

IN THE CHANCERY COURT OF DAVIDSON COUNTY, TENNESSEE

7th AVENUE NASHVILLE HOTEL	)	
OWNER, LLC,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CASE NO.
	)	
W.G. YATES & SONS	)	
CONSTRUCTION COMPANY,	)	
	)	
Defendant.	)	

COMPLAINT

Plaintiff 7th Avenue Nashville Hotel Owner, LLC (“Owner”), by and through its undersigned counsel at Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, hereby files its Complaint against Defendant W.G. Yates & Sons Construction Company (“Yates”) and respectfully states as follows:

INTRODUCTION

1. The Owner brings this action because it is suffering immediate and ongoing harm due to the defendant Yates’ prolonged failure to complete construction of Owner’s two hotels in Nashville, Tennessee, in a timely and workmanlike manner. These failures in Yates’ performance are jeopardizing occupancy and use of the hotels and have caused the Owner to incur substantial damages in excess of the contract balance. The contract funds currently being held by the Owner are insufficient to pay for the correction of all defective work and compensate the Owner for its compensable losses under contract and law. Owner accordingly brings this suit at the earliest possible juncture requesting (1) this Court declare the Owner’s right to use contract retainage for its intended purpose—to secure and pay for the satisfactory completion of Yates’ scope of work

pursuant to the contract and law—and (2) monetary damages.

PARTIES

2. Owner is a Delaware limited liability company with its principal place of business located at 591 W. Putnam Avenue, Greenwich, Connecticut 06830. Owner is authorized to conduct business in the State of Tennessee and conducts business in Davidson County, Tennessee.

3. Yates is a Mississippi corporation with its principal place of business located at 104 Gully Avenue, Philadelphia, Mississippi 39350. Yates conducts business in Davidson County, Tennessee.

4. Jurisdiction is proper in this Court pursuant to T.C.A. § 20-2-223 because the parties to this action transact business and contracted to supply services or things within Davidson County, Tennessee.

5. Venue is proper in this Court pursuant to T.C.A. § 20-4-101 because the transactions and construction project at issue occurred in Davidson County, Tennessee, and the causes of action arose in Davidson County, Tennessee.

FACTUAL BACKGROUND

THE PROJECT

6. This action arises out of a single large commercial construction project consisting of two hotels with certain shared amenities and structures commonly known as the Embassy Suites and 1 Hotel Project located at 710 Demonbreun Street, Nashville, Tennessee (“Project”).

7. The Project generally consists of an eighteen (18) story tower for 1 Hotel (“1 Hotel Tower”), a thirty (30) story tower for Embassy Suites (“Embassy Tower”), a shared subgrade parking garage, a shared four (4) story podium, more than 700 total hotel units, amenities, restaurants, retail space, and 23,000 square feet of meeting spaces.

8. The Project has a roofing structure comprised of multiple levels and elevations across the Embassy Tower and the 1 Hotel Tower (collectively, “Project Roof”).

9. Owner is the record owner of the Project.

10. LK Architecture (“LKA”) was retained to serve as the Architect of Record for the Project pursuant to a written contract with Owner.

11. Crescent Property Services LLC (“Crescent”) serves as the development manager of the Project. As the development manager, Crescent represents Owner’s interests in the Project and, among other things, directs, coordinates, monitors and supervises the performance of the Owner’s contractors for the Project, subject to the terms of the written contract between Crescent and Owner.

12. Cumming Management Group, Inc. (successor by merger with CAPEX Project Management, LLC) (“CAPEX”) was retained by Crescent to provide certain project management services in connection with the design, construction and commissioning of the Project, subject to the terms of the written contract between those entities.

THE CONSTRUCTION CONTRACT

13. On or about December 15, 2017, Owner and Yates entered into a written construction contract (“Contract”) for Yates to construct the Project in accordance with the Contract and associated contract documents identified therein (“Contract Documents”). A copy of the Contract is attached hereto as Exhibit A.

14. As set forth more fully in Article 6 of the Contract, the Contract price was based on the total cost of the work (“Cost of the Work”) plus Yates’ fee (“Contractor’s Fee”), subject to a guaranteed maximum price and any adjustments as provided for in the Contract Documents.

15. The Cost of the Work and the Contractor's Fee are expressly defined in the Contract Documents.

16. Pursuant to Article 3.5.1 of the Contract, Yates warranted to Owner, CAPEX and LKA that:

materials and equipment furnished under the Contract Documents will be of good quality and new, unless otherwise required or permitted by the Contract Documents, that Work will be free from defects not inherent in the quality required or permitted, and that the Work will conform with the requirements of the Contract Documents. Work not conforming to these requirements, including substitutions not properly approved and authorized, will be considered defective.

17. Pursuant to Article 3.5.2 of the Contract, Yates was required to "perform the Work in a good, workmanlike manner and warrant all Work against defects in material or workmanship for a period of two years from the date of Substantial Completion, unless specified otherwise."

18. Article 14.A.2 of the Contract specifically defines events and circumstances which constitute material breaches or "Events of Default:"

- a. [Yates] fails to commence the Work in accordance with the provisions of this Construction Contract after due notice to proceed;
- b. [Yates] abandons the Project;
- c. [Yates] repeatedly fails to prosecute the Work to completion thereof in a diligent, efficient, workmanlike, skillful and careful manner and in accordance with the Schedule and the provisions of this Construction Contract;
- d. [Yates] repudiates its obligation under this Construction Contract;
- e. [Yates] repeatedly fails to use an adequate amount or quality of personnel or equipment to complete the Work without delay;
- f. [Yates] fails to maintain the required insurance;
- g. [Yates] makes changes to personnel on Contractor's Table of Organization [...] without Owner's consent; or

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

19. Pursuant to Article 5(B)(1) of the Contract, the parties agreed that “[t]ime is of the essence in the performance of this Construction Contract.”

20. Pursuant to Article 5(B)(2) of the Contract, Yates was required to achieve substantial completion of the entire Project within the time limits set forth in the Contract:

[Yates] shall diligently proceed with the performance of the Work in order to achieve substantial completion of the Project within the time limit(s) identified in the GMP Amendment (hereinafter called “**Time(s) of Completion**”). All time limits stated in the Contract Documents are of the essence.

(emphasis in original).

21. Pursuant to Article 5(B)(2) of the Contract, the parties further agreed as follows with regard to liquidated damages for delays:

[Yates] agrees to perform its obligations with due diligence and within such time limits in accordance with the terms of the Contract Documents. [Yates] acknowledges that if [Yates] fails to reach Substantial Completion of the Work within the Time(s) of Completion, the Owner will sustain damages and loss as a result of such failure. The exact amount of such damages will be difficult to ascertain. The Owner and [Yates], therefore, agree that if [Yates] fails to achieve Substantial Completion of the Work within the Times(s) of Completion, the Owner shall be entitled to retain or recover from [Yates], as liquidated damages and not as a penalty, the amounts listed in the graduated chart below for each day beyond the scheduled Substantial Completion date until actual Substantial Completion:

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

Such liquidated damages are hereby agreed to be a reasonable pre-estimate of damages the Owner will incur as a result of delayed completion of the Work and they shall be the sole and exclusive remedy for delayed completion of the Work.

22. Pursuant to Article 5(B)(2), Owner “may deduct liquidated damages from any unpaid amounts then or thereafter due to [Yates].”

23. Further pursuant to Article 5(B)(2), “in no event shall the total liquidated damages exceed two times the total amount of Contractor’s Fee.”

24. Pursuant to Article 5(C) of the Contract and Article 3.10 of the General Conditions, Yates was required to issue a detailed critical path method schedule for performance of the work, and to regularly maintain and revise the critical path method schedules.

25. Pursuant to Article 5(C)(2) of the Contract, in the event of a delay in Yates’ performance, Yates was required to provide to Owner proposed recovery schedules detailing all activities necessary to meet all critical path dates required by the schedule then in effect.

26. Yates was further required by the Contract to recover lost time due to any delays in its performance at Yates’ own cost.

27. Article 5(C)(2) of the Contract provides the following in the event of delays:

Upon written notice from the Owner, [Yates] shall cause its employees, Subcontractors, Sub-Subcontractors and all other parties covered by this Construction Contract to perform and work at hours and on days, in addition to the normal working hours and normal working days, whatever overtime work or shift work is necessary to return to the Schedule. [Yates] shall not be reimbursed for any additional compensation paid to its employees or its Subcontractors’ employees or for any cost resulting from such overtime work or shift work and no adjustment shall be made to the Guaranteed Maximum Price.

28. In the event of delays to Yates’ performance, Article 5(B)(3) of the Contract disallows an extension of Time(s) of Completion for Yates’ performance to the extent the delay was caused by Yates or its subcontractors:

Extensions of the Time(s) of Completion will be permitted hereunder only to the extent such delay is not caused by any of the Contractor Parties and could not have been reasonably anticipated by [Yates]. As used in the Contract Documents, “**Contractor Parties**” means, collectively, [Yates], Subcontractors, Sub-Subcontractors, suppliers, and anyone directly or indirectly employed by any of them or for whose acts any of them may be liable.

(emphasis in original).

29. Article 2.4.1 of the General Conditions of the Contract grants Owner the right to carry out Yates' work, or a portion thereof, in the event Yates has committed an event of default:

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

30. Article 2.5 of the General Conditions of the Contract grants Owner the right to withhold payments from Yates and the right to supplement Yates' performance in the event an event of default has occurred:

2.5.1 The Owner shall have the right to withhold from payments due [Yates] such sums as necessary to protect the Owner against loss or damage which may result from negligence or unsatisfactory work by [Yates], failure by [Yates] to perform [Yates'] obligations under the Contract Documents, including failure to maintain satisfactory progress of the Work, claims against [Yates] or the Owner relating to [Yates'] performance of the Work, or any other basis upon which the [LKA] may withhold certification provided in Article 9.5.1, whether or not [LKA] has certified such payment.

2.5.2 If [Yates] fails to take prompt and adequate action to bring the Work on schedule or to correct deficiencies in the Work, or to perform any of [Yates'] obligations, the Owner may perform such Work or cure any default by [Yates] as the Owner deems necessary, and to offset the costs thereof against payments due [Yates].

31. Pursuant to Article 2.5 and Article 14(A)(2), the Contract explicitly allows Owner to carry out Yates' work, withholding payment to Yates for the same, when:

....

- c. [Yates] repeatedly fails to prosecute the Work to completion thereof in a diligent, efficient, workmanlike, skillful and careful manner and in accordance with the Schedule and the provisions of this Construction Contract;
- d. [Yates] repudiates its obligation under this Construction Contract;

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

...

32. Pursuant to Article 9(C) of the Contract, Owner has a right to offset any indebtedness owed by Yates to Owner under the Contract or governing law against any payments requested by Yates under the Contract:

In addition to any right of setoff provided by law, all amounts due [Yates] shall be considered net of indebtedness of [Yates] to the Owner and its respective subsidiaries, and the Owner may deduct any amounts due or to become due from [Yates] to the Owner and its subsidiaries from any sums due or to become due from the Owner to [Yates], regardless of whether the debt by the Owner has been reduced to a judgment by account.

33. Under Article 9.5.1 of the General Conditions to the Contract, Owner has the right to withhold payments to Yates on account of, among other things: (a) defective Work not remedied; (b) reasonable evidence the Work cannot be completed for the unpaid balance of the Guaranteed Maximum Price; (c) reasonable evidence that the Work will not be completed before the Time(s) of Completion.

CONTRACT RETAINAGE

34. Consistent with the requirements of Tennessee law, Article 9.6 of the General Conditions of the Contract provides for Owner's withholding of contract retainage from Yates in the amount of five percent (5%) with such amount to be deposited in a separate, interest-bearing, escrow account.

35. At the time of this Complaint, Owner has deposited \$11,244,234.77 of retainage in a separate, interest-bearing, escrow account ("Escrowed Retainage"). With interest, the current balance of the Escrowed Retainage is \$11,279,494.06.

36. Pursuant to the Contract, the Owner is permitted to withhold retainage from Yates and use such retainage to complete Yates' obligations if Yates fails to perform in accordance with the Contract.

37. The provisions in the Contract concerning release of the Escrowed Retainage are in addition to and in not in lieu of the other remedies available to Owner under the Contract in the event of default by Yates.

THE GMP AMENDMENT AND OCO #112

38. On or about March 28, 2019, Owner and Yates executed the Guaranteed Maximum Price Amendment to the Contract ("GMP Amendment"). A copy of the GMP Amendment is attached hereto as Exhibit B.

39. Owner issued a Notice to Commence construction to Yates on April 5, 2019, and Yates commenced performance of its work under the Contract.

40. The GMP Amendment established a new guaranteed maximum price for the work under the Contract of \$189,808,276.77.

41. The GMP Amendment established a new Substantial Completion date and Time of Completion of July 27, 2021 for Yates' work under the Contract.

42. Substantial Completion is a defined term in Article 9.7 of the General Conditions of the Contract:

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

43. Pursuant to Article 8 of the General Conditions of the Contract, “[t]he date of Substantial Completion is the date certified by [LKA], and approved by the Owner, in accordance with Article 9.7.”

44. After execution of the GMP Amendment, Yates alleged that it incurred impacts due to the coronavirus COVID-19 pandemic which included various negative impacts to Yates’ performance and ability to meet the construction schedule (“COVID Impacts”).

45. The COVID Impacts alleged by Yates are detailed in Owner Change Order #112 (“OCO #112”). A copy of OCO #112 is attached hereto as Exhibit C.

46. In light of Yates’ allegations of the COVID Impacts, Owner and Yates negotiated OCO #112, which it executed on or about June 17, 2021.

47. OCO #112 is a binding amendment of the Contract.

48. In part, OCO #112 was issued in response to the COVID Impacts alleged by Yates, and OCO #112 specifically contemplated other future foreseeable impacts of the COVID pandemic:

Except as specifically set forth in this Section, [Yates] acknowledges that Coronavirus Impacts as of the date of this Agreement (including those that may have already had an impact on the Project, those that currently have an impact on the Project, and those that are reasonably capable of anticipation as of the time of execution of this Change Order) are foreseeable and are contemplated and included in the GMP and the Project schedule as amended by this Change Order, and neither [Yates] nor its Subcontractors shall claim any increase in price, cost reimbursement, escalation of labor or material costs, compensation, or damages for any delay, disruption, or interference to the Work arising from such Coronavirus Impacts.

...

2). Change Order and revised Substantial Completion date considers all known Covid-19 effects to the project schedule as well as account for all weather-related delays and current Builder's Risk Claims.

49. OCO #112 established a new Time of Completion date of December 1, 2021, for Yates to achieve Substantial Completion of the Contract.

50. OCO #112 also established a new schedule of Liquidated Damages in the event of Yates' failure to achieve Substantial Completion of the Contract by the new deadline of December 1, 2021:

1. The Grace period in the contract related to Liquidated Damages (LDs) becomes zero days
2. LD's will be assessed in the amount of \$20,000.00 per day for days 1-10 after the contractual SC date.
3. LD's will be assessed in the amount of \$45,000.00 per day for days 11-20 after the contractual SC date.
4. LD's will be assessed in the amount of \$70,000.00 per day for days 21 and beyond the contractual SC date.

YATES' DEFAULTS

51. Yates defaulted in its performance of the Contract, materially breaching the Contract and committing Events of Default under Article 14(A)(2) of the Contract.

52. Owner repeatedly notified Yates of its defaults and demanded that Yates cure those defaults.

53. Yates failed to cure its defaults under the Contract.

54. Owner has incurred damages as a direct and proximate result of Yates' defaults.

YATES' DEFAULTS—DELAYED PERFORMANCE AND LIQUIDATED DAMAGES

55. Yates failed to schedule and perform its work in accordance with the Contract Documents.

56. Yates failed to achieve Substantial Completion of the Project in accordance with the Contract on or before December 1, 2021, and such failure has persisted for the months thereafter and through the date of the filing of this Complaint.

57. When Yates repeatedly failed to perform its work on schedule and failed to achieve Substantial Completion, Yates failed and refused to provide achievable recovery schedules, failed and refused to provide plans to achieve recovery of its delays, and failed and refused to recover its delays by increasing its workforce or taking other measures required of it under the Contract.

58. The Owner has routinely demanded Yates' timely performance in accordance with the Contract, but those demands have been widely ignored or rejected.

59. As of the date of this Complaint, the Project has not met all conditions, including those in Article 9.7 of the Contract, to be deemed substantially complete in accordance with the requirements of the Contract.

60. As of the date of this Complaint, there is substantial nonconforming work that remains outstanding which is restricting the Owner's use and occupancy of the entire Project for its intended purpose.

61. Article 5(B)(3) of the Contract specifically requires Yates to provide notice of any delay events to Owner no later than ten (10) days after the occurrence of the delay event.

62. Article 7.2.1 of the General Conditions of Contract requires Yates to provide notice of any claims for additional costs to Owner and CAPEX no later than seven (7) days after the occurrence of the event giving rise to such claim and to follow that notice with a written proposal no later than seven (7) days after providing the initial notice.

63. Neither OCO #112 nor any other change order to the Contract changed the Contract's strict requirements for timely notices of delays, changes, or other impacts to Yates' performance.

64. Nor did Owner at any time waive or excuse Yates' obligation to comply with the notice provisions in the Contract for delays, changes, or other impacts to Yates' performance.

65. As of the date of this Complaint, there are no pending change order requests from Yates requesting adjustment of the Substantial Completion date from December 1, 2021 to a new date.

66. Yates is not entitled under the Contract or law to an extension of the Substantial Completion date beyond the agreed, adjusted date of December 1, 2021.

67. On September 8, 2022, the City of Nashville issued the Temporary Certificate of Occupancy ("TCO") for the Project, but this TCO specifically excludes level 19 of the Project. Accordingly, the Project still is not substantially complete due to substantial nonconforming work that restricts the Owner's use and occupancy of the entire Project.

68. The Owner has demanded that Yates perform work required to achieve all TCOs, but Yates has refused and rejected those demands.

69. The Owner is in receipt of information from Yates that Yates will be unable or unwilling to perform the work necessary to ensure the issuance of Final Certificates of Occupancy by the upcoming deadlines in 2022, jeopardizing the Owner's ability to use and occupy the Project for its intended purpose in an uninterrupted manner.

70. The Owner is currently suffering damages as a result of its inability to use the entirety of the Project due to the delays and nonconforming work performed by Yates.

71. As of September 22, 2022, the liquidated damages which have accrued due to Yates' delays total \$19,970,000.00, which amount continues to increase until such time as the Project reaches Substantial Completion in accordance with the requirements of the Contract.

72. Pursuant to Article 5(B)(2) of the Contract, Yates' liability for liquidated damages is capped at two times the total amount of the Contractor's Fee.

73. As of September 22, 2022, and subject to further adjustment of the Cost of the Work as permitted under the Contract, the Owner has calculated Yates' total Contractor's Fee, in accordance with the calculation and definition in the Contract, to be \$6,111,074.49.

74. Yates' adjusted total Contractor's Fee calculated by Owner at this stage is \$6,111,074.49, and while that Contractor's Fee has not been approved by Owner, if this calculation is accurate then Yates' liability for liquidated damages shall be two times the adjusted Contractor's Fee for a total liquidated damage assessment of no less than \$12,222,148.98 ("Capped LD Assessment").

75. Yates has billed Owner for a total adjusted Contractor's Fee of up to \$6,078,260, but subsequently sought to unilaterally reduce its Contractor's Fee for the purpose of limiting its exposure for liquidated damages by wrongfully adjusting payment requests and contract accountings.

76. Yates' failure to achieve Substantial Completion by December 1, 2021 is an Event of Default and a material breach of the Contract.

77. Pursuant to the Contract, Owner is entitled to offset, retain, deduct and withhold the Capped LD Assessment from any unpaid amounts due or thereafter becoming due Yates.

YATES' DEFAULTS—DEFECTIVE AND INCOMPLETE WORK

78. During the course of its performance, Yates repeatedly performed defective work and failed to perform the entirety of its scope of work under the Contract.

79. The Project Roof, as constructed by Yates, is incomplete, defective and requires a complete replacement.

80. Yates has been repeatedly notified of the defects in the Project Roof, and Yates has failed to undertake necessary corrective work to cure the defective conditions, perform the necessary repairs, and complete the Project Roof in accordance with the Contract Documents.

81. Yates' delays in performing the corrective work have been unjustified and wrongful, and those delays have directly caused an increase in the costs of materials and performance of the remedial work.

82. Because of the long lead times for the materials necessary to repair the Project Roof, increase in material costs, and lack of warranty on the Project Roof at present, Owner expects to incur significant damage to repair the Project Roof well in excess of the original cost of installation.

83. The Contract balance is insufficient to pay for the cost of the remediation and replacement of the roof.

84. The applicable manufacturer will not warrant the Project Roof until such time as it has been replaced or satisfactorily corrected, and as such Yates has not provided and/or cannot provide the required warranty pursuant to the Contract Documents.

85. Yates has not replaced or corrected the Project Roof in accordance with the Contract Documents or explicit direction from the manufacturer.

86. Owner has been deprived the benefit of its bargain that the Project Roof provided by Yates would bear a manufacturer's warranty and perform as intended under the Contract Documents, and Owner has been, and will continue to be, damaged by the lack of a warrantable roof.

87. Until remedied, the conditions at the Project Roof will continue to cause damages to the Owner and the structure.

88. Yates defectively performed work in numerous other areas of the Project, including but not limited to the 1Hotel Tower restaurant, lobby, public restrooms, meeting rooms, spa, L18 Bar, L19 stairwell, public areas, rooms and suites, PDR, sprinkler heads, lighting system, gym, plumbing, and other areas.

89. Owner provided Yates with notice of the defective and incomplete work and an opportunity to cure those defects.

90. Owner also notified Yates of Owner's intention to exercise its rights under the Contract to supplement Yates' performance to correct and complete Yates' work, and Yates did not object to Owner's notice or otherwise cure Yates' defective and incomplete work.

91. To mitigate Yates' delayed performance, Yates' failure to achieve Substantial Completion within the adjusted Time of Completion, Yates' open and unremedied defective and incomplete work, and Yates' failure and refusal to cure its defaults, Owner retained an additional contractor on or about May 9, 2022, to supplement and correct Yates' defective performance of the Contract and another supplemental contractor on or about September 8, 2022 to supplement, complete and correct Yates' defective performance on level 19 of the Project and elsewhere (collectively, "Supplemental Contractors").

92. The Supplemental Contractors subsequently undertook partial, supplemental performance of Yates' work under the Contract.

93. On September 1, 2022, Yates informed Owner that it further refused to complete and correct its nonconforming construction work at the L19 stairwell, further impacting the Owner's ability to open and use the Project for its intended purpose.

94. Because of the condition in the L19 stairwell, applicable government authorities revoked a prior issued TCO for the affected area, meaning that the Owner cannot occupy or use the space for its intended purpose.

95. Yates breached the Contract by failing to notify the Owner of any defect prior to performing its work and then failing to perform the work in the L19 stairwell in accordance with the Contract Documents.

96. Yates wrongfully refused to perform the corrective work in the L19 stairwell, threatening non-performance unless the Owner executed other disputed change order requests granting Yates time extensions and costs for unrelated issues.

97. This additional event of default necessitated the hiring of the second additional contractor to perform the corrective work, and all such costs will be back charged to Yates according to the Contract.

98. At no time did Owner excuse or waive Yates' performance of the Contract regarding Yates' defective, untimely and non-conforming work on the Project, and the Supplemental Contractors were engaged by Owner to mitigate Yates' defaults at Yates' expense to achieve the already long-delayed Substantial Completion.

99. Owner's retention of the Supplemental Contractors did not allow Yates to abandon the Project or to fail to perform its remaining duties in connection therewith.

100. As of the date of this Complaint, Owner has paid the Supplemental Contractors \$983,000 and estimates that the Owner will incur additional costs in correction and supplementation of Yates' performance up to \$5,000,000 subject to further discovery and determination of conditions on site and proposals for performance of the work to the Project Roof ("Damages for Supplementation").

101. Pursuant to the Contract and law, all Damages for Supplementation are properly charged to Yates.

USE OF PROJECT

102. Owner has been deprived the full use of the Project due to defects and delays in Yates' performance and Yates' inability to meet Substantial Completion as defined in the Contract.

103. As of the date of this Complaint, the City of Nashville has not approved and issued a Final Use and Occupancy certificate for the Project.

104. As of the date of this Complaint, Owner is still not able to use the entire Project for its intended purpose due to incomplete and defective work performed by Yates.

105. As the direct and proximate result of Yates' delayed, incomplete and defective work, the Project has not yet achieved Substantial Completion, as defined in the Contract.

106. As of the date of this Complaint, various areas of the Project are incomplete and cannot be used for their intended purposes, and one level of the Project does not yet possess a TCO, meaning that the Owner has not received a TCO for the entirety of the Project or approval from local authorities for final occupancy of the entire Project.

107. These areas of the Project with outstanding incomplete and defective work include, but are not limited to, the following:

- a. Project Roof on both the 1 Hotel Tower and Embassy Tower, which is damaged in numerous areas due to Yates' failure to adequately protect the same during construction;
- b. The fire stair connecting the 19th floor of the 1 Hotel Tower, which is not constructed in accordance with construction documents or relevant building code;
- c. Multiple areas, including the locker rooms, bar, couples' treatment room, ADA guest rooms and the fitness room in the 1 Hotel Tower, which are not constructed in accordance with ADA requirements.
- d. Exterior glass broken during construction; and
- e. Multiple areas which exhibit interior water leaking, including the Embassy Tower service elevator lobby and 1 Hotel Tower spa.
- f. The outdoor bar and restaurant on the 19th floor of the 1 Hotel Tower, for which Yates has failed to complete the pergola system, thus preventing the bar from being able to pass City health inspection.

CURRENT CONTRACT ACCOUNTING

108. As of the date of this Complaint, the following sets forth an accurate summary of the accounting of the Contract:

CONTRACT ACCOUNTING	
Item	Amount
1. Base Contract GMP	\$ 189,808,276.77
2. Contract Adjustments	
a. Executed Change Orders	\$ 40,672,033.65
3. Adjusted Contract Subtotal	\$ 230,716,838.45
4. Paid to Date	\$ (219,053,987.00)
5. Net Contract Subtotal (including Escrowed Retainage)	\$ 11,662,851.45
6. Owner Back Charges under Contract	
a. Defective and Incomplete Work (Damages Incurred for Supplementation plus Estimated Additional Costs)	\$ (5,000,000.00)
b. Liquidated Damages	\$ (12,222,148.98)
7. Contract Balance (5+6)	\$ (5,559,297.53)

109. As of the date of this Complaint, the adjusted Contract subtotal is \$230,716,838.45, before accounting for all credits and back charges for monetary damages to which Owner is entitled.

110. As of the date of this Complaint, Owner has paid Yates a total of \$219,053,987.

111. The total amount paid to Yates includes \$1,350,000.00 paid to Yates by the Owner to accelerate Yates' performance *after* it failed to achieve substantial completion by December 1, 2021, but for which Yates failed to so accelerate, further breaching the Contract.

112. As of September 22, 2022, Yates has incurred more than \$19,970,000.00 in liquidated damages pursuant to the Contract of which Yates' liability is set at the Capped LD Assessment of \$12,222,148.98.

113. As of the date of this Complaint, Owner has incurred and estimates that it will incur back charges for the defective work in an amount no less than \$5,000,000.00 which amount is inclusive of but not limited to the costs of the Supplemental Contractor.

114. In total, Owner is contractually entitled to monetary damages from Yates in an amount to be proven at trial but in no event less than \$17,222,148.98.

115. As of the date of this Complaint, Owner has withheld and continues to withhold a total amount of \$11,279,494.06 in Escrowed Retainage which amount is insufficient to compensate Owner for the damages caused by Yates' material breaches and Events of Default under the Contract.

116. After accounting for all due credits and back charges and even after accounting for Owner being permitted to retain the Escrowed Retainage and Contract balance, there is a negative Contract balance due and payable to Owner by Yates in the amount of \$5,559,297.53.

117. Pursuant to the Contract and Tennessee law, Owner is permitted to retain and withhold payments, including the Escrowed Retainage, on account of the Capped LD Assessment and set off the back charges for defective work against any amounts due and owing under the Contract to Yates.

118. Accordingly, and because Owner's damages against Yates exceed the Escrowed Retainage, Yates is not entitled to payment of the Escrowed Retainage under the Contract or law, and it would be inequitable and unjust for Yates to be paid the Escrowed Retainage.

119. Pursuant to the Contract, the prevailing party shall be entitled to recover its attorneys' fees and expenses incurred in connection with this action to enforce the Contract.

COUNT ONE—DECLARATORY JUDGMENT

120. Owner reaffirms and re-alleges each and every allegation contained in Paragraphs 1 through 119 of the Complaint as though set forth fully herein.

121. Owner has, in all material respects, complied with and substantially performed the terms and provisions of the Contract.

122. Yates has materially breached the Contract by, among other things, performing Defective Work, refusing to remediate such Defective Work and abandoning the Project, and repeatedly failing to diligently prosecute the work and achieve Substantial Completion of its work under the Contract in accordance with the Time of Completion in the Contract.

123. Yates' material breaches of the Contract have directly and proximately caused Owner to incur monetary damages to be proven at trial but in no event less than \$17,222,148.98, an amount which exceeds the \$11,279,494.06 in Escrowed Retainage that Owner continues to withhold.

124. The Contract expressly permits the Owner to "retain or recover" liquidated damages from Yates.

125. The Contract also permits the Owner to "deduct liquidated damages from any unpaid amounts then or thereafter due" to Yates, thus permitting Owner's deduction of the Capped LD Assessment from the Escrowed Retainage.

126. In light of the Owner's damages, payment of the Escrowed Retainage to Yates is neither appropriate under the Contract nor required by the Tennessee Prompt Pay Act, codified at T.C.A. § 66-34-101 *et seq.*

127. The Tennessee Prompt Pay Act does not compel or mandate the payment of the Escrowed Retainage to Yates where Owner maintains a good faith dispute with Yates or valid back charges and damages are owed to Owner under the Contract and law.

128. Owner accordingly prays that this Court declare that Owner is entitled to permanently retain and withhold from Yates the Escrowed Retainage under the Contract and the Tennessee Prompt Pay Act pursuant to T.C.A. § 66-34-101, *et seq.*, and use the Escrowed Retainage to satisfy Yates' obligations under the Contract.

129. Alternatively, Owner prays that this Court declare that Owner is entitled to temporarily withhold from Yates the Escrowed Retainage under the Tennessee Prompt Pay Act until this Court resolves Owner's good faith concurrent Breach of Contract claim against Yates.

COUNT TWO—BREACH OF CONTRACT

130. Owner reaffirms and re-alleges each and every allegation contained in Paragraphs 1 through 129 of the Complaint as though set forth fully herein.

131. Owner has, in all material respects, complied with and substantially performed the terms and provisions of the Contract.

132. Yates has materially breached the Contract by, among other things, performing Defective Work, refusing to remediate such Defective Work and abandoning the Project, and repeatedly failing to diligently prosecute the work and achieve Substantial Completion of its work under the Contract in accordance with the Time of Completion in the Contract.

133. Despite repeated demands and opportunities to cure provided by Owner to Yates, Yates has repeatedly failed to remedy its delays and defective work in accordance with the requirements of the Contract.

134. Yates' material breaches of the Contract have directly and proximately caused Owner to incur monetary damages in excess of the current balance of the Contract.

135. If Owner is permitted to retain the Escrowed Retainage, then Owner is entitled to recover its damages from Yates in an amount to be proven at trial but in no event less than \$5,559,297 which is the net damage amount after the Owner is permitted to retain the Contract balance and Escrowed Retainage.

136. Alternatively, if Owner is compelled to pay the Escrowed Retainage to Yates prior to the adjudication of this Breach of Contract Complaint, then Owner is entitled to recover its damages from Yates in an amount to be proven at trial but in no event less than the net amount of \$16,838,791.59.

137. The Owner has incurred attorneys' fees as a direct result of Yates' breaches of the Contract, and pursuant to the Contract, Yates is liable to Owner for Owner's attorneys' fees and expenses which are incurred in this action to enforce the Contract.

PRAYER FOR RELIEF

WHEREFORE, Owner prays for the following relief from this Court:

(a) That service of process issue against Defendant requiring it to appear and to answer this Complaint.

(b) That this Court find Owner entitled to permanently withhold from Yates the Escrowed Retainage under the Contract and the Tennessee Prompt Pay Act pursuant to T.C.A. § 66-34-101, *et seq.*, and to use such Escrowed Retainage to satisfy Yates' obligations to Owner under the Contract and law, or alternatively, that Owner is entitled to withhold from Yates the Escrowed Retainage under the Tennessee Prompt Pay Act until such time as this Court resolves Owner's concurrent breach of contract claim against Yates.

(c) That Owner be awarded a judgment against Yates for breach of contract in an amount to be proven at trial, but in no event less than the net amount of \$5,559,297.53, which amount allows Owner to permanently retain the Contract balance and Escrowed Retainage, plus, attorney's fees, and interest thereon; or, if Owner is first compelled to pay the Escrowed Retainage to Yates prior to the adjudication of this Breach of Contract Count, that Owner be awarded a

judgment against Yates for breach of contract in an amount to be proven at trial but in no event less than \$16,838,791.59.

(d) That Owner be awarded such other, further and general relief to which it may be entitled and which the Court shall deem to be just and equitable.

Dated this 23rd day of September, 2022.

Respectfully submitted,

s/ Albert L. Chollet, III

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