STATE OF RHODE ISLAND

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: August 23, 2022)

W&J NEWCO, LLC	:	
	:	
Plaintiff,	:	
	:	
v.	:	**C.A. No. PC-2020-01539**
	:	
AGILENT TECHNOLOGIES, INC. and ULTRESS REALTY, LLC	:	
	:	
	:	
Defendants.	:	

DECISION

STERN, J. This matter comes before the Court for decision after a five-day bench trial on Plaintiff/Counterclaim Defendant W&J Newco, LLC's (Plaintiff) and Defendant/Counterclaim Plaintiff Agilent Technologies, Inc.'s (Defendant) respective claims for declaratory judgment. Broadly speaking, the parties' competing declaratory judgment counts relate to whether Defendant is entitled to indemnity as claimed pursuant to an Asset Purchase Agreement (APA) executed on May 25, 2018 by Ultra Scientific, Inc. (Ultra) and Defendant.[1] *See* Pl.'s First Am. Compl. 6-8; Def.'s Answer and Countercl. 11. A bench trial on these competing declaratory judgment counts occurred on May 2, 2022 through May 6, 2022. This Court's decision follows.

I

Facts and Travel

By way of background, on May 25, 2018, Ultra and Defendant entered into the APA pursuant to which Defendant agreed to purchase certain assets from Ultra for a sum of

[1] Plaintiff is the successor-in-interest to Ultra with respect to the APA.

$35,000,000. (Pl.'s Ex. 1; Def.'s Post-Trial Mem. 1.) Under the terms of the APA, the parties were required to place into escrow $3 million for a period of eighteen months following the closing, which occurred on July 18, 2018, that would serve as indemnity for claims made by Defendant should it elect to pursue any. (Pl.'s Ex. 1, at 6-7, 10.1; Pl.'s Post-Trial Mem. 1; Def.'s Post-Trial Mem. 1-2, 9.) This indemnification provision provided that the "Seller shall indemnify, defend and hold harmless [Defendant] . . . [for Losses] . . . incurred . . . [for] any breach of any representation or warranty of Seller[.]" (Pl.'s Ex. 1, at 45.) In turn, § 10.3, entitled "Escrow," provided that:

> "In the event an Indemnified Party wishes to assert a claim for indemnification under this ARTICLE X, Purchaser shall deliver to Seller a Claim Notice, containing a reasonably specific description of the basis and amount of the Losses incurred by the Indemnified Party, with a copy to the Escrow Agent if there is still any portion of the Escrow Amount in the Escrow Account." *Id*. at 46.

A "Claim Notice" is defined in the APA, § 3.3(e)(i), which provided that: "[a]t any time, or from time to time, before the Release Date," Purchaser (here, Defendant) may deliver a "written notice of claim to Seller and the Escrow Agent providing the information required under Section 10.3 of this Agreement and requesting a disbursement of the amount of the claim from the Escrow Account (each, a 'Claim Notice')." *Id*. at 7, App. A (setting forth defined terms and providing that Claim Notice was defined in § 3.3(e)(i)). As mentioned above, the "Release Date" was defined as "eighteen (18) months after the Closing Date[.]" *Id*.

Significantly, on May 24, 2018, a day prior to execution of the APA, Ultra had received a State Fire Marshal's Inspection Report (the Fire Marshal's Report) that cited sixteen fire code "deficiencies found during [a] 02-06-2018 inspection of [the Property]," which required correction in order to comply with the Rhode Island State Fire Safety Code. (Def.'s Post-Trial Mem. 1, 9; Def.'s Ex. A, at 1; Pl.'s Ex. 13, at 1.) Importantly, Ultra's then-President, John Russo (Russo), did

not provide or otherwise disclose the Fire Marshal's Report to Defendant as part of the due diligence process.[2] (Hr'g Tr. 5:2-15, 62:20-63:2, May 2, 2022.) Moreover, although Ultra had resolved some of the cited fire code violations, a number of violations remained outstanding as of both May 25, 2018 and July 16, 2018. (Pl.'s Ex. 29, at 2; Def.'s Post-Trial Mem. 13; Pl.'s Post-Trial Mem. 2.) Consequently, in order to resolve some of the outstanding fire code violations cited in the Fire Marshal's Report, Defendant claims to have engaged qualified professional consultants to design, manage, and implement a remediation project in order to bring the Property into compliance and to ensure the safety and well-being of Defendant's employees.[3] (Def.'s Post-Trial Mem. 1.) This resulted in Defendant allegedly incurring "more than $2,832,700 to address the undisclosed violations." (Def.'s Post-Trial Mem. 1-2; Pl.'s Post-Trial Mem. 2.)

[2] In fact, Russo testified that he did not even read the Fire Marshal's Report at any time prior to entering into the transaction with Defendant or prior to the commencement of this suit. (Hr'g Tr. 63:3-6, 63:24-64:2, May 2, 2022.)

[3] Notably, Defendant is only seeking indemnification for the following Fire Code Violations: Violation Number 6: Automatic sprinkler protection in the hard and soft wall clean rooms; Violation Number 8: Storage of sodium azide above the maximum allowable quantity; Violation Number 9: Shelving construction not designed to carry the loads of the chemicals being stored at the Property; Violation Number 11: Perchloric acid hoods and exhaust ductwork showed signs of corrosion throughout; Violation Number 12: Ventilation concerns throughout the laboratory at the Property; Violation Number 13: Installation of four doors between the office area and laboratory area that are ¾ hour rated and must swing in the direction of egress; Violation Number 14: Storage of flammable and combustible liquids above the maximum allowable quantities are not stored in flammable liquid cabinets or inside liquid storage areas; and Violation Number 15: A one hour fire rated separation between the laboratory area and the business area. *See* Pl.'s Ex. 13, at 5-14; Hr'g Tr. 165:7-16, 165:21-166:1, May 2, 2022; Pl.'s Post-Trial Mem. 2-3. With respect to Violation Number 8, however, it is clear that Ultra resolved this violation, thereby preventing Defendant from having to incur expenses to remediate this violation. *See* Pl.'s Ex. 29, at 2 (specifying that Violation Number 8 "has been corrected"); Hr'g Tr. 412:5-413:16, May 4, 2022; Pl.'s Ex. 11 (July 12, 2018 updated matrix noting that there were only twelve kilograms of sodium azide on site but that review was ongoing for other chemicals). Moreover, as for Violation Number 9, Cari Goodrich (Goodrich), who is employed by Defendant as its Environmental Health and Safety Manager, testified that Defendant is not seeking indemnity for this particular violation. (Hr'g Tr. 173:4-12, May 2, 2022; 492:16-18, May 5, 2022.) Consequently, the outstanding fire code violations for which Defendant may seek indemnification for are Violations 6, 11, 12, 13, 14, and 15.

As a consequence of the foregoing, on January 15, 2020, one day before the escrow amount was to be released to Plaintiff as the seller, Defendant served notice of a claim on the escrow agent seeking $2,832,700 in direct costs and expenses allegedly incurred to resolve the outstanding fire code violations.[4] (Pl.'s Post-Trial Mem. 1; Def.'s Exs. LL, MM.) Defendant based its indemnification claim on alleged breaches of certain representations and warranties in the APA arising from the Fire Marshal's Report, including, but not limited to, § 4.11 of the APA, the environmental matters representation. (Pl.'s Post-Trial Mem. 1; Def.'s Exs. LL, MM.) In response, Plaintiff disputed Defendant's indemnification claim in accordance with § 10.3 of the APA, and on or about January 27, 2020, Plaintiff notified Defendant that Plaintiff was disputing Defendant's indemnification claim and sought supporting documentation from Defendant of its indemnification claim. (Def.'s Exs. NN, OO.)

The parties eventually reached an impasse with respect to Defendant's indemnification claim, and Plaintiff subsequently filed suit against Defendant on February 17, 2020. *See* Pl.'s Compl. (Feb. 17, 2020).[5] After approximately two and a half years of litigation, on May 2, 2022

[4] At trial, Defendant also raised concerns relating to potential Occupational Health and Safety Administration (OSHA) issues at the Property. (Hr'g Tr. 497:4-498:4, May 5, 2022.) However, any potential OSHA violations were not included as part of Defendant's claim for indemnification. *See* Def.'s Ex. LL; Hr'g Tr. 497:12-17, May 5, 2022. Consequently, the Court will not consider potential OSHA violations herein.

[5] On January 10, 2022, Plaintiff filed a First Amended Complaint asserting three claims: Count I (Declaratory Judgment); Count II (Breach of Contract); and Count III (Breach of Implied Covenants of Good Faith and Fair Dealing). *See* Pl.'s First Am. Compl. 6-10. Defendant thereafter filed a Motion to Dismiss the counts contained in Plaintiff's First Amended Complaint, which the Court granted in part through a written Decision on April 11, 2022. *See* Def.'s Mot. to Dismiss (Mar. 7, 2022); *see also* Decision (Stern, J.) 11 (Apr. 11, 2022). Specifically, the Court granted Defendant's Motion to Dismiss as to Counts II and III of Plaintiff's First Amended Complaint but declined to address Count I in light of the upcoming trial. (Decision (Stern, J.) 5 n.5, 11 (Apr. 11, 2022).) Thus, as mentioned above, the only outstanding claims that exist between the parties are competing claims for declaratory judgment related to whether Defendant is entitled to indemnity pursuant to the APA as claimed. *See* Pl.'s First Am. Compl. 6-8; Def.'s Answer and Countercl. 11.

through May 6, 2022, this Court conducted a bench trial on both Plaintiff and Defendant's respective claims for declaratory judgment concerning whether Defendant is entitled to indemnity pursuant to the APA as claimed. *See* Docket (PC-2020-01539). During this trial, both parties presented and examined witnesses and evidence, and were permitted to submit post-trial closing briefs. This Court's decision follows.[6]

II

Standard of Review

Rule 52(a) of the Superior Court Rules of Civil Procedure provides that "[i]n all actions tried upon the facts without a jury . . . the court shall find the facts specially and state separately its conclusions of law thereon[.]" Super. R. Civ. P. 52(a). In a non-jury trial, '"[t]he trial justice sits as a trier of fact as well as of law.'" *Parella v. Montalbano*, 899 A.2d 1226, 1239 (R.I. 2006) (quoting *Hood v. Hawkins*, 478 A.2d 181, 184 (R.I. 1984)). This means that the trial justice "weighs and considers the evidence, passes upon the credibility of the witnesses, and draws proper inferences." *Id.* (internal quotations omitted).

"When a case is tried without a jury, 'the task of determining credibility of witnesses is peculiarly the function of the trial justice[.]'" *Jotorok Group, Inc. v. Computer Enterprises, Inc.*, No. PC01-3237, 2005 WL 2981658, at *4 (R.I. Super. Nov. 4, 2005) (quoting *State v. Sparks*, 667 A.2d 1250, 1251 (R.I. 1995) (further citation omitted)). The factual determinations and credibility assessments of a trial justice traditionally are accorded a great deference because it is "the judicial officer who . . . actually observe[s] the human drama that is part and parcel of every trial and who

[6] The Court would like to note, for sake of completeness, that Defendant Ultress Realty, LLC was dismissed from this action during the trial pursuant to Rule 52 of the Superior Court Rules of Civil Procedure with no objection from Plaintiff. (Hr'g Tr. 762:3-20, May 6, 2022) (Plaintiff's counsel stating that Plaintiff does not "have any affirmative claims against Ultress," and the Court granting Defendant Ultress Realty, LLC's Motion for Judgment pursuant to Rule 52).

has had an opportunity to appraise witness demeanor and to take into account other realities that cannot be grasped from a reading of a cold record." *In re Dissolution of Anderson, Zangari & Bossian*, 888 A.2d 973, 975 (R.I. 2006).

Our Supreme Court has recognized that a trial justice's analysis of the evidence and findings in the bench trial setting "'need not be exhaustive,"' stating that, '"if the decision reasonably indicates that [the trial justice] exercised [his or her] independent judgment in passing on the weight of the testimony and the credibility of the witnesses[,] it will not be disturbed on appeal unless it is clearly wrong or otherwise incorrect as a matter of law.'" *Notarantonio v. Notarantonio*, 941 A.2d 138, 144-45 (R.I. 2008) (quoting *McBurney v. Roszkowski*, 875 A.2d 428, 436 (R.I. 2005)). '"Even brief findings and conclusions are sufficient if they address and resolve the controlling and essential factual issues in the case.'" *Hilley v. Lawrence*, 972 A.2d 643, 651 (R.I. 2009) (quoting *Donnelly v. Cowsill*, 716 A.2d 742, 747 (R.I. 1998) (internal citation omitted)).

III

Analysis

As mentioned above, before this Court are competing claims for declaratory judgment with respect to whether Defendant is entitled to indemnity pursuant to the APA as claimed. A declaratory judgment '"is neither an action at law nor a suit in equity but a novel statutory proceeding . . . ."' *Northern Trust Co. v. Zoning Board of Review of Town of Westerly*, 899 A.2d 517, 520 n.6 (R.I. 2006) (quoting *Newport Amusement Co. v. Maher*, 92 R.I. 51, 53, 166 A.2d 216, 217 (1960)). Our Supreme Court has recognized that the Rhode Island Uniform Declaratory Judgments Act vests the Superior Court with the '"power to declare rights, status, and other legal relations'" whether or not further relief is or could be claimed. *Malachowski v. State of Rhode*

Island, 877 A.2d 649 (R.I. 2005) (quoting G.L. 1956 § 9-30-1). "This power is broadly construed, to allow the trial justice to 'facilitate the termination of controversies.'" *Bradford Associates v. Rhode Island Division of Purchases*, 772 A.2d 485, 489 (R.I. 2001) (quoting *Capital Properties, Inc. v. State of Rhode Island*, 749 A.2d 1069, 1080 (R.I. 1999)).

"The decision to grant or to deny declaratory relief under the Uniform Declaratory Judgments Act is purely discretionary." *Sullivan v. Chafee*, 703 A.2d 748, 751 (R.I. 1997) (citing *Woonsocket Teachers' Guild Local Union 951, AFT v. Woonsocket School Committee*, 694 A.2d 727, 729 (R.I. 1997)). '"A decision to grant or deny declaratory . . . relief is addressed to the sound discretion of the trial justice and will not be disturbed on appeal unless the record demonstrates a clear abuse of discretion or the trial justice committed an error of law."' *Imperial Casualty and Indemnity Co. v. Bellini*, 888 A.2d 957, 961 (R.I. 2005) (quoting *Hagenberg v. Avedisian*, 879 A.2d 436, 441 (R.I. 2005)). "It is the function of the trial justice to undertake fact-finding and then decide whether declaratory relief is appropriate." *Town of East Greenwich, Rhode Island v. East Greenwich Fire Fighters Association Local 3328, I.A.F.F., AFL-CIO*, No. KC-2017-1276, 2018 WL 4167335, at *3 (R.I. Super. Aug. 23, 2018) (citing *Providence Lodge No. 3, Fraternal Order of Police v. Providence External Review Authority*, 951 A.2d 497, 502 (R.I. 2008)). The Court may refuse to enter a declaratory judgment decree "where the judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding." Section 9-30-6.

A careful review of the parties' competing claims for declaratory judgment reveals that the dispute presently before the Court sounds essentially in contract. That is, while styled as a claim for declaratory judgment, Defendant's counterclaim for declaratory judgment is based on Plaintiff's alleged failure to disclose to Defendant "the existence and content of the State

Fire Marshal Inspection Report" prior to the execution of the APA on May 25, 2018, as well as prior to the APA's closing on July 18, 2018, which Defendant alleges constitute "breaches of the express warranties under the APA[.]" *See* Def.'s Answer and Countercl. 11-12; *see also* 23 Williston on Contracts § 63:1 (4th ed.) ("[a]s a contract consists of a binding promise or set of promises, a breach of contract is a failure, without legal excuse, to perform any promise that forms that whole or part of a contract").

It is axiomatic that in a claim for breach of contract, the plaintiff must prove both the existence and breach of a contract, and that the defendant's breach caused the plaintiff to suffer damages. *Fogarty v. Palumbo*, 163 A.3d 526, 541 (R.I. 2017) (citing *Petrarca v. Fidelity and Casualty Insurance Co.*, 884 A.2d 406, 410 (R.I. 2005)). "The underlying rationale in breach-of-contract actions is to place the innocent party in the position in which he would have been if the contract had been fully performed." *National Chain Co. v. Campbell*, 487 A.2d 132, 135 (R.I. 1985) (citing *George v. George F. Berkander, Inc.*, 92 R.I. 426, 430, 169 A.2d 370, 372 (1961)). '"It is well settled that a court may award damages for breach of contract to place the injured party in as good a position as if the parties fully performed the contract."' *Management Capital, L.L.C., v. F.A.F., Inc.*, 209 A.3d 1162, 1179 (R.I. 2019) (quoting *Sophie F. Bronowiski Mulligan Irrevocable Trust v. Bridges*, 44 A.3d 116, 120 (R.I. 2012); *see also Riley v. St. Germain*, 723 A.2d 1120, 1122 (R.I. 1999).

Notably, the amount of damages sustained from a breach of contract must be proven with a '"reasonable degree of certainty . . . ."' *Management Capital, L.L.C.*, 209 A.3d at 1179 (quoting *Marketing Design Source, Inc. v. Pranda North America, Inc.*, 799 A.2d 267, 273 (R.I. 2002) (further citations omitted). "A party 'will not be denied recovery merely because the damages are difficult to ascertain' but the party must 'prove damages with reasonable certainty."' *Id*. (quoting

Bridges, 44 A.3d at 120); *see also Sea Fare's American Café, Inc. v. Brick Market Place Associates*, 787 A.2d 472, 478 (R.I. 2001). Moreover, in addition to proving the amount of damages sustained with a reasonable degree of certainty, the plaintiff must also '"establish reasonably precise figures and cannot rely upon speculation."' *Bridges*, 44 A.3d at 120 (quoting *Sea Fare's American Café, Inc.*, 787 A.2d at 478; *see also National Chain Co.*, 487 A.2d at 134). '"The existence of damages, including their certainty, is a question for the factfinder to decide."' *Management Capital, L.L.C.*, 209 A.3d at 1179 (quoting *Fogarty*, 163 A.3d at 537).

A

The Existence of a Contract and Breach Thereof

Turning first to whether there was a contract and a breach of said contract; here, there is absolutely no question that there existed a valid and enforceable agreement between the parties: the APA. *See* Pl.'s Ex. 1; Def.'s Ex. 2. Similarly, there is also no question that there were breaches of certain representations and warranties contained in the APA on the part of Ultra as the seller.[7] Quite simply, Russo received the Fire Marshal's Report, which constituted an "Environmental Notice" under § 4.11(a) of the APA, on May 24, 2018, one day before the parties entered into the APA, but admittedly failed to provide a copy of said report to Defendant during due diligence or otherwise disclose the existence or contents of same to Defendant. *See* Pl.'s Ex. 13; Hr'g Tr. 62:20-63:6, 63:24-64:2, May 2, 2022 (Russo admitting that he did not provide a copy of the Fire Marshal's Report as part of the due diligence process), *id*. at 66:19-21, 71:4-9

[7] Interestingly, Plaintiff did not dispute whether Ultra breached certain representations and warranties contained in the APA at trial or in Plaintiff's closing brief. In fact, Plaintiff's closing argument focused on, among other things, whether Defendant's alleged damages were incurred and/or caused by the alleged breaches of certain representations and warranties, as well as whether Defendant waived its right to pursue a claim resulting from the alleged breaches of certain representations and warranties. *See* Pl.'s Post-Trial Mem. 4-29.

(Russo admitting that as a result of the Fire Marshal's Report, Ultra was in violation of the law). As Defendant correctly notes, this course of conduct on the part of Ultra, and particularly Russo, breached several provisions contained in the APA. *See* Def.'s Post-Trial Mem. 13-14. For example, the very existence of the Fire Marshal's Report itself violated § 4.11(a) of the APA, located in the "Representations and Warranties of the Seller" section, which expressly provides that

> "Seller and each Seller Subsidiary *is currently and has been in compliance with all Environmental and Safety Laws* and has not received from any Person any: (i) *written directive, notice of violation or infraction, or notice respecting any Environmental Claim* . . . or (ii) written request for information pursuant to any Environmental and Safety Law, which, in each case, either remains pending or unresolved, or is the source of ongoing obligations or requirements as of the Closing Date." (Pl.'s Ex. 1, at 25) (emphasis added).

The existence of the Fire Marshal's Report also violated § 4.8(a) of the APA, entitled "Compliance with Laws; Governmental Permits[,]" which provides that Ultra has complied in "all material respects with, is not in material violation of, and *has not received any notices of violation which remain pending or unresolved with respect to, any Legal Requirement with respect to the conduct of the Business, or the ownership or operation of the Business or the Purchased Assets*." *Id*. at 15 (emphasis added).

Additionally, as if the very existence of the Fire Marshal's Report was not enough to constitute a breach of certain representations and warranties contained in the APA, Russo's admitted and uncontroverted failure to disclose the existence of the Fire Marshal's Report and its contents was also a breach of certain representations and warranties. For example, § 4.11(h) expressly represents that Ultra has "provided or otherwise made available" to Defendant and listed on Schedule 4.11(h) "any and all environmental reports, studies, audits, records, sampling

data, site assessments, risk assessments, economic models and other similar documents with respect to the Business or Purchased Assets . . .. *related to compliance with Environmental and Safety Laws, Environmental Claims or an Environmental Notice* . . ." *Id*. at 26 (emphasis added). Similarly, § 4.8(b) of the APA provides that "[e]xcept as set forth in Disclosure Schedule 4.8(b), the conduct of the Business has complied in all material respects with and is not in material violation of any Legal Requirements applicable thereto." *Id*. at 15. It is undisputed that Ultra did not disclose the violation information contained in the Fire Marshal's Report on Schedule 4.11(h) nor Schedule 4.8(b). *See* Hr'g Tr. 62:20-63:6, 63:24-64:2, 66:19-21, 71:4-9, May 2, 2022. Therefore, Ultra's, and particularly Russo's, failure to disclose the existence and contents of the Fire Marshal's Report unquestionably constituted breaches of multiple representations and warranties.[8]

As noted above, rather than challenging whether Ultra in fact breached certain representations and warranties contained in the APA, Plaintiff set forth arguments attempting to effectively divest Defendant of its right to submit a claim for indemnification notwithstanding Ultra's various breaches of the APA. *See* Pl.'s Post-Trial Mem. 4-29. Specifically, Plaintiff first argues that Defendant's alleged damages were not incurred with respect to or caused by Ultra's breaches of certain representations and warranties because Defendant "contemplated incurring substantial cost[s] in addressing environmental, health and safety . . . issues as part of the acquisition." *Id*. at 4. In this regard, Plaintiff contends that Defendant incurred its alleged damages not as a result of Ultra's breach, but as a result of Defendant's own business decision to "absorb

[8] Defendant also noted in its closing brief other sections of the APA that Defendant alleges Ultra breached. *See* Def.'s Post-Trial Mem. 13-14. However, because Plaintiff has not expressly disputed breach of the above-mentioned sections of the APA, the Court need not address each section of the APA that Ultra may have violated.

the cost of upgrading the [Property] to meet the so-called 'Agilent standards[.]'" *Id*. Put simply, Plaintiff argues that even if the Property was in full compliance with the Rhode Island Fire Code as of the date the APA was entered into and as of the date the APA closed, Defendant "still planned to replace and upgrade" the Property to meet "Agilent standards" and to "accommodate what [Defendant] hoped would be a substantially expanded manufacturing program." *Id*. at 4-5.

In a similar vein, Plaintiff argues secondly that, as a result of the above-referenced "business decision" to address certain environmental, health, and safety issues post-closing, Defendant effectively "waived" its right to submit a claim for indemnification, or, alternatively, is "estopped" from pursuing indemnity resulting from any alleged breaches of representations and warranties. *Id*. at 5, 25. With respect to waiver, Plaintiff largely relies on New York and Second Circuit case law, which appears to support the principle that a purchaser can be subject to a waiver of rights (referred to as a "Galli Waiver") when the purchaser closes on a contract with full knowledge and acceptance of facts disclosed by the seller which would constitute a breach of warranty under the terms of the contract. *Id*. at 23-25 (citing *CBS, Inc. v. Ziff-Davis Publishing Co.*, 553 N.E.2d 997 (N.Y. 1990); *Galli v. Metz*, 973 F.2d 145 (2d Cir. 1992)). In essence, Plaintiff argues that Ultra "disclosed facts that would . . . constitute a breach of warranty under the terms of the APA" and that Defendant closed on the APA "with full knowledge thereof[,]" consequently causing Defendant to "waive" its right to seek indemnification. *Id*. at 25. Alternatively, Plaintiff contends that it relied on Defendant's alleged disclosure that it would be undertaking a "major facility upgrade" post-closing, which caused Ultra to presumably fail to act. *Id*. at 26. Based on this, Plaintiff argues that Defendant should be "equitably estopped" from pursuing indemnity arising from alleged breaches of certain representations and warranties contained in the APA. *Id*. at 25.

Plaintiff's causation and waiver/estoppel arguments, however, suffer from numerous fatal flaws. First, Plaintiff's causation argument plainly ignores the fact that Ultra violated numerous provisions contained in the APA concerning seller representations and warranties, as discussed above. Irrespective of whether Defendant planned to replace and upgrade certain aspects of the Property to meet "Agilent standards" post-closing, this does not change the fact that the very existence of the Fire Marshal's Report, as well as Russo's failure to disclose the existence of same, constituted breaches of the APA on the part of Ultra, which caused Defendant to incur expenses to remediate. Significantly, Defendant no longer had an *option* as to whether to repair and upgrade certain aspects of the Property in light of the Fire Marshal's Report and corresponding fire code violations. Rather, as a consequence of the Fire Marshal's Report and Ultra's failure to disclose same to Defendant prior to the closing of the APA, Defendant was now *required* to address the outstanding fire code violations, which resulted in Defendant incurring expenses related thereto. While the precise amount of damages incurred by Defendant as a result of Ultra's breach of the APA is an entirely different question (one which will be discussed below), any purported "business decision" by Defendant to make certain repairs and upgrades to the Property post-closing does not affect Defendant's ability to assert a claim for indemnification in this case because, but-for Ultra's breach, Defendant would not have been necessarily *required* to incur certain expenses to address the undisclosed fire code violations.

Second, Plaintiff's waiver/estoppel argument completely fails when considering the established and undisputed fact that, as mentioned above, Ultra, and particularly Russo, did not provide Defendant with a copy of the Fire Marshal's Report prior to the closing of the APA. *See* Pl.'s Ex. 13; Hr'g Tr. 62:20-63:6, 63:24-64:2, May 2, 2022 (Russo admitting that he did not provide a copy of the Fire Marshal's Report as part of the due diligence process), *id*. at 66:19-21,

71:4-9 (Russo admitting that as a result of the Fire Marshal's Report, Ultra was in violation of the law). While Plaintiff suggests that Defendant was made aware of possible environmental, health, and safety issues on the Property prior to closing, evidence put forth during the trial made clear that the Defendant was not aware of the existence of the Fire Marshal's Report and the corresponding fire code violations until August 7, 2018, approximately three weeks following the closing. *See* Def.'s Ex. F (e-mail forwarding the Fire Marshal's Report to Defendant dated August 7, 2018); Hr'g Tr. 154:11-24, 155:13-14, May 2, 2022 (Goodrich testifying that Defendant "didn't know about the fire marshal report before the closing"), *id*. at 277:24-278:6, May 3, 2022 (testimony that Defendant was provided the Fire Marshal's Report for the first time during a site visit of the Property on August 7, 2018), *id*. at 491:7-11, May 5, 2022 (Goodrich testifying that the e-mail marked as Defendant's Exhibit F was Goodrich's first indication that there was a fire marshal report). In fact, as mentioned above, Russo testified that he had not even seen a copy of the Fire Marshal's Report until commencement of this litigation. (Hr'g Tr. 63:3-10, May 2, 2022) (Russo admitting that he did not read the Fire Marshal's Report at any point prior to the transaction with Defendant, as well as responding "[c]orrect" when asked whether it is true that up until the time this lawsuit was filed, Russo had "never seen" the Fire Marshal's Report). Therefore, Ultra unequivocally failed to make *full* disclosure of facts which would constitute a breach of warranty under the terms of the APA (i.e., the existence of the Fire Marshal's Report and corresponding violations), and, thus, Plaintiff's argument that Defendant "waived" and/or is "estopped" from pursuing indemnity fails.[9]

[9] In addition to the reasons discussed above, the Court also rejects Plaintiff's estoppel argument because regardless of whether Ultra "relied" on Defendant's purported representations to upgrade the Property post-closing, Ultra's affirmative obligations under the APA remained the same: Ultra was required to disclose certain things pursuant to representations and warranties contained in the APA but failed to do so. *See* Def.'s Ex. B, at 15, 25-26. Put another way, Defendant's apparent

Even assuming, *arguendo*, that Defendant was made fully aware of all facts which would constitute a breach of warranty under the APA (which would essentially require one to ignore Russo's testimony noted above and assume that Ultra disclosed the existence of the Fire Marshal's Report prior to the APA's closing), § 10.7 of the APA provides

> "10.7 Investigation: The representations, warranties, covenants and obligations of Seller and the Individual Indemnifiers and the rights and remedies that may be exercised by Purchaser and any Indemnified Party *shall not be limited or otherwise affected by or as a result of any information furnished to, or any investigation made by or any knowledge of, Purchaser*, any Indemnified Party or their respective affiliates or representatives." (Pl.'s Ex. 1, at 47) (emphasis added).

Put simply, § 10.7 provides that Defendant's actual knowledge of any information does not limit or otherwise affect Defendant's rights afforded to it pursuant to the APA. *See id*. Effectively, even if this Court were to ignore the testimony elicited from Russo and the undisputed evidence establishing that Defendant was not made aware of the Fire Marshal's Report until August 7, 2018, the APA—by its very terms—preserves Defendant's rights, including the right to seek indemnification for breaches of representations and warranties by Ultra, regardless of any information furnished to Defendant. *See id*. Indeed, this conclusion is consistent with the case law cited by Plaintiff in support of its argument that Defendant waived any right to claim indemnity. *See* Pl.'s Post-Trial Mem. 24 (citing *Galli*, 973 F.2d at 150) (Second Circuit explaining that where a buyer "closes on a contract in the full knowledge and acceptance of facts disclosed by the seller which would constitute a breach of warranty . . . the buyer should

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plan to upgrade the Property post-closing did not relieve Ultra of its obligation to fully disclose all facts constituting a breach of warranty under the APA. Consequently, Defendant did nothing which would reasonably cause Ultra to believe that Ultra did not have to disclose the existence of the Fire Marshal's Report or the enumerated violations, and thus, the Court rejects Plaintiff's estoppel argument.

be foreclosed from later asserting the breach . . . *unless the buyer expressly preserves his rights under the warranties*") (emphasis added).

Therefore, based on the foregoing reasons, Plaintiff's waiver/estoppel argument fails in light of the fact that Plaintiff did not make Defendant fully aware of all the facts which would constitute a breach of warranty, as well as because of Defendant's express preservation of rights under the APA. *See* Pl.'s Ex. 1, at 47.

B

Damages Resulting from Breach of Contract

After having determined that there existed a valid and enforceable contract between the parties, as well as Plaintiff's breach of certain representations and warranties contained therein, the Court will now turn its attention to the question of damages resulting from the breach. As mentioned above, '"a court may award damages for breach of contract to place the injured party in as good a position as if the parties fully performed the contract."' *Management Capital, L.L.C.*, 209 A.3d at 1179 (quoting *Bridges*, 44 A.3d at 120); *see also Riley*, 723 A.2d at 1122. However, the amount of damages sustained from a breach of contract must be proven with a '"reasonable degree of certainty . . . ."' *Management Capital, L.L.C.*, 209 A.3d at 1179 (quoting *Marketing Design Source, Inc.*, 799 A.2d at 273 (further citations omitted). "A party 'will not be denied recovery merely because the damages are difficult to ascertain' but the party must 'prove damages with reasonable certainty."' *Id*. (quoting *Bridges*, 44 A.3d at 120); *see also Sea Fare's American Café, Inc.*, 787 A.2d at 478. The plaintiff must also '"establish reasonably precise figures and cannot rely upon speculation."' *Bridges*, 44 A.3d at 120 (quoting *Sea Fare's American Café, Inc.*, 787 A.2d at 478; *see also National Chain Co.*, 487 A.2d at 134). "The burden of proof therefore

is on plaintiff to prove, by competent evidence, the amount of damages that it suffered because of defendant's failure to perform." *National Chain Co.*, 487 A.2d at 135 (further citations omitted).

Applying these damages principles to the matter at hand, § 10.1 of the APA provides that Plaintiff shall indemnify, defend and hold harmless Defendant "from and against all Liabilities, losses, judgments, actions, damages, fines, awards, penalties, charges, assessments, costs and expenses of whatever kind . . . (collectively, 'Losses') imposed upon or incurred by [Purchaser] with respect to (i) any breach of any representation or warranty of Seller . . . ."[10] (Pl.'s Ex. 1, at 45.) As mentioned above, § 10.3, entitled "Escrow," provides that

> "In the event an Indemnified Party wishes to assert a claim for indemnification under this ARTICLE X, Purchaser shall deliver to Seller a Claim Notice, containing a reasonably specific description of the basis and amount of the Losses incurred by the Indemnified Party, with a copy to the Escrow Agent if there is still any portion of the Escrow Amount in the Escrow Account." *Id*. at 46.

In turn, a "Claim Notice" is defined in the APA, § 3.3(e)(i), which provides that "[a]t any time, or from time to time, before the Release Date," Purchaser (here, Defendant) may deliver a "written notice of claim to Seller and the Escrow Agent providing the information required under Section 10.3 of this Agreement and requesting a disbursement of the amount of the claim from the Escrow Account (each, a 'Claim Notice')." *Id*. at 7, App. A (setting forth defined terms and providing that Claim Notice was defined in § 3.3(e)(i)). Consequently, in accordance with these provisions contained in the APA, the amount of damages Defendant may seek indemnity for are limited to those expenses or "Losses" contained in Defendant's Claim Notice, which, in this case,

[10] The APA also provides for certain limitations on Plaintiff's obligation to indemnify Defendant for Losses. *See* Pl.'s Ex. 1, at 45. One limitation is that "Seller shall not be obligated to indemnify [Defendant] under this Agreement unless and until the aggregate Losses subject to such indemnification collectively exceed Ten Thousand Dollars ($10,000.00)[.]" *Id*. Based on a review of Defendant's Claim Notice, Defendant's alleged Losses clearly exceed this $10,000 threshold as Defendant is claiming approximately $2,832,700 in alleged Losses. *See* Def.'s Ex. LL.

include only expenses allegedly incurred as a direct result of satisfying the fire code violations enumerated in the Fire Marshal's Report.[11] *See, e.g.*, *Marketing Design Source, Inc.*, 799 A.2d at 273-74 (Supreme Court explaining that once the plaintiff proved breach of contract on the part of the defendant, the plaintiff was entitled to be "made whole" and was entitled to the amount it would have received had the defendant fully performed the contract) (internal quotations omitted). In order to properly recover these expenses, however, Defendant must prove—with a reasonable degree of certainty and by competent evidence—that the amounts incurred were in fact a direct result of satisfying the fire code violations, which effectively requires Defendant to establish that the remedial actions taken were necessary to resolve the fire code violations and did not go above and beyond addressing same. *See National Chain Co.*, 487 A.2d at 134-35.

Unsurprisingly, one of the more highly contested issues during trial involved whether the amounts allegedly spent by Defendant to cure the fire code violations were in fact limited solely to satisfying the outstanding violations, or whether the amounts allegedly spent by Defendant included amounts spent on upgrading the Property as well. This particular issue became apparent during trial when it was made clear that Defendant was not only reasonably aware of potential environmental, health, and safety issues prior to the closing of the APA, but that Defendant contemplated incurring expenses related to upgrading certain aspects of the Property prior to learning about the existence of the Fire Marshal's Report. *See* Pl.'s Ex. 8 (Defendant's "Urals Rhode Island Facility Upgrade Project"); Hr'g Tr. 110:25-111:1, May 2, 2022 (Goodrich confirming that another Defendant employee, Mitch Hastings (Hastings), believed that there were potential environmental, health, and safety issues with the Property), *id*. at 130:18-131:5

[11] The Court notes that Defendant's Claim Notice did not include any claim for attorney's fees or expenses incurred due to possible OSHA violations as mentioned previously, and, thus, the Court need not address whether Defendant is entitled to damages related thereto. *See* Def.'s Ex. LL.

(Goodrich testifying that she had discussions in July 2018 about what Defendant believed would be necessary to bring the Property up to "Agilent Standards" and that Defendant decided to incur costs and expenses related to upgrading the ventilation infrastructure at the Property regardless of the Fire Marshal's Report), *id*. at 327:24-328:2, May 3, 2022, 540:8-15, May 5, 2022. This caused both parties to focus largely on what Defendant did to satisfy the fire code violations and, more specifically, whether those remedial actions taken by Defendant went above and beyond what was necessary to resolve the outstanding violations. As mentioned above, however, Defendant bears the burden in the instant matter to prove its damages with reasonable certainty and with competent evidence. Consequently, the Court will focus primarily on what evidence Defendant presented at the trial to support its damages claim and, more specifically, whether Defendant demonstrated that the actions taken were in fact necessary to resolve the outstanding violations and did not go above and beyond resolving said violations.[12]

However, before addressing the evidence Defendant presented in support of its damages claim, the Court believes that it would be helpful to provide a general overview of what Defendant did after learning about the existence of the Fire Marshal's Report in August 2018, and specifically what steps Defendant took to begin addressing the violations contained therein. Starting in August 2018, after obtaining the Fire Marshal's Report through an e-mail from another Defendant employee, Goodrich, who again was Defendant's Environmental Health and Safety Manager, scheduled an assessment of the Property. *See* Def.'s Ex. F; *see also* Hr'g Tr. 493:3-15, May 5, 2022. This assessment involved reviewing the outstanding environmental, health, and

[12] To be clear, the question of whether a certain remedial action was necessary to address a violation, while similar, is slightly different from the question of whether that action went above and beyond the scope necessary to address the violation. While this is a very discrete distinction, it is nonetheless important to note in the context of determining Defendant's damages in this matter.

safety issues, meeting with the fire marshal to gather any additional context with respect to the cited violations, and then, if necessary, consulting with professionals or "experts in the field" to determine how Defendant could resolve the outstanding violations. (Hr'g Tr. 493:6-19, May 5, 2022.) Goodrich testified that she visited the Property on August 15 and August 16, 2018, to conduct this assessment, and that she was accompanied by, among others, Project Management Advisors (PMA) on that visit. *Id*. at 493:16-22. Notably, prior to visiting the Property to conduct the assessment, Goodrich received an e-mail from a former Ultra employee, Monica Bourgeois (Bourgeois), wherein Bourgeois asked Goodrich to review quotes that Bourgeois had obtained to potentially resolve three of the fire code violations in order to determine whether "[those] quotes . . . [were] adequate or [whether or not Defendant] would like another quote from a different . . . vendor." *See* Def.'s Ex. G (e-mail from Bourgeois to Goodrich dated August 10, 2018); *see also* Hr'g Tr. 503:7-18, May 5, 2022. Following the site visit, Goodrich testified to meeting with Bourgeois and communicating to her that Defendant "received permission from management" to take "over responsibility" of resolving and/or addressing the outstanding fire code violations. (Hr'g Tr. 505:17-506:1, May 5, 2022.)

As Goodrich explained, once Defendant assumed responsibility for resolving the outstanding fire code violations, Goodrich sought to bring in "experts" to help Defendant determine what the "real issues" were and help "guide" Defendant through the next steps. *Id*. at 509:10-18. For example, Defendant consulted with PMA, a construction management firm, who essentially served as the "quarterback" in connection with resolving the fire code violations. *Id*. at 509:19-510:3. Defendant also consulted with Code Red Consultants, who was utilized as the primary consultants to help Defendant "figure out what to do and to implement[.]" *Id*. at 510:17-22. Finally, Defendant consulted with Clark, Richardson and Biskup Consulting Engineers, Inc.

(CRB), which is an architectural, mechanical, engineering, and plumbing design firm, to help address the violations cited in the Fire Marshal's Report. *Id*. at 510:6-11.

After assembling this group of consultants, Goodrich explained that Defendant's first step was to have CRB take the Fire Marshal's Report and provide Defendant with a "complete review and analysis" of the cited violations, as well as to create a "Basis of Design." *See id*. at 511:3-14; *see also* Def.'s Exs. J, N. Once this review and analysis was completed by CRB, Goodrich and PMA created Exhibit J, which is the Executive Summary Urals Compliance Retrofit. (Def.'s Ex. J; Hr'g Tr. 511:11-14, May 5, 2022.) This document, according to Goodrich, was put together to provide Defendant's leadership with "high-level estimates" of alternative courses of action that CRB, together with PMA, believed Defendant could take with respect to the fire code violations. (Def.'s Ex. J; Hr'g Tr. 512:25-513:3, May 5, 2022.) Thereafter, the next step was for CRB to create a "Basis of Design," which CRB did on January 23, 2019. *See* Def.'s Ex. N. Goodrich explained that her understanding of CRB's Basis of Design was to attempt to provide Defendant with a sort of "general approach" of what the violations are and what "generally" may be done to address the violations. (Hr'g Tr. 515:10-20, May 5, 2022.)

Interestingly, Goodrich testified that she was expected to provide Defendant with "several options" in regard to how to address the outstanding fire code violations. *Id*. at 517:4-6; *see also* Def.'s Ex. K. In accordance with this task, Goodrich prepared Defendant's Exhibit K, which is a PowerPoint presentation intended to provide Defendant's leadership with a number of options for addressing the fire code violations. *See* Def.'s Ex. K. Goodrich also prepared Defendant's Exhibit JJJ, which depicts three potential options for Defendant to take with respect to addressing the fire code violations. *See* Def.'s Ex. JJJ. As shown in Defendant's Exhibit JJJ, among the options presented by Goodrich to Defendant was an option entitled, "Minimum Viable Compliance for

Exit," which estimated the total cost to remedy the outstanding fire code violations to be approximately $2.7 million. *Id*.; *see also* Hr'g Tr. 517:24-518:1, May 5, 2022 (Goodrich explaining that "minimum viable" refers to the "least amount of work" needed to close out or complete the Fire Marshal's Report). According to Goodrich, Defendant's leadership instructed Goodrich to pursue this "Minimum Viable Compliance for Exit" option, and, thereafter, Goodrich worked with PMA to figure out how to implement this selected plan.[13] *See* Hr'g Tr. 519:4-22, May 5, 2022.

With this brief summary of Defendant's process in mind, the Court will now turn to the evidence presented by Defendant in support of its damages claim, as well as certain evidence presented by Plaintiff. Interestingly, Defendant relied principally on two witnesses in attempting to establish that the remedial actions taken by Defendant were necessary to satisfy the fire code violations enumerated in the Fire Marshal's Report. The first witness was Goodrich, who, again, serves as Defendant's Environmental, Health, and Safety Manager and who is generally charged with taking the lead on analyzing, addressing, and remediating environmental, health, and safety issues at newly acquired facilities. *Id*. at 100:8-19, May 2, 2022. After being asked about certain costs enumerated in Defendant's Claim Notice and the remedial steps taken by Defendant as reflected therein, Goodrich testified that the work performed was "specifically necessary" to address certain violations contained in the Fire Marshal's Report. *Id*. at 527:24-528:2, May 5, 2022. In fact, Goodrich was specifically asked whether "all this work was necessary to address the violations[,]" to which Goodrich responded, "[y]es." *Id*. at 532:14-16.

[13] The Court would like to note that the term "for Exit" was never defined by Defendant. However, the Court presumes that "for Exit" meant the option which would both satisfy the fire code violations and allow Defendant to operate its business at the Property at a baseline, with the ultimate intention of leaving the Property after a period of time.

The Court, however, takes issue with Goodrich's testimony. Initially, this is because Goodrich testified in her capacity as a *fact* witness pursuant to Rule 701 of the Rhode Island Rules of Evidence. Rule 701 of the Rhode Island Rules of Evidence provides that if the witness is "not testifying as an expert, the witness' testimony in the form of opinions is limited to those opinions which are (A) rationally based on the perception of the witness and (B) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." R.I. R. Evid. 701. Put simply, Goodrich's testimony that the remedial actions taken by Defendant were necessary to satisfy the fire code violations was not based on any expertise on fire code violations and was, frankly, Goodrich's lay opinion based on her perception of events. While Goodrich may certainly have knowledge concerning environmental, health, and safety issues, Goodrich was not qualified as an expert at trial and is not an expert on fire code violations nor how to resolve said violations. Further, Goodrich provided her lay opinion essentially in a vacuum after merely walking through the items enumerated in Defendant's Claim Notice. Thus, without a proper foundation to support Goodrich's lay opinion that the actions taken by Defendant were indeed necessary to satisfy the fire code violations and did not go above and beyond resolving said violations, Goodrich's testimony falls short of constituting competent evidence upon which the Court may rely in determining whether the expenses incurred by Defendant were a direct result of satisfying the fire code violations.

Moreover, in this Court's opinion, Goodrich was somewhat evasive, and at times inconsistent, testifying in this matter, particularly during examination by Plaintiff's counsel. For example, Plaintiff's Exhibit 41 is a copy of a sworn affidavit submitted by Goodrich, wherein Goodrich stated that "[a]s part of the potential transaction, the Agilent acquisition manager starts putting together an analysis of what the costs might end up being to integrate the target company

into Agilent's business. *These are the costs independent of the purchase price*." (Pl.'s Ex. 41, ¶ 11) (emphasis added). However, when asked about this statement by Plaintiff's counsel at trial and specifically whether the costs to upgrade the Property were independent of the purchase price, Goodrich testified that she had no personal knowledge on this subject "[o]ther than perhaps it being told to [her]." (Hr'g Tr. 122:15-123:3, May 2, 2022.) Another example is when Goodrich was questioned by Plaintiff's counsel as to whether Goodrich confirmed Hastings' budget estimates to upgrade the Property. Despite Goodrich verifying Defendant's Interrogatory Responses wherein Goodrich represented that Hastings "confirm[ed] his estimates" with her, Goodrich later attempted to deny confirming such estimates. *See* Pl.'s Ex. 43 (Defendant's Supplemental Response to Plaintiff's Interrogatory Number 8); *see also* Hr'g Tr. 109:4-12 (Goodrich testifying that she did not think that she "confirmed [Hasting's] numbers"), *id*. at 110:11-111:3 (Goodrich testifying that she did not "recall discussing actual numbers" but recalls "help[ing Hastings] confirm what he was doing"). Therefore, in light of these inconsistencies, as well as the somewhat evasive nature of Goodrich's testimony at trial in answering questions posed by Plaintiff's counsel, the Court will give little weight to Goodrich's testimony in determining the issue of damages. *See Donnelly v. Grey Goose Lines, Inc.*, 667 A.2d 792, 794-95 (R.I. 1995) ("it is the function of the trial court and not of the appellate court to assess the credibility of witnesses" and, as a result, "[a] trial justice's findings on the issue of credibility . . . are entitled to great deference on appeal") (citing *Raheb v. Lemenski*, 115 R.I. 576, 579, 350 A.2d 397, 399 (1976)).

Defendant's second witness was Kenneth Richter (Richter), who is the western regional representative for PMA and who was qualified by the Court as an expert in project management. (Hr'g Tr. 624:12-625:2, 637:5-14, May 5, 2022.) To provide some context as to Richter's qualifications, Richter testified that he has a bachelor's degree in construction management and a

master's degree in business administration. *Id*. at 622:22-623:3. Richter explained that he does not have any professional certifications but is a member of a couple professional organizations, including the International Society of Pharmaceutical Engineers and BIOCOM, a California charity organization representing the life science industry. *Id*. at 623:4-12. As for employment history, Richter testified that he worked for a general contractor who primarily did work in areas including health care and airports, and thereafter, worked for Scripps Health, constructing and managing hospitals. *Id*. at 623:13-23. Ultimately, Richter left Scripps Health and started PMA, which, according to Richter, "essentially" manages real estate and designs construction projects throughout the United States. *Id*. at 624:10-22.

Similar to Goodrich, but in more detail, Richter attempted to explain what remedial actions Defendant took with respect to the fire code violations and the general basis for such actions. For example, Richter at one point testified that PMA believed that the "most appropriate solution" for addressing the violations related to maximum allowable quantities was to build an outdoor storage unit "because it would be more cost effective for the amount of chemicals that we could store." *Id*. at 672:2-6, May 6, 2022. After providing a number of opinions of this kind, Richter ultimately testified that based on his experience, education, and knowledge in the field as a project manager, the HVAC work done by Defendant was "reasonably necessary to comply with the fire marshal's violation"; the electrical upgrades undertaken by Defendant were "reasonably necessary to comply" with the Fire Marshal's Report; and the interior storage cabinets, as well as the exterior storage shed, were "reasonably necessary to comply" with the Fire Marshal's Report. *Id*. at 670:1-5, 690:3-691:1. Richter also opined that the amounts incurred by Defendant to perform the above-mentioned work, as well as the fees charged by PMA, were fair and reasonable. *Id*. at 691:8-18.

The Court, however, finds that Richter's testimony is also not competent evidence upon which the Court may rely in determining whether the remedial measures taken by Defendant were in fact necessary to address the fire code violations and did not go above and beyond resolving same. This is because Richter, while qualified as an expert in project management, is, like Goodrich, not an expert on fire code violations nor how to resolve fire code violations. Indeed, none of Richter's qualifications or work experience (outside of some experience working on projects where fire code violations were involved) demonstrate that Richter is a qualified expert in fire code violations. *See* Hr'g Tr. 627:16-20, May 5, 2022; *see also id*. at 627:24-628:17 (Richter testifying that he has experience working on projects involving fire code violations related to laboratory ventilation and chemical storage). In fact, when Richter was asked at his deposition, and again at trial, whether he would be providing any opinions on whether merely reducing inventory levels would have satisfied the fire code violations related to maximum allowable quantity, Richter testified that he was not because "*that's not [PMA's] area of expertise*." *Id*. at 632:22-633:17 (emphasis added); *see also* Richter Dep. 23:25-25:2. Thus, simply testifying about what remedial actions were taken by Defendant and providing a blanket opinion that such actions were necessary to satisfy the violations without any basis or foundation to support that opinion outside of Richter's experience as a project manager is not, in this Court's opinion, competent evidence the Court can rely on in determining Defendant's damages in this matter.

In a similar vein, the Court finds that Richter exceeded the scope of his designation as an expert in project management by attempting to provide opinions as to what was necessary to satisfy the fire code violations. While Richter is (and was) certainly qualified to opine on matters regarding construction and/or project management, as mentioned above, Richter is not (and was not) qualified to provide opinions as to what was necessary to address the fire code violations.

Indeed, Richter, both during his deposition and at trial, answered in the affirmative when asked by Plaintiff whether he would only be providing opinions on what work was performed and what the reasonable cost of said was, and not whether the work performed by Defendant was the minimum viable solution to resolving the violations. *See* Richter Dep. 45:10-46:6 (Plaintiff's counsel asking Richter whether "in this particular trial, you're not going to provide any opinions on what was the best, or what was the viable solution. You're simply providing opinions on '[t]his is what was done, and this was a reasonable cost for what was done'; is that correct?" To which Richter responded, "*I agree, yes*") (emphasis added); Hr'g Tr. 635:22-636:6, May 5, 2022. While Defendant objected to Plaintiff attempting to limit the scope of Richter's testimony, the Court ultimately allowed Richter to testify about whether the work performed by Defendant was necessary to conform to the Fire Marshal's Report but noted that the Court would take into consideration what Richter stated at his deposition in reviewing Richter's testimony. (Hr'g Tr. 637:21-639:5, 640:20-641:8, May 5, 2022.) In fact, the Court noted on the record that "if in the deposition [Richter] admits that he was going to express no such opinion, then the Court in all likelihood will disregard [the testimony]." *Id*. at 641:16-19. Now, while the Court will not merely disregard Richter's testimony as to whether the work performed by Defendant was necessary to conform to the Fire Marshal's Report, the Court finds that Richter's testimony lacks proper foundation for the reasons stated above and hereby declines to give his testimony much weight—for whatever the testimony is worth. *See Kelly v. Rhode Island Public Transit Authority*, 740 A.2d 1243, 1250 (R.I. 1999) ("When a trial justice has reviewed the evidence and commented on the credibility of the witnesses . . . this Court will not disturb such findings unless the trial justice has overlooked or misconceived material and relevant evidence or was clearly wrong.") (citing *Morrocco v. Piccardi*, 674 A.2d 380, 382 (R.I. 1996)); *see also Donnelly*, 667 A.2d at 795

("The trial justice's findings on credibility are . . . conclusive unless an examination of the record discloses that the 'decision was clearly wrong or unless the trial justice, in reviewing the evidence, overlooked or misconceived relevant and material evidence.'") (quoting *State v. Banach*, 648 A.2d 1363, 1368 (R.I. 1994)) (further citations omitted).

In fairness, however, the Court also takes issue with the scope of expert testimony presented by Plaintiff. For instance, Plaintiff put forth an expert, Michael Harrington (Harrington), who was qualified by the Court as an expert in construction management and who was engaged by Plaintiff to provide opinions as to whether what Defendant did to address the fire code violations was necessary or went above and beyond the scope required to address the violations, as well as whether the costs incurred by Defendant related thereto were reasonable. *See* Hr'g Tr. 383:21-384:4, 392:2-15, 394:16-20, 404:19-22, May 4, 2022. In terms of qualifications, Harrington testified that he has approximately forty years of construction experience performing work both as a construction manager and as a general contractor, and that through his experience as a construction manager, he has had opportunity to develop scopes of work for various projects. *Id.* at 365:9-25, 366:4-6. In accordance with Harrington's engagement, Harrington was asked questions by Plaintiff relating to whether the remedial actions performed by Defendant were necessary to satisfy certain violations. *See e.g.*, Hr'g Tr. 431:7-13 (Plaintiff asking Harrington whether a make-up air unit capable of supporting nine exhaust hoods and four exhaust fans was needed to satisfy violation number 12 to which Harrington responded, "[n]o"), 433:6-9 (Plaintiff asking Harrington whether three exhaust hoods and associated duct work was necessary to address violation number 11 to which Harrington responded "[n]o").

Like Richter, however, this Court finds that, based on Harrington's experience and designation as an expert in construction management, Harrington is not qualified to testify as to

what is necessary to satisfy fire code violations. Put simply, Harrington, like Richter, is not an expert in fire code violations nor how to resolve them based on a simple review of Harrington's qualifications. In fact, when asked by Defendant whether Harrington is an expert in code requirements for chemical storage, Harrington responded "I am not." (Hr'g Tr. 401:22-24, May 4, 2022.) Indeed, Harrington testified that he did not even look up the relevant code provisions which govern how many chemicals must be stored at a location, and that the opinions he gave at trial were based largely on discussions with Russo about the Property. *Id*. at 402:16-21. Thus, despite Harrington's designation as an expert in construction management, Harrington clearly is not an expert in fire code violations and any opinions thereon will consequently not be given much weight by the Court.

A review of all the above-mentioned testimony, including the flaws related thereto, showcases a glaring hole in the evidence presented in this matter related to Defendant's alleged damages. Generally speaking, as far as this Court is concerned, while construction and/or project managers may have knowledge through experience of how violations may potentially be addressed from a purely construction perspective, construction and/or project managers (such as Harrington and Richter) are generally not fire code experts qualified to attest as to what actions would and would not resolve fire code violations, as discussed above. While this is not to suggest that there are no construction and/or project managers who also happen to possess the requisite expertise in fire code violations, the experts in this matter clearly did not possess such expertise. Indeed, this very point is evidenced by the fact that both Harrington and Richter provided *differing* opinions based on their experience as to what would have satisfied the fire code violations, as detailed above. Reconciling these competing opinions from individuals who, again, are not experts in fire code violations, is nearly impossible for the Court for the simple fact that the Court,

like Goodrich, Harrington, and Richter, is also not an expert in fire code violations and is therefore not in the position to say whether Harrington or Richter's approach is correct without some adequate foundation to support that approach.

Consequently, without the ability to determine which approach would and would not have in fact resolved the fire code violations, the Court is unable to answer the ultimate questions of whether the remedial steps performed by Defendant were necessary to satisfy the violations or whether such steps went above and beyond the scope required to address the violations. *See Guzman v. Jan-Pro Cleaning Systems, Inc.*, 839 A.2d 504, 508 (R.I. 2003) (Supreme Court remanding case back to trial justice after trial justice erred in calculating the plaintiff's damages based on limited and incomplete evidentiary record). This reality is compounded further when considering the evidence put forth by Plaintiff attempting to demonstrate that the remedial steps taken by Defendant were part and parcel of a facility upgrade that Defendant would be pursuing *irrespective of the Fire Marshal's Report*. *See* Pl.'s Exs. 8, 10; Hr'g Tr. 120:1-9, May 2, 2022 (Goodrich testifying that she was tasked with determining what it would cost to bring the Property up to "Agilent Standards" if Defendant remained in the facility), 130:23-131:5 (Goodrich testifying that regardless of the Fire Marshal's Report, Defendant decided to incur costs and expenses related to upgrading certain aspects of the Property as part of the acquisition), 143:22-144:6, 318:12-20, May 3, 2022 (testimony that Defendant would not know about the "full impact" of environmental, health, and safety upgrades until post-closing), 551:4-13, May 5, 2022 (Goodrich testifying that Defendant had PMA under contract to perform environmental, health, and safety upgrades post-closing regardless of the Fire Marshal's Report); Pl.'s Ex. 12, at 4; Pl.'s Ex. 15, at 10. Thus, the flawed testimonial evidence, together with evidence presented by Plaintiff relating to Defendant's intention to

perform a facility upgrade, places the Court in the position of being unable to distinguish what remedial actions were necessary and what actions, if any, were not.

For these reasons, the Court has no option but to conclude that the parties, namely Defendant, failed to present the competent evidence necessary to prove its damages with reasonable certainty.[14] If, for example, Defendant (or even Plaintiff) had called an individual with expertise in fire code violations, such as a former fire marshal[15] or a member of the Fire Marshal's Plan Review Division, and asked whether the remedial actions performed by Defendant were necessary to address the fire code violations, this would have likely constituted competent evidence upon which the Court could have relied. Alternatively, Defendant could have submitted evidence demonstrating that the Fire Marshal's Plan Review Division approved Defendant's plan to address the fire code violations, which would have, at the very least, placed the Court in a better position to determine whether the actions taken by Defendant were necessary to satisfy the fire code violations.[16] *See* Hr'g Tr. 614:3-13, May 5, 2022 (Fire Marshal Kevin Morris explaining that the process a business undertakes to satisfy fire code violations is to put an application in for "whatever" the business will be doing, submit a plan to the Plan Review Division, the Plan Review Division will review the plan and say whether or not the plan does, in fact, meet the fire code). While presentation of such evidence would have still left open the similar but slightly different

[14] Interestingly, no evidence was presented by Defendant to even demonstrate that the fire code violations have, in fact, been resolved or otherwise cleared by the Fire Marshal's Office.

[15] Defendant did call Fire Marshal Kevin Morris who cited the Property for fire code violations but he was not asked any questions as to whether the actions taken by Defendant were necessary to satisfy the violations. *See* Hr'g Tr. 595-619, May 5, 2022.

[16] Notably, the testimony elicited from Fire Marshal Kevin Morris was relatively confusing in that it was unclear whether Defendant actually submitted a plan to the Plan Review Division. *See* Hr'g Tr. 614:24-615:5, 615:21-616:1, 618:13-18. Nonetheless, even assuming a plan was submitted, no evidence was presented to the Court of the Plan Review Division actually approving any such plan.

question of whether the actions taken by Defendant to address the violations went above the scope required, this would have again at least provided the Court with some basis to determine whether what Defendant did was in fact necessary to resolve the violations.[17]

Unfortunately, however, no evidence of this kind was presented to the Court. Instead, Defendant (as well as Plaintiff) presented only flawed and unsubstantiated testimonial evidence which, for the reasons stated herein, falls short of constituting competent evidence to support a damages claim. Consequently, the Court has been left with no competent evidence upon which to rely on in concluding whether the actions taken by Defendant, and therefore the amounts incurred, were indeed necessary to satisfy the fire code violations and were directly related thereto. As a result, Defendant has failed to prove its damages with a reasonable degree of certainty and by competent evidence.[18]

[17] To further explain this point, Defendant may have opted to address the fire code violations by pursuing either a "baseline" option or a "Cadillac" option. Although both options, technically speaking, are "necessary" to satisfy the fire code violations, the "Cadillac" option evidently goes above the scope required to address the violation while the "baseline" option is, in essence, the cheapest and/or minimal option available to address the violations. In this case, Defendant is only entitled to recover the expenses to install the baseline option based on a plain reading of the APA, as detailed above. Defendant, however, not only failed to prove by competent evidence that what Defendant did to address the violations was in fact necessary but also, in turn, failed to demonstrate that what Defendant did was indeed this baseline option and did not go above the scope necessary to resolve the violations.

[18] The Court must also note that both parties presented a variety of price quotes and proposals from different consultants, each specifying different scopes of work to address the fire code violations. *See e.g.*, Pl.'s Ex. 22 (Jesmac, Inc. and RW Bruno Proposals); Def.'s Exs. L-W. It appears that Harrington and Richter largely based their opinions on these differing price quotes in attempting to testify as to what was necessary to satisfy the fire code violations. However, the very existence of multiple price quotes and different scopes of work only further demonstrates that the Court is in no position, with the evidence presented, to say what was necessary and what was not. Moreover, the existence of multiple price quotes, including price quotes lower than what Defendant is claiming herein, only further compounds the fact that Defendant has failed to carry its burden of proving its damages with reasonable certainty and with precise figures.

IV

Conclusion

Based on the foregoing, the Court declares that Defendant's claim for indemnification fails due to Defendant's failure to prove its alleged damages with reasonable certainty and by competent evidence. Defendant shall notify the escrow agent that the amount presently held in the escrow account, plus interest if applicable, shall be released to Plaintiff within ten days following entry of an order and judgment. Counsel for the prevailing party shall prepare and submit the appropriate order and separate judgment consistent with this Decision.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	**W&J Newco, LLC v. Agilent Technologies, Inc. and Ultress Realty, LLC**
CASE NO:	**PC-2020-01539**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**August 23, 2022**
JUSTICE/MAGISTRATE:	**Stern, J.**
ATTORNEYS:	
For Plaintiff:	**William M. Russo, Esq.** **John A. Dorsey, Jr., Esq.**
For Defendant:	**John F. Kelleher, Esq.** **Giovanni La Terra Bellina, Esq.** **James L. Jacobs, Esq.** **Valerie M. Wagner, Esq.** **Melissa B. Black, Esq.**