IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

ADF INTERNATIONAL, INC.,
a foreign corporation,

Plaintiff,

vs.

SUFFOLK CONSTRUCTION COMPANY, INC.,
a foreign corporation, et al.,

Defendants.
_____/

CASE NO. 17-26997 CA 44

THIRD-PARTY DEFENDANTS' AND COUNTER-PLAINTIFFS' PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL JUDGMENT

Third-Party Defendants and Counter-Plaintiffs All Aboard Florida – Operations, LLC, n/k/a Virgin Trains USA Florida LLC, as successor to All Aboard Florida – Stations, LLC, DT Miami LLC, and DTS 2MC Office, LLC (collectively, the "Owners") hereby submit the following proposed findings of fact, conclusions of law, and final judgment.

PREFATORY NOTE REGADING SCOPE

Because Plaintiff ADF International, Inc. ("ADF") has no claims against the Owners, the proposed findings of fact and conclusions of law herein do not address all of ADF's factual and legal assertions in this litigation. Rather, the proposed findings and conclusions focus on the Defendants' derivative third-party claims against the Owners, and the counterclaims thereto.

The Defendants' third-party claims seek to deflect blame for the Defendants' failings and "pass through" to the Owners an unspecified portion of any damages which the Court may ultimately assess against them with respect to the Terminal and OB-1 Projects at issue here. In order for the Defendants to prevail on those claims, however, they must first establish that they are not themselves responsible for the amounts they seek to "pass through" to the Owners.

For example, Defendants Skidmore, Owings & Merrill LLP and Skidmore, Owings, and Merrill Florida LLC (together, "SOM") must prove that if the Final Construction Documents for the two Projects had been accurate, complete, and coordinated at the time they were issued, the Owners would have had to pay *more* than they actually did to construct the Projects. In addition, SOM must also prove *how much more*, to a reasonable degree of certainty. Otherwise, it would be manifestly inappropriate to require the Owners to pay any more than they already have for design-related changes – which, as discussed below, is too much.

Likewise, Defendant Suffolk Construction Company, Inc. ("Suffolk") must prove that even if it had properly managed the procurement, fabrication, and erection of structural steel for the two Projects, the Owners still would have had to pay more to construct those Projects. And, as above, Suffolk must also prove how much more, to a reasonable degree of certainty. Otherwise, it would again be manifestly inappropriate to require the Owners to pay more than they already have for the structural steel elements of the Projects.

We believe the Court will find that none of the Defendants are even remotely prepared to make the showings required to assess "pass through" liability and damages against the Owners. Quite the contrary, we believe the Court will find that the Defendants are liable to the Owners for substantial damages caused by their breaches of contract and negligence.

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

INTRODUCTION

1. This lawsuit arises out of the design and construction of two related projects in downtown Miami, Florida – the Virgin Trains MiamiCentral Station (the "Terminal Project"), and a 10-story office building which rises out of the Terminal structure (the "OB-1 Project"). All Aboard Florida – Operations, LLC, n/k/a Virgin Trains USA Florida LLC ("AAF") is the owner of the Terminal, while DT Miami LLC ("DTM") and DTS 2MC Office LLC ("DTS") were at certain points in time the owner of the OB-1 Project. AAF, DTM, and DTS are collectively referred to herein as the "Owners."

2. The Terminal is a critically important development project for the State of Florida, the City of Miami, and the Owners, as it is the flagship station for a new state-of-the-art passenger rail system which will ultimately connect the five largest urban population centers in Southern and Central Florida – Miami, Fort Lauderdale, West Palm Beach, Orlando, and Tampa. That passenger service is now running between Miami, Fort Lauderdale, and West Palm Beach, and construction of the segment to Orlando is underway. It is the first privately-funded passenger rail system built in the United States in many decades.

3. In 2014, the Owners hired a design firm and construction manager which they believed could accomplish their goals of delivering a first-class product timely and on budget. The design firm was Skidmore, Owings, and Merrill LLP ("SOM"), which holds itself out to be the premier architectural and engineering firm in the world. The construction manager was Suffolk Construction Company, Inc. ("Suffolk"), which holds itself out to be one of the premier construction managers in the country. Suffolk, in turn, hired ADF International, Inc. ("ADF"), which holds itself out to be one of the premier steel fabricators and erectors in the country.

4. The Owners expected the highest-levels of service, cooperation, and results. What they received, however, was quite different. The internal emails produced in this litigation reveal a startling level of dysfunction both within and among SOM, Suffolk, and ADF.

5. By their own admission, the SOM design teams working on the two Projects were consistently "understaffed" and could not get along with each other, much less with Suffolk. The performance of both entities suffered greatly as a result.

6. Suffolk and ADF also lacked sufficient skilled professionals to perform the work the Owners hired them to do in a timely manner and treated each other as "enemies" instead of partners, much to the detriment of the Projects.

7. Indeed, the evidence reflects that SOM, Suffolk, and ADF were primarily focused on their own bottom-lines and were far more interested in fixing blame than fixing problems, even when they themselves were directly responsible for the problems.

8. Significantly, they also kept the Owners "in the dark" about the magnitude of those problems and passed along the associated costs as if they were normal expenses which the Owners should have to cover.

9. The Owners ultimately paid a steep price for the dysfunction within and among SOM, Suffolk, and ADF, as the total cost of the two Projects even *after* value engineering was tens of millions of dollars *more* than initially budgeted. The Owners had no choice but to pay that steep price since the Projects are necessary for the operation of their passenger rail service, and they should not have pay any more as a result of the claims being asserted in this litigation.

10. To the contrary, the Court finds for the Owners on their Counterclaims against SOM and Suffolk for contractual indemnification and breach of contract, as set forth below.

EVENTS LEADING TO THE PRESENT LAWSUIT

A. The Engagement of SOM for the Terminal and OB-1 Projects

11. In January 2014, AAF and SOM entered into an Agreement Between Owner and Architect for the design of the Terminal (the "Terminal Design Agreement"). Tr. Ex. 232.

12. In October 2014, DTM and a SOM-affiliate known as Skidmore, Owings, and Merrill Florida LLC ("SOM Florida") entered into an Agreement Between Owner and Architect for the design of OB-1 (the "OB-1 Design Agreement"). Tr. Ex. 3434.

13. DTM and DTS later entered into an Assignment and Assumption Agreement in which DTM assigned to DTS all of its interests in the OB-1 Design Agreement. Tr. Ex. 4100.

14. The Terminal and OB-1 Design Agreements called for SOM and SOM Florida to perform certain "Basic Services" for a set fee, including "architectural, structural, mechanical, electrical engineering and other services, all as more particularly described [in the Agreements]." Design Agreements, § 1.1 & Attachment IX.

15. The "other services" included the preparation of Final Construction Documents for the Terminal and OB-1, which were required to be accurate, complete, and coordinated with one another. *Id.* §§ 1.2 & 1.3, Attachment IV § II(E), and Attachment VI § V.

16. The Design Agreements also contemplated that SOM and SOM Florida would perform certain "Additional Services" for additional fees, if three requirements were met:

(a) "Upon recognizing the need to perform Additional Services, the Architect shall notify the Owner with reasonable promptness and explain the facts and circumstances giving rise to the need";

(b) "The Architect shall not proceed to provide the Additional Services until the Architect receives the Owner's written authorization to do so";

(c) "the Owner and the Architect must, as a condition precedent to any payment therefor, agree, in writing, upon a lump-sum compensation for the performance of Additional Services prior to the Architect's commencement of such services or, if a lump-sum price is not established for any such Additional Services that the Owner has authorized in writing,

> the Owner may direct the Architect, in writing, to proceed under a not-to-exceed price on an hourly basis."

Id. § 6.1 & Attachment IV, Section III.

17. Significantly, each Design Agreement further specifies, among other things, that "[t]he Architect *shall be responsible* for the Architect's *negligent acts* or *omissions*" (§ 1.1.4), "[t]he Architect . . . *shall, at its own cost, make good any defects* in [its] Services" (§ 8.13); and "in its performance of all Services, the Architect *accepts the relationship of trust* and *confidence* established between it and the Owner by this Agreement" (§ 8.13) (emphasis added).

18. Each Design Agreement also contains a broad indemnification provision in which "the Architect agrees to compensate the Owner for, and indemnify and hold harmless Owner . . . from and against *any and all actions, awards, claims, demands, fees, losses, damages, injuries*, judgments, liabilities, liens, encumbrances, *expenses*, orders, penalties, proceedings at law or in equity, settlements, *suits*, together with reasonable legal fees and expenses, including fees and costs for attorneys (collectively, the 'Liabilities') to the extent that such Liabilities are directly caused by or arise out of: (i) the Services performed *negligently* by the Architect Parties[;] and/or (ii) any *negligence* or intentional misconduct or other *negligent act, error or omission* of the Architect Parties" (§ 8.10) (emphasis added).

19. The Design Agreements expressly contemplated a "fast-track" delivery method, meaning that early drawing packages would be prepared for concrete, steel, and other trades before the Final Construction Documents were issued.

20. However, the SOM entities' corporate representative acknowledged at trial that the fast-track nature of the design process did not relieve SOM and SOM Florida of responsibility for their own negligent acts and omissions in connection with those early drawing packages or the Final Construction Documents for the Projects.

B. The Engagement of Suffolk

21. In November 2014, AAF and Suffolk entered into an Agreement Between Owner and Construction Manager as Contractor which called for Suffolk to act as Construction Manager and General Contractor for the Terminal (the "Terminal Construction Agreement"). Tr. Ex. 2.

22. In August 2016, DTS and Suffolk entered into a separate Agreement Between Owner and Contractor which called for Suffolk to act as General Contractor for the OB-1 Project (the "OB-1 Construction Agreement"). Tr. Ex. 3.

23. In the Terminal Construction Agreement, Suffolk as Construction Manager "accept[ed] the relationship of trust and confidence established by this Agreement and covenant[ed] with the Owner to cooperate with the Architect and exercise [its] skill and judgment in furthering the interests of the Owner; to furnish efficient construction administration, management services and supervision; [and] to furnish at all times an adequate supply of workers and materials." Terminal Construction Agreement, § 1.2.

24. Similarly, in the OB-1 Construction Agreement, Suffolk as General Contractor "accept[ed] the relationship of trust and confidence established by this Agreement and covenant[ed] with the Owner to cooperate with the Architect . . . and to exercise [its] diligent skill and judgment in furthering the interests of the Owner; to furnish efficient business administration and supervision; [and] to furnish at all times an adequate supply of workers and materials." OB-1 Construction Agreement, Art. 3.

25. Each Construction Agreement also contains a broad indemnification provision requiring Suffolk to "indemnify and hold harmless, and defend, the Owner . . . from and against any and all claims demands, damages, losses, lawsuits and other proceedings, including judgments, claims of lien, civil or criminal penalties and charges in any way related to the Work or the Project, including . . . all attorneys' fees and costs related thereto, but only to the extent

caused by the (a) breach of the Contract Documents by the Contractor or (b) acts or omissions of the Contractor [or] a Subcontractor." Construction Agreement General Conditions, § 3.18.1.

26. In addition, the Terminal and OB-1 Construction Agreements both specified that "[t]he Owner shall not be responsible or liable to the Contractor for, and the Contractor hereby waives, any claims for changes, delays, accelerations, inefficiencies, impacts, and any other costs, damages, losses, or expenses of any nature whatsoever, resulting from any error, inadequacy, inaccuracy, inconsistency, insufficiency, unsuitability, discrepancy, ambiguity, omission, or insufficiency of detail or explanation in the Contract Documents." *Id.* § 1.2.1.

27. The Terminal Construction Agreement contemplated that the cost of the Project would be established through one or more Guaranteed Maximum Price Amendments ("GMPs") which were to be issued as the designs and specifications for the Terminal Project progressed. Terminal Construction Agreement, § 2.2.

28. The Construction Agreements further contemplated that the cost of the Projects might need to be increased or decreased through change order, in response to changes in the work to be performed. However, the Agreements also imposed strict deadlines and requirements for the submission of such claims. Under Article 15, claims for additional costs were required to be:

(a) initiated by written notice "within 10 days after occurrence of the event giving rise to the Claim or within 10 days after the claimant first recognizes the condition giving rise to the Claim, whichever is later"; and

(b) substantiated with "full details and substantiating data," including pricing, "within ten (10) calendar days after the Claim is initiated."

The Agreements also emphasized that:

> **THE TERMS OF THIS ARTICLE 15 ARE A MATERIAL INDUCEMENT FOR THE OWNER TO ENTER INTO THE CONTRACT DOCUMENTS BECAUSE THE OWNER CANNOT ACCEPT RISKS ASSOCIATED WITH UNTIMELY AND/OR IMPROPER CLAIMS.**

Construction Agreements, §§ 15.1.2, 15.1.4 (emphasis in original).

29. In addition, the Construction Agreements also specifically capped the amount of Subcontractor overhead and profit which could be charged to the Owners through change order at "Fifteen Percent (15%) of the total sum of that portion of the Cost of the Work attributable to the Work being performed by any such Subcontractor(s)." *Id.* § 5.1.3.

30. Finally, the Terminal Construction Agreement expressly imposed upon Suffolk the following additional requirements:

- "[to] manage the performance of each contractor, coordinate the work of the separate contractors, and ensure contractor's compliance with the provisions and requirements of each contract";
- "[to] be the recipient of all notices of claims by contractors against the Owner for additional cost or time due to any alleged cause [and] perform an evaluation of the contents of the claim, obtain the factual information concerning the claims, review the impact of the alleged cause, . . . and make recommendations to the Owner in writing . . . includ[ing] a written opinion regarding the validity of the claim"; and
- "[to] process all requests for and draft all change orders, review all proposed changes and negotiate, if necessary, prior to its submittal of proposed changes to the Owner for the Owner's review and approval."

Terminal Construction Agreement, § 5.1.3 & Ex. A, Part IV, §§ 1.5.10, 1.5.10.7, 1.5.13.

C. The Engagement of ADF

31. In March 2015, Suffolk and ADF entered into a Professional Services Agreement in which ADF agreed to provide pre-construction services with respect to the Terminal Project. Those services included, inter alia, "analysis on design impacts to the project schedule," "[p]repar[ing] a complete cost budget," "[w]ork with design team to develop best value options," and "[a]ssist in placing a Mill Order." Tr. Ex. 173, Ex. B.

32. In October 2015, Suffolk and ADF executed a Letter of Intent for the supply, fabrication, and erection of structural steel for the Terminal Project. The Letter indicated that the Subcontract amount for those services would be $28,684,800, and that the parties had "agreed to negotiate the final terms of the Subcontract in good faith." Tr. Ex. 77.

33. It was not until June 2016 that Suffolk and ADF finally entered into a Subcontract for the Terminal Project (the "Terminal Subcontract"). Tr. Ex. 4.

34. Three months later, Suffolk and ADF also entered into a separate Subcontract for the OB-1 Project (the "OB-1 Subcontract"). Tr. Ex. 7.

35. In each of those Subcontracts, ADF "agree[d] to perform the Work diligently and to provide a sufficient number of properly skilled and supervised workmen in accordance with the directions of the Contractor and in compliance with the project schedules of the Contractor." Subcontracts, Art. 5. In addition, ADF agreed that:

- "Subcontractor shall not make any claims for additional compensation for any work performed by the Subcontractor or for damages sustained by the Subcontractor by reason of any act or omission of the Contractor, Owner, or Architect during the performance of this Subcontract unless such work is done pursuant to, or such damages are sustained as a result of, a written order, a change order, construction change directive or written directive from the Contractor and such claim is made in the manner set forth in the Contract Documents";

- "[n]otice of all such claims . . . shall be given to the Contractor in writing within ten (10) business days . . . after the occurrence of the event giving rise to such claim, or the claim shall be considered waived and abandoned by the Subcontractor"; and

- "upon request from Suffolk Construction Company Inc. for a Request for Pricing ('RFP'), Change Order Request ('COR'), Construction Change Directive ('CCD'), ASI, or RFI, . . . Subcontractor will respond no later than seven (7) calendar days from the receipt thereof, as to the effect on the Subcontract Price and/or Subcontractor Work Schedule of said RFP, COR, CCD, ASI, or RFI and will provide full and complete detailed information to substantiate the effect."

Subcontracts, Art. 8.12 & Ex. B, ¶¶ 90-91.

36. The Subcontracts also imposed strict limitations on change orders, including that "Subcontractor is limited to a total of 15% overhead and profit on Costs for all change orders," and "Costs for purposes of change orders shall be limited to . . . [a]ctual, direct costs of labor, . . . [a]ctual, direct costs of materials, supplies, and equipment, [and other] out of pocket costs . . . ."

Id. Ex. B, ¶ 92. The Subcontracts then went on to provide a mechanism to verify such costs, stating that "[u]pon request, Subcontractor shall submit evidence to substantiate the costs." *Id.*

37. Finally, the Subcontracts also contain a broad waiver of damages for delay, which states "Subcontractor . . . shall have no claim for money damages or additional compensation for delay no matter how caused, but for any delay or increase in the time required for performance of this Subcontract not due to the fault of the Subcontractor, the Subcontractor shall be entitled only to an extension of time for performance of its work." *Id.* Art. 6.

D. The Design Process for the Terminal and OB-1 Projects

38. The Terminal and OB-1 Design Agreements contemplated four design phases, namely, the Concept Design Phase, the Schematic Design Phase, the Design Development Phase, and the Construction Documents Phase. *See* Design Agreements, § 1.1.

39. SOM budgeted man-hours for each phase by discipline and then tracked the hours it was expending against the fees it was earning in order to determine its financial performance on the two Projects. *See* Tr. Ex. 529, 809.

40. SOM's internal emails evidence that its design teams exceeded their budgets for man-hours early on, reduced staff, and then were consistently understaffed during the period when they were preparing the Construction Documents – or "CDs" – for the Terminal and OB-1. *See* Tr. Exs. 677, 683, 693, 696, 697.

41. SOM internal emails also evidence a significant lack of communication and coordination between and among the SOM architectural and engineering design teams working on the CDs for the Terminal and OB-1. *See* Tr. Exs. 258, 514.

42. That understaffing and lack of communication and coordination had an adverse effect on the progress, accuracy, completeness, and coordination of the CDs for the two Projects. *See* Tr. Exs. 258, 686, 529, 260, 265, 512, 513, 514, 269, 698, 758, 521, 531.

43. The evidence reflects that SOM originally committed to issue both 100% CDs and a Steel Mill Order set on August 21, 2015. *See* Tr. Exs. 258, 4109.

44. Shortly prior to that deadline, however, SOM advised that it would instead be issuing "a consolidated pricing set" which would be roughly 90% complete on August 21, 2015, followed by 100% Final CDs one month later which could be used to place the steel mill order. *See* Tr. Ex. 263, 507.

45. Nonetheless, when SOM issued its "consolidated pricing set" on August 21, 2015, it inserted a series of fine-print notes suggesting that it could not be used for pricing purposes. Specifically, although the set was titled "ISSUED FOR GMP," each subsequent page contained a note stating: "THESE DOCUMENTS . . . ARE NOT TO BE USED OR ISSUED FOR BID." Tr. Ex. 233.

46. SOM issued its next set of structural drawings for the Terminal Project on September 24, 2015. That set was supposed to have made "*only minor manageable changes*" to the steel, "defined as *less than 10%* of the shapes/connections." Tr. Ex. 263 (emphasis added). In reality, however, a much larger percentage of the shapes and connections had been modified. The set was also supposed to be a 100% CD set, but it was not close to that level of completeness. In fact, although the cover of the drawing set was marked "ISSUED FOR CONSTRUCTION," all but two of the 100+ drawings which followed were stamped "*NOT* FOR CONSTRUCTION." Tr. Ex. 235 (emphasis added).

47. SOM internal emails evidence that one of the reasons for that designation was that "[t]he architect's deliveries [we]re behind the structure [and] adjustments need[ed] to be made." The structural engineering group then decided to use that as "our *excuse* for future packages." Tr. Ex. 264 (emphasis added).

48. The first of those packages was a Steel Bulletin issued on October 23, 2015. That drawing package was stamped "ISSUED FOR CONSTRUCTION" and was used to place the initial steel mill order in early November 2015. Tr. Ex. 237.

49. The second package was another Steel Bulletin issued for construction which was released along with the 100% Final CDs for the Terminal on December 11, 2015. Tr. Ex. 753.

50. Two months later, SOM's structural group internally acknowledged that "Coordination items . . . were not appropriately addressed during the design phase." Tr. Ex. 758. In addition, SOM's Structural Engineer of Record for the Terminal and OB-1 – William Baker – sent an email stating:

> We need a concise summary of *the technical problems* on UConn, *AAF*, and Citi. Keep i[t] short; what set off the flare that it became necessary for intervention. On AAF, I think it was the note from Stan [Korista]. . . .

Tr. Ex. 521 (emphasis added). Mr. Baker then sought blame the architectural group, arguing that "*architecture kept making changes* and it was arch['s] fault." Tr. Ex. 531 (emphasis added).

51. Either way, for the Owners, those technical problems and continued changes had a substantial cost. SOM's failure to issue 100% Final CDs for the Terminal in August of 2015 – coupled with the numerous changes made in the September, October, and December 2015 sets – ultimately resulted in roughly $5 million in change orders on structural steel alone.

52. Likewise, the evidence reflects that SOM used the RFI and submittal processes to complete the Steel Bulletin and supposed 100% Final CDs issued on December 11, 2015, resulting in additional change orders.

53. Perhaps more disturbingly, however, it was not until discovery in this case that the Owners were made aware of SOM's internal staffing and other issues, which clearly impacted both the timing and quality of SOM's performance on the Terminal and OB-1 Projects.

E. Suffolk's Performance as Construction Manager

54. The Owners' Construction Manager for the Terminal and OB-1 Projects, Suffolk, lacked sufficient skilled professionals to perform the work it was hired to do in a timely manner. It consistently struggled to meet deadlines and to coordinate the work of its many subcontractors. It also admittedly "d[id] *a bad job following the contract* AAF issued and Suffolk agreed to sign." Tr. Ex. 4172 (emphasis added).

55. From inception, Suffolk was more interested in fixing blame than fixing problems, particularly when it came to the Project schedule and coordination among trade professionals.

56. SOM and Suffolk, for instance, were constantly butting heads and pointing fingers at one another, seeking to deflect blame for their own failings shift it to the other.

57. The perpetual infighting between SOM and Suffolk ultimately got to the point that they began describing their relationship as "broken" and "unfixable." Tr. Exs. 4172, 4188.

58. That and related conduct ultimately prompted the Owners' lead representative Scott Sanders to write:

> *I am sick of being in the middle of an architect and contractor that can't get along.* SOM and Suffolk both do this to me and I am trying to copy everyone on all emails like this to encourage stopping it. *Please respond in the best interest of the project.*

Tr. Ex. 4281 (emphasis added).

59. The Owners also were not kept as informed by Suffolk as they should have been regarding the problems it was encountering on the job, including problems with subcontractors. One Suffolk internal email, for instance, characterizes Mr. Sanders as being "in the dark" about certain design changes and their implications. Tr. Ex. 4146.

60. In addition, Suffolk also clearly missed the mark with respect to notice of claims. Under the Terminal and OB-1 Construction Agreements, any claim such as a PCI is required to be initiated within 10 days after occurrence of the event giving rise to the Claim or 10 days after the claimant first recognizes the condition giving rise to the Claim, whichever is later;

and it must also be substantiated with full details, including pricing, within 10 days thereafter. Construction Agreements, §§ 15.1.2, 15.1.4.

61. In the present case, while ADF's PCIs were rarely submitted in a timely manner, there were numerous instances where Suffolk held onto those PCIs for an extended period of time before passing them along, further compounding the untimeliness of the submissions.

62. By way of example, the evidence reflects that ADF's PCI-0001 arises out of design changes made on September 24, 2015, meaning that any claim for additional costs as a result of those changes should have been submitted to the Owners no later than October 4, 2015, with substantiation and pricing to follow no later than 10 days after that, *i.e.*, October 14, 2015. Instead, ADF did not submit PCI-0001 R0 until November 9, 2015, more than one month late, and Suffolk in turn held onto that PCI for more than nine full months, until August 25, 2016, before finally passing it along to the Owners.

63. The Court finds that, of ADF's outstanding PCIs, only 23 were initiated within the time permitted under the Terminal and OB-1 Subcontracts and Construction Agreements; and of those which ADF did initiate within the time permitted, ***none*** were sent to the Owners in the time permitted under the Construction Agreements.

64. In other words, Suffolk failed to provide the Owners with timely notice of ***any*** of the PCIs at issue in this litigation.

65. The evidence reflects that Suffolk also failed to properly vet the ADF PCIs which were converted to change orders and paid, resulting in a significant overpayments by the Owners. Under the Terminal and OB-1 Subcontracts and Construction Agreements, all ADF-related change orders were required to be based on "[a]ctual, direct costs" as opposed to estimates, and ADF was strictly limited to a total of 15% in overhead and profit.

66. Nonetheless, most ADF PCIs were and are based *not* on actual costs but estimates, and most of the ADF PCIs which were converted to change order and paid included more than 15% in overhead and profit.

67. ADF's internal "Profit Recap" for the six PCIs paid as part of GMP9 reveals that ADF's actual costs for those PCIs were roughly $1.4 million *less* than the estimates on which the PCI values were based. To make matters worse, those PCIs also included double charges for overhead, profit, and tax, and an additional Suffolk mark-up on top of that.

68. The Court finds that Suffolk's failure to properly vet those and other ADF PCIs caused the Owners to incur damages in the form of overpayments totaling $1,887,476.

SOM'S AMENDED THIRD-PARTY COMPLAINT AGAINST THE OWNERS

69. SOM and SOM Florida have filed an Amended Third-Party Complaint which asserts claims against the Owners for contractual indemnification, equitable subrogation, and common law indemnification. It also previously asserted claims for breach of contract and unjust enrichment which have been resolved by agreement and voluntarily dismissed.

70. The claims for contractual indemnification – Counts I & VI – allege that unspecified Owner consultants committed unspecified "negligent acts, errors, or omissions" or "intentional misconduct" in connection with the development of the Terminal and OB-1 Projects. The claims then go on to assert that "to the extent that any alleged damages demanded in ADF's Second Amended Complaint arose out of or were caused by the negligent acts, errors or omissions or intentional misconduct of [the Owner's] Consultants," SOM and SOM Florida are entitled to recover "damages in an amount to be proven at a hearing or trial."

71. Similarly, the claims for equitable subrogation – Counts III & VII – allege that the Owners and/or unspecified persons under their direction or control gave or failed to give unspecified "information, direction(s) and/or instruction(s) to SOM . . . that impacted the substance and timing of [the SOM entities'] issuance of plans and specifications, RFI and

submittal responses, or other work product" with respect to the Terminal and OB-1 Projects. The claims also allege that the Owners and/or unspecified persons under their direction or control undertook or failed to undertake unspecified "actions that impacted the performance of the work" on the Projects. The claims then go on to assert that "to the extent that any alleged damages demanded in ADF's Second Amended Complaint arose out of or were caused by the negligent acts, errors or omissions or intentional misconduct of [the Owner's] Consultants," SOM and SOM Florida are entitled to recover "damages in an amount to be proven at a hearing or trial."

72. Likewise, the claims for common law indemnification – Counts III & VIII – are based on the same allegations of unspecified misconduct and also seek to recover unspecified "damages in an amount to be proven at a hearing or trial."

73. The Court finds each of these claims to be without merit for several reasons. First, the SOM entities have failed to prove that any design deficiency in its plans were caused by negligence or intentional misconduct of any Owner consultant which performed design services, as required to recover under the contractual indemnification provisions sued upon in this case. Second, the SOM entities also failed to prove that they are without fault, as required to recover on claims for equitable subrogation and common law indemnity. Third, and most importantly, the SOM entities failed to prove that if the Final CDs for the Projects had been accurate, complete, and coordinated when issued, the Owners would have had to pay *more* than they did to construct the Projects; nor have they proved *how much more*, to a reasonable degree of certainty. It would therefore be manifestly inappropriate to require the Owners to pay any more than they already have for design-related changes – which is too much.

74. The Owners are entitled to prevailing party attorney's fees and costs under the Design Agreements. The Court reserves ruling on the amount of attorneys' fees and costs, which shall be addressed in subsequent proceedings

SUFFOLK'S THIRD-PARTY COMPLAINT AGAINST THE OWNERS

75. Suffolk's Third-Party Complaint herein alleges claims for breach of contract, equitable subrogation, and common law indemnification as to the Terminal and OB-1 Projects.

76. The claims for breach of contract – Counts I & II – allege that the Owners breached the Construction Agreements "by failing to make timely payments to Suffolk for amounts purportedly due ADF and for which ADF now seeks such amounts against Suffolk; and/or delaying the Project."

77. The claims for equitable subrogation – Counts III & IV – in turn, allege that "[t]he damages ADF alleges against Suffolk particularly as to the payment of certain PCOs and/or damages for purportedly improper and/or deficient design are the result of such actions, errors or omissions of [the Owners], and/or persons under the[ir] direction and/or control."

78. The claims for common law indemnification – Counts V & VI – allege that "[a]cts, errors and omissions alleged by ADF against Suffolk . . ., if any are proven by ADF and if Suffolk is ultimately held responsible therefor, were the result of negligent, acts, errors, omissions or intentional misconduct of [the Owners] and/or persons under [their] direction and/or control."

79. The Court finds each of Suffolk's claims to be without merit for several reasons. First, Suffolk has failed to demonstrate that the Owners failed to make any payment to Suffolk which the Owners were obligated to make to Suffolk for any amounts purportedly due ADF. Second, Suffolk has also failed to prove that it is without fault, as required to recover on its claims for equitable subrogation and common law indemnification. Third, and most importantly, Suffolk has failed to prove that even if it had properly managed the procurement, fabrication, and erection of structural steel for the two Projects, the Owners still would have had to pay more to construct those Projects; nor has it proven how much more to a reasonable degree of certainty. It would therefore again be manifestly inappropriate to require the Owners to pay more than they already have for the structural steel elements of the Projects.

80. In addition, Suffolk has also failed to prove that the Owners delayed the Project and has offered no proof of any delay damages.

81. The Owners are entitled to prevailing party attorney's fees and costs under the Construction Agreements. The Court reserves ruling on the amount of such fees and costs, which shall be addressed in subsequent proceedings.

THE OWNERS' COUNTERCLAIM AGAINST SOM

82. The Owners have counterclaims against both SOM and SOM Florida for contractual indemnification. They also previously had counterclaims for breach of contract which have been resolved by agreement and voluntarily dismissed.

83. The Owners' counterclaims for contractual indemnification – Counts III & IV – are also premised on a Design Agreement provision which states:

> [T]he Architect agrees to compensate the Owner for, and indemnify and hold harmless Owner . . . from and against any and all actions, awards, claims, demands, fees, losses, damages, injuries, judgments, liabilities, liens, encumbrances, expenses, orders, penalties, proceedings at law or in equity, settlements, *suits*, together with reasonable legal fees and expenses, including fees and costs for attorneys (collectively, the 'Liabilities') to the extent that such Liabilities are directly caused by or arise out of: (i) the Services performed negligently by the Architect Parties[;] and/or (ii) any negligence or intentional misconduct or other negligent act, error or omission of the Architect Parties.

Design Agreements § 8.10.

84. The Court finds the Owners are entitled to indemnification under this provision in light of the SOM entities' negligent acts, errors, and omissions in the performance of Services under the Design Agreements. The Owners are entitled to recover from SOM and SOM Florida reasonable attorneys' fees and other defense costs in amounts to be determined separately.

THE OWNERS AMENDED COUNTERCLAIM AGAINST SUFFOLK

85. The Owners have asserted counterclaims against Suffolk for breach of contract and contractual indemnification.

86. The Owners' counterclaims for breach of contract – Counts I & II – allege that Suffolk breached the Construction Agreements for the Terminal and OB-1 Projects by, *inter alia*, failing to properly vet certain ADF PCIs which were converted to change orders and paid. The Court finds those counterclaims to have merit for the reasons discussed above and it rejects Suffolk's affirmative defenses thereto. The Court awards damages on those claims as follows: (A) AAF shall be entitled to a final judgment against Suffolk in the amount of **$1,871,944**; and (B) DTS shall be entitled to a final judgment against Suffolk in the amount of **$15,532**. In addition, the Owners are also entitled to prevailing party attorney's fees and costs under the Construction Agreements. The Court reserves ruling on the amount of such fees and costs, which shall be addressed in subsequent proceedings.

87. The Owners' counterclaims for contractual indemnification – Counts III & IV – are also premised on the Construction Agreements, specifically, General Conditions § 3.18, which states in relevant part:

> To the fullest extent permitted by law, the Contractor and its successors and assigns, shall indemnify and hold harmless, and defend, the Owner . . . from and against any and all claims, demands, damages, losses, lawsuits and other proceedings . . . and charges *in any way related to the Work or the Project*, including, without limitation, claims, damages, losses or expenses . . . and all attorneys' fees and costs related thereto, but only to the extent caused by the (a) breach of the Contract Documents by the Contractor or (b) acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. . . .

Construction Agreements, General Conditions § 3.18 (emphasis added).

88. The Court finds the Owners are entitled to indemnification under this provision in light of Suffolk's breaches of the Construction Agreements and other acts and omissions described above. The Owners are entitled to recover from Suffolk the reasonable attorneys' fees and other defense costs they incurred in connection with this matter. The Court reserves ruling on the amount of such award, which shall be addressed in subsequent proceedings.

FINAL JUDGMENT

Based upon the foregoing Findings of Fact and Conclusions of Law, the Court hereby grants the following relief:

1. Judgment is entered in favor of Third-Party Defendants All Aboard Florida – Operations, LLC, n/k/a Virgin Trains USA Florida LLC, as successor to All Aboard Florida – Stations LLC, DT Miami LLC, and DTS 2MC Office LLC, on all claims raised in:

(a) Third-Party Plaintiffs Skidmore, Owings & Merrill, LLP's and Skidmore, Owings & Merrill Florida LLC's Amended Third-Party Complaint; and

(b) Third-Party Plaintiff Suffolk Construction Company, Inc.'s Third-Party Complaint.

Skidmore, Owings & Merrill, LLP, Skidmore, Owings & Merrill Florida, LLC, and Suffolk Construction Company, Inc. shall take nothing further from this action and Virgin Trains USA Florida, LLC, DT Miami LLC, and DTS 2 MC Office LLC shall go hence without day.

2. Judgment is entered in favor of Third-Party Counter-Plaintiffs All Aboard Florida – Operations, LLC n/k/a Virgin Trains USA Florida LLC and DTS 2MC Office LLC on their Counterclaims for contractual indemnification against Skidmore, Owings, & Merrill, LLP and Skidmore, Owings & Merrill Florida, LLC. The amount of the judgment shall be determined in separate proceedings.

3. Judgment is entered in favor of Third-Party Counter-Plaintiff All Aboard Florida – Operations, LLC n/k/a Virgin Trains USA Florida LLC on its claim for breach of contract and against Suffolk Construction Company, Inc., in the principal amount of **$1,871,944**, plus pre-judgment interest in an amount to be determined. The judgment shall also include an award of prevailing party attorneys' fees and costs in an amount to be determined in separate proceedings.

4. Judgment is entered in favor of Third-Party Counter-Plaintiff DTS 2MC Office LLC on its counterclaim for breach of contract and against Suffolk Construction Company, Inc., in the principal amount of **$15,532**, plus pre-judgment interest in an amount to be determined. The judgment shall also include an award of prevailing party attorneys' fees and costs in an amount to be determined in separate proceedings.

5. Judgment is entered in favor of Third-Party Counter-Plaintiffs All Aboard Florida – Operations, LLC n/k/a Virgin Trains USA Florida LLC and DTS 2MC Office LLC on their Counterclaims for contractual indemnification against Suffolk Construction Company, Inc. The amount of the judgment shall be determined in separate proceedings.

6. The Court reserves jurisdiction over this Cause to determine and provide the further relief contemplated above.

DONE AND ORDERED, this _____ day of _____, 2019.

_____
The Hon. William Thomas
Circuit Court Judge

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished via transmission of Notices of Service of Court Document generated by the E-Portal or in some other authorized manner for those counsel or parties who are excused from e-mail service, on September 18, 2019 to:

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