

IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

MONTGOMERY COUNTY, MARYLAND,
Executive Office Building
101 Monroe Street, 2nd Floor
Rockville, MD 20850

WASHINGTON METROPOLITAN AREA
TRANSIT AUTHORITY
600 5th Street, NW
Washington, DC 20001

Plaintiffs,

v.

PARSONS BRINCKERHOFF, INC.
100 South Charles Street, Tower 1, 10th Floor
Baltimore, MD 21201-2727
Serve: The Corporation Trust, Inc.
351 West Camden Street
Baltimore, MD 21201

FOULGER-PRATT CONTRACTING, L.L.C.
9600 Blackwell Road, #200
Rockville, MD 20850
Serve: CSC-Lawyers Incorporating
Service Company
7 St. Paul Street, Suite 820
Baltimore, MD 21202

THE ROBERT B. BALTER COMPANY
18 Music Fair Road
Owings Mills, MD 21117
Serve: Lori A. Balter
18 Music Fair Road
Owings Mills, MD 21117

Defendants.

RECEIVED

AUG 24 2015
Clerk of the Circuit Court
Montgomery County, Md.

Civil Action No. 408239-V

COMPLAINT

Plaintiffs, Montgomery County, Maryland (“the County”) and the Washington
Metropolitan Area Transit Authority (“WMATA”), by and through their undersigned counsel,

file this Complaint. The County asserts claims of breach of contract, breach of express warranty, professional negligence, negligence, indemnification, intentional misrepresentation, negligent misrepresentation and gross negligence, and seeks compensatory damages against defendants Parsons Brinckerhoff, Inc. ("PB"), Foulger-Pratt Contracting, LLC ("FPC") and The Robert B. Balter Company ("Balter") and punitive damages against defendant PB. WMATA asserts claims of breach of contract, breach of express warranty, professional negligence, negligence and indemnification and seeks compensatory damages against PB, FPC and Balter.

I. PRELIMINARY STATEMENT

This lawsuit grows out of the design and construction of the Silver Spring Transit Center ("SSTC"). In 1999, in order to assist the thousands of Montgomery County residents and guests who enter the Silver Spring Metrorail Station or areas adjacent to it every day to use trains, buses, taxis, private automobiles, and bicycles, the County approached WMATA to propose the development of a first-rate transit hub adjacent to the station that would be turned over to WMATA following completion for incorporation into WMATA's transit system. WMATA was receptive to the proposal.

Communications between the County and WMATA culminated in a 2004 agreement under which the County would take the lead in facilitating the design and construction of the facility consistent with WMATA's design criteria.

To move the project forward, the County entered into a contract with PB (of which WMATA is a third-party beneficiary) to provide professional engineering design and construction administration services, and later a second contract to provide additional construction administration services. In order to construct the facility, the County entered into a contract with FPC (of which WMATA is a third-party beneficiary) to serve as the general

contractor for construction of the three-level SSTC. The County also entered into a contract with Balter (of which WMATA is a third-party beneficiary with respect to work done on the SSTC) to conduct inspections and materials testing during construction to ensure that work was being done correctly and according to the requirements of the construction contract documents and specifications.

Construction began in the fall of 2008 with an anticipated substantial completion date of September 9, 2010. Almost immediately, however, defects in PB's design delayed the project for almost fourteen months and cost the County millions of dollars to remedy. Once the County and FPC resolved the issues surrounding the initial design problems, the project was supposed to be substantially complete by November 3, 2011. Instead, once construction of the elevated levels of the facility commenced, cracks and other defects began appearing in the concrete. After PB and FPC were unable to determine the cause of the defects or correct them, the County retained the engineering firm, KCE Structural Engineers, P.C. ("KCE"), to review all aspects of the design and construction of the SSTC and to recommend remedies for any defects KCE found.

In March 2013, KCE issued a report in which it detailed substantial defects in PB's design of the facility and its oversight of the project. KCE also described substantial defects in FPC's construction of the facility and identified how Balter had failed to detect construction defects and to adequately report them to the County or to WMATA. As part of its report, KCE recommended measures to correct the design and construction defects.

The County asked PB to design the remediation KCE considered necessary to bring the structure into compliance with applicable building codes and standards, as well as with WMATA's criteria. PB did some of this work. However, PB refused to help correct the critical design defects related to the impact of shear and torsion forces on the elevated levels of the

facility. Moreover, once the County raised concerns about this serious structural issue with PB, PB's response was less than forthcoming and interfered with the County's efforts to correct the structural defects. Lacking PB's cooperation, the County asked KCE to design a remedy for those defects and to oversee FPC's work correcting them.

In late 2013, FPC began work on remedying the numerous design and construction defects found in the SSTC. Work on the remediation continued through 2014 and into 2015. The project achieved substantial completion in August 2015. The SSTC is now ready to be placed into service for its intended use as the transit hub the County and WMATA first envisioned sixteen years ago.

The County shortly will transfer the SSTC to WMATA for incorporation into WMATA's transit system. Soon thereafter, the SSTC will begin serving the public, almost four years after the SSTC should have first begun operations and after substantially more money has been spent on it than it would have cost had the facility been designed and constructed correctly from the start. Despite their collective failure to provide the public what it has paid for, PB, FPC, and Balter each have received a substantial amount of public funds for their respective work on the SSTC.

For WMATA, several issues remain. Even after remediation, WMATA believes that the defects in design and/or construction for which PB and FPC are responsible and which Balter failed to detect or report will necessitate more monitoring, inspection, repair, and maintenance during the life-cycle of the facility than would have been required in the absence of those defects, and at a greater cost to WMATA. WMATA has also expended over \$864,521.00 in additional costs as a result of Defendants' failure to perform their obligations on the SSTC project.

In this lawsuit, the County seeks no less than \$50,000,000.00 in damages from PB and FPC for the defective design and construction of the SSTC, and \$30,000,000.00 from Balter for failing to prevent construction defects or to bring them to the County's attention. WMATA seeks no less than \$25,864,521.00 in damages from PB, FPC, and Balter for the additional monitoring, inspection, repair, and maintenance costs it will incur over the life of the SSTC as a result of the defective design and construction of the facility, as well as for the additional coordination costs incurred.

II. PARTIES

1. Plaintiff, Montgomery County, Maryland ("County") is a body corporate and politic, under the Constitution and general laws of Maryland.

2. Plaintiff, Washington Metropolitan Area Transit Authority ("WMATA") is an interstate compact agency and instrumentality of Maryland, Virginia, and the District of Columbia, with the powers and duties granted under the WMATA Compact, as codified at MD. CODE ANN., TRANS. § 10-204 (2013) and such additional powers conferred upon it pursuant to applicable law.

3. Defendant, Parsons Brinckerhoff, Inc. ("PB"), is a corporation organized in accordance with the laws of New York, with its principal place of business in New York, New York, and duly authorized to conduct business in Maryland.

4. Defendant, Foulger-Pratt Contracting, LLC ("FPC"), is a corporation organized in accordance with the laws of Maryland, with its principal place of business in Baltimore, Maryland, and duly authorized to conduct business in Maryland.

5. Defendant, The Robert B. Balter Company (“Balter”), is a corporation organized in accordance with the laws of Maryland, with its principal place of business in Owings Mills, Maryland, and duly authorized to conduct business in Maryland.

III. JURISDICTION AND VENUE

6. This Court has jurisdiction over the defendants pursuant to MD. CODE ANN. CTS. & JUD. PROC. § 6-103, and § 81 of the WMATA Compact.

7. Defendants PB, FPC, and Balter contracted to perform services and performed services in Maryland and further caused tortious injury in Maryland, and all of them have expressly consented to the jurisdiction of this court.

8. Venue is proper in the Court pursuant to MD. CODE ANN., CTS. & JUD. PROC. § 6-202 because the Silver Spring Transit Center is located in Montgomery County, Maryland. Section 81 of the WMATA Compact also makes venue in this Court proper.

9. Defendants Parsons Brinckerhoff, Inc., Foulger-Pratt Contracting, LLC, and The Robert B. Balter Company have expressly consented by contract to venue in the Circuit Court for Montgomery County.

IV. FACTUAL BACKGROUND COMMON TO ALL CAUSES OF ACTION

10. The Silver Spring Metrorail Station was opened in February 1978 as the original northern terminus of Metrorail’s Red Line.

11. Over the years, the Silver Spring Metrorail Station has become one of the most heavily used stations in the Metro system and among the most heavily used transit facilities in Maryland.

12. In 2012, on an average weekday, approximately 57,000 people entered the Silver Spring Metrorail Station or areas adjacent to it to use Metrorail, MARC rail, or one of the 2,500

Metrobuses, Montgomery County Ride-On buses and intercity buses that stop near the station. In addition, taxicabs and private vehicles regularly discharge and pick up passengers near the station, and there are always a multitude of pedestrians and bicyclists in the area, who often find themselves dodging buses and automobiles. Those buses and automobiles create substantial traffic congestion in the vicinity of the station and on the roads leading to and from it. Traffic congestion on the roads -- including pedestrian traffic in and around the station -- will become even more of an issue when the Purple Line is built. Plans call for a Purple Line stop next to the existing Silver Spring Metrorail Station.

13. It is estimated that by 2025, the number of people in and around the Silver Spring Metrorail Station will increase to approximately 97,000 a day.

14. The ever-increasing use of the Silver Spring Metrorail Station as a transit hub has been spurred by the County's significant redevelopment efforts in downtown Silver Spring, which has become a thriving and busy place.

15. Against this backdrop, in 1999, the County determined that its residents and guests would benefit from a full-service, multi-modal transit facility adjacent to the Silver Spring Metrorail Station, which would enhance the future operations of the station and all of the various transit services offered in its vicinity, provide a safer environment for pedestrians and bicyclists, and ease congestion by improving traffic flow.

16. The County approached WMATA about the construction of such a facility, and WMATA expressed interest in the project.

17. After further discussion over the next few years, the County and WMATA agreed that the County would take the lead in facilitating the design and construction of the facility,

which would be built in accordance with WMATA's design criteria and with WMATA's participation, but without any direct financial contribution from WMATA.

18. The County and WMATA also agreed that once the facility was substantially complete, the County would convey it -- and the County-owned land on which part of it would sit -- to WMATA in exchange for certain proceeds related to future private development intended to take place adjacent to the SSTC site.

19. Upon transfer, WMATA would be the owner and operator of the SSTC and would be responsible for operating, managing and maintaining it.

A. The Agreement Between the County and WMATA

20. The agreement between the County and WMATA for the creation of the SSTC was memorialized initially in a November 17, 2004 Memorandum of Understanding ("2004 MOU"), which was later amended in a subsequent Amended and Restated Memorandum of Understanding dated September 25, 2008 ("2008 MOU"). The 2008 MOU superseded the 2004 MOU and rendered it "null and void and of no further force and effect." [2008 MOU, Recitals ¶T. 1. A.]

21. The 2008 MOU recognized, among other things, that the Silver Spring "Metrorail Station will require renewal or replacement of aging infrastructure in order to accommodate the projected increase in patron demand," that "the County, with the Maryland Mass Transit Administration ("MTA"), has approached WMATA about the feasibility of constructing a full-service intermodal transit facility ("Transit Center") at the Metrorail Station," that "by consenting to the development and construction of the Transit Center, WMATA has acknowledged the benefits to its transit operations and to the general public afforded by the proposed new facility," and that WMATA concurred in considering the feasibility of

constructing the Transit Center based upon the County's representations that "WMATA will control and operate the proposed facility" and that "the proposed facility is at no capital cost, direct or attributable, to WMATA." [Recitals ¶¶ C, D, E and J.]

22. The 2008 MOU specified further that "[t]he costs of planning, developing, designing, constructing and finally completing the Transit Center will be paid for by the County..." [¶3. A.] It stated that "the County agrees that upon Substantial Completion of the Transit Center (as defined in Section 13 hereof), inspection and acceptance by WMATA, and approval, if any, by FTA, WMATA will control, operate and maintain the Transit Center" [¶3. B.], the development and construction of which "will be subject to the WMATA Compact [and] utilize WMATA's Design and Construction Criteria and Adjacent Construction Criteria." [¶3. B.] In addition, "[t]he County agrees to reimburse WMATA's staff costs ... for document and plan review, project administration and inspection costs associated solely with respect to the Transit Center in an amount not to exceed \$942,000." [¶3. D.]

23. The 2008 MOU provided that "[t]he County will manage the development and construction of the Transit Center..." [¶12. B.] The agreement gave WMATA the right to "review and comment upon the Transit Center Construction Contract, which contract shall cause WMATA to be designated as a third-party beneficiary of such contract," to "review and approve the plans," and to "monitor and inspect construction of the Transit Center for continuing compliance with the Approved Documents..." [¶12. B. 1, 2 and 3.]

24. WMATA agreed to "assign a full-time, on-site staff person to the Transit Center project." [¶12. B. 3.]

25. The 2008 MOU defined "Substantial Completion" of the Transit Center to mean that "the work on the Transit Center has progressed to a point of being completed for full use and

the functions intended ... and that there are no significant corrective actions to be undertaken by the Construction Contractor.” Substantial Completion also meant that “the Construction Contractor has obtained a Certificate of Occupancy from the Department of Permitting Services ... and that the Transit Center may be used and occupied by WMATA [for] its intended use with all building systems being properly functional...;” and that “the County’s Architect Engineer has inspected the work, has certified as to the matters set forth ... above, and has composed a punchlist of work and corrections remaining to be accomplished, which punchlist has been accepted by the Construction Contractor [and] the County and shall not include any items that preclude either the use of the Transit Center as contemplated in the approved POR or the operation of any portion of the Transit Center for normal transit operations.” [¶13. A. (1), (2) and (3).]

26. WMATA was given five business days from receipt of the punchlist to conduct an inspection of the Transit Center and indicate whether or not it accepted the punchlist and thus the SSTC. [¶13. A. (3).] The 2008 MOU stated that “such acceptance [is] not to be unreasonably withheld.” [¶13. B.] WMATA provided the County with the WMATA Supplemental List in accordance with the terms of the MOU.

27. The 2008 MOU requires the County to transfer the Transit Center to WMATA and to “assign to WMATA all of the County’s rights under the Transit Center Construction Contract for all warranties and guarantees and all Approved Documents.” [¶13. B.] Thereafter, “WMATA shall have the sole responsibility for operating, managing and maintaining the Transit Center....” [¶13. C.]

28. The 2008 MOU provides that “[i]n the event that WMATA rejects the Transit Center, WMATA shall specify the items that the County must complete and/or correct as a

condition of acceptance by WMATA and such items may not exceed the requirements imposed on the County under this MOU.” [¶13. B.]

29. For the County and WMATA, the agreement reflected in the 2008 MOU was intended to be mutually beneficial. Once the facility was built, County residents and others would find it easier and safer to use the Silver Spring transit hub. At the same time, WMATA would obtain a useful facility next to its Metrorail station (and County-owned land on which part of it sat) for which it did not have to pay.

B. Design and Engineering Agreement Between the County and PB

30. Even before execution of the 2004 MOU, in 2003, the County and PB commenced discussions about designing and engineering the SSTC (“the Project”).

31. PB is a nationally-recognized engineering and consulting firm which specializes in assisting public and private clients in planning, developing, designing, constructing, operating and maintaining critical infrastructure.

32. In their initial communications, PB represented to the County that it was able and willing to provide the necessary extensive professional design and engineering services, including project planning, environmental and historic evaluation and documentation, conceptual design, preliminary design, subsequent and more detailed design, engineering activities, and construction administration services for the Project.

33. On April 6, 2004, the County entered into a contract with PB (“the PB Design Contract”) to provide professional engineering design and construction administration services for a fixed price of \$4,047,607.00, with an additional amount not to exceed \$50,000 for additional services. [¶4.1.1 through 4.1.3.] That contract price subsequently was amended to \$8,506,283.38, consisting of \$4,220,418.00 for basic services, and \$4,285,865.38 for additional

services. By the time the SSTC was substantially complete, the County had paid PB \$8,278,128.23 under the PB Design Contract.

34. In entering into the PB Design Contract (in which PB was referred to as “Consultant”) the County relied upon PB’s representations about its capabilities, as well as the fact that PB had been working under a master contract with the State of Maryland for the same or similar services and was believed to be familiar with the design parameters needed to execute the Project.

35. The County also relied upon the recommendation of the MTA to select PB as the designer of the Project.

36. The PB Design Contract included the following recitals:

WMATA will own, operate and maintain the Silver Spring Transit Center upon “substantial completion” and for that reason WMATA is expressly designated within as a Third Party Beneficiary of the services provided under this Contract and the parties further acknowledge that WMATA has reviewed this Contract and comments from WMATA have extensively been included herein; [BACKGROUND ¶C.]

The Silver Spring Transit Center is to be designed to accommodate transit projections at least through the year 2020 and to accommodate transit needs of both WMATA and the County; [BACKGROUND ¶E.]

1) the Silver Spring Transit Center involves a high degree of coordination with existing and planned MTA facilities with which Consultant is very familiar and for which it provides ongoing engineering and design services; 2) MTA, utilizing the Consultant under the MTA Contract, is providing certain coordination services and engineering and design for the [SSTC] and its joint development with the Private Improvements; 3) the Consultant has provided a significant level of conceptual design work on behalf of MTA for the joint development of the [SSTC] and the Private Improvements, which work needs to be the basis for preliminary and further design work; and 4) MTA will be managing the grant agreement which can be managed more efficiently through the use of the same consultant. [BACKGROUND ¶N.]

37. The PB Design Contract provided that Substantial Completion of the Project shall be deemed to have occurred when “the Work of the Project has progressed to a point of being substantially completed and ... there are no significant corrective actions to be undertaken by the Construction Contractor,” when “the Construction Contractor has obtained a Certificate of Occupancy from the Department of Permitting Services,” and when “the Consultant has inspected the Work and has composed a ‘punch list’ of Work and corrections remaining to be accomplished and this ‘punch list’ does not include any items that a) preclude the use of the Project as contemplated in the Program of Requirements, or b) preclude operation of any portion of the building used for transit operations and ... the punchlist has been accepted by the County and WMATA.” [§1, ¶17. 1., 2. and 3.]

38. The PB Design Contract specified that:

The Consultant must provide professional design and engineering services for the Project in accordance with the terms and conditions of this Contract. The Consultant’s performance of services must be as professional consultant to the County to carry out the activities of Project design and construction administration and to provide the technical documents, including but not limited to development of the Construction Contract Documents and supervision to achieve the County’s Program of Requirements and Project objectives. At all times in the context of Consultant’s performance of Basic Services and Additional Services as described herein, the Consultant must act in the best interests of the County, utilizing that degree of care required for a design professional in accordance with generally accepted professional design practices, to ensure proper scheduling, coordination and completion of the Project in a cost efficient manner in accordance with the Program of Requirements and the Construction Documents, and within the CCAP. To the extent that Consultant uses subconsultants to satisfy any of its obligations in this Contract, Consultant shall obtain from the subconsultant and provide to the County, written commitments by the subconsultant to perform its work in accordance with the requirements of this Contract as if the subconsultant were performing as Consultant. [§2.1]

39. In addition, in the PB Design Contract, PB:

[r]epresent[ed] and agree[d] that (a) it is an experienced architectural and engineering firm having the ability and skill necessary to perform all the Services required of it under this Contract in connection with the design and construction of a project having the scope and complexity of the Project contemplated herein;...(c) the Project will be designed in accordance with all current laws, rules and regulations which are applicable to the design and construction of the Project (including, but not limited to, ... requirements of building codes of city, county, state and federal authorities which are applicable to the project.... Consultant must impose this requirement on behalf of the County and WMATA in any subcontract it enters into to satisfy its obligations under this Contract. [§3.2.1.]

40. PB further agreed that it “must perform all services under this Contract and, in doing so, act in a reasonable manner.” [§3.2.4.]

41. The PB Design Contract required PB to certify in writing at various points in the design process that:

“The plans, drawings, specifications, and other documents submitted herewith, in my/our professional opinion have been prepared in accordance with the Architectural/Engineering Services Contract No. _____. They are in compliance with appropriate codes and standards. They fulfill the Program of Requirements and the Work and equipment indicated by them may be purchased by the County in a construction contract, or contracts, the total price of which will not exceed the CCAP as indicated in the written notice from the County dated _____ (to be filled in with the date of the notice) and may, in the reasonable professional opinion of the undersigned employing due diligence to ascertain such pricing, be constructed completely within said CCAP. [§3.3.1.2.]

42. PB acknowledged “the importance to the County of the County’s Master Schedule and Critical Contract Completion Period and agree[d] to put forth its best professional efforts to perform its services under this Contract in a manner consistent with that schedule....” [§5.3.]

43. The PB Design Contract recognized WMATA's role in the development of the SSTC, stating that "WMATA's input, consultation, comments and advice are invited and encouraged at all stages of design of the Silver Spring Transit Center. WMATA approval is required for the following: a) the revised Program of Requirements; b) Concept Finalization; c) Schematic Design documents; d) Design Development documents; e) pre-bid Construction documents; f) material deviations from the Program of Requirements; g) Design Adjustments pertaining to the Construction Documents; and h) Substantial Completion of the Work and punchlist...." [§6.2]

44. WMATA's role in the design of the SSTC also was recognized in provisions stating that notice required by the PB Design Contract must be provided to a designated representative of WMATA [§8.1.], and that "WMATA will, upon substantial completion, own and operate the Project, and as such is an intended beneficiary of the Services. Consultant acknowledges and agrees that WMATA is a third-party beneficiary of this Contract and is entitled to enforce the rights, responsibilities and terms of this Contract in its capacity as a third party beneficiary...." [§13.]

45. The PB Design Contract stated that "Consultant [PB] will also coordinate its work with WMATA's requirements." [Exhibit A, SCOPE OF SERVICES, second unnumbered paragraph.]

46. The PB Design Contract assigned PB a prominent role in the County's relationship with FPC, FPC's work, and the selection and performance of FPC's subcontractors: "The CONSULTANT must assist the County in the preparation of the Contract(s) between [the] County and Construction Contractor(s) for the County's execution." [Exhibit A, ¶F. 8.] In addition, "the CONSULTANT must consult with the County and participate in all decisions as to

the acceptability of subcontractors and other persons and organizations proposed by the Construction Contractor for various portions of the work.” [Exhibit A, ¶E. 2.] And, “[t]he CONSULTANT must review and approve shop drawings, samples, schedule of values, and other submissions of the Construction Contractor(s) as well as the work performed by the Construction Contractor(s) for conformance with the design concept of the Project and for compliance with the Contract Documents.” [Exhibit A, ¶E. 3.] Furthermore, the contract specified that “[t]he County may condemn or reject Work when in the County’s or the CONSULTANT’S opinion the Work does not conform to the Contract Documents.” [Exhibit A, ¶E. 13.]

47. The PB Design Contract required PB to inspect the work of FPC and its subcontractors: “When the Construction Contractor states that the Work or portions of the Work are substantially complete, the CONSULTANT and its sub-consultants must inspect the Work or portions of the Work....” [Exhibit A, ¶E. 15.] In addition, “[t]he CONSULTANT and its consultant(s) must conduct up to three (3) comprehensive substantial completion inspections per construction phase at the request of the County.” [Exhibit A, ¶E. 17.]

48. The PB Design Contract contained an indemnification/hold harmless provision, which provided:

The Consultant is responsible for any loss, personal injury, death and any other damage (including incidental and consequential) that may be done or suffered by reason of the Consultant’s negligence or failure to perform any contractual obligations. The Consultant must indemnify and save the County and WMATA harmless from any loss, cost, damage, or other expenses, including attorney’s fees and litigation expenses, suffered or incurred due to the Consultant’s negligence or failure to perform any of its contractual obligations. If requested by the County and/or WMATA, the Consultant must defend the County and/or WMATA, as applicable, in any action or suit brought against the County or WMATA, as applicable, arising out of the Consultant’s negligence, errors, acts or omissions under this contract. The negligence of any agent, subConsultant or employee or the

Consultant is deemed to be the negligence of the Consultant. For the purposes of this paragraph, County and WMATA include their respective boards, agencies, agents, officials and employees. [Exhibit C, ¶17.]

49. The PB Design Contract expressly acknowledged the exclusive venue and jurisdiction of the Circuit Court for Montgomery County, Maryland for any lawsuit arising under it and the application of the laws and regulations of Maryland and Montgomery County in any such lawsuit. [Exhibit C, ¶8.]

50. The PB Design Contract provided that “[t]ime is of the essence.” [Exhibit C, ¶27.]

C. On-Site Project Engineer Agreement Between the County and PB

51. On November 20, 2009, the County and PB entered into a second contract (“PB Construction Oversight Contract”), under which the County retained PB as a “full-time On-Site Project Engineer to work under the direction of the County’s Contract Administrator or his designee” [§II] and to oversee FPC’s construction of the SSTC. Under the terms of the PB Construction Oversight Contract, PB was to bill the County for its work on an hourly basis in an amount not to exceed \$465,150.00. [§III.] PB and the County subsequently amended this contract to increase the not to exceed amount to \$1,170,855.00.

52. For the work that it represented it performed under the PB Construction Oversight Contract, PB has been paid \$1,170,825.00.

53. Among PB’s responsibilities under the PB Construction Oversight Contract was to “identify and resolve project design issues.” [§II, 5.]

54. The PB Construction Oversight Contract contained an indemnification/hold harmless provision substantially identical to the indemnification provision in the PB Design

Contract [Exhibit A, ¶18] and the same jurisdiction, venue and choice of law provisions as the PB Design Contract. [Exhibit A, ¶3.]

55. Like the PB Design Contract, the PB Construction Oversight Contract stated that “time is of the essence.” [Exhibit A, ¶29.]

D. The General Construction Contract Between the County and FPC

56. PB prepared and provided Construction Documents to the County, dated January 7, 2008, signed and sealed by its Engineer of Record, Douglas A. Lang, which served as the basis for construction of the Project.

57. On September 3, 2008, the County contracted with FPC to serve as general contractor for construction of the SSTC at a fixed price of \$65,841,294.00 (“FPC Construction Contract”, §7 (A).)].

58. The FPC Construction Contract incorporated by reference, among other things, the Drawing and Specifications for the Project, Federal Transit Administration Required Clauses, the County’s Request for Proposals, the Project Coordination Agreement, the WMATA Adjacent Construction Design Manual, General Conditions of Construction Contract, Supplemental Conditions of Construction Contract, and “all applicable provisions of the Montgomery County Code and Montgomery County Procurement Regulations in effect on the Bid or Proposal closing date” and any subsequent procedural amendments or additions. [§1 (A).]

59. In the FPC Construction Contract, FPC represented that it “is fully qualified to act as the Contractor and perform the Work on the Project” [§2 (A)], and that it “has received, reviewed, and carefully examined all of the documents which make up this Contract, including but not limited to, the drawings and specifications, and has found them in all respects to be

complete, accurate, adequate, consistent, coordinated and sufficient for construction of the Work for the Project.” [§2 (C).]

60. The FPC Construction Contract provided that the County “is acting for the benefit of WMATA, which (i) will become the legal owner of the Project, (ii) will be considered a third party beneficiary of this Contract, and (iii) will be entitled to enforce all rights and remedies of the Owner hereunder.” [Section 00 7300 – Supplemental Conditions of Construction Contract, Article 1, §1.1.43]

61. The FPC Construction Contract recognized the importance of FPC’s timely performance of its obligations: “The Contractor must commence the performance of this Contract upon Notice to Proceed as set forth in the General Conditions of Construction Contract and must diligently perform under the Contract and complete the Work without interruption through final completion of the Work for the Project. The Contractor must achieve Substantial Completion of the Work for the Project within the time period specified in Section 00 8000 Master Schedule and Critical Contract Completion Period.” [§6 (A).]

62. The FPC Construction Contract defined Substantial Completion as “the stage in the Progress of the Work, as confirmed by the Owner’s acceptance of the Architect/Engineer’s Certificate of Substantial Completion in accordance with Article 14, when the Work or designated portion thereof is sufficiently complete in accordance with the Contract Documents (i) so the Owner can occupy or utilize the entire Work or designated portion thereof for its full use and the functions intended and (ii) [and] ... the completion or correction of any Punch List items can be accomplished within a period of 30 days.” [Section 00 7300 – Supplemental Conditions of Construction Contract, Article 1, §1.1.66]

63. The FPC Construction Contract spelled out the consequences to FPC of not completing its work by the Substantial Completion date: “The Contractor must pay the Owner [the County] the sum of Eight Thousand Nine Hundred Dollars (\$8,900.00) as Liquidated Damages for each day of unexcused delay beyond the date set forth above for Substantial Completion.” [§6 (D).]

64. There were also consequences for not finally finishing the project promptly after Substantial Completion: “If the Contractor fails to achieve Final Completion within thirty (30) days after Substantial Completion, the Contractor shall pay the Owner the sum of Eight Thousand Nine Hundred Dollars (\$8,900.00) as Liquidated Damages per day for each day of unexcused delay.” [§6 (D).]

65. The FPC Construction Contract provided further that “[t]he Contractor’s Payment of any Liquidated Damages to the Owner is in addition to and not exclusive of any other remedies available to the Owner under the terms of this Contract or the Contract Documents.” [§6 (E).]

66. The FPC Construction Contract contained an anti-waiver provision on behalf of the County: “Neither payment to the Contractor, utilization of the Work on the Project for any purpose by the Owner, nor any other act or omission by the Owner is to be interpreted or construed as an acceptance of any Work of the Contractor that is not strictly in compliance with construction industry standards and the requirements of this Contract.” [§7 (E).]

67. The FPC Construction Contract described FPC’s duties, obligations and responsibilities. Among other things, it provided that “[a]ll work must conform strictly to the requirements of the Contract” [§9 (B)], that “[t]he Contractor must strictly supervise the performance and completion of the Work, and must monitor the Work as it progresses” [§9 (C)],

that “[t]he Contractor is strictly liable for all acts and omissions of those engaged in the Work on behalf of the Contractor” [§9 (C)], that “[t]he Contractor warrants that all labor furnished under the Contract will be competent to perform the tasks undertaken,” that “the product of such labor will yield only first-class results,” that “all materials used in the Work and equipment provided will be new and of high quality,” that “the work will be complete, of high quality, without defects, when completed,” that “all of the Work will strictly comply with the requirements of the Contract,” and that “[a]ny work not strictly complying with the requirements of the Contract will be a breach of the Contractor’s warranty.” [§9 (D)]

68. The FPC Construction Contract contained an indemnification/hold harmless provision, which provided:

The Contractor shall defend, indemnify and hold harmless the Owner, WMATA, their consultants and Separate Contractors, the Architect/Engineer, the Architect/Engineer’s consultants, and any of their Subcontractors, sub-subcontractor, Suppliers, agents and employees from and against liability for all claims, damages (including incidental and consequential), losses (including purely economic losses) and expenses, including but not limited to attorneys’, expert witnesses’ and consultants’ fees, which arise out of or result from (a) the performance of the Work, (b) operations at the Site or (c) any act or omission by the Contractor. Such performance, operations, acts or omissions of the Contractor include the performance, operations, acts or omissions of the Contractor’s Subcontractors, sub-subcontractors, Suppliers and their respective agents and employees and anyone for whose acts said parties may be liable. This indemnity obligation and the duty to defend applies, regardless of whether or not such claim, damage, loss or expense is also caused or alleged to have been caused in part by the negligence or act or omission of a party indemnified hereunder, provided it is also caused or alleged to have been caused at least in part by the Contractor, a Subcontractor, sub-subcontractor, Supplier or their agents or anyone directly or indirectly employed by them or anyone for whose acts said parties may be liable. The duty to defend accrues at the time a claim that potentially is within the scope of coverage of the indemnity herein is made against the indemnitee(s). For purposes of this Subsection 8.4.1, the term Owner and WMATA includes their boards,

agencies, agents, officials and employees. [Section 00 7300 – Supplemental Conditions of Construction Contract, Article 8, §8.4.1.]

69. The FPC Construction Contract provided for the application of the laws and regulations of Maryland and Montgomery County in any lawsuit arising under it. [§21.]

70. In Amendment No. 1 to the FPC Construction Contract, dated November 22, 2013, FPC expressly acknowledged the venue and jurisdiction of the Circuit Court for Montgomery County, Maryland for any lawsuit arising under the FPC Construction Contract. [Changes—Dispute Resolution ¶1.]

71. On October 9, 2008, the County provided FPC with a conditional and limited Notice to Proceed, thus allowing FPC to commence construction activities on the Project. On August 24, 2009, the County provided FPC with an amended Notice to Proceed which removed the conditions placed on the prior notice.

72. By agreement of the County and FPC, the date for Substantial Completion, as defined by the FPC Construction Contract, was ultimately set for November 3, 2011.

E. The County’s Agreements with Balter To Inspect Work on the SSTC

73. The County’s Department of Permitting Services (“DPS”) required that an inspections protocol must be implemented on the Project through a third party inspections and materials testing program (the “Special Inspections Program”).

74. Under the Special Inspections Program, periodic inspections must be conducted during construction of the SSTC to ensure that work on the project was being done according to specifications.

75. As part of the Special Inspections Program, the inspector, the design engineer and the general contractor were required to execute a Statement of Special Inspections (“SSI”) which served as the basis for the implementation of an inspections and testing protocol on the Project.

76. Balter was retained to administer the Special Inspections Program.

F. Balter 06 Inspection Contract

77. On November 15, 2006, the County and Balter entered into Contract No. 6504510207-AA/Inspection and Material Testing Services (“Balter 06 Inspection Contract”). WMATA was a third-party beneficiary with respect to the work done on the SSTC pursuant to the Balter 06 Inspection Contract.

78. Under the Balter 06 Inspection Contract, in which Balter was referred to as “the Contractor,” Balter was required to “provide field inspections, plant inspections, testing services and subsequent reports and certifications at the completion of each task order. At the time of task completion, the Contractor must provide the County with certified test reports and statements as may be required for all testing and inspection services provided under this contract.” [§4.]

79. The Montgomery County Special Inspections Program was specifically incorporated into the Balter 06 Inspection Contract. [§1.]

80. The Montgomery County Special Inspections Program provided specific testing specifications for Balter to follow with respect to all concrete in the structure, including but not limited to concrete slabs, girders, columns and beams. [§1.]

81. The Montgomery County Special Inspections Program required Balter to “provide construction observation and testing services of required scope and frequency to offer a professional opinion that the constructed project was built in accordance with the County-

approved construction documents, and that construction has been tested and inspected in accordance with the SSI and applicable codes and standards.” [Exhibit E, ¶1.7.2.]

82. The Montgomery County Special Inspections Program provided that “[a]ny deviation from the approved construction documents must be brought to the immediate attention of the registered design professional of record and the County code official.” [Exhibit E, ¶1.9.] It provided further that “[d]eficiency reports shall describe the nature and specific location of the deficiency and include a description of the action recommended by the appropriate professional in charge....” [Exhibit E, ¶1.10.]

83. The Montgomery County Special Inspections Program provided that “[t]he organizations and individuals performing inspections are responsible for the adequacy of their work,” and that “[a]ny individual involved in the inspection function who detects a condition which in his or her opinion justifies a stop-work proceeding or other immediate remedial measure, shall so notify the supervisor of the function in question.” [Exhibit E, ¶¶1.14, 1.16.]

84. The Balter 06 Inspection Contract contained an indemnification/hold harmless provision, which provided:

The contractor is responsible for any loss, personal injury, death or any other damage (including incidental and consequential) that may be done or suffered by reason of the contractor’s negligence or failure to perform any contractual obligations. The contractor must indemnify and save the County harmless from any loss, cost, damage, and other expenses, including attorney’s fees and litigation expenses, suffered or incurred due to the contractor’s negligence or failure to perform any of its contractual obligations. If requested by the County, the contractor must defend the County in any action or suit brought against the County arising out of the contractor’s negligence, errors, acts or omissions under the contract. The negligence of any agent, subcontractor or employee of the contractor is deemed to be the negligence of the contractor. For the purposes of this paragraph, County includes its boards, agencies, agents, officials and employees. [Exhibit A, ¶18.]

85. The Balter 06 Inspection Contract expressly acknowledged the exclusive venue and jurisdiction of the Circuit Court for Montgomery County, Maryland for any lawsuit arising under it and the application of the laws and regulations of Maryland and Montgomery County in any such lawsuit. [Exhibit A, ¶¶3, 8.]

86. On September 24, 2008, the County issued Balter a notice to proceed pursuant to the Balter 06 Inspection Contract “with the construction inspection and materials testing services, including the requirements of the special inspection program” for the SSTC.

G. Balter 10 Inspection Contract

87. On February 25, 2010, the County and Balter entered into another Inspection and Material Testing Services contract, Contract No. 0363200001-AA (“Balter 10 Inspection Contract”). WMATA was a third-party beneficiary with respect to the work done on the SSTC pursuant to the Balter 10 Inspection Contract.

88. The Balter 10 Inspection Contract contained all of the Balter 06 Inspection Contract provisions described above in identical or substantially similar form.

89. On December 29, 2010, the County issued Balter a notice to proceed pursuant to the Balter 10 Inspection Contract “to provide inspection and testing services” at the SSTC.

90. On April 25, 2011, the County issued Balter a notice to proceed pursuant to the Balter 10 Inspection Contract “to provide additional inspection and testing services and continued special inspection services” at the SSTC.

91. On May 9, 2012, the County issued Balter a notice to proceed pursuant to the Balter 10 Inspection Contract “to provide continued inspection and testing services” at the SSTC.

H. Problems in Design and Construction of the SSTC

92. The Project contemplated a three-level structure, known as the 305 (ground level); 330 (first elevated story); and 350 (second elevated story) levels.

93. The 305 (ground) level consists of a concrete slab on grade.

94. The 330 and 350 levels consist of post-tensioned and steel reinforced elevated concrete slabs.

95. Both before and after construction began, WMATA and the County expressed concern to PB about over-restraint in the design of the concrete slabs and questioned whether such a condition would create a problem. Each time either the County or WMATA raised such concerns, PB dismissed them and assured WMATA and the County that its design would create no problem for the construction of the SSTC.

96. FPC began construction of the SSTC in October 2008.

97. During the construction process, defects were discovered in PB's underground design, which brought construction to a halt while PB corrected them. This resulted in the implementation of Change Order #8 to the FPC Construction Contract, under which the County paid FPC \$3,152,858 for a 447 calendar day delay in its work on the Project.

98. Change Order #8 was one of a number of change orders necessitated by errors and/or omissions in PB's design. Each of those change orders created delay in the Project and millions of dollars of additional cost to the County for which the County seeks compensation from PB.

99. Placement of concrete began on the elevated levels of the SSTC in September of 2010. Representatives of the County, WMATA and PB subsequently observed cracks in the concrete at various places throughout the facility inconsistent with conditions typically

associated with new concrete construction. The cracking was so severe that, when it rained, water drained through cracks in the concrete slabs. In addition to cracking, the concrete in the structure experienced chipping and spalling (flaking), and in a number of places, post-tensioning cables and reinforcing steel, which were supposed to be imbedded below the surface of the concrete slab, had become exposed.

100. Upon review of the concrete placed in the elevated slabs, the County discovered that FPC had failed to pour portions of the slabs to the required ten inch thickness.

101. Due to the condition of the Project, including the slab thickness deficiency, the County was not in a position to obtain the requisite Use of Occupancy Permit for the structure.

102. The problems described above, and others, caused the County to undertake a further examination of the structure, during which the County observed further errors and omissions in PB's design of the facility and defects in the work performed by FPC and its subcontractors.

103. The County directed PB and FPC to conduct a review of the structure to determine how best to remedy the defects that had been observed, consistent with PB's and FPC's continuing contractual obligations to remediate work that did not conform to the requirements of their contracts with the County.

104. No credible solution was proposed by PB or FPC.

I. The County Retains KCE to Investigate Problems and Propose Solutions

105. The County retained the services of the engineering firm KCE Structural Engineers, P.C. to review and analyze all aspects of the design and construction of the SSTC and to make recommendations to remediate any defects it found.

106. KCE subsequently issued a report in which it detailed substantial defects in PB's design of the facility and its engineering oversight of the project. KCE also described substantial defects in FPC's construction of the facility, including the work performed by FPC's concrete subcontractor, Facchina Construction Company, Inc. KCE also was critical of Balter's work on the Project.

J. KCE's Findings of Defects in PB's Work on the SSTC

107. KCE found defects in PB's performance on the Project, including, but not limited to, the following:

- a) Failure to design to applicable building codes and standards and in accordance with criteria set forth in the PB Design Contract and related documents, including the required standards of WMATA.
- b) Failure to account for applicable shear and torsion forces on interior beams and girders on the 330 and 350 levels.
- c) Inadequate concrete cover over interior slab members and columns, including failure to account for all applicable construction tolerances relating to dimensions of elevated post-tensioned concrete slabs and to allow for compounding of construction tolerances.
- d) Insufficient use of expansion joints.
- e) Excessive restraint/over-stressing of structure, which caused significant cracking.
- f) Failure to include sufficient shrinkage and temperature reinforcement.
- g) Poorly coordinated design among disciplines.
- h) Absence of post-tensioning in pour strips.
- i) Failure to use load functions and other requirements pursuant to the criteria contained in the American Concrete Institute provision 318-02.
- j) Failure to take into account various Code-required limitations on stress-induced cracking.

K. KCE's Findings of Defects in FPC's Work on the SSTC

108. KCE found defects in FPC's performance on the Project, including, but not limited to, the following:

- a) Thin elevated concrete slabs, which were designed to be ten inches thick but which were no more than 8 inches thick in some places.
- b) Inadequate concrete cover over interior slab members.
- c) Absence of post-tensioning and mild steel in 330-level pour strips.
- d) Insufficient concrete strength below the required 8,000 psi in many locations.

L. Balter Fails to Prevent or Advise the County or WMATA of Construction Deficiencies KCE Identified

109. Balter, whom the County had retained as its watchdog in connection with the Project and paid \$1,124,399.57 for its services, apparently never detected – and certainly never reported to the County – defects for which PB and FPC were responsible as described in KCE's report, including, but not limited to, the following:

- a) The absence of post-tensioning and mild steel in 330-level pour strips;
- b) Insufficient concrete strength (caused by Balter's inadequate capture of concrete cylinders during concrete placement on elevated slabs);
- c) Concrete slabs not built to the required thickness of 10 inches.

110. Balter has admitted that it failed to utilize contract documents in its performance of inspections, as required by Balter's contracts with the County.

M. Remedial Actions Taken in Response to KCE's Report

111. Following its receipt of KCE's report, the County, along with WMATA, PB, and FPC, began meeting on a weekly basis to discuss the defects KCE had identified and how best to remedy them.

112. The County asked PB to design the remediation KCE considered necessary to bring the structure into compliance with applicable building codes and standards, as well as with WMATA's design criteria, so that the SSTC could be substantially completed and turned over to WMATA.

113. PB prepared remedial procedures to correct deficiencies in the pour strips and proposed an LMC (latex-modified concrete) overlay solution to the thin-slab problem.

114. A major defect KCE identified in the design of the SSTC was PB's failure to account for applicable shear and torsion forces on interior beams and girders on the 330 and 350 levels.

115. This problem was the subject of discussions during the weekly meetings described above, at which the County asked PB on more than one occasion to provide its shear and torsion calculations for the subject locations.

116. PB responded repeatedly that it had already provided those calculations, which the County took as an affirmation that PB had actually performed them.

117. Ultimately, PB admitted that it had never performed the shear and torsion calculations the County had requested. PB's prevarication caused significant delay and added costs in implementation of a solution to the defect PB had created.

118. PB refused to participate in devising a solution. Notwithstanding the fact that it had been paid \$9,448,953.23 for design, engineering and construction oversight work on a structure that was not usable in its present condition, PB advised the County that it would not participate in the remediation effort with regard to the shear and torsion defects in the interior beams and girders on the 330 and 350 levels.

119. After PB refused to do the work, the County contracted with KCE to design the necessary remediation with regard to the shear and torsion defects in the interior beams and girders on the 330 and 350 levels and to oversee its completion, at a substantial cost to the County.

120. The County and FPC subsequently entered into Amendment No. 2 to the FPC Construction Contract, under which FPC agreed to perform remediation work prescribed by KCE, including the reinforcement of existing beams and girders as a means of dealing with shear and torsion forces on them, as well as application of an LMC overlay on the upper two levels of the structure and additional crack repair work. In addition to the \$77,574,332.00 it had already been paid, FPC was paid millions of dollars for this remediation work, which would have been unnecessary if the job had been done correctly the first time.

N. Defects in the SSTC are Remedied and the County Transfers the SSTC to WMATA

121. On July 22, 2015, a Use of Occupancy Permit was issued for the SSTC.

122. On August 12, 2015, FPC substantially completed the work it performed pursuant to the FPC Construction Contract.

123. PB, as the County's Architect/Engineer, inspected the work and found nothing that precluded or interfered with the use or operation of any portion of the SSTC for normal transit operations as contemplated by the applicable agreements.

124. On August 13, 2015, PB issued a Certificate of Substantial Completion for the SSTC.

125. The County's transfer of the SSTC to WMATA is imminent.

126. The completed SSTC consists of bus loops with 32 WMATA, Montgomery County Ride-On, and intercity bus bays, a Kiss and Ride area with approximately 22 spaces,

including a taxi queuing area, bicycle and pedestrian connections, enhanced exterior and interior circulation patterns, provisions for installation and operation of an Intelligent Transportation System, provisions for the Metropolitan Branch Trail and the future Bi-County Transitway, as well as Intercity Bus accommodations.

127. WMATA will begin operating the SSTC shortly after transfer. WMATA anticipates that defects in design and construction that were the subject of the remediation described above will necessitate more repair and maintenance during the 50-year life-cycle of the facility than would have been required in the absence of those defects, at a greater cost to WMATA and that the facility will have a shorter life-span resulting in additional financial loss to WMATA.

128. Much of WMATA's anticipated greater cost for repair and maintenance during the life-cycle of the SSTC relates to a long-term protection strategy that will be required in order to enhance the durability of the structure, particularly on the elevated slabs on which excess cracking and other such damage is expected and for which one of WMATA's primary goals will be the prevention of the ingress of water and de-icing salts into the elevated concrete slabs.

COUNT ONE – BREACH OF CONTRACT/THE COUNTY (PB DESIGN CONTRACT)

129. The County restates and re-alleges the allegations of paragraphs 1 through 128.

130. PB agreed that in its work on the Project, it would provide professional engineering design and construction administration services in accordance with the terms of the PB Design Contract and all contracts and other documents incorporated into the PB Design Contract.

131. The PB Design Contract provided that, in performing services on the Project, PB would act in the best interests of the County and in a reasonable manner, and that its work would

be in accordance with accepted professional design practices and meet the requisite standard of care.

132. The PB Design Contract provided that PB would design the Project in accordance with all current laws, rules and regulations applicable to the design and construction of the Project, including requirements of all applicable building codes.

133. The PB Design Contract provided that PB would design the Project in accordance with both the County's requirements and WMATA's requirements.

134. The PB Design Contract provided that PB would make its best professional effort to complete its work consistent with the schedule set by the County, and that time was of the essence.

135. The PB Design Contract provided that PB would oversee the work of the general contractor and its subcontractors on the Project to ensure that such work was done in conformance with the design requirements of the Project and all relevant contracts and related documents, and that PB would inspect the work of the general contractor and its subcontractors.

136. In the performance of its design and construction administration services on the Project, PB did not fulfill its obligations under the PB Design Contract and is in breach of the PB Design Contract.

137. PB's defective design of the SSTC is a breach of the PB Design Contract.

138. PB's failure to ensure that the work of FPC and its subcontractors was done in conformance with the design requirements of the Project and all relevant contracts and related documents and was free of defects is a breach of the PB Design Contract.

139. PB's refusal to design the remediation work recommended by KCE for PB's failure to account for applicable shear and torsion forces on interior beams and girders on the 330 and 350 levels is a breach of the PB Design Contract.

140. PB's breaches of the PB Design Contract proximately caused numerous deficiencies in the design and construction of the SSTC that required extra work and remediation, imposed substantial delay in completion of the SSTC, and damaged the County, in an amount to be proven at trial, but not less than \$50,000,000.00.

COUNT TWO – BREACH OF CONTRACT/THE COUNTY (PB CONSTRUCTION OVERSIGHT CONTRACT)

141. The County restates and re-alleges the allegations of paragraphs 1 through 128.

142. Under the PB Construction Oversight Contract, PB agreed to serve as full-time On-Site Engineer for the Project, to oversee FPC's construction of the SSTC, and, among other things, to identify and resolve project design issues.

143. PB did not fulfill its obligations under the PB Construction Oversight Contract and is in breach of the PB Construction Oversight Contract.

144. PB's breach of the PB Construction Oversight Contract proximately caused numerous deficiencies in the design and construction of the SSTC that required extra work and remediation, imposed a substantial delay in the completion of the SSTC, and damaged the County, in an amount to be proven at trial, but not less than \$50,000,000.00.

COUNT THREE – BREACH OF EXPRESS WARRANTY/THE COUNTY (PB)

145. The County restates and re-alleges the allegations of paragraphs 1 through 128.

146. The PB Design Contract contained an express warranty on the part of PB that it was capable of designing and would design the SSTC free of defects and in conformance with all applicable documents and regulations.

147. The SSTC was not free of design defects or designed in accordance with all applicable codes, documents and regulations, in breach of the express warranty contained in the PB Design Contract.

148. PB's breach of the express warranty contained in the PB Design Contract proximately caused numerous deficiencies in the design and construction of the SSTC that required extra work and remediation, imposed a substantial delay in the completion of the SSTC, and damaged the County, in an amount to be proven at trial, but not less than \$50,000,000.00.

COUNT FOUR – PROFESSIONAL NEGLIGENCE/THE COUNTY (PB DESIGN CONTRACT)

149. The County restates and re-alleges the allegations of paragraphs 1 through 128.

150. As the project designer, PB had a professional duty to ensure that the design of the SSTC was consistent with applicable design standards, including local and national engineering design and construction codes.

151. As the project designer, PB owed the County and WMATA a duty to perform its professional services in accordance with the level of skill, care and knowledge required of a professional designer acting in the same or similar circumstances.

152. Despite PB's duty to exercise the requisite level of skill, care and knowledge, PB breached its duty and failed to meet the standard of skill, care and knowledge required of a professional designer acting in the same or similar circumstances.

153. PB negligently designed portions of the SSTC as set forth in this Complaint.

154. PB's negligence, as set forth above, proximately caused numerous deficiencies in the design and construction of the SSTC that required extra work and remediation, imposed a substantial delay in the completion of the SSTC, and damaged the County, in an amount to be proven at trial, but not less than \$50,000,000.00.

**COUNT FIVE – PROFESSIONAL NEGLIGENCE/THE COUNTY (PB
CONSTRUCTION OVERSIGHT CONTRACT)**

155. The County restates and re-alleges the allegations of paragraphs 1 through 128.

156. As the County's On-Site Construction Project Manager, PB had a professional duty to ensure that the construction of the SSTC was consistent with applicable design and construction standards, including local and national engineering design and construction codes.

157. As the County's On-Site Construction Project Manager, PB owed the County and WMATA a duty to perform its professional services in accordance with the level of skill, care and knowledge required of a professional On-Site Construction Project Manager acting in the same or similar circumstances.

158. Despite PB's duty to exercise the requisite level of skill, care and knowledge, PB breached its duty and failed to meet the standard of skill, care and knowledge required of a professional On-Site Construction Project Manager acting in the same or similar circumstances.

159. PB negligently performed On-Site Construction Project Management of the SSTC as set forth in this Complaint.

160. PB's negligence, as set forth above, proximately caused numerous deficiencies in the design and construction of the SSTC that required extra work and remediation, imposed a substantial delay in the completion of the SSTC, and damaged the County, in an amount to be proven at trial, but not less than \$50,000,000.00.

COUNT SIX – INDEMNIFICATION-HOLD HARMLESS/THE COUNTY (PB)

161. The County restates and re-alleges the allegations of paragraphs 1 through 128.

162. Under both the PB Design Contract and the PB Construction Oversight Contract, PB agreed that it would be responsible for any loss or other damage, including incidental and

consequential damage, attorneys' fees and litigation expenses suffered by reason of its negligence and/or failure to perform its contractual obligations.

163. The County has suffered significant loss and damage as a result of PB's negligence and/or failure to perform its contractual obligations, and demands indemnification and compensation from PB for the same in an amount to be proven at trial.

COUNT SEVEN -- INTENTIONAL MISREPRESENTATION/THE COUNTY (PB)

164. The County restates and re-alleges the allegations of paragraphs 1 through 128.

165. In the performance of its obligations under the PB Design Contract, PB owed the County a duty not to make intentionally false statements.

166. During the course of weekly meetings beginning in 2013 and attended by representatives of PB, FPC, Balter, WMATA and the County, the County asked PB on more than one occasion to provide the subject shear and torsion calculations.

167. In response to such requests, PB stated falsely that it had already provided the subject shear and torsion calculations the County was requesting.

168. PB made such statements either with the knowledge that they were false or with reckless indifference to the fact that they were false.

169. PB made such statements for the purpose of deceiving and defrauding the County, and PB intended and expected the County to believe PB and to conclude that PB had performed the subject shear and torsion calculations.

170. The County reasonably believed and relied upon such statements in concluding that PB had performed the subject shear and torsion calculations and delayed beginning remediation of interior beams and girders on the 330 and 350 levels. The County would not have delayed such remediation if PB had told the truth.

171. The County learned subsequently that PB never performed the subject shear and torsion calculations.

172. PB's intentional misrepresentations delayed the remediation of interior beams and girders on the 330 and 350 levels, causing substantial additional delays and damage to the County in an amount to be proven at trial, but not less than \$20,000,000.00.

173. At the time PB made the intentional misrepresentations to the County described above, PB either knew that its statements were false or made them with such reckless indifference to the truth as to impute knowledge to PB. Those statements were the product of actual malice, in the sense of conscious and deliberate wrongdoing, evil or wrongful motive, intent to injure, ill will and/or fraud, for which the County also seeks punitive damages in the amount of \$60,000,000.00.

COUNT EIGHT -- NEGLIGENT MISREPRESENTATION/THE COUNTY (PB)

174. The County restates and re-alleges the allegations of paragraphs 1 through 128.

175. In the performance of its obligations under the PB Design Contract, PB owed the County a duty not to make incorrect statements that it should have known were incorrect.

176. During the course of weekly meetings beginning in 2013 and attended by representatives of PB, FPC, Balter, WMATA and the County, the County asked PB on more than one occasion to provide the subject shear and torsion calculations.

177. In response to such requests, PB stated falsely that it had already provided the subject shear and torsion calculations the County was requesting.

178. In making such statements, PB intended and expected the County to believe and rely upon them and to conclude that PB had performed the subject shear and torsion calculations.

179. In making such statements, PB knew or should have known that the County likely would rely upon those statements, which would cause loss or injury to the County.

180. The County reasonably relied upon such statements in concluding that PB had performed the subject shear and torsion calculations and justifiably delayed beginning remediation of interior beams and girders on the 330 and 350 levels.

181. The County learned subsequently that PB had never performed the subject shear and torsion calculations.

182. PB's negligent misrepresentations delayed the remediation of interior beams and girders on the 330 and 350 levels, causing substantial additional delays and damage to the County in an amount to be proven at trial, but not less than \$20,000,000.00.

COUNT NINE – GROSS NEGLIGENCE/THE COUNTY (PB)

183. The County restates and re-alleges the allegations of paragraphs 1 through 128.

184. Both before and after work on the Project began, the County and WMATA expressed concern to PB about over-restraint in the design of the concrete slabs and questioned whether or not this would create a problem.

185. On each of the occasions on which the County and WMATA expressed such a concern, PB dismissed the concerns and assured WMATA and the County that its design would create no problem in the construction of the SSTC.

186. PB also failed to account for applicable shear and torsion forces on the interior beams and girders for the elevated concrete slabs.

187. PB had a manifest duty to design the SSTC free of defects in the concrete slabs that would create problems in the construction of the facility.

188. PB's design of the SSTC did in fact create problems in the construction of the facility, including damage resulting from over-restraint and shear and torsion forces in the design of the concrete slabs.

189. PB's dismissal of the County's and WMATA's concerns and PB's failure to account for applicable shear and torsion forces represent an intentional failure to perform its manifest duty to design the SSTC free of defects in the concrete slabs, which was done in reckless, thoughtless disregard of the potential consequences and without any effort to avoid them, and constitutes gross negligence.

190. PB's gross negligence through its intentional failure to perform its manifest duty with regard to the design of the concrete slabs proximately caused numerous deficiencies in the design and construction of the SSTC that required extra work and remediation, imposed a substantial delay in the completion of the SSTC, and damaged the County, in an amount to be proven at trial, but not less than \$50,000,000.00.

COUNT TEN – BREACH OF CONTRACT/THE COUNTY (FPC)

191. The County restates and re-alleges the allegations of paragraphs 1 through 128.

192. Under the FPC Construction Contract, FPC represented and agreed that it was fully qualified to act as the general contractor on the Project, that it had carefully reviewed the FPC Construction Contract and related documents incorporated by reference into the FPC Construction Contract, and that it would perform its work on the Project in strict conformance with the requirements of the FPC Construction Contract and related documents.

193. FPC agreed that all of its work on the Project would comply strictly with the requirements of the FPC Construction Contract, that it would strictly supervise the performance and completion of work on the Project, that it would monitor work as it progressed, that all labor

furnished under the FPC Construction Contract would be competent to perform the tasks undertaken and yield first-class results, that the materials and equipment used on the Project would be of high quality, and that the work would be without defects when completed.

194. The FPC Construction Contract provided that FPC would be strictly liable for all acts and omissions of those engaged in working on the Project on FPC's behalf, including the work of its subcontractors.

195. The FPC Construction Contract recognized the importance of FPC's timely performance of its work on the Project and required that FPC achieve substantial completion of its work (as the FPC Contract defined that term) by November 3, 2011.

196. Under the FPC Construction Contract, FPC agreed that if it failed to achieve substantial completion of its work by November 3, 2011, it must pay the County liquidated damages in the amount of \$8,900.00 a day for each day of unexcused delay beyond November 3, 2011, in addition to any other remedies available to the County under the terms of the FPC Contract and related documents.

197. FPC's obligations under the FPC Construction Contract were continuing in nature and included an obligation to remediate all work on the Project that did not conform to the requirements of the FPC Construction Contract and was rejected by the County.

198. In the performance of its work on the Project and construction of the SSTC, FPC did not fulfill its obligations under the FPC Construction Contract and is in breach of the FPC Construction Contract.

199. FPC is also in breach of the FPC Construction Contract due to the defective work of its concrete subcontractor, Facchina Construction Company, Inc.

200. FPC's breach of the FPC Construction Contract proximately caused numerous deficiencies in the construction of the SSTC that required extra work and remediation, imposed a substantial delay in the completion of the SSTC, and damaged the County, in an amount to be proven at trial, but not less than \$50,000,000.00.

COUNT ELEVEN – BREACH OF EXPRESS WARRANTY/THE COUNTY (FPC)

201. The County restates and re-alleges the allegations of paragraphs 1 through 128.

202. The FPC Construction Contract contained an express warranty on the part of FPC that it and its subcontractors were capable of constructing the SSTC free of defects and in conformance with all applicable codes, documents and regulations.

203. The Project was not free of construction defects, in breach of the express warranty contained in the FPC Construction Contract.

204. FPC agreed that any work not complying strictly with the requirements of the FPC Construction Contract would be a breach of warranty on FPC's part.

205. FPC's breach of the express warranty contained in the FPC Construction Contract proximately caused numerous deficiencies in the construction of the SSTC that required extra work and remediation, imposed a substantial delay in the completion of the SSTC, and damaged the County, in an amount to be proven at trial, but not less than \$50,000,000.00.

COUNT TWELVE – NEGLIGENCE/THE COUNTY (FPC)

206. The County restates the allegations of paragraphs 1 through 128.

207. As the general contractor, FPC had a duty to ensure that construction of the SSTC was consistent with applicable construction standards, including local and national construction codes.

208. As the general contractor, FPC owed the County and WMATA a duty to perform its services in accordance with the level of skill, care and knowledge required of a general contractor acting in the same or similar circumstances.

209. Despite FPC's duty to exercise the requisite level of skill, care and knowledge, FPC breached its duty and failed to meet the standard of skill, care and knowledge required of a general contractor acting in the same or similar circumstances.

210. FPC negligently constructed portions of the SSTC as set forth above.

211. FPC's negligence, as set forth above, proximately caused numerous deficiencies in the construction of the SSTC that required extra work and remediation, imposed a substantial delay in the completion of the SSTC, and damaged the County, in an amount to be proven at trial, but not less than \$50,000,000.00.

COUNT THIRTEEN – INDEMNIFICATION-HOLD HARMLESS/THE COUNTY (FPC)

212. The County restates the allegations of paragraphs 1 through 128.

213. Under the FPC Construction Contract, FPC agreed that it would be responsible for any loss or other damage, including incidental and consequential damage, attorneys' fees, expert witnesses' and consultants' fees suffered by reason of its negligence and/or failure to perform its contractual obligations.

214. The County has suffered significant loss and damage as a result of FPC's negligence and/or failure to perform its contractual obligations, and demands indemnification and compensation from FPC for the same in an amount to be proven at trial.

COUNT FOURTEEN – BREACH OF CONTRACT/THE COUNTY (BALTER 06 AND BALTER 10 INSPECTION CONTRACTS)

215. The County restates the allegations of paragraphs 1 through 128.

216. Under the Balter 06 Inspection Contract and the Balter 10 Inspection Contract, Balter was required to conduct inspections of the construction work being performed on the Project.

217. The Balter 06 Inspection Contract and the Balter 10 Inspection Contract specifically incorporated the requirements of the Montgomery County Special Inspections Program, which included specific testing specifications for all concrete in the Project, including but not limited to concrete slabs, girders, columns and beams.

218. Under the Balter 06 Inspection Contract and the Balter 10 Inspection Contract, Balter was required to take steps to prevent defects in the construction of the SSTC and to advise the County of the nature and specific location of any defects it found.

219. Balter failed to prevent defects in FPC's construction of the SSTC or to advise the County of the defects KCE subsequently found, including the absence of post-tensioning and mild steel in 330-level pour strips, insufficient concrete strength, and the fact that concrete slabs were not poured to the required thickness of 10 inches.

220. Balter's failure to prevent defects in FPC's construction of the SSTC or to advise the County of such defects was a breach of the Balter 06 Inspection Contract and/or Balter 10 Inspection Contract.

221. As a result of Balter's breach of the Balter 06 Inspection Contract and/or the Balter 10 Inspection Contract, defects in the construction of the SSTC that should have been prevented were not prevented, and the County was deprived of the opportunity to remedy such defects at an earlier time, both of which created substantial delay in the completion of the SSTC and substantial damage to the County in an amount to be proven at trial, but not less than \$30,000,000.00.

COUNT FIFTEEN – PROFESSIONAL NEGLIGENCE/THE COUNTY (BALTER)

222. The County restates the allegations of paragraphs 1 through 128.

223. Balter failed to exercise reasonable care in performing its inspection and testing duties regarding the SSTC, as described above.

224. Additionally, as described above, Balter improperly performed inspection and plan review services and materials testing in relation to the construction of the SSTC, in violation of applicable codes, statutes and regulations and the Procedures for Special Instructions governing third-party special inspectors in Maryland. Those violations constitute negligence and negligence per se.

225. In the manner described above, Balter failed to meet the standard of care applicable to a professional charged with the duty of ensuring compliance with applicable laws, codes and/or regulations by, inter alia, failing to ensure that the work was free of defects and in compliance with applicable industry standards and customs, the applicable building codes and contract documents, and by violating Maryland statutes, regulations and procedures governing special inspectors.

226. As a direct and proximate result of Balter's failure to exercise reasonable care and breach of its duty of care in the performance of its work, the County has suffered damages in an amount to be proven at trial, but not less than \$30,000,000.00.

COUNT SIXTEEN – INDEMNIFICATION-HOLD HARMLESS/THE COUNTY (BALTER)

227. The County restates the allegations of paragraphs 1 through 128.

228. Under the Balter 06 Inspection Contract and the Balter 10 Inspection Contract, Balter agreed that it would be responsible for any loss or other damage, including incidental and

consequential damage, suffered by reason of its negligence and/or failure to perform its contractual obligations.

229. The County has suffered significant loss and damage as a result of Balter's negligence and/or failure to perform its contractual obligations, and demands indemnification and compensation from Balter for the same in an amount to be proven at trial.

COUNT SEVENTEEN – BREACH OF CONTRACT/WMATA (PB DESIGN CONTRACT)

230. WMATA restates and re-alleges the allegations of paragraphs 1 through 128.

231. The PB Design Contract designated WMATA as a third-party beneficiary.

232. In the PB Design Contract, PB agreed that in its work on the Project, it would provide professional engineering design and construction administration services in accordance with the terms of the PB Design Contract and all contracts and other documents incorporated by reference into the PB Design Contract.

233. The PB Design Contract provided that in performing services on the Project, PB would act in a reasonable manner and that its work would be in accordance with accepted professional design practices and meet the requisite standard of care.

234. The PB Design Contract provided that PB would design the Project in accordance with all current laws, rules and regulations applicable to the design and construction of the Project, including requirements of all applicable building codes.

235. The PB Design Contract provided that PB would design the Project in accordance with both the County's requirements and WMATA's requirements.

236. The PB Design Contract provided that PB would oversee the work of the general contractor and its subcontractors on the Project to ensure that such work was done in

conformance with the design requirements of the Project and all relevant contracts and related documents, and that PB would inspect the work of the general contractor and its subcontractors.

237. In the performance of its design and construction administration services on the Project, PB did not fulfill its obligations under the PB Design Contract and is in breach of the PB Design Contract.

238. PB's defective design of the SSTC is a breach of the PB Design Contract.

239. PB's failure to ensure that the work of FPC and its subcontractors was done in conformance with the design requirements of the Project and all relevant contracts and related documents and was free of defects is a breach of the PB Design Contract.

240. Under the terms of the 2008 MOU, upon transfer of the SSTC to WMATA, WMATA will be responsible for the operation and maintenance of the SSTC.

241. PB's breaches of the PB Design Contract proximately caused numerous deficiencies in the design and construction of the SSTC that will necessitate more repair and maintenance during the 50-year life-cycle of the facility than would have been required in the absence of those deficiencies.

242. Such additional repair and maintenance includes, but is not limited to, implementation of a long-term protection strategy to enhance the durability of the structure, particularly on the elevated slabs on which excess cracking and other such damage is expected and for which one of WMATA's primary goals will be the prevention of the ingress of water and de-icing salts onto the elevated slabs.

243. The additional cost associated with performing such extra repair and maintenance, as well as any reduction in the useful life of the facility, will damage WMATA in an amount to

be proven at trial, but not less than \$25,000,000.00. In addition, WMATA has incurred a further \$864,521.00 in project costs as a result of Defendant's action.

COUNT EIGHTEEN – BREACH OF EXPRESS WARRANTY/WMATA (PB DESIGN CONTRACT)

244. WMATA restates and re-alleges the allegations of paragraphs 1 through 128.

245. The PB Design Contract contained an express warranty on the part of PB that it was capable of designing and would design the SSTC free of defects and in conformance with all applicable documents and regulations.

246. The PB Design Contract designated WMATA as a third-party beneficiary.

247. The SSTC was not free of design defects or designed in accordance with all applicable documents and regulations, in breach of the express warranty contained in the PB Design Contract.

248. Under the terms of the 2008 MOU, upon transfer of the SSTC, WMATA will be responsible for the operation and maintenance of the SSTC.

249. PB's breach of the express warranty contained in the PB Design Contract proximately caused numerous deficiencies in the design and construction of the SSTC that will necessitate more repair and maintenance during the 50-year life-cycle of the facility than would have been required in the absence of those deficiencies.

250. Such additional repair and maintenance includes, but is not limited to, implementation of a long-term protection strategy to enhance the durability of the structure, particularly on the elevated slabs on which excess cracking and other such damage is expected and for which one of WMATA's primary goals will be the prevention of the ingress of water and de-icing salts onto the elevated slabs.

251. The additional cost associated with performing such extra repair and maintenance, as well as any reduction in the useful life of the facility, will damage WMATA in an amount to be proven at trial, but not less than \$25,000,000.00. In addition, WMATA has incurred a further \$864,521.00 in project costs as a result of Defendant's action.

COUNT NINETEEN – PROFESSIONAL NEGLIGENCE/WMATA (PB)

252. WMATA restates and re-alleges the allegations of paragraphs 1 through 128.

253. As the project designer, PB had a professional duty to ensure that the design of the SSTC was consistent with applicable design standards, including local and national engineering design and construction codes.

254. As the project designer, PB owed the County and WMATA a duty to perform its professional services in accordance with the level of skill, care and knowledge required of a professional designer acting in the same or similar circumstances.

255. Despite PB's duty to exercise the requisite level of skill, care and knowledge, PB breached its duty and failed to meet the standard of skill, care and knowledge required of a professional designer acting in the same or similar circumstances.

256. PB negligently designed portions of the SSTC as set forth above.

257. Under the terms of the 2008 MOU, upon transfer of the SSTC to WMATA, WMATA will be responsible for the operation and maintenance of the SSTC.

258. PB's professional negligence proximately caused numerous deficiencies in the design and construction of the SSTC that will necessitate more repair and maintenance during the 50-year life-cycle of the facility than would have been required in the absence of those deficiencies.

259. Such additional repair and maintenance includes, but is not limited to, implementation of a long-term protection strategy to enhance the durability of the structure, particularly on the elevated slabs on which excess cracking and other such damage is expected and for which one of WMATA's primary goals will be the prevention of the ingress of water and de-icing salts onto the elevated slabs.

260. The additional cost associated with performing such extra repair and maintenance, as well as any reduction in the useful life of the facility, will damage WMATA in an amount to be proven at trial, but not less than \$25,000,000.00. In addition, WMATA has incurred a further \$864,521.00 in project costs as a result of Defendant's action.

COUNT TWENTY – INDEMNIFICATION-HOLD HARMLESS/WMATA (PB DESIGN CONTRACT)

261. WMATA restates and re-alleges the allegations of paragraphs 1 through 128.

262. Under the PB Design Contract, PB agreed that it would be responsible for any loss or other damage, including incidental and consequential damage, suffered by reason of its negligence or failure to perform its contractual obligations.

263. WMATA has suffered substantial loss and damage as a result of PB's negligence and failure to perform its contractual obligations, and demands indemnification from PB for the same in an amount to be proven at trial.

COUNT TWENTY-ONE – BREACH OF CONTRACT/WMATA (FPC)

264. WMATA restates and re-alleges the allegations of paragraphs 1 through 128.

265. Under the FPC Construction Contract, FPC represented and agreed that it was fully qualified to act as the general contractor on the Project, that it had carefully reviewed the FPC Construction Contract and related documents incorporated by reference into the FPC

Construction Contract, and that it would perform its work on the Project in strict conformance with the requirements of the FPC Construction Contract and related documents.

266. The FPC Construction Contract designated WMATA as a third-party beneficiary.

267. FPC agreed that all of its work on the Project would comply strictly with the requirements of the FPC Construction Contract, that it would strictly supervise the performance and completion of work on the Project, that it would monitor work as it progressed, that all labor furnished under the FPC Construction Contract would be competent to perform the tasks undertaken and yield first-class results, that the materials and equipment used on the Project would be of high quality, and that the work would be without defects when completed.

268. The FPC Construction Contract provided that FPC would be strictly liable for all acts and omissions of those engaged in working on the Project on FPC's behalf, including the work of its subcontractors.

269. In the performance of its work on the Project and construction of the SSTC, FPC did not fulfill its obligations under the FPC Construction Contract and is in breach of the FPC Construction Contract.

270. FPC is also in breach of the FPC Construction Contract due to the defective work of its concrete subcontractor, Facchina Construction Company, Inc.

271. Under the terms of the 2008 MOU, now that the County has transferred the SSTC to WMATA, WMATA is responsible for the operation and maintenance of the SSTC.

272. FPC's breaches of the FPC Construction Contract proximately caused numerous deficiencies in the construction of the SSTC that will necessitate more repair and maintenance during the anticipated 50-year life-cycle of the facility than would have been required in the absence of those deficiencies.

273. Such additional repair and maintenance includes, but is not limited to, implementation of a long-term protection strategy to enhance the durability of the structure, particularly on the elevated slabs on which excess cracking and other such damage is expected and for which one of WMATA's primary goals will be the prevention of the ingress of water and de-icing salts onto the elevated slabs.

274. The additional cost associated with performing such extra repair and maintenance, as well as any reduction in the useful life of the facility, will damage WMATA in an amount to be proven at trial, but not less than \$25,000,000.00. In addition, WMATA has incurred a further \$864,521.00 in project costs as a result of Defendant's action.

COUNT TWENTY-TWO – BREACH OF EXPRESS WARRANTY/WMATA (FPC)

275. WMATA restates and re-alleges the allegations of paragraphs 1 through 128.

276. The FPC Construction Contract contained an express warranty on the part of FPC that it and its subcontractors were capable of constructing the SSTC free of defects and in conformance with all applicable documents and regulations.

277. The Project was not free of construction defects, in breach of the express warranty contained in the FPC Construction Contract.

278. FPC agreed that any work not complying strictly with the requirements of the FPC Construction Contract would be a breach of warranty on FPC's part.

279. Under the terms of the 2008 MOU, upon transfer of the SSTC to WMATA, WMATA will be responsible for the operation and maintenance of the SSTC.

280. FPC's breach of the express warranty contained in the FPC Construction Contract proximately caused numerous deficiencies in the construction of the SSTC that will necessitate

more repair and maintenance during the 50-year life-cycle of the facility than would have been required in the absence of those deficiencies.

281. Such additional repair and maintenance includes, but is not limited to, implementation of a long-term protection strategy to enhance the durability of the structure, particularly on the elevated slabs on which excess cracking and other such damage is expected and for which one of WMATA's primary goals will be the prevention of the ingress of water and de-icing salts onto the elevated slabs.

282. The additional cost associated with performing such extra repair and maintenance, as well as any reduction in the useful life of the facility, will damage WMATA in an amount to be proven at trial, but not less than \$25,000,000.00. In addition, WMATA has incurred a further \$864,521.00 in project costs as a result of Defendant's action.

COUNT TWENTY-THREE – NEGLIGENCE/WMATA (FPC)

283. WMATA restates the allegations of paragraphs 1 through 128.

284. As the general contractor, FPC had a duty to ensure that construction of the SSTC was consistent with applicable construction standards, including local and national construction codes.

285. As the general contractor, FPC owed the County and WMATA a duty to perform its services in accordance with the level of skill, care and knowledge required of a general contractor acting in the same or similar circumstances.

286. Despite FPC's duty to exercise the requisite level of skill, care and knowledge, FPC breached its duty and failed to meet the standard of skill, care and knowledge required of a general contractor acting in the same or similar circumstances.

287. FPC negligently constructed portions of the SSTC as set forth above.

288. Under the terms of the 2008 MOU, now that the County has transferred the SSTC to WMATA, WMATA is responsible for the operation and maintenance of the SSTC.

289. FPC's negligence proximately caused numerous deficiencies in the construction of the SSTC that will necessitate more repair and maintenance during the 50-year life-cycle of the facility than would have been required in the absence of those deficiencies.

290. Such additional repair and maintenance includes, but is not limited to, implementation of a long-term protection strategy to enhance the durability of the structure, particularly on the elevated slabs on which excess cracking and other such damage is expected and for which one of WMATA's primary goals will be the prevention of the ingress of water and de-icing salts onto the elevated slab surfaces.

291. The additional cost associated with performing such extra repair and maintenance, as well as any reduction in the useful life of the facility, will damage WMATA in an amount to be proven at trial, but not less than \$25,000,000.00. In addition, WMATA has incurred a further \$864,521.00 in project costs as a result of Defendant's action.

COUNT TWENTY-FOUR – INDEMNIFICATION-HOLD HARMLESS/WMATA (FPC)

292. WMATA restates the allegations of paragraphs 1 through 128.

293. Under the FPC Construction Contract, FPC agreed that it would be responsible for any loss or other damage, including incidental and consequential damage, suffered by reason of its negligence or failure to perform its contractual obligations.

294. WMATA has suffered substantial loss and damage as a result of FPC's negligence and/or failure to perform its contractual obligations, and demands indemnification and compensation from FPC for the same in an amount to be proven at trial.

**COUNT TWENTY-FIVE – BREACH OF CONTRACT/WMATA (BALTER 06 AND
BALTER 10 INSPECTION CONTRACTS)**

295. WMATA restates the allegations of paragraphs 1 through 128.

296. Under the Balter 06 Inspection Contract and the Balter 10 Inspection Contract, Balter was required to conduct inspections of the construction work being performed on the Project.

297. The Balter 06 Inspection Contract and the Balter 10 Inspection Contract specifically incorporated the requirements of the Montgomery County Special Inspections Program, which included specific testing specifications for all concrete in the Project, including but not limited to concrete slabs, girders, columns and beams.

298. WMATA was a third-party beneficiary with respect to the work performed on the SSTC project under the Balter 06 Inspection Contract and the Balter 10 Inspection Contract.

299. Under the Balter 06 Inspection Contract and the Balter 10 Inspection Contract, Balter was required to take steps to prevent defects in the construction of the SSTC and to advise WMATA of the nature and specific location of any defects it found.

300. Balter failed to prevent defects in FPC's construction of the SSTC or to advise WMATA of the defects KCE subsequently found, including the absence of post-tensioning and mild steel in 330-level pour strips, insufficient concrete strength, and the fact that concrete slabs were not poured to the required thickness of 10 inches.

301. Balter's failure to prevent defects in FPC's construction of the SSTC or to advise WMATA of such defects was a breach of the Balter 06 Inspection Contract and/or Balter 10 Inspection Contract, thereby causing damage to WMATA.

302. Under the terms of the 2008 MOU, after the County has transferred the SSTC to WMATA, WMATA will be responsible for the operation and maintenance of the SSTC.

303. Balter's breaches of the Balter 06 Inspection Contract and/or Balter 10 Inspection Contract proximately caused numerous deficiencies in the construction of the SSTC that will necessitate more repair and maintenance during the 50-year life-cycle of the facility than would have been required in the absence of those deficiencies.

304. Such additional repair and maintenance includes, but is not limited to, implementation of a long-term protection strategy to enhance the durability of the structure, particularly on the elevated slabs on which excess cracking and other such damage is expected and for which one of WMATA's primary goals will be the prevention of the ingress of water and de-icing salts onto the elevated slabs.

305. The additional cost associated with performing such extra repair and maintenance, as well as any reduction in the useful life of the facility, will damage WMATA in an amount to be proven at trial, but not less than \$25,000,000.00. In addition, WMATA has incurred a further \$864,521.00 in project costs as a result of Defendant's action.

COUNT TWENTY-SIX – PROFESSIONAL NEGLIGENCE/WMATA (BALTER)

306. WMATA restates the allegations of paragraphs 1 through 128.

307. Balter failed to exercise reasonable care in performing its inspection and testing duties regarding the SSTC, as described above.

308. Additionally, as described above, Balter improperly performed inspection and plan review services and materials testing in relation to the construction of the SSTC, in violation of applicable codes, statutes and regulations and the Procedures for Special Instructions governing third-party special inspectors in Maryland. Those violations constitute negligence and/or negligence per se.

309. In the manner described above, Balter failed to meet the standard of care applicable to a professional charged with the duty of ensuring compliance with applicable laws, codes and/or regulations by, inter alia, failing to ensure that the work was free of defects and in compliance with applicable industry standards and customs, the applicable building codes and contract documents, and by violating Maryland statutes, regulations and procedures governing special inspectors.

310. The additional cost associated with performing such extra repair and maintenance, as well as any reduction in the useful life of the facility, will damage WMATA in an amount to be proven at trial, but not less than \$25,000,000.00. In addition, WMATA has incurred a further \$864,521.00 in project costs as a result of Defendant's action.

RELIEF SOUGHT

WHEREFORE, the County and WMATA respectfully request that the Court enter judgment against PB, FPC and Balter, jointly and severally, for the reasons stated, granting to the County and WMATA the following relief:

(1) Compensatory damages for the County against PB in an amount to be proven at trial but not less than \$50,000,000.00.

(2) Punitive damages for the County against PB for intentional misrepresentation as alleged in Count Seven in the amount of \$60,000,000.00.

(3) Compensatory damages for the County against FPC in an amount to be proven at trial but not less than \$50,000,000.00.

(4) Compensatory damages for the County against Balter in an amount to be proven at trial but not less than \$30,000,000.00.

(5) Compensatory damages for WMATA against PB in an amount to be proven at trial but not less than \$25,864,521.00.

(6) Compensatory damages for WMATA against FPC in an amount to be proven at trial but not less than \$25,864,521.00.

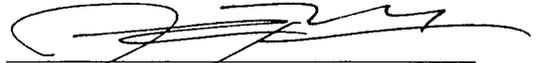
(7) Compensatory damages for WMATA against Balter in an amount to be proven at trial but not less than \$25,864,521.00.

(8) Attorneys' fees, experts' fees, consultants' fees and litigation costs and expenses as allowed by law and/or contract, interest and such other and further relief as the Court deems just and proper.

Respectfully submitted,

MONTGOMERY COUNTY,
MARYLAND

MARC P. HANSEN
COUNTY ATTORNEY



John P. Markovs
~~Deputy County Attorney~~



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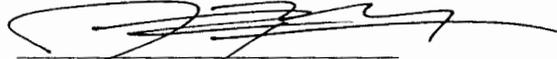
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JURY DEMAND

The County and WMATA demand a trial by jury on all triable issues on all claims which a jury may consider.



John P. Markovs



Gerard J. Stief

RULE 1-313 CERTIFICATE

Pursuant to Rule 1-313 of the Maryland Rules, I hereby certify that I am duly admitted to practice law in the courts of the State of Maryland.


William D. Nussbaum


Gerard J. Stief