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UNITED STATES BANKRUPTCY COURT

DISTRICT OF ARIZONA

In Re: LEGACY CARES, INC, an Arizona non-profit corporation. Debtor.	Chapter 11 Case No. 2:23-bk-02832-DPC **KEARNEY ELECTRIC, INC.'S POST-TRIAL BRIEF AND CLOSING STATEMENT**

Kearney Electric, Inc., by and through undersigned counsel, hereby respectfully submits its Post-Trial Brief and Closing Statement.

1. SUMMARY OF POSITION

The issue before the Court is quite simple: How much must Okland Construction Company, Inc. ("Okland") pay Kearney Electric, Inc. ("Kearney") for the amounts Okland received for Kearney's work at the Legacy Cares Sports Park project ("Project") from the bankruptcy settlement of the mechanic's lien claims? The answer is simple as well. Okland must pay Kearney the full amount it received from the debtor/tenant Legacy Cares, Inc. ("Legacy Cares") and the property owner Pacific Proving, Inc. ("Pacific") for Kearney's work. It is undisputed that the amount Okland received included 76.5% of the face value of Kearney's lien claim of $3,169,965. That amount is $2,425,023 and, as Okland has only paid Kearney $1,953,338, the amount still due

Kearney is $471,685.[1] As was made clear by the evidence and testimony submitted to the Court, payment of that amount is consistent with: (1) the parties' agreement which resulted in the bankruptcy settlement, (2) the Okland/Kearney subcontract, and (3) Arizona law. In addition, the amount claimed in the Change Orders was proven to be proper and compensable by the testimony and evidence submitted at trial by Kearney. It was Okland's burden to prove that it is entitled to pay Kearney any amount less than that and Okland failed to carry its burden in that regard. As such, the Court should enter an Order requiring Okland to pay Kearney $471,685, plus interest along with attorneys' fees and costs.

2. KEARNEY'S CHANGE ORDERS WERE PROPER AND COMPENSABLE

a. The only credible evidence regarding the scope and cost of the work performed by Kearney was from Kearney's Senior Project Manager Stephen Kawulok

One of the most telling aspects of the evidence presented at trial was the fact that only one witness testified with actual, detailed, and complete knowledge as to the specific Project work at issue here: Kearney's on-site Senior Project Manager Stephen Kawulok. Not a single witness with actual Project knowledge was presented by Okland. In every relevant respect, Mr. Kawulok's testimony as to Kearney's performed work - - and the costs of such work as set forth in the Change Orders - - went uncontradicted and unchallenged. While Okland presented the testimony of its Utah-based, Chief Financial Officer Robert Fischer, he readily admitted that he did not become substantively involved with the Project until March-April, 2022 [Transcript 11-20-24 at P. 40, lines 6-12]. Mr. Fischer admitted that he was "not on site, boots on the ground, at the time

[1] Alternatively, if this Court were to find that Kearney was only entitled to recover the percentage it agreed to with Pacific and Legacy Cares (75.14%), the principal amount due Kearney is $428,573 ($2,381,911 - $1,953,338 = $428,573).

Kearney Electric was submitting these Change Orders." [*Id* at Page 40 lines 19-20]. Implicit in this admission is the fact that Mr. Fischer has *no actual first-hand knowledge* of the work performed by Kearney. Missing at trial was testimony from <u>any</u> Okland employee with first-hand knowledge of the Project let alone Kearney's work and the submitted Change Orders; not Okland's Project Manager Todd Smith or its Project Director Joe Kranz, despite the fact that each was repeatedly referenced during the trial and identified as potential witnesses by Okland in its disclosure statement. [*Id* at Page 96 lines 8-17]. Mr. Kranz was Mr. Kawulok's counterpart at Okland and Mr. Smith his assistant. [Transcript 11-18-24 at Page 45 lines 2-11]. Neither was present to respond to, let alone agree or, potentially, contradict, Mr. Kawulok's testimony regarding their approval of the work and estimates submitted by Kearney.

While Legacy Care's Project Program Manager Marc Taylor testified, his personal knowledge of the details of Kearney's work was extremely limited and nowhere near that of Mr. Kawulok. No Okland witness was able to contradict, in any respect, the evidence that the work and materials billed for in Kearney's Change Orders was performed, incurred, and properly billed, no one.

Mr. Kawulok testified that his duties regarding the Project was to "manage the fiduciary responsibility of Kearney" to "manage the finances, manpower, purchasing, schedule, and working with the general contractor, customer relations, et cetera" and prepare "pay applications, Change Orders, building the budget, understanding the estimate, breaking down the estimate to build a budget, understanding how to allocate man hours while building Change Orders, et cetera." [*Id* at Page 12 lines 10-25 and Page 13 lines 19-23]. In short, he was involved in and has actual, direct knowledge of every aspect of the work at issue. He was the most knowledgeable individual - - of either party - - as to the matters at issue at trial and he testified, clearly and credibly as to each of those disputed issues and without response from Okland.

While having a knowledgeable Project representative testify a trial is likely necessary for any construction dispute matter, it is even more important in a matter such as here where the vast majority of the Project was built pursuant to individual work-specific Change Orders.[2] Those Change Orders, as to Kearney/Okland become amendments to the Kearney/Okland contract. [*Id* at Page 20 lines 4-8]. It is not disputed that Kearney's $853,000 base contract[3] ("Subcontract") was for mobilization only or that Kearney has already been paid that amount plus $13,217,108[4] in Change Order work for a total pre-bankruptcy payment of $14,067,539 [Trial Exhibit 3; Transcript 11-18-24 at Page 21 lines 20-22]. Adding that to the $2,036,118.63 claimed by Kearney in the bankruptcy, provides for a total cost of $16,103,657 for work performed by Kearney under the Okland contract. Over ninety-five percent (95%) of Kearney's work on the Project under Okland required Change Orders, was fully performed, and the vast majority of those Change Orders were paid by Legacy Cares (and, effectively, Okland as well) without objection. Given the dynamics of this specific Project, the fact that Mr. Kawulok's testimony regarding the work performed (including overtime) and the costs incurred went unchallenged, should frankly be dispositive.

b. The Change Orders complied with the contract requirements

i. All work was ordered by Okland, performed, and billed

Mr. Kawulok clearly explained the process for how the work at issue was directed

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[2] Mr. Kawulok testified that "[t]he job was being literally designed at the exact time we needed to start and it never - - the design never stopped. It was constantly evolving and changing. So as we would get in there and - - build a section of work, the next day we would get a subcontract amendment or CCD, contract change directive, that would alter the entire space" and "it happened quite often" "from start to finish." [*Id* at page 21 lines 11-19].

[3] Kearney had three separate contracts for the Project, two directly with the Owner and one under Okland as one of the project General Contractors. The parties' dispute only addresses Kearney's work performed under the Okland general contract.

[4] These Change Orders were paid without objection by Okland or Legacy Cares [Transcript 11-18-24 at Page 34 lines 1-10].

by Okland and then performed and billed by Kearney:

1) We're directed by the general contractor through written communication and/or verbal in some cases but that's followed up by written communication. And then we are -- generally there's documentation that is provided that has drawings or details as to what we are supposed to be doing, changing altering" then "[i]t becomes immediately part of the contract" "through the Change Order process." [Transcript 11-18-24 at page 21 line 25 – Page 22 line 10].

2) The first thing we do is communicate with our general contractor partner as to if this is a valid change to construction of [sic] the site. And once they tell us it is valid and its part of the scheduled, we react by mobilizing manpower and material to install the infrastructure at the same time, we're installing the infrastructure that we were contracted to install initially and maintaining a schedule that doesn't in any way give us more time. We have the same amount of time to do double the work. [*Id* at Page 23 lines 1-9].

3) "Since we had to react so quickly, everything was done with a notice to proceed, which we have logged with all of our change orders. That means, you know, go and get it done. [*Id* at lines 19-22].

   a. [S]ometimes if we have the time, we'll send the documents provided to our estimating department, and then they'll do a formal estimate that the general contractor will accept. And that is what the job is done for. [*Id* at lines 22-25]

   b. And then there's time and material work[5] wherein you got to go. You got to start. We don't have time to wait. And so then we'll document that with work tickets that are signed off by the general contractor, which we have provided in our exhibits for each change order that was of that nature. And then we build the cost of that change order from the direct real costs of the work performed, the hours the men were there, which we provided in our exhibits, the composite rate, which we provided in our exhibits, along with the material that is fair market priced and can be priced checked from any angle you want. And so that's what comprises a T&M, time and materials change order. [*Id* at Page 24 lines 1-11].

[5] A primary objection raised by Okland was that all of the Change Orders didn't include work tickets and material cost "backup." However, as explained by Mr. Kawulok and as indicated in the parties' contract, such backup was only required for work performed on a T&M basis. [Trial Exhibit 1 at Page 6 paragraph 22]. If work was done pursuant to an approved estimate, backup did not need to be provided as the estimate was he backup.

Thus, in response to a direction to perform work by Okland, Kearney had to either prepare and submit (1) a formal change order proposal (which the Project's ongoing time constraints did not allow for), (2) submit an estimate for Okland's approval and include that with the Change Order, or (3) perform the work on a time and materials basis and then submit the Change Order with the required labor and material backup. After describing the different ways that a Change Order communicated costs to Okland, Mr. Kawulok made clear that all of the work performed by Kearney proceeded "[a]lways with notification from the general contractor first" "[w]e didn't do anything without their direct authorization." [*Id* at lines 15-24]. All work was performed prior to the submission of the Change Order "especially when you don't have time in your schedule to take five or six days to write up an official change order document. You - - move and then provide the cost as you go." [*Id* at Page 25 lines 1-6]. Thus, Kearney either submitted an estimate for approval or proceeded with the work on a "T&M" basis and then submitted the required backup with the Change Orders.

As indicated below and as testified by Mr. Kawulok, each of the Change Orders submitted by Kearney was for the cost of work: (1) directed by Okland,[6] (2) performed by Kearney, and (3) was properly billed in accordance with the contract requirements. [*Id* at Page 42 line 19-Page 43 line 3]. Notably, the vast majority of the Change Orders at issue were submitted pursuant to approved estimates and not for time and materials and so "work tickets" backup was unnecessary and not required by the subcontract.

ii. Overtime hours were incurred and accepted

One of the primary objections raised by Okland has been whether overtime was incurred by Kearney at the rate and amount charged. Other that Okland's "belief" that it

[6] There was no instance when work was performed that had not been directed by Okland. [Id. at Page 43 lines 1-3].

was not incurred, Okland presented no evidence to support its contention. Mr. Kawulok made it abundantly clear that all claimed overtime work (including holiday time) billed for was, in fact, directed by Okland and was incurred by Kearney [*Id* at Page 31 lines 10-12, Page 32 lines 18-22]. He also convincingly explained the reason that certain overtime was billed at 100% (rather than just for the time in excess of an employee's 8 regular hours). Each Change Order submitted by Kearney requested an extension of time to the Project schedule and each such request was denied [*Id* at Page 25 lines 14-21]. Since Kearney was not provided additional time, in order to maintain the static schedule it had to bring on more people. Thus, not only did the onsite employees work overtime in addition to their regular time, but other Kearney employees were brought on after working full regular time hours on other Kearney projects. [*Id* at Page 25 line 22 – Page 26 line 9 and Page 206 lines 7-14]. While the Project started with 60-70 electricians, they ultimately had to have "150-160 electricians on site at any given time." [*Id* at Page 26 lines 12-25]. Notably, billed overtime was approved by Okland and the owner [*Id* at Page 73 lines 3-8. *See also, e.g.* Exhibit 9 which shows approval of 180 hours of overtime]. Okland's belated objection to charged overtime is inconsistent with the parties' course of conduct throughout the Project.

c. Kearney's Billing Rate was accepted and consistent throughout the Project

The evidence also demonstrated that Kearney used a single and consistent labor rate throughout the Project for both the work it performed directly for Legacy Cares as well as for work performed under the Okland General Contract - - a composite labor rate of $65.00. [Transcript 11-18-24 at Page 29 lines 9-20]. For the work performed under Okland there was no labor rate provided under the Master Subcontract Agreement or the Project-specific Work Order [Trial Exhibits 1 and 2; Transcript 11-18-24 at Page 27 line 23 – Page 28 line 10]. The labor rate for the direct work for Legacy Cares was also not

set forth in the contract [*Id* at Page 29 lines 4-8]. As such, the labor rate was the subject of each individual Change Order [*Id* at Page 28 lines 11-24].

Kearney's labor rate was a composite crew rate made up by blending the rates of the various working employees [*Id*. at Page 29 line 21 – Page 30 line 5]. Mr. Kawulok testified that the rate used was low, competitive, fair, and reasonable [*Id* at lines 3-9]. Mr. Kawulok also testified that the overtime rate was calculated as time and a half ($97.50) and "holiday" time as double time ($130). [*Id* at Page 31 lines 13-15 and Page 32 at lines 13-17]. Mr. Kearney testified that Kearney's normal and customary change order rates at the time of the project were $70-$75 per hour. [Transcript 11-19-24 at Page 119 lines 20-25].

Kearney's labor rates were communicated to Okland and Legacy Cares through the Change Order process and, as the Change Orders were accepted and paid, the $65.00 rate was accepted as the appropriate labor rate [*Id* at Page 32 lines 5-12]. Many of Kearney's Subcontract Supplements demonstrate payment and acceptance of the $65.00 an hour labor rate. *See e.g.,* Subcontract Supplements 05, 06, 13, 14 , 15, 20, and 21 [Trial Exhibits 123, 124, 131, 132, 133, 138, and 139] each of which show an approved and paid Subcontract Supplement - signed by Okland - that ties to a specific Kearney Change Order billed at the $65.00 labor rate. Any argument by Okland that the $65.00 labor rate was not known or approved throughout the Project is wholly without merit. Okland's argument in this regard is also inconsistent with the parties' course of conduct throughout the Project.

i. Neither Okland nor the Owner ever objected to the billed rate

Notably, there was never a contemporaneous objection by Okland (or Legacy Cares) to Kearney's billing rate set forth in the Change Orders at the time they were submitted. [*Id* at Page 35 lines 11-14]. Again, as indicated above, there was ample evidence of the labor rate being consistently used, accepted, and paid. It was really only

after Legacy Cares stopped paying that Okland began to try and come up with reasons to not pay Kearney what it was owed. [See e.g., Trial Exhibits 259-262]. However there was never any contemporaneous objection to the rate. Even Mr. Taylor's "redlines" to certain of Kearney's Change Orders did not object to the base charged labor rate.

Kearney billed the same rate for each Change Order,[7] including the $13MM in Change Orders approved and paid pre-bankruptcy. Those Change Orders (as well as the Change Orders submitted for the direct contracts with Legacy) included the $65.00 rate and were paid "100 percent across the board." [*Id* at Page 45 lines 22-25 and Page 46 lines 4-13]. As they were being submitted, the Change Orders including the $65.00 rate were never objected to, as to the rate, "Not Once." [*Id* at Page 48 line 25 – Page 49 line 4]. Mr. Taylor also testified that he (and, implicitly, Legacy Cares) recalled having no objection to Kearney's Labor rate either. [Transcript 11-19-20 at Page 73 lines 20-23. Again, Okland's argument is inconsistent with the parties' course of conduct throughout the Project.

ii. The Mike Kearney email was not part of the Contract

Okland has attempted to use an email exchange with Kearney President Michael Kearney to argue that a different, lower rate ($60.45) was somehow agreed to and that Kearney, therefore, needs to reduce the rate for the Change Orders at issue to reflect that lower rate. The argument is nonsensical for a number of reasons. First, the email exchange at issue [Trial Exhibit 186] is not a contract document nor does it satisfy the modification requirements of the Subcontract Work Order [Trial Exhibit 2 at 8]. Second, the email did not become an "issue" until mid-2022, long after the work was performed and each of the Change Orders submitted and, thus, is an after-the-fact attempt by

[7] Mr. Kawulok testified that there were some Change Orders were Okland asked him to reduce the labor rate to help get the Change Order "across the finish line." According to Mr. Kawulok he made every requested change in this regard. [Transcript 11-18-24 at Page 45 lines 13-21].

Okland to try and reduce what it owes to Kearney. Had this been a real Project issue, one would have expected that Okland would have objected to the rate routinely and at the time the Change Orders were submitted. Third and most importantly, it flies in the face of the fact that Kearney had already been paid over $13MM for work under Okland - - at the $65.00 labor rate and without objection.

Micheal Kearney testified that there was no restriction on the rates Kearney could bill on the project. [Transcript 11-19-20 at Page 121 lines 7-14] and that Kearney was paid at the $65.00 rate [*Id* at lines 15-16]. As to the specific email, Mr. Kearney testified that the rate referenced by him in the mail was for a lower rate - - but that it was the $65.00 rate charged which was lower than the $70-$75 Kearney was charging elsewhere. [*Id* at Page 138 lines 3-8]. Mr. Kawulok also testified to this specific issue and explained his personal understanding of the email; the lower rate referenced therein was for use as the Project's "estimating rate" so that the Project could be budgeted. But that it was absolutely not relevant to the Change Order rate that would be billed as work was released. [Transcript 11-18-24 at page 174 line 18 – 23 and Page 177 lines 3-9]. Messrs. Kearney and Kawulok's testimony was consistent and in harmony. Kearney would concede to a lower estimating rate ($60.45) for purposes of budgeting, but would bill the rate it intended for Change Order work ($65.00) for work actually performed and that rate, according to Mr. Kearney, was less than what Kearney typically charged.

Noticeably missing regarding this email exchange was testimony from anyone from Okland involved in the actual email exchange - - not Mr. Smith or Mr. Kranz. One would expect that for such a "crucial" issue, Okland personnel with knowledge of the issue would testify. They did not. There was no testimony from anyone from Okland as to what they understood the exchange to mean; only Okland and its counsel's litigation-contemplated "believe" as to what they "think it meant." The email exchange is irrelevant to the dispute and Okland's contention as to what it thinks it meant is

speculative and lacks foundation.

d. There was no "Discovery Dispute"

While the Court raised the question as to whether there was a discovery dispute between the parties relative to Okland's Request for Production and Kearney's Response [Trial Exhibit 276], there was no such dispute. Okland requested back up on a per Change Order basis and Kearney responded that it did not maintain any records in that manner other than what had already been disclosed (e.g., the time and materials Change Orders). Kearney's response was not challenged nor was the issue raised to the Court. Implicit in what Okland was seeking, however, appears to be the labor and materials (time and materials) backup for all Change Orders. However, that request is a red herring and seeks backup to the backup provided for each Change Order. As Mr. Kawulok testified to and as indicated in the parties' contract [Trial Exhibit 1 at Page 6 paragraph 22], such labor and materials backup was only required when Change Order work was performed on a time and materials basis. As indicated above and as confirmed by Mr. Kawulok, all Change Orders for time and materials work included the required backup. The vast majority of the Change Orders, however, included approved estimates and, as such, did not require additional backup beyond the estimate.

3. OKLAND'S BELATED ATTEMPT TO CHALLENGE KEARNEY'S CHANGE ORDERS FAILS

a. Kearney's Change Orders were never rejected by the Project Owner or Okland

Mr. Kawulok testified that the Change Orders were each submitted to Okland prior to Okland's submission of them to the owner. [*Id* Page 43 lines 4-9]. Discussions were then had regarding the Change Orders, which included Okland's request for certain revisions to be made. [*Id* at Page 43 line 10 – Page 44 line 4]. The request for revisions were only after the initial submission of the Change Orders and after all the work was done. [*Id* at 11-17]. Mr. Kawulok also made every revision requested by Okland [*Id* at

Page 75 lines 6-10]. Subsequently, they were submitted by Okland to the owner. Neither Okland nor Marc Taylor ever rejected any of the submitted Change Orders. [*I*d at Page 38, lines 4-9 and Page 167 lines 1-10]. None of the Change Orders were rejected by Legacy Cares either [*Id* at Page 35 line 24 – page 36 line 1].

Marc Taylor admitted that he did not reject any of the Change Orders. He admitted that he did not recall rejecting any Kearney Change Order submitted prior to March 2022 [Transcript 11-19-20 at Page 76 lines 5-8 and 12-15]. And for the remaining Change Orders, he admitted that, while he had "questions" about them, he never rejected any of them. [*Id* at Page 86 lines 10-14]. The reason for Mr. Taylor's questions was evident. Okland dropped some $24MM in Change Orders on the owner in March 2022, after the Project was completed, which was not anticipated, and there was not $24MM in the budget to pay for that work. [*Id* at Page 77 line 6 – Page 78 line 10]. The owner did not have the budget to pay the Change Orders or even the $21.3MM settlement it was attempting to negotiate with Okland directly. [*Id* at lines 17-21]. As such, Mr. Taylor was trying to come up with any reason he could so as to not have to pay the amounts claimed as there was no money to do pay them. Critical to this dispute, however, is the fact that the Change Orders (ultimately accepted in the bankruptcy settlement) were never rejected by the owner or Mr. Taylor during the review/question process. In fact, Kearney responded to each and every question Mark Taylor raised and Mark Taylor took no further action on the Change Orders in response. [*Id* at Page 78 line 22 – Page 79 line 12 and Page 81 lines 8-Page 82 line 11]. Mr. Kawulok testified that he did not receive Mr. Taylor's questions until June of 2022 and that he responded to each and every one and that he never heard back. [Transcript 11-18-24 at Page 81 line 12 – Page 82 line 1, Page 85 line 12 – 20, and Page 96 line 17 – 19].

There never was a resolution of Mr. Taylor's questions and Kearney's responses. [*Id* at page 96 lines 20-24]. The non-rejected Change Orders then became part of

Kearney's lien claim, were pursued in the foreclosure action, and ultimately accepted and paid as part of the bankruptcy settlement.

b. Kearney's Change Orders were "accepted" by the bankruptcy settlement

As discussed below, the settlement of the mechanic's lien claims in the bankruptcy were made on a "no look" basis meaning that Legacy Cares and Pacific paid those claims at an agreed-to rate without challenging the amount claimed. Kearney's claim included its claim for the $3,169,965 in, as of then, unpaid Change Orders under the Okland contract. By agreeing to settle and pay the claims, albeit at a lower agreed-to percentage negotiated by the parties, Legacy Cares as the "owner" accepted and approved the Change Orders.

While Kearney contends that it is entitled to receive the payment made by Legacy Cares (and Pacific) to Okland for those Change Orders simply as a matter of the enforceable settlement, the fact that Legacy Cares accepted and approved the Change Orders is also relevant as a matter of any contract dispute between Okland and Kearney. Legacy Cares' acceptance and approval of the Change Orders trumps any argument from Okland that the Change Orders are, in any respect, improper or not compensable. Okland's arguments in this regard becomes moot because Legacy Cares already accepted, approved, and paid them. Okland's own "objections" are ineffective and simply too late.

The parties' contract [Trial Exhibit 1] includes a "Pay if Paid" clause meaning that Okland only has to pay Kearney for its work to the extent that Okland has been paid for that work by Legacy Cares. That is the benefit to the general contractor for having such a clause in its subcontracts because it does not have to pay the subcontractors for their work if it does not receive payment for that work from the owner. The subcontractors, not the general contractor, bear the risk of non-payment. However, there

is a flip side to that clause. The general contractor does not have to pay the subcontractor if it is not paid for that work, but it has it has a corresponding obligation to pay the subcontractor when and what it is, in fact, paid for that work by the owner. The clause at issue here provides as follows:

> . . . All payments to Subcontractor under this Subcontract shall be made by Contractor solely and exclusively out of funds ***Contractor receives from Owner***. Subcontractor acknowledges that it shares, to the extent of payments to be made to it, in the risk that Owner may fail to make one of more payments to Contractor for all or a portion of its Work. . .

[Trial Exhibit 1 at Page 8 Paragraph 31].

Thus, the parties' contract requires Okland to pay Kearney for what it received for its work.[8] This is true irrespective of whether Okland believes that there *might* otherwise be a basis to challenge full payment to Kearney. However, the time for objection, if any, to Kearney's Change Orders by Okland was *before* payment was made to Okland by Legacy Cares in the bankruptcy. Okland's attempt to now refrain from paying Kearney what it received from Legacy Cares for Kearney's work (so it can maximize its own recovery) is too late. The parties' contract requires payment in full for what Okland received - - $2,425,023.

4. OKLAND'S BELATED ATTEMPT TO BACKCHARGE KEARNEY IS UNSUPPORTED AND LACKS FOUNDATION

Okland has also made the argument that it should be entitled to offset $115,086 from monies otherwise due Kearney for various reasons or "credits" (OCIP Credits, Trade Damage, Non-Conformance Credit, and Ginder Pumps Credit) [*See* Trial Exhibit 270]. This exhibit and Okland's argument, however, is without any foundation. While Mr. Fischer testified to this Okland-created, litigation document, there was no evidentiary support submitted for any aspect of it. There was certainly no evidence that

[8] Such payment is also required by the Prompt Pay Act, discussed *infra*.

any of these issues were raised with Kearney during the Project or that Okland's position on these items had ever been made known to Kearney. There was no evidence that any deductive change order was ever issued by Okland to Kearney purporting to contractually document Okland's position to enforce these claimed backcharges.

Equally important was the fact that there was no foundational evidence submitted to support any of the claimed deductions - - no evidence or testimony regarding why the grinder pumps allegedly had to be replaced or what "various trade damage" occurred or why either was allegedly the responsibility of Kearney. There was no evidence provided as to what conduit was "missing" or why it related to Kearney. There was also no evidence to support the claimed "OCIP credits" purportedly due from Kearney or its suppliers. What suppliers? If Okland was arguably due OCIP credits from Kearney's suppliers, one would assume that Kearney would then be entitled to backcharge those to the relevant suppliers. However, nothing beyond this conclusory chart was ever presented by Okland in support of the claimed backcharges. The claims are utterly without any evidentiary foundation or support and should be disregarded. Okland is not entitled to any offset or backcharge from monies due Kearney.

5. KEARNEY IS ENTITLED TO RECOVER AT LEAST 75.14% OF THE FACE VALUE OF ITS INDIRECT LIEN CLAIM BASED ON THE DEAL IT REACHED WITH PACIFIC AND LEGACY CARES

As presented at trial and previously argued in Kearney's *Motion for Summary Judgment* and *Reply* [ECF Nos. 782, 822], Kearney reached a settlement with Pacific and Legacy Cares where it would receive payment of at least $4MM on account of its direct and indirect mechanic liens. Michael Kearney, President of Kearney, testified that at the time the Project completed in early 2022, Kearney was owed approximately $5.3MM on account of its direct and indirect liens. [Transcript 11-19-24 at Page 124 lines 17-20, Page 125 lines 1-14]. With respect to the indirect lien under Okland, Kearney has consistently maintained, since no later than October 31, 2022, that it was

owed $3,169,965. [Trial Exhibit 183 at Page 2; Trial Transcript 11-19-24 at Page 126 lines 6-10 (Mr. Kearney testifying Kearney is owed between $3.16MM to $3.17MM)]. Okland knew that Kearney always maintained that it was owed $3,169,965 not only from the email, [Trial Exhibit 183], but also from its own calculations, [Trial Exhibit 275].

Pacific and Legacy Cares also knew how much was owed to Kearney on account of its indirect lien. [Trial Exhibit 185 at Page 74]. They, along with Kearney and other mechanic lienholders, entered into a "no look" settlement based on the face value of the mechanic's lien claims. The reason for the no look settlement was to avoid any disputes over claims (lien amounts). While a Change Order may be relevant to a claim objection if one was filed (they were not), Change Orders were not part of the bankruptcy settlement negotiations as confirmed by Mr. Fischer. [Transcript 11-20-24 at Page 57 lines 7-9]. The deal Pacific and Legacy Cares offered and Kearney accepted meant Kearney would receive a 75.14% recovery on the face value of Kearney's direct and indirect lien claims. [Trial Exhibits 178, 180-183]. The email from Andy Abraham, counsel for Pacific, confirming the settlement is clear: "$19 million will be paid to satisfy 100% of the [mechanic lien] claims----whether under Okland or direct MLS Claims. This amounts to 75.14% of the principal amount of all lien claims." [Trial Exhibit 178]. Mr. Kearney testified this is the settlement Kearney reached with Pacific and Legacy Cares. [Transcript 11-19-24 at Page 128 lines 12-20]. Kearney's counsel's email to Okland's counsel made clear this is the settlement Kearney reached with Pacific and Legacy Cares. [Trial Exhibits 180-181]. The *Memorandum of Understanding* as drafted by Legacy Cares' professionals, calculated Kearney's indirect lien claim at $3,169,965. [Trial Exhibit 185 at Page 74]. In exchange for receiving the settlement payment equal to 75.14% of its lien claims, Kearney agreed to release its liens against Pacific's property and waive any deficiency claim in the Legacy Cares bankruptcy

proceeding. [Trial Exhibit at Page 59-75]. Kearney honored this agreement [Transcript 11-19-25 at Page 129 lines 6-23] as did Pacific and Legacy Cares

The expected result? The following demonstrative chart outlines what Kearney expected to receive out of the bankruptcy settlement based on a 75.14% recovery:

		Lien Value	75.14% distribution	% Return
	Under Okland	3,169,965.00	$2,381,911.70	75.14%
Kearney's	Direct	2,155,990.00	$1,620,010.89	75.14%
expectation	Total	5,325,955.00	**$4,001,922.59**	**75.14%**

Kearney received the full $1,620,010.89 on account of its direct lien claim, which equates to a 75.14% recovery. But as to the indirect lien claim under Okland, Kearney received only $1,953,338.00, resulting in a 61.62% recovery and an overall 67.09% recovery. *See* demonstrative chart, below; *see also* Trial Exhibit 275.

		Lien Value	67% distribution	
	Under Okland	2,600,000.00	$1,953,338.00	61.62%
Okland's	Direct	2,155,990.00	$1,620,010.89	75.14%
proposal	Total	4,755,990.00	**$3,573,348.89**	**67.09%**

This is not the deal Kearney made, and Okland offered no evidence at trial as to why Kearney was not entitled to recover 75.14% from the bankruptcy settlement. Indeed, Okland used trial to challenge the amount of Kearney's lien claim, but not once did Okland present any evidence supporting the proposition that Kearney should recover at a percentage lower than 75.14%.

One step further, Okland offered no evidence at trial showing why Kearney would not be entitled to the same recovery percentage as Okland - - 76.5%. In that scenario, Kearney's recovery would look as follows:

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		Principal	Distribution	
	Under Okland	$3,169,965.00	$2,425,023.23	
Kearney recovery equal to Okland's recovery	Direct	$2,155,990.00	$1,649,332.35	
	Total	$5,325,955.00	**$4,074,355.58**	**76.50%**

Because Okland offered no evidence supporting its position that Kearney is not entitled to the 75.14% or 76.5% recovery percentage, nor any evidence showing that Pacific and Legacy Cares did not settle with Okland and Kearney on the face value of Kearney's lien claim of $3,169,965, and for the reasons discussed above as to why Kearney's lien claim is valid in amount and scope, Kearney is entitled to a 76.5% recovery on its indirect lien claim or $2,425,023.23. Consequently, Okland must pay Kearney an additional **$471,685.62** ($2,425,023.23 - $1,953,338.00 = $471,685.62), excluding pre-judgment interest, attorneys' fees, and costs, from the remaining bankruptcy settlement proceeds it received.

6. OKLAND HAD NO RIGHT TO INTERFERE WITH OR MODIFY THE DEAL KEARNEY REACHED WITH PACIFIC AND LEGACY CARES

Okland presented no documentary evidence at trial that it replied at all to the email from Andy Abraham [Trial Exhibit 178] and state its position that the mechanic lienholders - - under its lien - - would not receive the 75.14% recovery. The reason is obvious, the subcontractors (including Kearney) believed that they had a deal and Okland's unstated position would certainly blow up that deal. Instead, Okland allowed the settlement to proceed and both simultaneously or after signing on to the deal approached each subcontractor to strong arm a settlement and pay the subcontractors less. [Trial Exhibit 179; Transcript 11-20-24 at Page 11 lines 3-8].[9] Notably, Mr. Fischer states in the email that Okland will pay itself two-thirds of its legal fees and

[9] Okland submitted no evidence that Mr. Fischer's email was sent to parties outside of the Okland employees identified in the email.

costs before making payments to its subcontractors, which is why the subcontractors received a 73.16% recovery. [Trial Exhibit 179]. In Mr. Fischer's words, Okland then applied "the *unfortunate* settlement percentage [73.16%] that [Okland] was willing to pay" its subcontractors. [Transcript 11-20-24 at Page 21 lines 8-11] (emphasis added). Notably absent from the Master Subcontract Agreement [Trial Exhibit 1] is any provision entitling Okland to pay a subcontractor only what Okland is "willing" to pay, and such a position runs afoul with Arizona's Prompt Pay Act, A.R.S. § 32-1181 *et seq.* as well.

As shown at trial, this is Okland's *modus operandi*. Settle [directly] with the project owner first, and resolve subcontractor claims second. Okland took this approach in August 2022 with the Settlement Term Sheet, [Trial Exhibit 184]. Okland's subcontractors were not parties to the Settlement Term Sheet or even invited to the negotiations. [Transcript 11-20-24 at Page 42 lines 3-8]. At the time Okland signed the Settlement Term Sheet, Okland had yet to reach an agreement with its subcontractors, including Kearney, as to how much they would be paid from the settlement amount under that proposed agreement. [*Id* at Page 42 lines 14-17]. But by acting in this matter and without subcontractor agreement, Okland itself bore the risk that the subcontractors would not agree to take a lesser amount. When Okland took the risk of agreeing to settle on that same basis - - despite knowing the amounts of its subcontractors' lien claims - - it bore the risk of any potential shortfall. Because Okland unilaterally took that risk, it should solely bear any resultant "loss" from that decision.

Okland took the same approach with the bankruptcy settlement and bore the risk of dealing with the subcontractor claims. [*Id* at Page 17 lines 11-18; Page 59 lines 1-4]. Why? Because Okland cannot unilaterally settle the subcontractor's lien claims with Pacific and Legacy Cares. [*Id* at Page 51 lines 17-21; Page 79 lines 10-12]. Do not forget, however, a global settlement would never have been reached in the bankruptcy

case without Kearney's participation and settlement agreement with Legacy Cares and Pacific. [*Id* at Page 75 (beginning at line 13) through and including Page 77]. Put simply, Okland has no contractual basis to pay Kearney less, and is doing so as it did with other subcontractors simply for its own benefit. At the time the bankruptcy settlement was agreed to, all parties knew that Kearney's claim was for $3,169,965 and that Kearney expected to recover consistent with the agreement. The fact that Okland internally "felt" that Kearney was not entitled to that amount is irrelevant. Pacific and Legacy Cares paid Okland for Kearney's work based on their knowledge of the amount of Kearney's claim and the agreed-to percentage and that is what Okland received and what Kearney is entitled to receive as well.

7. OKLAND HAS NO RIGHT TO RECOVER ATTORNEYS' FEES BEFORE PAYING ITS SUBCONTRACTORS

Also within Okland's *modus operandi* is to take perks and other benefits not shared with its subcontractors. When negotiating and agreeing to the Settlement Term Sheet, Okland made sure to include comped access to the Legacy Cares Sports Park ("Sports Park") and a discount at the Sports Park's restaurant (the GOAT). [Trial Exhibit 184 at ¶ 6; Transcript 11-20-24 at Page 44-46]. Similarly, in the bankruptcy settlement, Okland made sure to reimburse itself for its attorneys' fees before paying any of the settlement proceeds to its subcontractors. [Trial Exhibit 179; Transcript 11-20-24 at Page 61 lines 3-7]. Such privilege is absent from the Memorandum of Understanding. [Trial Exhibit 185 at Page 74]. Yet, Okland offered no objective evidence as to why it should be permitted to recover its attorneys' fees but not its subcontractors. Even when one subcontractor, Wholesale Floors, attempted to recover its attorneys' fees, Okland put a stop to that as well. [Transcript 11-20-24 at Page 62 lines 9-18].

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Certainly Okland will assert that it is entitled to reimburse itself for its attorneys' fees based on an equitable basis, particularly the common fund doctrine, because Okland knows it has no contractual right to such fees. However, the common fund doctrine does not support Okland's position. "The basis for the [common fund] doctrine is the equitable consideration that parties who benefit from the efforts of counsel in creating a common fund should pay for their fair share of the work required to bring about that benefit." *Valder Law Offices v. Keenan Law Firm*, 212 Ariz. 244, 249 (App. 2006) (quoting Kerr v. Killian, 197 Ariz. 213, 217-18 (App. 2000)). "The 'doctrine serves the twofold purpose of compensating counsel for producing benefits for a class and preventing the unjust enrichment of the class members who receive them.'" *Id*. (*quoting Burke v. Ariz. State Ret. Sys*., 206 Ariz. 269, 272 (App. 2003)). There are limitations to the doctrine's use. *Id*. The Arizona court of appeals in Kerr agreed with the U.S. Supreme Court that the elements of the common und doctrine included three prongs:

> (1) Where the classes of persons benefitting from the lawsuit were small and easily identifiable;
>
> (2) Where the benefits could be traced accurately; and
>
> (3) Where the costs could be shifted to those benefiting with some precision.

197 Ariz. at 219 (*citing Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 264, n.39, 95 S. Ct. 1612, 44 L. Ed. 2d 141 (1975)). The Arizona court in *Valder* denied awarding fees under the common fund doctrine because it was impossible to determine what portion of the damages could be "traced accurately" or "shifted with some precision" or "exactitude" to one party. 212 Ariz. 244, 249-50. There, the court recognized that the "presence of counsel, actively involved" in the litigation limited this precision. *Id*.

The *Valder* opinion goes on to further state: "Thus, when there is but one counsel involved in the entire matter, the argument can clearly be made that there is a common

fund created and held by the statutory plaintiff to which the common fund doctrine should apply." *Id.* at 250. To award funds under the common fund doctrine, the "trial court must be able to 'trace accurately' the benefits and allocate the costs of litigation with some 'precision' or exactitude.'

Okland may believe it took the lead in the mechanics lien litigation and Legacy Cares' bankruptcy case, but Okland is alone in that belief. Many of the subcontractors were represented by their own counsel and that is evident in this Court's record (and the state court's record as well). Wholesale Floors' counsel took significant actions in the bankruptcy case as also evident by the Court's record. And most importantly here, Kearney's counsel represented its interests in both the state court litigation and bankruptcy case, and actively participated in the negotiations that led to the bankruptcy settlement. [Trial Exhibits 178-182, 173-176, Proof of Claim #25].[10] In all cases, Okland's efforts are one of many, and Okland is not entitled to surcharge the bankruptcy settlement payment due its subcontractors, including Kearney, to reimburse itself for its attorneys' fees, especially when the settlement did not allow for the parties to recover their incurred attorneys' fees. Okland is not entitled to recover a windfall while that same recovery was expressly denied its subcontractors and the other contractors with direct claims against the owner.

8. OKLAND'S ATTEMPT TO RAISE A CHANGE ORDER DISPUTE TO JUSTIFY PAYING KEARNEY LESS IS WITHOUT MERIT

Putting aside Okland's allegation that it has disagreed with Kearney's lien claim amount since 2022, key evidence in the form of admissions from Mr. Fischer, make the following clear:

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[10] Pursuant to Fed. R. Ev. 201, applicable to this proceeding, the Court may take judicial notice of the acts and events in this case and Kearney's Proof of Claim no. 25, including the attached mechanic lien foreclosure complaint.

1) Mr. Fischer, who attempts to detail the many alleged problems with Kearney's Change Orders, did not become heavily involved with the Project until March or April 2022, long after the Project was completed and Change Orders submitted. [Transcript 11-20-24 at Page 41 lines 20-25].

2) Mr. Fischer was not on site during the Project to see the work completed by Kearney and its employees. [*Id* at Page 40 lines 13-22].

3) Okland never took over Marc Taylor's responsibilities of approving or rejecting Change Orders, nor was that responsibility or authority ever assigned by Marc Taylor to Okland. [*Id* at Page 50 lines 11-14, 18-24].

4) Mr. Fischer's "rejection" of Kearney's Change Orders took place when preparing Trial Exhibit 268, two years after the Change Orders were submitted by Kearney and after Kearney responded to Mark Taylor's comments. [*Id* at Page 82 lines 18-25 and Page 83 lines 1-4].

5) The Change Orders at issue remain undecided and were not rejected by Marc Taylor. [*Id* at Page 50 line 25 and Page 51 lines 1-5].

6) The Change Orders were not part of the negotiations of the bankruptcy settlement. [*Id* at Page 57 lines 7-9].

7) Neither Pacific nor Legacy Cares expressed any concerns or objections to Kearney's Change Orders when negotiating the bankruptcy settlement. [*Id* at Page 57 lines 16-25 and Page 58 lines 1-12].

8) Okland paid its subcontractors what it thought and felt was "fair," not based on a market data resource, though it had no authority over approving or rejecting Change Orders. [*Id* at Page 50 lines 6-10, 11-14, 18-24; Page 47 at lines 16-25; Page 48 at lines 1-3; Pages 97-98].

9) Mr. Fischer has no objections or concerns with the $13MM worth of Change Orders that were approved and paid to Kearney. [*Id* at Page 64 lines 12-15].

10) Mr. Fischer admits there is no negotiated or fixed rate that Kearney may charge in the Master Subcontract Agreement. [*Id* at Page 67 lines 15-22].

11) Mr. Fischer admits he did not have accurate or updated information when preparing Trial Exhibit 268. [*Id* at Page 88 beginning at line 21 through Page 94 line 8]. Per Mr. Fischer, "[I]t's highly likely that I was missing some information" when preparing Trial Exhibit 268.

12) Okland presented no witnesses with personal knowledge to refute the accuracy of Kearney's employees' work hours. [*Id* at Page 96 lines 23-25 and Page 97 line 1].

Mr. Fischer's testimony makes clear that Okland justifies paying Kearney less of the bankruptcy settlement proceeds by pointing to alleged flaws in Change Orders that it has no authority to approve or reject; its subjective belief as to what is fair and should be paid versus what was billed despite all of Kearney's past Change Orders having been paid without issue; conclusions as to the amount of time Kearney's employees worked at the Sports Park made by a party without any personal knowledge who was not onsite during the Project; and using inaccurate or outdated information when preparing its analysis of Kearney's claims, all the while Kearney's Change Orders were never at issue in the no look bankruptcy settlement. There is zero credibility to Okland's hindsight-infused, arm-chair quarterback approach to devaluing Kearney's indirect lien claim simply to maximize its own recovery.

9. THE PROMPT PAY ACT AND THE CONTRACT REQUIRE OKLAND TO IMMEDIATELY PAY KEARNEY WHAT IT RECEIVED FROM PACIFIC AND LEGACY CARES WITH STATUTORY INTEREST

Okland's failure to pay Kearney the full settlement payment intended for Kearney means Kearney is entitled to all available statutory interest under the "Arizona Prompt Pay Act," A.R.S. § 32-1181 et seq. Indeed, Arizona's Prompt Payment Act requires Okland to pay Kearney the amount it received from Legacy and Pacific intended to pay for Kearney's work:

> If a subcontractor or material supplier has performed in accordance with the provisions of a construction contract, the contractor shall pay to its subcontractors or material suppliers and each subcontractor shall pay to its subcontractors or material suppliers, within seven days of receipt by the contractor or subcontractor of each progress payment, retention release or final payment, the full amount received for such subcontractor's work and materials supplied based on work completed or materials supplied under the subcontract

A.R.S. § 32-1183(B) (emphasis added).

If a final payment to a subcontractor is delayed by more than seven days after receipt of the final payment by the contractor pursuant to this section, the contractor shall pay its subcontractor interest, except for periods of time during which payment is withheld pursuant to subsection C of this section, "beginning on the eighth day, at the rate of one and one-half percent per month or a fraction of a month on the unpaid balance or at such higher rate as the parties agree." A.R.S. § 32-1183(H). Both the Master Subcontract Agreement and Arizona law require Okland to pay Kearney the remaining amount due it plus interest at 18% per annum commencing seven (7) days after receipt of the bankruptcy settlement payment.

Payment of this amount is also consistent with the parties' contract's "pay when paid" clause which provides:

> . . . All payments to Subcontractor under this Subcontract shall be made by Contractor solely and exclusively out of funds Contractor receives from Owner. Subcontractor acknowledges that it shares, to the extent of payments to be made to it, in the risk that Owner may fail to make one of more payments to Contractor for all or a portion of its Work. . .

[Trial Exhibit 1 at Page 8 Paragraph 31]. Both the Prompt Pay Act and the parties' contract require Okland to pay Kearney what it received from the owner for Kearney's work.

As discussed, Kearney reached an agreement with Pacific and Legacy Cares that meant Pacific and Legacy Cares paid 75.14% of the face value of Kearney's lien claims. Okland received these funds and then refused to pay Kearney due to Okland's after the fact dispute as to the value of Kearney's lien.[11] However, under the Prompt Pay Act, Okland was required to pay these amounts to Kearney irrespective of its "belief" of the

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[11] This point cannot be overstated. Okland received payment for work performed by its subcontractors - - Okland performed no work itself. Pacific and Legacy Cares paid Okland, in part, for 76.5% of the amount that they knew Kearney claimed it was owed - - $2,425,023.23 (76.5% of $3,169,965). And that is what the Prompt Pay Act and the parties' contract requires Okland to pay Kearney, not a penny less and certainly not whatever amount Okland "believes" it should pay or absent some contractual basis.

value of Kearney's lien. Since it failed to timely do so, Kearney is not only entitled to the full settlement payment on account of its lien, but also 18% interest for the time Kearney has gone without payment.

10. THE COURT SHOULD AWARD KEARNEY ITS ATTORNEYS' FEES AND COSTS

At bottom, the dispute between Kearney and Okland arises out of contract, regardless of whether the focus is on the Master Subcontract Agreement [Trial Exhibit 1], the Work Order [Trial Exhibit 2], or the Memorandum of Understanding [Trial Exhibit 185 at Page 59-74]. Pursuant to Arizona law, in "any contested action arising out of a contract, express or implied, the court may award the successful party reasonable attorney fees." A.R.S. § 12-341.01. Additionally, a successful party in a civil action shall recover all costs. A.R.S. § 12-341.

Mr. Kearney testified that Kearney has been represented by counsel in this dispute with Okland and has incurred attorneys' fees as a result. [Transcript 11-19-24 at Page 132 lines 21-25, Page 133 lines 1-7]. As argued herein, Okland failed to refute the validity of Kearney's Change Orders and failed to refute Kearney's right to at least a 75.14% recovery from the bankruptcy settlement. There is no reason for Kearney to receive anything less than a 75.14% recovery, though, in fact, Kearney should be awarded a 76.5% recovery because that it what Okland admittedly received. Accordingly, Kearney should be deemed the successful party, and the Court should award Kearney the principal amount owed of $471,685.62, with prompt pay interest plus Kearney's attorneys' fees and costs incurred in this matter.

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11. CONCLUSION

For the foregoing reasons, the Court should award Kearney the principal sum of $471,685 (or, alternatively, $428,573), plus prompt pay, prejudgment interest along with the attorneys' fees and costs Kearney incurred in pursuing its non-payment claim.

DATED: January 10, 2025.

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