuing breach which is not cured within the relevant time period to (i) terminate this Construction Contract and (ii) take possession of and use all or any part of Contractor's materials, equipment, supplies and other property of every kind used by Contractor in the performance of the Work and to use such property in the manner it deems desirable to complete the Work, including engaging the services of other parties therefor. Any such act by Owner shall not be deemed a waiver of any other right or remedy of Owner. If after exercising any such remedy, the cost to Owner of the performance of the balance of the Work is in excess of that portion of the Guaranteed Maximum Price which heretofore has not been paid to Contractor hereunder, Contractor shall be liable for and shall reimburse Owner for such excess and all such other damages as Owner may sustain by reason of the breach. In no event shall Contractor be entitled to any remaining Contractor's Fee or Savings if this Construction Contract is terminated for cause hereunder.

(Exh. 5).

Owner retained for itself a right to withhold payment for unsatisfactory work and to claim an offset against defective work. (Exh. 5, ¶ 9.C, General Conditions ¶ 2.5.1). Either party had the right to collect attorney's fees against the other as the prevailing party in litigation regarding the Construction Contract. (*Id.* at ¶ 20.1). There was also a "time is of the essence" provision. (*Id*. at ¶ 5.B.2). Finally, as is pertinent to this dispute, Yates also had the obligation to maintain builder's risk insurance to cover its work and the work of its subcontractors. (Exh. 5, ¶ 10).

Slow Start to Project

As previously discussed, Owner acquired the Property in 2016. (Exh. 229, Ex. A). It contracted with LK on November 1, 2016, for the Project designs. (Exh. 1). Owner contracted with Cumming in March 2017 as its representative on the Project. (Exh. 2). Cumming issued a request for proposal on the Project, and Yates submitted its bid on June 29, 2017. (Exh. 3). Owner accepted Yates's proposal on August 17, 2017. (Exh. 4). The parties executed the Construction Contract on December 15, 2017. (Exh. 5). The GMP Amendment to finalize the Project cost and the Notice to Commence were not executed until March 28 and April 5, 2019. (Exh. 6-7). During that interim, Crescent changed development partners and concepts for one of the hotels. Starwood engaged in extensive due diligence and work to obtain financing. The Project had significant design changes based upon the concept change and the involvement of Starwood. By the time the Project sitework commenced, there had been some personnel changes at Yates, subcontractor availability and pricing had changed, and Owner was very anxious about getting the Project going and completed. Delays meant increases in interest accrual on financing, lost opportunity costs for development funds, and fixed costs such as Cumming and Owner personnel time.

The Project itself includes a five-level concrete frame podium and below-grade garage shared by both hotels. 1 Hotel is 18 stories with 215 guestrooms, and Embassy Suites is 30 stories with 506 guestrooms. Both rise out of the shared multi-level podium. They each have a rooftop public space with a number of amenities. The entire Project includes more than 700 total hotel guest rooms, amenities, restaurants, retail space, and 23,000 square feet of meeting space.

There were some early glitches in the Project that made the 2019 start, into early 2020, slow. The excavation was late. (Exh. 294-297; Exh. 300, p. 98-101). There were slowdowns on the concrete work. Yates determined the planned tunnel forming needed to be changed because of cost and logistics, a decision that Owner acknowledges was Yates's to make. (Exh. 300, p. 95-98, 114-122, 179-180). The excavation of rock for the subsurface parking structure took more time than predicted. Yates was frustrated with Fly & Form, the concrete subcontractor, and worked on a recovery schedule to catch up the concrete pours. (Exh. 94, 287, 292, 294-296, 532; Exh. 300, p. 65-67, 74-75, 83-85, 128-129, 136-137, 140-161). This subcontractor originally was contacted about the Project in 2017 or 2018 and had three other large commercial construction jobs in the Nashville market when it started on this one later than previously planned. There was push and pull with this subcontractor about changes being made to the Project that impacted the work. (Exh. 300, p. 68, 74-79, 81-83). In particular, this work put FZ behind in doing the initial electrical work. (Exh. 370).

Per Saatkamp, during the same period of initial construction, there was a lot of compression in the Nashville construction market because of growth causing manpower shortages. Nashville also hosted the NFL draft in 2019 which required excavation and construction to halt for an entire week.

Pursuant to Yates's October 21, 2019 schedule, Embassy Suites was projected to open August 6, 2021. (Exh. 453). As of early March 2020, the concrete work was ongoing, the excavation in progress, at least one tower crane was on site, and subcontractors were secured for future aspects of the Project. The advent of the COVID pandemic caused an entirely new set of issues and problems that plagued the Project until September 2022 when Owner terminated Yates and initiated this litigation.

Project Progress March 2020 – June 2021

Nadolski testified that the COVID pandemic "brought the construction industry to its knees." Although construction was an essential industry that could keep working, every day involved changing standards from the Center for Disease Control ("CDC") and the Occupational Safety and Health Administration ("OSHA"). Yates was updating its protocols daily as information and recommendations caused shifts in what was expected and appropriate. Every onsite illness resulting in an absence of a foreman or superintendent had a downstream impact requiring the company to adapt without notice. Much of the Project labor had traveled to Nashville for the work, which presented a challenge because of group living, traveling, and general nervousness about being apart from family during the pandemic. Initially, the greatest impact was on manpower and resulting problems with productivity, including incorporating social distancing into the Project. As the pandemic progressed, the impact on supply chain also became a significant problem.

Yates had a March 23, 2020 schedule with a planned opening date of September 1, 2021, for Embassy Suites and a later date for 1 Hotel. (Exh. 453).

On April 16, 2020, on behalf of Yates, Wooten instructed all project managers to notify vendors and suppliers of its position regarding COVID impact on jobs, including:

> We have received notices from many trade partners that COVID-19 may have various impacts on the construction process. The safety and welfare of our team and our trade partners is our primary concern so please let us know immediately if you have a jobsite employee that tests positive for COVID-19 or a jobsite employee that has been exposed to someone who tested positive for COVID-19. Any employee who has tested positive for COVID-19 or was exposed to someone who tested positive for COVID-19 must leave the jobsite immediately. Additionally, we need you to inform us of the specific challenges, issues, and impacts that you are facing or foresee. Please make an evaluation of these challenges and keep us informed so that we can plan accordingly.

(Exh. 322).

As of July 8, 2020, Yates was approximately 3 to 3.5 weeks behind on its March 23, 2020 schedule. (Exh. 453). It was working with its subcontractors to continually update the schedule and sequence their work. (*Id*.). In August 2020, Yates was again revising its Project schedule as the COVID impacts continued to be felt and it was receiving impact claims from its subcontractors. (Exh. 96, 306). The curtainwall or glass "skin" of the building was coming from China, and Yates was notified by its vendor, NR Windows, that it would be delayed because of supplier shutdowns and product being held up in ports. (Exh. 96; Exh. 319, p. 56, 60, 62-63, 69-70, 74, 302-304, 306-309). Per Magdales from NR, key predecessor work for the curtainwall installation, such as concrete slabs, columns, and steel, were also causing delays. (Exh. 306, Exh. 319, p. 41). Yates acknowledged some delays in predecessor work because of COVID but also because of NR Windows design changes. Regardless, the glass that was in was ready for installation in August 2020. (Exh. 307). Yates was working toward having the entire structure up and "topped out" during this period, and NR Windows was working its way up both buildings. NR Windows and Yates went back and forth about which party was responsible for delays. (Exh. 292, 302-303, 308-309).

On September 11, 2020, Yates submitted a change order request for 32 days' delay for the curtainwall installation because of COVID. (Exh. 127). In its supporting documentation, Yates referenced manufacturing shutdowns in China and Malaysia impacting aluminum needed for the

curtainwall assembly. Owner and Yates had agreed to a $150,000 payment to expedite manufacturing to eliminate the gap in production and that the overall substantial completion date was pushed to September 7, 2021. Yates attached a revised schedule and copies of prior written notices to Ownership regarding overseas manufacturing impacts. (Exh. 97). Owner agreed to the revised schedule, which was executed on September 18 and 28, 2020, and noted that this OCO47 resolved "[a]ny and all delay claims prior to 8/1/2020." (Exh. 127).

These delays were not unique to the Project. Saatkamp testified that all of his jobs were impacted by COVID. Masking and distancing requirements were difficult for working in close spaces, having to stagger start and stop times, and getting up and down structures in the small buck hoists. Supply chain delays were significant because of shutdowns in foreign factories as well as shipping issues. Subcontractors had to assume a much longer lead time for material than was generally expected. Yates was also experiencing delays in getting inspectors from the Metro Codes Department because of their own COVID impacts. (Exh. 349).

In September 2020, Yates had two tower cranes on the Project. One crane had to be swapped out for a different type, and there were conflicts regarding placement. (Exh. 120, 122, 291, 293; Exh. 300, p. 123-127, 130-140). There were conflicts with Yates's subcontractor, The Circle Group, regarding the pace of its work and its complaints that predecessor work was behind, and, thus, delaying its work. (Exh. 146). Yates was directing The Circle Group to increase manpower which that subcontractor felt was unreasonable because delays were not its fault. There was significant pressure by Yates on all subcontractors, including this one, to stick to the revised schedule even as COVID continued to have a large impact on everyone on the Project. (Exh. 454). As with all parts of the Project, Owner was pushing Yates, and Yates was pushing subs. Everyone was working to get the Project done, but there were delays that could not be controlled.

As of December 1, 2020, Cumming was reporting to Owner that even though Yates's current schedule had a September 27, 2021 substantial completion date, it was 20 days delayed on that schedule. (Exh. 99). This is consistent with what Yates reported to Owner. (Exh. 123, 98, 344). COVID had taken a toll on Yates, its subcontractors, and the Project. Owner felt Yates's schedules did not accurately reflect the work in the field. Yates felt Owner was being unreasonably inflexible about the "float" needed in schedules given how COVID was impacting the Project and the complicated nature of such a large job. Owner "rejected" Yates's position that it needed another 20 days of relief on the schedule, requesting a "recovery" schedule. (Exh. 124). Yates responded, via Davis, on December 18, 2020, in part as follows:

> As discussed, Yates' project management team is significantly limited as a result of the second wave of COVID-19 that the country is currently experiencing. The project team and trade partners have been dealing with COVID-19 since the outbreak early this year. We had all hoped, as did our nation's leaders, that the impacts would not be as severe and long lasting as they have been. The impacts have continued to take their toll on the project affecting supply chains, productivity, as well as general fear/psychological effects. Since October, the situation has grown worse and now with the beginning of last week the situation has become dire with most of Yates' project management team having tested positive for or been exposed to the virus. Currently only 5 of our 20 managers can be on site, while the other 15 managers have confirmed positive results or are experiencing symptoms of COVID-19.
> …
>
> No one could have known the impacts the virus would have on the world. We certainly did not anticipate the impact to production levels, manpower, and the supply chain that we are experiencing and will likely continue to experience. Please know that Yates is working to minimize the impacts of COVID-19 on the Project while remaining compliant with CDC and OSHA guidelines and local restrictions. Unfortunately, with the rising number of COVID-19 cases within the jobsite and the country, we believe that further impacts to the Project schedule and costs are likely to occur. We will continue to track and notify you of the impacts to the Project as well as continue our efforts to minimize the impacts while maintaining the safety of the workforce on the Project.

(Exh. 481, 128).

On January 15, 2021, after having conferred with its primary subcontractors, Yates submitted an updated recovery schedule pursuant to Owner's request which built in 36 additional days with new substantial completion dates of October 2, 2021, for 1 Hotel and October 13, 2021, for Embassy Suites. (Exh. 129-130). On January 22, 2021, Yates submitted a formal delay claim for these new dates. (Exh. 131). On February 4, 2021, Owner responded that its own analysis did not support a request for 36 days of delay but that it would allow a 15-day delay and that a new schedule would have to be prepared consistent with that finding. (Exh. 132). Yates disagreed with that position through a four-page response letter on February 9, 2021. (Exh. 133). The parties had a call on February 11, 2021, to discuss. Jeakins reported to Starwood and other Owner representatives that the call went well, and Yates would provide specific, not generalized, COVID-delay information and submit an accurate schedule based off the approved dates. (Exh. 134).

As of January 2021, Crescent was reporting to Starwood and the lender that the substantial completion date for both hotels per the Construction Contract was September 7, 2021, but that the more realistic date was September 27, 2021. Delays with the 1 Hotel structure was blamed on weather and crane issues, and the focus on Embassy Suites had shifted to interior construction. (Exh. 28). Regardless, 1 Hotel was "topped out" on February 24, 2021. (Exh. 188).

Yates hired a scheduling expert, Berkeley Research Group ("BRG"), to do an analysis of schedule delays to support its delay request. BRG issued a 45-page report that Yates provided to Owner on March 26, 2021, opining that COVID had caused a six to eight month delay for 1 Hotel plumbing fixtures, that overall a 44-day delay was forecasted for the Project, and that substantial completion should be December 15, 2021. (Exh. 136). Jeakins's communications with Starwood demonstrated that he did not find much merit to the claim. (Exh. 135).

In its March 2021 report to Starwood and the lender, Crescent was reporting that curtainwall installation continued for both hotels and that interior finishes were being installed in the lower levels of Embassy Suites. The then-current projected full opening was January 18, 2022, with a new substantial completion date of December 1, 2021, or 85 days behind the original date. Again, the focus remained on the Embassy Suites interior construction and finishing the 1 Hotel exterior, with delays caused by weather and crane issues. Some FF&E had arrived but could not be installed given the status of construction. (Exh. 29, 120-121).

As of April 9, 2021, Owner had not informed Yates that it agreed to move the substantial completion date to December 1, 2021. Rather, Owner was negotiating the issue with Yates in exchange for enhanced liquidated damages if that date was not met. (Exh. 105). Owner's response to Yates's scheduling issues was to reject claims and demand recovery schedules. Nadolski described it as one of the greatest challenges of his career because Owner was so unrelentingly unsympathetic about how the global pandemic was affecting the construction. Nadolski became significantly more involved on behalf of Yates in negotiating the delay claims in 2021. He, like many in the spring of 2021, was hopeful that no new delays would come from the pandemic because of the availability of vaccines and statements from state and federal leaders. Nadolski assumed a compressed schedule, under normal conditions, would allow completion on this schedule. Yates conferred with the primary trades, such as BMCC, regarding this schedule and had their agreement. This information and belief was the only reason Nadolski agreed to a December 1, 2021 substantial completion date.

Owner would only agree to move the substantial completion date if Yates agreed COVID would not be a basis for further delay requests (with some exceptions) and enhanced liquidated damages were included. (Exh. 137-138, 323-324). Nadolski considered these penalties and

proposed lower liquidated damages and incentive payments. Owner was firm on this point, and Nadolski felt he had no choice but to agree on behalf of Yates. The culmination of these discussions was OCO112, dated June 1, 2021, executed by Yates on June 10, 2021, and Owner June 17, 2021. (Exh. 156).

OCO112

OCO112 contains several terms important to this dispute. The contract completion deadline was increased for a total of 85 days, including previous Owner concessions on schedule and changing the date of substantial completion to December 1, 2021. A new, detailed schedule was attached showing attainment of this goal. The provision regarding COVID-19, in relevant part, was:

> The Parties acknowledge that impacts due to the Coronavirus/COVID-19 outbreak, including but not limited to health emergencies, pandemics, shutdowns, quarantines, financial shocks, supply chain disruptions, travel disruptions, additional personal protective equipment (PPE), medical checks, shortages or unavailability of labor, equipment, and materials, and governmental or quasi-governmental delay, guidance, and directives (collectively, "Coronavirus Impacts"), may affect Contractor's costs and ability to meet the schedule during the Construction Phase. Contractor and its Subcontractors have used all reasonable efforts to identify any Coronavirus Impacts that could have a specific impact on that entity's performance of its Work or on the Project schedule. Except as specifically set forth in this Section, Contractor acknowledges that Coronavirus Impacts as of the date of this Agreement (including those that may have already had an impact on the Project, those that currently have an impact on the Project, and those that are reasonably capable of anticipation as of the time of execution of this Change Order) are foreseeable and are contemplated and included in the GMP and the Project schedule as amended by this Change Order, and neither Contractor nor its Subcontractors shall claim any increase in price, cost reimbursement, escalation of labor or material costs, compensation, or damages for any delay, disruption, or interference to the Work arising from such Coronavirus Impacts. However, if (i) due to unforeseeable supply chain disruptions or labor shortages directly caused by future Coronavirus Impacts that are not currently in effect or reasonably capable of anticipation, no alternative product or material substitutions or labor forces are readily available, or (ii) due to future delays, orders, or directives by governmental authorities not known as of the date of this Change Order, the Project schedule or actual construction cost is impacted, Contractor may submit a change request that fully documents such actual additional costs incurred and delay

> to the Project schedule for review by Owner. Such change request shall be open-book and subject to audit to verify actual costs to support Contractor's claims for additional time and/or additional costs. Owner will not reasonably withhold approval of such change request, provided that Contractor takes all reasonable steps to avoid any additional time and/or additional costs sought in the change request.

(Exh. 156). Liquidated damages were also increased, with zero days of grace, ranging from $20,000 to $70,000 per day. (*Id.*).

Nadolski considered the "open book" language to mean that Yates was subject to audit if there needed to be changes that were unanticipated or unknown based on accumulated costs. He also believed this replaced the prior reliance on a critical path method schedule. Davis did as well, based upon his individual meetings with the subcontractors, his spreadsheet of material needed, and anticipated delivery schedules. He also spoke with the Fire Marshal, whose office was back to pre-COVID staffing levels, and had confidence that inspection schedules would not unnecessarily hinder Project progress. Davis kept the lines of communication open with Cumming about needing change orders approved more quickly, and a reduction of Owner-driven design changes, especially with 1 Hotel, both of which significantly impacted Yates's ability to meet schedules. Owner's position was that Yates could not claim generalized COVID impacts on delays and that it was assuming the risk if it could not finish on time. The expectation was that Yates organize the labor and material with the subcontractors to finish on this new date.

Crescent again reported this change in date to Starwood and the lender, and that "Roofing, MEP, drywall framing, and interior finishes continued through June 2021 on both towers. . . ." Further, that "[t]he critical path remains on the interior construction of the podium levels and through the two guestroom towers." (Exh. 30).

Post-June 2021 OCO112 Schedule/Construction Issues

The Project progress began to experience "slippage" soon after OCO112 was executed. In July through November 2021, Yates and Cumming continued to work together on schedules, and Yates continued to submit recovery schedules where needed. (Exh. 106). Yates also notified subcontractors, where appropriate, that they were responsible for slippage and for providing their own recovery schedules. (Exh. 356-364, 373-374, 440-447, 455-56). The Project was incredibly complicated and all involved were working very hard to get done. Many issues arose that impacted the schedule.

There were Owner-driven design changes that needed to be prepared by the architect and approved by Owner, resulting in an exceptionally high number of RFIs, some of which took several weeks or months to resolve. (Exh. 193, 484, 486, 490-498). For instance, the green wall addition for 1 Hotel required a substantial price adjustment ($471,000) and a lot of man hours and work from BMCC. (Exh. 424-425, 429). There were design changes requiring redoing work with can lighting on the podium/public areas in August 2021 (Exh. 426), and design issues related to temporary elevators pushed out the schedule three to four weeks, requiring the buck hoist to remain longer than optimal, which prevented finishing the buck hoist rooms[8] and limited the access for taking material up the buildings. These items alone slowed down just one subcontractor, BMCC. Generally, Yates had design questions requiring RFIs that had to go through the architect and Owner before it could proceed on those items, some of which resulted in change orders and large contract dollar modifications. This delay resulted in work getting out of sequence and slowed down subcontractors. (Exh. 257, 490-497). Overall, from Yates's perspective, there was a slowdown in getting Owner approvals while it was being pushed to finish. (Exh. 427-428).

[8] These were the "stacks" of rooms whose exterior could not be closed off because the buck hoists ran up them and gave interior access to the Hotels on those floors.

Davis testified there were 1,077 COs and RFIs as of June 8, 2021, and 1,272 into September 2021. All of these represented Owner-driven changes that Yates had to incorporate into its construction plan.

Yates was providing Owner with daily reports regarding which subcontractors were on site and what areas they were working in and what they were doing. (Exh. 158-159). There were almost daily email exchanges that included representatives of Yates, Cumming, and Crescent. Progress in one area sometimes had to be slowed to progress in another area or to allow one of the subcontractors to get ahead of another. (Exh. 110-113, 115, 325-326, 485, 196, 160, 281, 488). Detailed coordination of specific areas of the Hotels were scheduled and addressed. (Exh. 111). There were in-person meetings involving leadership of all stakeholders through OAC Meetings and other meetings. (Exh. 483). Yates's pay applications also included schedule updates. (Exh. 484, 486).

Yates also had some performance issues, and even though some originated with subcontractors, Yates had the ultimate responsibility. Owner questioned some of the Embassy Suites' guest room finishes. There were some issues with failing Fire Marshal inspections that required reworking and rescheduling. (Exh. 106). From Owner's perspective, Yates was less organized and had more delays; from Yates's perspective, the emergence of new COVID strains, combined with the unreasonable pressure from Owner and Owner-driven changes, was a situation in which it was doing the best it could given the circumstances.

The reoccurrence of COVID with the Delta variant impacted the job. A Yates Tennessee superintendent on the Project died of COVID after being hospitalized and on a ventilator. Yates and subcontractors were impacted with employees out with illness, which Yates was keeping Owner informed of through OAC Meetings and other communications. (Exh. 483). Fire Marshal

and Codes inspector availability became significantly limited because of those offices' personnel issues.

Yates began doing punch list work on Embassy Suite rooms in July 2021, meaning they were completing them and preparing them for FF&E to be provided by Owner. That process was impacted by the slowdown in Fire Marshal inspections and fire safety equipment availability (or lack thereof). (Exh. 485).

Nadolski, Davis, Jeakins, Saatkamp, and maybe others, had a conference call on September 2, 2021, regarding problems getting inspectors and progressing the job, which were ongoing. (Exh. 115, 485). At that point, the parties discussed a path forward, and Owner shifted the focus toward a phased opening, assuming Metro would issue partial occupancy certificates. Some of that group met on site the week of September 20, 2021, to discuss what the phased opening would look like. (Exh. 281). Two primary hurdles were finishing the podium level of the Hotels and coordinating with the Fire Marshal to get approval for a partial opening. They went through the phased opening plan, changed schedule expectations to pull planning[9] because of dynamic and changing conditions, with a focus on particular areas of the buildings that would allow opening.

There was a lot of paperwork developed, many accusations passed among Project participants, and plenty of finger-pointing for blame on the slowdowns. Yates perceived Owner unreasonable and unforgiving, while itself adding difficulties and delays in the Project. Owner perceived that any problems were all Yates's fault, that its changes should not have impacted the schedule and should have been worked around and, regardless, per OCO112, that was Yates's problem. Yates had many people from its organization working on the Project from the top down.

[9] Pull planning is the process by which a contractor solicits information from its subcontractors regarding when and how many crews are going to be available to sequence activities based on that information rather than rigid pre-planned schedules that tell them when to do what part of the job.

In its September 3, 2021 Monthly Report and Pay Application, Yates stated, "We are currently tracking impacts from the Delta Variant of COVID19 and the new surge of cases across the country and reserve our right to submit a change request in the future." (Exh. 484). Additionally, the Project was again seeing inspection delays because of impacts on Metro personnel. (Exh. 484, 115, 325, 485, 196, 160, 326). Whenever Yates raised the issue of COVID impacting the Project, either through a subcontractor claim or its own issues, Owner's response was "COVID was covered in the last schedule extension OCO with Yates. That would make me think the delay would also be a Yates issue and not ownership," to which Yates's position was "[t]he CO dealt with the Covid impact we had experienced to date, it did not take into account a reoccurrence which is arguable [sic] worse than the original covid conditions. This variant or 4th wave as some has called it was not anticipated." (Exh. 326). Yates added people as completion neared, having them hyper-focused on particular aspects of the Project. It is apparent all participants were working as hard as they could to complete the Project, and everyone was financially motivated to do so. It was a difficult project, and there was a desire to be done—from Yates's perspective, to deliver the product, and from Owner's perspective, to satisfy its lender and begin generating revenue. (Exh. 72).

At the end of September 2021, Crescent reported to Starwood and the lender regarding Embassy Suites:

> Ownership walked the building on 9/22/21 for progress against the most updated schedule. Based on observations, Ownership has determined that while adequate progress is being made on the tower guestroom floors, there are several areas in the podium and roof levels that will impact Substantial Completion of the entire building. . . Yates is working directly with the city building inspector and fire marshal to issue Partial Use & Occupancy certificates for completed floors/areas of the building which will allow hotel staff access ahead of the full Certificate of Occupancy.

(Exh. 45). Thus, as of October 2021, Owner was aware of problems getting the Project complete as of the substantial completion deadline of December 1, 2021, and was shifting focus to a phased

opening and a February 1, 2022 substantial completion date. (Exh. 74). At that time, in addition to the Delta variant of COVID, the supply chain issues were significant. Design changes and issues with 1 Hotel were particularly significant. The specified guestroom bathroom floor tile for 1 Hotel being manufactured in Turkey was very delayed, as was the Watermark-branded fixtures. Sternlicht, Starwood's founder and the developer of the 1 Hotel concept, had very specific opinions and changes for that hotel that were causing headaches and delays for everyone. Yates was keeping Owner apprised of delays and related specifics. (Exh. 562-563).

Tazalla emailed the Starwood team on October 3, 2021, "The GC is behind. They will be paying us over $50k a day when they miss their target delivery on December 1st and will be looking for any reason to claim owner delays. If we give them a reason to claim a delay for these design changes we will lose the hundreds of thousands of dollars they will owe us that could be used to fix anything Barry [Sternlicht] doesn't like." (Exh. 76). Tazalla was the bottom-line guy for Starwood and was very focused on the profit for the Project and summed up why *Owner* had some significant responsibility for the timing of the Project:

> I am trying to understand how we can be successful but I am currently at a loss. Over the last 3 years we have redesigned what was the Curio hotel to be a 1 after commencing construction. We then changed things quite significantly after a model room review more than halfway through construction at Barry's direction. We changed many parts of the Embassy Suites guestroom as you remember under Barry's direction. We converted the 25,000 SF conference center to the 1 Hotel aesthetic post IC so that SH could manage. We recently signed an LOI with a new restaurant operator to change the ground floor F&B space at the Embassy Suites into a pseudo nightclub. The list goes on. The entire team has gone to pretty extreme lengths to make all this happen in spite of COVID. I could care less about any personal tension or fire I draw from it but in the context of looking at several new deals with the hotel acquisitions team I am losing faith that we can meet expectations including schedule, budget, etc.

(Exh. 76). There was significant infighting among the Starwood team about design changes, who approved them, whether they should have been approved, and what to do to get past them. (Exh. 77).

In addition, FZ's and Yates's witnesses testified the fire systems on order from Siemens, which would typically be something available to purchase "off the shelf," were many weeks delayed from manufacturers. (Exh. 499). Fire inspections were slow going because of Metro manpower issues. (Exh. 350). FZ's witnesses also testified that Owner changes created delays and added extra costs. (Exh. 351-361). FZ did provide recovery schedules as required to address delays during this critical period for the Project. (Exh. 362). Compression and stacking of trades, because of these schedule pressures, was also an issue. (Exh. 363-364, 375-377).

Yates had begun punch lists for guestrooms in Embassy Suites, working its way up the building (Exh. 488-489), but it was slow going. Yates was working on the top levels of that hotel, including the public spaces. 1 Hotel was behind Embassy Suites, and there were still buck hoist rooms to finish as well as Owner-driven design changes. (Exh. 351-354, 486, 73). Owner was proceeding under the assumption that it could not get a final occupancy certificate initially as hoped and that it would have to have a phased opening. Owner was also concerned about getting a delay claim from Yates for, among other reasons, having to contend with Owner-initiated changes. (Exh. 71).[10]

As of early November 2021, this continued to be the plan as Crescent reported to Owner and the lender:

[10] Specifically, in an email dated September 29, 2021, Tazalla stated, "We need to be very careful about giving direction as there are hundreds of thousands of dollars at stake given how behind schedule Yates is and the structure of their contract. It would be awful if an email became the basis of a delay claim that the ownership team had no insight into. Nothing has gone wrong yet, just urging everyone to remain diligent as it is only going to come heavier and faster from here out." (Exh. 71).

> Construction progress continues to fall behind as a result of supply chain and manpower issues. For this reason, we have elected to delay our opening date by one month to 3/15/22. The team continues to work through partial opening strategies with Operations as we receive guestrooms and other spaces from the Contractor ready for move-in. Fire and life safety inspections have been the biggest challenge for the Contractor's turnover schedule.

(Exh. 46). Owner was frustrated with Yates, who was frustrated with subcontractors. There were many communications in which one party was blaming another party for slowdowns on the Project. (Exh. 197-198). COVID was rampant and creating new headaches. Owner's new substantial completion date, for internal communication purposes, was February 15, 2022. (Exh. 75). Despite OCO112 and no changes to it, no one expected that the Project would be at substantial completion by December 1, 2021, least of all Owner. Crescent reported to Owner and Lender, in its end of November 2021 report, "Current projected Substantial Completion is 3/1/2022, 90 days later than the 12/1/2021 Contract requirement, exposing Contractor to significant Liquidated Damages." (Exh. 32). This was consistent with Yates's updated schedules. (Exh. 565).

December 2021 – March 18, 2022 Schedule Revision Discussions and Podium Milestone

December 1, 2021, came and went without substantial completion; rather, Yates continued to push hard to finish the Project. Nadolski reached out to Saatkamp and Jeakins on December 3 to set up a call to discuss status. (Exh. 327). Yates was keeping the pressure on FZ to get the fire systems done, and the two parties were going back and forth regarding FZ's proposed recovery schedule. (Exh. 114, 353, 365). FZ was the primary problem because fire safety prevented occupancy certificates and the ability for operations to come in and use the buildings. There were also architect changes coming in and change orders pending approval, including an extensive audio-visual system on L19 (rooftop) of the 1 Hotel. (Exh. 354, 501-503).

Yates provided Owner an updated schedule with substantial completion on March 1, 2022, due to Embassy Suite L30 delays and 1 Hotel green wall issues. Starwood instructed Crescent to

negotiate with Yates regarding a February 15, 2022, turnover of the building with some forgiveness of liquidated damages and a determination of which spaces could be ready for the "soft opening." (Exh. 199). LK did a January 7, 2022 report regarding its observations on the status of the Project with a list of "deficiencies" it classified from severe maintenance and functionality issues, major and minor functionality issues, major and minor aesthetic issues, major and minor performance issues, minor coordination issues, and major life safety issues. (Exh. 171).

During this same period, Owner was having to explain delays to the lender. On December 10, 2021, Crescent informed lender that "there are three main factors that have slowed production: labor shortage, fire device deliveries, city fire inspections." (Exh. 200). Internally, Jeakins was acknowledging these issues but continuing to put blame on Yates not overcoming these "real issues that are affecting projects around the country." However, he acknowledged that "[a] significant positive factor is that Yates continues to make progress towards completion, has been paying subcontractors to our knowledge and continues to be cooperative in most aspects of the project." (Exh. 201). Owner was also in discussions with lender about needing additional funding for the Project, which funding was part of the original loan documents. Specifically, in January 2022, Owner requested an additional draw that took the loan to a $220,300,000 balance, leaving an $8,700,000 cushion against the original $229,000,000 fund amount. (Exh. 87). Lender and Owner also had to exercise an extension of the loan obligations in February 2022. (*Id.*).

Nadolski came to Nashville on December 13, 2021, at Jeakins's request, for Davis and him to meet to discuss the phased opening, outstanding change orders, costs, and other issues important to finishing the Project. Nadolski suggested mid-summer dates for substantial completion which Jeakins pushed back on hard. Nadolski asked for an additional $8,000,000 to 10,000,000 to finish

the job, which Jeakins also objected to providing. Nadolski testified that Jeakins, on behalf of Owner, and he, on behalf of Yates, reached a deal for:

- An additional $2,000,000 for subcontractors/pending change orders;
- An additional $4,000,000 incentive pay including $1,500,000 immediately for disbursement; and
- A March 18, 2022 deadline to finish and turn over the podium so the operator could begin training and a waiver of liquidated damages if that deadline was met.

Nadolski testified he thought they had a deal and that Jeakins and he literally shook on it. Further, Jeakins committed to "make it happen" through his constituency, and they agreed Yates would proceed over the holidays pursuant to the plan. The Court found Nadolski's testimony credible and that it was supported by a series of events that followed, including internal documents among Owner constituencies. Jeakins's testimony that there was a deal on milestones, but that substantial completion did not change from a contract standpoint, is strained and lacked credibility. His attempt to explain that difference rang hollow with the Court.

On December 21, 2021, Jeakins conveyed a draft deal structure to Starwood based on the Nadolski meeting and consistent with Nadolski's version of their agreement. (Exh. 202). Starwood then began having its own internal discussions about how to address the situation, not immediately agreeing to what Jeakins and Nadolski agreed to when they met. (Exh. 78). Nadolski had not understood the deal to be subject to Starwood approval, but Jeakins and other Crescent witnesses testified that it was. This is where the dispute arose between the parties about whether they had a "December Deal" to modify substantial completion and focus on a phased opening with forgiveness for liquidated damages and the obligations included in OCO112.

On December 22, 2021, the parties executed OCO155 that provided for a payment of $2,000,000 toward outstanding change orders from subcontractors.[11] OCO155 still provided for a December 1, 2021, substantial completion date although that date had passed, and the parties were working on finalizing the staged opening. (Exh. 155). Nadolski noted that Jeakins and he continued to discuss schedules through the end of 2021 despite that language. (Exh. 328). Crescent worked internally to put together deal terms with input from Saatkamp and Cumming, with particular attention to the payout and forgiveness of liquidated damages, so that Yates was properly incentivized to increase manpower and apply pressure on its subcontractors. (Exh. 17, 116). As Saatkamp commented on December 29, 2021, "If Starwood will not agree to waive [liquidated damages] this fails. Which Yates has informed us is also a redline with their subs (if no waiver of LDs then no deal). Not sure how to overcome that. Emphasizing how bad the alternatives to this deal are is probably the best way to convince Starwood that waiving LDs and this structure of incentives is the best way to move forward." (Exh. 116). Crescent executives' position was, "This is a well thought out and logical plan . . . let's get it done." (Exh. 17).

On December 30, 2021, in response to Nadolski's email that the agreement was no liquidated damages if the podium was timely delivered, Jeakins said, "I did not make any agreement with you and I am not authorized by our ownership structure to make a deal like that. We had a discussion and I asked you if Yates intended to make a claim against ownership and that Ownership has no desire to pursue LD's if we can figure out a way to deliver the building. As stated from the beginning of these conversations, Ownership is willing to waive LD's if Yates can hit these dates and deliver the building." (Exh. 79). They went back and forth on milestones into

[11] Yates contends that this was "step one" of the "December Deal," as the phased openings were contingent upon receiving fire alarm devices and reprogramming the entire life safety system which was approved via this change order. (Exh. 15, 72, 281).

early January, discussing March 18 for podium life safety sign off, April 1 for total building life safety sign off and partial certificate of occupancy for 1 Hotel through Level 10 and Embassy Suites through level 18 and other milestones, and April 22 for full building certificate of occupancy and substantial completion. (*Id.*). Nadolski responded, "I need to clarify that Yates does not believe that the Owner is entitled to LD's to be applied per the contract date of 12/1/2022 [sic], as we believe that we are entitled to extensions of time for a variety of reasons that we have discussed. Therefore if the dates are not met, the Owner can claim LD's as of 12/1/21, but Yates will have the right to defend against those claims and also bring its own affirmative claims. If the dates are met, both parties waive all delay claims." (*Id.*). Jeakins responded, on January 4, 2022, "I have confirmed internally we are in agreement. How would you like to proceed in getting this finalized with an executed version." Crescent emailed internally that there was a deal, as did Starwood. (Exh. 79, 18).

Yates' December 31, 2021 and January 10, 2022 schedules reflected the revised dates in the December Deal with phased completion and focus on the podium level, as did how Yates proceeded on the job. (Exh. 566, 575, 280, 397-398, 385). Yates considered these schedules to reflect nine separate critical paths which had been reset with the December Deal. Jeakins awkwardly testified that the schedules did not mean anything to him in terms of an agreement but that they were "just a tool" and did not reflect a deal. This is despite the fact that Cumming's scheduler, during the same period, was reflecting multiple critical paths based upon the milestones. (Exh. 577). Again, the Court does not find Jeakins's testimony on this point credible.

Nadolski was pushing Jeakins for a written commitment and was concerned about the passage of time given the tight schedule that was in play. Jeakins emailed Nadolski on January 4 with "If the dates are met, both parties waive all delay claims." (Exh. 22). On January 5, 2022,

Jeakins emailed Saatkamp the milestones that were agreed to, as well as associated payments with "[r]eset LD's waived if Full Building CO received 4/22." Attaining podium life safety sign off on March 18, 2022, was intended to release a $500,000 incentive payment. (Exh. 203). Davis reiterated the milestones to his team on the same date, and Nadolski sent Jeakins a draft reflecting that agreement. (Exh. 384, 329). Yates paid BMCC a $350,000 milestone payment on January 4, 2022, and the new schedule was discussed at a January 5, 2022 subcontractor meeting. (Exh. 434, 501-502). Yates pushed its subcontractors toward the milestone dates. (Exh. 298-299). At the same time, on January 3, 2022, Crescent made contact with DPR Construction ("DPR"), who it later hired after terminating Yates, regarding "insight" into the Nashville construction market. (Exh. 254).

In its December of 2021 report to the Owners and lender, dated January 18, 2022, Crescent was reporting as follows:

> The ownership team has been working closely with Yates to develop a plan to finish construction for the building. As previously reported, Ownership has forecasted delays to the project due to manpower shortages and supply chain issues. After substantial negotiations with Yates over the holidays, Ownership plans will inject funds into Yates' contract in order to mitigate the aforementioned manpower and supply chain issues that have arisen on site. The first Change Order ($1,100,000) is included in this month's pay application. As a stipulation in the deal with Yates, these dollars will be given directly to the subcontractors to maintain workflow on site by helping pay for additional crews, overtime, and supervision for select critical trades.
> …
>
> Although Ownership has not received formal notice related to the COVID-19 pandemic and supply chain issues, Ownership is anticipating receipt of a delay claim from Yates. Preemptively, Ownership is evaluating the legal strategies, along with the schedule and monetary effects related to this potential delay claim from the contractor.

(Exh. 33).

On January 12, 2022, Jeakins informed Nadolski that Yates would have to be responsible for $500,000 of the $2,000,000 incentive payment. Nadolski responded:

> We have painstakingly worked the previous values with the trades and to go back now is going to be a problem specifically give the fact that we have already worked the pay applications. Any changes will further delay what was termed **"immediately".** I have asked for a call with the decision makers that have waited till now to assert they don't like the deal. As stated, it is very discouraging to us that "the partners" feel like they don't need to fund the entity that is working as hard as possible to make this happen. Furthermore we have already spent money in good faith with the understanding that the deal was going to work – these commitments were made even prior to receiving the outstanding trade change orders where we advanced issued them to the trades as well as brought on additional resources and to help make the push.

(Exh. 22) (emphasis in original).

However, even though Crescent assured Yates there was a deal, and Starwood internally had seemed on board, Tazalla and Starwood counsel continued to discuss internally. Tazalla expressed his opinion to counsel, on January 7, 2022, as follows:

> [D]elays are 2/3 COVID & supply chain and the rest is incompetence with this general contractor and specifically this projects management (there [sic] schedule has been completely awful for years and David and Nick have been showing them that). It is important to note that if Yate's [sic] wasn't bad at papering things and general administrative tasks another GC would be in a much stronger position contractually. Said another way, if Yates was more diligent, they would have millions in valid claims against us or at partially negating our potential claims against them. We essentially have them so cornered and they are so screwed there is some credibility to their "walking".

(Exh. 70). Tazalla testified that despite these emails seeming to confirm the December Deal, his position was without a CO, there was no deal. The Court finds Tazalla not credible on this point, as this was inconsistent with the communications among the parties and represents an attempt by Owner to renegotiate an agreement that had been made in good faith and already acted upon by Yates.

On January 10, 2022, Tazalla discussed an "Option B" of terminating Yates, demanding liquidated damages already owed and hiring a new general contractor. (Exh. 80). On January 13, 2022, internal Starwood emails reveal that Sternlicht, for the first time, was brought into the conversation and that no deal would be agreed to without liquidated damages that were believed to be "enforceable and recoverable from Yates" as of that date. (Exh. 22). After Starwood and Crescent conferred, on January 14, 2022, their communication was "everyone is on board to pay the $1.1m to the subs today and fully remove the 400k to Yates. The LDs are not waived as part of this. This keeps things together and probably buys up a couple of weeks." (Exh. 23). This was *not* what had previously been communicated to Yates. As of February 4, 2022, Starwood had negotiated with Meritz for a cash infusion and was working on a loan extension. (Exh. 82). Additionally, Starwood discussed getting Crescent to contribute some of its $5,000,000 guarantee to make the numbers work, and there was tension developing between those parties. (Exh. 80-81, 20).

Nadolski submitted the $1,100,000 OCO156 on January 14, 2022, consistent with the December Deal, which Crescent did not approve until February 1, 2022. The payments were for the primary subcontractors for "Milestone #1 Completion Date Agreement." Despite the parties' agreement, this CO ultimately included a reservation of rights by both Owner and Yates and stated that it was prepared "[i]n coordination with our ongoing negotiations regarding completion of the Project" and was not "an amendment to the contractual Substantial Completion date" or "a waiver of any of Owner's claims, including, but not limited to, its claim for liquidated damages which are accruing daily, which the contractor disputes." The substantial completion date remained December 1, 2021. (Exh. 21). Going forward, however, change orders in February listed the

substantial completion date as "To Be Determined." (Exh. 41-42, 330). The payment to Yates for acceleration was reduced from $500,000 to $250,000. (Exh. 161).

On January 27, 2022, Jeakins told Nadolski that there was no agreement on milestone dates and substantial completion remained December 1, 2021, with liquidated damages still in effect with $3,000,000 in funding for subcontractors. Further, although liquidated damages were not tied to milestones (e.g. they were already accruing), the milestone dates were reiterated. William Yates, the owner of Yates, attempted to reach Pitchford directly to discuss this matter after the Jeakins' email. (Exh. 24). On February 8, 2022, Nadolski wrote a response laying out the timeline of communications and Yates's position that it had an agreement with Owner and Owner was unilaterally changing the deal. His chronology went back to this mid-December 2021 meeting and "primary deal points" that followed and the consummation of OCO155. Further, that on December 22, 2021, subcontractors were told to proceed pursuant to the payment agreement, and they continued to email to get a signed agreement. Nadolski reminded Jeakins of his January 4, 2022 email in which he said "Yes, I am in agreement with your clarification on LD's – if the dates are met, both parties waive all delay claims." Nadolski's position was, at that time, they had a deal with milestone dates, treatment of liquidated damages, payments due to Yates, and Yates's release of its counterclaim. (Exh. 206). He concluded as follows:

> Yates believes we have an agreement, and the project record as summarized above will support this. Yates then relied on such agreement in making subsequent agreements with subcontractors. Crescent knew that Yates was writing subcontractor change orders based on Crescent/Yates agreement. Crescent has stated that Starwood has failed to consent to the deal points, but Starwood was a part of communications that consummated the agreement on January 4, 2022. We ask that Crescent honor the agreement that was made so that both Crescent and Yates can mutually focus on getting the project complete.

(Exh. 206).

Nadolski followed up with Jeakins on a number of items on February 15, 2022, including the discussion between William Yates and Pitchford. On February 22, 2022, Jeakins responded "We are working to provide a formal response." (Exh. 208). Jeakins did not get back to Yates that month. Yates had brought in an additional project manager, Pat Nash, whose specialty was getting projects finished and whose responsibility was to help meet the March 18 deadline. (Exh. 400-405, 387-390). Yates was keeping Owner apprised of progress through email communications and OAC Meetings, and Cumming was updating schedules. (Exh. 505, 577). Yates was having issues with Owner's contractor, Flood Brothers, in having to repeatedly go through rooms to punch them which was slowing down progress. (Exh. 172).

In Crescent's February 2022 Development Report, it listed the March 18 and April 8 and 22 milestones, consistent with the December Deal, as what was being worked toward on the Project. (Exh. 47). 1 Hotel progress was behind Embassy Suites, in part because of the increased scrutiny of the luxury brand, spa changes, and the number of opinions from the Owner's representatives. It involved difficulties such as the green wall and associated irrigation needs. Every time someone from Starwood visited, there were new changes suggested. New eyes brought new sets of expectations and multiple walks, punch lists, and cleaning. (Exh. 207). Davis emailed about the punch list issues stating that "we have cleaned rooms 4-6 times," and "I have 50+ people on [time] and [material] punching rooms and re-punching rooms that the subcontractors have already punched." (*Id.*). Further, COVID was impacting the job and manpower. (Exh. 386, 205).

Starting in late February 2022, some Yates-proposed change orders showed the substantial completion date "to be determined," which were signed by Pitchford. (Exh. 330-331). Others still showed a December 1, 2021 substantial completion deadline. (Exh. 571-574).

Ownership did not get back to Yates's February 9th email until March 11, 2022, over a month later, just before the March 18 podium milestone. Jeakins emailed Nadolski as follows:

> Ownership disagrees with the assertions made in your email below. Yates was aware that our discussions were not final or binding and that further approvals were needed. The Construction Contract clearly states that it may be amended or modified only by Change Order signed by both parties. There is no signed Change Order to define the terms of the deal or allow for payment of the additional funds.
>
> That said, I would still like to work with you towards closing out the project as efficiently and fairly as possible.

(Exh. 209). Nadolski responded, in part:

> I appreciate your response to my February 8, 2022 e-mail. Additionally we appreciate you honoring the portion of our "Deal" related to the trades. With that said we have made significant progress towards meeting our goals. For now we will agree to disagree and hopefully bring this to an amicable resolution. I do want to point out that we proceeded with the "Deal" and Crescent had full knowledge that we were proceeding but more importantly the only way the "Deal" would work is if we immediately implemented it and again Crescent was fully aware and acknowledged in writing. Our Contract is with Crescent, and not with others. I do think continued dialog needs to occur and hopefully we are not waiting a month for a response. As I mentioned to you on the phone this week, it was our understanding that Joseph was going to get back to William.

(*Id.*).

The Court finds, having heard the witnesses testify regarding this back and forth, that Owner was purposely delaying its responses to Yates to "lull" it into believing there was a deal, to committing more resources, and keeping pressure on subcontractors. In fact, it appears it was Owner's intention to hold liquidated damages over Yates's head and not honor its commitment to waive those based upon the new milestones, despite communicating otherwise to Yates. Yates had proceeded upon reliance on Jeakins's promises, on behalf of Ownership, and kept its obligation to meet the March 18, 2022 podium milestone, which resulted in OCO165 dated April 1, 2022, and executed by Owner on April 19, 2022, reflecting a partial incentive payment. (Exh. 211, 162, 508).

March 18, 2022 through Opening

Owner continued to have design changes that caused delays. (Exh. 378-379). The architect, like Yates, was working toward a substantial completion date of April 22, 2022. (Exh. 378). Internal Crescent tracking documents, showing punch list progress on the rooms, were showing the same substantial completion date and a May 15, 2022 opening date for the hotels. (Exh. 53, 578-579, 211, 213). Those internal communications were structured around the milestones from the December Deal, with Milestone #1 defined as the Fire Marshal sign off on 1 Hotel L8 and Embassy Suites through L12 so that training could begin with complete guestroom turn over, and all podium levels punched by ownership. The next milestone was April 8, 2022, for issuance of a temporary certificate of occupancy letter ("TCO"). (Exh. 212).

April change orders reflected the substantial completion date "to be determined." (Exh. 332, 162). Some of the change orders were approved after pending for several months, and/or included Owner changes or RFIs. (Exh. 332). Owner got designers involved who were working with the architect and demanded it make changes inconsistent with prior work. (Exh. 213, 394). Yates was finishing areas, such as kitchens, that depended upon equipment delivered by Owner's direct vendors. (Exh. 392).

As of April 12, 2022, when Yates submitted its March 2022 Pay Application, Yates had hit its first two milestones despite still experiencing supply chain issues. A total of 137 of 1 Hotel rooms were done, fixtures and finishes were being completed, and there was very little work to do. (Exh. 509). Embassy Suites had final sign off on fire safety for rooms on floors 5-12 and 15-20 scheduled for that date. Cumming verified the Embassy Suites lobby and L4 were ready for punch. (Exh. 215).

Operators and brand management were walking through and asking for adjustments in April and May, and some items Owner was responsible for, such as the Embassy Suites "blade sign," were not on schedule. (Exh. 62-63). As of April 19, 2022, Jeakins reported to Starwood:

> [T]he Embassy Suites TCO is expected next week through Level 30, but 1 Hotel TCO will not be until May with full CO towards the end of May once Embassy Suites level 30 is complete. The Building Inspector is requiring all furniture (including public space furniture) to be installed in its final location prior to TCO so that will affect the 1 Hotel and ES Level 30. The contractor has received life safety signoff from the fire marshal for most of the building and will receive the remaining sign off either tomorrow or next Wednesday. The majority of exterior work is complete, remaining work including signage and landscaping. Interior work is mostly related to punch work with exception to Level 30 of the ES tower where finishes are still underway around the pool deck and bar area. Work is scheduled to be complete on this level mid to late May. Below is a summary of remaining construction activities after 4/27 with an estimated total value under $500k.

(Exh. 48). The email listed exterior work including signage and landscaping and repaving the road, and Embassy Suites L30 and 1 Hotel Level 18[12] exterior. (*Id.*). Crescent approved OCO165 that same date releasing an additional $250,000 incentive based off Milestone #1 being met. (Exh. 162).

That same date, the Embassy Suites operator, Hilton, wrote to Crescent referencing a site visit the day before. Hilton was pushing the opening date to June 1, 2022. (Exh. 64). Tazalla testified at trial that the pressure to open was intense, and everyone was hyper-focused on opening.

Crescent's internal communications reflect frustrations with Cumming and its FF&E vendor on completing rooms, which were not Yates's issues. (Exh. 57). Yates was reporting discrete issues it could not resolve as quickly as it would like because of issues outside of its control. (Exh. 510-511, 521).

[12] The proof showed that 1 Hotel did not have a 13th floor, thus the rooftop – L19 – was sometimes referred to as Level 18 or L18, but was otherwise identified as L19.

As of April 26, 2022, when Yates prepared its April Report and Pay Application, 137 of the 1 Hotel rooms were done. (Exh. 509). Finishes were still being done on L19 and were subject to Sternlicht's review. Per Davis, very little work was left to do.

During this period, Tazalla, on behalf of Owner, was having regular communications with Meritz about when the Hotels would be opened and the status of their completion and cost overruns. (Exh. 87). Meritz insisted on an appraisal to extend loan terms and to evaluate the continued investment risk. (*Id.*). In June/July 2022, Tazalla allayed concerns about cost overruns by telling Meritz:

> While some of the cost increases were related to COVID and supply chain issues endured over the past several years, a large amount of the additional spend was owner elected enhancements including lighting and finish upgrades, additional suites, bringing in a world class restaurant brand for our ground level space, and enhanced IT/AV features for our conference center. . . Since 2018 the US market has seen historic increases in construction costs. The combination of material cost increases and labor shortages have led to much higher cost escalation in Nashville compared to the country as a whole. In summary, our basis when finished will be significantly below today's replacement cost given the market trajectory over the past 4 years.

(Exh. 87).

After final inspections and final punch lists from inspectors, on May 10, 2022, the city issued a TCO for Embassy levels B3-20 until May 16, 2022. (Exh. 65, 512, 173). Despite this status, Sternlicht was still communicating internally with Starwood about changes he wanted that would impact fire safety systems and millwork. (Exh. 84). The "blade sign" for Embassy Suites, which was a pre-requisite to being opened and was being coordinated by the Owner, was still being installed. (Exh. 216-217).

On May 13, 2022, Metro extended the Embassy TCO for floors B3-26 until June 13, 2022. (Exh. 173). Owner hired First Finish, without Yates's knowledge, as a subcontractor to work with its other subcontractor, Flood Brothers, to finish the rooms. Cumming was managing those Owner

subs, who created problems for Yates by causing room damage that had to be corrected. (Exh. 66, 67, 117-118, 283, 521). Crescent noted in emails that the "[b]iggest issue is Flood Brothers are not doing well" and "this has very high potential of kicking out opening once again." (Exh. 66, 67, 117). Owner had concerns with its subcontractor Flood Brothers and Mobile Fixtures, noting that "both need extra manpower and focus to help us hit any impeding deadlines." (Exh. 25). Yates continued to work on Embassy L30, with various subcontractor issues, both those of Owner and its own. (Exh. 284). Change orders from April and early May were being approved for Yates-controlled subcontractors. (Exh. 333-335). Some supply chain issues were impacting the last of the construction. (Exh. 86). As of May 20, 2022, Jeakins reported to Starwood that the value of remaining work was $250,000, and the Project was 99% complete. (Exh. 51). On May 23, 2022, Davis communicated with Crescent that the items on Hilton's final walk-through list within Yates's scope of work would be completed that week. He identified many items not within its scope that would require an RFI and change order. (Exh. 522).

On May 31, 2022, Metro issued a TCO for Embassy floors B2-27, until June 13, 2022. (Exh. 513). Owner planned to open Embassy Suites with 230 (of 506) guestrooms and all public spaces available for use. Yates did the Owner walk-through before turning over Embassy Suites on June 6, 2022. (Exh. 515). The opening was June 9, 2022. Level 30 which included the pool and rooftop food and beverage outlet, continued to be completed. (Exh. 34, 85, 518, 523). In the May report to Meritz and Ownership, Crescent reported on the opening and that "[c]onstruction progress is at 99.92% of the total contract." (Exh. 34).

After Embassy Suites opened, change orders continued to back up, requiring approval before Yates could continue with Owner-mandated modifications in an effort to finish up the last

items. (Exh. 220-221, 336-338). FF&E, controlled by Owner's vendors, continued to be a problem in punching out the final rooms in both hotels. (Exh. 222).

On June 13, 2022, Metro issued a TCO for Embassy floors B2-27 until July 29, 2022. (Exh. 173). On June 17, 2022, Metro issued a TCO for the "Hotel/Motel – Embassy Side Floors B2-14" and "1 Hotel floors B2-14" until July 29, 2022. (Exh. 173).

As of June 27, 2022, the status of Embassy Suites, per Starwood, was 450 of 506 guestrooms open, and the level 3 conference space was operating and taking group business. As for 1 Hotel, a "soft opening" was planned for July 8, 2022, with about 100 rooms available for guests and a list of items Sternlicht wanted changed, about which Tazalla was very frustrated. (Exh. 92). Per Starwood, "Still a lack of manpower onsite with Yates. They aren't being difficult but have very little sub support. Things moving very slowly. Working with counsel to notice them when we achieve substantial completion. We need to do this to hold retainage release until they complete punch, which can turn into a legal battle." (Exh. 92). Owner communications show a strategy to "hold hostage" retainage to get Yates to finish and not walk off the job. This was consistent with Owner's slow walking of CO approvals, again to keep Yates on the job but not commit to or make payments.

On July 26, 2022, Metro issued a TCO for Embassy Suites floors B2-28 and 1 Hotel floors B2-14 until August 9, 2022. (Exh. 173). On August 9, 2022, Metro issued a TCO for the entirety of both Hotels, until August 31, 2022. (Exh. 173). On August 24, 2022, Metro issued a TCO for Embassy floors B2-30 and 1 Hotel floors B2-16 and 19 until September 5, 2022. (Exh. 173). On September 8, 2022, Metro issued a TCO for "Hotel/Motel – Podium (Levels B3-4) Embassy Tower (4-roof) and 1 Hotel Tower (4-18) excluding level 19" until September 26, 2022. (Exh. 173). On September 23, 2022, Metro issued another TCO for "Hotel/Motel – Podium (Levels B3-4)

Embassy Tower (4-roof) and 1 Hotel Tower (4-18) excluding level 19," this one until October 19, 2022. (Exh. 173). On October 3, 2022, Metro issued another TCO for the same including level 19. (Exh. 173). The final use and occupancy permit was not issued until June 29, 2023, post-termination. (Exh. 173).

On July 8, 2022, 1 Hotel opened to the public, albeit not all rooms were completed and other aspects of the hotel were unavailable to the public, such as the spa and rooftop food and beverage outlet. The 1 Hotel spa opened to guests at some point after the hotel opening but prior to Yates's termination. Some of the equipment, such as heaters, were unavailable or needed rewiring. (Exh. 355, 516, 519-520).

Even though the Hotels were open, there were pre-commissioning delays caused by a slow installation of internet networks (Exh. 430-431) and ongoing design changes to 1 Hotel drain stoppers, water filtration systems, and amenity kitchens. (Exh. 433, 436). Owner's contractor to provide kitchen equipment on the amenity floors was slow, causing a delay in the rooftop TCOs. (Exh. 523-525).

Later that month, Jeakins reported to Owner's insurer that the Hotels were open, and TCOs were being resolved with the "[v]alue of remaining contract scope [] only month-to-month change order work" and described this as "minimal remaining contract work." (Exh. 224).

Into August 2022, after the Hotels were open, Owner continued to refuse to approve change orders to release funds owed to Yates and its subs "given where [they] are with Yates." (Exh. 227). There had been $1,464,656.17 in change orders since April 22, 2022, all of which remained outstanding. (Exh. 526-527). Subs, such as FZ, were owed substantial funds for change orders and pushing back on further work until resolution. (Exh. 545). Nadolski emailed Jeakins on August 26, 2022, in relevant part:

> As you are aware, Crescent authorized the work and the work has been completed. We need to pay the subcontractors for the work completed. I gave you several options including limiting the change order to subcontractor direct cost only or having a separate standalone agreement. You were not willing to consider these options, nor were you willing to offer any other suggestion other than removal of the reservation. Crescent is forcibly insisting we remove the reservation of rights by refusing payment that is rightfully due. This has consistently been the case throughout this project where work is authorized and then payment is delayed and used to reduce claimed amounts.
>
> In the past, we have clearly communicated to you that there would be a claim at the end of this project as there have been numerous issues that have remained unresolved which have been to the detriment of the Contract and the Subcontractors. Crescent reneged on the acceleration deal, and Yates' portion of the "deal" for general conditions. Crescent has used the CCD process to force trades to perform work, but then refuses to pay for work completed. Crescent has refused to look at legitimate delay issues which have placed the project into constructive acceleration, out of sequence work, and created inefficiencies.
>
> As I have communicated to you before, this is a large and complex problem (design issues, excessive change orders, COVID, City Inspections, supply chain issues, manpower availability etc.) and the only way to bring it to closure is to resolve it one bite at a time. However, Crescent refusal to address the simple issues such as paying subcontractors for change order work has made this project even more difficult.
>
> We previously agreed that the best course of action was to get the property open and finished. We are very close, but failing to address these issues prevents us from completing the project because, among other things, the subcontractors want their change orders resolved. Also, we have asked for a partial retainage release to help the process and you would not even consider this token of help to facilitate the subcontractors.
>
> In closing, I appeal to you to work with us to chip away at this and try to help us to get the outstanding pay applications processed and paid, address at least the direct cost of the outstanding change orders, and reconsider a partial release of retention. Our commitment to Crescent remains that we will finish the project and then we can then deal with outstanding claim issues – we have been true to this commitment and have not leveraged claims against completion of the project. We ask that you reciprocate and pay us for work performed.

(Exh. 26). Three days later, on August 29, 2022, Jeakins forwarded the email internally to other executives at Crescent as follows:

> Chet's email below. I have sent to Baker Donelson and we will discuss the response. We need the remaining TCO's then likely we remove them from the project and start closing out remaining items with a different team. We need to focus on this next phase and who we need involved to get remaining finals and to complete punch and deficient work without Yates in the picture.

(Exh. 26).

Stair/Landing Issue at 1 Hotel

Prior to this, on or about July 25, 2022, Codes compliance issues were discovered regarding the L19 stairwell in 1 Hotel, and an alternate design was implemented to achieve Codes compliance. The architect pursued resolution through Cumming and Yates but denied to Owner that it erred in the design plans causing the problem. (Exh. 249-250, 177). In an email dated July 28, 2022, Owner's immediate concern was that it not impact the TCO and to include Yates in the loop of conversation. (Exh. 250). Yates contacted its trades on August 11, 2022, to complete a work plan and schedule. (Exh. 544).

On September 1, 2022, Yates identified inconsistencies between the engineering and architectural drawings that led to the compliance issue. Yates would not fix the problem at its cost because, it asserted, the issue was not within its scope of work. (Exh. 176, 339, 251). Owner did not respond for six days, until September 7, 2022, in which Jeakins described Yates's position as "Refusing to correct Yates' non-conforming work" and not timely notifying Owner of the condition. Further, that "[a]s a result, the Owner must proceed with the corrective work and charge all costs incurred to Yates pursuant to the Contract." (Exh. 339). Yates denied being aware of the condition and disagreed with Jeakins's characterization of "nonconforming work." Nadolski asked Jeakins "to discuss this issue" and "try to come to an agreeable solution" but that "threatening us with back charges, nonpayment and change order approval delays at this point is not going to bring this to resolution." (Exh. 176, 339). Owner responded, "due to the critical impacts this issue has

created, Ownership has already proceeded with correction of the work." (Exh. 176). Although Yates was planning to do the work (Exh. 544), Owner hired DPR to implement the alternate design which, after complete, resolved Codes' impediment to issuing the October 3, 2022 TCO. This was the only work performed after the issuance of the September 23, 2022 TCO prior to that October 3, 2022 TCO. (Exh. 173). DPR charged Owner $58,340.28 for that work. (Exh. 258).

Other Post-Opening Issues

Meanwhile, Sternlicht visited 1 Hotel on July 25, 2022, and wrote to Starwood executives the next day with many issues about the hotel, almost all of which were design issues that were not Yates's responsibility. He thought the restaurant furniture was uncomfortable and "off brand" for the rooftop. He thought the restaurant lighting was too bright. He did not like the size of the waiting room in the spa. He did not like how water streamed from the guestroom faucets. He was also displeased with some of the guestroom furniture. (Exh. 93). Tazalla reminded Sternlicht of many re-designs per his request as the construction progressed, including significant changes to the Embassy Suites' model room later in the Project. (Exh. 90, 93). Internally Starwood executives opined, "[W]e have to focus on the fact that this is going to be a great hotel and the first good investment of a 1 [Hotel]." Further, that "[W]e are well positioned to hit and exceed our U/W returns. From the beginning the sole guide has been trying to prove to the firm as a whole that we could make money on hotel development…." (Exh. 90). Tazalla testified that of the $19,000,000 in cost overruns, $9,500,000 was attributable to 1 Hotel upgrades. Further, that another $5,000,000 would have been Crescent's responsibility based on its guaranty, but Starwood chose not to pursue collecting that money. (*Id.*).

On July 29, 2022, the exchange among Starwood executives caused by Sternlicht's visit was very telling about what had happened on the Project, and why it cost more and took longer

than originally anticipated. To Sternlicht, in response to his questions about the returns to Crescent and Starwood, Starwood counsel stated:

> We did have a number of issue [sic] and they weren't all us. We ultimately took control of the [general contractor] negotiations and that is headed for a lawsuit after completion but it was the right call. I would say though that [Crescent] have been not great on execution but overall a good partner with following our decisions the whole way through. Even when it was not obvious to [Crescent] why we were increasing scope so much. We will have a bunch more cost increases and do overs coming up that we will have to deal with and get their buy in.

(Exh. 54).[13] Further, that

> most of the cost overruns on this project were associated carry costs and schedule related to covid, etc.
>
> On the embassy we did have the situation where we approved renderings and started moving in that direction and then when model room was built (per the rendering) we changed course pretty significantly. The total costs direct were not huge but there was some impact to schedule associated with a change so late in the game.
>
> More of the scope changes came on the 1H side, which we always assumed would be the case and budgeted for that at the beginning. We incurred more changes than we anticipated but my opinion is that they were necessary, as are the remaining changes from here. We also went with a real restaurant that can make us money, but will cost more.

(Exh. 54). Sternlicht's response, in part, was "Face it, Covid was a bitch for everyone in construction but we didn't help ourselves in a few situations. Kevin did a great job bringing this pony into the barn. Now we have some tweaking to do." (Exh. 54).

In summary, through July 2022, there were multiple impacts to the progress of the Project affecting when the hotels could open, including:

- Increased costs from design changes and the design changes themselves (Exh. 53, 87);
- 1 Hotel upgrades required by Owner (Exh. 90);

[13] This is the same as Exhibit 91.

- Cumming (Exh. 85);
- Slow approval of change orders (Exh. 221);
- Dysfunction among Owner constituencies about design changes (Exh. 88-93).

The Hotels opened with some amenities not complete, some of which were under Yates's scope (L30 of the Embassy Suites) and some of which were Owner's (Hand Cut restaurant). When questioned about these issues, Jeakins was defensive and tried to explain away his company's responsibility, further undermining his credibility. This was a large, complex project that required all parties moving in the same direction at all times. Any hiccup with a supplier or subcontractor, inspector or design change, or slowdown in change order approval, could impact progress. Mistakes were made all around. COVID was a significant impact, which Owner incredibly brushed over in an attempt to lay blame at the foot of Yates and minimize how all aspects of the Project were affected. Every request by Yates for additional time was met with push back, requirements for extensive documentation, and unreasonable demands resulting in unacceptable compression. At trial, Owner's witnesses showed little or no sympathy for COVID impacts, which was also evidenced in their communications with Yates. (Exh. 123-124, 132, 326). Yates produced schedules that were unreasonable and unreliable, but it was in an impossible situation with an inflexible Owner who did not give appropriate leeway for the ups and downs of COVID. Emails among the players show a lot of "finger pointing" and blame-shifting among subcontractors, Yates, and Ownership.

Roof Issues Pre-Termination

Another huge issue on the Project related to roof damage and the roof warranty. Hartford Fire Insurance Company ("The Hartford") issued Yates the Builder's Risk Policy for the Project. Gus Nichols Wheeler, who was a Hartford National General Adjuster for Large Loss Property

Claims, was the lead claim professional in relation to the roof claims that are at issue in this litigation. He also testified at trial. (Exh. 546, ¶¶ 2-5). The builder's risk policy, 02MSAZ7767, was issued to Yates and its subcontractors against specified losses occurring during the effective dates of coverage, which were March 27, 2019, to September 27, 2021 (the "First Policy"). (*Id.* at ¶¶ 7-9; Exh. 547). A second builder's risk policy was issued effective September 27, 2021, through April 30, 2022, 02MSBB9573 (the "Second Policy"), that did not contain a LEG 3/06 Endorsement. (*Id.* at ¶¶ 10-11; Exh. 548). Such an endorsement removed the exclusion in the base builder's risk coverage form for "Faulty Workmanship or Design." (*Id*. at ¶ 9).

The Project includes 22 separate roofs for the Hotels of varying sizes. (Exh. 266). The Project design team prepared specifications requiring the use of a thermoplastic membrane roofing system ("TPO"). This is a plastic membrane with a vapor barrier installed on concrete or metal or wood deck. TPO is a product made for flat roofs and installed with an adhesive and other materials.

The Project roofing system was installed by John J. Campbell Company, an approved installer of Holcim/Firestone roofing products.[14] Holcim/Firestone issues a warranty for its roofing products after a final inspection. Yates was also required to provide a 20-year warranty to the Hotels' roofs. (Exh. 163). The Court heard testimony from Kirk Tull, formerly with Holcim's subsidiary Elevate Roofing, and Tim Williams, President of John J. Campbell, regarding the product specifications and installation process.

Tull supervised Mike Brown, the Holcim representative on the Project who had direct knowledge of the roof conditions. The roof is a Firestone TPO system. Holcim publishes an installation guide for installers that includes, among other provisions, guidelines for job conditions appropriate for installation (1.02), protecting roof walkways to prevent tears/punctures (1.16),

[14] Firestone Building Products was formerly owned by Bridgestone and owned by Holcim Building Envelope during the relevant period.

finished roof protection with slip sheets to also prevent tears/punctures (1.18), and membrane repair standards regarding size, number, and location requirements to prevent excessive piecemeal patching (1.19). (Exh. 139). Adherence to these practices is important to obtain a product warranty from Holcim.

One of Owner's consultants monitoring Yates's performance was Smith Seckman Reid Facilities Commissioning ("SSR"), tasked with reviewing the envelope of the building including the roof, curtainwall system, and anything else dealing with the exterior, including waterproofing details. On December 15, 2020, and March 30, 2021, SSR visited the Project with a Yates' representative. During the first visit, a John J. Campbell representative attended, and, during the second visit, Hinson (LK) attended. During both visits, SSR identified some installation concerns. (Exh. 164-165). During a July 9, 2021 visit with Yates, SSR identified ponding and some limited punctures to the TPO membrane, as well as "excessive amounts of debris" by trades. (Exh. 166).

On July 31, 2021, John J. Campbell submitted its pay application for the final payment of its $1,051,327.03 subcontract for the roofing work, minus the 5% retention of $51,876.90, indicating completion of its work. (Exh. 462). Williams testified he has never had a roof job where repairs were not needed, and he fully expected some follow-up work would be necessary.

On November 2, 2021, in a conference call that included Yates, SSR noted the roof problems as an open item. The call notes state, "Generally, roofs are not being protected from damage. . . indicating concern moisture is entering and damaging the roof system." Further, that Yates had an "intent to perform floor and infrared testing to verify all roof systems once staging and other materials are removed" and that this was being worked on. (Exh. 170).

On February 16, 2022, Yates notified Owner of water intrusion in the 3L ballroom and 4L bar/kitchen area of Embassy Suites. It also notified its builder's risk carrier, The Hartford, on that

same date, specifying the 5L and 6L roofs as causing the problems. (Exh. 169, 407). Yates also noticed some of its subcontractors, including John J. Campbell, of their potential responsibility for repairs. (Exh. 408). Owner was not included on those communications.[15] John J. Campbell responded on February 23, 2022, defending the quality of its installation process and placing blame for issues on the trades who caused damage. The roofer offered to obtain a price to replace the entire TPO membrane but "due to supply chain issues, all roofing materials and associated components are currently on limited allocation by many manufacturers and carry extremely long lead times." (Exh. 463).

On February 18, 2022, Yates notified Owner of the roof damage and its efforts to patch known holes. Owner had already been made aware of the issues through SSR. Cumming told Owner it did not believe the problem was serious enough to lead to a claim. (Exh. 234, 528-529). The next week, on February 24, 2022, SSR again inspected the roof with Yates. In its report, it questioned some of the roof installation and the number of patches to TPO punctures, observing that it was inconsistent with Holcim's installation guide. (Exh. 167).

Holcim was unaware of any installation problems or water damage. Holcim and John J. Campbell became aware of post-installation problems caused by trades damaging the roofing through staging on it in the first quarter of 2022, when Holcim was asked to do a final inspection and issue a warranty. While some trade damage during installation is common, Holcim refused to issue a warranty on the Hotels' roof systems because of construction-related damage and inadequate or inappropriate patching. Holcim's position was that John J. Campbell should have

[15] In Yates's counsel's letter of July 25, 2023, he referenced "storms that damaged some of the roofs in February 2022." (Exh. 244). This was not discussed by other witnesses, and it is unclear what precipitated the February 16 and 18, 2022 communications.

used larger patches of TPO or done whole roof replacements given the identified problems. (Exh. 141).

Despite the first TCO being issued on May 10, 2022, and the Hotels opening on June 9, 2022, and July 8, 2022, Yates considered the roof repair issue an open item. John J. Campbell and Yates worked on resolving Holcim's concerns through 2022, including the potential for Holcim to warranty repairs. (Exh. 464-465). On April 28, 2022, John J. Campbell submitted a proposal to repair 24,000 square feet of roofing in 14 areas for $669,911. Williams testified getting material would be a problem, but he wanted to be proactive in suggesting a resolution. (Exh. 466). Yates and John J. Campbell dialogued about how to get repairs done, and Williams testified he needed a change order to procure materials. (Exh. 467). Yates never accepted that proposal.

Given the TPO shortage, Yates looked at alternatives for repairs, including a spray silicone product manufactured by Brazos. Its President, Wally Scoggins, testified at trial that the product it uses, GreenShield, is a Firestone product and is designed to spray over the existing roof to seal and protect it. (Exh. 471). In June 2022, Yates contacted Tull to inquire about using a Firestone silicone coating to fix the problem and obtain a warranty. Tull did not agree that was an appropriate solution for a new roof, although he acknowledged it was difficult to obtain TPO at that time because of COVID and material not being available. (Exh. 144, 468). Regardless, Yates obtained a proposal from Brazos for $278,071. (Exh. 473).

On July 13, 2022, Yates informed Owner it was working on two different solutions. (Exh. 235). Yates communicated with Hinson (LK) and SSR throughout that month to answer technical questions regarding the GreenShield project, its intended effect, and its application. (Exh. 531). Additionally, on August 3, 2022, Yates corresponded with The Hartford with additional information on the roof claim, including pictures. (Exh. 169; Exh. 546, ¶¶ 15-17). The Hartford

set up an inspection for August 23, 2022, with J.S. Held LLC ("J.S. Held") and was also provided a copy of a repair proposal from Brazos and Yates. (Exh. 237, 560; Exh. 546, ¶¶ 18-20). J.S. Held issued a report on September 19, 2022, recommending payment of $445,198.27, less the deductible which included use of the Brazos product. (Exh. 546, ¶ 21; Exh. 549).

In the meantime, Davis communicated with Jeakins on August 8, 2022, that Yates was ready to move forward with roof repair. (Exh. 530). By August 18, 2022, Davis testified that Hinson and SSR had signed off on the silicone repair proposal. (Exh. 531). On August 31, 2022, Yates submitted a proposal to Hinson and Owner to use a GreenShield coating product for roof repair. (Exh. 236).

On September 16, 2022, The Hartford approved Yates's repair proposal, subject to a $100,000 deductible. (Exh. 237; Exh. 546, ¶ 22).

As of September 20, 2022, Owner had not responded to Yates's repair proposal, and Yates attempted to set up a meeting with Hinson to discuss. Hinson was told not to discuss the issue with Yates, which caused Yates to contact Jeakins directly on September 21. (Exh. 238). Jeakins did not respond other than, the next day, to send the termination notice. Nadolski testified that Yates was planning to do the repair work but was terminated before it could do so.

Substantial Completion

Despite the foregoing, on August 31, 2022, Jeakins drafted an "Architect's Certificate," which was issued by LK for the benefit of Meritz, as follows:

> LK Architecture, Inc. . . . hereby certifies to and in favor of Meritz Securities Co., Ltd. as Administrative Agent and as Lender under that certain Construction Loan Agreement dated as of April 1, 2019 . . . . that with exception of the areas in the attached exhibits, each phase of the Project has been substantially completed in accordance with the Plans . . . .

(Exh. 228, 27). The excepted areas included the L19 stairwell, the Project roof, all building commissioning, and 49 other identified issues. The Loan Agreement required a completion date for the Hotels of September 1, 2022, or it would be an incident of default pursuant to Paragraph 4.1(f). (Exh. 229, 87, 27). On September 1, 2022, Owner forwarded this document to its lender.

LK never refused Yates's Certificate of Payment for Payment Applications (per 9.5 of General Conditions). Hinson's testimony overall regarding Yates was that the quality was good with a few nits, including the roof problems. (Exh. 380, pg. 53-56).

As for substantial completion, Owner's focus shifted when convenient from the Hotels requiring minor remaining items to its lender versus everything being a major issue when communicating with Yates.

Termination

Owner decided to terminate Yates for cause. On September 20, 2022, Crescent put together a "Nashville Termination Action Plan" for discussion, including how to communicate with subcontractors who were being retained and those who were not, documentation of remaining work and retention of a replacement contractor to finish the Project. (Exh. 231). Jeakins testified that because the public was now using the Hotels, it was decided Yates needed to be removed to ensure there were no contentious communications or retaliation, but the Court does not find this credible given Yates's good faith effort to finish the Project. On September 22, 2022, Owner communicated the termination to Yates with a Notice of Termination that read:

> This correspondence provides formal notice of termination for cause by the Owner of the Contract pursuant to Contract Article 14(A)(3) due to Yates' material breaches of the Contract which remain uncured.
>
> The Owner is terminating Yates for reasons that include Yates' repeated and ongoing failure to perform the work in accordance with the requirements of the Contract, and performance of untimely, non-conforming and defective work. As

> detailed in countless correspondence, Yates' material breaches of the Contract include the following events of default:
>
> > c. repeated[] fail[ure] to prosecute the Work to completion thereof in a diligent, efficient, workmanlike, skillful and careful manner and in accordance with the Schedule and the provisions of this Construction Contract;
> >
> > d. repudiat[ion of] its obligations under this Construction Contract;
> >
> > e. repeated[] fail[ure] to use an adequate amount or quality of personnel or equipment to complete the Work without delay; . . .
> >
> > h. fail[ure] to perform any other obligation under this Construction Contract and does not correct such failure or breach within ten (10) days (or such shorter period of time if commercially reasonable under the circumstances) after receipt of written notice from Owner or Development Manager directing Contractor to cure such breach.
>
> Ten months after the contractual substantial completion date, the Project still is not substantially complete. Yates has not presented the Owner with any reasonable cure plan to recover lost time or complete the Project in a timely manner. Yates has repeatedly missed scheduled milestones . . . .
>
> Additionally, consistent with prior notices, the Owner has and will continue to retain supplemental contractors to complete Yates' incomplete, delayed, non-conforming and defective work. . . .

(Exh. 178). Owner also developed a termination plan which included communications to subcontractors and certain procedures for leaving the job site.

As of that date, the work on the L19 stairwell of 1 Hotel was complete, and hotel operations hosted a private event on the L19 rooftop that evening, although Owner contends that Yates failed to complete the pergola system sheltering the food and beverage outlet on L19. Owner was able to rent all 215 rooms in 1 Hotel the night of September 22, 2022. (Exh. 89).

The next day, Owner initiated this litigation, seeking declaratory relief that it was entitled to withhold retainage and alleging breach of contract entitling it to damages, including liquidated damages and attorney's fees.

Owner had already contracted with DPR on September 10, 2022, for a maximum of $300,000 of work, to analyze the status of the Project and for the L19 stairwell modification. (Exh. 179). The scope of work was increased and modified after DPR's review, and Owner ended up paying the company over $6,000,000 for work, including removal of the defective roof.

Owner also entered a subcontract with Siemens Industry, Inc. to finish the fire safety work previously being performed by FZ with Siemens as its subcontractor. (Exh. 182). FZ was effectively terminated when Yates was terminated, and Owner claims the $600,000 in work it contracted with Siemens to perform had already been paid for through payments to FZ. FZ claims that it paid Siemens for all materials provided for the Project. (Exh. 348).

Nadolski testified this course of events demonstrated that Owner set up Yates and took advantage of it in the last few months it was on the Project. Furthermore, that Yates did not receive any criticisms of scheduling or manpower until the L19 stairwell issue. Yates had subcontractors such as BMCC at work on the day of termination. Nadolski acknowledged the issues with the roof but noted the roof was not mentioned in the termination letter. He expected they would complete the Project and then address the parties' claims and resolve them. Nadolski testified as to how damaging this was to Yates in the marketplace and that this was only the second time it had been terminated for cause, and the first time was not found to be justified in arbitration. Owner took offense that Yates defended itself to the Nashville press, asserting that Yates had to maintain confidentiality about its status with the Project based on the Construction Contract. (Exh. 567).

Yates had counsel respond to the termination letter on October 27, 2022, challenging the basis for the termination. (Exh. 341). It was not responded to by Owner.

At the time of termination, the GMP had been increased to $230,716,838.45 through approved change orders. (Exh. 390, 415).[16]

Roof Issues Post-Termination

On November 7, 2022, Holcim, through Brown, was again at the Project when he identified, for the first time, water damage because of roofing problems and recommended a forensic audit. (Exh. 145). Soon thereafter DPR contacted John J. Campbell about doing repair work for it as the new contractor on the Project. It declined to do so. (Exh. 265).

In the meantime, the builder's risk claims remained open with The Hartford. Wheeler corresponded with Sheri Wilson at Lockton Companies, the broker responsible for procuring the builder's risk policy from The Hartford, on November 4, 2022, inquiring about the status of Owner's approval of the claim payment and seeking details about how to issue the check. (Exh. 546, ¶ 24; Exh. 550). Yates's counsel contacted Wheeler on November 22, 2022, notifying him of the termination and the lawsuit and raising the issue of a meeting to discuss open insurance claims. (Exh. 546, ¶ 25; Exh. 551).

On December 20, 2022, The Hartford notified Yates that it valued the claim(s) at $445,198.27, and minus a $100,000 deductible (it was treating the matter as four claims with $25,000 deductible each), and was issuing a check for $345,198.27 made out to Owner. The letter referenced weather events, not trade damage. (Exh. 239-240; Exh. 546, ¶¶ 26-27). Because the parties were in litigation and Yates was off the Project, communications were complicated and disjointed at this point.

[16] Yates's Controller, Lawrence Dow, explained that Exhibit 340 was an end-of-job profit calculation worksheet dated September 19, 2022. It shows net losses but did not show final costs outstanding because there were unresolved change orders with subcontractors and uncertainty related to retainage issues at the time of termination. Exhibit 415 is a Final Cost Report from January 2024 that includes the subcontractor pass-through claims. Yates billed $231,086,838.45 but the total cost for Yates on the Project was $247,951,377.13 (excluding legal fees and unpaid portions of pass-through claims).

On the same date, SSR did an assessment of the roof on behalf of Owner. In its subsequent report, it found that of the 22 roof sections:

- 4 were in poor condition (6-7, 14-15);
- 5 were in fair condition (1-3, 21-22);
- 6 were in good condition (4-5, 8-9, 11-12);
- 2 were not accessible (10, 13); and
- 5 were covered with pavers or green roofing (16-20).

(Exh. 266). Per DPR, Holcim agreed to warranty many of the roof systems, and it hired Porter Roofing to do repairs on the rest. Porter returned a March 3, 2023 proposal for $1,260,589, which DPR marked up to $1,994,350 to include additional repair work and insurance and contractor fees. (Exh. 275). By this time Yates had been off the Project for six months.

On February 27, 2023, Jeakins followed up with Wilson (Lockton) regarding the status of the roof claim. (Exh. 241). Wilson contacted Wheeler (The Hartford) the next day for an update. (Exh. 546, ¶ 30; Exh. 553). Wheeler and Jeakins spoke soon thereafter. (Exh. 546, ¶ 31; Exh. 554). Jeakins followed up with Owner's counsel on March 6, 2023, after learning from The Hartford the settlement check was issued and purportedly cashed by Starwood. (Exh. 242).

Jeakins requested a stop payment on the The Hartford's check, and Wheeler advised Wilson that additional documentation needed to be provided if there is a dispute about the onset and extent of roof damage. (Exh. 546, ¶ 32; Exh. 243). On April 4, 2023, Jeakins wrote The Hartford, acknowledging that a stop payment was issued on the claim check per Crescent's request.[17] He further disputed the amount offered and cited cause of the damage and requested

[17] Wheeler testified that this was done after the April 4, 2023 letter from Jeakins. (Exh. 546, ¶ 33). Regardless, it is undisputed that Jeakins requested the stop payment.

involvement in the claim process. He included materials to evidence a cost of $1,994,350 to repair, as marked up by DPR. (Exh. 546, ¶¶ 33-34; Exh. 243).

Also on April 4, 2023, John J. Campbell agreed to facilitate a roof re-inspection with Holcim/Elevate to determine which areas were warrantable. (Exh. 469). That inspection occurred, and Elevate prepared an audit report dated April 28, 2023. (Exh. 142). One of the areas it would not warranty was L19 of 1 Hotel because it was covered with pavers and could not be inspected.

On July 25, 2023, Yates's counsel wrote Owner's counsel, requesting that Holcim be allowed to do a final inspection of all Project roofs and consider issuing a warranty as to those that were not damaged. (Exh. 244). Further, that limited removal of pavers on those roof systems be allowed to evaluate warranty as to those, and that John J. Campbell be allowed to do minor repairs identified as necessary. Owner did not agree. Williams, on behalf of John J. Campbell, reiterated this offer in his testimony at trial and said he had done so in his deposition.

In the meantime, The Hartford hired a consultant, Wiss, Janney, Elstner Associates, Inc. ("Wiss Janney"), to review Jeakins' $1,994,350 submission and the scope of the claim. In a September 11, 2023 report, Wiss Janney determined the loss was covered and advised that replacement of the damaged section was $1,767,081. (Exh. 546, ¶¶ 35-36; Exh. 558).

On September 23, 2023, DPR submitted to Crescent a $22,820.04 roof repair pay application. (Exh. 245). Jeakins testified this was not final as evaluations were still ongoing.

Owner hired yet another expert to evaluate the roof systems, Kevin Maxwell with Vertex Companies, who testified at trial. His November 22, 2024 opinion, based on his January 9, 2024 visit to the Project, was that Owner did not receive warrantable roof systems and that the replacement of the roof by DPR was necessary and a silicone coating remedy was not appropriate.

Further, that the damage was Yates's responsibility to repair. (Exh. 285-286).[18] Maxwell agreed that in the summer of 2022 there was a long lead time to obtain TPO material. Further, that the existence of some patches does not always prevent manufacture warranty of roofs.

The Hartford notified the parties on February 6, 2025, of its determination that it would pay $1,767,081, minus a deductible of $300,000, on the roof claims. (Exh. 546, ¶ 37; Exh. 246). On February 17, 2025, Owner's counsel wrote The Hartford's counsel that the updated cost for repairs was $3,452,692, with an additional estimate of $595,626 to remove pavers for an inspection of another portion of the roof, and thus the prior offered amount was not acceptable. (Exh. 546, ¶ 38; Exh. 247, 559). On February 19, 2025, Hartford decided to issue payment for the $1,467,081, pointing out that Owner's estimate had gone from $1,999,783, to $4,490,654 on November 13, 2024, to $3,452,692 on February 17, 2025, and was not supported by the materials provided. (Exh. 546, ¶¶ 39-40; Exh. 248).[19] On February 21, 2025, The Hartford issued checks totaling **$1,467,081** made payable to Owner, Starwood, and Yates and mailed to Owner's business address. The checks were received on February 25, 2025, and cashed on April 4 and 9, 2025. The Hartford has received no other information on the claims. (Exh. 546, ¶¶ 41-43; Exh. 555).

Retainage Issues

As the relationship neared the end and the Hotels were open, Yates had more COs that Owner was pushing back on paying. Starwood told Crescent not to pay any COs without express approval. (Exh. 223, 230). As of September 8, 2022, Owner was holding $11,279,494.06 in retainage owed to Yates who, in turn, owed it to their subcontractors. (Exh. 69). Post-termination, as of December 8, 2022, Owner was holding $10,482,759.46 in retainage owed to subcontractors. (Exh. 517).

[18] The issue of fault is not, and has never been, disputed by Yates.
[19] The same date Owner's counsel wrote to The Hartford's counsel reiterating its position. (Exh. 559).

In an internal email dated July 21, 2022, Jeakins recognized that Tennessee law gave owners limited options to withhold retainage but that "[e]ven with these limitations, we may have options that would allow the extended withholding of retainage" that their counsel was researching. Further, "[a]ny threat by Ownership at this time to pursue legal action to withhold retainage would be perceived by Yates and subs as highly negative and have the opposite effect on motivation to complete the work." Jeakins further suggested to Tazalla that "[a] more immediate way to increase pressure and provide subcontractor incentive to finish could be to offer the immediate partial release of withheld retainage upon 'substantial completion' of all spaces by a date that we set." (Exh. 12).[20] This recommendation, on July 21, 2022, was the same day Jeakins acknowledged to another Starwood representative that "[w]ith both properties now open, the construction is minimal" and the "[v]alue of remaining contract scope is only month-to-month change order work." (Exh. 224).

Prior to litigation, the retainage was not released by Owner. Post-litigation, on October 6, 2022, Yates's counsel made a demand for release pursuant to the Prompt Pay Act. Owner responded on October 17, 2022, denying Yates's claims regarding retainage. (Exh. 570). Yates made a second demand for retainage release on November 22, 2022, and noticed a lien on the Property for $20,140,072.84. (Exh. 343). Owner did not release retainage until after the Court ordered the release in its January 24, 2023 Order pursuant to Yates's Motion for Partial Summary Judgment, finding "the Project status meets the requirements of Tenn. Code Ann. § 66-34-204 requiring release of the Retainage. 7th has received a use and occupancy permit, it is substantially complete, and 7th is using and has the ability to use the hotels." (1.24.23 Order, p. 9).

[20] This is the same as Exhibit 225.

The parties executed a Release of Retainage Agreement on February 23, 2023, providing that Yates would be paid the retainage. (Exh. 183). Yates filed a Notice of Satisfaction of Partial Judgment on March 15, 2023, informing the Court that Owner had fully satisfied the Court's January 24, 2023 award and that the parties negotiated a settlement of:

> the full amount of the escrowed retainage subject to Count I of Owner's Complaint, including accrued interest from the date of deposit into escrow until release, to Defendant, and that Defendant has further released the retainage to each of the remote contractors to whom it was owed. To induce Owner's release of the Retainage as required by said Judgment, Defendant has waived and relinquished any claims against Owner for damages, fees, or penalties under the Tennessee Prompt Payment Act associated with Owner's withholding of the escrowed retainage.

(3.15.23 Notice of Satisfaction of Partial Judgment).

Post-Termination Expenses Claimed by Owner

Owner and replacement contractor DPR entered into a construction agreement dated September 10, 2022, for 1 Hotel and Embassy Suites which included 63 items in the scope of work. The contract provided that "Owner shall pay the total sum of Contractor's Cost of Work in accordance with Exhibit F, plus a Fee of 10% for the Not to Exceed ('NTE') amount of Three Hundred Thousand Dollars ($300,000)." For its work in the months following termination, DPR billed Owner $111,976.55, including $79,819.10 for "Cost to Complete" and $20,572.90 for "Cost to Repair." BMCC testified, in relation to the mechanical and plumbing work, that some of what DPR charged was not within its scope, such as work on the Hand Cut restaurant.

DPR spent most of its time in 2022 familiarizing itself with the Hotels, meeting Nashville officials, and dealing with permits. (Exh. 261-262, 264, 267-268, 273). DPR's representative handling the work, Matthew Angel, whose time was billed to Owner at $145/hour, testified that remediation work is challenging because of the unknown scope and particularly when, as here, the properties are being used and there is pressure to get done. Also, the replacement contractor has to

introduce itself to Codes and change out all the permits. It also needs information and, sometimes, material for the job from subcontractors who have likely been terminated and are potentially owed money and in litigation (which they were in this case since Owner was withholding retainage). (Exh. 260). BMCC representatives testified DPR asked the company to return to the Project, but BMCC refused because it was still owed money and had not been paid its retainage. In 2023, DPR was more engaged doing hands-on work, including working on issues with the Hotels' HVAC systems and punch list items. (Exh. 255, 263, 273). As of October 28, 2024, DPR had charged Owner $5,245,518.64, which included a 10% management fee. (Exh. 259). DPR estimated its costs, if it repaired everything necessary on the Project, including the roof, as $6,314,334, including $3,452,692 for roof repair, a fee of $574,030, and a forecast of $823,652 for work not yet complete. (Exh. 269-270). Yates was not given the opportunity to do any of this work.

Owner also paid Yates $370,000 to install windows that had been ordered from its subcontractor, NR Windows, that were delayed and Yates had finally received and was holding pending payment. (Exh. 183). Owner claims these funds as a component of its damages.

Owner contracted with Simpson Security Systems to program the fire safety systems at a cost of $174,886.88, which is a component of its claimed damages. (Exh. 184).

On September 20, 2022, Owner paid AgroSci, Inc., Yates's subcontractor to maintain the green wall plants, $57,356.25 directly for an outstanding invoice. (Exh. 185). Owner believed Yates was responsible for the loss of some plants and necessary replacement because the building was in Yates's control at the time.

Owner hired First Finish to, it asserts, perform some of the work in Yates's scope while Yates was still on the job and after. The Owner payments to First Finish totaled $1,169,112, which

Owner asserts is a component of its damages, despite the fact some of the work was correcting damage by Flood Brothers, Owner's FF&E subcontractor. (Exh. 186, 222).

The Sale of the Hotels

As of October 31, 2022, Tazalla reported to Meritz that "Both hotels are off to a great start with tremendous performance in September. . . ." 1 Hotel had a 56% occupancy rate in September and a projected 76% occupancy rate for October. Embassy Suites had a 77% occupancy rate in September and a projected 83% in October. (Exh. 88). This is inconsistent with Tazalla's and others' testimony that opening without all amenities in place caused "brand damage" to the Hotels, further undermining their credibility.

Owner's interest in the Hotels was sold in April 2024 for approximately $530,000,000 after an investment of approximately $375,000,000 by Owner, which was the total cost of the Project. This cost included land purchase, construction, and financing costs.

COVID-Related Expert Witnesses

A theme throughout trial was Yates's reliance on COVID-related delays, including labor impacts through illness and generalized fear of illness, additional necessary safety measures, and supply chain disruption. Owner, while recognizing there was some COVID impact to the Project progress, minimized or downplayed that impact compared to Yates. This difference of perspective led to many disputes regarding impact delays and reasonable expectations regarding progress and, ultimately, a schedule that Yates could not and did not meet and Owner's claims for liquidated damages.

Yates presented testimony from Dr. Thomas Goldsby, the Dee & Jimmy Haslam Chair in Logistics and Professor of Supply Chain Management at the Haslam College of Business at the University of Tennessee. Dr. Goldsby was accepted as an expert in supply chain management and

has impressive academic and industry credentials in that field. (Exh. 320). Dr. Goldsby was retained to provide opinions regarding the global supply chain in 2021 and 2022 and what the outlook was prior to June 1, 2021, whether that outlook changed and, if so, how, with a particular focus on the impact of the Delta and Omicron variants of COVID. (Exh. 320-321). Dr. Goldsby testified that as of June 1, 2021, global supply chain experts anticipated that supply chain issues would rapidly resolve such that there likely would be oversupply, including in the construction industry. That did not occur because of the Delta and Omicron variants of COVID, causing supply chain problems, specifically shipping container shortages and congestion in busy ports in China, the US, and other countries. Dr. Goldsby testified that supply chain volatility returned to normal levels in early 2023. (*Id.*). He described China as the "supermarket to the world" and illustrated that with testimony about anything with an on/off switch originating from there. Dr. Goldsby testified that ports in Asia were being shut down because of a single COVID case. He summarized his conclusion as follows:

> The supply chain meltdowns of 2020 were real and pervasive. No business or person was free of or protected from the effects. Greater balance in supply and demand was achieved by mid-2021, and the prevailing thought was that supply chains were returning to something closer to normal.
>
> Because we were confident that vaccines would return life to normal, we were blindsided when Delta and Omicron postponed our rebound in operational performance and in the resumption of normal demand.
>
> We believed that the fire of COVID had been tamped down and was getting under control. However, the emergence of Delta ignited another fire disrupting the industry and resulted in the global shipping container meltdown. Omicron just added more fuel to that fire.
>
> It is my strong opinion that [the construction industry] could not be spared from the forces described in this report, particularly given exposure to international supply chains for the sourcing of key inputs. These conditions would lead to both exceptional delays in the provisioning of supplies and inflated prices.

(*Id.*). This opinion, while very generalized and not specific to the Project or its particular supply chain problems, was persuasive to the Court, especially as it relates to applying the exception set forth in OCO112 for unforeseeable effects of COVID.

Yates also called Dr. Thomas Gormley, Associate Professor and Director of the Commercial Construction Management Program at Middle Tennessee State University ("MTSU"). Dr. Gormley, who has over 50 years of experience in the construction industry, was accepted as an expert in the Nashville area construction market in the spring and summer of 2021, whether the Delta and Omicron COVID variants were reasonably foreseeable as of that time, as well as the impact of both strains on the local construction market with respect to supply chain, manpower, and project inspections by government agencies. (Exh. 381-382). Dr. Gormley's sources of information were not only from academic and industry sources but also from 39 students interning at construction companies whom he oversaw during the summer of 2021. (Exh. 381, Ex. 1). He also does consulting as an owner's representative on a number of local commercial projects. Dr. Gormley opined that "instead of the local construction market easing back toward pre-pandemic levels as expected in the second quarter of 2021, the market was back to square one trying to manage everything from absent workers to quarantines, supply chain issues, and inspection delays" in relation to the Delta COVID variant. (Exh. 382). Further, "[w]hen Delta's impact on the market finally began to subside, the Omicron wave took its place, creating further negative impact on the local construction market into 2022." (*Id.*). He concluded that "predicting or foreseeing the Delta or Omicron variants in the spring of 2021 was well beyond what would be expected of a contractor exercising 'reasonable efforts.'" (*Id.*). This opinion, while specific to the Nashville-area construction industry, was not specific to the Project or its particular supply chain

problems but was persuasive to the Court, especially as it relates to applying the exception set forth in OCO112 for unforeseeable effects of COVID.

Owner presented rebuttal proof through Dr. Steven Maurice VanHook, a Board-Certified Infectious Diseases physician currently in practice at Ascension Saint Thomas West Hospital ("St. Thomas West"). Dr. VanHook is currently Chair of the Quality and Patient Safety Committee for all St. Thomas hospitals in the Tennessee region and was previously Chief of Infectious Diseases at St. Thomas West. Dr. VanHook rebutted Drs. Goldsby's and Gormley's opinions and testified that in June 2021 COVID was likely a continuing health crisis, and it was not unforeseeable that there would be continued impacts from COVID at that time. (Exh. 568-569). Specifically, "[a]s of the effective date of OCO 112, based on the developed science and information that had been disseminated to the public, it would have been unreasonable to proceed on the basis that COVID-19 was not and would no longer pose disruptions to everyday activities or that COVID-19 incidence numbers in Tennessee and elsewhere would not potentially increase." (*Id.*). Further, that the availability of vaccines did not eliminate risk and that COVID and its variants were present and foreseeable in June 2021. (*Id.*). Dr. VanHook spoke from his experience as a physician and based upon information not only available to medical professionals but also the public. Dr. VanHook's medical expertise and knowledge was very impressive to the Court but had little application to the legal issues in the case. He had no information relevant to the construction industry or supply chain issues but rather said everyone "should have known" that COVID could resurge and that people were still getting critically ill from it. The Court finds his testimony limitedly relevant to this dispute.

Construction Management, Delay, and Damages Expert Witnesses

Both parties presented impressive experts in the field of construction management and scope of work to assess Owner's delay and damages claims, as well as Yates's damages claims. Both have strong experience and expertise in the field and rely on standards published by the Association for the Advancement of Cost Engineering International ("AACE"), which is an organization comprised of professionals in the field of project controls, including estimating, scheduling, and evaluating claims. A mutually relied upon publication is the 29R-03 Forensic Schedule Analysis dated April 25, 2011 (the "29R-03"). (Exh. 279).

Owner's expert was Anthony Gonzales, Managing Principal with Spire Consulting Group, an engineering consulting company that specializes in both cost and time forensic analysis across four service lines – project controls for owners and contractors, project management as an owner's representative, construction advisory for owners and developers, and dispute resolution. Owner retained Gonzales in September 2022 as a testifying expert regarding the delays and associated damages that occurred on the Project, as well as the reasonable damages owed to Owner to complete and repair Yates's scope of work under the Construction Contract. He was recognized by the Court as an expert in construction management, claims construction, scheduling, and delays and damages. Gonzales's opinion, in summary, was:

- Yates was responsible for 258 days of delay after OCO112 due to poor subcontractor coordination, failure to manage and prepare for inspections, improper schedule management, and failure to timely procure materials; and
- Yates was responsible to Owner, as of December 31, 2024, for $20,022,283 in damages, including $2,646,968 cost to complete, $5,472,036 cost to repair, and $12,186,387 liquidated damages (and a credit to Yates of $283,108 as outstanding contract balance).

(Exh. 277-278).

Yates's expert was Mike Birmingham, Senior Managing Director with FTI Consulting ("FTI"), a global consulting firm with a construction practice division that focuses on consulting and construction disputes and projects, including scheduling and forensic scheduling for active construction and post-construction disputes. Yates retained Birmingham in December 2022 as a testifying expert to establish its damages and to respond to Owner's delay-related and damages-related claims, including allocation of responsibility for critical path delays and alleged damages. (Exh. 474-476). He was recognized by the Court as an expert in the field of construction schedules, construction delays, and construction damages. Birmingham's opinion, in summary, was:

- Yates was delayed and disrupted in the timeframe following OCO112 due to COVID, Owner-issued change orders and extra work, punch list impacts, and FF&E impacts; and
- Yates incurred additional costs of $19,601,208 (revised damage value) associated with those impacts.

(Exh. 474-476).

Both experts relied on the 29R-03 and used the concept of critical path method ("CPM") to some degree in their analysis. It explains in its Introduction:

> Forensic scheduling analysis refers to the study and investigation of events using CPM or other recognized schedule calculation methods. It is recognized that such analyses may potentially be used in a legal proceeding. It is the study of how actual events interacted in the context of a complex model for the purpose of understanding the significance of a specific deviation or series of deviations from some baseline model and their role in determining the sequence of tasks within the complex network.
>
> Forensic schedule analysis, like many other technical fields, is both a science and an art. As such, it relies upon professional judgment and expert opinion and usually requires many subjective decisions. One of the most important of these decisions is what technical approach should be used to measure or quantify delay and identify the effected activities in order to focus on causation. Equally important is how the analyst should apply the chosen method. The desired objective of this RP is to

> reduce the degree of subjectivity involved in the current state of the art. This is with the full awareness that there are certain types of subjectivity that cannot be minimized let alone eliminated. Professional judgment and expert opinion ultimately rest on subjectivity, but that subjectivity must be based on diligent factual research and analyses whose procedures can be objectified.

(Exh. 279, § 1.1). The application of subjectivity to evaluate the schedule delays and damages in this case explains the variance between two experts in the same field, using the same resource to guide their work. The critical path on a construction project is defined as:

> At any given point in time on projects, certain work must be completed at that point in time so the completion of the project does not slip later in time. The industry calls this work, "critical work." Project circumstances that delay critical work will extend the project duration. Critical delays are discrete, happen chronologically, and accumulate to the overall project delay at project completion.
>
> When the project is scheduled using CPM scheduling, the schedule typically identifies the critical work as the work that is on the "longest" or "critical path" of the schedule's network of work activities. The performance of non-critical work can be delayed for a certain amount of time without affecting the timing of the project completion. The amount of time that the non-critical work can be delayed is "float" or "slack" time referring to as Total Float.
>
> The CPM schedule for a particular project generally represents only one of the possible ways to construct the project. Therefore, in practice, the schedule analyst must also consider the assumptions (work durations, logic, sequencing, and labor availability) that form the basis of the schedule when performing a forensic schedule analysis. This is particularly true when the schedule contains preferential logic (i.e., sequencing which is not based on physical or safety considerations) and resource assumptions. This is because both can have a significant impact on the schedule's calculation of the critical path and float values of non-critical work at a given point in time.

(Exh. 279, § 1.5(A)). The 29R-03 also recognizes that "[s]chedules are a project management tool that, in and of themselves, do not demonstrate root causation or responsibility for delays. Legal entitlement to delay damage should be distinct and apart from the forensic schedule analysis methodologies contained in this RP." (*Id.* at § 1.2(f)). Further, that "[a]s the project approaches completion, CPM may not be the best tool to assess criticality. This is true especially in a problem

project where many activities are being performed out-of-sequence in an attempt to meet an aggressive deadline." (*Id.* at § 4.3(B)(4)).

Gonzales used an MIP 3.3 analysis from the 29R-03, which is a retrospective review of a project and schedule to quantify loss of time and delay. (Exh. 279, § 3.3). Gonzales's finding of a 258-day delay by Yates assumed that it was not entitled to *any* COVID-related delay consideration after OCO112 was executed on June 1, 2021, and that substantial completion was not until the last TCO was issued on October 3, 2022.[21] Gonzales also did not recognize the establishment of milestone deadlines and the focus on opening with use of a "pull plan schedule" versus the previously identified critical paths, as impacting the analysis. Gonzales found all of DPR's charges to be reasonable and did not take into account any of The Hartford insurance proceeds for the roof or attribute any fault to Owner for the delay in roof repairs or its termination of Yates. (Exh. 277-278). Contrary to the instruction in 1.2(f) of 29R-03, Gonzales relied on the schedule to attribute fault and responsibility for delays without consideration of outside factors such as COVID impacts on labor and materials procurement or Owner-created factors, such as delays in approving COs or the high number of design changes. He did not take into consideration that Owner was requiring schedules based on what it wanted to see, rather than what Yates was telling Owner was realistic, and that Cumming was creating and approving schedules on behalf of Owner despite onsite knowledge of the state of the Project. In other words, that Yates was providing schedules that took those factors into consideration, as he testified he would have expected, but that Owner was rejecting them—he was blaming Yates for inaccurate schedules that Owner required. Gonzales saw no significance to direct instructions from Owner to focus on getting operators into the Hotels and opening them for business—he rigidly adhered to a CPM analysis based on schedules that

[21] Gonzales did credit Yates with 48 days in which Owner or weather caused delay.

identified opening the *rooftops* as critical to substantial completion when it was uncontroverted that Owner instructed Yates to focus on the podium, lobbies, and guest rooms to get the Hotels open for overnight guests. He thought it was more important to have the Embassy Suites L30 kitchen open rather than fire safety systems that Owner was persistently and loudly pushing Yates to get installed so the Hotels could open. (Exh. 199, 283). This narrow and rigid analysis undermined the credibility of Gonzales's testimony to the relevant issues at trial.

Birmingham testified that the CPM analysis should not have been applied after September 2021 when the parties prioritized opening and set milestones to accomplish that and that he applied, in essence, a cumulative impact analysis. Further, that Owner's rejection of Yates's proposed realistic schedules and insistence on schedules that could not be met made them unreliable. The schedules were not being used in the field, especially as the Project neared completion. Birmingham found that the podium and fire safety systems were the drivers for opening, and, thus, Gonzales's "singular focus" on Embassy Suites L30 was in error. He also found that the resurgence of COVID post-OCO112 (which was negotiated over months between April and June 2021), into early 2022, impacted the Project and needed to be considered as a non-Yates caused delay issue and that the parties did, in fact, agree on a revised plan on January 4, 2022. Even though Owner reneged on the plan, Yates followed it and met the agreed upon milestones, making the imposition of liquidated damages inappropriate and based on a flawed understanding of what was being prioritized on the job. Birmingham's findings that there were new expectations and milestones different from Gonzales's CPM analysis were based, in part, on Owner's development reports and the OAC Meeting notes. He also credited testimony from Yates and subcontractors that fire alarm and 1 Hotel tile delays were unforeseeable and prevented meeting the OCO112 deadline, which everyone knew and accepted. Finally, Birmingham analyzed the extent of change order work

initiated by Owner post-December 1, 2021, as having an impact on substantial completion. He disagreed with Gonzales's finding that October 3, 2022, was the substantial completion date. (Exh. 474-476).

Birmingham quantified Yates's cost overruns on the Project from June 2021 forward as $27,230,551. With reductions by Yates including adjustments to subcontractor claims, its damages are $19,601,208, which he classified as a conservative number with appropriate exclusions. (Exh. 474-476). Birmingham disputed Owner's entitlement to liquidated damages for the reasons summarized above, as well as the claimed costs to complete and costs to repair. Some of the completion work, he asserted, was not within Yates's scope. Further, that the roof claim was subject to insurance, and DPR should not have incurred expenses outside of those proceeds for the work. Finally, as a general matter, that DPR's charges were not reasonable, and Yates was not given the opportunity to complete the Project. (Exh. 474-476).

Gonzales's Rebuttal Testimony and Yates's Objections

Gonzales prepared a rebuttal report to Birmingham's report on Yates's damages. (Exh. 583-584). Gonzales began his testimony by explaining that he was incorporating into his presentation information he learned through attendance at the trial, specifically witness testimony. Yates objected to some of Gonzales's testimony as instructing the Court on how to apply the facts to the law and parroting legal arguments inconsistent with his role as an expert.

Gonzales offered rebuttal testimony on August 19-20, 2025, which Yates initially objected to, and the Court allowed the testimony to proceed as an offer of proof subject to written objections, which Yates filed on September 25, 2025. Owner filed a response on October 10, 2025. Yates contends that Gonzales's rebuttal testimony and accompanying PowerPoint presentation (Exh. 584) were improper because they exceeded the permissible scope of expert testimony.

Rule 702 of the Tennessee Rules of Evidence ("T.R.E.") allows the testimony of an expert witness with "scientific, technical, or other specialized knowledge [that] will substantially assist the trier of fact to understand the evidence or to determine a fact in issue." T.R.E. 703 allows an expert to rely on facts or data perceived by or made known to the expert at or before the hearing. Gonzales was recognized by the Court as an expert in construction management, claims construction, scheduling, and delays and damages.

Yates objects to Gonzales's (1) testimony about the meaning of contract documents; (2) testimony beyond the scope of his expertise as it related to fire alarm procurement; and (3) testimony that merely endorses legal positions taken by Owner in this case. Specifically, as to the first category, Yates objects to slides 30, 66, 177-180, and 182; the second, slides 48-49; and the third category, slides 67, 100-101, 105, and 232.

Upon review, the Court finds that Gonzales's testimony and PowerPoint contains numerous legal conclusions and conclusory statements on the dispute between the parties, including the meaning/interpretation of contract documents and legal obligations, and exceeds the scope of his expertise. Accordingly, the Court hereby STRIKES the following testimony and associated PowerPoint slides in Exhibit 584 from the record:

- Slide 30; Tran. Vol. 22, 5992: 24 – 5993: 5; 5996: 23 – 5997: 8;
- Slides 48-49; Tran. Vol. 22, 6008: 3 – 6009: 14;
- Slides 66-67;
- Slides 100-101;
- Slide 105; Tran. Vol. 22, 6027: 2 – 6028: 3;
- Slides 177-180, and 182; and
- Slide 232.

The Court does not rely on or incorporate any of this material into this Memorandum and Opinion.

Otherwise, in response to his criticisms of Birmingham not using the CPM throughout his analysis, Gonzales was questioned about the AACE publication Demonstrating Entitlement to Cumulative Impact Claims in Construction, 130R-23 ("130R-23"). (Exh. 586). Gonzales acknowledged cumulative impact as a recognized method for evaluating the cumulative effect of changed work happening on a job and its overall impacts on the project's substantial completion date but denied it was applicable to delay claims. 130R-23 states as follows:

> A common cause asserted for cumulative impact is that it was the result of multiple changes whose impact could not be determined until much later in the project or after the project had been completed. Cumulative impact has metaphorically been described as the disruption caused by a 'thousand cuts.' An individual change does not cause indirect disruption; rather, indirect disruption may be caused by the effect of *multiple* changes. Multiple requests for information (RFIs) can cause cumulative impact in certain circumstances, but an extraordinary number of RFIs alone cannot demonstrate the contractor's entitlement to recovery of its additional direct labor and equipment costs based on cumulative impact.
>
> *…[t]he underlying theory is that numerous changes cause a cascading ripple-type of impact on performance time and efficiency which is too uncertain or diffuse to be readily discernable at the time of pricing each individual change.*

(Exh. 586, § 1.2) (emphasis in original) (citation omitted). "In summary, because cumulative impact is difficult to identify and quantify contemporaneously due to the nature of impacts caused by multiple change events, it is challenging to precisely pinpoint causation and the resulting damages. However, cost increases and delays resulting from changes to previously unchanged work and disruption are very real and often very significant." (*Id.*).

The Court finds this methodology described in 130R-23 is more aligned with what the facts show was happening on the Project in late 2021 and in 2022 and that the cumulative impact analysis was the most appropriate way to evaluate the schedule on the Project beginning in September 2021.

Yates's Claimed Damages

Per Yates's Controller, it used multiple accounting software applications to track all Project-related transactions, subcontractor payment applications and draws, and cost forecasting. Yates's monthly pay applications were complex with extensive backup documentation using AIA forms. The applications included itemized gross costs, pending retainage, outstanding and paid change orders, and a sworn statement regarding accuracy delivered in an "open book format" so that Owner had visibility into all of Yates's labor and material costs. (Exh. 391, 393, 410-413, 484, 486).

The revised contract amount with approved change orders was $230,716,838.45. Yates agreed to do the additional $370,000 in window work through NR Windows, totaling a revised contract amount of $231,086,838.45. Owner paid Yates and its subcontractors a total of $230,668,222.23. (Exh. 415). Per Birmingham, FTI reviewed Yates's post-OCO112 costs and calculated Yates's damages by comparing: 1) Yates's actual costs in its final job cost report to its end of job projections as of June 30, 2021, excluding various cost increases which FTI deemed unrelated to the impacts suffered by Yates beyond its control; and 2) including in the discrete additional cost claims only those reasonably attributable to the impacts suffered by Yates beyond its control and/or caused by Owner. (Exh. 474-476). Thus, Yates seeks $19,601,208 in damages, which includes subcontractor pass-through claims.

There was billing from time to time that did not include costs in general conditions and adjustments to general requirements as Yates attempted to categorize the numbers on the Project to get subcontractors paid. Nadolski explained Yates's entitlement to damages as based on the Owner treating it unfairly, not allowing cost or time it was entitled to because of COVID delays

and challenges, not living up to its agreements, including refusal to approve appropriate COs and requiring it to "eat" the cost of acceleration schedules.

Subcontractor Fly & Form was owed $180,735.76 on the Project when Yates was terminated. (Exh. 300, pg. 108-09).

Subcontractor BMCC was owed $4,694,090 on the Project when Yates was terminated, including a significant COVID-impact claim. (Exh. 450-451). Yates settled that claim with BMCC for $123,223 after this litigation was commenced and after retainage was released, with BMCC retaining a right to additional recovery from any award to Yates. (Exh. 452, 461). BMCC estimates it lost about $9,000,000 on the Project and blames the loss on COVID impacts, Owner design changes, stacking trades and alterations from schedules.

Subcontractor FZ claimed entitlement to $3,267,651.20 based upon impacts to the Project that were out of its control yet required additional, unplanned man hours, with a 20% reduction of its gross calculation to be conservative. (Exh. 347, 368). Yates settled that claim with FZ for $1,175,835.22 after this litigation commenced. (Exh. 367).

Subcontractor Allegheny was owed $97,857 on the Project when Yates was terminated. (Exh. 474).

Subcontractor Groove was owed $33,000 on the Project when Yates was terminated. (Exh. 474).

Overall Observations and Credibility Findings

The Court finds Yates's representatives more credible than Owner's representatives regarding what was happening on the job and what they agreed to as the Project progressed. Yates's representatives were more believable, and their positions tracked the email correspondence exchanged at the time, while Owner's position changed when convenient, depending upon whether

it was discussing the Project status to its lender, internally, or with Yates. Owner gave some consideration for COVID but was generally unsympathetic to COVID-related delays, and the Court finds this inflexibility to be unreasonable under the circumstances. Owner likewise took no accountability at trial for its heavy-handed input including changes in brands and design changes which caused significant delays, even in light of internal emails acknowledging the vast amount of design changes that affected the Project. (Exh. 58-60; 90-91, 93).[22] Moreover, Owner was under significant pressure to get the Project done based upon its lender agreements, and Owner took too long responding to COs which caused decisions not to be timely in terms of COVID developments and contractor/sub needs.[23] This likewise caused the limited concessions provided to Yates to be too little too late.

The Court finds that the parties modified the Construction Contract and shifted the substantial completion deadline to focus on a phased hotel opening based on milestones with concessions for a compressed schedule. Owner then purposely delayed finalizing an OCO to trap Yates into working frantically to finish with the understanding there would be schedule forgiveness and compensation to it and its subcontractors for acceleration costs, and then Owner reneged on the deal to squeeze Yates and hold liquidated damages over its head. Owner stopped timely responding to emails despite everyone working under the assumption that it had an agreement. Jeakins's attempt to distinguish the milestones from contract delays is thinly veiled. On one hand, he testified that opening was not Yates's concern, yet all communications centered around getting

[22] For example, Starwood representatives noted "we made major changes [to Embassy Suites] during construction on FFE certain finishes . . . this didn't cost the deal too much in actual dollars but in terms of the bandwidth of the A&E, development team and contractor nearly buried us given we redesigned the entire 1 Hotel during construction too," and "we did a major overhaul [of the conference center]," "on embassy . . . we approved some renderings and started moving in that direction and then when model room was built per the rendering we changed significantly" and "there were incremental costs of that change so late in the game." (Exh. 90).

[23] Hinson (LK) testified that some COs took longer than what is industry standard which caused delays on the Project. (Exh. 380, p. 48-49).

opened, and the milestones were based on opening. Jeakins's rebuttal testimony focused on opening as important on one hand, but then for legal purposes that it was not important. This inconsistency and strategic language is illustrative of the double-talk Yates was getting from Owner throughout—and undermines the credibility of Owner's representatives' testimony.

The high number of COs and OCOs with design changes at the end of the Project also prevented Yates from finishing. (Exh. 220-221). Moreover, Owner's vendors complicated the punch list process and the Project records reflect that Owner kept adding new items to the punch list which extended the time for completion. While the Court believes that Yates is also responsible for mistakes on the Project and redo's that caused delays, the Court finds that the majority of the issues stemmed from Owner's inflexibility, high number of design changes, changes in direction, failure to communicate, and COVID-related impacts.

Ultimately, the evidence demonstrates that Yates acted in good faith under the contract to implement the Project according to Owner's needs, but the Court cannot say the same for Owner. The Court further finds that Owner withheld retainage in violation of the TPPA to leverage Yates, which further supports the Court's finding that Owner acted in bad faith. (Exh. 224, 225). Owner was planning to terminate Yates for months, reneged on the December Deal, and used the L19 stairwell as a pretext to terminate for cause in order to obtain liquidated damages and prevent a forthcoming delay claim from Yates, despite agreeing to milestone deadlines, waiving liquidated damages, and acknowledging substantial completion.

Conclusions of Law

The parties dispute who materially breached the contract first. Owner contends Yates materially breached by repeatedly failing to diligently prosecute the work and achieve Substantial Completion by December 1, 2021, refusing to remediate defective work, and abandoning the

Project. In contrast, Yates contends that the parties modified the contract and shifted the substantial completion deadline to focus on a phased hotel opening. Thus, Yates contends that Owner committed the first material breach by wrongfully terminating Yates and by failing to give notice and an opportunity to cure. Owner contends that no formal change order was entered as required by the Construction Contract to change the substantial completion deadline.

The Contract

A party alleging breach of contract must prove "the existence of a valid and enforceable contract, a deficiency in the performance amounting to a breach, and damages caused by the breach." *Fed. Ins. Co. v. Winters*, 354 S.W.3d 287, 291 (Tenn. 2011) (citing *ARC LifeMed, Inc. v. AMC–Tenn., Inc.*, 183 S.W.3d 1, 26 (Tenn. Ct. App. 2005)). Ordinarily, a party who first materially breaches may not recover under the contract. *Madden Phillips Const., Inc. v. GGAT Dev. Corp.*, 315 S.W.3d 800, 813 (Tenn. Ct. App. 2009) (citing *United Brake Sys., Inc. v. Am. Envtl. Prot., Inc.*, 963 S.W.2d 749, 756 (Tenn. Ct. App. 1997)). The Court of Appeals has explained:

> A party who has materially breached a contract is not entitled to damages stemming from the other party's later material breach of the same contract. *John P. Saad & Sons, Inc. v. Nashville Thermal Transfer Corp.*, 715 S.W.2d 41, 47 (Tenn. 1986); *Cummins v. McCoy*, 22 Tenn. App. 681, 691, 125 S.W.2d 509, 515 (1938). Thus, in cases where both parties have not fully performed, it is necessary for the courts to determine which party is chargeable with the first uncured material breach. *See* Restatement (Second) of Contracts § 237 comment b (1979).

Carter v. Krueger, 916 S.W.2d 932, 936–37 (Tenn. Ct. App. 1995) (quoting *McClain v. Kimbrough Construction Company*, 806 S.W.2d 194 (Tenn. Ct. App. 1990)).

In order to determine which party was the first to materially breach, it must first be determined what the contract required of the parties, which is a question of law. *Forrest Const. Co., LLC v. Laughlin,* 337 S.W.3d 211, 221 (Tenn. Ct. App. 2009) (citing *Guiliano v. Cleo, Inc.*, 995 S.W.2d 88, 95 (Tenn. 1999); *Angus v. Western Heritage Insurance Co.*, 48 S.W.3d 728, 730

(Tenn. Ct. App. 2000)). Here, the Court must determine the scope of the parties' agreement and whether the parties modified the substantial completion deadline of December 1, 2021, with the "December Deal."

The Construction Contract provides that it may be amended or modified only by change order signed by both parties. (Exh. 5, ¶ 20.A.). Generally, Tennessee courts "allow[] contracts to be orally modified even if the contracts specifically state that the contract can only be modified in writing." *Markow v. Pollock*, No. M2008-01720-COA-R3-CV, 2009 WL 4980264, at *8 (Tenn. Ct. App. Dec. 22, 2009) (quoting *Moulds v. James F. Proctor, D.D.S., P.A.*, 1991 WL 137577, at *3 (Tenn. Ct. App., July 29, 1991); *Knoxville Rod and Bearing, Inc., v. Bettis Corp. of Knoxville, Inc.*, 672 S.W.2d 203, 207 (Tenn. Ct. App. 1983)). A party's agreement to a modification may be express or implied from a course of conduct. *Constr. Crane & Tractor, Inc. v. Wirtgen Am., Inc.*, No. M2009-01131-COA-R3-CV, 2010 WL 1172224, at *10 (Tenn. Ct. App. Mar. 24, 2010) (citing *Galbreath v. Harris*, 811 S.W.2d 88, 91 (Tenn. Ct. App. 1991)). However, like any contract, the modification must result from mutual assent. *Id.* (citing *Interstate Marketing Corp. v. Equipment Servs., Inc.*, No. M2005-00208-COA-R3-CV, 2006 WL 1547867, at *4 (Tenn. Ct. App. Jun. 6, 2006)).

The evidence demonstrates that the parties agreed to forego the substantial completion deadline of December 1, 2021 and set milestones for a phased opening of the Hotels. The parties initially entered into the agreement through the meeting and follow-up emails between Nadolski on behalf of Yates and Jeakins, who had apparent authority to agree to the terms on behalf of Owner. Jeakins was the main point of contact from Owner to Yates, and Jeakins met with Nadolski to discuss a plan for the passing of the December 1, 2021 substantial completion deadline. The Court finds Nadolski credible and Jeakins not credible regarding the outcome of this meeting. The

subsequent communications demonstrated that the parties expressly agreed to these milestones in lieu of the December 1, 2021 deadline, as well as to forgive the liquidated damages if the milestone dates were met. (Exh. 18, 79). In reference to the milestone agreement, Owner made the $1,100,000 payment for subs with OCO156, albeit with language that it was not waiving liquidated damages and that the parties were in "ongoing negotiations." (Exh. 21). Yates kept its obligation to meet the March 18, 2022 podium milestone, which resulted in OCO165 reflecting a partial incentive payment in line with the agreement. (Exh. 211, 162, 508). The parties' course of conduct evidences an agreement they were all working to follow, and Owner purposely delayed its responses to emails to commit it to writing to pressure Yates into committing more resources and to, in turn, pressure its subcontractors. Owner attempted to renege on the deal and hold liquidated damages over Yates in order to finish the Project in bad faith.

Accordingly, the Court finds there was a meeting of the minds to modify the contract and forego the December 1, 2021 substantial completion deadline, as well as to waive the liquidated damages if the milestones were met, known as the "December Deal." The parties agreed to switch to a phased opening plan and schedule work based on the accelerated milestones in the December Deal. Davis testified that Yates started to manage the Project differently by working towards a phased opening, which included taking the Project in pieces, redirecting manpower, and focusing on certain areas that aligned with Owner's priorities and direction. Owner made a partial payment to Yates for achievement of the March 18, 2022 milestone in line with the December Deal. Further, the Substantial Completion date was changed from December 1, 2021, to "TBD" in nine of the final ten OCOs. (Exh. 41, 162, 330-337). To find otherwise would be to unreasonably ignore the parties' actions and sequence of events that occurred in response to the communications. The evidence demonstrates that Owner agreed to an extension and focused on milestones but drug out

email responses and CO approvals in breach of that agreement. Thus, Owner's argument that the December Deal is unenforceable because it is not a signed OCO is without merit. There was either an express agreement or implied agreement based on the parties' conduct confirming a modification of the substantial completion deadline to hit the milestones for a phased opening of the Hotels.

Moreover, "Tennessee law recognizes that a party may waive its right to insist on strict performance of a contractual provision impliedly by conduct." *Madden Phillips Const., Inc.*, 315 S.W.3d at 818 (citing *Harlan v. Hardaway*, 796 S.W.2d 953, 959 (Tenn. Ct. App. 1990). Our courts have found waiver of time for completion in construction cases. *Alexander & Shankle, Inc. v. Metro. Gov. of Nashville and Davidson Cnty.*, No. M2006–01168–COA–R3–CV, 2007 WL 2316391 (Tenn. Ct. App. Aug. 13, 2007). Waiver can occur even where the parties agreed that time was of the essence and set a date for completion. *Id*. "[A]n owner, knowing construction will not be completed before the deadline, who allows the contractor to continue working after the deadline and encourages the contractor to finish the job, waives his right to terminate under a 'time is of the essence' provision." *Id*. Here, Owner cannot credibly claim breach for failure to meet the December 1, 2021 deadline and seek liquidated damages despite making a deal based on milestones, incentive payments, and a phased opening to which Yates agreed and performed thereunder.

The Project Was Substantially Complete Prior to Termination

Yates contends that it substantially performed the Construction Contract and that Owner committed the first material breach by wrongfully terminating it. Under Tennessee law,

> Substantial performance [of a contract] is said to exist 'where there has been no willful departure from the terms of the contract, and no omission in essential points, and it has been honestly and faithfully performed in its material and substantial particulars,' and the only variance from the strict and literal performance consists

> of 'technical or unimportant omissions or defects.' *Cotherman v. Oriental Oil Co.*, (Tex. Civ. App.) 272 S. W. 616, 619, citing, Page on Contracts, vol. 5, § 278.

Interstate Bldg. Corp. v. Hillis, 17 Tenn. App. 171, 66 S.W.2d 597, 598 (1933). Essentially, a party can assert substantial performance when the deviation from the contract is only slight and a good faith effort was made to fully comply. In other words, if the purported breach is not material, then a defendant has substantially performed its contractual obligations. *See Thayer v. Wright Co.*, 362 S.W.2d 805, 810 (Tenn. Ct. App. 1961) (the law does not require perfection but only substantial compliance, without material variance from specifications); *Interstate Bldg. Corp.*, 66 S.W.2d at 597; *Mullins v. Greenwood*, 6 Tenn. App. 327, 1927 WL 2222 (1927); *see also* Restatement (Second) of Contracts, § 237, cmt. d (substantial performance doctrine applies only when breach is not material).

As set forth in the Construction Contract, "Substantial Completion" is defined as:

> that point in the progress of the Work when the Work or designated portion thereof is sufficiently complete in accordance with the Contract Documents to enable the Owner or its tenants to use and occupy the Project or the agreed, defined portion of the Project, for its intended use, and (i) only minor punch list items or similar minor corrective work remains to be completed that do not adversely affect the capability of the Project to operate and function safely in the ordinary course of business; and (ii) a temporary (or partial) certificate of use and occupancy and any other permits or approvals necessary to allow use and occupancy of the Project, or the agreed, defined portion thereof, have been issued; and (iii) the Architect and Development Manager have each certified that the Project, or the agreed, defined portion thereof, is substantially complete.

(Exh. 5, General Conditions, ¶ 9.7.1). This definition was later supplemented in the GMP Amendment to add that,

> Owner and [Yates] agree that the total value of all items included on the punch list created at Substantial Completion shall not exceed Five Hundred Thousand Dollars ($500,000.00), and Substantial Completion shall not be achieved if the total value of the items included on the punch list exceeds Five Hundred Thousand Dollars.

(Exh. 6, ¶ 10.b). "Project" is defined as "the total construction of which the Work performed under the Contract Documents may be the whole or a part and which may include construction by Owner or by separate contractors." (Exh. 5, General Conditions, ¶ 1.1.10).

The Court finds that Yates substantially performed under the Construction Contract. In particular, Yates met Substantial Completion as defined in the Construction Contract and GMP Amendment. First, Owner acknowledged that less than $500,000 remained and that the Project was 99% complete. (Exh. 34, 48, 51, 224).[24] Second, the first TCO for Embassy Suites was issued on May 10, 2022, and for 1 Hotel on June 17, 2022. (Exh. 173). The Hotels had been open to the public for months prior to termination. In fact, on the day of termination, all 215 rooms at 1 Hotel were booked, and hotel operations hosted a private event that evening on the rooftop. (Exh. 89). Third, the architect certified that the Project was substantially complete on August 31, 2022 and that "each phase of the Project has been substantially completed in accordance with the Plans." (Exh. 27).[25] Although Owner contends that the Architect's Certificate excepted to certain areas such the roof and L19 stairwell, the Court finds this certificate demonstrated substantial completion. Owner cannot conveniently shift positions when presenting the Project status to its lender versus its claims against Yates. Owner submitted a certificate of substantial completion to lender to prevent issues with the loan.

[24] As of April 19, 2022, Jeakins reported to Starwood that construction activities after 4/27 totaled less than $500,000. (Exh. 48). As of May 20, 2022, Jeakins reported to Starwood that the value of remaining work was $250,000 and the Project was 99% complete. (Exh. 51). In the May report to Meritz and Ownership, Crescent reported on the opening and that "[c]onstruction progress is at 99.92% of the total contract." (Exh. 34). In July 2022, Jeakins reported to Owner's insurer that the Hotels were open and TCOs were being resolved with the "[v]alue of remaining contract scope [] only month-to-month change order work" and described this as "minimal remaining contract work". (Exh. 224). On July 21, 2022, Jeakins acknowledged to another Starwood representative that "[w]ith both properties now open, the construction is minimal" and the "[v]alue of remaining contract scope is only month-to-month change order work." (Exh. 224).

[25] No evidence of Development Manager's (i.e. Cumming's) sign-off on substantial completion was submitted one way or the other, but because Cumming worked for Crescent, and because Jeakins drafted the Architect's Certificate of Completion LK executed on August 31, 2022, this appears to be a moot point.

Accordingly, the Court finds that the Project was substantially complete prior to termination as of August 31, 2022, when the Architect's Certificate was issued.

Owner Wrongfully Terminated the Contract

Owner seeks liquidated damages from December 1, 2021 through October 3, 2022, when the final TCO had been issued, as well as costs to repair and complete. Yates contends that it was wrongfully terminated from the Project, and that Owner is therefore not entitled to damages.

In the September 22, 2022 Notice of Termination, Owner identified the following events of default pursuant to the Construction Contract in Article 14(A)(2):

> c. repeatedly fails to prosecute the Work to completion thereof in a diligent, efficient, workmanlike, skillful and careful manner and in accordance with the Schedule and the provisions of this Construction Contract;
>
> d. repudiates its obligations under this Construction Contract;
>
> e. repeatedly fails to use an adequate amount or quality of personnel or equipment to complete the Work without delay;
>
> h. fails to perform any other obligation under this Construction Contract and does not correct such failure or breach within ten (10) days (or such shorter period of time if commercially reasonable under the circumstances) after receipt of written notice from Owner or Development Manager directing Contractor to cure such breach.

The Construction Contract grants Owner the right to terminate Yates for default and take possession of and complete the Project in the event Yates commits one of these incidents of default. (Exh. 5, ¶ 14(A)(3)).

As for subsections (c) and (e), Owner contends that Yates repeatedly failed to accurately schedule the Project or achieve its scheduled progress, failed to achieve substantial completion by the December 1, 2021 deadline, failed to schedule and prepare for inspections, and failed to timely procure materials. Owner contends that Yates struggled to adhere to the schedules for the Project and failed to complete the Project on time in accordance with contract requirements. Owner relies

on Gonzales's report to identify delays that impacted the critical path, quantify those delays, and assign responsibility for those delays. Thus, Owner contends that Yates is responsible for 258 days of unexcused delay, due to poor subcontractor coordination, failure to manage and prepare for governmental inspections, failure to timely procure materials, and numerous rejected schedules and demands for recovery schedules. Owner contends the record is replete with evidence of Yates and its subcontractors incurring added costs and delays due to nonperformance or poor performance, trade damage caused by subs, failure to protect work in place, insufficient manpower to overcome delays both before and after COVID, failure to coordinate which caused out-of-sequence work and subcontractor inefficiency, and payment disputes over disputed change orders. Owner points to the testimony of various subcontractors who testified that Yates's predecessor work caused delays and out-of-sequence work and repeated fire marshal failures.

The Court finds, however, the parties had agreed to forego the substantial completion deadline of December 1, 2021, and focus instead on a phased opening of the Hotels. The Court did not find Gonzales's analysis to be persuasive or that the critical path remained completion of L30 of Embassy Suites. Rather, Owner prioritized partial opening of the Hotels and set milestones for podium/public areas and podium life safety signoff to accomplish that goal. Further, while the Court recognizes that Yates was not perfect or error-free in its scheduling, the majority of delays in scheduling stemmed from COVID-related labor shortages, supply chain issues, and a general lack of available inspectors, as well as Owner-initiated changes throughout the Project and the duplicative punch list process. Owner emails acknowledged these issues despite its efforts to downplay the effects of COVID and convince the Court otherwise. Likewise, Owner internally acknowledged delays from Owner-initiated changes, but failed to take any accountability at trial.

Owner also contends that Yates failed to complete and correct the L19 stairwell as an event of default. Pursuant to the Construction Contract, Owner contends that Yates had the obligation to give prompt notice to the architect in writing of any error or inconsistency in the drawings and specifications before proceeding with the work. (Exh. 5, General Conditions, ¶ 3.2.1). Further, that contractually Yates was responsible for costs incurred to repair the error because it was Yates's fault that it was not detected prior to construction, and that no extension of time would be attributable to the repair. (*Id*.). In fact, the L19 stairwell issue was first identified in July 2022 by the architect after Codes found violations, and the architect blamed Yates. (Exh. 249). Yates was not notified until August, at which time it pushed back on the theory it was at fault, and thus had to pay for repairs. Regardless, Yates sought bids from subcontractors to correct the problem (Exh. 544) and resolved one of the Codes' issues. Owner interpreted Yates's refusal to take responsibility for the error and pay for the correction as a refusal to perform and repudiation of the contract (Exh. 251) and paid DPR for the work. Jeakins did not respond to Nadolski's September 7, 2022 email that Yates was "open to an agreeable solution" but rather Yates was terminated. As Davis and Nadolski testified, Yates was not refusing to do the work—it just wanted to be reasonably compensated.

The Court finds that Yates was not in breach as it related to the L19 stairwell. When Yates was informed of the issue, it attempted to determine the discrepancy and resolve it. In fact, Yates resolved one of the three Codes violations. Moreover, the dispute regarding who was responsible to pay for the correction was valid, and Yates was taking steps to do it regardless. Nadolski noted that "clearly there is a mistake in the design with the structural plans showing one condition and the architectural plans showing a different condition," and that "no one was aware of this condition until it was recently brought to our attention." (Exh. 339). The testimony from Davis and Nadolski,

along with the emails, demonstrate that Yates was attempting to amicably resolve the issue, and Owner used it as a pretext to terminate—a decision that Owner had already been made. The Court finds that Yates's actions do not rise to the level of repudiation, nor do they "amount to a total and unqualified refusal to perform the contract." *UT Med. Grp., Inc. v. Vogt*, 235 S.W.3d 110, 120 (Tenn. 2007) (citations omitted). Instead, Yates's position was that there was a mistake in the design, and the Court finds Yates's representatives on this point to be credible. Despite asserting this, Yates attempted to resolve the issues, and, in fact, resolved one of the three Codes violations. Moreover, the issues with the L19 stairwell could not have been a genuine reason for termination because Owner was already planning to terminate Yates in June and July 2022 before the issue was identified. This further undermines Owner's credibility as internal email communications show Owner was waiting for an opportunity to terminate after substantial completion. (Exh. 92, 54, 90, 26, 227). The Court does not find that Yates's failure to correct the L19 stairwell was an event of default.

As for the roof, Owner contends that Yates was required to provide a warranty and all materials and equipment would be of good quality, new, and free from defects. (Exh. 5, General Conditions, ¶ 3.5.1). Pursuant to the Construction Contract, Yates had to promptly correct all work rejected by Owner for failure to conform to the Contract Documents and bear costs of correcting such rejected or nonconforming work. (Exh. 5, General Conditions, ¶ 11.2.1). The applicable specifications required a 20-year warranty from a specified manufacturer. Firestone was an approved manufacturer, and GreenShield was not. (Exh. 163). Owner also points to SSR site visit reports as notice to Yates of the specific defects with the roof. (Exh. 164-167). Since Yates never delivered a warranted roof, Owner contends it is in default of the Construction Contract. Further,

that partial payment by The Hartford does not change the fact that Yates owes a fully warranted roof under the Construction Contract.

Yates did attempt to resolve the issue despite COVID's effect on material availability. At the time the issue was being addressed, TPO was not available, and Yates had to work around that problem. On August 8, 2022, Yates was ready to move forward with the roof repair and by August 18, 2022, Hinson (LK) and SSR had signed off on the silicone repair proposal. Davis testified that the coating that would be added in certain areas would also provide a 20-year warranty. However, Owner declined to work with Yates to come to a reasonable solution; instead, Owner unilaterally terminated Yates and failed to coordinate with The Hartford on a reasonable approach before proceeding. Moreover, the damage to the roof was covered by insurance, but Owner instead chose to pursue Yates, as further discussed in more detail below.

Davis testified, which the Court finds credible, that Yates was trying to get the job done, but Owner removed Yates unreasonably and intended to so do for some time. The Court finds that the reasons given in the termination letter were disingenuous and a cover for a planned and strategic termination. The Court further finds that Yates was able to complete the Project and did not manifest any intent to abandon the Project. In fact, Yates always maintained a good faith effort to finish the Project despite Owner's inflexibility and unreasonableness in the schedule, including COVID's effect on labor and material shortages.

Accordingly, the Court does not find that Yates committed any defined Event of Default which constituted a material breach under the Construction Contract. Owner's wrongful termination of Yates constituted the first material breach, which deprived Yates of the opportunity to complete or correct its work. As a result, Owner may not recover for damages arising after the termination.

Despite this, Owner contends that it is still entitled to liquidated damages and costs to complete or repair. The Construction Contract, at Article 5.B, provides that Owner is entitled to liquidated damages for each day beyond Substantial Completion, and OCO112 modified those amounts. Owner asserts that Yates is responsible for 258 days of delay from the Substantial Completion deadline of December 1, 2021, entitling it to the liquidated damages amount capped at $12,186,387. However, the Court did not find Gonzales's testimony to be persuasive and found that the parties modified the contract to prioritize a phased opening of the Hotels rather than a substantial completion deadline. The parties pursued this modified agreement, and, at the time of termination, Yates had substantially performed under the agreement and did not commit a material breach. Furthermore, Owner waived its right to insist on strict performance and obtain liquidated damages. Accordingly, the Court does not find that Owner is entitled to liquidated damages.[26]

As for the remaining damages, Owner relies upon Articles 2.4 and 2.5.2 of the General Conditions for costs to complete and repair, which provide that if Contractor defaults or fails to carry out its obligations or fix defective work, Owner may carry out the obligations and charge costs or withhold payment and offset costs. Owner seeks $2,646,968 in costs to complete:

Contractor	**Cost**
First Finish	$1,169,112
NR Windows	$320,802
Simpson Security	$174,887
Siemens	$600,000
DPR	$382,167

[26] The Court also notes that "[t]he fundamental purpose of liquidated damages is to provide a means of compensation in the event of a breach where damages would be indeterminable or otherwise difficult to prove." *Guiliano v. Cleo*, Inc., 995 S.W.2d 88, 98 (Tenn. 1999) (citations omitted). The Court does not find that Yates has committed a material breach entitling Owner to liquidated damages.

Owner seeks $5,472,036 in costs to repair:

Contractor	**Cost**
DPR	$5,044,680
NR Windows	$370,000
AgroSci	$57,356

Owner incurred some of these costs to complete or repair Yates's work *after* it unilaterally terminated Yates, including NR Windows in the amount of $370,000 for the repair and replacement of broken windows, Simpson Security Systems to program the fire safety systems, Siemens Industry, Inc. to finish the fire safety work previously performed by FZ, and DPR as the replacement contractor. Owner wrongfully terminated Yates and denied Yates the opportunity to complete or correct any defects in its work. Therefore, Owner may not recover these costs to complete or repair. *See Madden Phillips Const., Inc. v. GGAT Dev. Corp.*, 315 S.W.3d 800, 827 (Tenn. Ct. App. 2009).

As for the remaining pre-termination damages, Owner hired First Finish without Yates's knowledge to work with Flood Brothers to finish the rooms from May through August 2022. These Owner subcontractors also created problems for Yates by causing room damage that had to be corrected. (Exh. 66, 67, 117-118, 283, 521). The Court does not find that Yates should be obligated to pay these costs considering that they were hired to assist with Owner's FF&E installer and created duplicative work.

Owner also seeks a credit of $320,802 for NR Windows asserting that Yates improperly billed for OCO30. Specifically, Gonzales testified that there was an OCO for NR Windows based on which Owner paid $1,000,000 but only $700,000 of which NR Windows incurred. Owner

seeks the difference as an overpayment for work NR Windows did not perform because the actual costs were less than the not-to-exceed amount in the change order. Yates contends that there is insufficient information as to how this number was calculated or how it relates to completion costs. Yates's expert testified that this amount relates to a not-to-exceed price associated with material tariffs and were not completion costs. The Court does not find that Owner has sufficiently proven that there was an overpayment entitling it to these damages or that these should be considered costs to complete.

Lastly, Owner paid AgroSci two days prior to terminating Yates for replacement of plants that had wilted and died around June/July 2022. (Exh. 185, 256). According to Jeakins, he learned that the plants died as a result of a water valve being turned off. Owner contends that this payment should be Yates's responsibility because it occurred while the building was under Yates's control. Owner hired AgroSci to design the green wall, and Owner told Yates it had to hire AgroSci for the installation of the system. Owner then hired AgroSci to maintain the plants once installed, and the operator was responsible for the maintenance agreements. Jeakins acknowledged such in his email at the time in which he stated, "AgroSci is clearly responsible for the maintenance of these plants." (Exh. 185). The Court does not find his testimony at trial otherwise placing the blame on Yates to be credible. The Court does not find that the obligation to maintain the plants was included in Yates's scope of work, and, therefore, Owner is not entitled to these damages.

Notice and Opportunity to Cure

The Court finds that Owner failed to provide Yates with the required notice and opportunity to cure. As a general rule, a party alleging defects in the performance of a contract is required to give notice and a reasonable opportunity to cure the defects. *Forrest Const. Co., LLC*, 337 S.W.3d at 229 (citing *Carter*, 916 S.W.2d at 935). Such a rule is designed to allow the defaulting party to

repair the defective work, to reduce the damages, to avoid additional defective performance, and to promote the informal settlement of disputes. *Id*. (citing *Custom Built Homes v. McNamara*, No. M2004-02703-COA-R3-CV, 2006 WL 3613583, at *5 (Tenn. Ct. App. Dec. 11, 2006)).

The Construction Contract provides for a ten-day cure period only for failure to perform "any other obligation" not otherwise listed. (Ex. 5, ¶ 14.A.2(h)). Owner appears to rely on other events of default that did not contractually require notice and an opportunity to cure. Despite this, Yates is entitled to notice and an opportunity to cure under the common law as a matter of common equity and fairness. *McClain,* 806 S.W.2d at 198; *M & M Elec. Contractor, Inc. v. Cumberland Elec. Membership Corp.*, 529 S.W.3d 413, 426 (Tenn. Ct. App. 2016) ("Even in the absence of an express notice provision in the contract, 'the courts will frequently imply an obligation to give notice as a matter of common equity and fairness.'").

Owner contends that it provided Yates with numerous notices of its construction defects and nonconforming work and opportunities to cure those defects. The Court does not find any specific or direct notice of any particular event of default to provide Yates the requisite opportunity to cure. In fact, Davis testified that there were no emails, meetings, or blow-up argument, and, moreover, there was "no hint that [termination] was even on the table," as "it was out of the blue." (Tran. Vol. 20, p. 5302). Yates was continuing to work on punch lists and manning the job daily which was made difficult by the fact that both Hotels had guests and were open to the public. This further reinforces the Court's finding that Owner's termination was wrongful and the first material breach.

Roof Damage and Waiver of Subrogation

The roof damage does not justify termination because the repair was an insured risk under a contract where Owner waived its right of subrogation. In particular, Yates contends that Owner

received insurance proceeds to repair the roof, and the GMP Amendment contained a waiver of subrogation clause. Thus, Owner contractually waived its right to seek damages other than insurance proceeds for the roof. In response, Owner contends that partial payment by The Hartford does not change the fact that Yates was contractually obligated to provide a fully warranted roof which was never delivered. Further, that Yates is only exculpated to the extent of The Hartford's coverage.

Yates procured a builder's risk insurance policy on the Project, and the GMP Amendment provides:

> 12.1.1 Waiver of Subrogation
>
> The Owner and Contractor waive all rights against (1) each other and any of their subcontractors, sub-subcontractors, agents and employees, and (2) Owner's separate contractors, if any, and their subcontractors, sub-subcontractors, agents, and employees, for damages caused by fire or other causes of loss before, during, or after the Work to the extent covered by property insurance obtained by either Party, except such rights as they have to proceeds of such insurance held by Owner.

(Exh. 6, ¶ 12.1.1).

Yates initiated a claim with The Hartford on August 3, 2022, and The Hartford conducted an inspection of the damages on August 23, 2022. The Harford issued payment in the amount of $345,198.27 to Owner on December 20, 2022. On March 3, 2023, Owner contacted The Hartford indicating that the damage was caused by contractor negligence. In correspondence dated February 19, 2025, The Hartford decided to issue payment in the amount of $1,467,081 after reviewing the initial claim and adjusting the amount based on the reported cause of loss after application of deductibles totaling $300,000. (Exh. 248).

The Court finds that the cost to remedy the damage to the roof was an insured risk and that Owner is not entitled to additional damages from Yates, other than for the $300,000 deductible that was Yates's responsibility. The contract provided an express waiver of subrogation and release

of the parties. The clear language and plain intent of the parties was to shift the risk of covered losses to the insurer. Owner attempts to limit the provision by arguing that Yates is only entitled to exoneration from Owner's incurred costs "to the extent of" payment received by Owner. However, the Court does not find the provision to be so limiting, other than allowing Owner to obtain the amount of the deductible. *See Briggs & Stratton Power Prods. Grp., LLC v. Osram Sylvania, Inc.*, No. W2016-01799-COA-R3-CV, 2017 WL 5992361, at *5 (Tenn. Ct. App. Dec. 4, 2017) (allowing party to recover amount of deductible). In fact, per DPR, Holcim agreed to warranty many of the roof systems, and it hired Porter Roofing to do repairs on the rest who returned a March 3, 2023 proposal for $1,260,589, which was roughly $200,000 less than what The Hartford ultimately paid. (Exh. 275). Accordingly, Owner is bound by the amount of the insurance payment, totaling $1,467,081, with Yates paying the $300,000 deductible that makes Owner whole for the repair loss.

Damages

In the absence of a justified termination, Yates is entitled to recover for its performance under the Construction Contract. Yates does not seek the full recovery of $29,000,000 for the total cost overage Yates experienced on the Project[27] but seeks a reasonable estimate of its additional costs on an open book basis consistent with OCO112. Yates provided a "modified total cost claim" through its expert and argues that OCO112 supports its right to assert an "open book" claim[28] for its costs. Yates seeks $19,601,208 for itself and its pass-through subcontractors, not including interest and fees.

[27] As testified to by Dow, this includes cost overage on the Project of roughly $17 million, $6 million in expected fees, and an additional $6 million in subcontractor pass-through claims. (Exh. 415).

[28] "Open book" is a common industry method whereby the costs being claimed are disclosed and subject to audit by the project owner.

"The purpose of assessing damages in a breach of contract suit is to place the plaintiff, as nearly as possible, in the same position he would have had if the contract had been performed." *BancorpSouth Bank, Inc. v. Hatchel*, 223 S.W.3d 223, 228 (Tenn. Ct. App. 2006) (citations omitted). Tennessee law permits the recovery of all damages that are the normal and foreseeable result of a breach of contract. *Bush v. Cathey*, 598 S.W.2d 777, 783 (Tenn. Ct. App. 1979). Uncertain, contingent, or speculative damages should not be awarded. *Maple Manor Hotel, Inc. v. Metro. Gov't of Nashville & Davidson County*, 543 S.W.2d 593, 599 (Tenn. Ct. App. 1975). Courts will allow damages for breach of contract even where it is impossible to prove the exact amount of damages. *Provident Life & Accident Ins. Co. v. Globe Indem. Co.*, 156 Tenn. 571, 3 S.W.2d 1057, 1058 (Tenn. 1928). All that is required is proof with a reasonable degree of certainty. *Buice v. Scruggs Equip. Co.*, 37 Tenn. App. 556, 267 S.W.2d 119, 125–26 (Tenn. Ct. App. 1953).

Yates contends it is entitled to reimbursement pursuant to the exception set forth in OCO112 and the Construction Contract for costs resulting from anything "constituting interference by Owner," such as unjustified rejection of recovery schedules, excessive scope changes and re-design, and the duplicative punch list process. (Exh. 5, ¶ 5.B.3).[29] Owner contends that Yates cannot recover because OCO112 was intended as a waiver of any COVID-related claims and Yates failed to provide notice of a claim or show causation pursuant to the contract terms for any delays or cost increases.

[29] That provision provides in relevant part:

> In no event shall Contractor be entitled to any claim for damages for any delay in completion of the Work unless the delay was caused by acts constituting interference by Owner with the Contractor's performance of the Work (an "Owner Delay"), and then, only to the extent that such acts continue after the Contractor has provided written notice to Owner of such interference. . . . In the event an Owner Delay continues after written notice, Contractor shall be entitled to all direct damages caused by the delay.

(Exh. 5).

i) OCO112 and COVID-Related Damages

OCO112, executed by Yates on June 10, 2021, provides that Yates shall not "claim any increase in price, cost reimbursement, escalation of labor or material costs, compensation, or damages for any delay, disruption, or interference to the Work arising from such Coronavirus Impacts," with the exception:

> if (i) due to unforeseeable supply chain disruptions or labor shortages directly caused by future Coronavirus Impacts that are not currently in effect or reasonably capable of anticipation, no alternative product or material substitutions or labor forces are readily available, or (ii) due to future delays, orders, or directives by governmental authorities not known as of the date of this Change Order, the Project schedule or actual construction cost is impacted, Contractor may submit a change request that fully documents such actual additional costs incurred and delay to the Project schedule for review by Owner. Such change request shall be open-book and subject to audit to verify actual costs to support Contractor's claims for additional time and/or additional costs.

(Exh. 156). Yates contends that it was not foreseeable that COVID cases would increase more than before due to the Delta and Omicron variants, causing labor shortages and supply chain issues, relying on Drs. Goldsby's and Gormley's opinions, which the Court found persuasive. Yates acknowledges that COVID in general would cause supply chain issues and illness, but did not have a reason to think it was going to come back the same way it had before, if not worse, especially in light of the communications that were being presented to the public at the time.

The Court finds that the exception applies to the COVID-related impacts after execution of OCO112—no one reasonably anticipated that COVID would re-surge in light of the availability of vaccinations and what the government was reporting to the public at the time. Owner's position was that Yates could not claim generalized COVID impacts on delays and that it was assuming the risk if it could not finish on time. However, the parties agreed to include an exception and the Court finds that it applies under the circumstances.

ii) OCOs and Waiver

Owner also contends that Yates waived much of its claim through executed change orders. In particular, that Birmingham relies extensively on issues fully resolved by OCO155, including the Salto door system, L1 bathroom vanity lights, AcoustiBuilt Ceilings, and Siemens programming issues. In OCO155, Yates agreed "that all direct and indirect costs related to this Change Order . . . have been fully compensated" and that this OCO "closes all remaining COR's through #276." (Exh. 15). The line items within OCO155 describe changes including COR 231R1 for the 1 Hotel Salto System, COR 264 for the L3 Bathroom Vanity Lights, COR 269 for the AcoustiBuilt Ceilings Patchwork on L3, and COR 276 for the Siemens Programming for TCO. (*Id*.). However, OCO155 was entered into during the December Deal negotiations. The Court does not find that this settled out these particular line items in light of the December Deal. The Court cannot find that future issues with these line items were waived.

iii) Contract Terms and Causation

Finally, Owner argues that Yates failed to follow strict notice requirements pursuant to the Construction Contract and that Yates's cumulative impact claims lack a causation analysis. Owner contends that Yates presents an omnibus claim that does not specify exact impacts causing damage and does not tie any specific amounts of time or costs to unforeseeable supply chain disruptions or labor shortages and that to award such damages would be speculative.

The Construction Contract provides that it is Yates's responsibility to prove a delay was specifically caused by a delay on the critical path. (Exh. 5, ¶ 5.B.4). The Construction Contract further provides that Change Order Requests, Change Orders, Owner-directed changes, and claims for additional compensation shall be processed in accordance with the General Conditions. (Exh. 5, ¶ 4.B). For Owner-initiated changes, all changes shall be initiated by submitting a written change

order request to Yates who has 15 days to provide a price proposal with schedule impact. Thereafter, Owner is to issue a Change Order either with the agreed upon changes or a Time and Materials Change Order with a not-to-exceed price. (Exh. 5, General Conditions, ¶ 7.1). For Contractor-initiated changes, Yates is to provide written notice of any claim within ten days of the event giving rise to such claim and follow such notice with a written price proposal within seven days, and both "shall be a condition precedent to any further consideration of the claim." (*Id*. at ¶ 7.2; Exh. 6, ¶ 10(j)).

Yates contends that OCO112 modified these provisions and that the parties agreed to discuss at the end of the Project cost overruns attributable to COVID on an open-book basis and to reach a resolution. Nadolski and Davis testified that they considered the "open book" language to mean that Yates was subject to audit if there needed to be changes that were unanticipated or unknown based on accumulated costs and that this replaced the prior reliance on a critical path method schedule.

Additionally, Yates notified Owner it intended to make a delay claim under OCO112. In its September 3, 2021 Monthly Report and Pay Application, Yates stated, "We are currently tracking impacts from the Delta Variant of COVID19 and the new surge of cases across the country and reserve our right to submit a change request in the future." (Exh. 484). Owner also acknowledged these issues in its December 2021 Development Report, dated January 18, 2022, recognizing that there were "forecasted delays to the project due to manpower shortages and supply chain issues." (Exh. 33). Further, that "[a]lthough Ownership has not received formal notice related to the COVID-19 pandemic and supply chain issues, Ownership is anticipating receipt of a delay claim from Yates." (*Id*.). In Tazalla's email dated January 7, 2022, he acknowledged "the delays are 2/3 COVID and supply chain," and "if Yates wasn't bad at papering things . . . they would

have millions in valid claims against us or at partially negating our potential claims against them." (Exh. 70).

OCO112 allowed the parties to focus on finishing the Project in lieu of a dispute over claims that were COVID-related due to unforeseeable events. The Court finds that OCO112 allowed Yates to make delay claims based on the COVID-exception on an open book basis and replaced the prior reliance on a critical path method schedule. The Project was on a compressed schedule with everyone involved working to complete the Project in light of these issues. Owner knew the additional work and costs were being incurred, realized a benefit from those costs and extra work, and knew that there was a future delay claim coming. Furthermore, in the weeks prior to termination, Nadolski emailed Jeakins:

> In the past, we have clearly communicated to you that there would be a claim at the end of this project as there have been numerous issues that have remained unresolved which have been to the detriment of the Contract and the Subcontractors. Crescent reneged on the acceleration deal, and Yates' portion of the "deal" for general conditions. Crescent has used the CCD process to force trades to perform work, but then refuses to pay for work completed. Crescent has refused to look at legitimate delay issues which have placed the project into constructive acceleration, out of sequence work, and created inefficiencies.

(Exh. 26).

Moreover, the Construction Contract provided that, for "Owner Delays," Yates was allowed to provide written notice of such interference and was entitled to all direct damages caused by the delay. (Exh. 5, ¶ 5.B.3). These delays follow a different process than for Owner-initiated or Contractor-initiated changes as set forth above. This would include unjustified rejection of recovery schedules, the many design changes, and the duplicative punch list process, which interfered with Yates's work and increased costs. The Court finds that Owner received notice of

these interferences via emails and OAC Meeting minutes, and Owner should be responsible for the damages caused by the delays.[30]

Regardless, even if Yates failed to abide by the strict notice requirements and change order process, it may still obtain relief through alternate theories of recovery. As held by the Tennessee Court of Appeals:

> In circumstances analogous to those of this case, the courts of this State have permitted parties who have performed additional work to recover even in the absence of a contractually required written change order. In doing so, the courts have relied on several different theories to support their decisions. The most common basis for permitting recovery for extra work without a written change order is that the parties, by their conduct on the job, waived the requirement. Other courts have reached similar results by relying on the "implied-in-fact contract" theory, the oral recission theory, the estoppel theory, and the quantum meruit theory.

Realty Shop, Inc. v. RR Westminster Holding, Inc., 7 S.W.3d 581, 601 (Tenn. Ct. App. 1999) (internal citations omitted). Owner sought to progress the work to completion and acknowledged that Yates intended to make a future delay claim. Owner never asked to stop the work and, in fact, deliberately delayed responding to change order requests and Yates's emails in general to continue progress on the Project without additional payment. Thus, it is fair to assume Yates was doing work for which it would eventually be compensated and that there was an implied promise to pay. *See V. L. Nicholson Co. v. Transcon Inv. & Fin. Ltd., Inc.*, 595 S.W.2d 474, 482 (Tenn. 1980).

Damages Sought

Yates seeks damages in the amount of $19,601,208. Yates's damages calculation is based on the projected costs as of June 2021 rather than a complete out-of-pocket loss that was testified to by Dow. In particular, FTI compared Yates's actual costs in its final job cost report to its end of

[30] The Court distinguishes this from a notice of termination which carries greater weight by creating a legal obligation grounded in common equity and fairness which allows the defaulting party the opportunity to repair defective work, reduce damages, and promote the informal settlement of disputes. *M & M Elec. Contractor, Inc.*, 529 S.W.3d at 427.

job projections as of June 30, 2021, and then excluded certain costs to verify that the damages sought are a reasonable calculation of impacts that were attributable to the Owner. (Exh. 474-476). FTI relied upon phase codes as defined by Yates's cost report, and Yates's breakdown of damages by such categories is set forth as follows in FTI's report:

Item	Cost Category	Damage Value	Revised Damage Value
1	Supervision	$ 2,721,822	$ 2,721,822
2	GC / GR	3,040,471	3,040,471
3	Additional Punchlist Costs	3,215,966	3,215,966
Subtotal GC / GR Costs		$ 8,978,259	$ 8,978,259
4	Additional Subcontractor Costs		
4a.	Direct Owner-caused Impacts or Direction	2,199,605	2,199,605
4b.	Other Owner-caused Impacts	857,841	841,315
Subtotal Subcontractor Costs		$ 3,057,446	$ 3,040,920
5	Subcontractor Claims	6,379,285	6,379,285
6	Yates Post Termination Costs	270,725	270,725
Subtotal Additional Claim Costs		$ 6,650,010	$ 6,650,010
Subtotal Claim		$ 18,685,715	$ 18,669,189
Contractor fee (2.75%)		513,857	513,403
Subtotal Claim (with contractor Fee)		$ 19,199,572	$ 19,182,592
7	Unpaid Contract Balance	418,616	418,616
Totals		$ 19,618,188	$ 19,601,208

(Exh. 476).[31]

The first three categories are Yates's costs associated with managing the Project. Yates's position is that these costs were higher due to the extended time on the job and complexity. Birmingham testified that for the Supervision and GC/GR categories, he conducted a modified total cost claim that compared the total cost overruns and adjusted the claim value based on amounts that were not supported, which included those impacts that were not Owner's responsibility.

[31] GC/GR refers to General Conditions and General Requirements. In his subsequent report, Birmingham made an adjustment to 4b and removed a back charge associated with a subcontractor and revised the total damages amount.

The fourth category is additional subcontractor costs, which are amounts Yates paid to subs to perform change order work that was not covered by an OCO because of Owner rejection. Those are further split into two buckets—direct Owner-caused impacts and indirect Owner-caused impacts, which account for either direction given by Owner including Owner-requested changes or related to the overall impacts on the Project following OCO112, including Owner's request to open and occupy portions of the Hotels without a time extension.

The next category includes the subcontractor pass-through claims for Groove, Allegheny, BMCC, and FZ, which the Court addresses separately below. The post-termination costs were for demobilizing and tying up loose ends. Yates then added the 2.75% contractor fee on top, as well as the unpaid contract balance of $418,616. (Exh. 415).

Owner takes issue with the cumulative impact delay analysis, which generally refers to the compounding effect of multiple changes or delays over time, and it asserts that Yates failed to show discrete proof of causation and resulting damage. Owner contends that Yates should have itemized the impact events, identified the cause of the event, determined the extent of cost impacts associated with the event, and shown that Owner is responsible for the impact.

Subcontractor Pass-Through Claims

Yates seeks $6,379,285 in pass-through subcontractor impact claims:

Subcontractor	**Amount**
BMCC	$3,019,706
FZ	$3,237,654
Allegheny	$97,857
Groove	$33,068

Birmingham testified that these are amounts being sought by the subcontractors that are now being passed through to Owner. For FZ, it performed a modified total cost and reduced its claim by 20% to account for some of its own inefficiencies. For BMCC, its claim was a portion of its total overrun approximating $9 million.

Like the other categories of damages, Owner contends that these claims are insufficiently supported. In particular, Owner contends that Yates failed to analyze or distinguish between alleged damages caused by the subcontractor itself, Yates, or Owner. Yates refers to the FTI report and the methodologies and supporting documentation in Attachments 9-12 therein. (Exh. 474). In particular, FZ and BMCC used the modified total costs to reasonably estimate the impact of delays due to COVID and Owner on their respective pass-through claims.

Yates admits it is extremely challenging to connect specific dollars to specific issues when multiple, inter-related issues caused the contractor to incur added costs. This became evident in the history leading up to OCO112, particularly with the impact of COVID. However, Yates supplied backup documentation to support these costs including monthly payment applications that were provided to Owner who could have audited those numbers but did not. Yates's expert reviewed these documents and determined that they were a reasonable calculation of Yates's damages. In fact, Owner's internal documents noted the same impacts to the Project that Yates was communicating, including COVID-related impacts following OCO112, additional work in change orders, impacts to the punch list, completion, and opening of the building associated with Owner's FF&E. Based on FTI's review, those impacts were all occurring and overlapping which prevented parsing out which factor caused what precise number of days delay.

Yates's damages were actual costs incurred by Yates to build the Hotels. The Court found that Owner and unforeseen COVID-related delays were responsible for a majority of the delays.

The Court acknowledges there is no perfect way to connect a specific dollar amount to each particular delay—there were too many overlapping factors. That is a significant basis for the Court's credit of Birmingham's expert opinion and his use of the cumulative impact analysis from 130R-23. (Exh. 474-476, 586). The Court finds Yates has provided proof of its damages within a reasonable degree of certainty, including the subcontractor pass-through claims. *Buice*, 267 S.W.2d at 125-26. Accordingly, Yates is entitled to damages in the amount of $19,601,208, minus the $300,000 deductible credit to Owner for the roof insurance payment.

Prejudgment Interest

Yates seeks up to 10% interest pursuant to Tenn. Code Ann. § 47-14-123 but notes that the Court can further increase that amount to the applicable formula rate under Tenn. Code Ann. § 47-14-103, currently set at 10.75%.

Regarding the request for prejudgment interest pursuant to Tenn. Code Ann. § 47-14-123, the Court applies the standards established in the Tennessee Supreme Court's 1998 decision in *Myint v. Allstate Ins. Co*., 970 S.W.2d 927 (Tenn. 1998), as follows:

> An award of prejudgment interest is within the sound discretion of the trial court and the decision will not be disturbed by an appellate court unless the record reveals a manifest and palpable abuse of discretion. *Spencer v. A–1 Crane Service, Inc.*, 880 S.W.2d 938, 944 (Tenn. 1994); *Otis v. Cambridge Mut. Fire Ins. Co.*, 850 S.W.2d 439, 446 (Tenn. 1992).
> …
>
> Several principles guide trial courts in exercising their discretion to award or deny prejudgment interest. Foremost are the principles of equity. Tenn. Code Ann. § 47–14–123. Simply stated, the court must decide whether the award of prejudgment interest is fair, given the particular circumstances of the case. In reaching an equitable decision, a court must keep in mind that the purpose of awarding the interest is to fully compensate a plaintiff for the loss of the use of funds to which he or she was legally entitled, not to penalize a defendant for wrongdoing. *Mitchell v. Mitchell*, 876 S.W.2d 830, 832 (Tenn. 1994); *Otis*, 850 S.W.2d at 446.
>
> In addition to the principles of equity, two other criteria have emerged from Tennessee common law. The first criterion provides that prejudgment interest is

> allowed when the amount of the obligation is certain, or can be ascertained by a proper accounting, and the amount is not disputed on reasonable grounds. *Mitchell*, 876 S.W.2d at 832. The second provides that interest is allowed when the existence of the obligation itself is not disputed on reasonable grounds. *Id*. (citing *Textile Workers Union v. Brookside Mills, Inc.*, 205 Tenn. 394, 402, 326 S.W.2d 671, 675 (1959)).

Applying *Myint* to the record in this case, the Court finds there is evidence to support an award of prejudgment interest for the unpaid balance on the Construction Contract. Owner acknowledges that there was an unpaid contract balance, albeit Owner asserts the amount to be $283,108 rather than Yates's assertion of $418,616, creating a difference of $135,508. However, the Court finds Yates's calculation to be sufficiently supported by backup documentation, and the Court finds this amount was certain and could not be disputed based on reasonable grounds. Accordingly, the Court awards 10% interest on the unpaid balance of $418,616 as of the date of termination, September 22, 2022.

Conclusion

Based on the foregoing, the Court finds as follows:

IT IS ORDERED, ADJUDGED, and DECREED that Yale Riley, Esq. is DISMISSED as a party to this action.

IT IS FURTHER, ORDERED, ADJUDGED, and DECREED that Owner's claim for breach of contract is DENIED and that claim is DISMISSED with prejudice.

IT IS FURTHER, ORDERED, ADJUDGED, and DECREED that Yates's claim for breach of contract is GRANTED, and Yates is awarded $19,601,208 for itself and its pass-through subcontractors, minus the $300,000 deductible for the roof claim, resulting in a net award of $19,301,208.

IT IS FURTHER, ORDERED, ADJUDGED, and DECREED that Yates is awarded pre-judgment interest at the rate of 10% on the unpaid contract balance of $418,616 as of the date of termination, September 22, 2022, totaling $141,526.61.

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that Yates's alternative claims for unjust enrichment and quantum meruit are DISMISSED with prejudice.

IT IS FURTHER, ORDERED, ADJUDGED, and DECREED that Yates is AWARDED its reasonable attorney's fees as the prevailing party. Accordingly, the Court ORDERS Yates's counsel to file an affidavit of fees and expenses for the above items within twenty (20) days. Yates is ORDERED to provide the actual invoices to support its claim and allows appropriate but limited redactions. Owner has twenty (20) days after filing to object. Thereafter, the Court will enter an order as to the amount of reasonable fees and expenses upon reviewing such affidavit/declaration of fees and expenses and any opposing submission on the papers.

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that the bond releasing Yates's lien from the Property in the amount of $20,140,072.84, recorded on October 2, 2023, Instrument No. 20231002-0077075 (Exh. 187), held by 7th Avenue Nashville Hotel Owner, LLC and Fidelity and Deposit Company of Maryland, jointly and severally, is valid. The Court reserves judgment regarding Yates's entitlement to the bond until entry of a final order in this matter.

IT IS SO ORDERED.

s/Anne C. Martin

ANNE C. MARTIN
CHANCELLOR
BUSINESS COURT DOCKET
PILOT PROJECT

cc by U.S. Mail, email, or efiling as applicable to:

Christopher M. Caputo, Esq.
Albert L. Chollett III Esq.
Erin E. Gomez, Esq.
F. Dalton Thompson III, Esq.
Jordyne C. Johnson, Esq.
BAKER, DONELSON, BEARMAN, CALDWELL & BERKOWITZ, P.C.
1600 West End Avenue, Suite 2000
Nashville TN 37203
ccaputo@bakerdonelson.com
achollett@bakerdonelson.com
egomez@bakerdonelson.com
dthompson@bakerdonelson.com
jcjohnson@bakerdonelson.com

D. Bryan Thomas, Esq.
Petar A. Angelov, Esq.
Lara Morris, Esq.
BRADLEY ARANT BOULT CUMMINGS LLP
1221 Broadway, Suite 2400
Nashville, TN 37203
dbthomas@bradley.com
pangelov@bradley.com
lmorris@bradley.com

James F. Archibald III, Esq.
BRADLEY ARANT BOULT CUMMINGS LLP
1819 5th Avenue North
Birmingham, AL 35203
jarchibald@bradley.com