

**IN THE CIRCUIT COURT FOR THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA
CIVIL DIVISION**

KAST CONSTRUCTION III, LLC
Florida limited liability company,

Case No.: 18-003560-CI

Plaintiff / Counter-Defendant,

v.

TITUS CONSTRUCTION GROUP, a Florida
corporation, and BERKLEY INSURANCE
COMPANY, a Connecticut corporation,

Defendants / Counter-Plaintiffs.

FINAL DECISION

This action, between KAST Construction III, LLC (“KAST”), Titus Construction Group (Titus”), and Berkley Insurance Company (“Berkley”), came before the Trial Resolution Judge (TRJ) from September 8 through September 18, 2025, in a private bench trial under Section 44.104, *Florida Statutes*. The TRJ heard testimony from multiple witnesses and reviewed numerous exhibits that were accepted into evidence.

FINDINGS OF FACT

This case arises from the framing and drywall work for One St. Petersburg, a 42-story condominium tower located in St. Petersburg, FL (the “Project”). **Pretrial Stipulation**, p. 2. KAST was the Project’s General Contractor; Titus was the framing and drywall subcontractor; and Berkley was Titus’ payment and performance bond surety. The central issues before the TRJ are: (1) whether KAST properly defaulted Titus under the parties’ Subcontract Agreement (“Subcontract”) and (2) whether Berkley fulfilled its obligations under the performance bond (“Bond”). Titus and Berkley dispute that Titus defaulted and assert counterclaims to recover amounts they claim are due under the Subcontract. KAST asserts that it is entitled to offset those

amounts against the damages resulting from Titus' defaults and Berkley's breach of the Bond.

KAST presents numerous claims relating to the performance, quality, and timeliness of Titus' work. KAST ultimately defaulted Titus and enlisted another subcontractor, Wal-Mark Contracting Group, LLC ("Wal-Mark"), to complete the work after Titus failed to cure its deficiencies and delays. Titus and Berkley dispute that Titus defaulted and argue that Titus' work complied with the Subcontract's quality standards and any delays were caused by other subcontractors or weather events beyond Titus' control.

I. THE SUBCONTRACT AND BOND

The parties agree that their rights and obligations are governed by the Subcontract and the Bond. KAST and Titus entered into the Subcontract on May 6, 2016, in the amount of \$5,950,000.00. **Pretrial Stipulation**, p. 2; **KTE 13**. The Subcontract required Titus to provide a performance bond that it obtained through Berkley. The Subcontract was later modified through Subcontract Change Orders ("SCOs") 1 through 9.5 with an amended value of \$5,936,682.00. **Pretrial Stipulation**, p. 2. KAST has paid Titus \$3,041,591.00 for work performed through November 30, 2017. **Pretrial Stipulation**, p. 2; **KTE 188**. The following Subcontract Articles and Bond Sections guide this TRJ's findings:

A. The Subcontract

i. Performance and Quality of Work: Articles 1 and 18

Under Article 1, for the performance of the Work, Titus must provide staff sufficient in skill and size to maintain the Project schedule. **KTE 13**, Article 1(d) ("As part of its obligation to provide and perform the Work, Subcontractor recognizes its responsibility to furnish a *competent and adequate staff* [...] keep an adequate force of skilled workers on the job to complete the Work *in strict accordance with all requirements of this Subcontract* and the Contract Documents[...]")

(emphasis added).

The Subcontract also contains a separate Article defining quality standards for the materials and workmanship Titus agreed to provide for the Project. Under Article 18, Titus agreed to “provide first-quality, new materials [...] and workmanship conforming to the Contract Documents’ requirements and be in accordance with the best standards of the construction industry where the Project is located.” **KTE 13**, Article 18(a). Titus agreed to replace or correct any defective or non-conforming work within twenty-four hours after receiving notice from KAST. **KTE 13**, Article 18(a).

ii. Progress Payments, Change Orders, and Time: Articles 3, 6, 7, and 8

The Subcontract’s procedures for progress payments, SCOs, and schedule revisions in Articles 3, 6, 7, and 8 govern Titus’ responsibility for schedule delays. These procedures are also relevant to KAST’s claims relating to Titus’ defaults and Titus’ and Berkley’s counterclaims, including claims for unapproved change orders.

During the Project, Titus followed the Subcontract and submitted numerous Potential Change Orders (“PCOs”) for claimed disruptions and impacts caused by other trade contractors and weather impacts, which KAST paid or credited against KAST’s claims.¹ The parties tracked all pending PCOs in Change Order Logs attached to approved SCOs. After KAST approved the amounts that Titus presented in PCOs, the parties executed SCOs, and Titus included the approved amounts in subsequent payment applications. Each Titus payment application contains a lien waiver stating that as of the date of the application, Titus “does hereby waive, release, and relinquish any and all rights, claims, demands, liens, claims for relief, causes of action and the like, whether arising at law, under a contract, in tort, in equity or otherwise, which [Titus] has now or

¹ Titus documented PCOs with Extra Work Orders (“EWOs”), in which Titus identified its additional labor hours and material costs that were signed by KAST’s superintendents.

may have had arising out of the performance of the work or the furnishing of labor or materials[.]”
See, e.g., KTE 188. Titus did not reserve any claims, including time extensions, to be resolved after the completion of the SCO work.

Under the Subcontract, Titus also agreed to be bound to any schedule modifications made by KAST unless Titus objected in writing within forty-eight hours after receiving notice of the modification. **KTE 13**, Article 6; testimony of Alex Cervera, 128:1-20. Article 7 of the Subcontract allows Titus to obtain extensions of time when obstructed or delayed in the prosecution of its work for any reason not the fault of its own, so long as such a request is made in writing within seventy-two hours of the delay. **KTE 13**, Article 7(b). As the TRJ already noted during trial, at no point during the Project did Titus ever object to updated schedules issued by KAST or make a claim for a time extension due to the obstruction or delay of others, most particularly the complained of MEP contractors. Testimony of Bill Perry, 1334:5-21 (A: *I don’t think Titus was asking for relief. The TRJ: Aha – they didn’t ask for relief. That’s the point.*).

iii. Default: Article 26

Article 26 contains a step-by-step process that defines events of default by Titus, specifies how KAST must notify Titus to cure the default, and identifies KAST’s non-exclusive remedies if Titus fails to do so, which include KAST’s right to withhold the unpaid Subcontract balance.

Article 26(a) identifies specific events of default:

- (i) *fail to supply the labor, materials, equipment, supervision* and other things required of it *in sufficient quantities and of required quality* to perform the Work with the skill, conformity, promptness and diligence required hereunder;
- (ii) *cause interference, stoppage, or delay to the Project* or any activity necessary to complete the Project;
- (iii) *become insolvent*;
- (iv) *fail to properly and promptly make payment* for all materials and

services provided in the performance of the Work; or

(v) fail in the Contractor's opinion in the performance or observance of any of the covenants, conditions, or other terms of this Subcontract.

KTE 13, Article 26(a) (emphasis added).

If any of the events in Article 26(a) occur, Article 26(b)(1) then requires KAST to notify Titus of the specific events of default and provide Titus with 48 hours to cure. **KTE 13**, Article 26(b). If Titus fails to timely cure, Article 26(b) provides KAST with four non-exclusive remedies:

- (i) require Titus to use overtime labor at its own cost to recover the schedule;
- (ii) *attempt to remedy the default by whatever means KAST deems necessary, including correcting, furnishing, performing or otherwise completing the work, or any part thereof, by itself or through others and deducting those costs from any monies due or to become due to the Subcontractor;*
- (iii) provide Titus with an additional 48 hours to cure and then terminate the Subcontract; or
- (iv) *recover all losses, direct and consequential damages, and attorneys' fees incurred because of the default.*

KTE 13, Article 26(b) (emphasis added).

Finally, Article 26 contains numerous safeguards to protect KAST in the event its damages from Titus' default exceed the remaining Subcontract balance. Article 26(c) provides that whenever KAST exercises any one or more of the remedies in Article 26(b), "[i]f the costs of completion of the Work plus the allowance for administrative burden, together with any other damages or losses sustained or incurred by Contractor, *shall exceed the undisbursed balance of the Price, Subcontractor and its guarantors, surety, or sureties shall pay the difference* within fifteen (15) days of written demand from Contractor." **KTE 13**, Article 26(c) (emphasis added). Article 26(d) makes clear that Titus' "*surety, or sureties agree to be bound to Contractor with respect to such remedies notwithstanding any provision of the bonds* provided pursuant to Article

10 hereof.” **KTE 13**, Article 26(d) (emphasis added). Article 26(h) further highlights that once Titus has defaulted and fails to cure, KAST is entitled to withhold further payment until “the Work shall be wholly completed to the satisfaction of the Contractor and shall have been accepted by Contractor and Owner.” **KTE 13**, Article 26(h). At that time, Titus would be entitled to payment only if the unpaid balance exceeds the costs and expenses in completing the work and curing Titus’ defaults.

Reading all of these provisions *in pari materia*, as is the TRJ’s obligation, the Subcontract states that KAST could withhold the undisbursed balance from both Titus and its surety if Titus defaults and KAST determines that the costs to cure the defaults will exceed the balance. See the analysis *infra*.

B. Interpretation of the Rights and Obligations Under The Bond

The parties agree that Berkley’s rights and obligations are governed by the terms of the Bond. This Bond expressly incorporates the terms of the Subcontract, including KAST’s rights and remedies under Article 26. **BTE 1, KTE 13**. This includes Article 26(c), which expressly states that Titus’ “surety” must pay KAST any amounts, losses, or damages that exceed the undisbursed Subcontract balance *and* allows KAST to withhold payments if the costs to complete plus any resulting damages exceed the Subcontract balance. Under Article 26(d), Berkley is also bound by these terms “notwithstanding any provision of the bonds provided pursuant to Article 10 hereof.” **KTE 13**, Article 26(d).

Under the Bond, if KAST notifies Berkley that Titus is in default, Berkley must investigate (the “Investigatory Period”) and select one of six options.² During this time, KAST has the right

² This “Investigatory Period” is triggered after the last of three events occur: (1) KAST provides Titus and Berkley with written notice of the default, (2) Berkley is given access to the Project site, or (3) KAST provides Project documents requested by Berkley for its investigation, which must be requested within 10 days following receipt of the written notice of default. **BTE 1, Section A**.

to mitigate Titus' default. **BTE 1**, Section B. Berkley contends that it selected the Bond's fourth option under Section A (4) ("Option Four") by paying Titus' subcontractors and internal employees beginning in October 2017. Option Four requires the surety to "[a]rrange to provide financial and/or other assistance to the Principal ('Financing') to assist the Principal with *completion of the Subcontract.*" **BTE 1**, Section A (4) (emphasis added).

Berkley also contends that because it "arranged" to finance Titus under Option Four, it possessed an independent right to the remaining Subcontract balance based on language in Option Four saying, "Obligee shall pay the *Balance of the Subcontract Price* as directed by Surety." Testimony of Ellen Cavallao, 1591:20-1592:71; **BTE 1**, Section A (4) (emphasis added). During trial, Berkley argued that this language **requires** KAST to pay the Subcontract balance to Berkley regardless of: (1) whether KAST was entitled to withhold the Subcontract balance from Titus under Article 26 or (2) whether the cost to complete the work exceeded the Subcontract balance.

The TRJ rejects Berkley's argument for two reasons. First, even if Berkley properly selected Option Four, and the TRJ finds that it did at least initially, Berkley did not elect to or finance the *completion* of all of the Subcontract as detailed below. Second, even if Berkley satisfied its obligations under Option Four, say, for example, paying for the work of the subcontractor who supplemented the work of its principal, it would be entitled only to the "Balance of the Subcontract Price" which is a defined term in the Bond and, as detailed below, still subject to KAST's remedies arising out of Titus' defaults under Article 26.

The Bond's Section E defines "Balance of the Subcontract Price" as: "the total amount *payable by Obligee to Principal under the Subcontract* and any amendments thereto, less the amounts heretofore properly paid by Obligee under the Subcontract." **BTE 1**, Section E (1) (emphasis added). In other words, any rights Berkley might have to the Balance of the Subcontract

under Option 4 are the same as those of its Principal (Titus). This includes Article 26(b), (c), (d), and (h), which by their terms also apply to Titus' "surety or sureties." **KTE 13**. This case therefore turns on whether KAST properly defaulted Titus, which Titus and Berkley disputed during the Project and now.

II. KAST PROPERLY DEFAULTED TITUS UNDER ARTICLE 26

A. Titus' Defaults Were Unrelated to Impacts from Other Subcontractors and Weather-related Events

KAST's claims and defenses in this case are dependent upon a finding that KAST had grounds to, and did properly, default Titus. KAST has alleged multiple events of default against Titus under Article 26(a)(i), (ii), and (v). Titus alleges the following defaults by KAST:

1. Failing to supervise and coordinate other trades resulting in ongoing damage to TITUS and extensive re-work;
2. Failing to protect the building from the elements, resulting in re-work, delays, extra cost to TITUS, and completely disrupting the schedule and sequence of the work;
3. Failing to pay TITUS, including failing to pay \$350,000 of proposed change orders (PCOs") that KAST now acknowledges were due;
4. Failing to maintain the schedule and sequence of the work, resulting in unreasonable demands for acceleration for which KAST refused to pay;
5. Failing to provide the contractually required trash chute for the building;
6. Wrongfully refusing to pay TITUS any of the remaining \$2.8 million in contract funds.

Titus alleges that KAST's default of TITUS was wrongful for these reasons and a material breach of the Subcontract. The TRJ finds otherwise by the evidence presented at trial.

Through witness testimony and Project records, KAST offered evidence that Titus failed to provide labor and supervision in sufficient *quality and quantity* to perform the work as required by the Subcontract (26(a)(i)); delayed or otherwise interfered with the Project schedule (26(a)(ii));

and failed to conform or observe the Subcontract's covenants, terms, and conditions (26(a)(v)).

Titus' defenses for nonperformance were not supported by the evidence at trial. Titus denies that it defaulted, arguing that KAST imposed performance and quality standards beyond the Level 4 finish required by the Subcontract for the Project's units. However, this argument does not address KAST's contention that the walls were not plumb, level, and square, which is required regardless of finish level. Testimony of Mark Hopkins, 610:9-19 (Q: *We talked earlier in terms of straight corners. That's something you would expect to see on – at least a Level 3 and up wall; is that right? A: Any building I've done, you expect to see straight corners on the drywall, any building. It's – the Level 3 and Level 4 pertains to the overall finish of the drywall. It's just – it's the nature of the beast, you know. Drywall is supposed to be hung plumb, level, and square.*).

Titus and Berkley also contend that KAST is blaming Titus for delays and disruptions—including a default by the plumbing subcontractor and two rain events that caused water damage to drywall on certain floors—that were outside of Titus' control and created a “cumulative impact” of schedule delays. Testimony of Nate Pardue, 1120:12-25. However, this contention is contradicted by the substantial evidence presented at trial of Titus' systemic quality deficiencies, lack of manpower, and schedule delays. To the extent Titus suffered impacts caused by other subcontractors or weather events, the evidence also established that Titus was either paid or credited for any such impacts in its approved Payment Applications or approved PCOs. Testimony from Alex Cervera, 1680:4-1685:3. As detailed above, when Titus received these payments, Titus signed lien waivers that affirmed it had been fully paid for any of these alleged impacts or claims.

Titus presented no evidence of any impacts or additional costs other than the PCOs it submitted to KAST during the Project. Titus never made a claim of “cumulative impact” during the project, nor did it reserve its rights to make that claim later. KAST, however, presented

substantial evidence that KAST paid or credited Titus for the additional costs Titus claimed from these events. **KTE 46; KTE 47; KTE 57; KTE 62; KTE 68; KTE 71; KTE 73; KTE 74; KTE 82; KTE 84; KTE 90; KTE 91; KTE 92; KTE 104; KTE 354A** (PCO 40). Titus also never requested an extension of time, or for any additional “impact damages,” to complete its work due to the so-called “cumulative impact” of these events under Article 6 of the Subcontract.³ To the contrary, on November 6, 2017, Titus agreed to an updated Project schedule without any reference to claimed delays outside of its control.⁴ **KTE 153; KTE 13**, Article 6(d).

7. Titus’ Quality Deficiencies and Delays

Titus’ quality deficiencies and subsequent delays resulted from Titus’ mismanagement. During late July 2017, Titus disclosed to KAST that it was having financial problems and asked KAST to make direct payments to one of Titus’ subcontractors. **KTE 85**; testimony of Alex Cervera, 162:9-15. Around this time, KAST began noticing issues with Titus’ work quality that impacted Titus’ ability to maintain the Project schedule. *Id.* at 176:3-25. These issues arose before Titus agreed to accelerate the schedule to earn an acceleration bonus, which will be discussed below.

Beginning in late September 2017, KAST held separate weekly “OPS” meetings with Titus to ensure Titus corrected its quality control deficiencies while also completing its base scope work in accordance with the Project schedule. **KTE 126**; testimony of Alex Cervera, 176:3-15. These meetings continued for months, and KAST prepared minutes of each OPS Meeting and distributed them to multiple Titus employees for review and comment. **KTE 141** (October 30, 2017); **KTE 145** (November 3, 2017); **KTE 169** (November 16, 2017); **KTE 172** (December 5, 2017). During these meetings, Titus’ on-site employees identified the manpower they needed on each floor to

³ No exhibits from the Project record were presented at trial that even discuss or mention this “cumulative impact.”

⁴ KAST defaulted Titus in part due to Titus’ inability to comply with the November 6, 2017, schedule.

correct specified quality issues and recover the schedule. The meeting minutes also track all the schedule deadlines Titus failed to meet for its production floors and to correct its work due to lack quality control. Most significantly, at no time did anyone from Titus or Berkley ever respond to the identified manpower counts, quality deficiencies, and related issues included in the meeting minutes by asserting that KAST was requiring a higher level of finish than contractually required or by objecting to the agreed manpower counts.

Around late September, KAST requested that Titus agree to accelerate to recover schedule delays caused earlier in the Project by weather events and a default by one of the MEP subcontractors. KAST offered to pay Titus additional amounts for increased manpower and supervision to accelerate floors 20 through 26 and directed Titus to submit a PCO for the amount Titus would need to recover the schedule. As a result, on October 6, 2017, Titus submitted PCO 77 in which Titus determined that it would need \$48,000.00 to accelerate levels 20 through 26 for six weeks. **KTE 129.** KAST notified Titus that it would accept Titus' \$48,000.00 proposal in PCO 77 if Titus agreed to correct the quality deficiencies and satisfy manpower requirements KAST and Titus discussed during the OPS meetings. **KTE 135.** KAST also conditioned PCO 77 on Titus' compliance with a Titus-only schedule for all floors (not just 20-26) KAST provided on October 11, 2017. **KTE 135.** The next day, Titus' principal, Nate Pardue, responded that Titus "agreed to these conditions." **KTE 135.**

Despite these weekly meetings and increased involvement from KAST, Titus was behind schedule by sixteen days as of November 6, 2017. Testimony of Kjell Carlson, 683:22-684:8. On that same day, Cervera provided Titus (and all other Project subcontractors) with an updated "Overall Project Construction Schedule." **KTE 153.** Cervera requested Titus, and the other subcontractors, to review the updated Project schedule and provide any comments within five days,

otherwise the schedule was deemed accepted. **KTE 153.** Under the Subcontract, the updated schedule is deemed accepted if no objection is raised within forty-eight hours. **KTE 13**, Article 6. Titus never commented on or objected to the November 6, 2017, schedule.⁵

Titus continued to struggle with quality issues—namely, walls that were not plumb, level, and square, and twisted corners—causing Titus to fall further behind schedule. Titus also was unable to provide the amount of manpower Titus stated it needed and agreed to provide during the OPS meetings. KAST’s superintendent Mark Hopkins testified extensively to the deficiencies and delays identified in pre-paint inspection reports and OPS meeting minutes, and identified several examples of Titus’ systemic defects for the TRJ:

Level (Ex. No.)	Quality Issues Identified	Delay From Deadline
L4 (KTE 151)	Irregularities where horizontal and vertical surfaces meet on inside corners. Hopkins, 575:4-577:19.	19 days per 12/5/17 OPS Meeting Minutes. Hopkins, 581:13-20; KTE 191 .
L11 (KTE 168)	Crooked inside corners where horizontal and vertical surfaces meet, drywall not cut properly around outlets, drywall not to level four finish. Hopkins, 584:6-14.	11 days per 11/21/17 OPS Meeting Minutes. KTE 172 .
L14 (KTE 200)	Corner intersections are not straight. Hopkins, 591:1-11.	12 days. Hopkins, 597:1-12; KTE 191 .
L23 (KTE 204)	Crooked inside corners, flaws in the drywall and finishing, poor quality work at the intersection of surfaces. Hopkins, 598:23-600:10 (Q: And are these similar issues we saw back on the – A: We saw them on every picture we’ve looked at.).	34 days. Hopkins, 601:24-602:11, KTE 191 .
L29 (KTE 255)	Repairing corners and walls ⁶ (Hopkins,	Two months behind per

⁵ This schedule was separate and distinct from the six-week Titus-only schedule tied to PCO 77. **KTE 153**; testimony of Alex Cervera, 212:23-213:13.

⁶ As this TRJ already noted, Titus’ quality issues increased as Titus progressed through the building. “*The Court: Let me ask you a question. Do these little orange markings on here look more numerous than the photos we’ve seen on the 14th floor? A: This one does. The Court: -- and the ones before. A: Yes. This floor does, yes. I agree. And more in the centers of the walls and stuff.*” Hopkins, 604:9-16.

	603:16-23), missing drywall (Hopkins, 605:13-606:3).	“baseline start and finish” from Project schedule. KTE 362.
L34 (KTE 280)	Excessive amount of “minor” flaws to corners and walls. Hopkins, 606:18-07:19.	Three months behind per “baseline start and finish” from Project schedule. KTE 362.

Titus’ argument that KAST was simply demanding a higher level of finish than the Subcontract required does not address the threshold question of whether there were material deficiencies with its work. As the TRJ already noted, Titus’ claims of “over inspection” or a Level 5 finish are not valid defenses to KAST’s claims that the walls were not straight, level and plumb. This issue was discussed at length during trial with multiple witnesses, including Titus’ Principal:

THE COURT: All right. Well, was there -- is there some contention? Because I have seen in the pleadings, “over inspection.” So was there some contention that Kast was not following the GA standard from the lighting.

THE WITNESS: That most definitely is a contention, because we witnessed it. You’re supposed to stand five feet away. You don’t go up and put a 8-foot level or a 4-foot straight edge. You don’t do that. This is an apartment-grade finish. They bought like a hotel finish.

So you stand five feet away –

THE COURT: But putting a straight edge is not finish. Straight edge is level and plumb. There is a difference between level and plumb (and finish).

THE WITNESS: No. Well, what they would do is they would rock it. Like, say there is a hump for a box. If you have a flat wall and you got a hump. They would put the straight edge and then rock it like that. And then we would cut it out, and there’s a box.

THE COURT: Yeah, well that’s the way you do it. Is there some other way you do it? That’s what –

THE WITNESS: That is not the way you do it. On a Level 4 finish, you stand five feet away –

THE COURT: No, no. If a hump is in a wall, and I mean – you put the straight edge on it and you rock it. If it rocks, you got to fix.

THE WITNESS: You don’t put the straight edge on it. You stand five feet away from the wall –

THE COURT: No, no. Five feet away from the wall to look at the finish. I don't want to argue with you, but five feet away to look at finish. Okay. But to determine Level 1 plumb –

THE WITNESS: That's on the framing.

THE COURT: It can be in the drywall, too. If the framing is off, the drywall is off.

Testimony of Nate Pardue, 938:10-939:23. In short, whether the walls were plumb, level, and square has nothing to do with finish level. Testimony of Andrew Wilbert, 429: 2-6. KAST presented evidence of persistent problems with twisted corners, window returns, and soffits—all of which are demonstrative of the walls not being plumb, level, and square. Moreover, evidence was presented at trial that KAST purchased a specialty primer from the Project's painting Subcontractor, Merit Professional Coatings (“Merit”) to achieve the look of a high finish level. **KTE 86**; testimony of Eli Bedran, 85:22-86:25 and thus did not need to have Titus achieve that level of finish. Therefore, the TRJ does not accept Titus' argument regarding a Level 5 finish as a valid defense to KAST's claims that the walls were not straight.⁷

KAST's superintendent was not the only witness who provided evidence of Titus' increasingly substandard work. The senior project manager to the supplemental drywall Subcontractor (Wal-Mark), Andrew Wilbert, testified that upon his initial walk of the Project before being retained, he identified improperly installed rated-walls throughout the Project. Testimony of Andrew Wilbert, 416:20-419:6. Wilbert also testified that Wal-Mark did not experience the same complications from the Project's MEP trades that Titus blames for much of its quality issues. *Id.* at 436:14-437:23. Wilbert also confirmed the industry practice of hanging

⁷ Titus also alleges that it was not required to provide a Level 5 finish in the corridors other than on the lobby levels (1 and 7). This contention, however, is contradicted by the Subcontract and the Project's ID Drawings. **KTE 13**, Schedule B; **KTE 18**. The claim is also rebutted by Titus' work in that it provided a Level 5 finish in the corridors according to Alex Cervera. Testimony of Alex Cervera, 1673:16-1676:14.

drywall 5/8 inch above the slab to protect it from water intrusion. *Id.* at 424:22-425:14. Unlike Titus, Wal-Mark did not have to replace water damaged drywall during January or March of 2018 due to this practice.

Additionally, the project manager for the Project's painting Subcontractor (Merit), Eli Bedran, testified that Titus' work quality worsened as the project progressed. Testimony of Eli Bedran, 78:20-79:7. Bedran identified the same quality defects as described by Hopkins and Cervera. He testified that Titus' mistakes were primarily in keeping their walls, soffits, and corners straight.⁸ *Id.* at 79:8-20, 80:8-10, 87:2-24. (*Q: How much of Titus' work was not plumb, level or square that you saw? A: I can say that almost all of the upper floors – most of the upper floors that they did. Q: So, following Floor 8, you started to see issues with Titus's work being plumb, level or square? A: That's a fair statement.*)

When compared to the work of other drywall subcontractors like Wal-Mark, Bedran testified that there was a "night-and-day" difference in the work quality. *Id.* at 85:4-6. "*There is no comparison. Wal-Mark was a lot, a lot better drywall sub than Titus was [...]*" *Id.* at 86:2-9. Bedran explained that Wal-Mark's work was always plumb, level, and square. *Id.* at 86:2-25. (*Q: Did you experience any instances with Wal-Mark where their drywall work was not plumb, level, or square? A: No.*) Titus' excuses for the quality of its work are not supported by the evidence.

The TRJ credits the testimony of Hopkins, Bedran, and Wilbert regarding standards that require that drywall be plumb, level, and square, including the routine industry practice of hanging the drywall 5/8 inches off the slab. The TRJ further finds their testimony consistent with contemporaneous inspections and OPS meeting minutes.

⁸ According to Bedran, the problems with Titus' work were so extensive that Merit resolved to never bid on a future project if Titus was the drywall subcontractor. *Id.* at 83:16-24.

8. Titus' Defaults

KAST became even more concerned when Titus' quality deficiencies and delays increased as Titus worked its way up through the upper floors of the Project. According to KAST, Titus' issues hit a breaking point on November 15, 2017, when approximately 71 of Titus' 145 workers abruptly left the Project. **KTE 353** (part 2, pgs. 95-105). When KAST informed Titus and Berkley of the mass walk-off, Pardue tried to explain it away as "bad information" and that Titus was letting go of non-performing crews to replace them with a new subcontractor. **KTE 162**.

Pardue's testimony is contradicted by his internal e-mails and the numerous OPS meeting minutes documenting that Titus was not meeting manpower requirements Titus knew it needed for quality control and schedule recovery. First, the night before, Pardue admitted in an internal email to having limited finances (\$86,000.00) to pay approximately half of Titus' crews on the Project. (**KTE 159**). Second, Pardue could not recall any details of this "replacement plan" or what subcontractor was allegedly brought in to replace the non-performing crews. Testimony of Nate Pardue, 1022:24-1023:10, 1121:20-1122:8. Finally, Titus never informed KAST or, more importantly, Berkley, of this "plan" before Titus "dismissed" half of its crew when Titus was already behind in its recovery schedule. Testimony of Ellen Cavallaro, 1615:6-8; testimony of Alex Cervera, 222:9-14. Titus attempted to confuse the recovery schedule with the acceleration schedule, claiming that if it failed to meet the recovery schedule it would just lose some or all of the "acceleration bonus". But Titus fails to account for the agreement it made to meet the demands of the recovery schedule.

When KAST met with Titus and Berkley the next day, neither Titus nor Berkley were able demonstrate that Titus would be able to correct its work or recover the schedule. **KTE 169**. After months of trying to work with Titus to overcome Titus' repeated failures and delays, KAST was

becoming increasingly exposed to claims from its other subcontractors impacted by Titus and substantial liquidated damages from the Owner due to Titus' inability to meet its obligations. Testimony of Jim Miller, 849:15-850:6 (*"KAST did Titus a huge favor negotiating that change order, because if they didn't get the time extension, the owner would have assessed – and could have assessed [...] the \$5,000 [daily] liquidated damage penalty."*). As a result, KAST invoked Article 26(a) and issued the November 16 Notice to Cure that identified Titus' specific events of default under the Subcontract. **KTE 13**, Article 26(a). The Notice to Cure expressly tracked the language of Article 26, stating:

"Therefore, in the event TITUS fails to provide and maintain adequate manpower, supervision, and resources *to support the mutually agreed upon project schedule dated 11/6/17*, including corrections to all quality deficiencies in accordance with that schedule, this letter shall serve as a formal 48-Notice to Cure and *we reserve our right to supplement your forces in accordance with Article 26 of your subcontract agreement."*

KTE 166 (emphasis added). Titus would have the TRJ interpret this Notice as solely an issue of manpower to meet the acceleration schedule, which Titus claims it quickly corrected. However, the plain meaning cannot be ignored – Titus had to recover the schedule and correct its quality deficiencies, which the TRJ interprets to mean not only the correction of past deficiencies but the avoidance of future deficiencies.

9. Titus' Failure to Cure

KAST's November 16 Notice to Cure identifies multiple events of default under Article 26(a). As the TRJ finds, the Notice was not limited to manpower counts as claimed by Berkley and Titus at trial. **KTE 166**. Indeed, the Notice to Cure and the testimony from Cervera make clear that KAST invoked Article 26 due to Titus' repeated failures *to support the November 6 Project schedule*, which included the timely correction of observed and agreed deficiencies in Titus' work. Testimony of Alex Cervera, 235:2-17. By Pardue's own admission, Titus failed to cure that

default. Testimony of Nate Pardue, 1146:14-1147:9.

The evidence further supports KAST's claim that Titus failed to cure the events of defaults KAST identified in the November 16 Notice to Cure. Titus continued to have issues with poor quality work, non-performing subcontractors, and making the same errors repeatedly, consequently falling further behind the recovery schedule. For example, OPS meeting minutes from November 21, 2017, document that Titus had failed to meet its own commitments for completion of QC work on 10 out of the 17 floors it was working on at the time. **KTE 172.**

On November 28, 2017, KAST notified Titus and Berkley that, because Titus had failed to cure its numerous defaults, KAST was exercising its right under Article 26(b)(ii) to supplement Titus with another subcontractor on floor 35. By that date, Titus was behind schedule by forty-one days. Testimony of Kjell Carlson, 683:4-21. **KTE 180.** KAST brought on Wal-Mark to maintain the overall Project Schedule by allowing Titus to focus on correcting its quality issues and recover its schedule on levels 2 through 34.

10. KAST Corrects Titus' Defaults

Even after KAST supplemented Titus on floor 35, Titus continued to struggle with its work quality and continued to fail to maintain the schedule, further disrupting the other subcontractors and increasing KAST's exposure to claims. **KTE 193** (Titus' failure to install QuietRock at trash chutes). On December 4, 2017, KAST provided Titus and Berkley with a detailed spreadsheet that described the work quality and timeliness issues that prompted KAST to default Titus and engage Wal-Mark. **KTE 190.** The next day, OPS meeting minutes indicate that Titus was still behind schedule on completing QC corrections on several floors. **KTE 191.**

Rather than curing its defaults, Titus and Berkley disputed that there were problems with Titus' work quality. Titus then proposed granting KAST a credit to remove floors 35 through 42

from Titus' scope in PCO 88 based on Titus' schedule of values. KAST immediately rejected Titus' proposal because it was not an accurate measure of KAST's recoverable costs under Article 26(b)(ii). On January 5, 2018, KAST again notified Titus that it had not cured its numerous defaults.⁹ KAST offered Titus a final opportunity to perform the work on those levels if Titus committed to meeting the Subcontract's quality standards and the current schedule. **KTE 208.** When Titus refused, KAST continued to use Wal-Mark to work on the upper floors.

KAST obtained estimates from Wal-Mark for floors 36 through 42 and tracked the claims its other subcontractors submitted due to Titus defaults. When KAST determined that these amounts would "exceed" the "undisbursed balance of the [Subcontract] Price," KAST notified Berkley and Titus that KAST was retaining the Subcontract balance as authorized by Article 26(b)(iv) and (c). **KTE 231.** On March 1, 2018, KAST provided Titus and Berkley with a detailed "Cost to Complete Summary" with an accounting of the Subcontract amount, pending change orders, costs to date to cure Titus' default, projected remaining costs, the administrative burden associated with the default, and supporting back-up documentation. **KTE 254.** In accordance with Article 26, KAST credited Titus/Berkley the then-outstanding Subcontract balance of \$1,842,601.96 against the \$2,837,754.75 KAST estimated it would incur to cure Titus' defaults. **KTE 254.** KAST provided several updates to the cost to complete and other damages KAST incurred due to Titus' defaults. Titus claims, however, that its performance was delayed and disrupted by failures of KAST to have the MEP trades timely and correctly perform their work. Titus alleges that these failures are documented in its Daily Reports as follows:

January 11, 2018: MEPs are still delaying TITUS floors. TITUS keeps having to return to floors to repair MEP damage and errors. TITUS is missing schedule dates due to the MEPs not getting inspections on time.¹⁰

⁹ Indeed, KAST even went so far as to show Titus' employees the work Wal-Mark performed on floor 35 to identify what Titus needed to do to correct its work.

¹⁰ TITUS T. Ex. 55, p. 4

February 19, 2018: KAST was supposed to release corridors on 2 floors a week, but has only released 5 floors in three months. MEP quality issues are still extremely poor are causing extra work for TITUS.¹¹

April 20, 2018: KAST has TITUS spread throughout the building from level 2 to 34 and “way out of sequence.” Tile subcontractor is having to repeatedly re-do its work but does not remove prior grout layers, which is causing door openings to too low and TITUS having to modify every door. Punch list is not ready and TITUS gets one unit at a time instead of a whole floor.¹²

May 9, 2018: KAST is still not releasing 3 floors of corridors a week as promised. Once units are complete, they sit without KAST locking the doors after drywall and paint, allowing other trades to store materials and damage the finished walls. KAST is not doing quality control of other trades and that is creating a lot of work for TITUS due to wall and framing damage.¹³

July 31, 2018: KAST has all trades working out of sequence and “on top of each other.” KAST is still not locking units to protect the finished walls from trade damage. The punch list is not proceeding in sequence, KAST has not released a corridor punch list, and the actual punch dates are “unknown.”¹⁴

August 17, 2018: KAST still has the entire job out of sequence. KAST and the owner are not following the punch schedule. There is supposed to be a one week interval between KAST punch and owner punch, but KAST is allowing the process to take 6 weeks. KAST punch is on level 18 while owner has only punched through levels 3 and 4. KAST is still sending TITUS back to completed and accepted units for repair work.¹⁵

September 4, 2018: KAST is still sending TITUS back to levels 2-5 to punch units that were already punched two months ago. The KAST and owner punch is one month behind schedule and 6 floors behind for KAST and 14 floors behind for the owner. The punch is out of sequence. KAST is still not locking or protecting completed units and trade damage is continuing causing more work. “This has been the problem on this job KAST fails to maintain the schedule and in return ask TITUS to work on 8 floors at a time.”¹⁶

¹¹ TITUS T. Ex. 55, p. 4

¹² TITUS T. Ex. 55, p. 3

¹³ TITUS T. Ex. 55, p. 3

¹⁴ TITUS T. Ex. 55, p. 2

¹⁵ TITUS T. Ex. 55, p. 2

¹⁶ TITUS T. Ex. 55, p. 1

The TRJ rejects Titus' claims for two reasons: first, on cross-examination, Nathan Pardue admitted that these daily logs were not completed contemporaneously with the work, but filled in well after the Project was completed and after the lawsuit was filed.; secondly, if in fact these issue actually happened, Titus could have, but did not, make a claim for time and money to correct them.

KAST subsequently retained an outside expert, Jim Miller from Baker Tilly to audit KAST's claims. Miller presented his expert opinion on KAST's damages resulting from Titus' default at trial. After deducting the balance under the Subcontract, Miller determined that KAST's damages total \$2,403,616.80 which is further detailed in the damages section below.¹⁷ Titus and Berkeley dispute Miller's analysis but neither offered any expert testimony to rebut Miller's opinions.

III. BERKLEY BREACHED THE BOND

Berkley began investigating Titus' performance during September 2017 after another surety alerted Berkley of Titus' financial difficulties. Berkley engaged an outside construction consultant to monitor Titus and report back to Berkley. Testimony of Ellen Cavallaro, 1537:15-23. KAST cooperated with Berkley, its consultants, and outside counsel, included them in OPS meetings, and shared real time information on Titus' performance for several weeks before KAST issued its Notice to Cure. Testimony of Alex Cervera, 201:24-203:13; **KTE 141, KTE 145, KTE 169, KTE 172.**

During October of 2017, KAST learned that Berkley was providing a "loan" to Titus for the Project but was not provided with any specifics on Berkley and Titus' apparent funding agreement. Testimony of Alex Cervera, 368:10-16. On October 26, 2017, Titus and Berkley directed KAST to make all future payments "otherwise payable to Titus and which are due, or

¹⁷ This amount includes prejudgment interest.

which may become due” to Berkley. **KTE 139**. The financial arrangement was made before Titus’ default, and KAST’s claim against the Bond. Whether Berkley’s financing was sufficient to enable Titus to meet the manpower commitments it made, maintain the agreed Project schedule, and correct its quality deficiencies as reflected in the OPS meeting minutes is unknown. What is undisputed is that despite Berkley’s funding Titus’ payroll, Titus’ performance did not meet its obligations under the Subcontract.

A. Berkley Provided Funding for Titus’ Payroll but Did Not Finance Project Completion

After KAST issued its November 16, 2017, Notice to Cure, Berkley’s counsel responded on November 27, requesting KAST provide project documents to allow Berkley to investigate KAST’s claims and select one of six options.¹⁸ Berkley’s letter states that it was conducting its investigation under “Paragraph A of the Bond.” Berkley’s counsel did not state that Berkley had selected Option Four and arranged for financing for completion of the Subcontract work. KAST provided Berkley with requested Project documents on December 1, 2017. **KTE 189**. Per the terms of the Bond, Berkley therefore had until December 31, 2017, to elect a remedy. **BTE 1**, Section A.

The TRJ finds that Berkley’s support of Titus’ payroll satisfied its obligations under the Bond at least initially, and its continuation of financing after the Default is a *de facto* election of Option 4. Providing funds for Titus to make payroll is the inception of electing Option Four to arrange “financing to assist the Principal with Completion of the Subcontract.” Unfortunately,

¹⁸ As the TRJ noted during trial, the surety often looks for a “D letter” informing the surety of its Principal’s default. Testimony of Ellen Cavallaro, 1652:13-25. Indeed, Berkley has argued that KAST’s November 16 Notice to Cure was not a “declaration of default.” *Id.* at 1579:17-24. Despite this argument, the record evidence shows that Berkley’s actions upon receiving the November 16 letter that cites to Article 26 comport with what the Bond requires upon receipt of a notice of default. Specifically, Berkley’s counsel notified KAST on November 27 that Berkley was investigating KAST’s claims and requested several Project documents. Berkley’s assertion of work product and claims investigation privileges after receipt of the November 16 letter further confirms that November 16 was the triggering date for electing a remedy under the Bond. **BTE 1**.

Berkely did not complete its Option Four election, as will be discussed below. KAST contends that the only Bond Option Berkley selected was Option Five in that Berkley denied liability and notified KAST of the reasons for the denial as detailed by Berkley's outside counsel. **BTE 1**, Section A (5). While there is no evidence Berkley ever notified KAST it elected Option Four, it continued to finance until Titus was off the Project. But that financing of Titus did not fulfill Berkley's performance bond obligations. To fulfill its obligations, Berkley would have had to agree, and arrange, to finance the completion of the remaining Subcontract work, which would include floors 1, 7, and 35 through 42. Those floors, ultimately completed by Wal-Mark, were paid for by KAST, not Berkley, nor were they ever removed from Titus' scope of work. Testimony from Ellen Cavallaro, 1639:11-15.

Complicating Berkley's claim that it selected Option Four is Berkley's counsel's December 12, 2017, letter to KAST stating that Berkley was, as of that date, considering its performance options under the Bond. The Interim Agreement proposed by Berkley on February 9, 2018 stated that Berkely had not selected any of the six options under the Bond and was considering whether to provide financing to Titus under a Separate Financing Agreement—which the Interim Agreement was contingent upon.¹⁹ **KTE 241**, Article 11 (*"this Agreement shall **not** be construed as an election by Berkley of any rights afforded Berkey under the Performance Bond. Berkley specifically reserve any and all rights afforded thereto under the Subcontract and/or Performance Bond, including but not limited to the election of its complete reservation of rights under paragraphs A (1) through A (6) of the Performance Bond."*) (emphasis added). This letter makes

¹⁹ During trial, Berkley's representative claimed for the first time that the disclaimers in the Interim Agreement provision prepared by Berkley's outside counsel was a "mistake." Testimony of Ellen Cavallaro, 1645:22-1646:6. Regardless of any "mistakes" in the Interim Agreement, these provisions are admissions by Berkley, and must be viewed in context with Berkley's December 12, 2017, letter stating Berkley was considering its options under the Bond. As stated above, Berkley never chose any options to complete the work or finance it.

it clear that Berkley was only considering a continuation of financing of Titus' payroll, which falls well short of Berkley's obligations under Option 4 to finance the completion of all work within the scope of Titus' Subcontract. At some point in time, as Wal-Mark was continuing to perform, Berkley had an obligation to either agree to fund the remainder of the Titus' Subcontract work, which Wal-Mark was performing, or elect to take-over the work and fund it with a contractor of its choosing. It did neither. At no time during this period did Berkley ever tell KAST that it would provide financing for Titus to complete the Subcontract. To the contrary, after denying that Titus defaulted, Berkley notified Kast that Berkley would not finance Titus' performance unless KAST paid Berkley the remaining Subcontract balance, which Berkley was not entitled to under Article 26 of the Subcontract or Section A of the Bond. **KTE 242**. The phrase "Obligee shall pay the Balance of the Subcontract Price as directed by Surety" as stated in the Bond does not create an independent right to payment divorced from the Subcontract. The Bond's definition of "Balance of the Subcontract Price" is "the total amount *payable* by Obligee to Principal under the Subcontract." **BTE 1**, Section E (emphasis added). Berkley agreed in the Bond Section E (and by incorporating the Subcontract by reference) that any rights to the outstanding Subcontract balance was still subject to KAST's rights under Article 26 of the Subcontract. Had Berkley agreed to fund the entire remaining Subcontract work it would have an argument that it was entitled to the balance of the Subcontract, but it never made that election.

Thus, even if there is a *de facto* election of Option Four, Berkley did not carry through with that election to fund the remining cost of the work which KAST was incurring through Wal-Mark.

CONCLUSIONS OF LAW

KAST alleges Titus materially breached the Subcontract when it defaulted on November 16, 2017, and failed to cure its defaults. In turn, Titus alleges KAST breached the Subcontract first

through the “cumulative impact” of other subcontractor defaults and weather events earlier in 2017. As for the Bond, KAST alleges Berkley breached it by failing to elect and complete a remedy option following Titus’ default. Conversely, Berkley alleges KAST breached the Bond by improperly defaulting Titus and failing to pay Berkley the outstanding Subcontract balance. Based on the factual findings above, the TRJ concludes the following with respect to these claims:

I. KAST’S CLAIM AGAINST TITUS

After hearing all the evidence and evaluating the issues, the TRJ finds that Titus materially breached the Subcontract by repeatedly providing substandard work that was not plumb, level, and square and not adhering to the overall Project schedule. The parties worked for months to correct Titus’ quality and manpower issues and to recover the Project schedule before KAST defaulted Titus. By November 16, 2017, when KAST issued the Notice to Cure, approximately half of Titus’ work force left the Project, its work was replete with persistent quality issues, and Titus was behind schedule. All three of these events constitute defaults under the Subcontract. **KTE 13**, Article 26(a). Titus failed to cure those defaults per the terms of the Subcontract. For these reasons, KAST properly defaulted Titus.

A. Titus Materially Breached the Subcontract

To constitute “a [...] material breach, a party’s nonperformance must ‘go to the essence of the contract.’” *Covelli Family, L.P. v. ABG5, L.L.C.*, 977 So. 2d 749, 752 (Fla. 4th DCA 2008) (citation omitted). When a contract, like this Subcontract, specifies that “time is of the essence,” failure to timely perform is also a material breach. *Edward Waters College, Inc. v. Johnson*, 707 So. 2d 801, 802 (Fla. 1st DCA 1998); **KTE 13**, Article 6(a) (“Time is of the essence.”).

As described at length above and documented throughout the Project’s OPS meeting minutes, Titus repeatedly delayed the Project schedule (and its own schedule), failed to cure

chronic quality control issues, and failed to maintain sufficient manpower to complete its work in accordance with the Subcontract requirements. These items constitute events of default. **KTE 13**, Article 26(a). These defaults go directly to the essence of the Subcontract—that the work be completed with sufficient quality and on time—and are therefore material. Moreover, the events of default were not minor or “one offs.” Indeed, the record is replete with evidence that Titus’ quality control, manpower, and schedule issues plagued the Project for months.

B. Titus Failed to Cure its Defaults

At trial, Titus attempted to characterize the November 16, 2017, default as strictly related to manpower counts. Testimony of Nate Pardue, 1121:1-4. However, this description does not comport with the language of the Notice. In fact, the Notice makes clear that the default is failing to support the Project’s schedule, including the issue of deficient work and its timely correction. **KTE 166**. As documented repeatedly in the OPS meetings, which began approximately several weeks before the default, the two primary issues preventing Titus from complying with the schedule were quality control problems and inadequate manpower. **KTE 141; KTE 145; KTE 169; KTE 172**. While Titus is correct that manpower was *one of the* problems prevalent at the time, the November 16 default was not framed solely around manpower—the true issue laid within the schedule failures resulting from repeated deficiencies in workmanship.

Even if low manpower was Titus’ only default, Titus still failed to cure. Titus maintained sign-in sheets throughout the Project documenting its workforce. According to Nate Pardue, Titus’s superintendents oversaw the sign-in sheets for accuracy and compliance. Testimony of Nate Pardue, 1131:18-20. The OPS meeting minutes from November 16, 2017—the date of default—indicates that Titus reported a need of 100 men to recover the schedule. **KTE 169**. On November 17, 2017, only 73 men signed in for Titus. **KTE 353** part 2, 111-116. November 18,

2017, was a Saturday, which Titus characterized as a “catch up day.” Testimony of Nate Pardue, 1103:7-24. However, Titus provided no evidentiary support for its contention that the 37 men who worked on Saturday should be combined with the 73 men who worked on Friday to total 100 working men in a day. The Subcontract does not allow for such multi-day compilations, and there was no evidence from the Project record that this methodology was acceptable or even raised by Titus at the time. The next working day was November 20, 2017, and Titus had 73 sign-ups. **KTE 353** part 2 121-126. This shortcoming continued at least over the following week. **KTE 353** part 2.

During trial, Pardue testified that it is not the number of men who signed-in that is important for determining whether the default was cured, but rather the number of hours the men worked in each time frame divided by the standard workday (eight hours) to determine the “manpower” equivalent of its man-hours. Testimony of Nate Pardue, 524:8-525:3, 526:13-527:4. The TRJ finds this explanation to be without merit. No contemporaneous Project records support this calculation method—manpower needs provided by Titus in OPS meetings were exclusively provided in the form of how many men were needed. No one from Titus ever explained this behind-the-scenes math to KAST in response to the numerous OPS meeting minutes that documented the manpower shortfalls, and the assertion that Titus can combine work performed on different dates to create a new “manpower” analysis ignores the reality of a Project schedule. As testified to by Cervera:

THE COURT: Let me hear that answer again. Repeat that. “A root cause.”

THE WITNESS: Part of the root cause of the problem and the delays to getting the quality deficiencies addressed in a timely manner was that even though Titus’ own men were – was laying out the plan collaboratively with what needed to happen and answering the questions Kast was asking in those OPS minutes or meetings – we were sending the minutes explaining what Titus’ men were asking for – someone was doing some sort of math

behind the scenes to divide total manpower by 8 and create man days, and then make the statement that, because we have 21.4 man days on this day that we've covered – even though, with 17 people, that we've covered what 21 men needed to do that day. And that's not possible.

I don't believe at any point in time they sent people that were working on level 15 for 10 hours up to level – they only worked on 8 hours and then they went up to Level 24 for 2 hours. That's not what happened. That's the logic behind the divide by 8, which makes no sense. It's part of the root cause.

It's part of the fundamental disagreement. We were sending them the manpower needed, the heads that were needed in different places, and they were doing some math and providing less each and every time. And the dates were slipping and slipping and slipping. And there was no communication of the math.

Testimony of Alex Cervera, 1704:10-1705:14.

In addition to Titus' low manpower, schedule delays persisted long after the default on November 16, 2017. As identified by KAST's expert Kjell Carlson, Titus' delays jumped from sixteen days as of November 6 to forty-one days by November 28. Testimony of Kjell Carlson, 683:4-684:8. By January 2018, Titus delayed the Project by fifty-seven days. *Id.* at 672:8-675:17. It is clear from the testimony presented at trial and the Project record that Titus failed to cure its defaults not only within the 48-hour cure period, but for months afterward.

C. Titus' Default Entitled KAST to Withhold Payments

Titus' material breaches, which are events of default under Article 26, entitled KAST to withhold payments to offset KAST's cost and damages resulting from Titus' defaults. In Florida, a party to a contract does not owe further obligations after the other party has materially breached the contract. *Nacoochee Corp. v. Pickett*, 948 So. 2d 26, 29 (Fla. 1st DCA) (failure by purchaser to timely close on a "time is of the essence" promise discharged seller of further contractual obligations). Article 26 of the Subcontract includes two provisions which explicitly state that, once defaulted, Titus is not entitled to payment until the work is complete and accepted by the Project's architect and owner. **KTE 13**, Article 26I and (h).

II. KAST'S CLAIM AGAINST BERKLEY

Like Titus, the TRJ finds that Berkley breached the Bond by failing to properly exercise a performance remedy that guaranteed performance of the Subcontract. “The purpose of a performance bond is to guarantee the completion of the contract upon default by the contractor.” *Am. Home Assurance Co. v. Larkin Gen. Hosp., Ltd.*, 593 So. 2d 195, 198 (Fla. 1992) (citation omitted). In the event of default, “the surety [under the bond] performs the work, mitigates loss by its performance, and pays the subcontractors and suppliers.” *In re Modular Structures, Inc.*, 27 F.3d 72, 74 n.1 (3d Cir. 1994).

Berkley's obligation is to ensure *full performance* of Titus' work under the Subcontract if Titus is unable to do so. Titus repeatedly defaulted on the Subcontract by failing to produce quality work and failing to maintain the Project schedule. Meanwhile, KAST complied with all its Subcontract obligations when it notified Berkley of Titus' default, provided an opportunity to cure, and waited until the conclusion of that cure period to supplement the work.

Berkley was afforded a thirty-day Investigatory Period (in addition to the several weeks Berkley spent investigating the project during October and November) to elect an option once KAST notified Berkley and Titus of Titus' events of default. Critically, the Subcontract and Bond expressly permit KAST to mitigate the default during this time—which KAST did with Wal-Mark. **KTE 13, BTE 1.** Berkley had access to the Project site, and KAST provided Berkley with Project documents to assist in its investigation. Here, Berkley was well aware of Titus' defaults by the end of November 2017, Berkeley's investigators had access to the Project site as early as September of 2017 (**KTE 361**), and KAST provided the requested records on December 1, 2017 (**KTE 189**). Upon the conclusion of the Investigatory Period, Berkley was obligated to elect and complete one of the six performance remedies enumerated in the Bond. **BTE 1, Section(A)(1-6).** Berkley failed

to do so.

A. Berkley Did Not Elect a Remedy

In a bond, like the Bond at issue, the surety (Berkley) promises the obligee (KAST) to answer the default of the principal (Titus). *Dadeland Depot, Inc. v. St. Paul Fire & Marine Ins. Co.*, 945 So. 2d 1216, 1226 (Fla. 2006). Because the Bond is subject to the general law of contracts, the terms of the Bond govern the rights and responsibilities of the parties. *Clark v. Clark*, 79 So. 2d 426 (Fla. 1955). Therefore, the question of whether Berkley complied with the Bond is governed by the Bond language.

Berkley's claim that KAST's November 16, 2017, Notice to Cure under Article 26 (the Default Article) is not a "declaration of default" does not excuse Berkley's failure to perform. KAST's November 16, 2017, Notice complied with KAST's obligations under Article 26(b)(i), identified Titus' specific events of default under Article 26(a), and gave Titus forty-eight hours to cure those defaults. After forty-eight hours, KAST had the right to cure, mitigate, or correct the defaults under Article 26(b). Berkley, as surety, did not agree to pay KAST's costs that exceeded the balance of the Subcontract. **KTE 13**, Article 26(d).

At trial, Berkley asserted that it elected Option Four, which provides: "Arrange to provide financial and/or other assistance to the Principal ('Financing') to assist the Principal with completion of the Subcontract [...] The Obligee shall pay the *Balance of the Subcontract Price* as directed by the Surety[...]" **BTE 1**, Section A (4). It is undisputed that Berkley began financing Titus, in some form, by the end of October of 2017. **KTE 139**; testimony of Ellen Cavallaro 1569:7-12 (Q: "So, based on the outcome of this [October 31, 2017] meeting, what did Berkley decide to do? A: We decided to start financing. We had a letter of direction in place with Kast. We arranged for Nicosia to have someone on the job site to be the surety's eyes and ears on the job.").

However, this pre-default financing arrangement does not automatically or ultimately constitute an election or compliance under Option Four of the Bond.

As discussed above, the parties exchanged letters regarding Titus' default for months following the Notice to Cure. During that time, Berkley never informed KAST it elected to pursue Option Four of the Bond or any other option. Testimony of Alex Cervera, 344:23-345:3. Rather, when the events occurred, Berkley repeatedly *denied the default*. **KTE 176; KTE 194; KTE 242**. In fact, in February of 2018, Berkley represented to KAST it had not elected, and was not electing, a remedy. **KTE 241**, Article 11 (“this Agreement *shall not be construed as an election by Berkley of any rights* afforded Berkey under the Performance Bond. Berkley specifically reserves any and all rights afforded thereto under the Subcontract and/or Performance Bond, including but not limited to the election of its complete reservation of rights under paragraphs A (1) through A (6) of the Performance Bond.”) (emphasis added).

B. Even if Berkley Elected an Option, it Did Not Fully Perform

As discussed above, even assuming *arguendo* that Berkley's actions constituted a *de facto* election of Option Four, Berkley did not actually “[a]rrange to provide financial and/or other assistance to the Principal (‘Financing’) to assist the Principal with *completion of the Subcontract*” because Berkley only financed Titus' payroll costs, not the actual completion of the Subcontract work. Berkley failed to reimburse KAST for costs incurred by Wal-Mark for the upper floors, or other subcontractors due to Titus' poor-quality work, or KAST's own additional costs for additional oversight required for Titus. **BTE 1**, Section A (4). As stated above, the upper floors were never removed from Titus' scope of work. Testimony from Ellen Cavallaro, 1639:11-15.

Similarly, Berkley never sought to have the upper floors “returned” to Titus to facilitate its performance under the Bond. Therefore, if Berkley had committed to fully implement Option Four,

it would still be obligated to reimburse KAST's damages incurred in ensuring completion of the Subcontract work. **BTE 1**, Section B ("To the extent the Balance of the Subcontract Price is exhausted, and Surety elects to proceed under paragraph A, subparts 1, 2, 3, or 4, *Surety shall reimburse Obligee for the difference between the Balance of the Subcontract Price and the Cost of the Mitigation Work* incurred and paid by Obligee.") (emphasis added).

C. Berkley Did Not Have an Independent Right to the Subcontract Balance

The Performance Bond between Berkley and Titus explicitly incorporates the entirety of the Subcontract by reference. **BTE 1**. Florida courts have repeatedly recognized "the well-established doctrine of incorporation by reference to impose liability on a performance bond surety" because the purpose of performance bonds is "to insure performance in accordance with the terms of the respective subcontracts." *Nat'l Fire Ins. Co. of Hartford v. Fortune Const. Co.*, 320 F.3d 1260, 1275 (11th Cir. 2003); *see also Gulf Bldg., LLC v. Philadelphia Indem. Ins. Co.*, No. 22-CV-60573, 2024 WL 309026, at * 2 (S.D. Fla. Jan. 8, 2024).

Upon Titus's default as discussed above, Berkley had the right to select from a list of six possible options. Berkley claims to have selected Option Four, which provides that Berkley may "Arrange to provide financial and/or other assistance to the Principal ('Financing') to assist the Principal with completion of the Subcontract [...] The Obligee shall pay the *Balance of the Subcontract Price* as directed by the Surety." **BTE 1**. The "*Balance of the Subcontract Price*" is a defined term in the Performance Bond and refers to "the total amount *payable by Obligee to Principal* under the Subcontract and any amendments thereto, less the amounts heretofore properly paid by Obligee under the Subcontract." **BTE 1**, Section E (emphasis added). Therefore, even assuming that Berkley performed its duties under Option Four by financing completion of the remaining work, Berkley at most would be entitled to the total amount payable to Titus under the

terms of the Subcontract. **KTE 13**, Article 26 I. We will never know what that amount may have been because Berkley did not elect to complete the Subcontract work. By that failure, the cost of completion of the work exceeded the Subcontract balance, and the “total amount payable by Obligee to Principal under the Subcontract” is zero.

Furthermore, the Subcontract provides, “The foregoing remedies shall be considered separate and cumulative and shall be in addition to every other remedy given hereunder or under the Contract Documents, or now or hereafter existing at law or in equity. Subcontractor’s guarantors, surety, or sureties agree to be bound to Contractor with respect to such remedies *notwithstanding any provision of the bonds* provided pursuant to Article 10 hereof.” KAST Trial Ex. 13 at 18 (emphasis added). Therefore, under the plain language of the Bond and Subcontract, Berkley is not entitled to be paid the Subcontract Price without accounting for the cost of completion which entirely offsets and indeed exceeds the balance of the Price.

Courts within Florida and in other jurisdictions have found that a surety is bound by the terms of a subcontract in similar circumstances. *See Nat’l Fire Ins. Co. of Hartford v. Fortune Const. Co.*, *supra* at 1275; *R.J. Griffin & Co. v. Continental Ins. Co.*, 230 Ga. App 822, 824 (1998) (finding that the surety’s “suretyship contract binds it to complete the work in accordance with the subcontract, and the subcontract itself provides that subcontractor’s guarantors, surety, or sureties agree to be bound to contractor with respect to such remedies notwithstanding any provision of the bonds provided.”).

Berkley’s equitable subrogation rights allow it to “step into the shoes” of Titus after Titus is in default and Berkley has elected a Bond remedy. *See Transamerica Ins. Co. v. Barnett Bank of Marion County, N.A.*, 540 So. 2d 113, 116 (Fla. 1989) (“A surety who performs or pays on behalf of an obligee steps into the shoes of the obligee to the extent of performance or payment.”).

The rationale is straightforward: Berkley is bound by the plain language of the Subcontract and Bond, which defines the amount payable to Berkley as whatever is payable to Titus—and, in this case, that amount is zero because the cost of completion exceeds the Subcontract balance.²⁰

III. KAST’S DAMAGES

Article 26(b)(iv) provides that KAST is entitled to “all losses, damages, penalties, and fines, whether actual or liquidated, *direct or consequential* [...] by reason of or as a result of Subcontractor’s default.” **KTE 13**, Article 26(b)(iv) (emphasis added). Beginning in March 2018, KAST continually updated Titus and Berkley of KAST’s damages caused by Titus. KAST’s losses include: (1) Wal-Mark’s costs to complete, delay and extra work claims from KAST’s subcontractors (painting, electrical, etc.) caused by Titus, (2) Project delays, (3) KAST’s additional labor costs (cleanup, supervision, and corrections), (4) the contractual 15% additional administrative burden, (5) premiums for a lien transfer bond, and (6) prejudgment interest. KAST retained an outside expert, Jim Miller, to audit KAST’s damages and present his findings at trial. Titus and Berkley did not present any expert testimony in rebuttal. Miller quantified KAST damages as follows:

Category	Value
Wal-Mark Cost to Complete	\$2,522,155.00
Delay And Extra Work Claims from Other Subcontractors	\$622,174.00
Schedule Delays: Extended General Conditions	\$548,055.00
KAST’s Additional Labor Costs	\$327,732.00

²⁰ As Berkley has argued, sureties are entitled to “equitable subrogation” when they perform under a performance bond. However, the right of equitable subrogation is limited to “any contract funds owed by the owner of a project.” *In re Cone Constructors, Inc.*, 265 B.R. 302, 310 (Bankr. M.D. Fla. 2001). *See also Transamerica Ins. Co. v. Barnett Bank of Marion Cnty., N.A.*, 540 So. 2d 113, 115-16 (Fla. 1989) (“When, on default of the contractor, [the surety] pays all the bills of the job to date and completes the job, it stands in the shoes of the contractor *insofar as there are receivables due it*”) (emphasis added). There are no receivables that would be due to Titus, and therefore there are no receivables due to Berkley.

Lien Transfer Bond Premium ²¹	\$52,253.00
Article 26 Administrative Burden (15%)	\$610,855.33
Pre-Judgment Interest ²²	\$925,326.08
KAST Total Claim:	\$5,604,550.41
Less: Subcontract Balance ²³	\$3,204,933.00
Total Amount Claimed by KAST: ²⁴	\$2,403,616.80

A. Damages From Wal-Mark and Other Subcontractors

To mitigate its damages following Titus' default and failure to cure, KAST retained Wal-Mark on a time and materials basis to perform work on level 35 in November of 2017. **KTE 179.** Over the next few months, KAST gradually released Wal-Mark to work on the upper floors to maintain the schedule while Titus continued to struggle to meet its obligations. The TRJ heard testimony that Wal-Mark was kept on a time and materials basis so that in the event Titus cured its defaults or Berkley opted to complete the work, Wal-Mark could easily be told to stop work. Testimony of Alex Cervera, 323:16-324:10.

Because of the continuing nature of Titus' default and performance struggles and Berkley's involvement on the Project, this method of supplementing the work is reasonable. Similarly, Wal-Mark's costs included in KAST's claim against Titus are also reasonable. Wal-Mark's senior project manager testified that Wal-Mark's costs were comparable to its competitors in the industry (Testimony of Andrew Wilbert, 466:3-8), and the costs were independently verified by KAST's

²¹ On August 22, 2018, Titus recorded a lien against the property, which KAST transferred to a Bond on September 24, 2018. **KTE 324.** In Florida, a lienor has one year from the recording of a lien to file a claim pursuant to that lien. [stat.] Here, Titus never did so. Therefore, despite KAST continuing to pay premiums on the Bond after that year expired, KAST is entitled to recover only for the first payment.

²² The pre-judgment interest was calculated using the statutory rates for each year from June 1, 2018, through October 25, 2025.

²³ This includes the PCOs identified in **TTE 6A.**

²⁴ This figure does not include attorneys' fees, which will be determined at a post-judgment hearing.

expert Jim Miller. Testimony of Jim Miller, 722:5-10. KAST paid Wal-Mark \$3,097,675.46 on the Project. Of that amount, KAST initially attributed \$2,771,958.47 to Titus. As part of his audit, Miller reviewed every Wal-Mark work ticket and reduced this part of the claim by almost \$250,000.00. *Id.* at 768:10-16, 789:3-11.

KAST also incurred \$622,174.00 in back-charges from other Subcontractors due to Titus' poor performance and ultimate default, with the bulk of this cost coming from the Project's painter, Merit. As discussed during trial, increased back-charges from the painter are reflective of Titus' poor quality control procedures and lack of supervision. Testimony of Andrew Wilbert, 439:12-440:9 (Q: "*What QC measures did Wal-Mark take after – just walk us through after the framing, the hanging, and tape and finish to make sure you had plumb, level, and square? A: So I mean, like I said before, our first QC is going to be framing QC. And then QC, you'll work – the way I like to work is we do QC before prime. Most of our problems are really better solved before they prime it. So and then after we prime, we take another look at it. Two steps. You do the framing. Drywall is the drywall. And then you do it after the finishers hit it*").

During the Project, Merit tracked its additional costs in separate work tickets on a time and materials basis. Deposition of Eli Bedran, 31:10-32:7, 51:5-25. Because of Titus' poor work quality, Merit was forced to re-paint Titus' excessive re-dos and drywall patches. Testimony of Eli Bedran, 79:8-20. To account for Titus' drywall mistakes and the schedule delays they caused, Merit had to bring on extra personnel from other projects. *Id.* at 83:25-84-18. Merit tracked the costs it incurred due to Titus's errors through time and material tickets. *Id.* at 31:10-20. As with Wal-Mark, Miller audited every Merit work ticket and concluded that \$456,583.00 out of \$867,102.00 was caused by Titus. Testimony of Jim Miller, 770:6-771:11. Several other Subcontractors also back-charged KAST for rework performed due to Titus' poor performance,

which were reviewed by Miller and presented as part of the claim. *Id.* at 843:2-846:6, **KTE 327** (Pinnacle); **KTE 332** (ET Flooring); **KTE 333** and **KTE 334** (Kirlin); **KTE 336** (Nolte); **KTE 337** and **KTE 338** (Paramount); **KTE 339**, **KTE 340**, **KTE 341**, **KTE 342**, and **KTE 343** (PDI).

There is an issue regarding KAST's claim of \$456,000 that it paid to Merit Painting between June of 2017 and January 2019. Merit was not just the painter. The project owner did indeed desire a Level 5 finish at the project, but KAST purchased the Level 5 finish from Merit instead of having TITUS do the work.²⁵ As a result, Merit was responsible for supplying the perfectly smooth and unblemished walls called for in a Level 5 finish.²⁶ Additionally, under its subcontract, Merit undertook the responsibility to correct blemishes and flaws in the walls prior to painting.²⁷ Between the Level 5 finish and the obligation to do the final correction of blemishes on the walls, Merit had a heavy burden of performance to assure the appearance of its own work.

Merit also had the obligation to review and accept the walls for painting.²⁸ Merit had the obligation to do a second round of repairs prior to final coat.²⁹ Even KAST acknowledged the principle of "you paint it, you buy it" as applying to Merit's work.³⁰ Even before Merit accepted the walls, KAST itself accepted the walls as a result of the Pre-Paint Inspection process. Merit would then review the walls and accept them for primer (the key component for the Level 5 finish

²⁵ KAST T. Ex. 86

²⁶ See, TITUS T. Ex. 3D GA 214

²⁷ TITUS T. Ex. 3F, p. 8--Spec 02900 Painting "fill minor defects with filler compound and spot prime defects after repair".

²⁸ TITUS T. Ex. 3F, p. 5 "examine areas and conditions under which painting work is to be applied. Do not proceed with work until unsatisfactory conditions have been corrected . . . Starting of painting work will be construed as Applicator's acceptance of surfaces and conditions within any particular area."

²⁹ *Id.*, p. 6 "Before applying succeeding coats . . . touch up all scratches, abrasions and other disfigurements . . . All spot-priming or spot-coating shall be feathered into the adjacent surfaces."

³⁰ Miller T. Tr., p. 879

so the walls had to be fully satisfactory), and then Merit would accept the walls again several months later for final paint after the finish trades had completed their work.³¹ Thus, the walls were inspected, corrected and accepted three times—once by KAST and twice by Merit.

These facts raise questions regarding KAST's claim. Virtually all of the T&M tickets are for re-painting walls after the walls have already been accepted multiple times by TITUS, KAST and Merit. A review of KAST's spreadsheet shows that the word "drywall" appears only 39 times, and the vast majority of these are references to painting "drywall repairs" or "prime patches" or re-priming or re-painting due to "excessive drywall patches."³² Patches could be the result of trade errors and damage.

Many tickets refer to "prep, prime, paint walls, ceilings trim" which appears to be typical Merit scope of work.³³ Other tickets refer to a "third finish coat" and associated covering up of the unit.³⁴ There are dozens of items in the claim that have no description at all as to the cause³⁵ and therefore cannot be awarded as damages due to TITUS. These items total approximately \$125,000. If the tickets that have no causative description, or that refer to patches or repairs, are removed, the remaining tickets are approximately \$187,000. Even though Mr. Miller admitted at his deposition that he could not read the tickets and find even one that definitively identified an issue that TITUS caused,³⁶ damages need only be proved with reasonable certainty, not exactitude. See *Grossman Holdings v. Hourihan*, 414 So. 2d. 1037 (Fla. 1982); *Shadow Lakes, Inc. v. Cudlipp*

³¹ TITUS T. Ex. 402

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*, at p. 15 and 17-25

³⁶ Miller T. Tr., p. 892

Construction. & Dev. Co., 658 So. 2d. 116 (Fla. 2d DCA 1995). The TRJ finds that KAST is entitled to damages in the amount of \$187,000 for this claim out of the \$456,000 claimed.

B. Schedule Delays

Under Article 26, Titus is responsible for damages associated with the fifty-seven days of delay it caused to the Project schedule. According to KAST's schedule expert Kjell Carlson's analysis, Titus' drywall hanging work delayed the Project by six days during the time frame of July to October of 2017. Testimony of Kjell Carlson, 670:6-671:6. Titus' quality control work further delayed the Project by another fifty-one days during the time frame of August 2017 to January 2018. *Id.* at 672:8-675:17. Critically, the contractual default period falls directly within both of these time frames. **KTE 166.**

Although Titus presented its own scheduling expert, Bill Perry, to rebut the delay claim, his analysis is fundamentally flawed because he assumed Carlson calculated the Project's critical path tied to the Project's Temporary Certificate of Occupancy ("TCO"). Testimony of Bill Perry, 1315:4-8 (Q: *But again, my question to you, sir, you said you were 100 percent certain that [Carlson] calculated their critical path out to TCO. That was your opinion, right? A: Absolutely.*). This was not the case. As Carlson explained:

"We did not make a measurement, so to speak, like [Perry] did in their analysis where they were literally a flow calculation that the computer is operating. Ours was much more observational and looking at the – again, at the time, we had largely PDF schedules. So we were reviewing those and in each period and step along the way, looking at it to see what the critical path was showing in each of those schedules, what was the leading one and comparing that back against what we know to be the overall As-Built Schedule in the end."

Testimony of Kjell Carlson, 691:13-692:3. Moreover, the bulk of Titus' work was in the units on the Project. However, the units were not included in the TCO. **KTE 312.** As the TRJ already pointed out during trial, the drywall work for the units could not be on the critical path to TCO if

the units were not part of the TCO. Testimony of Bill Perry, 1306:3-1307:8. However, the drywall work for the unit would inherently be part of the critical path to Substantial Completion. *Id.* at 1307:9-25.

Because Perry's analysis is premised on a misunderstanding of Carlson's analysis and on a milestone that did not include a significant portion of Titus' work, the TRJ cannot reasonably rely on Perry's criticisms of Carlson's analysis. Perry admitted that he made no attempt to determine if Titus' work delayed Substantial Completion. Testimony of Bill Perry, 1262:10-13. Therefore, KAST has met its burden in demonstrating Titus's fifty-seven days of delay. This was multiplied by a daily rate of \$9,615 by KAST's damages expert, Jim Miller, to arrive at KAST's extended general conditions calculation. Titus disputes the amount of the extended general conditions costs as follows:

The Subcontract incorporates the Prime Contract and makes it binding on KAST and TITUS as if they were parties.³⁷ The Prime Contract provides that KAST shall recover extended general conditions "per a mutually agreed-upon 'per diem' assessment for each calendar day of extension."³⁸ KAST was awarded two change orders from the Owner for extended general conditions.³⁹ Owner Change Order 21 awarded 9 days of extended general conditions of \$6,903.08 per day.⁴⁰ OCO 21 also contained KAST's acknowledgment that the amount was "per Section 5.1.2 of the Contract." Similarly, in OCO 44, granting a 12-day extension⁴¹, the Owner granted

³⁷ TITUS T. Ex. 3, p. 2, 22 ; Miller T. Tr., p. 870

³⁸ TITUS T. Ex. 1, p. 4

³⁹ TITUS T. Ex. 407, 412

⁴⁰ *Id.* at p. 41

⁴¹ TITUS T. Ex. 412

extended general conditions, and KAST agreed the amount was “the agreed upon per diem rate” for the 12 days.⁴² When questioned on this discrepancy, Mr. Miller testified that these were for “insurance claims” due to storms, and did not represent general conditions for other delays.⁴³ The Prime Contract makes no such distinction. Additionally, OCO 21 acknowledge the agreed per diem for issues having nothing to do with storms or insurance such as changes to the project concrete and rejection of a shear wall.⁴⁴

There is no valid reason that Mr. Miller did not use the agreed *per diem* called for by the Prime Contract. As a result, the TRJ finds that Mr. Miller overstated the general conditions claim by \$154,593.00. Of the \$548,055.00 claimed the TRJ finds that KAST is entitled to damages in the amount of \$393,593.00

C. KAST's Direct Costs

KAST incurred additional costs for increased supervision necessary for Titus' work performance. Cervera testified that these supervisors were brought to the Project specifically to inspect Titus' work and help Titus improve its performance. KAST is entitled to recover these amounts under the express language of Article 26 I as “costs of completion,” or “any other damages or losses sustained by Contractor.” **KTE 13**, Article 26 I. KAST presented evidence through Cervera and its damages expert of its increased costs for specific employees and why these dedicated KAST employees were required to mitigate Titus' defaults. Testimony of Alex Cervera, 336:3-24. Moreover, KAST's expert did not include these costs when calculating the daily rate for

⁴² *Id.* at p. 2

⁴³ Miller T. Tr., p. 873

⁴⁴ TITUS T. Ex. 407, p. 2

KAST's extended general conditions discussed above. Testimony of Jim Miller, 852:9-853:20, **KTE 344B**. Titus did not offer any competing evidence regarding these values but rather argued that KAST's damages were not recoverable under the Subcontract.

D. Administrative Burden—15%

Article 26(b)(ii) assesses a 15% administrative burden on “any monies due or to become due to Subcontractor.” **KTE 13**, Article 26(b)(ii). Article 26(c) distinguishes the 15% administrative burden as a separate element from KAST's other direct or consequential damages, including its delay damages and increased employee costs. **KTE 13**, Article 26(c) (“cost of completion of the Work, *plus* the allowance for administrative burden, together with any other damages or losses sustained [. . .]”). (emphasis added). Because the administrative burden fee is broken out from the rest of KAST's damages, it is a distinct component of the claim under the Subcontract that is not subsumed by KAST's direct costs or extended general conditions.

E. Subcontract Balance

In accordance with Article 26, KAST credited Titus with the unpaid balance of the Subcontract in the amount of \$3,204,933.00 against KAST's claim, which is reflected in the damages chart above. This amount includes the unpaid Subcontract balance of \$2,895,091.00 plus \$309,842.01 in PCOs KAST approved and credited against its claims. Titus contends that the Subcontract is \$4,782,108.01 based on several PCOs that were amended years after the Project completion, less than one month before trial. These PCOs are not compensable for several reasons. First, the revised damages calculations performed on old PCOs violate the Subcontract requirements for payment (particularly with respect to Titus' timeliness obligations in seeking payment for changes to the work). Second, none of the PCOs were approved during the Project:

- Titus claims entitlement to PCO 73 for trash clean-up costs in the amount of \$140,760.00.

However, the record is clear that Titus withdrew that PCO and never reinstated it during the Project. Testimony of Nate Pardue, 1195:20-25.

- KAST credits Titus \$48,000.00 for PCO 77. Despite this, Titus presented revised calculations for PCO 77 extending the acceleration rate to every additional floor Titus worked on to total \$205,710.00. There is no evidence that the additional floors were accelerated or that Titus submitted an updated claim for those floors during the Project through PCO 77.
- PCO 83, valued by Titus at \$20,336.00 for additional access panels, was never approved during the Project and therefore Titus is not entitled to it now.
- PCO 88, valued by Titus as \$1,258,369.00 to credit for the removal of levels 35-42, 7, and 1 (as opposed to KAST's claim of \$2,522,155.00) that KAST rejected. There is no basis to accept this rejected PCO or how its calculation for the value of this scope is reasonable or in line with the Subcontract requirements.

Therefore, these PCOs are not compensable now.

IV. DEFENDANTS' COUNTERCLAIMS AGAINST KAST

For the reasons explained above, both defendants' counterclaims against KAST are denied. Titus did not meet its burden of proof in demonstrating that KAST breached the Subcontract first through the "cumulative effect" of other subcontractor defaults and weather events in 2017. Titus was paid for the additional costs incurred by Titus resulting from these events. **KTE 46; KTE 47; KTE 57; KTE 62; KTE 68; KTE 71; KTE 73; KTE 74; KTE 82; KTE 84; KTE 90; KTE 91; KTE 92; KTE 104; KTE 354A** (PCO 40) and waived its rights to further compensation or time.

Similarly, Berkley did not present sufficient evidence that KAST breached the Bond, either by impeding Berkley's investigation or by failing to disburse the Subcontract balance. The

evidence presented at trial and discussed at length above demonstrates that KAST complied with the Bond and worked with Berkley to facilitate Berkley's investigation into the default. Moreover, Berkley did not possess an independent right to the Subcontract balance after Titus was in default and KAST determined in accordance with Article 26(b), (c), and (d) that its damages and losses resulting from Titus' defaults exceed the remaining balance under the Subcontract. Therefore, there was no breach of the Bond by KAST.

CONCLUSION

For the foregoing reasons, this TRJ rules as follows:

- (1) Titus breached the Subcontract by defaulting and failing to cure its defaults.
- (2) KAST did not breach the Subcontract.
- (3) Berkley breached the Bond by failing to properly perform under the Bond; and
- (4) KAST did not breach the Performance Bond.

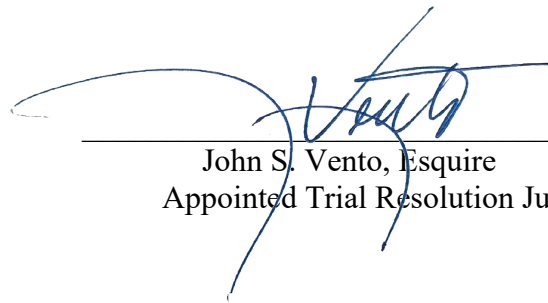
Based on these findings, a Final Decision is entered in favor of KAST on Count I for breach of the Subcontract against Titus and on Count II for breach of the Bond against Berkley. A Final Decision is also entered in favor of KAST for all counts included in both defendants' counterclaims. KAST is entitled to the recovery of damages exclusive of attorneys' fees, costs, and post-judgment interest as follows:

Wal-Mark Cost to Complete	\$2,522,155.00
Delay And Extra Work Claims from Other Subcontractors	\$353,174.00
Schedule Delays: Extended General Conditions	\$393,462.00
KAST's Additional Labor Costs	\$327,732.00
Lien Transfer Bond Premium ⁴⁵	\$52,253.00

⁴⁵ On August 22, 2018, Titus recorded a lien against the property, which KAST transferred to a Bond on September 24, 2018. **KTE 324**. In Florida, a lienor has one year from the recording of a lien to file a claim pursuant to that lien.

Article 26 Administrative Burden (15%)	\$490,318.00
KAST Total Claim:	\$4,139,094.00
Less: Subcontract Balance ⁴⁶	\$3,204,933.00
Pre-Judgment Interest ⁴⁷	\$458,081.09
Total Amount of Damages to KAST: ⁴⁸	\$1,392,242.09

Dated this 22nd day of October 2025, at Tampa, Hillsborough County, Florida.



John S. Vento, Esquire
Appointed Trial Resolution Judge

[stat.] Here, Titus never did so. Therefore, despite KAST continuing to pay premiums on the Bond after that year expired, KAST is entitled to recover only for the first payment.

⁴⁶ This includes the PCOs identified in **TTE 6A**.

⁴⁷ The pre-judgment interest was calculated using the statutory rates for each year from June 1, 2018, through October 25, 2025.

⁴⁸ This figure does not include attorneys' fees, which will be determined at a post-judgment hearing.