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IN THE SUPREME COURT OF THE STATE OF DELAWARE

TUTOR PERINI CORPORATION, Defendant Below-Appellant, v. GREENSTAR IH REP, LLC and GARY SEGAL, Plaintiffs Below-Appellees.	)	C.A. No. 35,2020 Court Below: Court of Chancery of the State of Delaware C.A. No. 12885-VCS

APPELLEES' ANSWERING BRIEF

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NATURE OF PROCEEDINGS

This is a straightforward breach of contract case.

Tutor Perini Corporation ("Tutor Perini") bought GreenStar Services Corporation ("Greenstar" or the "Company") in a merger in 2011 (the "Merger"). The purchase price that Tutor Perini paid was based upon the book value of Greenstar's operating subsidiaries, principally Five Star Electric Corporation ("Five Star") and WDF, Inc. ("WDF"). Included in book value was approximately $34.2 million of "costs in excess of billings" ("CIE") – essentially amounts of construction change orders that were not yet approved, and thus could not be billed, but were recorded as revenue at the cost incurred to perform the change order work ("booked"). While CIE is labeled a "cost," it is an asset on the balance sheet, as it represents the value of work performed that is expected to subsequently be billed and collected.

Ron Tutor, the eponymous founder who has been the CEO of Tutor Perini or its predecessors for over 40 years, included in the Agreement and Plan of Merger (the "Merger Agreement") two holdbacks (one of $17.5 million, and a second of $8 million) for, *inter alia*, the collection of the $34.2 million of CIE – Tutor's view was that those amounts were included in the book value he paid for Greenstar, and he wanted to ensure that he got what he paid for.

Subsequently, the parties disputed whether the conditions for release of the holdbacks had been satisfied. A compromise was reached, and the parties entered into the Holdback Settlement and Release Agreement (the "Holdback Agreement") that is the subject of this appeal. Pursuant to that agreement, $17.5 million of the Merger holdbacks was released, and the remaining $8 million (the "Holdback Amount") was to be paid upon collection by Five Star and WDF of $60.529 million (nearly double the CIE in the Merger), representing (i) approximately $45.9 million of CIE on the books of Five Star and WDF at the time of the Holdback Agreement, and (ii) approximately $13.6 million of losses previously recorded on three WDF jobs.

Tutor justified this demand by stating that he wanted to collect the book value that he had paid for when he bought Five Star and WDF. Gary Segal, the former CEO of Greenstar and then-current CEO of Five Star, pointed out that Five Star and WDF also had significant claims against the owners of many construction projects, representing disputed change orders, delay damages and other unresolved issues. With limited exceptions, these substantial amounts were *not* recorded on the books of Five Star and WDF at the time of the Merger, and were therefore not paid for by Tutor Perini when it bought Greenstar. As such, collection of these amounts would thus be pure profit for Tutor Perini. Segal took

the position that any collection of these unbooked amounts should be available to offset any shortfall in the $60.529 million that Tutor was requiring to be collected for the release of the $8 million holdback.

Tutor agreed, and the Holdback Agreement was prepared. It lists, on Exhibit B, the $60.529 million of booked change orders and previously recorded losses, representing the "bogey" that Five Star and WDF were required to collect for release of the $8 million Holdback Amount. The Holdback Agreement also lists, on Exhibit C – titled "Offset Claims" – approximately $205 million of largely-unbooked claims, the collection of which would offset any shortfall in the collections required by Exhibit B. The Holdback Agreement states that collection of an amount listed on Exhibit C will be credited if it "results in additional net profit recognized by [Greenstar] or its subsidiaries after March 31, 2013 (or which [Tutor Perini] believes in good faith will result in additional net profit recognized in accordance with [Greenstar's] or its Subsidiaries' customary business practices)." A250 § 2. It is undisputed that, to the extent the claims on Exhibit C were not previously booked, their collection *necessarily would* result in additional net profit, as there would be new, unbooked revenue with no associated costs.

Exhibit D to the Holdback Agreement makes this crystal clear. It provides an example intended to clarify the structure of the Holdback Agreement,

and expressly states that the "[t]otal cash collection requirement per Exhibit B" of $60.529 million "[c]an be made up of any combination of cash receipts from Exhibits B & C." A269. Exhibit D makes no mention of profits.

The record found by the trial court plainly establishes that more than $60.529 million of the amounts listed on Exhibits B and C was collected. But Tutor Perini now says that collection of Exhibit C offset amounts is not sufficient – it asserts that those collections can be counted only if they increase the overall profit of the relevant job, which can be determined only upon completion of that job. As the trial court properly found, Tutor Perini's contention has no support in the contract language, is contrary to the express language of Exhibit C, is inconsistent with the genesis and purpose of Exhibit C, completely reads Exhibit D out of existence, and suffers from numerous other infirmities. *See* Memorandum Opinion ("Op.") at 37-40.

What is really going on here is clear. Tutor dislikes Segal, and as Tutor initially denied but then admitted at trial, he wants to "punish" Segal. Thus, Tutor previously denied Plaintiffs approximately $19.4 million in earn-out payments related to the same Merger at issue here. At an earlier stage of this case, Plaintiffs won those claims on judgment on the pleadings and the court below dismissed Tutor Perini's fraud counterclaim with prejudice, and that judgment was

summarily affirmed by this Court. *See Greenstar IH Rep, LLC v. Tutor Perini Corp.*, 2017 WL 5035567 (Del. Ch. Oct. 31, 2017), *aff'd*, 186 A.3d 799 (Del. 2018) ("Greenstar I"). The present stage of this case is the result of a similarly meritless effort by Tutor to punish Segal.

Such vindictive use of litigation is wholly improper. Here, the trial court properly rejected Tutor Perini's arguments, and sanctioned Tutor Perini for its discovery misconduct. *See Greenstar IH Rep, LLC v. Tutor Perini Corp.*, 2019 WL 6884752 (Del. Ch. Dec. 4, 2019); *see also* A3-4 at D.I. 227. The contract is clear – Plaintiffs are entitled to the Holdback Amount if collection of amounts listed on Exhibits B and C to the Holdback Agreement exceeds $60.529 million. The evidence clearly showed sufficient collections; the trial court's judgment was plainly correct. Accordingly, the judgment entered by the trial court should be affirmed.

SUMMARY OF ARGUMENT

1. Denied. The Holdback Agreement is clear – the required $60.529 million of collections can be comprised of any combination of collections of the booked amounts listed on Exhibit B plus the amounts listed on Exhibit C, which (with the limited exceptions that are noted) are unbooked claims. This is consistent with the language of Section 2 of the Holdback Agreement referencing "additional net profit," as it is undisputed that collection of previously unbooked claims results in additional net profit.

Tutor Perini's proffered construction – that the reference to "additional net profit" means additional net profit on the overall job – has no support in the language of the Holdback Agreement, is inconsistent with the timing provisions of the agreement (which contemplates a true-up in one year, while overall job profit could be determined only upon job completion, which could be up to five-plus years after the execution of the Holdback Agreement) and, as shown herein, would contradict numerous provisions of the Holdback Agreement, or render them surplusage, including Exhibit D. As the trial court properly found, "Tutor Perini's proffered construction [of the Holdback Agreement] is not reasonable." Op. 40.

2. Denied. The trial court properly found that amounts identified on Exhibits B and C to the Holdback Agreement had been collected and that certain counterclaims on Exhibit C were no longer pending. Ample evidence supports those determinations. There is no basis to overturn the trial court's factual findings, particularly in view of the deference this Court gives to such factual findings.

STATEMENT OF FACTS

A. The 2011 Acquisition Of Greenstar By Tutor Perini.

On July 1, 2011 Tutor Perini entered into the Merger Agreement, pursuant to which Tutor Perini acquired Greenstar, including its subsidiaries, Five Star and WDF. Op. 1; B498 ¶ 4; A61. Tutor Perini based its $175 million purchase price on a target book value of $140 million. *See* Opening Brief ("OB") at 12; A68, A74 § 1.01 (Definitions of "Equity Value" and "Target Closing Net Worth"); A79-81 § 2.08; A755 at 388:24-389:17 (Tutor).[1]

One of the assets included in book value was $34.2 million of "costs in excess of billing," or "CIE," that is discussed below. OB 13; Op. 6. This amount was primarily unapproved change orders arising from owners' directions for additional work that Five Star and WDF performed, but could not yet bill because the change order had not been formally approved by the owner. OB 13. Because Tutor Perini was paying for these amounts by paying book value, the Merger Agreement included a schedule setting forth the $34.2 million of "Unapproved or Pending Change Orders" (A116 § 6.08(a); A158) and a guarantee

[1] The Merger Agreement provided for an adjustment to the extent the closing date book value exceeded or fell short of the $140 million target. In fact, the closing book value was nearly $174 million, resulting in a final purchase price of approximately $208 million. Op. 5-6, n.21.

that those amounts would be collected. A116-17 §§ 6.08(b) and (c); *see also* OB 13.

Because Tutor Perini would own Greenstar after closing, it would have no effective recourse if Greenstar's representations and warranties (including its warranty that the pending change orders would be collected) were breached. Accordingly, as is common in mergers, the Sellers escrowed a portion of the purchase price to fund an indemnity to the buyer (Tutor Perini) if the representations and warranties of the Company (Greenstar) were breached. Indeed, the Merger Agreement included two escrow provisions: $17.5 million (10% of the purchase price) was placed into an escrow in which general claims for breach of representations and warranties in the Merger Agreement could be pursued. A82-83 § 2.12(a); A69. In addition, a second $8 million escrow was provided as security for claims relating to certain specified projects. A82-83 § 2.12(a); A74; *see also* OB 13. The Merger Agreement provided that the representations and warranties would survive for one year after the closing of the Merger (A125 § 9.01(a)), and that the escrow funds would be released unless claims were made within that one-year period. *Id.*

In the Merger Agreement, Tutor Perini also obtained a profit guarantee (A114 § 6.07 (entitled "Realization of Gross Margin"); OB 13; A768 at

442:1-4 (Tutor)), the satisfaction of which was never questioned. A768 at 442:15-443:14 (Tutor).

B. Change Orders, Claims And CIE.

When a contractor bids on a project, it bases its price on the plans and specifications provided by the owner, based on an estimate of future costs plus a profit margin. Op. 10. During the course of a project, owners frequently ask the contractor to perform work that is different from or beyond what was included in the original bid (a "change order"). A634 at 11:23-12:20 (Segal); A752-53 at 379:18-380:17 (Tutor). In addition, a contractor often must do extra work because of factors beyond the contractor's control (for example, delays due to weather or other contractors not completing their work in a timely or proper manner), which can give rise to a claim by the contractor that it is owed additional compensation for its work on the project. Op. 10; A635 at 13:6-18 (Segal); A817 at 535:19-536:8 (Bennett); *see also* OB 15.

A substantial part of Five Star and WDF's work at the time of the Merger was on large projects for New York City agencies (*e.g.*, the Port Authority of New York/New Jersey, the Department of Environmental Protection, the Metropolitan Transit Authority, and similar agencies). A771 at 454:9-12 (Tutor). The contracts for such agency projects frequently totaled tens of millions of dollars

and took years to complete. A821 at 553:13-17 (Bennett). Due to the size and complexity of the projects, there were substantial "pending" change orders – work directed by the owner or construction manager as to which no formal change order had yet been approved.

In the absence of an approved change order, Five Star and WDF could not bill the owner or the agency for the "change order" work that the owner or agency had directed. OB 15; A635 at 14:18-21 (Segal). Under Generally Accepted Accounting Principles ("GAAP"), Five Star and WDF were permitted to book (*i.e.*, record as revenue) the costs associated with pending change orders if the contractor believed it would eventually collect those amounts from the owner. OB 15; Op. 11. These amounts (essentially an expectation of future revenue) are recorded on the books of a construction contractor as "costs in excess of billings" or "CIE." *Id.* CIE represents the costs for work that has been performed, but that cannot yet be billed.

In contrast, the claims arising from circumstances beyond the contractor's control (weather-related delays, delays or other increased costs due to other contractors not properly or timely completing their work, and the like) were not the result of the building owner or construction manager *directing* that additional or different work be performed, but rather were essentially additional

costs incurred by the contractor as a result of matters not contemplated in the original bid. Thus, pending change orders represented work that the building owner approved and conceded it would have to pay for, while claims represented instances in which the contractor claimed to be owed money, but the building owner or construction manager did not yet recognize the contractor's right to payment. Under GAAP, claims could be booked (recorded as revenue) only to the extent that, as a result of an analysis, the contractor believed that a portion of the claim would be paid. B171. As will be shown below, at the times relevant to this appeal, Five Star and WDF generally did not book claims. In the few instances where they did, the accounting treatment was supported by a contemporaneous accounting memorandum setting forth the nature of the claim and the basis for the determination that some portion of the claim would be collectible. *E.g.*, B1; B104; B108; B244.

C. The Parties Reached Impasse On The Release Of The Escrow Amounts.

Under the Merger Agreement, a "true up" of the escrow amounts was supposed to occur in July of 2012, on the one-year anniversary of the Merger. A116-17 § 6.08(b); A113 § 6.06(a) ("True-Up Date"). When Sellers sought payment, Tutor Perini claimed that the CIE had not been collected. (Notably, it never made any claim that the "profit guarantee" was not met). The parties

thereafter engaged in extensive discussions about the release of the escrow amounts, and in April of 2013, Segal and Roman (CEO of WDF) pressed for release of the escrow (B4), but Tutor refused. Op. 8.

D. The Holdback Agreement.

To avoid litigation, Ron Tutor proposed terms for a new agreement that would replace the Merger Agreement's provision for the $17.5 and the $8 million escrow amounts. Op. 8. In an April 5, 2013 letter, Tutor outlined his proposal that the $17.5 million escrow amount be paid to the Sellers through a one-year note, and that the remaining $8 million stay in escrow, to be released to the Sellers only if certain additional collections were achieved. A189-90.

Tutor Perini proposed that, to obtain release of the remaining $8 million, Five Star and WDF be required to collect a total of $60,529,000, representing (i) $46,928,000 of CIE recorded on the books of Five Star and WDF as of March 31, 2013, plus (ii) $13,601,000 of losses previously recorded by WDF on certain of its jobs. B10. The required $60,529,000 collection was nearly double the $34.2 million of CIE that Five Star and WDF were required to collect under the original Merger Agreement. But, as Tutor reasoned, the CIE and recorded losses were things that he had essentially paid for by paying book value

for Greenstar, and he was entitled to such collections as a condition for the release of the final $8 million. Op. 35.

Segal pointed out that Five Star and WDF also had extensive claims, totaling over $200 million, almost none of which had ever been booked, and that Tutor Perini had therefore never paid for. A636 at 20:2-23 (Segal). To the extent Tutor Perini collected the unbooked portions of these amounts, it would be receiving what was essentially a windfall – amounts that had *not* been included in the book value of the Company and that Tutor Perini had thus *not* paid for. Segal argued that collection of the unbooked amount of the claims should be available to "offset" any shortfall in collection of the $60.529 million that Tutor was demanding as a condition for release of the final $8 million. *Id.*; A384 at 83:17-84:10 (Roman). Tutor agreed to this approach:

> Q: And in general, what was your understanding of how the Holdback Agreement would work?
>
> A: That, in fact, specific to the Holdback Agreement, whenever they achieved more than what they booked, they would be able to use that to offset whatever was booked or was achieved less than what was booked. In other words, I tried to be fair and say, if you booked $10 million and you settled for $15, you could take the extra five if, on another claim, you settled for less than you – because I was looking for a gross of what they put forth as their real monies owed and I allowed them to move money so long as at the end of the day we got, as the owner, what he said we would get.

A757 at 399:7-22 (Tutor).

In accordance with this principle, on April 25, 2013, Tutor Perini's CFO, Burk, delivered to Sellers a draft of the Holdback Agreement, including Exhibits B and C. B10. Burk's cover email stated: "We have tried to keep this as simple as possible." B10; A850 at 667:8-10 (Burk). It is undisputed that all but $1 million of the $46,928,000 in the second column of Exhibit B represented CIE on the books of Five Star and WDF as of March 31, 2013.[2] A774 at 464:12-16 (Tutor); A819 at 544:14-19 (Bennett); A850 at 668:23-669:21 (Burk); A650 at 74-14-18 (Segal). It is also undisputed that, with certain rare exceptions that were noted on the face of Exhibit C, the Exhibit C "Offset Claims" represented amounts that were not booked as of the date of the Holdback Agreement. Tutor testified:

> Q: And the offset claims were things that weren't booked and therefore, you hadn't paid for when you bought the company. Right?
>
> A: You are correct.

A774 at 465:24-466:3 (Tutor); *accord*, A637 at 21:11-17 (Segal); B258 at 34:23-35:7; A384-85 at 84:15-85:4 (Roman); A851 at 673:7-12 (Burk).

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[2] The $1 million attributable to the 156 Stations project in the second column of Exhibit B is described as "reserve for possible legal costs" in connection with that project. A265. That $1 million in essence represented an additional amount required to be collected in order to entitle Sellers to receive the $8 million being held pursuant to the Holdback Agreement.

Exhibit B listed 15 projects. Exhibit C listed 30 projects, 14 of which were also listed on Exhibit B and 16 of which were not. Exhibit C contained comments that indicated that a portion of the Claim Amounts for three projects – Freedom Tower, Jamaica 2E and Jamaica 2G – were booked, as set forth in the Exhibit C excerpt on page 32 of the trial court's Memorandum Opinion:

Job	Exhibit B Claims / Unbilled @ 3/31/13	Exhibit C Claim Amount	Exhibit B Comment	Exhibit C Comment
Freedom Tower[130]	$5	$29.436	Collection of $5M *included in 2012 revenue* for [] general condition claim of $29.4M (See Exhibit C).	*Claim amount settled less $5M previously recognized will be offset amount* (see Exhibit B).
Jamaica 2E[131]	$5.8	$23.086	Collection of $5M *included in 2012 revenue* for [] general condition claim of $23.1M (See Exhibit C).	*Claim amount settled less $5M previously recognized will be offset amount* (see Exhibit B).
Jamaica 2G	$15.541	$7.3	Collection of amount related to request for [] delay as of 3/31/13.	

Thus, for Freedom Tower, the Exhibit C claim amount is $29,436,000, with the comment: "Claim amount settled less $5M previously recognized will be offset amount (see Exhibit B)." A267. Exhibit B, in turn, records $5 million for Freedom Tower, with the comment: "Collection of $5M included in 2012 revenue for extended general condition claim of $29.4M (see Exhibit C)." A265. In other words, of the $29,436,000 claim for Freedom Tower, $5 million was previously "booked" and therefore included in 2012 revenue, and

the remaining $24,436,000 was never booked. Contemporaneous internal accounting memoranda confirm this accounting treatment. B1; B108.

For the Jamaica 2E project, the Exhibit C total claim amount is $23,086,000, and the Exhibit B and Exhibit C notes are identical in form to the notes for the Freedom Tower project, except they state that $5.8 million was previously recognized as revenue. Thus, for the Jamaica 2E project, $5.8 million of the $23,086,000 claim was previously booked, and the balance ($17,286,000) was not booked. A265, 267. Once again, a contemporaneous accounting memo supports this accounting treatment. B104.

For Jamaica 2G, the Exhibit C claim amount is $7.3 million. The CIE amount on Exhibit B is $15,541,000 – far more than only $2 million of the $7.3 million claim A265, 267. A contemporaneous accounting memo (B244) establishes that only $2 million of the $7.3 million claim was booked as revenue.[3] Thus, the $15,541,000 on Exhibit B included only $2 million attributable to the Exhibit C claim, and the balance of the Exhibit B amount ($13,541,000) represented pending change orders.

[3] Although B244 is autodated in 9/12/2018, it speaks of matters as of March 31, 2013. A739 at 327:2-12 (Soroka).

With the exception of the Freedom Tower, Jamaica 2E and Jamaica 2G projects just discussed, all of the amounts on Exhibit C represent claims as to which no revenue had previously been booked.

As Tutor Perini's witnesses admitted, and the trial court found, collection of these unbooked amounts would result in revenue and no associated expense, and would necessarily increase profit on a dollar-for-dollar basis. A735-36 at 311:23-312:11 (Soroka): A834 at 602:1-7 (Bennett); Op. 35. And, of course, this was the very concept that Tutor and Segal agreed upon: to release the $8 million that was subject to the Holdback Agreement, Five Star and WDF would have to collect $60.529 million of revenue (the Exhibit B amount), but any shortfall in the collection of the Exhibit B amount could be offset by collection of the Exhibit C amounts, since those were unbooked amounts that Tutor Perini had never paid for, and whose collection would result in profit for Tutor Perini on a dollar-for-dollar basis. The parties also agreed that any pending counterclaims associated with the claims listed on Exhibit C would be deducted from the amounts collected. Op. 18.

Soroka, the Chief Accounting Officer of Tutor Perini, agreed that amounts collected in excess of the booked amounts would result in profit and could

be used to "offset" shortfalls in other Exhibit B collections. Using the $5 million booked claim of Freedom Tower as an example, Soroka testified:

> Q: So if $6 million was generated, would $5 million – the $5 million count toward Exhibit B and the $1 million could toward Exhibit C? . . .
>
> THE WITNESS: To the extent that $5 million was recorded as recovery on that project at the time and the claim was settled for $6 million, that would lead to a $1 million gain or profit. So the short – so $5 million would relate to Exhibit B and the $1 million would be the offset amount on Exhibit C.

B363 at 124:2-12. Segal had the same understanding, and testified consistently as to the identical hypothetical. A639 at 29:18-30:15. Tutor testified consistently to a similar hypothetical. A774 at 466:4-18.

E. The Execution Of The Holdback Agreement.

Because the parties agreed on the business transaction underlying the Holdback Agreement, there was not extensive back-and-forth as to the draft. Greenstar's attorney sent a markup to Tutor Perini's attorney on May 1, 2013. B34. Jordan Bennett, Five Star's then-CFO, also prepared Exhibit D "to make things very clear in getting the final Escrow monies released in the future should someone not familiar with the agreement get involved." B30; *see also* B268 at 76:13-22 (Bennett). As Bennett testified:

> A: . . . [S]ome legal contracts are hard to understand. I wanted to make it "simple–stupid." Very easy for

someone to plug in numbers to figure out whether or not the money is collected pursuant to the agreement.

Q: And you thought including the example would achieve that goal?

A: Yes.

B268 at 76:15-22.[4]

The exhibit, which is entitled "Example of Escrow Holdback Calculation," sets forth two examples, both of which state that the "[t]otal cash collection requirement per Exhibit B" of $60.529 million "[c]an be made up of any combination of cash receipts from Exhibits B & C." A269. Thus, the exhibit – which uses the word "receipts" no fewer than six times and does not use the word "profit" once – makes clear that the amounts collected or collectible on the pending change orders and claims listed on Exhibit B (booked amounts) and Exhibit C (unbooked amounts) count equally toward the $60.529 million cash collection required.

[4] Bennett left the employ of Five Star in 2015. A828 at 578:14-18 (Bennett). He was unemployed in 2018 when Plaintiffs advised Tutor Perini that they would be seeking Bennett's deposition in this action. Tutor Perini rehired Bennett shortly after learning of this deposition request, and Bennett remained employed by Tutor Perini at the time of the trial. *Id*. at 580:11-19 (Bennett).

Exhibit D's example showing that the $60.529 million of required collections could result from revenues on Exhibit B or Exhibit C is consistent with the entire purpose of the Holdback Agreement, which was to incentivize collection of a total of $60.529 million, either from the amounts listed on Exhibit B or from those listed on Exhibit C. As Tutor testified:

> We were trying to be fair and give them an opportunity, whenever they failed to collect the money they had represented, if they collected more elsewhere, they could use that money. All we cared about is that we would come out whole on what they had booked and what we had approved.

A774 at 465:9-14; *see also* A774 at 467:12-15.

In fact, Tutor admits that in speaking with Segal and Roman, "I . . . told them, if you collect more, you can use that overage to offset any shortfalls. I was trying to motivate him [sic] to collect our damn cash . . . ." A780 at 489:23-490:2.

On May 2, 2013, Burk sent Sellers a markup of Greenstar's May 1 draft agreement. B91 ("See a few modifications to Brad markup. All else is ok"). No changes were made to Exhibit D.

On May 3, 2013, Tutor Perini, Greenstar and Greenstar IH Rep, LLC ("IH Rep") entered into the Holdback Agreement. A249.

F. Tutor Promises To Pay $6 Of The $8 Million And Revisit The Remainder In A Few Months.

As found by the trial court and as the record fully supports (as discussed below), Five Star and WDF have collected more than $60.529 million attributable to the amounts listed on Exhibits B and C of the Holdback Agreement, and expect to collect tens of millions more. Accordingly, by early 2015, Sellers wrote a letter requesting release of the remaining $8 million Holdback Amount. A338. A back-and-forth ensued. *See* A342, A354; B113. Tutor Perini's final response to this series of communications, A359, made clear that it was not going to release any portion of the $8 million being held. In response to that email, Larry Roman (then- and now-CEO of WDF) wrote to the CFO of Tutor Perini, stating that "we are VERY disheartened by this response" and that certain of Tutor Perini's positions were, in the view of Roman and Segal, "bad faith on the part of TPC." B137.

Following Roman's email, Segal discussed the matter with Tutor. During the call, Tutor said that, in view of the extensive collections and improvement of the Company's business, he would give IH Rep $4 million of the $8 million in dispute. A643 at 46:3-17 (Segal). Segal responded "[N]o Ron. Unacceptable. I want 8 out of the 8." *Id.* Tutor then said that he would release $6 million, and address the remaining $2 million in a few months. *Id.* at 47:11-20.

Segal accepted that offer on the condition that IH Rep receive the $6 million in the next week or two. *Id.* Tutor said "[D]one," and the call ended. *Id.*

Tutor claimed not to recall the conversation with Segal (A778 at 480:5-12), but he did not deny that it occurred. *Id.* Indeed, Tutor admits that he told Segal that he would pay $6 million now and revisit the $2 million in a few months. *Id.* at 481:23-482:19. At trial, Tutor tried to spin this promise as an offer that was rejected. A779-80 at 487:17-489:8. That testimony was simply not credible in view of contemporaneous documents. In particular, following the call that admittedly occurred, Tutor sent Segal an email on May 8, 2015 stating:

> After an extensive review of the agreements regarding escrow, I believe equity supports the payment of $6M out of the $8M escrow account on the believe [sic] that many of the claims, although uncollected, will be collected based on their entitlements and the review to date. We will meet again on the 1st of October to review the progress to be certain that in fact we are at a point where we are in the form of agreement can address the release of the balance.
>
> Ronald N. Tutor

B139. Upon receiving this email, Segal advised Bennett (then-CFO of Five Star) that "I finalized the escrow with Tutor on Friday – he's paying 6 of the 8 this week!" B140. When the $6 million was not received, Segal had several phone calls with Tutor to inquire about the $6 million. Tutor promised to make the payment, and never disclaimed his promise of payment; instead, he repeatedly

assured Segal that payment was imminent. A643-44 at 48:2-51:18 (Segal). Tutor similarly assured Roman that payment would be forthcoming. *See* A396 at 130:11-132:10 (Roman).

Ultimately, after further inquiries, Tutor sent Segal an email on June 15, 2015 as follows:

> If you ask me one more time when you will receive the money that I promised I will withdraw my promise of payment. You will get paid as soon as I can given your horrific impact on TPC's cash flows, if I were you I would be very quiet about the issue.
>
> Ronald N. Tutor

B142. In view of this email, Tutor's testimony that he never promised to pay $6 of the $8 million was simply not credible.

G. Tutor Admits That He Wants To "Punish" Segal.

What really happened here became clear at trial. When Tutor acquired Greenstar, he knew (i) that there were extensive change orders and claims at Five Star's and WDF's many jobs with New York City agencies, and that those amounts would not be paid until completion of the jobs, which could take several years (A771 at 454:9-19 (Tutor)), and (ii) that regulators had been bringing suits against many companies in the construction industry involving regulations about subcontracting work to minority owned, women owned and disadvantaged business enterprises ("MWDBEs"). Tutor understood the MWDBE issues posed

"severe risks" for Five Star (B415 at 23:16-23), and in negotiating the Merger he sought an indemnity for those claims. B415-16 at 25:12-26:12. Tutor admitted that MWDBE indemnities were one of the "biggest issues in the merger negotiations." B416 at 27:19-28:5. Sellers refused to grant the indemnity Tutor sought, and in the end, he acquired Greenstar with only a limited MWDBE indemnity: In addition to the general $17.5 million escrow that would expire in one year, Tutor received only an additional MWDBE indemnity of $2 million that would expire in three years. A125-26 §§ 9.01(c) (i) and (ii); A68 (definition of "FP Amount"). Nonetheless, Tutor Perini made a business decision, electing to proceed with the acquisition and thus assuming the risk of MWDBE liability beyond the very limited indemnity Tutor negotiated.

By the second half of 2015, however – shortly after promising to pay $6 of the $8 million and to revisit the rest later – Tutor soured on Gary Segal. Tutor's abrupt change of heart came as a result of the fruition of risk that Tutor knew of, and assumed, when he bought Greenstar: first, in June of 2014, nearly three years after Tutor Perini acquired Five Star (and long after the Sellers' general indemnity obligation expired), the U.S. Attorney for Eastern District of New York executed a search warrant on Five Star arising largely out of the MWDBE claims that Tutor knew about and assumed when he purchased the Company. B450 at

163:14-164:15 (Tutor). At the same time, Five Star and WDF were experiencing cash flow difficulties because, as Tutor knew when he bought the Company, they had extensive change orders and claims that the New York City agencies would not settle until completion of the relevant projects.[5]

In any event, Tutor decided in his own mind that Segal had "cheated him out of tens of millions of dollars" and was a "criminal, crook, liar, thief, fraudster and a cheat." A764 at 424:17-425:14. Tutor fired Segal as CEO of Five Star (Op. 23) and then decided to punish Segal by causing Tutor Perini to violate its contractual obligations. Thus, despite Greenstar being highly profitable with pre-tax earnings of over $211 million in the four years following the acquisition (*Greenstar I*, 2017 WL 5035567, at *3), Tutor Perini refused to pay over $19 million of earn-out payments due to the Sellers under the Merger Agreement. The Sellers filed this lawsuit and were granted judgment on the pleadings for the withheld earn-out payments. *Id.* at *4. This Court affirmed that decision by summary order.

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[5] As Tutor testified, "close to $200 million" of such claims involved the World Trade Center project, which was nearing completion in late 2015. A759 at 404:20:405:8. As Tutor admitted at trial, substantially all of these funds have now been collected. *Id.*

Tutor also caused Tutor Perini to refuse to pay the Holdback Amount that is the subject of this appeal. It withheld these amounts for improper motives, because Ron Tutor was trying to punish Mr. Segal. Tutor flatly denied this improper purpose at trial (A764 at 427:11-23), but upon further cross-examination admitted his true purpose: "I want to punish him for the truth." A765 at 429:4-6.

This type of litigation misconduct is wholly improper and should not be countenanced.

ARGUMENT

I. THE TRIAL COURT PROPERLY FOUND THAT THE COLLECTIONS AT ISSUE SATISFIED THE CONTRACTUAL REQUIREMENTS, INCLUDING THE "ADDITIONAL NET PROFIT" REQUIREMENT.

A. Question Presented.

Did the trial court err by adopting Plaintiffs' interpretation of the Holdback Agreement's requirements, including the "additional net profit" requirement, as a reasonable construction?[6]

B. Scope of Review.

This Court "review[s] questions of contract interpretation *de novo*." *Salamone v. Gorman*, 106 A.3d 354, 367 (Del. 2014).

C. Merits of the Argument.

As the trial court properly found, "[t]he primary goal of contract interpretation is to 'attempt to fulfill, to the extent possible, the reasonable shared expectations of the parties at the time they contracted.'" Op. 27, citing *Comrie v. Enterasys Networks, Inc.*, 837 A.2d 1, 13 (Del. Ch. 2003). If the contract is clear on its face, extrinsic evidence may not be used to interpret the intent of the parties, to vary the terms of the contract or to create ambiguity. Op. 27-28; *GNG Capital Invs., LLC v. Athenian Venture Partners*, 36 A.3d 776, 779-80 (Del. 2012).

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[6] This argument was preserved at A947-64; B556-72.

The gravamen of Tutor Perini's appeal is that the trial court failed to give a reasonable construction to Section 2 of the Holdback Agreement, which provides that the "Offset Claims" that may be credited against the Pending Claims:

> shall only apply to the projects and claim amounts with respect to such projects set forth on Exhibit C hereto (and only to the extent that such "Offset Claim" results in additional net profit recognized by [Greenstar] after March 31, 2013 (or which [Tutor Perini] believes in good faith will result in additional net profit) recognized in accordance with [Greenstar's] customary businesses[.]

A249 § 2.

As the trial court correctly found, collection of the Exhibit C amounts at issue ***did*** result in "additional net profit" to the extent those claims were not previously listed on Exhibit B. Op. 35-36; 40.[7] The trial court properly rejected Tutor Perini's contention that the "net profit" requirement in Section 2 of the Holdback Agreement permitted credit for collection of Exhibit C amounts only if, at the end of the job, net profit for the job was higher than the net profit for the job projected as of March 31, 2013. Op. 37. As the trial court properly found, "Tutor Perini's proffered construction is not reasonable." Op. 40. This holding is correct for numerous reasons.

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[7] Plaintiffs only claimed credit for Exhibit C collections above what was listed on Exhibit B, and the trial court only credited such amounts in determining that more than $60.529 million was collected.

First, "Tutor Perini's proffered construction adds limitations to Exhibit C collections that appear nowhere in the Holdback Agreement." Op. 37. The Holdback Agreement, by its express terms, requires only that the ***collection*** of the amounts listed on Exhibit C "results in additional net profit recognized by [Greenstar] after March 31, 2013" [or is expected to do so].[8] The contractual provision says nothing about the overall job being more profitable. The contractual language simply says that the collection of the Exhibit C amount must result in additional net profit. The trial court's interpretation honors this language. As Tutor Perini concedes, it is improper for a court to add terms that appear nowhere in the parties' agreement. OB 24, citing *Nw. Nat'l Ins. Co. v. Esmark, Inc.*, 672 A.2d 41, 44 (Del. 1996).

Second, Tutor Perini's construction is directly contrary to the express terms of Exhibit C, which is entitled "Offset Claims" and describes the amount of the "Offset Claims" that may be credited pursuant to Section 2 of the Holdback Agreement. For two of the largest projects, Freedom Tower and Jamaica 2E, Exhibit C states, mathematically, what the offset amount will be: "Claim amount

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[8] If the parties had wanted to include a guarantee of profit for the job, they would have expressly included one, as they did in the Merger Agreement. *See* pp. 9-10, *supra*.

settled less $5M [$5.8M in the case of Jamaica 2E] previously recognized will be offset amount (see Exhibit B)." A267. In other words, for Freedom Tower, the amount for which the claim is settled less the $5 million portion of the claim previously recognized and included on Exhibit B "will be" the "offset amount." Thus, if $17 million is collected (which actually occurred), $17 million less the $5 million previously recorded as revenue "will be offset amount." There is no contemplation of some further calculation of overall job profitability. Tutor Perini's claim is directly contrary to what Exhibit C expressly dictates that the offset amount "will be." Thus, Tutor Perini's construction is directly contrary to Exhibit C of the Holdback Agreement, and therefore impermissible. *Martin Marietta Materials, Inc. v. Vulcan Materials Co.*, 68 A.3d 1208, 1221 (Del. 2012).

Third, Tutor Perini's construction is directly contrary to Exhibit D of the Holdback Agreement. As the trial court properly noted, "that exhibit directly supports the premise that any Exhibit B and C cash collections should be added together when determining whether the Bogey has been hit: 'Total cash collection requirement per Exhibit B (*can be made up of any combination of cash receipts from Exhibits B and C*).'" Op. 31 (emphasis by the trial court). There is no language in Exhibit D suggesting that collection of Exhibit C amounts "count" only if the profitability of the job at completion is greater than was estimated at the

time of the Holdback Agreement. As the trial court held, Tutor Perini's construction would essentially render Exhibit D meaningless (Op. 31, n.128), which Tutor Perini concedes would be "patently unreasonable." OB 23, citing *Sonitrol Holding Co. v. Marceau Investissements*, 607 A.2d 1177, 1183 (Del. 1992).

Fourth, Tutor Perini's construction is contrary to the timing contemplated by the Holdback Agreement. As Tutor Perini's witnesses admitted, profitability of a job can be determined only upon completion of the job. A821 at 553:1-21 (Bennett). When the Holdback Agreement was executed, the parties knew that many of the jobs listed on Exhibit C would require years to complete (*see* pp. 6, 10-11, 24, *supra*) – indeed, some were not completed at the time of trial. Yet the Holdback Agreement contemplated a "final determination" little more than a year after execution of the Holdback Agreement (A251 § 4), at a time when the overall profitability of many of the jobs listed on Exhibit C would remain indeterminate. Tutor Perini's assertion that Exhibit C claims could only be credited if the overall profitability of the job increased is flatly inconsistent with the contemplated timing of the Holdback Agreement.

Finally, as the trial court correctly determined, "Tutor Perini's construction ignores the commercial context in which the parties agreed to modify

the prerequisites to earning the Special Holdback." Op. 40. The entire purpose of that agreement was to insure that Tutor Perini collected booked amounts, or that if there were a shortfall, Tutor Perini collected unbooked amounts that would then "offset" that shortfall. In Ron Tutor's colorful words, "I was trying to motivate him to collect our damn cash . . . ." A780 at 490:1-2 (Tutor).

Tutor Perini does not address any of the foregoing points, but instead asserts that the trial court's construction was "unreasonable" for a number of reasons. As shown herein, none of those arguments is persuasive.

First, Tutor Perini argues that the trial court's construction renders the "additional net profit" language in Section 2 of the Holdback Agreement "meaningless surplusage." OB 22-24. Its basis for this claim appears to be that only 13 (actually, 14) of the 30 claims on Exhibit C pertain to jobs that also appear on Exhibit B, and the "additional net profit" language is "mere surplusage as to [the remaining] claims" (*i.e.*, those that do not have a corresponding entry on Exhibit B). OB 23. This assertion is wrong as a matter of law. Contract provisions often set forth general rules governing parties' rights and obligations that may not impact every instance arising under the contract. For example, a loan agreement may provide for monthly payments and a default interest if a payment is late. The default interest provision is not "surplusage" because some payments

may be made on time; rather, it is a provision that applies to *all* payments, but may have import only to certain payments (those that are not timely made). So here – the "additional net profit" provision applies to *all* Exhibit C claims. However, it has the effect of reducing the permitted credit only for those claims as to which revenue was previously booked. On the factual record before the trial court, that was only portions of the Freedom Tower, Jamaica 2E and Jamaica 2G projects, and the court's ruling honors that limitation.

Tutor Perini next argues that the trial court's construction was unreasonable because it failed to recognize the distinctions between the Exhibit B claims and the Exhibit C claims. OB 24-27. This is erroneous. The claims listed on Exhibit B (entitled "Pending Claims/Unbilled Costs") were pending change orders and the booked portion of claims, all of which had been recorded as revenue by Tutor Perini, and whose collection was required for the release of funds under the Holdback Agreement. In contrast, Exhibit C represented pending claims which, with the three exceptions noted, were not booked. Those amounts were not *required* to be collected for the Holdback Amount to be released, but instead represented amounts whose collection could "offset" any shortfall in the Exhibit B required collections. The trial court's ruling fully recognized and gave credit to these structural differences. Op. 12-18, 28-34.

Tutor Perini next argues that the trial court's interpretation is "inconsistent with the accounting constructs included in the Holdback Agreement." OB 27-30. As Tutor Perini's own witnesses admitted, however, "additional net profit" results if revenue is collected attributable to previously-unbooked claims. A735-36 at 311:23-312:12 (Soroka); A834 at 602:1-7 (Bennett). This is exactly what the trial court properly ruled: "All things equal, the collection of unbooked claims increases net profit because collections increase revenue without increasing costs." Op. 35.

Tutor Perini also states that the trial court held that "whether an Exhibit C claim was booked or unbooked is irrelevant to whether that claim could result in additional net profit." OB 29, citing Op. 46, n.193. The trial court made no such holding. Rather, as to a particular project – 156 Stations – the Court noted that only $1 million was included on Exhibit B, and held that, as to that project, it did not need to reach the question of whether the amount of the claim had been booked (but not included on Exhibit B) because "I am persuaded that the Holdback Agreement unambiguously allows the Sellers to credit their actual collections ***on the 156 Stations project*** to the extent they did not overlap with collections on

claims listed on Exhibit B." Op. 46, n.193 (emphasis added). This holding, specific to the 156 Stations project, was correct.[9]

Contrary to Tutor Perini's assertion (OB 30), the trial court's construction of the "additional net profit" requirement for Exhibit C claims does not lead to "absurd results." The only example that Tutor Perini offers is a failure to collect a ***booked*** portion of an Exhibit C claim, which Tutor Perini asserts would "not only fail to result in 'net profit,' but further still, [would] result in massive 'write-down[s]' to net profitability." *Id*.

However, there is no evidence that any portion of any Exhibit C claim was "booked," other than the three instances in which a portion of a claim was recorded on Exhibit B. So, for example, $5 million was recorded on Exhibit B for the Freedom Tower project. If Sellers succeeded in collecting only $3 million in total for the Exhibit C claims, there would be a write-down of $2 million. But in that instance, Sellers would not get credit for any portion of the Exhibit C claim. Rather, they would get a credit of $3 million for the booked amount that had been collected, leaving a $2 million shortfall that would have to be made up by

[9] As the trial court properly found, Tutor Perini's construction would render the Exhibit C amount for this claim superfluous. Op. 46-47.

collection of a different "Offset Claim" listed on Exhibit C. There is nothing "absurd" about that result.

Next, Tutor Perini claims that the trial court's construction "ignored important commercial context for the Holdback Agreement." OB 31-33. This assertion is directly contradicted by Tutor's own testimony:

> Q: And the purpose of the offset claims was that if the amount that could be collected exceeded the book value, then Greenstar had a right to offset that which wasn't collected on Exhibit B. Correct?
>
> A: We were trying to be fair and give them an opportunity, wherever they failed to collect the money they had represented, if they collected more elsewhere, they could use that money. All we cared about is that we would come out whole on what they had booked and what we had approved.
>
> Q: Right. And so the purchase price, as you said on direct, was based upon book value. Correct?
>
> A: Absolutely.
>
> Q: And only --
>
> A: And the work in process guarantees.
>
> Q: Right. And the things that were booked comprise the book value. Correct?
>
> A: That's correct.
>
> Q: And the offset claims were things that weren't booked, and therefore, you hadn't paid for when you bought the company. Right?
>
> A: You're correct.

> Q: So, if Five Star had a $30 million claim, and it recognized $10 million of revenue, because that's its good faith belief of what it's going to collect, then Tutor Perini paid for the $10 million they paid in book value, but not the 30 million. Correct?
>
> A: That's correct. Again, all of those went into calculating net worth.
>
> Q: Right.
>
> A: Which was tied to purchase price.
>
> Q: Right. And if Five Star collected more than 10 million on my $30 million claim, they could use the amount above 10 million to make up for the shortfall on a different claim. Correct?
>
> A: Absolutely.
>
> Q: And it was certainly the intent of the agreement that you weren't trying to get the benefit of Five Star and WDF's failures. What you were trying to do is look in the aggregate, and if all of the stated claims ended up collecting what they certified they would, even if there was more on one and less on another, you were going to give them recognition. Correct?
>
> A: That was the absolute intent of the agreement.

A774 at 465:4-467:4. This testimony could not have been clearer: the commercial context of the Holdback Agreement was that Sellers would get credit for collection of the Exhibit C amounts. The trial court's ruling effectuates this clear intent.

Finally, Tutor Perini claims that the trial court erred in holding that Plaintiffs' construction of the "additional net profit" requirement was the only

reasonable interpretation of the Holdback Agreement. However, as noted above (*see* pp. 30-33, *supra*), Tutor Perini's construction both adds concepts that appear nowhere in the actual language and is contrary to the express terms that are included in the contract language. Accordingly, the trial court properly found that Plaintiffs' construction was the only reasonable interpretation of the Holdback Agreement.

II. PLAINTIFFS HAVE PROVIDED NO BASIS FOR OVERTURNING THE TRIAL COURT'S WELL-SUPPORTED FACTUAL FINDINGS CONCERNING THE EXHIBIT B AND EXHIBIT C AMOUNTS ACTUALLY COLLECTED.

A. Question Presented.

Is there a basis to overturn the trial court's factual findings that certain Exhibit B and C claims had been collected and that the John Jay counterclaim was no longer outstanding?[10]

B. Scope of Review.

"This Court will uphold the trial court's factual findings unless they are clearly erroneous." *Gatz Props., LLC v. Auriga Capital Corp.*, 59 A.3d 1206, 1212 (Del. 2012). In applying this standard, the Court "afford[s] a trial court's factual findings a 'high level' of deference." *RBC Capital Markets, LLC v. Jervis*, 129 A.3d 816, 869 (Del. 2015). The "deferential standard applies not only to historical facts that are based upon credibility determinations but also to findings of historical fact that are based on physical or documentary evidence or inferences from other facts." *CDX Holdings, Inc. v. Fox*, 141 A.3d 1037, 1042 (Del. 2016). "So long as the Court of Chancery's findings and conclusions are supported by the record and the product of an orderly and logical deductive process, they will be

[10] This argument was preserved at A964-71; B582-84; B590-97.

accepted." *E.g.*, *SV Inv. Partners, LLC v. ThoughtWorks, Inc.*, 37 A.3d 205, 210 (Del. 2011).

C. Merits of the Argument.

The trial court heard live testimony from seven witnesses, including the current CFO of Five Star (Therien), the former CFO of Five Star (Bennett), the Chief Accounting Officer of Tutor Perini (Soroka), the CEO of WDF Corporation (Roman) and the CFO of WDF (Foncello). The court below also received over 450 trial exhibits and the deposition testimony of 14 witnesses. Op. 2-3. The trial court carefully considered the parties' claims concerning each project (Op. 42-52) and found that, leaving aside certain of Plaintiffs' claims that did not need to be reached to arrive at the outcome,[11] Sellers were entitled to credit for $75.688 million of collections less $9.173 million of a pending counterclaim, leaving total credited collections of $66.515 million (Op. 53) – far more than the $60.529 million "bogey" required to release the Holdback Amount.

[11] If this Court does not affirm the trial court's decision, these claims will need to be addressed on remand, along with the promissory estoppel claim that the trial court also found unnecessary to decide in view of its ruling in favor of Plaintiffs.

On appeal, Tutor Perini challenges only four of the trial court's factual findings.[12] As shown herein, each of the challenged findings is fully supported by the record and should therefore be affirmed.

1. The Freedom Tower Project.

The total claim for the Freedom Tower project was $29.436 million, of which $5 million was booked and listed on Exhibit B; the remaining $24.436 million was not booked.

It is undisputed that the Port Authority, which oversaw the Freedom Tower project, divided the claims for the project into pre-Hurricane Sandy claims and post-Hurricane Sandy claims. B144. It is also undisputed that in 2015, the Port Authority paid Five Star $5 million in settlement of the pre-Hurricane Sandy claims. B145; B150. It is also undisputed that the remaining claims were settled in 2016 for $12 million (Op. 43), for total collections of $17 million.

Tutor Perini challenges collection of the $5 million Exhibit B amount, asserting that "Plaintiffs did not present sufficient evidence to prove that the cash

[12] As the court below found – and Tutor Perini does not appeal – assuming Plaintiffs' construction of "net profit" is correct, "Tutor Perini concede[d] the Sellers may credit at least $45.047 million toward the Bogey." Op. 45. Tutor Perini also does not appeal the trial court's determination that on the 156 Stations project, "the Sellers may credit the $10.5 million they actually collected from Exhibit C toward the Bogey." Op. 48.

collected on the project related to the specific claim identified on Exhibit B." OB 39. The testimony supporting the trial court's conclusion was overwhelming, however:

- Segal, who was CEO of Five Star at the time of collection, testified that the $5 million listed on Exhibit B was collected. A643 at 45:7-8.
- Tutor, the CEO of Tutor Perini, testified that the $5 million of Freedom Tower amounts listed on Exhibit B were collected. A782 at 498:6-16.
- Therien, Five Star's current CFO, testified that the $5 million listed for Freedom Tower on Exhibit B was collected. A665 at 133:5-7.
- Soroka, the Chief Accounting Officer of Tutor Perini, testified that the $5 million of pre-Sandy claims for Freedom Tower were paid in 2015. A737 at 317:9-11.
- Tutor Perini did not contest this collection in its post-trial answering brief, instead noting that "Tutor Perini has given Plaintiffs credit for the $5 million on Exhibit B." A907, n.15.

See CDX Holdings, Inc., 141 A.3d at 1042 ("W]hen factual findings are based on determinations regarding the credibility of witnesses, the deference already required by the clearly erroneous standard of appellate review is enhanced."); *In re Walt Disney Co. Deriv. Litig.*, 906 A.2d 27, 50 (Del. 2006) ("To the extent those [factual] findings turn on determinations of the credibility of live witness testimony and the acceptance or rejection of particular items of testimony, those findings will be upheld.").

Against all of this undisputed evidence, Tutor Perini asserts only that the evidence of what the $5 million payment in 2015 was for was "in equipoise." OB 40. This is false. All of the evidence outlined above supports the assertion that the $5 million payment received in April 2015 was for a portion of the claims listed on Exhibit C ($5 million of which had been recorded as revenue and listed on Exhibit B). There is no evidence that this $5 million payment was for anything else, nor could it have been.

By its terms, the $5 million payment was to settle the disputed pre-Sandy amounts – by definition, ***claims***. B150. The only claims that any party identified concerning Freedom Tower were the $29.446 million of claims listed on Exhibit C. Either those claims were claims listed on Exhibit B, in which case the Exhibit B amount was collected, or they were not on Exhibit B, and instead were part of the $24.446 million listed on Exhibit C that were not booked. In any event, it is undisputed that a total of $17 million was collected, and there is no evidence that it was for anything other than the claims listed on Exhibit C. Accordingly, the Sellers are entitled to full credit for the $5 million of Freedom Tower collections that Tutor Perini disputes.

2. Jamaica 2G.

Exhibit B lists $15.541 million for the Jamaica 2G project, while Exhibit C lists claims of $7.3 million. The record establishes that $2 million of this amount was booked, and therefore $13.541 million reflected on Exhibit B was for pending change orders. *See* pp. 16, 18, 34, *supra*.

The evidence at trial showed that all of these change orders were collected. As the trial court found, Tutor Perini's contemporaneous memoranda – prepared in the midst of the parties' pre-litigation discussions – gave Sellers credit for this collection, and the trial court found this to be credible in the circumstances. Op. 49-50. Moreover, the trial court's finding was supported by extensive additional evidence:

- Tutor admitted that the pre-trial decision to credit Sellers with $13.541 million of Jamaica 2G collections was the result of "accounting's exhaustive review and my [Ron Tutor's] review of accounting." A776 at 473:24-474:6.
- Roman, the current CEO of WDF (and indirect employee of Tutor Perini) admitted that all of the Jamaica 2G change orders were paid. A378-79 at 58:7-63:20.
- A contemporaneous analysis by Anthony Bonica, an accounting manager at WDF, concluded that by 2014, all of the pending change orders reflected on Exhibit B to the Holdback Agreement for Jamaica 2G had been paid. B111.
- If the change orders had been rejected, they would have had to have been written off, which both Roman and Soroka admitted

did not occur. A378-79 at 60:25-61:13 (Roman); A741-42 at 335:18-336:21 (Soroka).

Accordingly, the evidence overwhelmingly shows $13.541 million of the Exhibit B amounts for Jamaica 2G were collected.

3. John Jay.

Larry Roman, the CEO of WDF, testified at deposition: "We settled certain claims on John Jay, I checked yesterday, somewhere between $1.6 million and $1.7 million was settled . . . ." A375 at 47:5-9.

Tutor Perini claims that "Roman's testimony was speculative, uncorroborated by any documentation, and insufficient to satisfy Plaintiffs' burden to proffer 'substantial evidence.'" OB 44. But, Tutor Perini offered no contrary evidence. Accordingly, the ***only*** evidence was the admission by the CEO of WDF, who reports directly to Ron Tutor, that this amount was collected. In the absence of any contrary evidence, that is sufficient to support the trial court's finding.

4. The John Jay Counterclaim.

Larry Roman, at deposition, testified as follows:

Q: Let me ask on John Jay, is the counterclaim still pending?

A: No.

A375 at 47:17-19.

Roman went on to explain that he was in court and the counterclaiming party was "not looking at getting money from us" (*id.* at 48:9-10) and had abandoned any potential counterclaims. A414 at 203:11-204:13. Tutor Perini – which controls the Counterclaim Defendant – offered no contrary evidence of any type. Accordingly, the undisputed evidence of WDF's CEO fully supports the trial court's finding.

* * *

For the reasons stated above, none of Tutor Perini's four challenges to the trial court's specific factual findings concerning amounts collected or the John Jay counterclaim has merit. Accordingly, the trial court correctly found that at least $66.515 million of collections (net of the Newtown Creek counterclaim) are entitled to be credited against the $60.529 million "bogey."

CONCLUSION

For the reasons stated herein, the judgment of the trial court should be affirmed.

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May 8, 2020

CERTIFICATE OF SERVICE

I hereby certify that on May 8, 2020, the foregoing was caused to be served via File & Serve*Xpress* upon the following counsel of record:

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