ORIGINAL

IN THE SUPREME COURT OF OHIO

AMERICAN MUNICIPAL POWER, INC.,	:	**CASE No. 2014-1847**
	:	
Petitioner,	:	On a Certified Question of State Law from the U.S. District Court, Southern District of Ohio, Eastern Division
v.	:	
	:	
BECHTEL POWER CORPORATION,	:	Case No. 2:11-cv-131
	:	
Respondent.	:	

MERIT BRIEF OF PETITIONER AMERICAN MUNICIPAL POWER, INC.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

I. STATEMENT OF FACTS 2

II. ARGUMENT 6

PROPOSITION OF LAW 6

Reckless conduct by the breaching party, as defined in *Anderson v. Massillon*, 134 Ohio St.3d 380, 2012-Ohio-5711, 983 N.E.2d 266, renders a contractual limitation of liability clause unenforceable.

A. The Common Law Of Contracts And Public Policy 6

B. The Ohio Legislature Has Recognized That Reckless Conduct Violates Public Policy Resulting In The Loss Of A Limitation Of Liability 7

C. A Reckless Conduct Standard Is Consistent With This Court's Opinion In *Berjian* 10

D. The Reckless Standard Set Forth In The Restatement Of The Law 2d, Contracts, Section 195(1) (1981) And Adopted By Other States Should Be Adopted By This Court 12

E. A Reckless Standard Is Also Supported By The Duty Of Good Faith And Fair Dealing In The Restatement Of The Law 2d, Contracts, Section 205 (1981) 15

F. Reckless Conduct As Defined By This Court In *Anderson* Is A High Standard 16

III. CONCLUSION 17

CERTIFICATE OF SERVICE 18

APPENDIX

U.S. District Court Certification Order A-1

U.S. District Court Opinion and Order on Summary Judgment A-17

TABLE OF AUTHORITIES

Cases

Anderson v. Massillon, 134 Ohio St.3d 380, 2012-Ohio-5711, 983 N.E.2d 266 ..... passim

Arbino v. Johnson & Johnson, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420 6

Bolling v. Clevepak Corp., 20 Ohio App.3d 113, 484 N.E.2d 1367 (6th Dist. 1984) 15

Cincinnati City School Dist. Bd. of Edn. v. Conners, 132 Ohio St.3d 468, 2012-Ohio-2447, 974 N.E.2d 78 ..... 6, 7

Eagle v. Fred Martin Motor Co., 157 Ohio App.3d 150, 2004-Ohio-829, 809 N.E.2d 1161 (9th Dist.) 6

Feore v. Trammel, 102 So. 529 (Ala. 1924) 11

Finch v. Southside Lincoln-Mercury, Inc., 274 Wis.2d 719, 2004 WI App. 110, 685 N.W.2d 154 14

J.F. v. D.B, 116 Ohio St.3d 363, 2007-Ohio-6750, 879 N.E.2d 740 7

Kirkwood v. FSD Dev. Corp., 8th Dist. Cuyahoga No. 95280, 2011-Ohio-1098 16

Laeroc Waikiki Parkside, LLC v. K.S.K (Oahu) Ltd. Partnership, 115 Hawai'i 201, 166 P.3d 961 (2007) 13, 14

Littlejohn v. Parrish, 163 Ohio App.3d 456, 2005-Ohio-4850, 839 N.E.2d 49 (1st Dist.) 15

PHH Mtge. Corp. v. Ramsey, 2014-Ohio-3519, 17 N.E.3d 629 (10th Dist.) 15

Rhino Fund, LLLP v. Hutchins, 215 P.3d 1186 (Colo.App. 2008) 14

Richard A. Berjian, D.O., Inc. v. Ohio Bell Tel. Co., 54 Ohio St.2d 147, 375 N.E.2d 410 (1978) ..... passim

Sharon v. City of Newton, 437 Mass. 99, 769 N.E.2d 738 (2002) 14

Sommer v. Federal Signal Corp., 79 N.Y.2d 540, 593 N.E.2d 1365 (1992) 13, 14

State ex rel. Cincinnati Enquirer, Div. of Gannett Satellite Information Network v. Dupuis, 98 Ohio St.3d 126, 2002-Ohio-7041, 781 N.E.2d 163 6

Thomas v. Atlantic C.L.R. Co., 223 F.2d 1 (5th Cir. 1955) 11

Thomas v. Atlantic Coast Line R. Co., 201 F.2d 167 (5th Cir. 1953) 11

Wolf v. Ford, 335 Md. 525, 644 A.2d 522 (1994) 13, 14

Statutes

R.C. 9.86 7

R.C. 109.361 7

R.C. 109.362 7

R.C. 2743.02 8

R.C. 2744.03 7

R.C. 2744.03(A)(6) 7

R.C. 3345.122 8

R.C. 3797.12 8

R.C. 5923.37 8

Other Authorities

17 Ohio Jurisprudence 3d, Contracts, Section 94, at 528 (1980) 6

Am. S.B. No. 361 9

Prosser, *Law of Torts*, Section 68, 444 (4th Ed. 1978) 11, 12

Restatement of the Law 2d, Contracts, Section 195(1) (1981) 12, 13, 14, 15

Restatement Of The Law 2d, Contracts, Section 205 (1981) 15, 16

Restatement of the Law 2d, Torts, Section 500 (1965) 14, 16

INTRODUCTION

Petitioner American Municipal Power, Inc. ("AMP"), on behalf of 69 participating member municipalities in Ohio and 12 member municipalities in other states, contracted with Respondent Bechtel Power Corporation ("Bechtel") in 2009 to construct a coal-fired power plant in Meigs County, Ohio (the "Project"). Bechtel failed to perform critical contractual obligations leading to a surprise $1 Billion increase in the estimated cost of the Project. The dramatic increase and resultant termination of the Project caused nearly $100 million in damage to AMP and its member municipalities that participated in the Project.

In the underlying federal court litigation, the U.S. District Court for the Southern District of Ohio held on summary judgment that under Ohio law only willful or wanton conduct by the breaching party would render a contractual limitation of liability clause unenforceable. Although finding that Bechtel failed to perform critical obligations under the contract, the Court applied a wanton, or "no care whatsoever," standard and concluded that the limitation of liability clause in the AMP-Bechtel contract was enforceable, thus limiting AMP's damages under that clause to $500,000.

Recognizing that the issue of enforcement of a limitation of liability clause was controlled by Ohio law and that there was no controlling Ohio Supreme Court precedent on whether reckless conduct renders a limitation of liability clause unenforceable, the District Court certified the question of state law to this Court. On December 24, 2014 this Court entered an order agreeing to answer the following question:

> Does reckless conduct by the breaching party, as defined in *Anderson v. Massillon*, 134 Ohio St.3d 380, 2012-Ohio-5711, 983 N.E.2d 266, render a contractual limitation of liability clause unenforceable?

In *Anderson*, this Court defined reckless conduct as being characterized by "the conscious disregard of or indifference to a known or obvious risk of harm to another that is

unreasonable under the circumstances and is substantially greater than negligent conduct." Thus, the issue for this Court is whether a party to a contract can consciously disregard a contractual obligation, knowing that in doing so it creates an unreasonable risk of harm to the other party, and yet still claim the protection of a limitation of liability clause.

Consistent with the public policy of Ohio as expressed by its General Assembly, AMP respectfully submits that the answer to that question is no and that, accordingly, the Court should answer the certified question in the affirmative.

I. STATEMENT OF FACTS.

AMP, formerly known as American Municipal Power-Ohio, Inc. or AMP-Ohio, is a nonprofit corporation organized under the laws of and with its principal place of business in Columbus, Ohio.[1] (D.Ct. Opinion at 1; Appx. at A-17) AMP is a wholesale supplier for municipal power systems that purchases, generates, and distributes power for 128 publicly owned member utilities in nine states. (Id.)[2] Following years of feasibility studies, AMP, on behalf of its member communities who elected to participate (the "Participants"), undertook to develop and construct a coal-fired power plant along the Ohio River known as the American Municipal Power Generating Station ("AMPGS") in Meigs County. (Id. at 2; Appx. at A-18) After receiving multiple responses to a request for proposals for an engineering, procurement and construction (EPC) contractor, Bechtel was selected by AMP and the Participants. (Id.)

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[1] The District Court's Certification Order incorporated the facts set forth in its Summary Judgment Order which appears at p. A-17 of the Appendix to this brief. AMP's statement of facts is taken from that Order.

[2] AMP now has 83 Ohio members and 48 non-Ohio members for a total of 131.

During the negotiations leading up to the execution of the EPC contract, Bechtel provided AMP with an "indicative price estimate."[3] (Id.) The EPC contract was signed as of January 1, 2009. (Id. at 3; Appx. at A-19) The EPC contract required Bechtel to begin implementation of a formal "trend" program during the early stages of the preliminary phase of the project which began January 1, 2009. (Id. at 13-14; Appx. at A-29-30) The contract's trend provision (Appendix V to the EPC contract) required Bechtel to timely identify cost and schedule impacts that might impact Bechtel's "current estimate basis." (Id. at 14; Appx. at A-30) The District Court found that the current estimate basis was the indicative price provided to AMP in August 2008, as updated throughout the preliminary phase. (Id. at 2, 14; Appx. at A-18, A-30)

Appendix V required Bechtel to document trends as they are identified and review them with AMP not less frequently than monthly. (Id. at 12; Appx. at A-28) The purpose, as stated in Appendix V, was to allow AMP "to fully evaluate and consider these developments before incorporating them into the project scope and/or execution plan." (Id.)

In the normal and daily course of its business, Bechtel compiles cost and productivity information from its similar power projects and generates detailed reports on a periodic basis. (Id. at 3; Appx. at A-19) Bechtel uses this "similar project information" when estimating the costs of future and ongoing power projects such as AMPGS. (Id.) In its summary judgment order, the District Court rejected Bechtel's argument that it was not required to utilize similar project information in trending cost and schedule impacts to the AMPGS indicative estimate. (Id. at 17; Appx. at A-33) The Court found that the contract was not ambiguous and plainly required Bechtel "to trend similar project information that may introduce cost impacts to the project's cost estimate." (Id.)

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[3] The District Court specifically referenced Bechtel's August 2008 indicative price estimate. That estimate was approximately $2.3 Billion.

In May 2009, AMP and the Participants were reevaluating whether to build the power plant and, as part of that process, AMP requested that Bechtel update its indicative price estimate. (Id. at 4; Appx. at A-20) In response, Bechtel advised AMP that the estimated cost had declined by $157 million. (Id.) On May 28, 2009, AMP's Participants met and voted to direct AMP to move forward with the Project. (Id.)[4] As so directed, AMP proceeded to enter into contracts on behalf of the Participants totaling over $400 million for the design and fabrication of the power plant's boilers and generators. (Id.) AMP also exercised options to purchase the land on which the plant was to be built, paid millions of dollars to Bechtel and other consultants and contractors and, through Bechtel, started construction of the plant. (Id.)

Five months later, on October 30, 2009, Bechtel advised AMP for the first time that the cost of the Project would be over $1 Billion more than Bechtel's August 2008 and May 2009 estimates. (Id.) Based on this dramatic surprise increase in Bechtel's estimated price, AMP's Participants voted to cancel the Project. (Id. at 5 and 38-40; Appx. at A-21 and A-54-56) AMP terminated Bechtel's contract for default and also terminated, at a substantial penalty, the $400 million contracts for the boilers and generators, and also terminated the other contractors and vendors for the AMPGS project. (Id. at 4-5; Appx. at A-20-21)

In February 2011, AMP filed suit against Bechtel in the U.S. District Court for the Southern District of Ohio. Among its claims, AMP alleged that Bechtel materially breached the EPC contract by failing to fulfill its critical obligations under the contract's trend provision. (Id. at 5; Appx. at A-21) Specifically, AMP alleged that Bechtel was obligated, but utterly failed, to trend cost information from its other, similar projects. (Id.) AMP alleged that Bechtel's breach

[4] The District Court's Order recites that "AMP's members met and decided to move forward with building the AMP Generating Station." It was actually only the 81 member-Participants in the Project.

had caused damages to AMP and its Participants in excess of $97 million including $16.5 million in payments made to Bechtel, $56 million in payments to the boiler and generator contractor (Hitachi) as well as payments to other contractors and vendors. (Id. at 28; Appx. at A-44)

In its summary judgment order, the District Court found:

1. *The trend provision in the EPC contract required Bechtel to trend cost and schedule impacts against the indicative target price. (Id. at 15; Appx. at A-3)*

2. *The trend provision in the EPC contract required Bechtel to trend similar project information that may introduce costs impacts to the project's cost estimate. (Id. at 17; Appx. at A-33)*

3. *Bechtel does not dispute and thus no issue of fact exists as to whether Bechtel knew of the risks associated with failing to disclose potential cost impacts. (Id. at 20; Appx. at A-36)*

4. *Bechtel concedes that it did not trend similar project information. (Id. at 21; Appx. at A-37)*

In spite of these findings, the District Court held that the limitation of liability clause in the EPC contract was enforceable and that, as a result, AMP's damages were limited to $500,000. (Id. at 27; Appx. at A-43) In reaching this conclusion, the District Court interpreted Ohio law as requiring enforcement of limitation of liability clauses unless the breaching party's conduct was "willful" or "wanton," citing *Richard A. Berjian, D.O., Inc. v. Ohio Bell Tel. Co.*, 54 Ohio St.2d 147, 157-58, 375 N.E.2d 410 (1978). (Id. at 10; Appx. at A-26) The court defined "wanton" as exercising "no care whatsoever" and found that Bechtel had exercised "some care," thereby entitling Bechtel to summary judgment on the enforcement of the limitation of liability clause.[5] (Id. at 25-26; Appx. at A-41-42) In doing so, the court rejected AMP's argument that "reckless conduct" as defined in *Anderson,* 134 Ohio St.3d 380, 2012-Ohio-5711,

[5] While not an issue before this Court, AMP presented voluminous evidence, including expert testimony, that Bechtel's conduct was wanton as defined in *Anderson* and does not concede that the District Court's ruling was correct.

983 N.E.2d 266, at ¶ 34, also renders a limitation of liability clause unenforceable. (Id. at 9-11; Appx. at A-25-27)

II. ARGUMENT.

PROPOSITION OF LAW

Reckless conduct by the breaching party, as defined in *Anderson v. Massillon*, 134 Ohio St.3d 380, 2012-Ohio-5711, 983 N.E.2d 266, renders a contractual limitation of liability clause unenforceable.

A. The Common Law Of Contracts And Public Policy.

In *Cincinnati City School Dist. Bd. of Edn. v. Conners*, 132 Ohio St.3d 468, 2012-Ohio-2447, 974 N.E.2d 78, this Court discussed at length the interplay between the common law of contracts and public policy exceptions to that common law as determined by this Court. The Court began its analysis by noting that "[t]he freedom to contract is a deep-seated right that is given deference by the courts." *Id.* at ¶ 15. AMP does not dispute that proposition. The Court then went on to note:

> This deference, however, is not absolute. * * * The question becomes, when is it appropriate to apply the principle of the public-policy exception so as not to infringe on the parties' rights to make contracts?
>
> * * *
>
> "Accordingly, contracts which bring about results which the law seeks to prevent are unenforceable as against public policy." *Eagle v. Fred Martin Motor Co.,* 157 Ohio App.3d 150, 2004-Ohio-829, 809 N.E.2d 1161, ¶ 64 (9th Dist.), quoting 17 Ohio Jurisprudence 3d, Contracts, Section 94, at 528 (1980).
>
> * * *
>
> Our duty is to determine when the public-policy exception must be recognized, but it is the "legislative branch [that] is 'the ultimate arbiter of public policy." *Arbino v. Johnson & Johnson,* 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, ¶ 21, quoting *State ex rel. Cincinnati Enquirer, Div. of Gannett Satellite Information Network v. Dupuis,* 98 Ohio St.3d 126, 2002-Ohio-7041, 781 N.E.2d 163, ¶ 21.

Id. at ¶¶ 16-17; *see also J.F. v. D.B*, 116 Ohio St.3d 363, 2007-Ohio-6750, 879 N.E.2d 740, ¶ 11 (Cupp, J., dissenting) ("It has long been an established principle of law that the freedom of contract is not unlimited and that parties may not enter into a contract that is in violation of established law or public policy.") (citation omitted).

The Court in *Conners* went on to hold that, given the legislature's evident intent to make classroom space available to community schools as expressed through its statutes, "inclusion of a deed restriction preventing the use of property for school purposes in the contract for sale of an unused school building is unenforceable as against public policy." *Conners* at ¶ 24. While *Conners* is distinguishable from this case in several respects, the principle that the Court should look to legislative acts for guidance in determining public policy exceptions to the common law of contracts is beyond dispute.

B. The Ohio Legislature Has Recognized That Reckless Conduct Violates Public Policy Resulting In The Loss Of A Limitation Of Liability.

The Ohio legislature has expressly adopted a wanton or reckless standard throughout the Ohio Revised Code in defining conduct sufficiently culpable to warrant the loss of statutory benefits or protections that would otherwise limit liability. For example, R.C. 2744.03, dealing with immunity for political subdivisions and their employees, provides that, in addition to other specified immunities, an employee is immune from liability unless the employee's acts or omissions "were with malicious purpose, in bad faith, or in a wanton or reckless manner." R.C. 2744.03(A)(6). On the state level, R.C. 9.86 provides that no officer or employee of the state shall be liable in a civil action "unless the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner." A sampling of the numerous other statutes where the legislature has adopted a reckless standard includes: R.C. 109.362 (Prior to the attorney general defending a state officer under R.C. 109.361, the attorney general must make a

determination that the officer or employee was not "acting manifestly outside of his employment * * * or in a wanton or reckless manner * * *."); R.C. 2743.02 (The state waives immunity from liability unless the court of claims determines that the officer or employee acted in a wanton or reckless manner.); R.C. 3345.122 (Members of board of trustees of an institution of higher education are not liable in damages in a civil action unless the trustee acted in a wanton or reckless manner.); R.C. 3797.12 (Certain persons are immune from civil liability in connection with child abuse registration unless they acted in wanton or reckless manner.); R.C. 5923.37 (A member of the organized militia on active duty is not liable for an act performed within his military duties unless the conduct was wanton or reckless.).[6]

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[6] In numerous other statutes, the Ohio legislature has similarly adopted the "reckless" standard. Among them are the following: R.C. 1125.33, R.C. 1165.33, R.C. 1157.33 (superintendent of financial institution, receiver, conservator and other related parties will not be liable for any action or failure to act "unless it involved an act or omission undertaken * * * with reckless disregard for the best interests" of any bank, savings banks, or savings and loan associations, their shareholders, depositors, creditors, or the public); R.C. 120.06 (state public defender may utilize private legal counsel to represent the Ohio public defender commission, state public defender and related parties in malpractice or other civil action if defendant "did not act manifestly outside the scope of defendant's employment * * * with malicious purpose, in bad faith, or in a wanton or reckless manner"); R.C. 1513.372 (no immunity for eligible landowner or nonprofit organization for injury or damage suffered in connection with reclamation project if the party's acts or omissions are "reckless or constitute gross negligence or willful or wanton misconduct"); R.C. 1515.081 (state may only indemnify and hold harmless a supervisor or other officer, employee or agent of soil and water conservation in tort action if, at the time of the act or omission, that person "was not acting manifestly outside the scope of his employment * * * or acting with malicious purpose, in bad faith, or in a wanton or reckless manner"); R.C. 1561.261 (employee of division of mineral resources management who performs rescue work at underground coal mine is not liable in any civil action for damage or injury caused in the performance of rescue work "unless the employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner"); R.C. 1701.59 (corporate directors shall be liable in damages for an action he takes or fails to take "only if the action or failure to act involved an act or omission * * * undertaken with reckless disregard for the best interests of the corporation"); R.C. 2108.33 (bureau of motor vehicles and related parties are not liable in civil action or subject to criminal prosecution for acting, or attempting to act, or failing to act, in accordance with organ donor registry responsibilities unless it was "committed or omitted with malicious purpose, in bad faith, or in a wanton or reckless manner"); R.C. 2923.129 (entity or instructor who provides competency certification for concealed handgun licenses is immune from civil liability resulting

In the above statutes, the General Assembly has limited the liability of the subjects of the statute but has recognized an exception to that limitation where the beneficiary of the limitation acts in a wanton or reckless manner. In doing so, the legislative branch has expressed the public policy underlying those statutes that recognizes that reckless conduct is sufficient to lose limitations of liability that would otherwise apply.

Further evidence of the legislature's consistent adoption of a reckless standard comes from the recently completed 130th General Assembly. In December, 2014, the 130th General Assembly enacted Am. S.B. No. 361. That legislation provides, *inter alia*, that when a statute creates a criminal offense but does not specify the intent required for culpability, "the element of the offense is established only if a person acts recklessly." The act also defines reckless as acting with heedless indifference to the consequences and with a disregard for a substantial and unjustifiable risk.

This Court previously recognized a public policy exception for willful or wanton conduct in contractual limitation of liability cases in *Berjian,* 54 Ohio St.2d at 157-58, 375 N.E.2d 410. As the District Court noted in its certification order, however, "there appears to be no controlling Ohio Supreme Court precedent on whether Ohio law recognizes recklessness as a standard of

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from death, injury or loss to a person injured by a licensee, if he "did not issue the competency certificate with malicious purpose, in bad faith, or in a wanton or reckless manner"); R.C. 351.05 (no director, officer or employee of convention facilities authority shall be liable for damage or injury caused in the performance of his duties, "unless his actions were manifestly outside the scope of his employment * * * "or unless he acted with malicious purpose, in bad faith, or in a wanton or reckless manner"); R.C. 1335.11 (principal who fails to comply with contractual or statutory provision concerning timely payment of sales commissions to sales representative upon contract termination is liable for exemplary damages if failure to comply "constituted willful, wanton or reckless misconduct or bad faith").

conduct that would bar enforcement of a contractual limitation of liability.[7] (D.Ct. Cert. Order at 12; Appx. at A-12)

Throughout the Ohio Revised Code, reckless conduct, along with wanton conduct, has been adopted by the General Assembly as the standard for denying the protection of limitations of liability. The legislature's pervasive use of a reckless standard evidences a clear expression that such conduct contradicts public policy in Ohio. Adoption by this Court of a reckless standard in contractual limitation of liability cases is consistent with, and in furtherance of, that policy.

C. A Reckless Conduct Standard Is Consistent With This Court's Opinion In *Berjian.*

In *Berjian,* this Court held that an exculpatory clause in a telephone company contract for advertising was not void as against public policy and held that: "[a]bsent any wilful or wanton misconduct, a telephone company may by contract limit its liability to the cost of the services provided where it negligently fails to place a customer's order for advertising in the classified section of its directory." *Berjian*, 54 Ohio St.2d at syllabus, 375 N.E.2d 410. In recognizing a public policy exception for willful or wanton conduct, the Court cited to no prior Ohio Supreme

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[7] The District Court further noted, however, that "[d]espite the lack of Ohio law on the issue, five district courts have indicated that reckless conduct renders a limitation of liability clause unenforceable. *See Nahra v. Honeywell, Inc.*, 892 F. Supp. 962, 970 (N.D. Ohio 1995) (citing *Berjian* for the proposition that a limitation of liability clauses will be upheld absent a willful or reckless breach); *Solid Gold Jewelers v. ADT Sec. Sys., Inc.*, 600 F. Supp. 2d 956, 959 n.2 (N.D. Ohio 2007) (citing *Nahra* for the proposition that limitations on liability are upheld absent a willful or reckless breach); *Superior Integrated Solutions, Inc. v. Reynolds and Reynolds Co.*, No. 3:09-cv-314, 2009 WL 4135711, at *3 (S.D. Ohio Nov. 23, 2009) (citing *Solid Gold* and stating that a reckless breach is considered willful misconduct that would invalidate a limitation of liability clause); *Transcon. Ins. Co. v. Simplexgrinnell LP*, No. 3:05CV7012, 2006 WL 2035571, at *5 (N.D. Ohio July 18, 2006) (citing *Nahra* for the proposition that limitation of liability clauses will be upheld absent a willful or reckless breach); *Purizer Corp. v. Battelle Mem'l. Inst.*, No. 01 C 6360, 2002 WL 22014, at *5 (N.D. Ill. Jan. 7, 2002) (same)." (D.Ct. Cert. Order at 10; Appx. at A-10)

Court or other Ohio decisions. Rather, the Court in *Berjian* cited to two authorities: *Thomas v. Atlantic Coast Line R. Co.*, 201 F.2d 167 (5th Cir. 1953) ("Thomas I") and Prosser, *Law of Torts*, Section 68, 444 (4th Ed. 1978). *Berjian* at 158.

In *Thomas I*, the Fifth Circuit held that a provision in a lease excluding a railroad company from liability for damages to the property resulting from the company's negligence was valid. The Court went on to hold, however, that the complaint in the case was susceptible to the construction that the company was guilty of willful or wanton negligence and that: "[f]or if it could be said that the lease agreement did propose to exempt the railroad from liability for the consequences of a willful breach of duty it would, to that extent be illegal." *Id.* at 170. As a result, the court remanded the case for a trial. *Id.*

After a trial resulting in a directed verdict for the defendant, the case returned to the Fifth Circuit in *Thomas v. Atlantic C.L.R. Co.*, 223 F.2d 1 (5th Cir. 1955) ("Thomas II"). In *Thomas II*, the Fifth Circuit cited to Alabama case law on what constitutes wanton conduct and concluded its analysis with the following holding in *Feore v. Trammel*, 102 So. 529 (Ala. 1924):

> It follows from the decisions that * * * to constitute wantonness, that the party charged, or his servant acting for him in the premises, was conscious of the conduct which caused the injury, and conscious, from his knowledge of the existing conditions, that injury would likely or probably result from his conduct or omission to act, and with reckless indifference to consequences he consciously and intentionally did the wrongful act or omitted to do or discharge some known duty in the premises which produced the injurious result declared for in the complaint.

(Citations omitted). *Id.* at 533. The definition of wanton utilized in *Thomas II* is substantially the same as the definition of reckless adopted by this Court in *Anderson*.

This Court's reliance on Prosser, *Law of Torts*, Section 68, 444 (4th Ed. 1978) in *Berjian* is similarly significant. The section in Prosser's *Law of Torts* cited by this Court, Section 68, deals with assumption of risk and includes a discussion of express agreements relieving one

party from liability for the consequences of his or her conduct. The specific page reference cited by the Court provides:

> In general, and on the basis either of common experience as to what is intended, or of public policy to discourage aggravated wrongs, such agreements are not construed to cover the more extreme forms of negligence which are described as wilful, wanton, *reckless* or gross, or to any conduct which constitutes an intentional tort.

(Emphasis added.) Prosser, *Law of Torts*, Section 68, 444 (4th Ed. 1978).

By examining the authorities cited by this Court in *Berjian*, it becomes clear that the Court did not embrace the public policy exception it recognized for willful and wanton conduct to the exclusion of other forms of extreme negligence. Indeed, the *Berjian* court, while specifically noting that willful and wanton conduct were exceptions, stated that a party "may by contract limit its liability" where it acts "negligently." *Berjian* does not specifically address reckless conduct although, as referenced above, an analysis of *Berjian's* underpinnings shows that the inclusion of reckless as an exception along with willful and wanton is entirely consistent with this Court's opinion in that case. Reckless conduct, which this Court has now defined in *Anderson* as requiring a "conscious disregard" and conduct "substantially greater than negligent conduct," is conduct of the same class as willful or wanton conduct and, accordingly, should be recognized as a public policy exception to enforcement of a limitation of liability clause.

D. The Reckless Standard Set Forth In The Restatement Of The Law 2d, Contracts, Section 195(1) (1981) And Adopted By Other States Should Be Adopted By This Court.

The Restatement of the Law 2d, Contracts, Section 195(1) (1981) provides:

> A term exempting a party from tort liability for harm caused intentionally or recklessly is unenforceable on grounds of public policy.

Section 195(1) refers to tort liability but, as is evidenced by the opinions below, highest courts of other states have applied it regularly to cases involving contractual limitation of liability clauses.

In *Sommer v. Federal Signal Corp.*, 79 N.Y.2d 540, 593 N.E.2d 1365 (1992), New York's highest court was faced with a nearly identical issue as is presented by the certified question here. An alarm company contract contained clauses both exonerating the company from liability and limiting the amount of damages that could be recovered against it. The Court held that such clauses could not insulate a party from damages caused by "gross negligence" and held: "Whatever may be the case in other contexts, public policy precludes enforcement of contract clauses exonerating a party from its reckless indifference to the rights of others, whether or not termed 'gross negligence.'" *Id.* at 554, fn. 3. In support of its conclusion, the court noted that the New York legislature had expressly adopted a reckless indifference standard in the context of joint tortfeasor liability. *Id.* at 541. The court also cited to the Restatement of the Law 2d, Contracts, Section 195(1) (1981) for the proposition that "intentional or reckless conduct vitiates contractual term limiting liability." *Id.* at 554.

In *Wolf v. Ford*, 335 Md. 525, 531, 644 A.2d 522 (1994), Maryland's highest court was faced with the issue of enforcement of a clause in an agreement between an investor and a securities firm which excluded the firm from liability for its own negligence. While dicta, the Maryland court noted that there are circumstances where the public interest will not permit an exculpatory clause in a contract, such as "a party will not be permitted to excuse its liability for intentional harms or for the more extreme forms of negligence, i.e., reckless, wanton or gross." *Id.* As authority, the court cited, *inter alia*, the Restatement of the Law 2d, Contracts, Section 195(1) (1981).

The Supreme Court of Hawaii, in *Laeroc Waikiki Parkside, LLC v. K.S.K (Oahu) Ltd. Partnership*, 115 Hawai'i 201, 166 P.3d 961 (2007), addressed the issue of whether a

nonrecourse provision in a contract was enforceable. After reviewing prior decisions from Hawaii as well as other courts and authorities, the court held:

> * * * we hold that a nonrecourse provision that explicitly protects a party from tort liability would be permissible as long as the agreement was not unconscionable and it was knowingly and willingly made, and, *adopting the majority view of the states*, such a provision is valid to the extent it does not waive liability in situations of intentional or reckless conduct.

(Emphasis added.) *Id.* at 224. Like the Maryland Court of Appeals in *Wolf* and the New York Court of Appeals in *Sommer*, the Hawaii Supreme Court cited many authorities including the Restatement of the Law 2d, Contracts, Section 195(1) (1981).

Other appellate courts have also relied upon the Restatement of the Law 2d, Contracts, Section 195(1) (1981). *See Rhino Fund, LLLP v. Hutchins*, 215 P.3d 1186, 1191 (Colo.App. 2008) ("Most courts will not enforce exculpatory and limiting provisions if they are unconscionable, if they result from unreasonable bargaining power, or if they purport to relieve parties from their own willful, wanton, reckless or intentional conduct.") (citations omitted); *Finch v. Southside Lincoln-Mercury, Inc.*, 274 Wis.2d 719, 2004 WI App. 110, 685 N.W.2d 154, ¶ 23 ("Rather, we conclude that * * * an exculpatory clause, though otherwise valid as applied to some causes of action, cannot operate to relieve a party from the consequences of intentional or reckless conduct.") (citations omitted); *Sharon v. City of Newton*, 437 Mass. 99, 110, 769 N.E.2d 738 (2002), fn. 12 ("Commentators have readily distinguished the public policy implications of exculpatory releases whose only effect is relief from ordinary negligence from those intended to relieve a party from gross negligence, or reckless or intentional conduct.") (citations omitted).

In comment (a) to Section 195, the Restatement cites to Restatement of the Law 2d, Torts, Section 500 (1965) for the proposition that one cannot exempt himself from liability caused by either intentional or reckless conduct. This Court expressly adopted Section 500 in defining reckless conduct in *Anderson,* 134 Ohio St.3d 380, 2012-Ohio-5711, 983 N.E.2d 266, at

syllabus, ¶ 4. Similarly, this Court should adopt Section 195 of the Restatement of the Law 2d, Contracts and apply it, as have the other courts cited above, to not only tort liability but also contractual limitation of liability clauses.

E. A Reckless Standard Is Also Supported By The Duty Of Good Faith And Fair Dealing In The Restatement Of The Law 2d, Contracts, Section 205 (1981).

Consciously disregarding a known or obvious risk of harm to a non-breaching party to a contract is the antithesis of good faith and fair dealing. Indeed, to allow a party to recklessly breach a contract and then assert the benefit of a limitation of liability clause would undermine the obligation of good faith and fair dealing that Ohio courts have long recognized.

For example, in *PHH Mtge. Corp. v. Ramsey*, 2014-Ohio-3519, 17 N.E.3d 629 (10th Dist.) the court held:

> It is well-established that every contract has an implied covenant of good faith and fair dealing that requires not only honesty but also reasonableness in the enforcement of the contract. *Littlejohn v. Parrish*, 163 Ohio App.3d 456, 2005-Ohio-4850, 839 N.E.2d 49, ¶ 21 (1st Dist.). "'Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party.'" *Id.* at ¶ 26, quoting Restatement of the Law 2d, Contracts, Section 205, Comment a (1981).

Id. at ¶ 33.

The Restatement of the Law 2d, Contracts (1981) cited in *PHH Mtge.* provides:

> Section 205. Duty of Good Faith and Fair Dealing
>
> Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.

Multiple Ohio courts have recognized the contractual duty of good faith and cited to Section 205. *See, e.g,. Littlejohn* at ¶ 21 ("Ohio law also supports that there is an implied duty of good faith in almost every contract."); *Bolling v. Clevepak Corp.*, 20 Ohio App.3d 113, 121, 484 N.E.2d 1367 (6th Dist. 1984) ("* * * parties to an employment contract, as with any other contract, are bound

toward one another by standards of good faith and fair dealing.") (citations omitted); *Kirkwood v. FSD Dev. Corp.*, 8th Dist. Cuyahoga No. 95280, 2011-Ohio-1098, ¶ 9.

Denying the benefit of a limitation of liability clause to a breaching party whose conduct a court finds to have been reckless is entirely consistent with notions of honesty and reasonableness in the enforcement of a contract that underlie the duty of good faith and fair dealing expressed in Restatement Section 205 and embodied in the common law of Ohio.

F. Reckless Conduct As Defined By This Court In *Anderson* Is A High Standard.

As noted above, when this Court defined reckless conduct in paragraph 4 of the syllabus of its opinion in *Anderson,* it expressly adopted Restatement of the Law 2d, Torts, Section 500 (1965). The following comments to Section 500 make clear that reckless conduct, while different than willful or wanton conduct, remains a high standard:

- For conduct to be reckless, "(i)t must not only be unreasonable, but it must involve a risk of harm to others substantially in excess of that necessary to make the conduct negligent." Restatement of the Law 2d, Torts, Section 500, Comment a (1965).

- "The difference between reckless misconduct and conduct involving only such a quantum of risk as is necessary to make it negligent is a difference in the degree of the risk, but this difference of degree is so marked as to amount substantially to a difference in kind." Restatement of the Law 2d, Torts, Section 500, Comment g (1965).

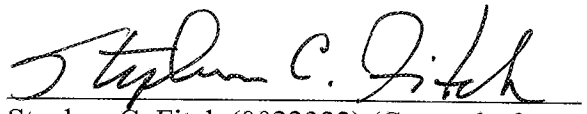
This Court's definition of reckless conduct in *Anderson* as "the conscious disregard of or indifference to a known or obvious risk of harm to another that is unreasonable under the circumstances * * *" and misconduct that is "substantially greater than negligent conduct" effectively acknowledges that reckless conduct is not just a difference in degree but substantially a difference in kind than mere negligence. Answering the certified question in this case in the affirmative is consistent with this Court's opinion in *Berjian* in recognizing that, in Prosser's

words, breaching parties who engage in the more extreme forms of negligence may not, at the same time, avail themselves of a contractual limitation of liability. Answering the certified question in the affirmative is also consistent with, and in furtherance of, the public policy of Ohio as expressed in numerous statutes by the Ohio legislature.

III. CONCLUSION

For the reasons set forth above, Petitioner American Municipal Power, Inc. asks that the Court answer the certified question in the affirmative.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing *Merit Brief of Petitioner American Municipal Power, Inc.* was served via regular U.S. mail, postage prepaid, this 2nd day of February, 2015 upon:

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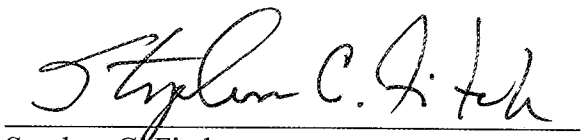

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APPENDIX

U.S. District Court Certification Order

U.S. District Court Opinion and Order on Summary Judgment

U.S. District Court Certification Order

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

American Municipal Power, Inc.,

Plaintiff,

v. **Case No. 2:11–cv–131**

Bechtel Power Corporation, **Judge Michael H. Watson**

Defendant.

OPINION AND ORDER

American Municipal Power, Inc. ("AMP" or "Plaintiff") sues Bechtel Power Corporation ("Bechtel" or "Defendant") for breach of contract.[1] The Court granted Defendant summary judgment in part, finding the contract's limitation of liability clause enforceable. Plaintiff now seeks certification of a question of Ohio law to the Ohio Supreme Court, or in the alternative, seeks certification of the Court's summary judgment order for interlocutory appeal to the United States Court of Appeals for the Sixth Circuit. ECF No. 108. For the following reasons, the Court **GRANTS** Plaintiff's motion to certify a question of law to the Ohio Supreme Court and reserves ruling on Plaintiff's alternative motion.

[1] The Court previously dismissed AMP's claims for negligent misrepresentation and breach of fiduciary duty. Opinion and Order 16, ECF No. 63.

I. BACKGROUND

The Court extensively set forth the underlying facts of this case in its previous Opinion and Order, ECF No. 106, and will restate only the relevant facts here.

In January 2009, AMP entered into an engineering, procurement, and construction contract ("EPC Contract") with Bechtel regarding the development of a coal-fired supercritical power plant. As part of the initial phase of the EPC Contract, Bechtel would develop, in accordance with professional standards, a target price estimate for the project. As part of the development process, the EPC Contract required Bechtel to timely identify potential developments that might impact the cost and/or schedule of the project's current estimate for AMP's evaluation. The identification of cost and scheduling impacts is called "trending," and the provision in the EPC Contract outlining the requirement is referred to as the "trend provision." AMP alleges Bechtel breached the EPC Contract by failing to comply with the trending requirements as outlined in the trend provision.

Bechtel moved to limit AMP's potential recovery to $500,000 pursuant to the EPC Contract's limitation of liability clause and to dismiss the breach of contract claim to the extent it sought damages exceeding that amount. ECF No. 9. AMP countered that the limitation of liability clause was unenforceable because Bechtel acted willfully, wantonly, recklessly, or with gross negligence. ECF No. 19. The distinction between those legal terms has become an important issue in this case.

The Court held that Ohio law precludes enforcement of a limitation of liability clause upon a showing of willful or wanton conduct and that the facts alleged in AMP's Complaint support a plausible inference that Bechtel was wanton in its failure to comply with the trending provision. Opinion and Order 8–9, ECF No. 63. The Court thus declined to limit AMP's potential damages at that time. *Id.* at 12.

Thereafter, Bechtel moved for summary judgment on the issue of limitation of liability. ECF No. 86. AMP again argued that the limitation of liability clause was unenforceable, this time arguing that *Anderson, Administrator v. City of Massillon*, 134 Ohio St. 3d 380 (2011), which was decided after the Court issued its Opinion and Order on Bechtel's motion to dismiss, established that limitation of liability clauses may be rendered unenforceable by willful, wanton, or *reckless* conduct. ECF No. 93. AMP submitted that Bechtel acted wantonly or at least recklessly, thereby precluding enforcement of the EPC Contract's limitation of liability clause.

The Court disagreed and awarded Bechtel summary judgment on the issue of limitation of liability, finding that *Anderson* did not change the Court's prior finding that Ohio law does not recognize recklessness as a standard that will render a limitation of liability clause unenforceable and that there was no genuine dispute of fact as to whether Bechtel was willful or wanton in its alleged breach. Opinion and Order, ECF No. 106.

Bechtel also moved for summary judgment on the merits of AMP's breach of contract claim, arguing that AMP could not prove damages. The Court denied Bechtel's motion on this ground, thereby necessitating a trial wherein AMP's potential damages could not exceed $500,000.

AMP's instant motion centers on the Court's finding that, under Ohio law, recklessness does not bar enforcement of a contractual limitation of liability clause. AMP does not seek reconsideration of this issue. Rather, it seeks to certify the issue to the Ohio Supreme Court, or in the alternative, seeks certification of the Court's summary judgment order to the United States Court of Appeals for the Sixth Circuit for interlocutory appeal.

II. ANALYSIS

AMP first requests that the Court certify to the Ohio Supreme Court the question of whether reckless conduct as defined in *Anderson v. Massillon*, 134 Ohio St. 3d 380 (2012) can render a contractual limitation of liability clause unenforceable.

Rule 9.01(A) of the Practice Rules of the Supreme Court of Ohio allows a federal court to certify questions of Ohio law to the Supreme Court if the analysis may be determinative of the proceeding and there is no controlling precedent in the decisions of the Supreme Court of Ohio. S. Ct. Prac. R. 9.01.

AMP maintains that the question of whether reckless conduct renders a contractual limitation of liability clause unenforceable is one for which there is no controlling precedent and that may be determinative of this proceeding.

Bechtel opposes certification on two grounds: (1) AMP's request is procedurally improper, and (2) AMP has not satisfied the Rule 9.01(A) standard.

A. Whether AMP's Request for Certification is Procedurally Improper

The parties dispute whether AMP's request for certification is barred by its failure to seek certification of its proposed question prior to the Court's resolution of the issue on consideration of Defendant's motion to dismiss and/or motion for summary judgment. Bechtel submits that AMP was required to seek certification *before* the Court decided the issue and cannot now seek certification after an unfavorable ruling. AMP maintains that no such requirement exists.

As support for its position, Bechtel cites *City of Columbus v. Hotels.com, L.P.*, 693 F.3d 642 (6th Cir. 2012), wherein the Sixth Circuit stated the following:

> "The decision whether or not to utilize a certification procedure lies within the sound discretion of the district court." *Pennington v. State Farm Mut. Auto. Ins. Co.,* 553 F.3d 447, 449–50 (6th Cir. 2009) (internal quotation marks omitted). . . . In an unpublished opinion, we have stated that **certification is disfavored where a plaintiff files in federal court and then, after an unfavorable judgment, "seek [s] refuge" in a state forum.** *Local 219 Plumbing & Pipefitting Indus. Pension Fund v. Buck Consultants, LLC,* 311 Fed.Appx. 827, 831 (6th Cir. 2009). **"The appropriate time to seek certification of a state-law issue is before a District Court resolves the issue, not after receiving an unfavorable ruling."** *Id.* at 832.
>
> The view that state-law issue certification should be sought before, not after, a district court resolves the issue, is shared by many of our sister circuits. *See, e.g., Thompson v. Paul,* 547 F.3d 1055, 1065 (9th Cir. 2008) ("There is a presumption against certifying a question to a state supreme court after a federal district court has issued a decision."); *Enfield v. A.B. Chance Co.,* 228 F.3d 1245, 1255 (10th Cir. 2000) (denying certification where party did not seek certification until adverse decision and stating "[t]hat fact alone persuades us

> that certification is inappropriate"); *Perkins v. Clark Equip. Co., Melrose Div.*, 823 F.2d 207, 209–210 (8th Cir. 1987) (discouraging requests for certification made by a party after summary judgment has been decided against that party because "[o]therwise, the initial federal court decision will be nothing but a gamble with certification sought only after an adverse decision").
>
> The localities in this case waited to request certification until after the district court had already made numerous decisions in this case. The district court did not abuse its discretion in declining to certify this issue to the Ohio Supreme Court.

Hotels.com, 693 F.3d at 654 (emphasis added).

Bechtel also cites *Geronimo v. Caterpillar, Inc.*, 440 F. App'x 442, 449 (6th Cir. 2011), which includes much of the same language cited to in *Hotels.com*, and correctly notes that cases cited by AMP involve certification before a district court's resolution of the issue.

While *Hotels.com* and *Geronimo* state that certification of a question after the district court resolves the issue is *disfavored*, and courts have denied requests for certification made after receiving an unfavorable ruling, it is clear that the decision to certify a question is within the district court's sound discretion. *See, e.g., Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974); *Hotels.com*, 693 F.3d at 654 (citation omitted). While the Sixth Circuit has not explicitly stated that the decision of *when* to certify a question is within the district court's discretion, the Court has found no authority for the proposition that if the district court chooses to certify a question, it *must* do so before it resolves the issue. Absent such authority, the Court interprets the above cases to favor and encourage certification before the district court's resolution of the issue but to ultimately

place the decision of whether to certify within the district court's discretion even when certification is sought after an adverse decision.

Accordingly, the Court declines to deny AMP's request solely on the ground that it was required to seek certification earlier.[2]

B. Whether AMP has satisfied the standard of Rule 9.01(A)

Bechtel next argues that AMP has failed to satisfy the standard for certification. District courts may certify questions to the Ohio Supreme Court if: (1) the analysis of the issue may be determinative of the proceeding, and (2) there is no controlling precedent in the decisions of the Ohio Supreme Court. S. Ct. Prac. R. 9.01. Bechtel argues AMP has failed to satisfy both requirements.

1. Whether the issue may be determinative of the proceeding

Bechtel argues AMP has failed to establish that the issue of whether recklessness precludes enforcement of a limitation of liability clause is determinative of the proceeding. Citing to *Guardian Ins. & Annuity Co. v. White*, No. 1:13–cv–360, 2014 WL 1685919, at *3 (S.D. Ohio April 29, 2014), Bechtel first asserts that in determining whether an issue is "determinative" of a proceeding for purposes of certification to the Ohio Supreme Court, courts apply the "controlling question of law" standard used in determining whether to certify an order for interlocutory appeal. That standard requires a question of law to

[2] This conclusion should not, however, be understood to condone the practice of seeking certification after the district court's resolution of the question to be certified. AMP should have sought certification in its response to Bechtel's motion for summary judgment as an alternative to the arguments it presented therein.

either terminate or materially affect the outcome of the litigation. Bechtel then argues that the issue of recklessness and limitation of liability does not present a "controlling question of law" for interlocutory appeal purposes and thus is not "determinative" of the proceeding under Rule 9.01(A).

The Court does not read *Guardian* to hold that the controlling question of law standard for interlocutory appeals applies to the determination of whether to certify a question to the Ohio Supreme Court, nor has it found any other case so holding. In the context of certification to the Ohio Supreme Court, this Court has stated that "a question which may be determinative of a proceeding is one which would form the basis of the Court's disposition of one or more of a plaintiff's causes of action." *Prof'ls Direct Ins. Co. v. Wiles, Boyle, Burkholder & Bringardner Co., LPA*, No. 2:06–cv–240, 2008 WL 3925634, at *2 (S.D. Ohio Aug. 25, 2008) (citing *Super Sulky, Inc. v. U.S. Trotting Ass'n*, 174 F.3d 733, 744 (6th Cir. 1999)).

Here, the Court recognizes that whether reckless conduct bars enforcement of the EPC Contract's limitation of liability clause relates only to the amount of potential damages available for AMP's breach of contract claim and is not dispositive of the underlying merits of that claim. Nevertheless, the Court finds that the issue is determinative of the central dispute in this proceeding. Indeed, the only remaining claim in this case is for breach of contract, and the primary issue in this case thus far has been the enforcement of the EPC Contract's limitation of liability clause. In fact, Bechtel's motion to dismiss did not

seek to dismiss AMP's breach of contract claim on the merits but rather sought enforcement of the limitation of liability clause. Similarly, Bechtel moved for summary judgment not on the issue of whether it breached the EPC Contract but on the issue of whether its liability was limited. Notably, resolution of the issue implicates the difference between $97 million and $500,000 in potential damages. Thus, while the issue at hand will not terminate the proceeding, reasonable jurists could conclude that given the unique circumstances of this case, the question of whether reckless conduct bars enforcement of a limitation of liability clause is tantamount to determinative of this particular proceeding.

2. Whether there exists controlling Ohio Supreme Court precedent

The parties next dispute whether there exists controlling Ohio Supreme Court precedent on the issue of whether a reckless standard of conduct renders a limitation of liability clause unenforceable.

In *Richard A. Berjian, D.O., Inc. v. Ohio Bell Tele. Co.*, the Ohio Supreme Court held that willful or wanton conduct can render a limitation of liability clause "ineffective." 54 Ohio St. 2d 147, 158 (1978). Bechtel maintains that this decision constitutes controlling Supreme Court precedent on the issue at hand. The Court disagrees. In holding that willful or wanton conduct precludes enforcement of a limitation of liability clause, *Berjian* did not exclude recklessness as a standard that would bar enforcement of a limitation of liability clause. In fact, there is no indication that the court even considered the effect of recklessness at all. Therefore, while *Berjian* constitutes controlling precedent as

to whether willful or wanton conduct precludes enforcement of a limitation of liability clause, it is silent as to whether recklessness does so as well.

Additionally, the parties have not cited, and the Court has not found, an Ohio Supreme Court decision discussing recklessness as a bar to enforcing a limitation of liability clause or an Ohio appellate or trial court decision precluding enforcement of a contractual limitation of liability clause due to reckless conduct.

Despite the lack of Ohio law on the issue, five district courts have indicated that reckless conduct renders a limitation of liability clause unenforceable. *See Nahra v. Honeywell, Inc.*, 892 F. Supp. 962, 970 (N.D. Ohio 1995) (citing *Berjian* for the proposition that a limitation of liability clauses will be upheld absent a willful or reckless breach); *Solid Gold Jewelers v. ADT Sec. Sys., Inc.*, 600 F. Supp. 2d 956, 959 n.2 (N.D. Ohio 2007) (citing *Nahra* for the proposition that limitations on liability are upheld absent a willful or reckless breach); *Superior Integrated Solutions, Inc. v. Reynolds and Reynolds Co.*, No. 3:09–cv–314, 2009 WL 4135711, at *3 (S.D. Ohio Nov. 23, 2009) (citing *Solid Gold* and stating that a reckless breach is considered willful misconduct that would invalidate a limitation of liability clause); *Transcon. Ins. Co. v. Simplexgrinnell LP*, No. 3:05CV7012, 2006 WL 2035571, at *5 (N.D. Ohio July 18, 2006) (citing *Nahra* for the proposition that limitation of liability clauses will be upheld absent a willful or reckless breach); *Purizer Corp. v. Battelle Mem'l. Inst.*, No. 01 C 6360, 2002 WL 22014, at *5 (N.D. Ill. Jan. 7, 2002) (same).

These district court decisions, while of some assistance, are not controlling. First, the decisions are not binding on this Court. Second, the decisions merely assert in a conclusory manner that recklessness bars enforcement of a limitation of liability clause, citing to either *Berjian* or each other. Absent any discussion of the issue, this assertion is merely dicta.[3] Third, although the district court decisions apply Ohio law, they are not themselves Ohio law and thus do not serve as an example of Ohio authority on the issue.[4] Fourth, after these cases were decided, the Ohio Supreme Court clarified that willful, wanton, and reckless are not interchangeable standards of conduct and noted that Ohio appellate courts have incorrectly conflated them. *Anderson v. Massillon*, 134 Ohio St. 3d 380, 387–88 (2012). Therefore, to the extent these

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[3] Moreover, the Court respectfully disagrees with the district courts' reliance on *Berjian* in stating that reckless conduct will invalidate a limitation of liability clause, as it does not read *Berjian* to have reached the issue, let alone stand for that proposition.

[4] AMP appears to argue that *Anderson* also casts doubt on Ohio decisions equating recklessness with wanton conduct in discussing limitations of liability. In so doing, it references the Court's Opinion and Order addressing Bechtel's motion to dismiss, in which the Court noted that "[s]ome Ohio cases discuss gross negligence and recklessness as a bar to the limitation of liability. *See, e.g.*, *Thompson v. McNeill*, 53 Ohio St. 3d 102, 104 (1990); *Harsh v. Lorain Cnty. Speedway*, 111 Ohio App. 3d 113, 118 (Ohio Ct. App. 8th Dist. 1996)." Opinion and Order 7, ECF No. 63.

Upon further review of those cases, the Court finds that its citation to *Thompson* and *Harsh* for this proposition was inaccurate. While *Thompson* and *Harsh* conflate the different standards of conduct, they do not discuss recklessness as a bar to enforcing a limitation of liability. *See Thompson v. McNeill*, 53 Ohio St. 3d 102, 104 (Ohio Ct. App. 8th Dist. 1996) (holding that under certain circumstances, reckless conduct may render an individual liable for his conduct during a golf game); *Harsh v. Lorain Cnty. Speedway*, 111 Ohio App.3d 113, 118 (Ohio Ct. App. 6th Dist. July 31, 2009) (discussing enforceability of a release of liability and equating wanton and reckless conduct in discussing gross negligence claim). Accordingly, although *Anderson* clarified the difference between the willful, wanton, and reckless standards, it had no effect on Ohio law regarding the type of conduct capable of invalidating a limitation of liability clause.

district court decisions likewise conflate recklessness and other conduct, they are no longer good law. Accordingly, these district court decisions are inapposite to the analysis of whether there exists controlling Ohio Supreme Court precedent on the issue at hand.

In sum, while there exists controlling Ohio Supreme Court precedent on whether willful and wanton conduct bars enforcement of a limitation of liability clause, there appears to be no controlling Ohio Supreme Court precedent on whether Ohio law recognizes recklessness as a standard of conduct that would bar enforcement of a contractual limitation of liability. There also does not appear to be guidance from the Ohio appellate and trial courts on the issue. In light of this lack of Ohio law, as well as the Ohio Supreme Court's recent clarification in *Anderson* of the difference between the willful, wanton, and reckless standards, the Ohio Supreme Court is in the best position to determine if recklessness as defined therein should be deemed to bar enforcement of a contractual limitation of liability clause.

"As the Supreme Court of Ohio has explained, '[c]ertification ensures that federal courts will properly apply state law.'" *Am. Booksellers Found for Free Expression v. Strickland*, 560 F.3d 443, 446 (6th Cir. 2009) (citation omitted). Moreover, "the United States Supreme Court also recognizes that 'certification of novel or unsettled questions of state law for authoritative answers by a State's highest court . . . may save time, energy, and resources and help build a

cooperative judicial federalism.'" *Id.* (citation omitted). Certification in this case would accomplish both goals.

For the foregoing reasons, the Court **GRANTS** AMP's motion to certify to the Ohio Supreme Court, ECF No. 108. Should the Ohio Supreme Court decline certification, the Court will consider AMP's motion for interlocutory appeal at that time.

IV. CERTIFICATION REQUIREMENTS

A. The Certified Question

For the reasons set forth above, the undersigned certifies the following question of state law to the Supreme Court of Ohio pursuant to Rule 9.01 of the Rules of Practice of the Supreme Court of Ohio:

1. Does reckless conduct by the breaching party, as defined in *Anderson v. Massillon*, 134 Ohio St. 3d 380 (2012), render a contractual limitation of liability clause unenforceable?

B. The Information Required by Ohio Supreme Court Rule § 9.02(A)

Because the Court is certifying a question to the Supreme Court of Ohio, the Court provides the following information in accordance with Ohio Supreme Court Rule § 9.02(A)–(E).

1. **Name of the case:** Please refer to the caption on page 1 of this order.
2. **Statement of facts:** Please refer to Sections I and II.B.2 of this order. Should the Ohio Supreme Court require a detailed iteration of the facts of this case, the Court respectfully refers the Supreme Court to this Court's

opinion and order on Bechtel's motion for summary judgment, ECF No. 106.

3. **Name of each of the parties:**

   a. Plaintiff: American Municipal Power, Inc.

   b. Defendant: Bechtel Power Corporation

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5. **Designation of Moving Party:** Plaintiff

C. Instructions to the Clerk

In accordance with Rule 9.03(A) of the Rules of Practice of the Supreme Court of Ohio, the Clerk of the United States District Court for the Southern District of Ohio is hereby instructed to serve copies of this certification order upon counsel for the parties and to file this certification order under the seal of this Court with the Supreme Court of Ohio, along with appropriate proof of service.

IT IS SO ORDERED.

MICHAEL H. WATSON, JUDGE
UNITED STATES DISTRICT COURT

U.S. District Court Opinion and Order on Summary Judgment

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

American Municipal Power, Inc.,

Plaintiff,

v. **Case No. 2:11–cv–131**

Bechtel Power Corporation, **Judge Michael H. Watson**

Defendant.

OPINION AND ORDER

In this diversity action, American Municipal Power, Inc. ("AMP" or "Plaintiff") sues Bechtel Power Corporation ("Bechtel" or "Defendant") for breach of contract.[1] Defendant moves for summary judgment regarding the enforcement of the contract's limitation of liability clause. It further seeks summary judgment on AMP's entire claim, arguing AMP failed to prove that its alleged breach caused the alleged damages. For the following reasons, the Court **GRANTS** Defendant's motion in part and **DENIES** it in part.

I. FACTS

AMP is a nonprofit corporation organized under the laws of and with its principal place of business in Ohio. AMP is a wholesale supplier for municipal power systems that purchases, generates, and distributes power for 128 publically-owned AMP member utilities.

[1] The Court previously dismissed AMP's claims for negligent misrepresentation and breach of fiduciary duty. Opinion and Order 16, ECF No. 63.

Bechtel is a corporation organized under the laws of Nevada with its principal place of business in Maryland.

AMP alleges the following in its Complaint. In 2007 and 2008, AMP commissioned feasibility studies for the development of a coal-fired supercritical power plant. The studies included a comparison of the projected costs of purchasing power from third-party electric suppliers and the costs of developing, owning, and operating a coal-fired supercritical power plant and generating the needed power. AMP determined that it would be most economical to build and own its own coal-fired supercritical plant. This project became known as the AMP Generating Station.

In October 2007, AMP issued a request for proposals to several contractors regarding the engineering, procurement, and construction related to the AMP Generating Station. In January 2008, several contractors, including Bechtel, submitted a proposal. AMP ultimately selected Bechtel as the contractor for the AMP Generating Station.

In August 2008, AMP and Bechtel entered into a Technical Services Agreement in which Bechtel agreed to perform preliminary tasks, including project development activities, engineering and pre-engineering, procurement, and construction services. On August 11, 2008, Bechtel submitted to AMP an update of its indicative price that reflected increases of $22 million from the Bechtel proposal of about eight months earlier.

On or about January 1, 2009, AMP entered into an engineering, procurement, and construction contract ("EPC Contract") with Bechtel. As part of the initial phase of the Contract, Bechtel would develop a target price estimate between January 20 and November 2, 2009 in accordance with professional standards. As part of the development process, the EPC Contract required Bechtel to timely identify potential developments that may introduce cost and/or schedule impacts to the project's current estimate for AMP's evaluation. Compl. ¶ 35, ECF No. 1. The identification of cost and scheduling impacts is called "trending," and the provision in the EPC outlining the requirement is referred to as the "trend provision."

The parties agree Bechtel compiles cost and productivity information from its projects and generates various reports on a periodic basis ("similar project information"). The parties also agree the information is part of what Bechtel considers when estimating the costs of future and ongoing power projects. AMP alleges Bechtel failed to trend its similar project information even though it knew that the information showed that its expected EPC cost for AMP's project was grossly understated. Compl. ¶¶ 34–36, ECF No. 1.

From November 2008 to December 2009, Bechtel sent AMP monthly progress reports. AMP alleges that throughout the months of November 2008 to September 2009, Bechtel represented to AMP that the August 2008 expected EPC cost was sound and reliable. None of the reports included the effect of Bechtel's similar project information.

In April 2009, AMP entered into a $5.06 million Bechtel-managed agency contract with Powerspan Corporation for preliminary engineering required to develop a full-price proposal on an air quality control system for the AMP Generating Station.

In May 2009, AMP informed Bechtel that due to the declining cost of energy, it was reevaluating whether to build a power plant. On May 5, 2009, Bechtel met with AMP and updated elements of its indicative price, reporting that the estimated cost had declined by $157 million. On May 28, 2009, AMP's members met and decided to move forward with building the AMP Generating Station.

AMP then entered into contracts with third parties to facilitate the progress of the AMP Generating Station. AMP issued a purchase order of over $270 million to Hitachi for the design and fabrication of the boilers for the AMP Generating Station and a purchase order of over $129 million to Hitachi for the design and fabrication of the steam turbine generators for the AMP Generating Station. AMP also purchased land and, through Bechtel, made improvements to that land totaling $14.6 million. Finally, AMP expended nearly $4 million for the services of consultants on the AMP Generating Station and paid Bechtel approximately $16.5 million for its services.

On October 30, 2009, Bechtel advised AMP that the EPC cost of the AMP Generating Station would be more than $1 billion dollars greater than Bechtel's August 2008 and May 2009 estimates. On November 11, 2009, Bechtel made a

presentation to AMP's representatives confirming that the estimated overall EPC cost of the AMP Generating Station project would be $1.06 billion more than Bechtel's August 2008 and May 2009 estimates. On November 17, 2009, Bechtel made another presentation to AMP's representatives incorporating possible cost reductions that could result from eliminating or reducing various elements of the project. With these reductions, the estimated price remained $846 million more than Bechtel's August 2008 and May 2009 estimates.[1]

Based on this change in price, AMP decided to cancel the project. By a letter dated November 24, 2009, AMP terminated Bechtel's EPC contract for default. That same day, AMP also terminated contracts with Hitachi, Powerspan Corporation, and other contractors and vendors on the AMP Generating Station project.

AMP now claims Bechtel breached the EPC Contract by failing to fulfill its obligations under the Contract's trend provision, namely its obligation to trend similar project information. It claims $97 million in damages, which include payments made to Bechtel, Hitachi, Powerspan Corporation, and other contractors and vendors.

II. STANDARD OF REVIEW

The standard governing summary judgment is set forth in Federal Rule of Civil Procedure 56(a), which provides: "The court shall grant summary judgment

[1] It is not clear from the Complaint whether the $1 billion increase was measured from August 2008 or May 2009. Those two price estimates themselves differed by $157 million.

if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The Court must grant summary judgment if the opposing party fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). *See also Van Gorder v. Grand Trunk Western R.R., Inc.*, 509 F.3d 265, 268 (6th Cir. 2007).

When reviewing a summary judgment motion, the Court must draw all reasonable inferences in favor of the nonmoving party, who must set forth specific facts showing there is a genuine issue of material fact for trial, and the Court must refrain from making credibility determinations or weighing the evidence. *Matsushita Elec. Indus. Co.*, 475 U.S. 574, 587 (1986); *Pittman v. Cuyahoga Cnty Dept. of Children and Family Serv.*, 640 F.3d 716, 723 (6th Cir. 2011). The Court disregards all evidence favorable to the moving party that the jury would not be required to believe. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150–51 (2000). Summary judgment will not lie if the dispute about a material fact is genuine, "that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Barrett v. Whirlpool Corp.*, 556 F.3d 502, 511 (6th Cir. 2009).

Thus, the central issue is "'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that

one party must prevail as a matter of law.'" *Pittman*, 640 F.3d at 723 (quoting *Anderson*, 477 U.S. at 251–52).

III. DISCUSSION

AMP seeks damages for breach of the EPC Contract. Bechtel seeks summary judgment enforcing the EPC Contract's limitation of liability provision. It further seeks summary judgment on AMP's entire claim, arguing that AMP has failed to show that its damages were caused by Bechtel's alleged breach.

A. Limitation of Liability

Bechtel argues its liability for breach of contract should be limited to $500,000, the contractual limitation of liability appropriate to the stage of the contract performance at the time the project was cancelled, because there is no genuine dispute of material fact over whether Defendant's alleged breach was wanton.

Article 16 of the EPC agreement limits Bechtel's liability as follows:

> Contractor's . . . cumulative monetary liability to AMP-Ohio and owners arising under or in relation to the EPC agreement will in no event exceed a) an amount equal to the earned fee component paid to contractor but in no event less than five hundred thousand US dollars ($500,000) and in no event more than the amount specified in Section 6.1 of Appendix T-3, as such amount specified in Section 6.1 of Appendix T-3 may be adjusted in accordance with Section 5.1.3 and Appendix T-3.

EPC Contract Art. 16, Opp. Ex. 31 (part 1) PAGEID # 1969, ECF No. 96-18. Bechtel states it was never paid an earned fee on the project and, accordingly, Article 16 limits Bechtel's liability to $500,000.

AMP argues that the limitation of liability clause cannot be enforced at this stage because there is at least a genuine dispute of material fact over whether Bechtel acted wantonly or recklessly. Bechtel argues AMP employs the wrong standard for wantonness, and there is no genuine issue of material fact.

1. Standard for Enforcing Limitation of Liability Clause

AMP argues that evidence that Bechtel wantonly or recklessly breached the EPC agreement prohibits the enforcement of the limitation of liability clause at this stage. Bechtel disputes whether recklessness can bar the enforcement of a limitation of liability clause and argues a breach must be central to the contract to permit invalidation of a limitation of liability clause.

In a previous Order on the motion to dismiss, this Court stated, under Ohio law, [2] a limitation of liability clause is not enforced where the party to the contract seeking protection has engaged in willful or wanton misconduct. *Richard A. Berjian, D.O., Inc. v. Ohio Bell Tel. Co.*, 54 Ohio St. 2d 147, 157–58 (1978). The Court determined that although no allegations made a finding of willful breach plausible, the allegations, if proven, could support a finding that Bechtel committed a wanton breach. Wanton misconduct is "a degree greater than negligence" and "is characterized by the failure to exercise any care toward one to whom a duty of care is owed when the failure occurs under circumstances for which the probability of harm is great and when the probability of harm is known

[2] The EPC Contract provides that it is to be construed in accordance with Ohio law. EPC Contract Art. 20, Opp. Ex. 31 (part 1) PAGEID # 1974, ECF No. 96-18.

to the tortfeasor." *Hunter v. Columbus*, 139 Ohio App. 3d 962, 969 (Ohio Ct. App. 10th Dist. 2000).

Also in the previous Order, the Court recognized that some Ohio decisions discuss recklessness as a bar to a limitation of liability clause in a contract. *See, e.g.*, *Superior Integrated Solutions, Inc. v. Reynolds and Reynolds Co.*, No. 3:09–cv–314, 2009 WL 4135711, at *3–4 (S.D. Ohio Nov. 23, 2009). At the time, Ohio law often equated recklessness with wanton conduct. *See, e.g.*, *Thompson v. McNeill*, 53 Ohio St. 3d 102, 104 (1990); *Harsh v. Lorain Cnty. Speedway*, 111 Ohio App. 3d 113, 118 (Ohio Ct. App. 8th Dist. 1996). The Court, therefore, determined the controlling standard on when to enforce a limitation of liability is whether the party that breached the contract was willful (did so intentionally) or wanton (failed to exercise any care whatsoever). *See Ohio Cas. Ins. Co. v. D & J Distrib. & Mfg. Inc.*, No. L-08-1104, 2009 WL 2356849, at *8, *10 (Ohio Ct. App. 6th Dist. July 31, 2009).

AMP argues that *Anderson v. Massillon*, 134 Ohio St. 3d 380 (2012), an Ohio Supreme Court case published after the Court's previous order, changes the Court's previous analysis on when a limitation of liability clause will not be enforced. Bechtel responds that although *Anderson* clarified the differences between wanton and reckless, recklessness is still not a standard that bars the enforcement of limitations of liability.

Anderson clarifies that "wanton" and "reckless" are not equivalent but also explains why some Ohio courts have used the term "reckless" in describing when

enforcement of a limitation of liability clause is barred. In *Anderson*, the Ohio Supreme Court determined the use of "wanton" in a municipality defense-to-liability statute and "reckless" in a municipal employee immunity-from-suit statue were not equivalent. 134 Ohio St. 3d at 388. The *Anderson* court noted that *Thompson v. McNeill*, 53 Ohio St. 3d 102 (1990) had created confusion between the two standards by stating "reckless" was often used interchangeably with "willful" and "wanton," and that "[g]iven the cross-application of these terms in our case law, it is not surprising that Ohio appellate courts have reached the conclusion that the 'willful,' 'wanton,' and 'reckless' standards are 'functionally equivalent.'" *Id.* at 387. Accordingly, the use of "reckless" in conjunction with a discussion of the limits of a limitation of liability clause in cases like *Superior Integrated Solutions, Inc. v. Reynolds and Reynolds Co.* in 2009 is not surprising.

The Ohio Supreme Court has now clarified the difference between the "wanton" and "reckless" standard, but the standard for overcoming a limitation on liability clause is, and has always been, willful or wanton. *See Richard A. Berjian, D.O., Inc. v. Ohio Bell Tel. Co.*, 54 Ohio St. 2d 147, 157–58 (1978). *See also Gardner v. Ohio Valley Region Sports Car Club of America*, No. 01AP-1280, 2002 WL 1477335, at *4 (Ohio Ct. App. 10th Dist. 2002) (collecting cases in analogous area of limitation of liability contracts which use wanton and willful not reckless as standard). Therefore, AMP can only succeed on prohibiting the

application of the limited liability clause if it proves Bechtel's conduct was willful or wanton.[3]

Bechtel also argues that a wanton breach must be central to a contract to invalidate a limitation of liability clause. It contends that the trend provisions, which are the provision AMP alleges it breached, is not central to the contract. While the cases Bechtel cites happen to deal with breaches central to the contracts' purpose, there is no indication in either case that the centrality of the breach affected the court's unwillingness to enforce the limitation of liability clause. *See Superior Integrated Solutions, Inc.*, 2009 WL 4135711, at *3; *Purizer Corp. v. Battelle Mem. Inst.*, No. 01 C 6360, 2002 WL 22014, at *5 (N.D. Ill. 2002). Accordingly, the Court declines to consider whether the trend provision was central to the contract in considering whether the limitation of liability clause should be enforced.

2. The EPC Contract's Trending Requirements

AMP identifies the EPC Contract's trend provisions as the portion of the Contract Bechtel breached. Therefore, understanding the scope of the EPC Contract's trend provisions is essential to this Court's consideration of whether there is evidence Bechtel wantonly breached the EPC Contract. Each side characterizes the trend requirements under these provisions differently; however, the interpretation of a contract is a question of law to be decided by the Court.

[3] Again, however, in its previous order on Bechtel's motion to dismiss, the Court determined that AMP's allegations did not make a finding of willful breach plausible. Opinion and Order 12, ECF No. 63.

Stalloy Metals, Inc. v. Kennametal, Inc., 983 N.E. 2d 823, 830 (Ohio Ct. App. 11 Dist. 2012). The EPC Contract is over 1,000 pages long but only a few provisions relate to Bechtel's obligation to trend price impacts. Specifically, AMP alleges Bechtel breached the trend-related provisions of Appendix V and Section 2.2.

The trend-related provision of Appendix V states:

> During the early stages of the Preliminary Phase, Contractor will begin implementation of a formal trend program which will, among other things, provide timely identification of potential developments (i.e. "trends") that may introduce cost and / or schedule impacts (or savings) to the current estimate basis so that AMP-Ohio and Contractor can fully evaluate and consider these developments before incorporating them into the project scope and / or execution plan. As trends are identified they will be documented and reviewed with the AMP-Ohio team member on a periodic basis but not less frequently than monthly.

EPC Contract App. V, Opp. Ex. 31 (part 4) PAGEID # 2606, ECF No. 96-21.

Section 2.2 of the EPC Contract requires all of Bechtel's "Work," defined as all acts or actions required by the EPC Contract, to be performed "in accordance with Professional Standards," defined as "those standards and practices used by, and the degree of skill and judgment exercised by, recognized United States engineering and/or construction firms, when performing high quality services on power plants similar to the Facility. . . ." EPC Contract § 1.1, § 2.2, Opp. Ex. 31 (part 1) PAGEID # 1870, 83–4, ECF No. 96-18.

Additionally, the EPC Contract includes an integration clause, which reads:

> This Agreement contains the entire agreement between the Parties with respect to the subject matter hereof, and supersedes any and

> all prior and contemporaneous written and oral agreements, proposals, negotiations, warranties, guarantees, understandings, and representations pertaining to the subject matter hereof.

EPC Contract § 20.12, Opp. Ex. 31 (part 1) PAGEID # 1978, ECF No. 96-18.[4]

With these provisions in mind, AMP argues that Bechtel materially breached the EPC Contract by failing to: (1) implement a proper, complete trend program beginning January 1, 2009 and maintain it thereafter; (2) establish and maintain a formal trend program as required by its Corporate Trend Procedure, Industry and Professional Standards; (3) assign a trend engineer to the Project; (4) trend against the Indicative Target Price; and (5) trend and report to AMP potential cost and schedule impacts, particularly known cost impacts from its experience on other similar projects.[5]

Of these duties that Bechtel allegedly breached, only a few are actually contained in Appendix V's trend provision, Section 2.2, or anywhere else in the EPC Contract. First, the EPC Contract does require Bechtel to begin

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[4] AMP also states that Articles 2.3.1 and 5.2.3 and Appendix V, Section 2.4, 2.5 and 3 required Bechtel to establish and maintain a detailed project and budgeting system and to report to AMP on a regular basis with respect thereto, and that Bechtel failed to do so. Article 2.3.1 simply requires Bechtel to perform the contract work in accordance with the project schedule and hold progress meetings. EPC Contract § 2.3.1, Opp. Ex. 31 (part 1) PAGEID # 1898, ECF No. 96-18. Article 5.2.3 requires each application for payment to be supported by a monthly progress report in accordance with Article A. EPC Contract § 5.2.3, *id.* at PAGEID # 1924. Appendix V, Sections 2.4, 2.5 and 3 list specific tasks that need to be accomplished in the Early Development and Pre-EPC phases and include schedules, budgets and progress reports. EPC Contract App. V § 2.4, 2.5, 3, Opp Ex. 31 (part 4) PAGEID # 2602–04, ECF No. 96-21. AMP does not develop these arguments and points to no evidence in the record that would create a genuine issue of material fact over whether Bechtel wantonly breached these provisions.

[5] Although AMP discusses all of these material breaches in its Response, its Complaint focuses on Bechtel's failure to trend similar project information.

implementation of a formal trend program during the early stages of the Preliminary Phase, which began January 1, 2009.[6] EPC Contract App. V, Opp. Ex. 31 (part 4) PAGEID #2606, ECF No. 96-21. Second, the implementation of the trend program was required to be performed in accordance with Professional Standards, but not with Bechtel's corporate policy on trend procedures. EPC Contract § 1.1, § 2.2, Opp. Ex. 31 (part 1) PAGEID # 1870, ECF No. 96-21. Third, the EPC contract did not require Bechtel to assign a trend engineer.

As for the fourth alleged breach, the failure to trend against the indicative target price, Bechtel contends that the EPC Contract did not include or incorporate the indicative target price. It argues it gave AMP the initial indicative target price prior to the execution of the EPC Contract, and therefore consideration of and reliance on the price is barred by the EPC Contract's integration clause. Nonetheless, AMP is correct that the "current estimate basis," against which Appendix V's trend provision required Bechtel to identify cost and schedule impacts, means the indicative target price. Appendix V's trend provision requires Bechtel to, beginning on January 1, 2009, timely identify trends that might impact the "current estimate basis." The only "estimate basis" available during the early stages of the preliminary phase was the indicative target price and Bechtel's updates to it throughout the preliminary phase.

[6] The Preliminary Phase "means the period from the Effective Date to and until the Day prior to the Commencement Date." EPC Contract § 1.1, Opp. Ex. 31 (part 1) PAGEID # 1870, ECF No. 96-18. The Effective Date was January 1, 2009. EPC Contract Introduction, *id.* at PAGEID # 1856. The Commencement Date was to have been the date on which AMP delivered Bechtel a full notice to proceed with the project. EPC Contract § 2.1.3, *id.* at PAGEID # 1881.

Indeed, Bechtel argues it was not required to trend against the indicative target price, but offers no other "estimate basis" on which it was supposed to base its trend updates beginning January 1, 2009. The trend provision therefore required Bechtel to trend cost and schedule impacts against the indicative target price.

As for the final alleged breach, the failure to trend similar project impacts, Bechtel argues the EPC Contract does not include such a requirement. Bechtel is correct that the EPC Contract does not explicitly mention comparisons to other similar projects as a trend program requirement. Nevertheless, AMP argues Appendix V's trend provision "clearly required trending of all the different types of potential cost and schedule impacts," which it argues includes similar project information. Resp. 32, ECF No. 93.[7]

To determine whether this provision imposes such a requirement, the Court applies Ohio law.

> "Under Ohio law, the interpretation of written contract terms, including the determination of whether those terms are ambiguous, is a matter of law for initial determination by the court . . . . The role of courts in examining contracts is to ascertain the intent of the parties. . . [,which] is presumed to reside in the language they choose to use in their agreement . . . . Where the terms in a contract are not ambiguous, courts are constrained to apply the plain language of the contract . . . . However, [e]xtrinsic evidence is admissible to ascertain the intent of the parties when the contract is unclear or ambiguous, or when circumstances surrounding the

[7] AMP also argues Bechtel was required to trend many different types of potential impacts to cost and schedule as a matter of established Bechtel corporate policy and pursuant to Bechtel's April 2009 project controls presentation. As noted above, however, the EPC Contract does not require Bechtel to conform its work to its corporate policy. Moreover, the April 2009 project control presentation was not incorporated into the EPC Contract, and therefore, nonconformance with what was set out in the presentation cannot be a basis for breach of the EPC Contract.

> agreement give the plain language special meaning . . . . Contractual language is ambiguous only where its meaning cannot be determined from the four corners of the agreement or where the language is susceptible of two or more reasonable interpretations . . . . [C]ourts may not use extrinsic evidence to create an ambiguity; rather, the ambiguity must be patent, i.e., apparent on the face of the contract. In determining whether contractual language is ambiguous, the contract "must be construed as a whole . . . .

Savedoff v. Access Gp., Inc., 524 F.3d 754, 763–4 (6th Cir. 2008) (internal citations and quotations omitted).

The first question for the Court is therefore whether the language in Appendix V's trend provision is ambiguous.

Appendix V states in relevant part: "[Bechtel] will begin implementation of a formal trend program which will, among other things, provide timely identification of potential developments (i.e. "trends") that may introduce cost and / or schedule impacts (or savings) to the current estimate basis . . . ." EPC Contract App. V, Opp. Ex. 31 (part 4) PAGEID # 2606, ECF No. 96-21.

AMP argues this provision required Bechtel to trend all types of cost information, including similar project information. Bechtel argues its requirement under this provision was limited to trending primarily scope-related items. Both parties cite to extrinsic evidence in support of their characterization of the requirement. In doing so, however, they skip a crucial step in the analysis—determining whether the language is ambiguous on its face. Only if the language is ambiguous on its face does the Court look to extrinsic evidence to determine

the intent of the parties. *Savedoff*, 524 F.3d at 763–64. Otherwise, the Court applies the plain language. *Id.*

Here, the language of the trend provision is not ambiguous. It plainly requires Bechtel to implement a program that includes updates to AMP about potential developments that may impact the cost or schedule of the project. Information about the cost of similar projects may constitute a potential development that would impact the cost or schedule of AMP's project.[8] Bechtel does not point to anything in the EPC Contract, or any properly executed amendments to it, limiting this requirement to scope-related impacts.[9] Therefore, Appendix V's trend provision required Bechtel to trend similar project information that may introduce cost impacts to the project's cost estimate.

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[8] Defendants do not argue that similar project cost information is not something that would impact the cost of the project. Indeed, the EPC Contract explicitly requires Bechtel to disclose similar project cost information at its open book meeting with AMP to aid in the determination of the target price estimate details. EPC Contract App. V, Opp. Ex. 31 (part 4) PAGEID # 2605, ECF No. 96-21. This indicates that the parties considered similar project cost information to be the type of information that would impact the cost of the project.

[9] In support of its argument that the February 2009 meeting limited its trending requirements to scope, Bechtel specifically points to the following statement from the meeting minutes:

> The Project Trend Program (which currently consists primarily in Appendix T3 Attachment 1) is intended to be the primary tool by which the Project will track impacts to the Target Price. *It is expected that this will remain the case until at least about mid-Summer 2009. . . . We are not at point in time right now [where] we are plugging numbers into an actual estimate.*

Mot. Summ. J. 35, ECF No. 86 (citing Ex. 3 at 5, ECF No. 99-26) (emphasis added). Bechtel asserts AMP did not contemporaneously express disapproval of this trending plan. *Id.* at 35 (citing Kiesewetter Dep. Ex. 7, ECF No. 99-11). As AMP correctly asserts, however, the oral discussion at the meeting does not constitute a valid amendment to the EPC Contract. *See* EPC Contract § 20.13, Opp. Ex. 31 (part 1) PAGEID # 1978, ECF No. 96-18.

In sum, Appendix V's trend provision required Bechtel to: (1) begin implementation of a formal trend program during the early stages of the preliminary phase, which began January 1, 2009; (2) trend potential cost and schedule impacts, particularly similar project information as part of that program; and (3) trend such impacts against the indicative target price.

Section 2.2 unambiguously required Bechtel to complete these requirements in accordance with professional standards.

Having identified these requirements, the Court turns to whether there is a genuine issue of material fact as to whether Bechtel's alleged failure to satisfy those requirements constitutes wanton conduct.

3. Whether Bechtel Wantonly Breached Appendix V's Trend Provision

AMP argues Bechtel wantonly breached the EPC Contract by failing to exercise any care whatsoever as to the above trending requirements.

Although Bechtel maintains that it did not breach the EPC Contract, it assumes a breach for purposes of its motion and argues that AMP has failed to present evidence establishing that the breach was wanton. Specifically, Bechtel argues it cannot be found to have exercised no care whatsoever because it exercised at least some care by: (1) accomplishing important tasks required under the EPC Agreement in the preliminary phase; (2) keeping AMP apprised of the development of the target price estimate and the significant issues with the project that might affect its anticipated cost; and (3) exercising substantial care under the trend program.

a. Important Tasks in the Preliminary Phase

Bechtel first argues that because AMP does not dispute evidence demonstrating that Bechtel substantially performed all of its other non-trend related duties under the EPC Contract, Bechtel cannot be found to have exercised no care whatsoever.

AMP argues Bechtel cannot excuse its failure to comply with the trend requirements by citing to other work it has performed.

The Court agrees. AMP alleges Bechtel breached the trend-related provisions of Appendix V and Section 2.2 of the EPC Contract. The issue before the Court is whether the breach of those specific provisions was wanton. The proper inquiry is therefore whether Bechtel exercised no care whatsoever as to its duties under these provisions. Bechtel does not cite to any authority to support expanding the inquiry to whether it exercised any care as to its duties under the EPC Contract as a whole rather than the provisions it allegedly breached. Accordingly, Bechtel's compliance with the other requirements of the EPC Contract does not preclude a finding of no care whatsoever as to its obligations under the provisions at issue.

b. The Plan for Target Price Estimate Development

Bechtel similarly argues that the evidence demonstrating that it complied with the target price estimate development process as described in Appendix V of the EPC Contract precludes a finding of no care whatsoever. Again, the relevant inquiry is whether Bechtel exercised no care whatsoever as to the

specific trend provisions it allegedly breached. Accordingly, its compliance with the remainder of Appendix V's provisions does not preclude a finding of wanton conduct.

c. Whether Bechtel Exercised Substantial Care under the Trend Program

Bechtel finally argues that even if the Court narrows its inquiry to whether Bechtel exercised any care as to its obligations under just the specific trend provision, the evidence demonstrates that it exercised substantial care in complying with its obligations.

AMP disputes that Bechtel properly performed any of its trend obligations. It argues a genuine dispute of fact exists as to whether Bechtel exercised any care with respect to its trend obligations and whether there was a great probability of harm to AMP in Bechtel's failure to do so.[10]

AMP's central argument is that Bechtel's failure to trend similar project information during the early stages of the preliminary phase constitutes a wanton breach. It asserts that from late 2008 and throughout 2009, Bechtel had information about price increases of certain areas in these other projects. The bulk of the price increase for AMP's project, AMP argues, resulted from the same areas that saw price increases in Bechtel's similar projects. It argues that had

[10] AMP further avers that Bechtel "knew that the substantial risks associated with undisclosed potential cost impacts was significant, especially during the Project's early months." Resp. 38, ECF No. 93 (citing, among other evidence, Whorten Dep., Opp. Ex. 22, ECF No. 96-11; Email, Opp. Ex. 21, ECF No. 103-11, ECF No. 96-14). Bechtel does not dispute this evidence, and therefore no issue of fact exists as to whether Bechtel knew of the risks associated with failing to disclose potential cost impacts. The only question, therefore, is if an issue of fact exists as to whether Bechtel exercised any care as to its obligations.

Bechtel trended this similar project information as required by the EPC Contract, AMP would have avoided its damages.

Bechtel concedes that it did not trend similar project information. It argues that assuming the failure to do so constitutes a breach, the performance of its other trend obligations precludes a finding that it failed to exercise any care whatsoever.

The failure to trend similar project information does not alone establish a wanton breach. Appendix V's trend provision did not include an explicit, separate duty to trend similar project information. Rather, Bechtel's duty under the provision was to implement a program that included trending *all types* of cost and schedule impacts, *one of which* was similar project information.[11] Therefore, Bechtel's failure to trend similar project information, while it may be a breach, cannot alone constitute a *wanton* breach of the trend requirements. The Court must instead determine whether Bechtel failed to exercise any care whatsoever as to implementing a trend program, beginning in January 2009, that included trending all types of cost and schedule impacts.

Bechtel presents various evidence that it argues precludes a finding that it failed to exercise any care whatsoever as to its trending requirements. Bechtel's argument is based on its contention that the parties' kick-off meeting established

[11] Had these sophisticated parties intended to make trending similar project information an explicit requirement of the trend program, they could have so contracted. Indeed, they explicitly require the disclosure of such information at the target price estimate review meeting and could have similarly done so with respect to the trend program requirements. EPC Contract App. V, Opp. Ex. 31 (part 4) PAGEID # 2605, ECF No. 96-21.

that it would provide scope-related impacts from January 2009 to summer 2009, at which time it would transition to providing cost impacts. Bechtel provides evidence of its compliance with this new plan to show that it exercised care with respect to its trend obligations. As previously explained, however, the kick-off meeting did not change Bechtel's requirement to trend *all types* of cost or schedule impacts throughout the entire preliminary phase (January 2009–November 2009). Nevertheless, the Court will examine the evidence Bechtel cites to determine whether an issue of fact exists as to its performance of its obligations as defined by the EPC Contract.

Bechtel presents the following evidence that it implemented a trend program during the preliminary phase:

- Bechtel circulated the first trend list in March 2009 seeking scope decisions. Trend List, Ex. 40, ECF No. 99-43.
- Bechtel gave AMP August, September, and October progress reports, in which it informed AMP of price increases of $155.7 million, $239 million, and $358 million respectively. MSJ Ex. 32 at 15, ECF No. 99-34 ($155.7 million); MSJ Ex. 33 at 14, ECF No. 99-36 ($239 million); MSJ Ex. 34 at 13, ECF No. 99-37 ($358 million).[12]
- Michael Lehr, Beck's project manager, testified that by early summer/fall of 2009, he knew of a $350 million price increase based on costs associated with Powerspan and the coal handling and urea handling system. Lehr Dep., Ex. 4 PAGEID ## 3811–14, ECF No. 99-8.
- A meeting occurred between Bechtel and Beck on May 5, 2009 to discuss costs and a spreadsheet of the updated cost information was emailed three

[12] AMP did not receive these reports until September, October, and November. Ex. 32, ECF No. 99-44 (August report sent on September 3); Ex. 33, ECF No. 99-36 (September report sent on October 5); Ex. 34, ECF No. 99-37 (October report sent on November 5).

days later. Email, Ex. 58, ECF No. 100-21; Wagner Dep. Ex. 59 PAGEID # 5293, ECF No. 100-22; Email and Spreadsheet Ex. 60; ECF No. 100-23.

- Bechtel identified schedule impacts in its February, March, and May monthly reports. Expert Report, Reply Ex. 1 PAGEID ## 7750, 52, ECF No. 101-15.
- Bechtel conducted a quantity turnover meeting with Beck on September 24, 2009, reviewing areas of potential cost increase. Notes, Ex. 35, ECF No. 99-38; Notes, Ex. 36, ECF No. 99-39.[13]

Bechtel contends that all of the foregoing evidence precludes a finding that if failed to exercise any care whatsoever as to its trend obligations under the trend provision.

AMP does not dispute this evidence. Instead, it argues that Bechtel's evidence of price trending in late summer/early fall cannot save it from its failure to fulfill its other trend requirements. It presents the following evidence to demonstrate that Bechtel never fulfilled those requirements.

AMP first provides evidence that Bechtel failed to assign a trend engineer and conform its reports to corporate policy. Such evidence is irrelevant however, because, as explained above, such failures do not constitute a breach of the EPC Contract, let alone a wanton breach.

AMP next cites the deposition testimony of Victoria Platz as evidence that Bechtel had no intention of trending cost information beginning in January 2009 as required by the Contract. Her testimony does not fully support that assertion,

[13] It is not clear from these exhibits whether potential cost increase was reviewed at the meeting, as the exhibits are less than clear handwritten notes. Nonetheless, as AMP does not specifically dispute that potential cost increase was discussed at the meeting, and the Court was able to make out some reference to a higher budget in the notes, the Court will consider the evidence.

however. In reference to an exhibit, and it is not clear from the attachment what the exhibit is, Platz confirmed that her understanding was that the trend program described in that exhibit is something that would occur only after the target price was agreed to. Platz Dep., Opp. Ex. 68 PAGEID # 3204, ECF No. 96-51. She then testified that her understanding was that the trending related more to scope deviation while the estimate was prepared. *Id.* at PAGEID # 3205. When pressed on whether the trending related only to scope deviation, she answered it was scope and pricing deviation, explaining that the price of bid packages for equipment and subcontracts would be compared to the indicative price. *Id.* at PAGEID # 3206. Her testimony therefore indicates that the trend program was primarily limited to scope deviation but included some price deviation as well. Such testimony does not support AMP's contention that Bechtel had no intention of trending cost information beginning in January 2009.

AMP next argues Bechtel failed to trend against the current estimate basis but does not present any evidence in support. Resp. 36, ECF No. 93.[14]

[14] AMP's exact argument is unclear. It first states: "Bechtel argues that its multifaceted trend obligations (except for scope) did not arise 'until at least around mid-summer 2009, at which point the estimate effort would commence' . . . . The overwhelming record evidence, however, contradicts Bechtel's contention." It then goes on to argue that the current estimate basis was the indicative target price and that Bechtel's obligation to trend began on January 1, 2009. AMP further states Bechtel wantonly failed to trend as required against the indicative target price. But, it is unclear how the requirement that Bechtel trend all types of cost information beginning January 2009 is connected to Bechtel's failure to trend against the indicative target price. Indeed, AMP's argument seems to be a repeat of the allegation that Bechtel failed to start trending price in January 2009 and failed to trend similar project information against that price. *See* Resp. 34, ECF No. 93

Last, AMP presents evidence that Bechtel never trended similar project information. *See e.g.* Opp. Ex. 37 PAGEID # 8447, ECF No. 103-16 (expert opinion stating the same); Opp. Ex. 71 PAGEID # 136–40, ECF No. 96-54 (deposition testimony of Joseph McConlogue stating he did not trend the indicative estimate with his experience on similar projects on a monthly basis); Opp. Ex. 22 PAGEID # 1691–92, ECF No. 96-11 (deposition testimony of Todd Whorten who, when asked if he ever trended the indicative estimate with the historical data from other projects, testified that trending the indicative estimate was not the plan). Bechtel does not dispute this evidence.

Upon review of all the aforementioned evidence, the Court finds that there is no dispute of fact as to whether Bechtel exercised *any care whatsoever* as to its Appendix V trend obligation to implement a trend program, beginning in January 2009, that included trending all types of cost and schedule impacts.

Taken together, the undisputed evidence shows the following. Bechtel implemented a trend program beginning in January 2009. The program first trended scope-related impacts in March 2009. Bechtel trended schedule impacts in February, March, and May 2009, and price impacts in August, September, and October 2009. It also discussed possible price increases in May 2009. It never trended similar project information. While Bechtel failed to trend its price impacts as early as it should, and failed to trend similar project information at all, it did implement a program beginning in January 2009, trend schedule impacts as early as one month later, and eventually trend price impacts. This evidence

demonstrates Bechtel exercised some care, thereby precluding a finding that it exercised no care whatsoever.

4. Whether Bechtel Wantonly Breached Section 2.2

AMP also alleges Bechtel wantonly breached Section 2.2 of the EPC Contract by failing to perform the aforementioned requirements in accordance with professional standards. In support, AMP presents expert testimony opining that Bechtel's failure to trend similar project information violated professional and industry standards. Opp. Ex. 37 PAGEID # 8486, ECF No. 103-16.

In Response, Bechtel cites to the opinion of its own expert. His opinion concluded that Bechtel "timely communicated cost variances to AMP in a manner consistent with industry practice . . ." and "regularly communicated its target price estimate development progress and results in a manner that met the Professional Standards requirement in the EPC Agreement." Reply Ex. 1 PAGEID ## 7721, 7761, ECF No. 101-15.

This evidence does not create an issue of fact as to whether Bechtel exercised no care whatsoever in performing its trend requirements in accordance with professional standards. Again, the question is not only whether Bechtel's failure to trend similar project information violated professional standards. The question is whether Bechtel exercised any care whatsoever in performing its obligation to implement a trend program, beginning in January 2009, that included trending all types of cost and schedule impacts in accordance with professional standards. Part of that obligation is trending similar project

information, and perhaps the failure to do so does violate professional standards. But that alone is not sufficient to establish a wanton breach. Without any other evidence that Bechtel violated professional standards in regards to its trend obligations, it cannot be found to have exercised no care whatsoever in performing its trend obligations in accordance with professional standards.

In sum, there is no genuine issue of fact as to whether Bechtel failed to exercise any care whatsoever in performing its trend obligations under Appendix V and Section 2.2 of the EPC Contract. Accordingly, it cannot be found to have committed a wanton breach, and the EPC Contract's limitation of liability provision applies.[15] As a result, any damages AMP might receive in this case would be limited to $500,000.

B. Damages

Although the amount of damages is limited, AMP must still prove damages as an essential element of its breach of contract claim.

Bechtel argues it is entitled to summary judgment on AMP's breach of contract claim on the ground that AMP has failed to prove damages. It specifically argues AMP has failed to show that Bechtel's alleged breach *caused* AMP's alleged damages.

[15] Again, the Court is assuming a breach for purposes of this conclusion.

AMP argues there is at least a genuine issue of material fact as to whether it has adequately proven reliance damages.[16]

It is beyond dispute that a party seeking to recover for breach of contract must establish damages proximately caused by the breach. *See Portsmouth Ins. Agency v. Med. Mut. of Ohio*, No. 10CA3405, 2012 WL 1623864, at *19 (Ohio Ct. App. 4th Dist. May 3, 2012); *Wells Fargo Bank, N.A. v. Sessley*, 188 Ohio App. 3d 213, 228–29 (10th Dist. 2010). "[I]n the absence of 'circumstances [that] clearly indicate an obvious cause and effect relationship [or lack thereof],' 'the issue of proximate cause is ordinarily one for determination by the jury.'" *Id.* (quoting *Ornella v. Robertson*, 14 Ohio St. 2d 144, 151 (1968)).

One category of damages available in a breach of contract action is reliance damages. The Restatement (Second) of Contracts provides:

> As an alternative to [expectation damages], the injured party has a right to damages based on his reliance interest, including expenditures made in preparation for performance or in performance, less any loss that the party in breach can prove with reasonable certainty the injured party would have suffered had the contract been performed.

[16] AMP claims reliance damages based on the costs it incurred in reliance on Bechtel's performance of its trend obligations. It identifies these damages as "payments to Hitachi for the boilers and steam turbine generators; payments to Bechtel as the EPC contractor; payments to Powerspan for the air quality control system development; payments to consultants such as Beck; payments to various contractors; payments to exercise options to purchase the real estate; payments to various law firms for the Project's pre-litigation legal expenses; and internal AMP labor and overhead." Resp. 40–41, ECF No. 93. These expenditures resulted in "$56,094,761 to Hitachi; $16,538,717 to Bechtel; $4,369,810 to Powerspan; and $10,763,859 in other costs for a total, after including prejudgment interest through December 2012, of $97,577,884." *Id.*

Restatement (Second) of Contracts § 349 (1981). Such damages "assign a dollar value to the detriment the non-breaching party incurred in reliance on the now-broken promise and reimbursement of the expenditures that the non-breaching party made in performing or preparing to perform the contract." *Alternatives Unlimited-Special, Inc. v. Ohio Dept. of Educ.*, No. 12AP-647, 2013 WL 4807016, at *7 (Ohio Ct. App. 10th Dist. Sept. 10, 2013). As with expectation damages, reliance damages must be foreseeable to the breaching party, and the amount of damages must be established with reasonable certainty. Restatement (Second) of Contracts §§ 351–52 (1981).

Bechtel does not dispute the foreseeability of AMP's alleged reliance damages or that their amount is capable of being proven with reasonable certainty. Rather, it asserts AMP cannot prove Bechtel's alleged breach *caused* AMP's damages.

The parties dispute what AMP must show to establish that Bechtel's alleged breach caused its damages.

AMP argues that in the context of reliance damages, the causation inquiry is limited to whether AMP incurred expenditures in preparation for or in performance of the EPC Contract that were foreseeable to Bechtel.

In support of this argument, AMP relies on *Westfed Holdings, Inc. v. United States*, 52 Fed. Cl. 135 (Fed. Claims Ct. 2002). AMP specifically argues that *Westfed* establishes that to prove causation, AMP need only show that "the

expenses submitted as reliance damages were incurred in reliance on the contract, or that losses were sustained as a result of reliance on the contract." *Id.* at 155.

In *Westfed Holdings*, the United States Court of Federal Claims held that the passage of the Financial Institutions Reform, Recovery and Enforcement Act breached the government's agreement with the plaintiff regarding the government's regulatory treatment of the plaintiff. *Id.* at 149. The parties disputed who had the burden of proving causation when reliance damages are sought. *Id.* at 154. In addressing the plaintiff's claim for reliance damages, the court held that the plaintiff has the burden of showing that its claimed expenditures were incurred as a result of the contract, while the defendant bears the burden of proving that any of those damages were incurred for other reasons. *Id.* at 155. In so holding, the court did state that to recover reliance damages, the plaintiff must prove "the expenses submitted as reliance damages were incurred in reliance on the contract, or that losses were sustained as a result of reliance on the contract." *Id.* at 155. Nonetheless, the court stated this in the context of explaining how plaintiff's burden of proof differs from that of the defendants. Indeed, the full sentence from which AMP pulls that language reads:

> [Plaintiff] therefore must show that the expenses submitted as reliance damages were incurred in reliance on the contract, or that losses were sustained as a result of reliance on the contract, while defendant may prove, in diminution of the amount of losses proved by plaintiff, any losses that plaintiff would have incurred in the event of full performance of the contract.

Id. at 155. In clarifying the nature of the burdens, the court did not eliminate the requirement that the defendant's breach cause the plaintiff's damages. The court further states that "the proper inquiry is whether the breach . . . was a 'substantial factor' in causing those damages." *Id.* at 160.[17] AMP's reliance on *Westfed* is therefore misplaced.

Moreover, AMP seems to conflate the causation requirement with the definition of reliance damages. Reliance damages are defined as those damages based on a plaintiff's expenditures made in performance of its obligations. Under this definition, AMP's asserted damages can be correctly characterized as reliance damages. But Ohio law still requires the plaintiff to prove that an alleged breach is the cause/proximate cause of the damages. *Portsmouth Ins. Agency*, 2012 WL 1623864, at *19; *accord LifeWise Master Funding v. Telebank*, 374 F.3d 917, 933 (10th Cir. 2004) ("In order to recover reliance damages for breach of contract, the plaintiff must demonstrate with certainty that there was a breach and that such damages have been caused by the breach."). Absent any authority to the contrary, the Court turns to whether a genuine dispute of fact exists as to whether Bechtel's alleged breached caused AMP's damages.

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[17] See also *Westfed Holdings, Inc. v. United States*, 55 Fed. Cl. 544, 549 (Fed. Claims Ct. 2003) (reaffirming *Westfed Holdings'* application of the substantial factor test); *Westfed Holdings, Inc. v. United States*, 407 F.3d 1352, 1364 (Fed. Cir. 2005) (explaining why the substantial factor causation test applied in such cases as opposed to the "but for" causation test).

AMP argues Bechtel's alleged breach—the failure to trend similar project information—resulted in a surprise price increase, causing them to terminate the project and incur damages.

Bechtel argues AMP has failed to create an issue of fact as to whether the alleged breach caused its damages because the damages are speculative. It contends the alleged damages are speculative because AMP has failed to establish: (1) that it would have terminated the project earlier if Bechtel had informed it of the cost increase earlier, and (2) Bechtel's alleged breach was the primary reason AMP terminated the EPC Contract.

1. Whether AMP Would have Terminated the Project Earlier

Comparing the instant case to *Atlantis Info. Tech v. CA, Inc.*, N. 06–CV–3921, 2011 U.S. Dist. LEXIS 111085 (E.D.N.Y. Sept. 28, 2011), Bechtel first argues AMP has failed to show causation because it cannot show that it would have cancelled the project earlier if Bechtel had informed it of similar project cost increases earlier.

In *Atlantis*, the parties entered into a software licensing agreement granting the defendant a license to use and distribute software in exchange for royalty payments made to the plaintiff. *Id.* at *1. The plaintiff sued the defendant for breach of that agreement. *Id.* at *6. The defendant counterclaimed, alleging that the plaintiff breached the agreement by failing to enhance and update the software. *Id.* at *8. The defendant sought expectation damages based on the idea that it would have ceased paying the plaintiff royalties as soon as it learned

of the alleged breach and would have instead developed a replacement for the plaintiff's software. *Id.* at *9. The court held that the defendant's expectation damages were unrecoverable because there was no evidence to show that its theory that it would have replaced the plaintiff's software as soon as it learned of the alleged breach was anything more than speculation. *Id.* at *10–11.

Bechtel argues that like the defendant in *Atlantis*, AMP's damages are dependent on the hypothetical curative steps that it would have taken had it known of Bechtel's alleged breach, namely cancelling or delaying the project to avoid additional expenses. And similar to the defendant in *Atlantis*, Bechtel argues, AMP has not presented sufficient evidence that it would have cancelled or delayed the project had Bechtel trended similar project information.

AMP argues *Atlantis* is inapposite because AMP does not seek damages based on the curative steps it would have taken had it known of Bechtel's breach earlier. AMP asserts it seeks damages based on the costs it incurred under the EPC Contract, which were transformed into reliance damages upon Bechtel's breach. Nonetheless, because AMP must still show that Bechtel's alleged breach caused its damages, it must show that it cancelled the project and incurred its damages because of Bechtel's failure to trend similar project information. To establish such causation, AMP must show that had Bechtel done so, AMP would not have cancelled the project, thereby avoiding its damages. Indeed if that was not the case, then Bechtel's failure to trend similar project information would

not have been of any consequence.[18] The Court therefore turns to whether a dispute of fact exists as to whether AMP would have cancelled the project had Bechtel trended similar project information.

Bechtel points to the following evidence to establish that AMP cannot establish that it would have cancelled the project had Bechtel not trended similar project information.

If first points to the following portion of John Bentine's deposition testimony on behalf of AMP:

> We don't know if Bechtel had been forthright and done its job what we would have done, but we do know that we would have had better information about what the prospects of bringing this project in at a capital cost and projected operating cost into the future that would have made sense for our members, so we don't know. . . .
>
> Q: But you just don't know what specific action you would have taken?
>
> A: Well, it is kind of hard to turn the clock back and say what we would have done had we had the information that Bechtel had that they didn't share with us.

Bentine Dep., Ex. 72 PAGEID # 5583–84, ECF No. 100-37.[19]

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[18] AMP also argues *Atlantis* is inapposite because the defendants in those cases sought expectation damages while AMP seeks reliance damages. But again, the causation requirement applies equally to both types of damages. Further, its reliance on a comment to the Restatement (Second) of Contracts is misplaced. The comment states: "Although the [uncertainty] requirement applies to damages based on the reliance as well as expectation interests, *there is usually little difficulty in proving the amount that the injured party has actually spent in reliance on the contract*, even if it is impossible to prove the amount of profit that he would have made." Restatement (Second) or Contracts § 352 (1981), comment a (emphasis added). This comment refers to the *amount* of damages, not their *existence*.

Bechtel next indicates that even though AMP knew of potential cost increases in the summer and fall of 2009, it did not undertake a feasibility review to determine if it should continue with the project. *See* Lehr Dep., Ex. 4 PAGEID ## 3811-13, ECF No. 99-8 ("In late summer, early fall of 2009 we were aware of what we thought was going to be about a $350 million price increase from the May estimate from Beck."); Ex. 32 at 15, Clark Dep., Ex. 2 PAGEID # 3804, ECF No. 99-7 ("We had not done [a feasibility update] since May, we had not, and the update was then conducted in November.").

Last, Bechtel points to the fact that AMP did not have a breakpoint as to when the project would become too expensive to continue. *See* Answers to Interrog., Ex. 74.1 PAGEID # 5596, ECF No. 100-38; Bentine Dep. Ex. 72 PAGEID ## 5587-88, ECF No. 100-37; Sullivan Dep., Ex. 21 PAGEID # 4719, ECF No. 99-24.

Bechtel argues that all of this evidence shows that AMP cannot show with any reasonable degree of certainty that a particular cost increase would have resulted in project cancelation.

In response, AMP offers Bentine's testimony to show that AMP would have proceeded differently if it had known that Bechtel breached its

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[19] Bechtel argues this testimony is even more speculative than that which the *Atlantis* court found to be too speculative: "Had we known at that time, we would have immediately launched into a process where we would have re-examined [our course of action]." *Atlantis*, 2011 U.S. Dist. LEXIS 111085, at *30.

trending obligations. It specifically points to his testimony that "things would have been done differently, much differently had [AMP] had the benefit of Bechtel's actual experiences on those other jobs from day one in this contract and we didn't." Bentine Dep., Opp. Ex. 61 PAGEID # 3135, ECF No. 96-44. Further, Bentine stated that had AMP known in May when they asked for an update what was going on in all the other projects, he does not believe AMP would have exercised the options or signed the agreement with Hitachi . . . ." *Id.* at PAGEID # 3536.

Bechtel contends this testimony is insufficient to create an issue of fact because Bentine admitted that the best he can do is speculate as to what AMP would have done had Bechtel trended similar project information. Bentine Dep., Ex. 72 PAGEID # 5583–84, ECF No. 100-37. Taken together and in the light most favorable to Plaintiff, however, Bentine's testimony indicates that although it is difficult to say exactly what AMP would have done had Bechtel trended similar project information earlier, Bentine does not believe that AMP would have exercised its options or signed the agreement with Hitachi.[20] Unlike the testimony that was found speculative in *Atlantis*—that the defendant would have

[20] AMP also points to Ivan Clark's declaration, stating that in his opinion, if Bechtel had provided similar project information earlier, the project participants would have very likely stopped the project until the cost increases were resolved. Clark Decl., Opp. Ex. 79, ECF No. 96-63. The Court declines to consider that portion of Clark's declaration, however, as he has no personal knowledge of what the participants would have done and is not formally qualified as an expert to opine on the issue.

immediately reexamined their options if they had learned of the breach earlier—declining to exercise options and sign agreements is a specific course of action that AMP says it would have taken had Bechtel fulfilled its trend obligations. Accordingly, considered in the light most favorable to Plaintiff, a genuine issue of fact exists as to what AMP would have done had Bechtel trended similar project information.

2. Whether Bechtel's Alleged Breach was the Primary Reason AMP Terminated the Contract

Comparing the instant case to *Infocision Mgmt. Corp. v. Found. For Moral Law Inc.*, No. 5:08CV1342, 2010 U.S. Dist. LEXIS 17633, at *8–10 (N.D. Ohio Mar. 1, 2010), Bechtel next argues AMP has failed to show causation because it cannot show that Bechtel's alleged breach was the primary reason AMP terminated the contract.

In *Infocision*, the plaintiff sued for breach of a contract whereby the plaintiff would provide telemarketing services for the defendant charity. *Id.* at *1. The defendant counterclaimed, alleging that the plaintiff breached the contract by calling certain donors more than twice, causing these donors to "burn out", and decreasing donations. *Id.* at *4. The court held the defendant had failed to establish that calling certain donors more than twice was the proximate cause of its damages because the defendant failed to rule out other possible causes for the decline in donations. *Id.* at *13–18. Bechtel argues that like the defendant in

Infocision, AMP has not ruled out possible causes for its damages other than Bechtel's failure to trend similar project information.[21]

Bechtel presents evidence that AMP cancelled the project for reasons other than Bechtel's failure to comply with its trend obligations. It first points to evidence that part of the reason for the project's cancellation was the risk of further escalations in capital price resulting from Bechtel's refusal to enter into a lump sum contract. King Dep., Ex. 10 PAGEID # 3929 ECF No. 99-13; Answers to Interr., Ex. 74.1 PAGEID # 5593, ECF No. 100-38. ("The determining basis . . . was the unexpected, substantial increase in the EPC price provided by Bechtel, along with the lack of any protection against future price increases and Bechtel's refusal to agree to a lump sum turn key price contract.").

Bechtel also points to evidence that at the meeting where participants voted to cancel the project, AMP cited five factors in support of the recommendation to cancel, four of which were unrelated to Bechtel:

- Rating agencies are being hammered by environmental activists . . .
- Potential shortfall of subscription; Prairie State influence
- Risk of continued economic downturn and financial market uncertainty
- Member confidence based on original projected cost v. estimated target price
- Recent proposed design changes by Bechtel have increased environmental permit risk

[21] AMP argues *Infocision* is inapposite because the defendants in those cases sought expectation damages while AMP seeks reliance damages. But again, the causation requirement applies to reliance damages.

Powerpoint, Ex. 67 PAGEID # 5510, ECF No. 100-3; Kieswetter Dep., Ex. 7 PAGEID # 8915, ECF No. 99-11.

In response, AMP provides evidence indicating that it was the unexpected cost increase that caused the cancellation of the project. *See* Answers to Interrog., Opp. Ex. 53 PAGEID # 3024, ECF No. 96-39 ("The determining basis for this recommendation [terminating the project] was the unexpected, substantial increase in the EPC price provided by Bechtel, along with the lack of any protection against future price increases and Bechtel's refusal to agree to a lump sum turn key price contract."); Bentine Dep., Opp. Ex. 61 PAGEID ## 3139–41, ECF No. 96-44 (discussing price increase as a reason for cancelling the project); Clark Dep., Opp. Ex. 42 PAGEID ## 2767–68, ECF No. 96-28 (same); Green Dep., Opp. Ex. 14 PAGEID ## 1658–59, ECF No. 96-7 (same); Kiesewetter Dep., Opp. Ex. 52 PAGEID ## 3018–3019, ECF No. 96-38 ("The primary reason for the cancellation of the project was the increase in the estimated EPC costs."); King Dep., Opp. Ex. 62 PAGEID ## 3144, 47–48, ECF No. 96-45 (same); Marquis Dep., Opp. Ex. 65 PAGEID ## 3161–62, ECF No. 96-48 (same); Sullivan Dep., Opp. Ex. 66 PAGEID ## 3166, ECF No. 96-49 (same); Green Dep., Opp. Ex. 14 PAGEID ## 1661–1666, ECF No. 96-7 (denying other reasons for cancelling the project).

Bechtel argues that even if this evidence shows that the cost increase caused the project's cancellation, the cost increase itself is not a breach of the contract. Therefore, they argue, AMP has failed to show that an alleged *breach* by Bechtel caused its damages.

While Bechtel's reasoning is correct, the Court does not understand AMP's argument so narrowly. Its argument is not solely that the price increase caused its damages. AMP argues that the *unexpected* price increase caused its damages, and that the unexpected increase was caused by Bechtel's failure to trend similar project information. In other words, it argues that Bechtel's failure to trend similar project information resulted in a *surprise* price increase, which caused AMP to terminate the project and incur damages. Although AMP asserts its damages claim is not based on the hypothetical steps it would have taken, its claim boils down to the argument that had Bechtel properly fulfilled its trend obligations, AMP would have known of the increase earlier and terminated the project earlier, thereby reducing its damages. Therefore, the evidence indicating that the price increase was the primary reason for cancelling the project can be considered as evidence that Bechtel's alleged breach caused AMP's damages. And as both parties have presented conflicting testimony as to whether the surprise price increase, which allegedly resulted from Bechtel's failure to trend similar project information, caused AMP's damages, a genuine issue as to that fact exists.

Accordingly, a genuine issue of fact exists as to whether Bechtel's alleged breach caused AMP's damages and the Court denies Bechtel summary judgment on AMP's breach of contract claim.

IV. CONCLUSION

Bechtel's motion for summary judgment is granted to the extent that the EPC Contract's limitation of liability clause applies and denied to the extent that it seeks summary judgment on AMP's breach of contract claim. The Clerk shall remove ECF No. 86 from the Civil Justice Reform Act motions report.

IT IS SO ORDERED.

Michael H. Watson

MICHAEL H. WATSON, JUDGE
UNITED STATES DISTRICT COURT