IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION – CIVIL

Chestlen Development, L.P. *Plaintiff,*	:	January Term, 2021 No. 00645
v.	:	[Lead Case] Commerce Program
Tutor Perini Building Corp. *Defendant,*	:	

FINDINGS AS TO LIABILITY AND ORDER

AND NOW, this 28th day of October 2025, upon conclusion of the liability portion of the first phase of the trial without a jury in these consolidated cases, and in accord with the findings of fact and conclusions of law issued simultaneously herewith, the Court enters the following **FINDINGS** as to **LIABILITY** only:

(1) in favor of Chestlen and against Tutor on Chestlen's claims against Tutor for breach of contract;

(2) in favor of Chestlen and against Tutor on Tutor's claim against Chestlen for breach of contract;

(3) in favor of Ventana and against Tutor on Tutor's claims against Ventana for breach of contract;

(4) in favor of Tutor and against Carney on Tutor's claims against Carney for breach of contract;

(5) against Carney on its claims against Tutor for breach of contract and violation of CASPA;

ORDER-Chestlen Development, Lp Vs Tutor Perini Building [NOK]

(6) against Arch on claims for breach of the bond securing the performance of Carney; and

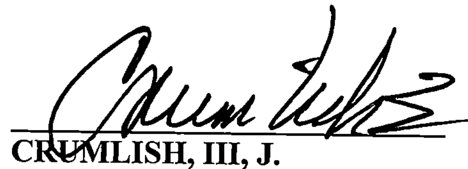
It is further **ORDERED** that:

(1) On or before December 5, 2025, the parties shall file their Pre-Trial Conference Memoranda addressing the remaining damages issues with respect to the above-listed claims and findings of liability, which Memoranda shall include lists of witnesses and exhibits to be offered at the damages hearing;

(2) Counsel shall appear for a pre-damages-hearing conference on December 16, 2025, at 9:30 am in Courtroom 636, City Hall Philadelphia, Pennsylvania; and

(3) The parties and their witnesses shall appear for a damages hearing on January 26, 2026 at 1:00 pm in Courtroom 636, City Hall Philadelphia, Pennsylvania, and for five (5) business days thereafter to the extent necessary to try the claims for damages.

BY THE COURT:



CRUMLISH, III, J.

IN THE COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY, PENNSYLVANIA

Chestlen Development, L.P. *Plaintiff,*	:	January Term, 2021 No. 00645
v.	:	
Tutor Perini Building Corp. *Defendant,*	:	[Lead Case] Commerce Program

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. Introduction

This matter encompasses more than twenty-five consolidated cases arising out of disputes in the construction of the W Hotel, a 51-story project in Center City Philadelphia. Due to the complexity and size of the matter, the court severed the principal liability issues under the main construction contracts for a trial aimed at determining when and if a breach of the contracts occurred and which party or parties bore responsibility for the breach. For this portion of the case, the court determined that the building owner, Chestlen Development, L.P., its construction manager Tutor Perini Building Corp. ("Tutor"), the concrete contractor Thomas P. Carney, Inc. Construction ("Carney") and the window wall contractor Ventana DBS LLC ("Ventana") were the parties having the major involvement in the construction of the building, whose involvement and work determined the contributions of the remaining subcontractors. Accordingly, they were designated to participate in the initial liability trial. Also participating in the trial was Arch Insurance, as surety for Carney.

Prior to the start of the trial, a settlement was reached with the architect and engineers for the project, whereby the remaining amounts of their policy limits were made available, to be awarded following a damages trial. This resolution meant that the liability phase could proceed

non-jury. The court conducted the trial over five months, with the parties presenting live testimony for a set period each month and additional testimony in the form of deposition designations and previously recorded expert testimony submitted separately. After the testimony and exhibits were submitted, the record for this portion of the trial was closed, and the parties subsequently submitted proposed findings of fact and conclusions of law. The parties also submitted their evidentiary objections, upon which the court has now ruled. Based upon this record, the court enters its findings and legal rulings.

The court notes that this construction project began in 2015 and had a guaranteed completion date in 2018-2019.[1] However, a Certificate of Occupancy signifying completion was not issued until April 2021. The first lawsuit over the construction was filed in 2019, and the case has spawned almost 30 lawsuits. From the outset, the parties have disclaimed problem-solving approaches to the completion of the project and turned this litigation into a challenging behemoth that made any efforts at resolution impossible.

At trial the parties spent inordinate amounts of the court's time delving into cumulative and repetitive testimonial diversions having a de minimus, if not remote, relationship to the central substantive liability issues in the case before the trial court involving the actual causes of alleged breaches of contractual obligations of the parties. Regrettably, pervasive enervations only intensified in the post-trial submissions.

Chestlen's submission is 145 pages, encompassing 138 pages of proposed facts, numbering 833 proposed findings. Carney's submission is 196 pages, containing 1346 paragraphs of

[1] The agreed-upon time for completion of the project was 1,017 days from the issuance of the Notice to proceed, or longer with permitted delays. (Contract § 3.3). Chestlen argues that the Substantial Completion date should be set at December 31, 2021. (Chestlen proposed FF #347). The contract contained a process for extending the completion date whereby Tutor could seek Chestlen's approval to extend the date based upon a "permitted delay." (Contract, General Conditions ¶ 7.3.1 to ¶ 7.3.2.).

combined purported factual and legal findings. Tutor provided the court with 16 pages of proposed findings in 833 numbered paragraphs, followed by 104 conclusions of law (over 20 pages) and an additional 35 numbered paragraphs setting forth Tutor's purported "requested relief." Additionally, the submitted reams of proposed findings meander through introductory points that, while background, bear no relevance to the central issue for resolution – who breached their duties and how did this project go "off the rails" and who caused it?

The court repeatedly counselled all counsel during the trial to remain focused and reminded all that the issue before the court was liability as to alleged breach(es) of the parties' contract(s). Regrettably, the parties often veered far from the necessary essential facts.[2] Even while addressing the facts related to action and inaction at the construction site and the parties' communications regarding the performance and required quality of the construction and the contractual completion requirement, the parties have included arguments in the guise of facts. What the record largely shows is a level of developed animosity and distrust between parties -the owner and its project manager (and its subcontractors)-- that resulted in the construction manager in derogation of its duties to act in the best interests of the project engaging in a pervasive pattern of obfuscation, contentious posturing, deception, provoking its project subcontractor parties, and hiring "experts" or consultants during the project to facilitate its effort to avoid fully and

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[2] Defendant Tutor's submission begins with the following statement:

"The construction of the W and Element hotel (the "Project") was a complicated, challenging, and remarkable achievement that required the skill, determination, and perseverance of approximately seventy (70) Philadelphia building and trade subcontractors. Built in the center of Philadelphia, during the COVID-19 global pandemic, these hard-working men and women added a beautiful and profitable high rise to Philadelphia's landscape."

Construction started in 2015, with an approximately 3 year expected completion. Most of the work was done BEFORE COVID, yet Tutor attempts to play on the emotional memory of the pandemic to erect a smokescreen to prevent the court from taking a serious look at the actual details of the construction during the critical pre-COVID timeframe. Furthermore, Tutor's proposed findings commence with a 17-page narrative outlining Tutor's purported factual rearguments.

faithfully discharging its contractual duties and avoid "act[ing] in the best interests of the project" " which Tutor's principal fact witnesses understood to be and described as a "fiduciary duty."

The testimony at trial and the communications described in testimony and in contemporaneous communications during the project demonstrated to the court that the contractor (Tutor), rather than assist or facilitate in efficient and faithful compliance with the specified tasks at hand, attain completion or fulfill its coordination responsibilities, engaged in a calculated effort to avoid blame at all costs and to point the finger for all contractual violations (large and small) on the universe of their perceived competitors and perceived adversary(s), contrary to an expeditious, competent professional completion of the project. These efforts also fostered such an unseemly high level of snark and enmity which consequently provoked intransigence in the parties as to make it nearly impossible to achieve any willingness or responsibility to solve problems, during the entire project.

The Court, having carefully observed and accessed the weight and credibility of all the witnesses and all the evidence submitted and admitted at trial, will fulfill its role as the trier of fact, and giving careful consideration to its weighing all the admissible and relevant and probative submitted evidence and accessing the credibility of all presented witnesses and due consideration to the post lability trial of the parties Proposed Finding of Fact and Conclusions of Law will rule as a matter of fact and law on competing liability claims and defenses in this stage of the case. The court adopts the following findings of fact.

FINDINGS OF FACT

1. These consolidated actions involve contract-based claims between Chestlen and Tutor; Tutor and Carney; and Chestlen/Tutor and Ventana arising from the construction of a high-rise in Philadelphia.

2. Chestlen owns the real property at 1441 Chestnut Street, Philadelphia, Pennsylvania ("Property") where the high-rise was built. Ex. 1018 (Stipulated Facts) ¶ 2.

3. Tutor was the construction manager through contracts with Chestlen. Ex. 1018 (Stipulated Facts) ¶ 8; Ex. 407 (Primary Contract); Ex. 408 (Companion Contract).

4. Carney was the concrete contractor through subcontracts with Tutor. Ex. 1018 (Stipulated Facts) ¶ 12; Ex. 99 (Primary Subcontract); Ex. 98 (Companion Subcontract).

5. Arch Insurance Company ("Arch Insurance") was the surety that provided the performance bonds for Carney's work. Ex. 1018 (Stipulated Facts) ¶ 13.

6. Ventana provided the exterior glazing system through a subcontract with Tutor. Ex. 1018 (Stipulated Facts) ¶ 18; Ex. 6962 (Ventana Subcontract).

7. Liberty Mutual Insurance Company issued the performance bond for Ventana's work. Ex. 1018 (Stipulated Facts) ¶ 19.

8. The project that is at the center of this dispute ("Project") involved the design and construction of the W/Element Hotel, which is the second largest hotel in Philadelphia and is comprised of the Element Hotel, an extended stay 3-star hotel, and the W Hotel, a full service 4-star hotel. Ex. 1018 (Stipulated Facts) ¶ 1.

9. The Element includes 460 rooms, and the W includes 295 rooms, for a total of 755 guest rooms. 1T23:21-1T24:1 (Lenfest Tr. Test. 1/27/2025 AM).

10. Guest rooms in each hotel span from Level 9 to Level 49. Ex. 1018 (Stipulated Facts) ¶ 27.

11. The Element is Level 9 to Level 31, and the W is Level 32 to 49. 1T24:2-5 (Lenfest Tr. Test. 1/27/2025 AM).

12. Levels 3 to Level 8 include offices, amenities including a spa, gym, pool and bar, meeting rooms and a ballroom. 1T24:6-12 (Lenfest Tr. Test. 1/27/2025 AM).

13. There are also levels for lobbies, below grade parking and basement areas. 1T12:13-19 (Lenfest Tr. Test. 1/27/2025 AM).

14. The "podium" portion of the Project spans from Level B4 to Level 8.

15. The "tower" portion of the Project spans from Level 9 to Level 51. Ex. 1018 (Stipulated Facts) ¶ 26.

16. The Project originally started out conceptually in 2000 as all condominiums, then it became half condominium and half hotel with no hotel branding, then became branded as Waldorf Astoria Hotel and Residences, then it ultimately became a W Hotel and W Residences and then the last and final iteration was a W Hotel and Element Hotel. Ex. 1030-B (Ertz. Dep. Test. 3/4/2024) 72:6-24.

17. The only structural design differences among the design iterations occurred 1) when the building went from all residential to part hotel to accommodate the large public spaces hotels have and 2) when the building became all hotel, the parking requirements reduced, and parking was put underground. Ex. 1030-B (Ertz. Dep. Test. 3/4/2024) 73:5-74:7.

18. The engineered structural design was always cast-in-place concrete with no steel plate. Ex. 1030-B (Ertz. Dep. Test. 3/4/2024) 73:5-74:7.[3]

[3] 3 Tutor makes much of the project's evolution, attempting to suggest that the thickness of the slabs was reduced as a cost-cutting measure. The court concludes that this was a post hoc rationalization by Tutor to deflect focus on

19. Chestlen selected Cope Linder Architects, now known as Nelson Worldwide ("CLA"), as the architect for the Project.

20. CLA retained O'Donnell & Naccarato ("O&N") (collectively, the "Design Team"), also a respected Philadelphia-based engineering firm, to serve as the structural engineer of record for the Project. Chestlen retained Vine Street Matthews ("VSM") as its owner's representative for the Project. [Stip. ¶ 3.]

21. O&N designed the Project with 12-inch concrete slabs in the Podium level, 9-inch concrete slabs in the Tower, and 10-inch concrete slabs in the top several floors to address balconies and building step backs. [Stip. ¶ 15; 14T (Behler), 56:10-59:2.]

22. O&N's design using 9-inch slabs was not a design error. [22T (Sukalo), 71:15-72:2; Ex. 183, p. 2 ("TT concludes . . . that the design of the slab . . . meet[s] code requirements.").]

23. O&N's design using 9-inch slabs complied with the standards of the American Concrete Institute ("ACI"). [15T (Behler), 35:2-15; 22T (Sukalo), 71:15-72:2; 16T (Blasetti), 107:20-108:1; Ex. 53; Ex. 54.]

24. The floor slabs were not "reduced" to 9 inches in thickness (contrary to Mr. Sukalo's testimony) but rather were always 9 inches thick per O&N's design. [Ex. 1111 (Guedelhoefer Rebuttal Report), p. 19; Ex. 4032 (Cornelius Report), pp. 20-22; 14T (Behler), 56:10-59:2; 15T (Behler), 35:23-36:2.] No party presented at trial any document to support the

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deficiencies in the actual concrete work. The court finds no credible evidence to support this claim. Furthermore, Tutor bid on the project with the proposed slab thickness and never voiced any concerns regarding their thickness until after the litigation commenced. Tutor's entire trial strategy focused on degrading the participants in the design process as well as VSM's team, purporting to demonstrate their lack of experience and/or stupidity. Contrary to this objective, the court found Tutor's witness-accusers to be arrogant, sexist (the architect and leading representatives of VSM were women and the Tutor witnesses displayed animosity and discredited these participants on the basis of their gender), dismissive and not credible and rejects the entirety of their testimony. Tutor appears to weave a compelling tale—an inexperienced owner, too much cost cutting, incompetent designers and owner supervisory staff, and lack of sufficient peer review. However, the court does not agree that the record supports this jaded view. In fact, the depiction is consistent with the demeanor of Tutor's witnesses and the arrogance and dismissiveness was evident not only in their testimony but in the record of their dealings on the job with Chestlen's team.

theory (or Mr. Sukalo's self-serving theory, more appropriately) that "value engineering" reduced the thickness of the slabs on this Project from 10 inches to 9 inches.

25. Tutor agreed to construct the Project using 9" slabs. [Stip. ¶ 16; 22T (Sukalo), 101:6-8.]

26. Tutor did not raise any doubts or concerns about the 9-inch slabs until after this litigation commenced. No Tutor employee on the Project believed that the deflections in the field were because of the 9-inch slab. Peter Sukalo never put his alleged concerns with the 9-inch slab in writing to anyone at any point during the Project. [22T (Sukalo), 99:1-100:9.]

27. After a competitive bidding process, and based on VSM's recommendation, Chestlen retained Tutor as the construction manager on the Project. [Stip. ¶ 7; 1T (Lenfest), 43:7-19.]

28. Following negotiations [1T (Lenfest), 47:1-3], on March 31, 2015, Chestlen and Tutor entered into two Construction Management Agreements – referred to as the "Primary" and "Companion" contracts and collectively as the "Contract." [Stip. ¶ 8; Ex. 407 (Primary Contract); Ex. 408 (Companion Contract).][4]

29. The parties elected not to use a standard AIA Construction Contract but rather hired attorneys to draft a contract with provisions seemingly expressly tailored to the anticipated issues that would arise in the construction of this project.

[4] Mr. Lenfest testified that the Project involved two separate agreements because of certain requirements to obtain State funding under the RACP Grant. As a result, "the construction was bifurcated to include an amount that matched up with the terms of the RACP grant." [1T (Lenfest), 46:14-25.] Ultimately, the Primary Contract comprised Tutor's Tower work, and the Companion Contract comprised Tutor's Podium work. However, because the terms of the Primary Contract and Companion Contract are substantially the same, all citations and quotations to the Contract hereinafter will be to the provisions of the Primary Contract [Ex. 407], unless the context requires otherwise.

30. A key provision in the contract that controls and directs this court's resolution of the dispute in this matter is that Tutor promised to complete the work by a date certain for a Guaranteed Maximum Price ("GMP"). [Ex. 407, pp. 4-6, Contract §§ 3.3, 4.1.]

31. As to the timing element, the Contract required Tutor to "attain Substantial Completion of the Work not later than one thousand seventeen (1017) days following the date of issuance of the Notice to Proceed, subject to adjustments in the Contract Time as provided in the Contract Documents (the "Required Substantial Completion Date")." [Ex. 407, p. 5, Contract § 3.3.].

32. There is no dispute that the Contract contains a clear description of what constitutes as a defined term "substantial completion."

33. Under that definition and the evidence at trial related to the progress of the work and the time limits in the Contract for completion, there can be no dispute that Tutor did not meet those time limits, although now Tutor contends that it has excuses and was not required to meet the deadline due to these excuses arguably the fault of Chestlen, its agents and/or the design professionals.

34. If the work was delayed and Tutor believed the delay was Chestlen's responsibility, the Agreement contains a detailed process for Tutor to seek Chestlen's approval to extend the Substantial Completion Date and the Contract Time based on a "Permitted Delay." [*Id.* at pp. 66-68, General Conditions ¶ 7.3.1 to ¶ 7.3.2.]

35. Section 7.3.1 of the General Conditions to the Agreement provides that Tutor may obtain an extension of the Contract Time via Change Order for a "Permitted Delay" (*i.e.*, a delay caused by Owner or the Design Professionals, which could not be avoided or anticipated, and for which Tutor used all reasonable means to mitigate), less any delay Tutor caused.

36. The contract provides that if Tutor did not attain Substantial Completion by the Required Substantial Completion Date, it would pay Chestlen $35,000 per day as liquidated damages ("LDs"), beginning on and including the tenth day after the Substantial Completion Date until it attained Substantial Completion of the Work. [*Id.* at § 3.5.]

37. The court considers the provisions of the Contract outlined above and related to completion, **to which Tutor fully agreed** in a contract which its own attorneys participated in drafting, to place the majority of the risk for completion on Tutor—Chestlen was contracting for Tutor's professionalism, competence, managerial skills and construction expertise to direct and coordinate the work in order to meet the contract deadline.

38. The other defined key term of the Contract was the "guaranteed maximum price" ("GMP"). The Final GMP is the dollar amount Tutor agreed not to exceed to construct the Project, including its own costs and the costs of its subcontractors. [*Id.* at pp. 6-7, Contract § 4.1.]

39. In the Contract, Tutor "guaranteed" that Chestlen would not pay more than the "Final GMP" for work under the Contract. [*Id.* at pp. 6-7, Contract § 4.1.]

40. Mr. Lenfest testified that having a GMP was important because it gave Chestlen certainty in knowing how much it would cost to build the Project, and it was a requirement for Chestlen's lenders. [1T (Lenfest), 48:23-49:16.]

41. The Contract explicitly authorizes changes to the Contract Time and Final GMP **only** by Change Order or a Construction Change Directive. [Ex. 407, p. 79, General Conditions ¶ 11.1.2.]

42. The Contract contains an internal "Claims" procedure for resolving disputes about increasing the GMP, extending the Contract Time, or any other claim Tutor may have under the Contract. For disputes about increasing the GMP or extending the Contract Time, Tutor is required

to "assert in writing any such claim . . . **within ten (10) days following notice of the Owner's decision**." For disputes about any other aspect of the Contract, Tutor is required to "assert in writing any such claim . . . **within twenty-one (21) days**" after the earliest of when it knew or should have "recognized the conditions giving rise to the claim." [*Id.* at pp. 89-90, General Conditions ¶ 14.11.1 (emphasis added).]

43. The "Claims" provision provides that "**[f]ailure to assert a claim within the applicable time period**, including a claim in respect of a delay pursuant to Subparagraph 7.3.3.1 hereof . . . **shall be a waiver of the right to assert the same**." [*Id.* at pp. 89-90, General Conditions ¶ 14.11.1 (emphasis added).]

44. Chestlen and Tutor signed two change orders extending the Required Substantial Completion Date. Ex. 1018 (Stipulated Facts) ¶ 33.

45. The two change orders extended the Required Substantial Completion Date to August 3, 2018. Ex. 1018 (Stipulated Facts) ¶ 34; *see also* Ex. 1171 (Change Order 005); Ex. 1266 (Change Order 049).

46. Tutor was required to obtain different payment and performance bonds for the work under each contract. Ex. 407 (Primary) § 2.3, p. 4; Ex. 408 (Companion) § 2.3, p. 4.

47. Other obligations that the contract conferred on Tutor include:

a. "perform the Work in accordance with the Contract Documents and submittals approved or otherwise acted favorably upon pursuant to Paragraph 4.10" that related to coordination of work. Ex. 407 (Primary) § 4.2.1, p. 45.

b. to compare the field conditions with the Contract Documents before commencing construction; detect errors, inconsistencies and omissions; and

bring errors, inconsistencies and omissions to the attention of Chestlen and VSM. Ex. 407 (Primary) § 4.2.2, p. 45.

c. to "maintain a daily log of the Work, activities and relevant factors which occur on the Project, including

(i) weather conditions,

(ii) personnel on the Project,

(iii) Subcontractors' Work/tasks performed and manpower,

(iv) material and equipment received,

(v) major equipment utilized;

(vi) visitors on Site,

(vii) problems or issues identified and resolution of same, and

(viii) any other items that may affect the Project Schedule, progress of the Work, or may require additional costs to be incurred." [Companion, ¶ 4.8.3].

d. to retain a competent licensed professional engineer or land surveyor to measure and set benchmarks. Ex. 407 (Primary) § 4.3.3, p. 46.

e. to maintain at the Project Site for Chestlen a complete set of "Plans, Specifications, Change Orders, Construction Change Directives and Amendments . . ., approved Shop Drawings, Product Data, submittal schedule, RFI log and Samples." [Companion, ¶ 4.9.1].

f. to approve and submit Shop Drawings, in essence representing and covenanting that "the Work described in the Shop Drawings had been coordinated with all other Work[.]" Ex. 407 (Primary) § 4.10.6, p. 53.

g. to inspect the Work performed under the Contract "to determine that such portions are in proper condition to receive subsequent Work." [*Id.* at p. 47, General Conditions ¶ 4.3.5.]

h. to "provide monthly progress reports in accordance with the Owner's reasonable requirements, which reports shall include, at a minimum, the following: (i) a statement of the current status of construction in relation to the Project Schedule; (ii) an estimate of the remaining Project Schedule and whether any delays have been encountered; (iii) any proposed change in the Project Schedule; and (iv) such other information as the Owner or its funding sources may reasonably request. [Companion, ¶4.20.1]

i. to keep and maintain "full and detailed accounts and exercise such controls as may be necessary for proper financial management under the Contract and . . . ensure that its accounting and control systems are reasonably satisfactory to the Owner" and to provide access to Chestlen and its representatives upon reasonable notice. [Ex 407, ¶8.5.1]

j. to provide Chestlen with monthly reports as described in Section 4.20 of the General Conditions. [*Id.* at p. 58, General Conditions ¶ 4.20.]

k. to provide and administer project management software. [*Id.* at p. 58, General Conditions ¶ 4.21.].

l. to promptly remove any lien established against the Project by any Subcontractor, Subsubcontractor, Supplier, or lower-tier supplier or any other Responsible Party. [*Id.*, ¶ 14.7.1].

m. to use its contingency fund only for certain costs authorized in the Agreements and not to charge costs arising out of Tutor's or any other Responsible Party's negligence, breach of the Contract or intentional misconduct. [Companion, ¶4.5].

48. After considering competitive bids from three contractors for the cast-in-place concrete work on the Project, including Carney [19T (Sukalo), 67:16-69:17.] and *its own self-bid* for the concrete work, Tutor selected Carney.

49. Tutor agreed to provide dedicated management staff to supervise Carney's work. [*Id.* at 71:7-72:1.]

50. Tutor allotted $550,000 towards staff to provide dedicated management of Carney's work. [*Id.* at 68:22-70:8.]

51. Tutor did not hire any additional staff to monitor the concrete. The assigned concrete superintendent, Tim Mott, was not "additional staff." [22T (Sukalo), 86:25-87:18.]

52. In addition, Tutor understood that Carney would work with Healy, Long & Jevin ("HLJ") for the Tower floors. [19T (Sukalo), 75:12-21, 80:6-10; Ex. 294; Ex. 295; Ex. 296.]

53. Carney represented to Tutor that Jack Healy was "going to be part of the quality control efforts" for the Project. [37T (Carney), 33:12-34:6.]

54. Carney and HLJ negotiated a draft subcontract, in which HLJ would perform two specified tasks for Carney. [Ex. 100, p. 5.] Pursuant to that draft subcontract, HLJ was to "[c]onduct a complete specification and drawing review for the purpose of engineering a shoring and forming system above Level 9" and "[p]rovide the senior management required to support and monitor the project during the installation of the Work from levels 9 to 52." [*Id.*]

55. Although HLJ and Carney did ultimately execute a subcontract, HLJ did not perform the two specified tasks, and did not have any contractual role on the Project. [19T (Sukalo), 86:10-25, 90:4-12; 4T (Meistering), 114:6-115:7; Ex. 297.]

56. In January 2017, Tutor learned that Jack Healy – owner of HLJ – was not even "in the loop" regarding the Project. [Ex. 297.]

57. In January 2017, upon realizing that HLJ had not been involved in the Project to date, Tutor reminded Carney that Tutor had agreed to use Carney on the Project "under the condition that [Carney] team with Healy Long." [*Id.*]

58. Chestlen would not have approved Carney as concrete subcontractor without additional supervision from Tutor and direct involvement from HLJ. [19T (Sukalo), 86:10-25; *see also* Ex. 1028 (J. Click Deposition Designations), 98:20-99:24 (Tutor's representations to VSM and Chestlen about the expected involvement of HLJ, among other things, helped alleviate Chestlen's early concerns about Carney).]

59. On or around May 28, 2015, Tutor entered two subcontracts with Carney – referred to as the "Primary" and "Companion" subcontracts and collectively as the "Carney Subcontract." [Stip. ¶ 12; Ex. 98; Ex. 99.]

60. The Carney Subcontract requires Carney to prepare plans and procedures describing the means and methods of its work. [Ex. 99, ¶ 2A.]

61. Carney's submitted plans and procedures included a shoring and reshoring plan prepared by Collins Engineers Inc. ("Collins") for levels 14-49 ("Collins Shoring/Reshoring Plans"). [Ex. 55.]

62. The plans and specifications for the Project required Carney to follow the Collins Shoring/Reshoring Plans. [Stip. ¶ 43; 4T (Meistering), 111:9-13; Ex. 43.]

63. The Collins Shoring/Reshoring Plans required Carney to sequence its shoring/reshoring operating in a specified manner. [Ex. 43.]

64. The Collins Shoring/Reshoring Plans required Carney to use five levels of shoring and reshoring. [Stip. ¶ 44; Ex. 43.]

65. Carney only used two sets of formwork on the Project. [Ex. 622.]

66. Carney selected and Tutor approved a four-day cycle for the floor-to-floor pouring of the slabs in the Tower. [Ex. 105.]

67. On or about June 3, 2015, Arch Insurance Company ("Arch"), as surety, executed bond no. SU1132258 (the "Primary Performance Bond") for Carney, in the penal amount of $31,142,830, to secure Carney's performance of the Primary Subcontract. [Stip. ¶ 13; Ex. 7495; Ex. 7496.]

68. On or around May 7, 2015, Tutor entered into a subcontract with Ventana DBS LLC – referred to as the "Ventana Subcontract." [Stip. ¶ 18; Ex. 1.]

69. Ventana's subcontract on the Project was a "design assist contract." [Stip. ¶ 20.]

70. "Cutting and patching of work of other trades that has been installed incorrectly and/or out of tolerance" was specifically excluded from the scope of Ventana's work under the Subcontract. *See* Exhibit 6962, Ventana Subcontract at Exhibit "A" – Scope of Work, p. 17.

71. This subcontract exclusion includes any and all patching or grinding of the concrete slab edges of the Project, as Ventana expected that the building substrates (i.e., the concrete slabs) would comply with the parties' agreed upon installation tolerances. Gerald Kern Trial Tr., 5/19/25(pm), 10:24-11:9.

72. "Out of sequence work due to issues other than temporary facilities" was also specifically excluded from Ventana's scope of work under the Subcontract. *See* Exhibit 6962, Ventana Subcontract at Exhibit "A" – Scope of Work, p. 17; Gerald Kern Trial Tr., 5/19/25(pm), 11:10-12:2.

73. Ventana contracted with Façade Concepts run by Jerry Hogan to design the window wall system. [37T (Kern), 119:13-21.]

74. Liberty Mutual Insurance Company issued a performance bond for Ventana's performance of work under the Ventana Subcontract. [Stip. ¶ 19; Ex. 7497.]

75. Under its Primary Contract with Chestlen, Tutor was also obligated to review the proposed work of its subcontractors, as reflected in the subcontractors' shop drawings, to ensure that the proposed work conformed with the requirements of the Contract Documents, before passing on those shop drawings for the owner's and the design team's review. *See* Exhibit 407; Primary Contract; Peter Sukalo Trial Tr., 3/24/25(pm), 51:2-15; Shelby Wagner Trial Tr., 3/26/25(am), 75:3-9.

76. Specifically, Section 4.11 of the General Conditions of the Primary Contract provides as follows:

> 4.11 COORDINATION
>
> 4.11.1 Without limiting any of the Construction Manager's other obligations under the Contract Documents, it is acknowledged that the Construction Manager is responsible for the coordination of the Work, including the Work of those Subcontractors with design responsibilities with other portions of the Work. In addition, the Construction Manager acknowledges and agrees that it shall use a building information modeling program reasonably satisfactory to the Owner to provide for proper coordination among all Subcontractors.

See Exhibit 407, Primary Contract, p. 54; Peter Sukalo Trial Tr., 3/24/25(pm), 41:25-42:12.

77. Under its Primary Contract with Chestlen, Tutor was also obligated to review the proposed work of its subcontractors, as reflected in the subcontractors' shop drawings, to ensure that the proposed work conformed with the requirements of the Contract Documents, before passing on those shop drawings for the owner's and the design team's review. *See* Exhibit 407; Primary Contract; Peter Sukalo Trial Tr., 3/24/25(pm), 51:2-15; Shelby Wagner Trial Tr., 3/26/25(am), 75:3-9.

78. Specifically, Section 4.10.5 of the General Conditions of the Primary Contract provides, in part, as follows:

> 4.10.5 The Construction Manager shall review, and only if satisfied that they conform to the Contract Documents, approve and submit to the Design Professional for its review and approval, all Shop Drawings, Product Data and Samples required by the Contract Documents as provided below...

See Exhibit 407, Primary Contract, p. 52; Peter Sukalo Trial Tr., 3/24/25(pm), 52:4-13.

79. Further, Section 4.10.6 of the General Conditions of the Primary Contract provides as follows:

> 4.10.6 By approving and submitting Shop Drawings, Product Data and Samples, the Construction Manager represents and covenants that it shall have (i) determined and verified all materials, field measurements and field construction criteria related thereto or confirmed it will do so in a timely manner, (ii) checked the Shop Drawings, Product Data and Samples for complete dimensional accuracy, (iii) checked to insure that Work contiguous with and having bearing on the Work shown on the Shop Drawings is accurately and clearly shown, (iv) checked the Shop Drawings against the composite drawings prepared by the Construction Manager, (v) verified that the Work described in the Shop Drawings has been coordinated with all other Work, and that any equipment described in the Plans and Specifications will fit into the assigned space, and (vi) checked and coordinated the information contained within such submittals with the requirements of the Contract Documents.

See Exhibit 407; Primary Contract, p. 53.

80. From the start of the Project, Tutor suffered from chronic turnover of its personnel. [Ex. 1121.][5]

81. The turnover was detrimental to the project insofar as it caused Tutor to lose institutional knowledge of key decisions made on the Project. [4T (Meistering), 76:15-23] and

[5] Carney's proposed Findings of Fact 432-439 lays out the specifics of some of the turnover and are accepted by the court to support this finding.

resulted in inconsistent decision making. [23T (Wagner), 22:14-25 and Ex. 1109 (Baldwin Report) at 90-93.] and led to replacements who lacked necessary experience, particularly as regards to high-rise concrete construction. [Ex. 1023 (P. Bolger Deposition Designations), Vol. 1, 19:7-21 and 20:3-12 (experience on comparably tall building limited to composite steel/concrete structure); Ex. 1024 (J. Brown Deposition Designations), Vol. 1, 16:14-20 (no reinforced concrete high-rise experience).]

82. The construction began, and the Contract Time began to run, when Tutor received a Notice to Proceed. [Ex. 407, p. 5, Contract § 3.3.]

83. Chestlen issued Tutor a Notice to Proceed on April 6, 2015. [1T (Lenfest), 52:2-12; Ex. 1103.]

84. While Carney was pouring the concrete, Chestlen and its design team repeatedly raised concerns about Carney's quality control and schedule delays. [Ex. 511; 4T (Meistering), 115:12-116:26.] [Ex. 1174; 9T (Smith), 29:5-33:9.] [Ex. 1181; 23T (Wagner), 72:7-73:2.] [Ex. 703; 9T (Smith), 33:17-45:12.]

85. Peter Sukalo of Tutor commented that the "[Carney] team can't even plan for the next day let alone try to put together a recovery schedule." [23T (Wagner), 73:3-21.]

86. As designed, Ventana's window wall system was intended to be secured to the head and sill of the concrete slabs using anchor bolts and plates. [38T (Kern), 53:7-54:16.]

87. Since the window wall system was designed via the Collaborative Design Assist process and the manner of attaching the system to concrete was critical to the installation, the concrete contractor was a key component of the process in ensuring that the concrete pour met the specifications of the design.

88. The parties discussed the installation tolerances for Ventana's design and Ventana could have designed for greater tolerance, but CLA, the architect did not specify such a factor. Shelby Wagner Trial Tr., 3/26/25(pm), 132:19-133:12; Gerald Kern Trial Tr. 5/19/25(pm), 37:13-42:14; Jerry Hogan Trial Tr. 5/21/25, 273:25-275:14. Gerald Kern Trial Tr., 5/19/25(pm), 43:23-44:21.

89. CLA warned Tutor in December 2016 that the concrete work was the foundation of the building and if not done correctly additional future problems were "guaranteed." [Ex. 1174; *see also* 1T (Lenfest), 65:5-12; Ex. 1109 (Baldwin Report) at 15-27.]

90. Ventana mobilized on the Project on August 23, 2017. [Stip. ¶ 25; Ex. 450.]

91. Contrary to the Contract, Tutor failed to schedule a pre-installation exterior enclosure meeting prior to beginning installation. [38T (Kern), 15:23-16:6, 28:2-10; Ex. 3041; Ex. 324; Ex. 1028 (J. Click Deposition Designations), Vol. 1, 235:17-236:8.]

92. Contrary to the Contract, Tutor failed to survey the concrete slabs before Ventana started window wall installation. [38T (Kern), 18:10-21, Ex. 3041.

93. Immediately upon mobilization, Ventana recognized that there was a "big problem" and that they were confronting far more than occasional rebar conflicts and a "couple high spots or low spots" in the slabs. Despite the clear and unambiguous concrete tolerance requirements that were discussed at length and agreed upon at the CDA meetings, and which were clearly shown on Ventana's approved shop drawings, when Ventana commenced its work it repeatedly encountered concrete slabs throughout the building which did not meet the agreed-upon ¾ inch up or down installation tolerances, and which instead suffered excessive deflection. Gerald Kern Trial Tr., 5/19/25(pm), 75:4-78:5.

94. Ventana also found that the concrete slabs were poured to the wrong elevations or were not level or flat. Gerald Kern Trial Tr., 5/19/25(pm), 111:11-112:22.

95. On numerous other floors throughout the building, the non-conforming concrete slabs required significant grinding and chipping at the slab edges, the use of impractical shims under the window wall anchors, and other unplanned, costly, and time-consuming measures to accommodate the installation of the window wall system, all of which resulting in significant delays to Ventana's installation work and additional labor costs to Ventana. Gerald Kern Trial Tr., 5/19/25(pm), 75:4-77:14, 113:12-114:16; 39T (Kern), 37:11-39:5; Ex. 6920.]

96. At the end of September 2017, Chestlen, through VSM, advised Tutor that Carney's "deficiencies are impacting the façade installation." [Ex. 15; Ex. 450; 4T (Meistering), 131:5-132:3.]

97. In response, Tutor denied that the concrete quality was the cause of the issues, telling Chestlen that it was "incorrect." [Ex. 450.]

98. At the same time as it was disputing the concrete deficiencies, in September 2017, Tutor proceeded to grind the edges of the concrete slabs, ostensibly to address "abnormalities" [4T (Meistering), 137:19-22] and render the slab edges suitable to receive Ventana's window wall anchors. [Stip. ¶ 42; Ex. 172; 4T (Meistering), 136:18-137:22, 137:8-22; 23T (Wagner), 78:4-79:18; Ex. 288; Ex. 758; 14T (Behler), 102:22-103:21.]

99. Tutor initiated the slab edge grinding without Chestlen's and the Design Team's knowledge or approval. [Stip. ¶ 42; Ex. 172; 4T (Meistering), 136:18-137:22; 23T (Wagner), 78:4-79:18; Ex. 288; Ex. 758; 4T (Meistering), 137:8-22; 14T (Behler), 102:22-103:21.]

100. When it learned that Tutor was grinding slab edges, the Design Team raised concerns with Tutor that the grinding could cause structural issues and asked how Tutor determined that "the grinding was necessary, and the best answer for the stated issue." [Ex. 758.]

101. Terry Meistering of VSM "learned the slab, the newly poured slab edges were being chipped and bush hammered and grinded and there was rebar being exposed and I'd never seen anything to that extent on a new slab in such quantity." [4T (Meistering), 137:12-18.]

102. Throughout construction, Ventana encountered rebar in the concrete where its anchors were to be installed on "every slab" it worked on. [39T (Kern), 37:20-23.]

103. To address the rebar conflicts, Tutor began implementing "no-fly zones" for rebar placement, which involved placing "markings on the forms before concrete is poured and that marking would show the size of our [Ventana's] 8-inch anchor clip and would also show the two locations where the bolts would be located." [*Id.* at 45:2-13.]

104. However, even after Tutor began marking "no-fly zones" indicating where Ventana's window wall would be anchored to the slab, Ventana continued to encounter rebar where it needed to anchor its window wall system to the slabs. [*Id.* at 51:10-17.]

105. The Court finds that Ventana communicated with its system designer, Mr. Hogan, about the concrete issues that it was encountering no later than October 13, 2017, and therefore rejects any suggestion that Ventana delayed involving Mr. Hogan in the discussions to try to solve the concrete issues which were impacting Ventana's work.

106. Chestlen observed that "concrete floors were going up, and no windows were going in and that raised a lot of concerns because we knew the windows had been in warehouse because we had walked the warehouse." [4T (Meistering), 130:18-23.]

107. By November 2017, the window wall installation was "significantly behind schedule" [20T (Sukalo), 89:17-21], such that Ventana was "just starting window installation on the 10th floor [20 stories below where [concrete had been poured]." [20T (Sukalo), 89:8-21.]

108. Chestlen raised concerns both orally and in writing about the quality of the concrete work and the schedule. [Ex. 504, 1191]

109. Carney poured the concrete slabs for floors 11, 12, 13, and 14 to the wrong elevations from what was shown on the design documents. [Ex. 59, pp. 31-34; Ex. 329; Ex. 83.]

110. Because they were poured to the wrong elevations, the distance between the slabs on those floors was outside the tolerance accounted for in the specifications. [38T (Kern), 79:14-21.]

111. Tutor and Carney conceded that excessive deflections were occurring. [29T (Cooney), 66:9-24.] [29T (Cooney), 66:9-24, 107:11-108:5; Ex. 53, 108]

112. Although Tutor knew of significant excessive deflections in the concrete in 2017, Tutor did not remediate the defective concrete floors.

113. On August 9, 2017, Tutor contacted Tim Fahey of Surface Specialists LLC about remediation work on the concrete floors. [Ex. 550 at 6 (Tutor Perini August 9, 2017 email to T. Fahey); 8T (Fahey), 146:13-24.] Tutor advised Surface Specialists that "[w]e have work on 8 floors that need repair" – nearly two-thirds of the 13 above-ground floors that had been poured as of that date. [Ex. 550; Ex. 103 (Pour Dates).]

114. Surface Specialists walked the floors on August 14, 2017 and advised Tutor that the concrete slabs had "two conditions that will affect the build-out of the floors; abrupt ridges/elevation changes and an overall rolling (up/down) that will not allow for the proper setting

of elevator sills, door bucks, resilient flooring, base moldings, plumbing fixtures, counter tops, etc." [Ex. 550.]

115. Tutor did not authorize Surface Specialists to proceed with remediation in August 2017 [*Id.* at 159:4-21 and 160:24-161:3 and 162:8-24] and did not inform Chestlen that remediation was considered and rejected in August 2017. [5T (Meistering), 102:2-12.]

116. Tutor took the false position with Chestlen and Ventana that there was nothing wrong with the floors. [40T (Kern), 130:19-131:2, Ex. 450.]

117. The court concludes that Tutor's interaction with Surface Specialists demonstrates that Tutor acknowledged that there were defects in the concrete that were substantial, and, based upon the recommendation received, Tutor is charged with knowledge that those issues required remediation, information it purposefully failed to disclose or failed to take action to resolve.

118. Instead, covertly, as early as in or around November 2017, Tutor engaged Thornton Tomasetti ("TT") to analyze concrete deflection and levelness issues. [Stip. ¶ 45; 16T (Blasetti), 77:11-19.]

119. In the TT engagement, Tutor informed TT that Carney was using improper means and methods during concrete installation, specifically that Carney was not following the Collins Shoring/Reshoring Plans because it was prematurely cracking concrete forms and cracking the wrong forms. [16T (Blasetti), 94:3-5, 97:12-14, 99:1-19; Ex. 356; Ex. 301; Ex. 345.]

120. Moreover, on November 3, 2017, VSM had alerted Tutor that concrete quality control was impacting window wall installation. [Ex. 324.]

121. On January 10, 2018, TT issued a memo to Tutor [Stip. ¶ 48], in which TT opined that the "excessive deflections reported in the field are likely due to the improper reshoring activity described by [Tutor]." [Ex. 53.]

122. Tutor did not share the January 10 TT memo with Chestlen, VSM, or any of Chestlen's design team. [19T (Sukalo), 104:8-105:7.]

123. Following the issuance of the memo, Tutor did not direct, nor did Carney make, any changes to its shoring and reshoring means and methods. [Ex. 55; 30T (Cooney), 17:9-14.] [30T (Cooney), 17:9-14; Ex. 345, 347, 622.] [T33 (Hart), 150:11-19.]

124. Carney continued to fail to follow the Collins Shoring/Reshoring Plans as it poured concrete slabs through the top of the Tower. [Ex. 345; Ex. 622; Ex. 347.]

125. Tutor and Carney offered no eyewitness testimony at trial that Carney was following the Collins Shoring/Reshoring Plans at any point on the Project below or above Floor 37. The Carney foremen who were responsible for shoring and reshoring for the Tower floors did not testify at trial. [35T (Carney), 90:3-16.]

126. Floor surface flatness defects associated with failing FF numbers and unrelated to the excessive slab deflections were identified by remediation contractors during site visits to the Project as early as August 2017 and into early 2018, but Tutor left them unaddressed. [Ex. 575, Fahey emails.]

127. These defects resulted from poor concrete placement, screeding, strikeoff, and finishing of the floor slabs by Carney and were a significant contributor to the overall scope of required floor remediation. [Ex. 1106 (Guedelhoefer Report), pp. 40-42; Ex. 1111 (Guedelhoefer Rebuttal Report), pp. 7-8.]

128. Tutor and TT acknowledged that there was "eyewitness testimony" confirming that Carney was not waiting for the concrete to reach sufficient strength and was cracking the wrong forms. [Ex. 345; Ex. 356; Ex. 622.]

129. The court concludes from the real-time on-site observations and TT reports that the issues with deflection and the failure to level the floors were replicated as the additional floors were poured.

130. In a letter dated February 13, 2018, VSM asked Tutor to produce "[a]ll letters and/or memoranda prepared by TPBC or any of its third-party consultants addressing the quality of the concrete work…." *See* Exhibit 151 - February 13, 2018 VSM letter to Tutor Perini and cover emails.

131. In response to VSM's request, at the end of March of 2018 Tutor produced to VSM four large binders of correspondence between *it and Carney*, in which Tutor consistently criticized Carney's work. *See* Exhibits 1972, 1973, 1974 and 1975 – binders of correspondence; Terry Meistering Trial Tr., 1/29/25(am), 42:10-23.

132. VSM had never seen the letters contained in the binder. Terry Meistering Trial Tr., 1/29/25(am), 48:5-10, 20-25, 49:12-17, 50:10-14.

133. The statements made by Tutor in the numerous letters and emails to Carney, as contained in the four binders of documents, blaming Carney for the concrete defects and conditions and threatening Carney with the costs of new window walls and delays were inconsistent with Tutor's representations to VSM that the concrete issues were the result of the design. Terry Meistering Trial Tr., 1/29/25(am), 51:14-57:13.

134. Tutor informed Carney directly, via email dated February 24, 2018, that *defective work* was causing issues with the window wall installation, and that Ventana's delays and overtime would become the financial responsibly of Carney. *See* Exhibit 82 - February 24, 2018 email from Tom Barron to Dennis Hart.

135. The window wall system required coordination with the concrete subcontractor, Carney, because the window wall system would need to be anchored into the concrete slabs poured by Carney. [38T (Kern), 53:7-54:16 and 41T (Kern), 61:11-19.]

136. Among other things, Ventana expected Tutor to ensure that Carney's rebar placement did not conflict with the anchors for Ventana's window wall system. [39T (Kern), 124:21-125:5.]

137. Tutor allowed Carney to set rebar and pour concrete on the Project from July 2016 through August 2018. [Stip. ¶ 28.]

138. Tutor did not properly or sufficiently coordinate the work between Carney and Ventana or ensure that the shop drawings they worked from were consistent. [9T (Smith), 25:14-21; 22T (Sukalo), 49:13-50:23; 23T (Wagner), 53:9-54:20; 39T (Kern), 125:2-7.]

139. In June 2018, it became clear that Tutor would not meet the Required Substantial Completion Date. (in August) [Ex. 177, p. 2.]

140. In July 2018, Tutor issued a schedule in which it projected it would attain Substantial Completion by July 5, 2019 [Ex. 1233.]; however, this was beyond the contractual substantial completion date required under the contract (and thus, must be deemed to be an admission of a failure of an essential duty under the contract).

141. In addition, Mr. Lenfest and Mr. Wallace confirmed that Chestlen began withholding Tutor General Conditions because Tutor would be unable to complete the work within the GMP by the Required Substantial Completion Date. [1T (Lenfest), 78:20-79:4; 27T (Wallace), 122:23-123:6.]

142. The Project did not attain Substantial Completion, as that term is explicitly defined in the Contract, by the Required Substantial Completion Date of August 3, 2018. [Stip. ¶ 36; Ex. 1232; 1T (Lenfest), 77:12-24.]

143. As of August 3, 2018:

(a) Concrete was still being poured. [Ex. 103.] The concrete "topped out" – meaning the top floor slab was poured – in late August 2018 [Ex. 103];

(b) The window wall installation was incomplete, so the building was not enclosed and could not be temperature controlled [1T (Lenfest), 73:18-76:13; Ex. 7419; 40T (Kern), 123:5:11];

(c) No FF&E had been installed [Ex. 120; 23T (Wagner), 77:4-16]; and

(d) Tutor's anticipated Substantial Completion date was July 5, 2019, which would put Substantial Completion 339 calendar days behind schedule. [Ex. 123; 1T (Lenfest), 76:14-77:17.]

144. On August 15, 2018, Chestlen notified Tutor that Tutor would be liable for liquidated damages due to missing the Required Substantial Completion Date. [Ex. 1233.]

145. In the same time frame, Tutor had sent letters to Carney (on July 9, 2018) and Ventana (on August 30, 2018), notifying those subcontractors that they would be liable for liquidated damages. [Ex. 1947; Ex. 1948.]

146. Scott Levy of Tutor confirmed that, regardless of the subcontractor ultimately responsible for the delays, Tutor remained responsible to Chestlen for liquidated damages. [32T (Levy), 83:2-19.]

147. In September 2018 – after TT opined that the concrete issues were the result of Carney's means and methods, after Chestlen began withholding Tutor's General Conditions, and after the Required Substantial Completion Date – Tutor issued Potential Change Order ("PCO") #0565, titled "Delay and Cost Impact Due to Concrete Structural Design." [Ex. 124; Ex. 201.]

148. Just one week later, Chestlen rejected PCO #0565. [Ex. 124; 23T (Wagner), 107:16-109:4.]

149. Chestlen rejected PCO #0565 because: (1) it was baseless, as Tutor's consultant, TT, had already by then concluded that the design of the slabs and anticipated deflections met code; (2) it was untimely, as the Notice failed to comply with the Contract requiring notice within 21 days after Tutor "becomes aware, or should have reasonably become aware of the commencement of the delay," and (3) it was deficient, as no backup was provided as required by the Contract. [Ex. 124; Ex. 407, pp. 66-67, General Conditions ¶ 7.3.1.]

150. Ms. Wagner, who authored the rejection letter, explained that Tutor's attempt to justify its delay with a claim of design error came "*months if not years after some of the concrete issues started to become apparent, and there is a contractual requirement to put the owner on notice when they become aware of a problem* . . . " [23T (Wagner), 108:22-109:4.]

151. Except for the one-page deficient potential change order described above, Tutor did not submit any additional time extensions while they were on the Project. [1T (Lenfest), 61:9-11; 27T (Wallace), 208:5-210:8.]

152. While the parties went back and forth over whether the building would achieve the substantial completion date, who was responsible for the delays and whether Chestlen had a continuing obligation to pay Tutor, Tutor continued working "under protest" [20T (Sukalo), 18:14-19:14.], installing demising walls, setting door entries and soffits, installing flooring, and performing other work directly on top of the deficient concrete substrate. [Stip. ¶ 53.]

153. Three years after the submission of the one-page deficient potential change order and after Tutor abandoned the Project, Tutor sent Chestlen its August 2021 Request for Additional

Compensation, which included the rejected potential change order and numerous subcontractor delay claims dated years earlier that had not previously been sent to Chestlen. [Ex. 219.]

154. On January 3, 2019, as Tutor was nearing the completion of the interior fit-out, Chestlen began installing FF&E. [Stip, ¶ 54; Ex. 120; 23T (Wagner), 77:4-16; Ex. 262.]

155. Chestlen began installing FF&E on the 20th floor because of issues with the window wall installation on lower floors. [23T (Wagner), 121:1-7.]

156. Chestlen stopped installation because it discovered deficiencies with the concrete floors. [Ex. 120; Ex. 486 and 262; 23T (Wagner), 77:4-16.]

157. Chestlen, through VSM, observed "[t]hat some cabinets were out of level more than an inch and a half over 10 feet" and the "window frame to the floor was very obviously not level." [23T (Wagner), 121:21-122:6.]

158. On January 18, 2019, Chestlen sent Tutor a Notice of Default and Demand for Immediate Corrective Action which stated that the "installation of flooring over substrate is being done in violation" of the Contract and "the floors do not conform with the Contract Documents." [Ex. 62.]

159. On January 24, 2019, after Chestlen had stopped installing FF&E, Benjamin Jones – a representative of Marriott – visited the Project site himself. As Mr. Jones recounted in a February 22, 2019 Letter he sent to Chestlen [Ex. 209, p. 12], while on site Marriott observed uneven and unlevel floors and cabinets that had to be "shimmed by what looked to be over 1-1/2" on one side." [Ex. 209, p. 12.] That same representative also advised Chestlen that he put a smooth, round pen on the floor and observed the pen roll "downhill" due to the excessive deflections and flatness/levelness issues. [*Id.*]

160. On January 25, 2019, Tutor responded to the January 18, 2019, Notice of Default denying responsibility. [Ex. 204.]

161. As a result, On February 8, 2019, Chestlen issued a Stop Work Order to Tutor for all carpet and resilient flooring work in the guest rooms and podium levels of the Project. [Stip. ¶ 55; Ex. 205.]

162. Tutor ignored the Stop Work Order and failed to communicate it to its flooring contractor performing the work. [Ex. 1218.]

163. On February 11, 2019, Tutor responded to the Stop Work Order and attempted to cast blame on "structural design deficiencies and unintended reactions." [Ex. 206.]

164. The court finds credible and compelling the testimony of Ms. Smith of CLA concerning her conclusions about the quality of the work and Tutor's conscious disregard for the owner's concerns and the project specifications. [Ex. 209; 13T (Smith) 48: 17-23.]

165. The court cannot agree with Tutor arguments that Smith's conclusions and the recommendations that proceeded from them were unreasonable, unjustified or unsubstantiated by the observable and measurable conditions on the site and required remediation.

166. The court finds the testimony of Smith highly credible.

167. The court finds credible and persuasive that the evidence (visual and testimonial) supports Smith's statement that: "workmanship, however, does not meet the project's minimum requirements." [Ex. 209 (March 2019 Design Team Correspondence With Tutor).]

168. Smith's conclusions factually were supported by Designstudio the project's interior designer, who opined that the guestrooms were: "noticeably uneven," that "one can perceive the change in floor level when walking the length of the room," and described the FF & E conditions as "extreme" and "untenable." [*Id.*]

169. Excessive slab deflections were the result of construction overloads and not the result of improper or inadequate design. Even TT tested the design of the floor slabs and determined they met the Code requirements and thus the specs. [Ex. 54; Ex. 1106 (Guedelhoefer Report), pp. 27-28; Ex. 4032 (Cornelius Report), pp. 19-32; Ex. 7524 (Cornelius Demonstrative), pp. 14, 40-63.]

170. The overwhelming preponderance of evidence at the trial both testimonial and documentary supports the court's conclusion that Tutor **knew** that the floors did not meet specifications but did not timely disclose its knowledge to Chestlen or consult with it.

171. Tutor knew based upon its own site observations of the work, upon the initial information provided by TT, knowledge admittedly reflected in its clandestine reactions in seeking out Surface Specialists and securing estimates for the costs of timely and effective remediation from Surface Specialists, CSI and PA Flooring. [8T (Fahey), 174:21-175:17.]; [Ex. 552, 553]; [Ex. 160, 161]; [Ex. 608; Ex. 162.]

172. Tutor declined to proceed with any of these contractors for remediation in 2017 or 2018 and did so without disclosing or consulting with Chestlen. [20T (Sukalo, 12:25-13:17; 14:9-17; 29T (Cooney), 90:25-91:6.]

173. Tutor did not share these remediation proposals with Chestlen or VSM or anyone from the design team. [20T (Sukalo), 13:19-14:4 and 14:5-8; 1T (Lenfest), 108:20-109:10; 5T (Meistering), 106:9-12; 24T (Wagner), 5:11-6:8; Ex. 404.]

174. Tutor never advised Chestlen in 2017 or 2018 that the floors needed to be remediated, and Chestlen never approved of Tutor proceeding with the interior work without remediating the floors [1T (Lenfest), 109:5-10.]

175. Tutor never told Chestlen that it intended to install framing and doorjambs and interiors over deficient concrete floors. [5T (Meistering), 106:15-18.]

176. Excessive slab deflections exacerbated window wall fit-up problems and contributed to the magnitude of required window wall remediation. [Ex. 1106 (Guedelhoefer Report), pp. 37-40.]

177. When Tutor was asked by VSM in 2019 why they failed to proceed with the remediation in 2018, Jack Cooney of Tutor responded that it was too "expensive" and that "it was a million-dollar problem and we didn't have a million dollars to spend on it." [5T (Meistering), 106:19-107:4; 23T (Wagner), 137:10-138:3; Ex. 1028 (J. Click Deposition Designations), Vol. 1, 209:3-22.]

178. Chestlen opted to remediate the floors due to their severe conditions and "to get it as close as possible to our requirements in the contract documents." [9T (Smith), 67:11-68:1.]

179. Tutor only agreed to "minimal work" and Chestlen "believed that they [Tutor] had an obligation, per the contract, to do this work." [6T (Meistering), 13:9-22.]

180. On March 28, 2019, Chestlen issued a no-cost, no delay-day Construction Change Directive ("CCD") so that Tutor would proceed with at least some portion of the required remediation. [Ex. 136.] Tutor refused to comply with the CCD.

181. With Tutor refusing to do so, Chestlen then developed (in coordination with the rest of the Design Team) a plan to remediate the concrete floors. As part of those efforts, CLA prepared a survey for each room to determine "the right amount of product in the right areas." [6T (Meistering), 21:3-22:1.]

182. The remediation of the concrete floors was required to address both floor levelness and floor flatness, which Tutor admitted was its responsibility. [Ex. 128; 5T (Meistering), 95:11-15, 98:20-99:7.]

183. The remediation of the floors began in April 2019 and was completed in October 2019. [Ex. 210; Ex. 531.]

184. The remediation could not cure the concrete deficiencies so that they met specifications, but it was the best Chestlen could do under the circumstances based upon the amount of product it could install on the floors. [6T (Meistering), 24:9-19; 24T (Wagner), 23:12-24.]

185. During and after the completion of the floor remediation, the interior fit out progressed, but an incident on March 16, 2020 wherein the Fire Sprinkler Main on the 48th floor failed and flooded the Project, requiring months of repairs delayed completion of the project.[6] [Ex. 1104; Ex. 1136; Ex. 1287; Ex. 1678; Ex. 2137; 6T (Meistering), 24:23-26:9.]

186. Tutor first requested a Certificate of Substantial Completion from CLA on December 15, 2020 – already twenty-eight months beyond the Required Substantial Completion Date of August 3, 2018. [Stip. ¶ 37; Ex. 1292, pp. 8-9.]

187. At CLA's request, Tutor compiled additional information and resubmitted its request for a Certificate of Substantial Completion on January 6, 2021. [Ex. 1292, p. 6.]

188. On January 28, 2021, CLA responded to Tutor's request for a Certificate of Substantial Completion. The response noted several issues that precluded issuance of a Certificate

[6] This incident and the related repairs clearly delayed the opening of the Hotel. The amount of delay and the extent to which it is excludable from Plaintiff's damages may be considered in the subsequent trial on damages. The court may also include consideration of the approved change orders and the amount of time they contributed to an extension of the completion date and the issue of compensable delay.

of Substantial Completion, including "work [that] remains which does not allow the owner to utilize the work for its intended use." [Ex. 1291, pp. 1, 10-11.]

189. In its letter, CLA also attempted to assist Tutor meet Substantial Completion by providing three exhibits: (1) a Substantial Completion checklist; (2) a list of work to be completed prior to Substantial Completion; and 3) a list of incomplete work. [Ex. 1291.]

190. Tutor did not agree to a checklist or any of CLA's suggestions.

191. Instead, Tutor submitted a revised request for a Certificate of Substantial Completion from CLA on February 18, 2021. [Stip. ¶ 38; Ex. 1292 and Ex. 1293.]

192. On March 19, 2021, CLA responded to Tutor's request for a Certificate of Substantial Completion and concluded that Tutor had not met the requirements for Substantial Completion. [Stip. ¶ 39; Ex. 1293.]

193. The court agrees that the preponderance of credible evidence at trial supported CLA's analysis that the following conditions precluded the conclusion that the project was substantially complete:

(a) The hotel was not suitable for its intended use since "guests cannot occupy rooms in which the window, a mechanical code requirement for ventilation, does not properly function or where the doors do not properly function for guest use of the outdoor terraces" [Ex. 1293; 9T (Smith), 99:15-101:4];

(b) General commissioning was never completed [Ex. 1293; Ex. 677; Ex. 1679; Ex. 1681; Ex. 1684; Ex. 1685; Ex. 1687; Ex. 1688; Ex. 1689; 9T (Smith), 8:18-21, 98:19-21, 102:7-25];

(c) LEED certification had not been achieved [9T (Smith), 8:5-11, 98:8-21];

(d) Warranties were not received [Ex. 1293 and 9T (Smith), 98:12-18];

(e) Elevator work was not completed [9T (Smith), 103:4-104:10];

(f) Life Safety Systems not functioning in accordance with Contract [*id.* at 104:11-105:15];

Sitework required under the Companion Contract was not completed [Ex. 1293].

194. Tutor did not provide a written response to the architect's March 19, 2021, letter. [9T (Smith), 94:14-95:7.]

195. The Architect has never issued a Certificate of Substantial Completion, which Ms. Smith described as "very unusual." [*Id.* at 93:14-20, 111:1-11.]

196. No evidence was submitted at trial that Tutor had ever achieved Substantial Completion pursuant to the terms of the Contract.

197. After Tutor failed to reach Substantial Completion on the Project, Chestlen "tried to get the project across the finish line as fast as I [Brook Lenfest] could." [2T (Lenfest), 12:6-22.]

198. Brook Lenfest and Jared Wallace were at the Project every day after Tutor left the Project and personally performed some of the remaining work themselves. [*Id.* at 12:6-22.]

199. That additional work included repairing flooring in the W suites, repairing elevator doors, installing aerators that were missing in over sixty-five faucets in W hotel rooms, installing missing fixtures in bathrooms, installing missing light fixtures, replacing the wrongly installed light fixtures in meeting rooms, re-ordering and installing missing tiles in the bathroom, repairing defective tile installation in ballroom, replacing door cassettes, addressing numerous plumbing deficiencies, replacing mechanical equipment that had been run without oil, addressing that Tutor left Chestlen with no attic stock of tiles – "the list is so long it's hard to remember." [*Id.* at 12:23-14:15 and 17:16-18:7; 27T (Wallace), 223:19-226:20.]

200. On June 7, 2019, because Tutor failed to condition the HVAC air per its plan, Chestlen agreed to accept the mechanical equipment for temporary cooling in order to allow the interior installations to proceed. The conditions for such acceptance included Tutor's agreement

that the "[e]quipment will be turned over for commissioning in like new condition with full warranty coverage as defined in the Agreement." [Ex. 1280.]

201. That did not happen. The equipment was not turned over in "like new condition." [27T (Wallace), 222:10-223:12.] At least eighty of the air handlers in the guest rooms were not in working condition and many more were in poor condition "where filters weren't changed, oil levels were low." [2T (Lenfest), 16:5-17:15.] Chestlen had to hire a replacement contractor to overhaul all 755 water source heat pumps and replace dozens of compressors just to supply a working air source for the rooms. [27T (Wallace), 223:2-12.]

202. As of March 2021, the Project had over one hundred inoperable window vents. [9T (Smith), 100:18-101:4; Ex. 1293; Ex. 133; Ex. 38; Ex. 145; Ex. 146; Ex. 7423.]

203. On April 1, 2021, L&I issued a Certification of Occupancy ("CO") for the Project. [Stip. ¶ 56; Ex. 1294.], which the City later revoked.

204. The Element Hotel opened to the public in May 2021. [2T (Lenfest), 11:25-12:5.]

205. As of May 7, 2021, Marriott (the hotel operator) would not sell 247 rooms because of issues with the operable window vents in guest rooms. [Ex. 430; 27T (Wallace), 212:14-213:6.]

206. As of May 20, 2021, VSM had identified, and Tutor had agreed, that at least 188 windows needed repair. [Ex. 1689.]

207. L&I returned to the Project on June 28, 2021, and issued an Inspection Report on June 29, 2021 relating to issues for which it had revoked the CO. [Ex. 1295.]

208. The W Hotel opened to the public in August 2021. [2T (Lenfest), 11:25-12:5; 27T (Wallace), 216:7-9.]

209. Like the Element, however, the W Hotel was also a partial opening involving "public spaces" and . . . "75 or a hundred rooms that were usable," because "[t]he rooms were not finished." [28T (Wallace), 45:10-23.]

210. As of December 2021, the Project still had inoperable window vents. [Ex. 315; 27T (Wallace), 219:8-15.]

211. The Project still has inoperable window vents today. [2T (Lenfest), 18:24-19:6.][7]

212. For purposes of assessing liquidated damages, however, Chestlen seeks to set a substantial completion date under the Contract of December 31, 2021.[8]

213. That date reflects that by August 2021, both the W and Element hotels were partially open, while at the same time such date holds Tutor accountable for numerous remaining open items required to achieve Substantial Completion pursuant to the Contract, as well as the numerous delays for which Tutor Perini is responsible. [Ex. 1104.]

214. Chestlen seeks to blame Ventana, as the designer of the window wall system for issues that arose with the installation of the window wall, specifically, that Ventana should have provided "a window wall design that could meet the performance requirements of the Project, including working with the as-designed slabs having specified deflections. [Ex. 1109 (Olson

[7] Chestlen contends that rooms with inoperable windows are "unsellable." The court considers this issue a matter of damages, which will require proof at a further trial. Furthermore, the court is unwilling to adopt a blanket number of such rooms as indicative of lost revenue without evidence related to occupancy rates at comparable properties.

[8] The court acknowledges that this date is beyond the dates on which Plaintiff received a certificate of occupancy and when it opened and was actually operating the hotel. The evidence demonstrated that the opening did NOT coincide with the completion of the work and that many issues remained to be resolved. However, for purposes of setting the parameters for the assessment of damages, when Chestlen elected to open the hotel and it was determined by L&I that it was suitable for occupancy may represent income that the court may consider as mitigation of damages to reduce the amount claimed by Chestlen .

Rebuttal Report - Meshulam), p. 13; Ex. 1110 (Olson Rebuttal Report - RMC), p. 1; Ex. 25, p. 3, § 1.3(b) (Ext. Encl. Gen'l Req. Specs - Admin. Req. Coordination Drawings).]

215. Carney contended during trial that pursuant to the Project Specifications Ventana was required to "field measure" the concrete conditions before it ordered the fabrication of its window wall units.

216. The court concludes that Chestlen's and Carney's evidence was non credible or non-existent and does not explain how Ventana could be charged with the obligation to modify its design on the fly to accommodate the defectively installed slabs with the excessive amount of deflection that occurred and the questionable placement of the rebar.[9]

217. Numerous witnesses at trial testified that the notion of field measuring, once the concrete slabs were poured, and then ordering the window wall units was impractical and not appropriate for a project of this size.

218. Tutor was aware not only of the significant concrete deflections being encountered by Ventana, but also of the adverse impacts that these defects were causing to Ventana's work. *See infra* at ¶¶ 779-786 (Ventana sent Tutor more than 100 delay notices).

219. Questions about excessive deflections, Carney's "4 day pour cycle," and Carney's shoring and reshoring methods arose as early as November-December of 2017. *See* Exhibit 623

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[9] Chestlen seems to rely upon the assertion that Ventana "had never installed a project using the system provided at this Project, much less on a high-rise structure on the scale of this building. [*Id.* at p. 38; Ex. 16; 39T (Kern), 137:8-138:2; 42T (Hogan), 108:23-109:4.] and that Ventana used a system that was "novel and unfamiliar to them," presuming that supports the conclusion that the design and/or installation work was defective. However, given the degree of deflection and the issues with placement of the rebar by other parties, it is hardly a foregone conclusion (and certainly not one that confirms the cause or eliminates anything else) that the only reason for the problems with the windows was Ventana's responsibility. In fact, the overwhelming preponderance of evidence is to the contrary.

- November 20-21, 2017, email chain between Carney and Collins Engineering; Exhibit 105 - Tutor December 6, 2017 email chain to TT.

220. In an email dated December 8, 2017, to Patrick Lanni of Tutor, Andrew Blasetti of TT discussed Carney's shoring and reshoring practices, and commented that Carney's actions "may be overstressing lower floors and increasing slab deflection," and "was dangerous and can lead to extensive floor cracking, excessive deflections, or worse." *See* Exhibit 356 – TT 12/8/2017 email to Tutor.

221. Ventana was kept in the dark about these reports and how they had confirmed what Ventana had been saying all along about the concrete's impact upon its work.

222. Ventana had to significantly alter its installation methods from its usual and anticipated method, at much greater cost to Ventana, to better accommodate the defective concrete slabs because Tutor and Carney were not able or willing to solve the concrete problems themselves. *See* Exhibit 224 – Kern June 22, 2018 email to Magyar; Gerald Kern Trial Tr., 5/19/25(pm), 111:23-114:16, 116:20-25.

223. Because believing they had no other choice, Ventana changed their installation methods to accommodate the differential settlement of the building and still install their head and sill runners in a level line around the building. Shelby Wagner Trial Tr., 9:6-21, 3.28.25.

224. Ventana made clear at the March meeting that this change in its means and methods to install its window wall system out of level would take a lot of extra work on Ventana's part. Shelby Wagner Trial Tr., 11:21-24, 3.28.25; Gerald Kern Trial Tr., 5/19/25(pm), 111:23-114:16.

225. Ventana also made clear at the March meeting that it could only install the head and sill runners out of level "within reason." *See* Exhibit 626 – minutes of Review, at no point

did Mr. Hogan say that the Ventana window wall system could "follow the contours" of the concrete slabs or accommodate uneven or excessively wavy concrete slab edges. *See* Exhibit 213; Shelby Wagner Trial Tr., 22:7-14; 3.28.25.

226. In addition to the non-conforming concrete slabs, Ventana also experienced significant impacts and delays to its work due to Carney's placement of steel rebar in the exact same locations where Ventana's window wall anchors had been planned to be installed. Gerald Kern Trial Tr. 5/20/25(am), 23:2-24:11.

227. Even though Ventana's shop drawings clearly showed, at every level of the building, precisely where its anchors were to be installed onto the concrete slabs by bolts drilled through the slabs, Tutor completely failed to coordinate this anchor work by Ventana with the rebar installation work being performed by its subcontractor Carney. Gerald Kern Trial Tr. 5/20/25(am), 35:5-37:23.

228. As a result of Tutor's lack of performance of contractual duties of coordination, Carney repeatedly installed steel rebar into its concrete slabs in the very same places where Ventana had planned to drill its anchor holes.

229. Had Tutor and Carney listened to VSM, they would have reviewed Ventana's shop drawings and would have seen that the locations for the holes for the anchor bolts could conflict with the rebar rods being placed in the concrete slabs.

230. The precise location of the rebar was not shown on the Carney shop drawings so Ventana would have had no way of knowing where the rebar was installed under the concrete until Ventana began drilling. Gerald Kern Trial Tr., 5/20/25(am), 37:1-10.

231. The rebar conflicts began with the very first slab Ventana worked on. Gerald Kern Trial Tr., 5/20/25(am), 37:2-23.

232. To resolve the rebar conflicts, Ventana also had to engineer and order additional aluminum and additional anchor bolts at their own expense. Gerald Kern Trial Tr., 5/20/25(am), 30:16-31:19.

233. To install the windows around the rebar Ventana had to redesign the anchor clips and use longer and different types of anchors. Jerry Hogan Trial Tr., 5/22/25(am), 82:6-83:21.

234. Additionally, anything that was reengineered had to be vetted by Façade Concepts' engineer who approved the original anchor clip design to make sure the windows were secure and complied with code, which required time and expense. Jerry Hogan Trial Tr., 5/22/25(am), 84:23-86:25. Trial Tr., 5/20/25(am), 37:2-23.

235. During this litigation, Carney has contended that due to engineering reasons it was unable to move its rebar in the concrete forms to accommodate the locations for Ventana's anchor bolts.

236. However, the exhibits introduced at trial make clear that Carney never asserted this contention during the Project itself.

237. Ventana was directed by Tutor to explore other possible installation methods for its anchor bolts, including using different types of bolts including chemical bolts and redesigning and making extensive modifications to its anchor plates. Jack Cooney Trial Tr., 4/29/25(pm), 71:19-72:21; Terry Meistering Trial Tr., 1/28/25(pm), 141:16-24; Shelby Wagner Trial Tr., 3/26/25(pm), 143:7-144:4.

238. These modifications included using longer anchor plates, continuous anchor plates, and the use of a steel plate or angle.

239. To resolve the rebar conflicts, Ventana also had to engineer and order additional aluminum and additional anchor bolts at their own expense. Gerald Kern Trial Tr., 5/20/25(am), 30:16-31:19.

240. Ventana ultimately reengineered its anchor plates (three different sizes) and anchor bolts (three different types of bolts) and used a "hit or miss" random method to install its windows around the improperly placed rebar. Gerald Kern Trial Tr., 5/20/25(am), 24:14-25:14.

241. However, there were thousands of anchors on the Project, and Ventana's "hit or miss" approached increased the time for anchor installation up from a few minutes per anchor to up to 30 minutes per anchor. Gerald Kern Trial Tr., 5/20/25(am), 25:12-14.

242. Ventana gave Tutor notice of the delays it encountered due to rebar conflicts in letters and emails.

243. Ventana also gave Tutor notice of these delays through formal Notices of Delay.

244. Specifically, Ventana issued 16 separate delay notices to Tutor regarding the rebar conflicts, including:

Exhibit 6318 - Delay Notice #9 – 1/4/2018
Exhibit 6323 - Delay Notice #13 1/16/2018
Exhibit 6347 - Delay Notice #45 – 7/16/2018 (33rd floor)
Exhibit 6348 - Delay Notice #46- 8/16/2018 (Floors 32-37)

245. Tutor refused to acknowledge any of the many Notices of Delay that Ventana issued for the rebar conflicts, without reason. Gerald Kern Trial Tr., 5/20/25(am), 61:5-10; 63:20-25.

246. The delays caused by the non-conforming and uncoordinated concrete slab edges and the conflicting concrete rebar also pushed Ventana's own work into the work of the following subcontractors, resulting in massive discoordination of and stacking of trades and further critical interferences and obstructions to Ventana's planned, orderly workflow. *See*

Exhibit 6972 - Photographs of encumbered floors; Gerald Kern Trial Tr., 5/19/25(pm), 149:13-150:2. Exhibit 1020 – Designated Excerpts of Tom Barron Deposition Testimony taken 9/19/23, 23:3-28:12 (trash and materials created a "traffic jam" on the floors).

247. As construction manager, Tutor failed to ensure that all the other subcontractor's work precedent or coincidental to Ventana's work at the Podium was coordinated and completed in a timely manner. Thus, Ventana was forced to proceed out of sequence to move its work to the Tower and later finished its work at the Podium on a piecemeal basis over a period of three years. *See* Exhibit 6974 - Kozek 4/12/24 Expert Report, p. 242.

248. The parties agreed that the project has an "operable vent" problem.

249. The court credits the testimony of Ventana's expert witness, Mr. Moore of Heitmann & Associates, and its lay witness, Mr. Kern, which showed that the reason why the operable vents are not functioning properly is because of the excessive and unanticipated concrete deflection and differential settlement that is occurring between the building's columns. *See* Exhibit 6976 - report of Ventana trial expert Jeffrey Moore, P.E. of Heitmann & Associates, Inc. dated May 31, 2024 (the "Moore 5/31/24 Expert Report") (pgs. 41-44);.Gerald Kern Trial Tr. 5/20/25(am), 105:9-111:15.

250. The court concludes: that operable vents had been manufactured properly; Ventana had made a good faith effort to correct operable vent issues by performing extensive adjustments and remediations; inspections showed that the operable vents are consistently out of square with the lower side of the window frame following deflection; vents that were once operating properly were later becoming out of square; and that the issues with the operable vents were due to differential settlement of the structure. *See* Exhibit 2912 – May 5, 2021 letter from Ventana to TPBC; Jarred Wallace Trial Tr. 4/28/25(am), 40:2-42:9.

251. Ventana's delays were not due to lack of manpower or the inability to procure materials in a timely manner, but rather it was due to improper and non-conforming site conditions caused by Tutor and thus these delays did not constitute a good faith basis for withholding payments from Ventana. *See* Exhibit 6977 - report of Ventana trial expert Jeffrey Kozek of Resolution Management Consultants, Inc. dated July 15, 2024 (the "Kozek 7/15/24 Expert Report"), p. 4.

252. Despite believing that the concrete problems were the result of either Carney's defective work or O&N's defective design, Tutor issued multiple delay notices and backcharges that wrongly blamed Ventana for these delays. *See* Exhibit 6974 – Kozek 4/12/24 Expert Report, p. 96.

253. Proper coordination, as a condition of the contract by Tutor, would have kept the locations of the anchors free of rebar conflicts to allow Ventana to utilize its planned installation process. *See* Exhibit 6974 - Kozek 4/12/24 Expert Report, p. 88.

254. Section 8.7 of the Contract provides that Tutor is responsible to pay subcontractors "in a timely manner after receipt of payment from the Owner" for the subcontractor's work. [Ex. 407, p. 18, Contract § 8.7.]

255. Paragraph 8.1.3 of the General Conditions to the Contract provides that Tutor cannot submit a pay application with a request for payment that Tutor does not intend to remit to the subcontractor who performed the work, due to a dispute between Tutor and the subcontractor. [*Id.* at p. 69, General Conditions ¶ 8.1.3.]

256. Tutor stopped paying Ventana as of Ventana's January 2018 pay application. [27T (Wagner), 44:23-45:11.]

257. Neither Chestlen nor VSM directed Tutor to stop paying Ventana. [4T (Lenfest), 59:17-60:8.]

258. Even though it was not being paid, Ventana continued to submit its monthly payment applications to Tutor. Gerald Kern Trial Tr. 5/20/25(am), 92:14-94:18.

259. Tutor failed to pay Ventana's monthly payment applications Nos. 43 through 66. *See* Exhibit 6665 – Composite Exhibit of All Unpaid Ventana Payment Applications; Gerald Kern Trial Tr. 5/20/25(am), 92:14-94:18

260. Tutor did not inform VSM or Chestlen, in writing or otherwise, that it was withholding monthly payments from Ventana. Shelby Wagner Trial Tr., 45:16-18; 3.28.25; Jared Wallace Trial Tr., 10:6-15, 4.28.25(1).

261. The total amount withheld by Tutor from Ventana's monthly payment applications was in excess of $11 million. Bob Trainor Trial Tr., 5/22/24(pm), 83:2-16.

262. Tutor acted in bad faith when it began to withhold and then continued to withhold monthly payments from Ventana considering these reports that it received from its own engineering consultant, TT.

263. Tutor did not put Chestlen on notice of any delays with respect to Ventana's work. [22T (Sukalo), 56:6-16.]

264. Tutor did not put Chestlen on notice that they would be withholding payment to Ventana. [*Id.* at 56:6-16; 28T (Wallace), 10:9-15.]

265. Tutor falsely represented to Ventana that the reason they were not getting paid was because Chestlen was not paying Tutor. [43T (Trainor), 74:19-76:3.]

266. In June 2018, Ventana advised Chestlen that it had not been paid by Tutor despite Chestlen's payment of those monies to Tutor. Chestlen came to learn that Tutor was holding those

monies, which was over $1 million, and intended to pay other trades with those monies, which was unacceptable to Chestlen – "the items in the payout need to reflect what's being approved in payout and that's what we're [Chestlen] paying for, not some other reason Tutor comes up after the fact and blames Ventana and then tries to use it to pay some other subs." [6T (Meistering), 26:14-27:24; Ex. 215; 43T (Trainor), 76:4-18.]

267. By the time the liens were asserted, Chestlen had already paid Tutor over $239 million in cash [Ex. 1976, p. 1 (line 7); Ex. 1977, p. 1 (line 7)]; had accrued over $40,000,000 in liquidated damages; and had accrued tens of millions more in floor remediation costs.

268. Title to the Property is clouded with over $155 million in liens. [2T (Lenfest), 9:16-23, 11:19-21.]. Several of Tutor's subcontractors submitted unvetted delay claims, many of which had not been previously shared with Chestlen [*id.* at 209:21-25], which became part of those subcontractors' mechanics' liens.

269. Peter Sukalo admitted that River Mechanical's delay claim for $11 million was received in January 2020 and was not forwarded to Chestlen until August 2021 – in contravention of the explicit notice requirements under the Contract. [Ex. 7489; 22T (Sukalo), 117:17-118:11, 119:4-12 and 120:7-20.]

270. Peter Sukalo admitted McCrae/Gordon's delay claim for close to $6 million dated April 17, 2020 was not forwarded to Chestlen until August 2021 – in direct breach of the notice requirements under the Contract. [Ex. 368, 22T (Sukalo), 118:13-119:12 and 120:7-20.]

271. Tutor incorporated all of its subcontractors' claims, including the unvetted delay claims, into its own lien filed against the Property. [Ex. 219; Ex. 1942.]

272. Tutor's own records allocate delay responsibility to Carney and Ventana. [Ex. 735 (Email from Tutor's scheduler describing almost a year of delays as "Carney Delays" [60 days]

and "Ventana Delays" [297 days]); Ex. 708 (Email from TT stating "Windows are going in on the lower floors now, despite the fact that Ventana previously claimed that they could not install them due to slab deflection issues. TP [Tutor] is trying to nail them on this because it caused the initial delay.").]

273. Arch issued two bonds to secure Carney's performance under its Primary and Companion Subcontracts with Tutor Perini (collectively, "Arch Bonds"). [Stip. ¶¶ 13-14; Ex. 7495; Ex. 7496.]

274. In the Arch Bonds, Carney and Arch agreed to "bind themselves . . . to [Tutor and Chestlen] . . for performance of the [Carney Subcontracts]"; and they further agreed to "fully indemnify and save harmless [Tutor] for all liability, cost, damage, expense and attorney's fees . . . by reason of [Carney's] failure to performance of the Subcontract" . . ." [Ex. 7495, p. 1; Ex. 7496, p. 1.]

275. The "Conditions" section in the Arch Bonds states that "[w]henever [Carney] is declared by [Tutor] to be in default under the Subcontract . . . [Arch] shall promptly . . . remedy the default in all respects . . . [or] complete the Subcontract in accordance with its terms and conditions [or] . . . obtain a bid or bids . . . for completing the Subcontract . . . . [or] determine "the amount for which it is liable to [Tutor] and pay [Tutor] that amount" . . . ." [Ex. 7495, p. 1; Ex. 7496, p. 1.]

276. In the event of a Carney default, Arch agreed that it would be liable for the "cost of completion," which includes the cost to correct defective work, legal and design professional costs, and liquidated damages. [Ex. 7495, pp. 2-3; Ex. 7496, pp. 2-3.]

277. On February 1, 2018, Arch sent a letter in which it "acknowledge[d] receipt of [Tutor's] letter . . . dated January 29, 2018," "conclude[d] that [Tutor's] letter was sent solely for

informational purposes," and declared that it "will take no additional action unless [Arch] hear[s] further from [Tutor]." [Ex. 333.]

278. While Arch claims that it never received sufficient notice of a claim against the Arch Bonds, that position is not credible and rejected by the court given Tutor's unequivocal statement in its January 29 letter that "[Carney] is in beach of [its] contract requirements" – which leaves no room for ambiguity.

279. Arch has also attempted to reduce or disclaim its liability altogether based on a theory that Chestlen and/or Tutor failed to timely remediate and therefore failed to mitigate damages from Carney's defective concrete.

280. Contrary to Arch's position, Chestlen made numerous vigorous efforts to mitigate its losses. Under the Contract, Tutor was responsible for completing the Work in accordance with the designs, plans, and specifications. [Ex. 407, p. 5, Contract § 2.1.]

281. The credible overwhelming preponderance of trial evidence contradicts Tutor's allegations and contradicts Tutor's claim that Chestlen breached the Contract. *First*, Tutor repeatedly failed to cooperate with Chestlen and, contrary to the Contract, failed to protect Chestlen's interests. *Second*, the concrete deflections were excessive, unanticipated, and were caused by Carney's workmanship, not O&N's design, and therefore are Tutor's responsibility. *Third*, even regardless of responsibility, Tutor is responsible for all delays because Tutor never submitted a timely, properly documented claim for a Permitted Delay [Ex. 407, p. 67, General Conditions ¶ 7.3.1.1] and, moreover, the Contract provides that the only way to extend the Contract Time is by a Change Order or a CCD, which never occurred for any of the time periods Tutor now complains about. [Ex. 407, pp. 79-80, General Conditions ¶ 11.2.1.] *Fourth*, the Contract fully supports Chestlen's right to apply liquidated damages as credit for payments owed to Tutor – the

Project failed to attain Substantial Completion by the Required Substantial Completion Date [*id.* at pp. 5-6, Contract §§ 3.3, 3.5, 3.6], Chestlen notified Tutor of its intent to apply liquidated damages credits in lieu of payments after Payment Application 63 [*e.g.*, Ex. 7426; 27T (Wallace), 172:19-22], and Tutor failed to make a Claim under Paragraph 14.11 of the General Conditions to the Contract to dispute Chestlen's decision regarding liquidated damages. [Ex. 407, pp. 89-90, General Conditions ¶ 14.11.]

282. Among the critical promises Tutor made to Chestlen are the promise to deliver the Project on time [Ex. 407, p. 5, Contract § 3.3] and within the Final GMP [*id.* at pp. 6-7, Contract § 4.1.]

283. If Tutor failed to Substantially Complete the Work by the Required Substantial Completion Date, then it is liable to Chestlen for liquidated damages. [*Id.* at pp. 5-6, Contract § 3.5.]

284. The Required Substantial Completion Date is determined based on the Contract Time. [*Id.* at pp. 5-6, § 3.3.]

285. Tutor agreed that the Contract Time is "a reasonable time for achieving Substantial Completion." [*Id.* at p. 64, General Conditions ¶ 7.1.2.1.]

286. It further agreed that the Contract Time would be 1,017 days from the Notice to Proceed, subject to adjustments as provided in the Contract. [*Id.* at p. 5, Contract § 3.3.]

287. The only way to adjust the Contract Time is by a Change Order or Construction Change Directive. [*Id.* at p. 79, General Conditions ¶ 11.1.2.]

288. To adjust the Contract Time for a delay for which Tutor thinks Chestlen is responsible, Tutor must follow the procedure in Paragraph 7.3.1 of the General Conditions to the Contract. [*Id.* at pp. 66-67, General Conditions ¶ 7.3.1.]

289. Paragraph 7.3.1 of the General Conditions to the Contract requires Tutor to bring a claim to extend the Contract Time for a Permitted Delay (*i.e.*, delay caused by Owner or its Design Team) within twenty-one days. [*Id.*]

290. If Tutor missed the Required Substantial Completion Date and Chestlen accrues liquidated damages, Chestlen can apply those liquidated damages as an offset to any amount owed to Tutor Perini – including payment for subcontractors. [*Id.* at p. 6, Contract § 3.6.]

291. Tutor failed to make a timely or properly documented delay claim that would extend the Required Substantial Completion Date, triggering Chestlen's right to use liquidated damages and to apply those liquidated damages as credits towards payment.

292. Despite Tutor's contractual obligation to cooperate in good faith with Chestlen, the evidence shows that Tutor consistently acted and failed to act to further their own self-interests and did so in bad faith, hiding the facts and misleading Chestlen and VSM during the course of the Project.

293. For example, Tutor knew about the concrete deficiencies, and discussed remediating these deficiencies with Mr. Fahey of Surface Specialties in 2017 and 2018. *See* Exhibit 550 – September 29, 2017 Fahey email to Tutor Perini; Tim Fahey Trial Tr., 1/30/24(pm), 146:3-149:7, 1/31/25(pm); 143:15-144:21.

294. However, Tutor never shared these discussions it had with Mr. Fahey with VSM or Chestlen. Shelby Wagner Trial Tr., 3/25/25(am), 134:8-136:21.

295. Tutor also hid the TT January 10, 2018 "Slab Deflection Analysis" report from VSM and Chestlen, because it noted Carney's improper shoring and reshoring activities and that the slab deflections were impacting Ventana's work.

296. Tutor also hid the TT February 7, 2019 "Evaluation of Reported Structural Movements" report from VSM and Chestlen, because it placed blame on Carney and exonerated Ventana for the delays that it was experiencing in installing its window wall system.

297. Tutor acted in inexcusable bad faith when it began to withhold and then continued to withhold monthly payments from Ventana in light of these reports that it received from its own engineering consultant, TT.

298. Section 14.7 of the General Conditions of the Agreement requires Tutor to discharge or obtain a discharge bond for any lien placed on the Project by its subcontractors within ten days of notice from Chestlen. [Ex. 407, p. 88, General Conditions ¶ 14.7.]

299. Although Tutor initially bonded several liens (such as liens filed in 2018 by Carney and Ventana, and a lien filed in 2020 by Component), it took more than ten days to bond those liens, resulting in Chestlen claiming damages for "hundreds of days [of] unbonded title damage." [27T (Wallace), 190:12-191:17.]

300. In those instances, the unbonded liens resulted in Chestlen's lender withholding funds, which led Mr. Lenfest to fund construction "in cash because there was no ability to draw lender funding." [27T (Wallace), 191:7-17; 2T (Lenfest), 11:1-13.]

301. Chestlen stopped paying Tutor for General Conditions for the time after the Required Substantial Completion date of August 3, 2018. [Stip. ¶ 52; 1T (Lenfest), 78:20-79:4.]

302. Beginning with the Tutor pay application for July 2020, Chestlen asserted that it was exercising a contractual right to apply credits for liquidated damages and remediation expenses to pay for all future pay applications. [2T (Lenfest), 6:11-8:13; Ex. 407, p. 6, Contract § 3.6; *id.* at pp. 70-71, General Conditions ¶ 8.3.1; Ex. 7426.]

303. Tutor argued that Chestlen could not use liquidated damages credits until any dispute about responsibility for delays was resolved. [22T (Sukalo), 116:9-12.] Tutor also argued that – regardless of Chestlen's asserted right to use liquidated damages credits under Section 3.6 – it was not going to pay its subcontractors unless it received money from Chestlen. [22T (Sukalo), 110:18-25].

304. Tutor refused to recognize Chestlen's asserted explicit contractual rights and instead stopped paying its subcontractors. [2T (Lenfest), 6:11-25, 8:14-23; 20T (Sukalo), 76:5-24; 27T (Wallace), 174:22-175:5; Ex. 7426.]

305. As a result, many of those subcontractors refused to complete their work, and many filed liens against the Property (most of which have been consolidated with this case). [Stip. ¶ 59; 2T (Lenfest), 8:18-23; Ex. 1929 (Abbonozio); Ex. 1930 (Carney); Ex. 1931 (Component); Ex. 1932 (Crystal); Ex. 1933 (DeSeta); Ex. 1934 (Giffen); Ex. 1935 (Glazing); Ex. 1936 (James Floor Covering); Ex. 1937 (McCrae-Gordon); Ex. 1938 (McGregor); Ex. 1939 (Otis); Ex. 1940 (River Mechanical); Ex. 1941 (Suburban); Ex. 1943 (Ventana).]

306. In a good faith effort to keep clear title, Chestlen "began contacting Tutor's subcontractors attempting to work it out with them"; and Mr. Lenfest even "agreed to come out of his pocket to make offers to subcontractors." [27T (Wallace), 175:18-5; *see also id.* at 177:1-6 ("We met with a lot of subcontractors . . . [a]nd we tried to come up with ways so that they could get paid something."); Ex. 340 ("We . . . have advised Otis that we would work in good faith to try to make [payment] happen").]

307. As those liens were filed, Chestlen notified Tutor of the liens, pursuant to Section 14.7 of the General Conditions of the Agreement. [*See, e.g.*, Ex. 340; Ex. 1944 (notices for

Glazing, Otis, DeSeta, River Mechanical, and Giffin); 2T (Lenfest), 8:24-9:1; 27T (Wallace), 181:2-182:20.]

308. The following liens arising from the Project have not been bonded over by Tutor as required under the contract and currently encumber the Property:

- Glazing Concepts LLC [Ex. 1575.]
- River Mechanical, Inc. [Ex. 1580.]
- Edward J. DeSeta Co., Inc. [Ex. 1573.]
- James Floor Covering, Inc. [Ex. 1576.]
- Otis Elevator [Ex. 1579.]
- Crystal Steel Fabricators, Inc. [Ex. 1572.]
- Suburban Enterprises Terrazzo & Tile Co., Inc. [Ex. 1581.]
- McCrae-Gordon, A Joint Venture, LLC [Ex. 1577.]
- Giffin Interior [Ex. 1574.]
- McGregor Industries, Inc. [Ex. 1578.]
- Tutor Perini Building Corp. [Ex. 1582.]

[Stip. ¶ 59-60; Ex. 1944.]

309. The total GMP was initially $239,161,272, and according to Tutor Perini's Payment Applications 71P and 71C, was increased to $255,782,216. [Ex. 1976; Ex. 1977.]

310. By the time the liens were filed, Chestlen had already paid Tutor over $239 million in cash [Ex. 1976, p. 1 (line 7); Ex. 1977, p. 1 (line 7)].

311. As of the date of the trial, title to the Property is clouded with over $155 million in liens. [2T (Lenfest), 9:16-23, 11:19-21.]

312. Peter Sukalo admitted that River Mechanical's delay claim for $11 million was received in January 2020 and was not forwarded to Chestlen until August 2021. [Ex. 7489; 22T (Sukalo), 117:17-118:11, 119:4-12 and 120:7-20.]

313. Peter Sukalo admitted McCrae/Gordon's delay claim for close to $6 million dated April 17, 2020 was not forwarded to Chestlen until August 2021. [Ex. 368, 22T (Sukalo), 118:13-119:12 and 120:7-20.]

314. Tutor claimed that it was "assembling all the claims" and, therefore, did not send any of the delay claims, including River, McCrae Gordon and Otis, when they were received. [22T (Sukalo), 118:23-119:3.]

315. Tutor's August 2021 Request for Additional Compensation included subcontractor delay claims that had not previously been sent to Chestlen. [Ex. 219.] The Request for Additional Compensation was the alleged basis for Tutor's subsequently filed lien. [*Id.* at 129:2-14.]

316. Tutor incorporated all its subcontractors' claims, including the unvetted delay claims, into its own lien filed against the Property. [Ex. 219; Ex. 1942.]

317. Section 4.5 of the Contract addressed the proper use of the construction manager's contingency fund. [Ex. 407, p. 13, Contract § 4.5.]

318. Tutor was required to ask Chestlen's permission for any expenditure over $100,000. [Ex. 407, p. 13, Contract § 4.5.]

319. Tutor took money from the contingency fund for expenses which were not allowable, including for "costs incurred as a result of negligence of a subcontractor." [*Id.* at 42:13-43:19; Ex. 177.]

320. Tutor used the contingency fund to "increase their general conditions to cover their staff costs." [*Id.* at 45:9-46:16; Ex. 177.]

321. Despite demands from Chestlen, Tutor refused to reinstate any of the monies back into the contingency fund and refused to provide updated contingency logs consistent with the contract. [*Id.* at 43:16-19 and 47:3-10.]

322. Arch has attempted to reduce or disclaim its liability altogether based on a theory that Chestlen and/or Tutor failed to timely remediate and therefore failed to mitigate damages from Carney's defective concrete.

323. Contrary to Arch's position, Chestlen made numerous efforts to mitigate its losses. Under the Contract, Tutor was responsible for completing the Work in accordance with the designs, plans, and specifications. [Ex. 407, p. 5, Contract § 2.1.]

324. Tutor obtained remediation proposals as early as August 2017, but concealed those proposals from Chesten and, moreover, failed to proceed to remediate the floors at that time.

325. The preponderance of the credible trial testimony showed that had remediation occurred then, it would have taken less time and cost less money than the remediation that Chestlen was ultimately forced to conduct years later after Tutor began the interior fit-out.

326. But with the limited information it did have, Chestlen acted diligently in seeking to have Tutor (its Construction Manager) address the issues with the concrete floors, but its efforts were largely frustrated because Tutor was obstructing and intentionally concealing critical information from Chestlen about the true cause and extent of the floor issues.

327. Arch also contends that Chestlen's floor remediation amounts to betterment.

328. Here, Chestlen's floor remediation did not amount to betterment. To the contrary, even the remediated floors did not all meet the contractual specifications, but given its desire to open the hotel, Chestlen nonetheless accepted those floors.

329. Tutor contends Chestlen breached the contract in that Chestlen failed to cooperate with Tutor during the Project (and specifically during its "investigation" of the concrete deficiencies) [Tutor Complaint, at ¶¶ 48, 60], provided inadequate plans [*id.* at ¶ 78], used the anticipated concrete deflections to obtain better floors than what it contracted to receive [*id.* at ¶¶ 61, 75], caused delays on the Project [*id.* at ¶¶ 74, 89 (alleging, on information and belief, a "scheme to slow down the Project when . . . COVID-19 caused . . . shutdown[s]")], and improperly relied on its right to liquidated damages [*id.* at ¶ 85.]

330. The substantial preponderance of credible trial evidence contradicts Tutor's allegations and contradicts Tutor's claim that Chestlen breached the Contract.

331. The court specifically finds that, *first*, Tutor repeatedly failed to cooperate with Chestlen and, contrary to the Contract, failed to protect Chestlen's interests; s*econd*, the concrete deflections were excessive, unanticipated, and were caused by Carney's workmanship, not O&N's design, and therefore are Tutor's responsibility; *third*, even regardless of responsibility, Tutor is liable for all delays because Tutor never submitted a timely, properly documented claim for a Permitted Delay [Ex. 407, p. 67, General Conditions ¶ 7.3.1.1] and, moreover, the Contract provides that the only way to extend the Contract Time is by a Change Order or a CCD, which never occurred for any of the time periods Tutor now complains about. [Ex. 407, pp. 79-80, General Conditions ¶ 11.2.1.]; *fourth*, the Project failed to attain Substantial Completion by the Required Substantial Completion Date [*id.* at pp. 5-6, Contract §§ 3.3, 3.5, 3.6] ,and Chestlen notified Tutor of its intent to apply liquidated damages credits in lieu of payments after Payment Application 63 [*e.g.*, Ex. 7426; 27T (Wallace), 172:19-22], and Tutor failed to make a Claim under Paragraph 14.11 of the General Conditions to the Contract to dispute Chestlen's decision regarding liquidated damages. [Ex. 407, pp. 89-90, General Conditions ¶ 14.11.]

332. The court, as trier of fact, largely rejects the expert opinions submitted, particularly those that are inconsistent with its findings of fact insofar as the record has sufficient evidence from the testimony of fact witness that the court has determined are credible as to the conduct of Tutor and Carney and the actions that took place or they failed to do on the project that could be evidenced, perceived by the parties involved in the construction, evidence sufficient by a preponderance of the credible, admitted factual trial evidence to support the court's conclusions of law.

CONCLUSIONS OF LAW

1. Chestlen has proven by a clear preponderance of evidence its breach of contract claims against Tutor Perini.

2. To prevail on a claim for breach of contract, a party must prove three elements: (1) a contract, (2) breach, and (3) damages. *See McShea v. City of Phila.*, 995 A.2d 334, 340 (Pa. 2010); *Gorski v. Smith*, 812 A.2d 683, 692 (Pa. Super. 2002).

3. The agreement is unambiguous.

4. Tutor breached the Agreement because it failed to do what the Agreement required it to do within the time that it had agreed to complete performance.

5. Tutor breached the Contract in the following ways:

   (a) Tutor failed to oversee and coordinate construction by and among the various trades, particularly the concrete work of Carney and window wall design and installation of Ventana.

   (b) Tutor performed deficient Work, particularly the concrete and operable window vents; and it failed to correct that Work;

   (c) Tutor failed to complete the Work by the Required Substantial Completion Date of August 3, 2018; and failed to Substantially Complete the Work;

   (d) Tutor Perini exceeded the GMP;

   (e) Tutor failed to act as a fiduciary and to act in the best interests of Chestlen;

(f) Tutor breached the contract by submitting pay applications seeking money for Ventana with no intention of paying Ventana;

(g) Tutor misused the Project's Contingency Fund; and

(h) Tutor failed to bond over or discharge mechanic's liens.

6. In light of these conclusions, Tutor cannot establish, and the court cannot reach the determination that Tutor "substantially performed" its obligations under the contract. The overwhelming evidence in the court's factual findings mandates the rejection of Tutor's argument that it performed its obligations.

7. The two principal defenses to Chestlen's claims presented at trial—*i.e.*, failure to mitigate and betterment—are damages issues for which the law nonetheless weighs in Chestlen's favor.

8. Tutor has also contended that the existence of a Builder's Risk insurance policy should defeat liability – a position the Court denied without prejudice when Tutor raised the same argument earlier in the case via motion. *See* Order dated February 18, 2025. The court concludes that Tutor's position is flawed and unpersuasive for all the reasons set forth in Chestlen's opposition to Tutor's motion. And, moreover, despite having an opportunity at trial to present evidence in support of its arguments, Tutor presented nothing to support its position.

9. The evidence attributing the delays and contract breaches to the Design Professionals did not meet Tutor and Carney's burden of proof to establish the elements of a claim for negligence by these parties or do not excuse Tutor and Carney's failure to fulfill their contractual obligations to Chestlen.

10. The delays and costs associated with the issues relating to the concrete slabs are not inherent in the design or the responsibility of the Design Professionals but resulted from Tutor's failures to supervise and coordinate the construction and Carney's failures to follow the

specifications and failure to exercise proper care and follow reasonable standards for the performance of such work.

11. Every delay in the performance and completion of the project is the responsibility of Tutor and Carney.

12. The court expressly rejects Tutor's claim that it is entitled to ANY deemed extensions in the time for completion of the project, including due to the progress of structural concrete and window wall work, the stop work order, COVID-19 or any delay in accepting completion.

13. Tutor breached the obligation of good faith under the contract in failing to operate and communicate transparently with the owner and in intentionally hiding and purposefully failing to timely provide critical information from the owner regarding the issues with the concrete.

14. Tutor further breached the obligation of good faith in its actions related to the self-interested clandestine investigation of concrete issues by and through TT and its failure to disclose TT's findings to Chestlen, VSM and CLA.

15. Any claim by Tutor that it was "not required" to make formal delay claims because the owner "already knew" is wholly rejected because of Tutor's pervasive bad faith and lack of fair dealing.

16. Tutor admitted in testimony at trial of its primary witness that it viewed Tutor as having a fiduciary obligation to Chestlen.

17. Tudor by a clear ponderance of the evidence, materially and intentionally failed to timely disclose critical necessary and material facts and information and failed to act, and its conduct was overwhelmingly contrary to acting in the best interests of the project, acting in good faith and/or as a fiduciary to Chestlen during the project.

18. Tutor failed to act consistently with those obligations to Chestlen and its failure amounts to bad faith and a material breach of contract.

19. Insofar as Tutor and Carney materially breached the contract well in advance of Chestlen's failure to pay, Tutor's claim based upon failure to pay is irrelevant and immaterial.

20. The parties do not effectively dispute, and thus the Court finds, that Ventana has met its burden of proof by a preponderance of evidence with respect to the elements of its breach of contract claim.

21. Starting with Ventana's Payment Application No. 43 for January of 2018, Tutor has wrongfully failed to pay, in their entirety, the monthly payment applications submitted by Ventana for the work that Ventana performed on the Project.

22. The decision to stop paying Ventana was Tutor's alone and was not mandated or requested by the Owner.

23. However, Tutor continued to pass along Ventana's payment applications to the Owner for a substantial period in 2018, and it continued to receive payments from the Owner for Ventana's work, without notifying the Owner that it had no intention of paying Ventana for the invoiced work.

24. The Subcontract incorporated by reference the Project Specifications, pursuant to which Tutor, as Construction Manager, was obligated to coordinate the work of Ventana and its other subcontractors related to the work performed to the building exterior.

25. Tutor's responsibility to coordinate the work was acknowledged by Tutor's top executive on the Project, Mr. Sukalo, who testified unequivocally at trial that Tutor was required under the contract documents to coordinate the work of its subcontractors including Ventana and Carney.

26. However, the overwhelming weight and preponderance of the evidence at trial showed that Tutor utterly failed to fulfil its obligation to coordinate the work of Ventana and its other subcontractors, resulting in extra work and additional costs incurred by Ventana to install the window wall system.

27. Tutor attempted to show at trial that Ventana's window wall system design was defective and failed to satisfy the Project requirements, thereby contributing to delays to the Project.

28. However, the overwhelming weight and preponderance of the credible evidence at trial established that Ventana's window wall installation tolerance was well within industry standards and fully met the Project requirements as agreed upon during the CDA meetings.

29. No party ever asserted a "design defect" claim against Ventana and cannot claim a defect as a basis for recovery from or a defense to Ventana.

30. The overwhelming weight of the evidence at trial established that the delays to Ventana's work were caused by the non-conforming, non-coordinated and defective work by others, and were not due to any fault of Ventana, in essence confirming by a preponderance of the evidence that Ventana did not breach any contractual obligation AND that Tutor breached its contract with Ventana.

31. Pursuant to Pennsylvania's Contractor and Subcontractor Payment Act, 73 P.S. § 501, *et. seq.* ("CASPA") (discussed in more detail below), for a contractor to withhold payment from a subcontractor the amount withheld must "bear[] a reasonable relation to the value of any claim held in good faith by the owner, contractor or subcontractor against whom the contractor or subcontractor is seeking to recover payment." 73 P.S. at § 512.

32. Here, the Court finds that any possible issues that might have existed regarding F.E. Cladding's lien waivers were addressed by Ventana and not sufficient to afford Tutor a good faith reason for withholding millions of dollars of monthly payments from Ventana substantially more than the amounts allegedly subject to a potential F.E. Cladding lien. The Court notes the testimony from Ventana that it produced other evidence of payment having been made to F.E. Cladding in the form of cancelled checks.

33. The Pennsylvania Contractor and Subcontractor Payment Act, 73 P.S. § 501, *et. seq.* ("CASPA"), is a statute enacted "to cure abuses within the building industry involving payments from contractors to subcontractors and to encourage fair dealing among the parties to a construction contract." *Zimmerman v. Harrisburg Fudd I, L.P.*, 984 A.2d 497, 501 (Pa. Super. Ct. 2009).

34. T]he purpose of [CASPA] is to provide protection to contractors [who] require the greatest protection when they perform work on major construction projects." *El-Gharbaoui v. Ajayi*, 260 A.3d 944, 954 (Pa. Super. Ct. 2021), quoting *Nippes v. Lucas*, 815 A.2d 648, 651 (Pa. Super. Ct. 2003).

35. CASPA protects subcontractors such as Ventana (and the other subcontractors who have asserted mechanics' liens in conjunction with this project) by, among other things, requiring contractors to pay subcontractors within fourteen days of receiving a progress or final payment from the owner, or within fourteen days of receipt of the subcontractor's payment application, whichever is later. 73 P.S. § 507(c).

36. CASPA also mandates that when a contractor withholds payment from a subcontractor, the contractor must notify both the subcontractor and the owner of the basis for withholding payment. *See* 73 P.S. § 511(b).

37. The purpose of CASPA's notice requirement is to afford the subcontractor the opportunity to correct the deficiency. *See Moravian Assocs., L.P. v. Henderson Corp.*, 2008 U.S. Dist. LEXIS 62260, *33-35 (E.D. Pa. 2008) (held that a letter sent by Moravian's counsel to Henderson's counsel after the project was completed was not intended to be notice within the meaning of section 511 as it did not "not point to any specific items as requiring attention.").

38. As a threshold matter, CASPA governs the Subcontract between Tutor and Ventana (and the other subcontractors in this consolidated matter who have asserted mechanics' liens), as, by its plain terms, CASPA governs Pennsylvania construction contracts involving Pennsylvania projects. 73 P.S. § 502. *See also Am. Builders & Contrs. Supply Co. v. High Constr.*, 2021 Pa. Dist. & Cnty. Dec. LEXIS 2387, *11 (holding that CASPA applied because the construction contract in question called for "the furnishing of building materials to be incorporated into permanent improvements on real property").

39. Here, the undisputed record demonstrates that, over a period of more than two years, Ventana installed the window wall façade on a 51-story building (and performed substantial other glazing work), in conformity with its contract obligations.

40. Ventana timely submitted its payment applications to Tutor for its work. From January of 2018 through May of 2018 (Payment Applications Nos. 43 through 46) Tutor Perini submitted those Payment Applications to Chestlen and received payment on them.

41. Under CASPA, Tutor was strictly required to pay Ventana within fourteen days of receipt of payment on those applications from Chestlen.

42. Tutor did not do so in clear violation of CASPA.

43. Tutor has violated CASPA by (i) failing to timely pay Ventana for its monthly payment applications and change order work, (ii) failing to provide Ventana and Chestlen timely

notice of the reasons for withholding monthly payments from Ventana, and (iii) withholding millions of dollars of payments from Ventana without any good faith basis—all of which present textbook violations of CASPA that highlight the vital importance and continuing need for CASPA today.

44. As to the remaining subcontractors on the Project, Tutor failed to comply with CASPA because its assertion of the "pay-if-paid" clauses was in bad faith.

45. Tutor had a good faith basis to withhold funds from Carney insofar as Tutor notified Carney that it may be in default under its subcontract, that backcharges would be assessed against it, and that liquidated damages may also be passed down. *See, e.g.*, Ex. 1973 at 54 (December 4, 2017 letter notifying Carney of potential delays); 55 (September 18, 2017 letter), 53 (December 21, 2017 letter), 50 (January 11, 2018 letter).

46. While Tutor's subcontracts contain indemnification obligations, stating that each subcontractor agreed: ""[t]o the full extent allowed by Pennsylvania law, to indemnify, defend and save harmless," the Owner and Tutor for damages "of any kind at any time arising out of or in any way connected with the Subcontractor's performance or failure to perform the Subcontract work, or the acts or omissions of Subcontractor," and their sub-subcontractors, such provision does not wholly absolve Tutor for damages related to Carney's performance, insofar as Tutor breached its obligation to supervise Carney and to coordinate the construction, which failure is causally related to the delays and cost overruns. *See* Ex. 4087 at § 4(E); 6962 at § 4(E).

47. The court concludes that both Tutor and Carney are jointly liable for the delays and for the additional costs to complete the project which do not arise out of excusable delays within the meaning of the contract, with the percentage of liability to be determined at the damages trial.

48. The court wholly rejects Tutor's request for "relief requested" tagged on to the end of its submission following its 188-page outline of proposed findings of fact and conclusions of law as procedurally irregular and wholly inconsistent with the evidence at trial and the foregoing factual findings and conclusions of law.

CONCLUSIONS

For all the foregoing reasons, the court summarizes its findings as follows:

(1) the Court finds in favor of Chestlen and against Tutor on Chestlen's claim for breach of contract against Tutor, with damages, attorneys' fees, and other costs to be determined later in accordance with the Court's trial directives.

(2) the Court finds in favor of Chestlen and against Tutor on Tutor's breach of contract claim against Chestlen.

(3) to the extent that Chestlen was asserting liability on the part of Ventana for any delays or attempted to suggest that Ventana was not entitled to recover under its subcontract for work performed on the project, the court finds in favor of Ventana and concludes that Ventana does not owe any damages to Chestlen and is not liable to Chestlen.

(4) the court enters a finding in favor of Ventana and against Tutor on all three counts of Ventana's complaint in an amount to be determined at a damages trial.

(5) the court finds liability on the part of Carney for failure to perform its subcontract and for delays in the completion of the project, the degree of which, the damages related to the failure of supervision and coordination and the extent of recovery, if any, Tutor may obtain for breach of the subcontract between Tutor and Carney, shall be determined at a damages trial.

(6) the court finds in favor of Tutor and against Carney on Carney's claims for breach of contract and violation of CASPA.

(7) the court rejects the claims of Carney and Tutor that the deficiencies in the performance of their duties under the subcontract and contract are the fault of the Design Professionals.

(8) the court finds against Arch on its bond securing the performance of Carney, rejecting any alleged defenses based on lack of notice or failure to mitigate.