UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

UNITED STATES OF AMERICA, for the use and benefit of SUSTAINABLE MODULAR MANAGEMENT, INC., Plaintiff, vs. JE DUNN CONSTRUCTION COMPANY, *et al.*, Defendants.	Case No.: 2:20-cv-00790-GMN-NJK **ORDER**

Pending before the Court is the Motion for Partial Summary Judgment, (ECF No. 103), filed by Defendant/Counterclaimant JE Dunn Construction Company, and Defendants Federal Insurance Company, Hartford Fire Insurance Company, and Travelers Casualty and Surety Company (collectively "Surety Defendants"). Plaintiff United States of America for the use and benefit of Sustainable Modular Management, Inc. ("SMM") filed a Response, (ECF No. 117), to which JE Dunn and the Surety Defendants filed a Reply, (ECF No. 123).

For the reasons discussed below, the Court GRANTS in part and DENIES in part JE Dunn and the Surety Defendants' Motion for Partial Summary Judgment.

I. BACKGROUND

This dispute arises out of SMM's alleged abandonment and repudiation of its subcontract with JE Dunn, which required SMM to design and construct a temporary phasing facility ("TPF") during the renovation of a hospital at Nellis Air Force Base ("Nellis AFB"). The specific facts underlying this dispute relevant to resolving JE Dunn and the Surety

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Defendants' Motion for Partial Summary Judgment are outlined below.[1]

A. The Prime Contract

JE Dunn entered into a contract (the "Prime Contract") with the United States Army Corps of Engineers (the "Government") to design and construct renovations to the Mike O'Callaghan Federal Medical Center at Nellis AFB. (Prime Contract, Ex. 1 to Eli Kaldahl Decl. to Ex. A to Partial MSJ, ECF No. 104-2). The Prime Contract required JE Dunn to construct TPFs to house hospital departments during the renovation of hospital. (*Id.* at 4). JE Dunn was obligated to "perform the work required . . . in strict accordance with the terms of [the] solicitation . . . ." (*Id.* at 3).

JE Dunn planned to perform the hospital renovations in two phases. First, the emergency department, trauma room, and certain administrative offices would move into the TPF while JE Dunn renovated those departments. (Eli Kaldahl Decl. ¶ 7, Ex. A to Partial MSJ, ECF No. 104-1). Second, after these renovations were completed, those departments housed in the TFP would return to the renovated hospital and the remaining departments would move into the TPF while JE Dunn completed the remaining renovations. (*Id.* ¶¶ 8–9). JE Dunn would then dismantle and remove the TPFs once the renovations were completed. (*Id.* ¶ 14).

B. The Subcontract

JE Dunn and SMM entered into a Subcontract under which SMM would design, construct, deliver, and install the TPF at Nellis AFB, reconstruct the TPF in between the two phases of work, and then remove the TPF upon completion of the renovations. (*See generally* Subcontract, Ex. 3 to Eli Kaldahl Decl. to Ex. A to Partial MSJ, ECF No. 104). The TPFs consisted of approximately 20 modular units that SMM agreed to lease to JE Dunn through the Government. (*Id.* at 24). Section 3.3 of the Subcontract required SMM to have a

[1] To be clear, JE Dunn and the Surety Defendants' Motion for Partial Summary Judgment includes additional facts that were considered by the Court, but not included in this Order. These facts were not pertinent to resolving the present Motion.

superintendent onsite to supervise subcontractors and perform work. (*Id.* at 5). The agreement incorporated the Prime Contract and obligated SMM to design and construct the TPF in accordance with the Government's criteria. (Subcontract at 2–3, 21–24, Ex. 3 to Eli Kaldahl Decl. to Ex. A to Partial MSJ, ECF No. 104-4).

The Subcontract also incorporated specifically identified Federal Acquisition Regulations ("FAR"). (*Id.* at 29–32, 53). This included FAR 52.233-1(i), which provides: "The Contractor shall proceed diligently with performance of this contract, pending final resolution of any request for relief, claim, appeal, or action arising under the contract, and comply with any decision of the Contracting Officer." (Partial MSJ 7:17–19, ECF No. 103) (quoting FAR 52.233-1(i)). Like FAR 52.233-1(i), the Subcontract also contained a separate provision stating that "[SMM] shall maintain its progress during any dispute resolution proceeding." (Subcontract at 15, Ex. 3 to Eli Kaldahl Decl. to Ex. A to Partial MSJ). Taken together, these provisions created a dispute resolution procedure whereby SMM was obligated to continue working if a conflict arose during performance of the Subcontract and required it to exhaust potential claims through an alternative resolution procedure before halting work.

C. Performance

According to JE Dunn, numerous issues with SMM's performance arose after it began work, delaying completion of the project. (Partial MSJ 9:1–27). SMM disputes whether its performance was deficient, and counters that any delay was caused by JE Dunn's obstructionist conduct. (*See generally* Resp., ECF No. 117). What is undisputed is that these issues, regardless of who caused them, resulted in phase one not being completed by the set deadline. (Eli Kaldahl Decl. ¶ 33, Ex. A to Partial MSJ). After this deadline, the parties identified two disputes which led to JE Dunn completing the work SMM had been contracted to perform.

1. ASI Drawings

The Subcontract required SMM to submit stamped and sealed architectural supplemental

instructions ("ASI") drawings to JE Dunn. (Subcontract at 22, Ex. 3 to Eli Kaldahl Decl. to Ex. A to Partial MSJ). According to JE Dunn, the Government refused to review ASI drawings submitted by SMM on March 3, 2020, because they were not stamped. (Eli Kaldahl Decl. ¶ 50, Ex. A to Partial MSJ). JE Dunn maintains that SMM "refused to submit and never submitted stamped ASI drawings to JE Dunn," (*id.*), which threatened the continued progression of the project. (Continuing Default Letter, Mar. 13, 2020, at 2, Ex. 20 to Eli Kaldahl Decl. to Ex. A to Partial MSJ, ECF No. 105-12). JE Dunn sent SMM notices of continuing default on March 13 and 19, 2020, notifying SMM that it considered SMM's failure to submit stamped ASI drawings as breaches of the Subcontract, and that it would employ another design firm to stamp and seal the ASI drawings. (*Id.*); (Continuing Default Letter, Mar. 19, 2020, at 2, Ex. 21 to Eli Kaldahl Decl. to Ex. A to Partial MSJ, ECF No. 105-13).

SMM disputes JE Dunn's contention that it refused to submit stamped and sealed ASI drawings. Specifically, SMM contends that any delay in submitting stamped and sealed ASI drawings was attributable to changes made by JE Dunn in the underlying design. (Mar. 13, 2020, Email Regarding ASI Drawings at 2–3, Ex. 42 to Michael Alfred Decl. to Ex. 1 to Resp., ECF No. 119-16); (Nick Mackie Decl. ¶ 13, Ex. 33 to Michael Alfred Decl. to Ex. 1 to Resp., ECF No. 119-7). On March 20, 2022, SMM provided a revised set of ASI drawings to JE Dunn for approval and indicated that SMM would move forward with stamping and sealing the drawings after it obtained JE Dunn's approval. (ASI Drawings Email, Mar. 20, 2022, at 2, Ex. 44 to Michael Alfred Decl. to Ex. 1 to Resp., ECF No. 119-18). JE Dunn did not respond to SMM's email. (Nick Mackie Decl. ¶ 14, Ex. 33 to Michael Alfred Decl. to Ex. 1 to Resp.). JE Dunn employees later acknowledged that any delay in stamping or sealing ASI drawings did not affect work in the field. (Mar. 31, 2020, Email Regarding ASI Drawings at 2, Ex. 45 to Michael Alfred Decl. to Ex. 1 to Resp., ECF No. 119-19); (Billy Schwartzkopf Dep. 246:13–1247:4, Ex. 46 to Michael Alfred Decl. to Ex. 1 to Resp., ECF No. 119-20).

2. Removal of Superintendents

Section 3.3 of the Subcontract mandates that SMM have a superintendent on site to monitor work. (Subcontract at 5, Ex. 3 to Eli Kaldahl Decl.). During the course of SMM's performance, JE Dunn removed two SMM superintendents and purportedly refused to provide a safety course needed for the third to enter the jobsite.

The first superintendent was removed when, according to SMM, another JE Dunn subcontractor, Berg Electric, entered the job site on March 20, 2020, and attempted to cut into a live or hot electrical box. (Mar. 24, 2020, Letter to Chris Grant at 2, Ex. 28 to Michael Alfred Decl. to Ex. 1 Resp., ECF No. 119-2). Joe Clayton, SMM's first jobsite superintendent, intervened because he believed this action raised coordination and safety issues. (*Id.*, Ex. 28 to Michael Alfred Decl. to Ex. 1 to Resp.); (Joe Clayton Dep. 229:5–232:1, Ex. 29 to Michael Alfred Decl. to Ex. 1 to Resp., ECF No. 119-3). Clayton sent JE Dunn a written report detailing his concerns about this conduct the next day. (Clayton Mar. 25, 2020, Letter at 2, Ex. 30 to Michael Alfred Decl. to Ex. 1 to Resp., ECF No. 119-4). Contrary to SMM's safety concerns, JE Dunn perceived Clayton's actions as interfering with the progress of other contractors and found that Clayton disregarded the "proper onsite safety reporting protocols." (JE Dunn Apr. 2, 2020, Letter at 2, Ex. 31 to Michael Alfred Decl. to Ex. 1 to Resp., ECF No. 119-5). On April 2, 2020, JE Dunn removed Clayton as superintendent of the project and revoked his jobsite access. (*Id.*).

That same day, SMM appointed Christopher Meyer as Clayton's replacement. (SMM Apr. 2, 2020, Letter at 2, Ex. 32 to Resp., ECF No. 119-6). SMM maintains that had it not appointed Meyer, it would have been required to stop work based on Section 3.3 of the Subcontract mandating that SMM have a superintendent on site to monitor work. (Nick Mackie Decl. ¶ 3, Ex. 33 to Michael Alfred Decl. to Ex. 1 to Resp.). Six days later, JE Dunn removed Meyers from the project, asserting that Meyers interfered with subcontractors performing

electrical work. (Chris Grant Apr. 10, 2020, Letter at 2, Ex. 22 to Eli Kaldahl Decl. to Ex. A to Partial MSJ, ECF No. 105-13). Without a replacement superintendent on site, "SMM directed its subcontractors to stand down until a third superintendent" could be appointed. (Nick Mackie Decl. ¶ 4, Ex. 33 to Michael Alfred Decl. to Ex. 1 to Resp.). JE Dunn interpreted SMM withdrawing its workers as abandonment of the project, and notified SMM it would "proceed to supplement all remaining work required to complete" phase one until SMM appointed another supervisor.[2] (Chris Grant Apr. 10, 2020, Letter at 2, Ex. 22 to Eli Kaldahl Decl. to Ex. A to Partial MSJ). JE Dunn inquired whether "SMM ha[d] any intention of returning to complete work on site." (*Id.*).

On April 16, 2020, SMM responded to JE Dunn, denying that Meyer had interfered with the jobsite and denying that SMM had abandoned the project. (SMM Apr. 16, 2020, Letter at 2, Ex. 23 to Eli Kaldahl Decl. to Ex. A to Partial MSJ). SMM explained that because of the Easter holiday weekend and the outbreak of COVID-19, it would be unable to send its new superintendent, Mike Panarese, to the jobsite until Monday, April 20, 2020. (*Id.*). SMM concluded by stating it intended to resume work on April 20 upon Panarese's arrival "in spite of and without waiving its complaints against JE Dunn." (*Id.*).

JE Dunn sent a response the next day, stating that it:

> [p]roceeded to supplement all remaining work required to complete [phase one] as communicated in JE Dunn's April 10, 2020 letter. JE Dunn will continue to perform all remaining Mechanical, Electrical, Plumbing, and Low Voltage scopes in their entirety. The project cannot afford additional disruptions to completing these systems by the introduction of different crews or supervision of these scopes by a new person, especially due to the amount of work that has progressed since SMM left the project. Please let us know which trades, other than Mechanical, Electrical, Plumbing and Low Voltage, SMM intends to have return to the site.

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[2] Paragraph 14.1 of the Subcontract authorized JE Dunn to supplement SMM's labor after three days written notice if SMM "at any time . . . refuse[d] or neglect[ed] to supply a sufficiency of properly skilled workmen . . . or . . .fail in any respect to prosecute the Work with promptness and diligence or . . . fail in the performance of any of the agreements contained therein . . . ." (Subcontract at 19, Ex. 3 to Eli Kaldahl Decl. to Ex. A to Partial MSJ).

(JE Dunn Apr. 17, 2020, Letter at 2, Ex. 24 to Eli Kaldahl Decl. to Ex. A to Resp., ECF No. 105-15). Panarese accelerated his planned arrival date and appeared at the project site on this same day, April 17. (JE Dunn Apr. 21, 2020, Letter at 3, Ex. 34 to Michael Alfred Decl. to Ex. 1 to Resp., ECF No. 119-9). Despite Panarese's presence, JE Dunn reaffirmed that it planned to continue supplementing "all remaining work required to complete [phase one]." (*Id.*).

SMM expressed to JE Dunn two days later that it remained "ready, willing, and able to complete the scope in its subcontract" with JE Dunn. (SMM Apr. 19, 2020, Letter at 2, Ex. 25 to Eli Kaldahl Decl. to Ex. A to Resp., ECF No. 105-16). According to Panarese, JE Dunn refused to let him supervise the jobsite until he completed a safety course, which Panarese requested but JE Dunn would not administer. (Mike Panarese Decl. ¶ 2, Ex. 36 to Michael Alfred Decl. to Ex. 1 to Resp., ECF No. 119-10). On April 23 or 24, 2020, JE Dunn informed SMM that it planned to complete the balance of SMM's work on the project. (Nick Mackie Decl. ¶ 10, Ex. 33 to Michael Alfred Decl. to Ex. 1 to Resp.). SMM relayed this communication to the Surety Defendants, its vendors. (*See* Resp. 8:16–24) (citing letters SMM sent to companies it contracted with).

D. Alteration of Modular Units

SMM owned and had legal title to the modular units that formed the TPF used in the project. (Nick Mackie Decl. ¶ 24, Ex. 33 to Michael Alfred Decl. to Ex. 1 to Resp.). JE Dunn retained possession of the modular units after SMM stopped working on the project. (*Id.* ¶ 22). At this point, SMM was not allowed further access to the project and could not observe whether JE Dunn altered the modular units. (*Id.*). After the Government finished its term of occupancy, JE Dunn allowed SMM to inspect the modular units for the purpose of removing them from the project site. (*Id.*). SMM observed that "JE Dunn had demolished and/or essentially chain sawed and/or chopped [] up" the modular units, "thereby rendering them worth less than the cost to transport and store them." (*Id.*).

E. Current Litigation

SMM brought this case against JE Dunn and the Surety Defendants under the Miller Act, which requires contractors doing construction contract work for the Government to obtain performance and payment bonds to ensure the work is completed and that all persons supplying labor and material for the project are paid. (*See generally* First Am. Compl, ECF No. 72). SMM further alleged claims for: (1) breach of contract against JE Dunn; (2) breach of contract against the Surety Defendants, (3) conversion against JE Dunn for exercising dominion or control of the modular units, and (4) declaratory judgment against JE Dunn. (*Id.*). JE Dunn and the Surety Defendants in turn filed counterclaims against SMM for: (1) breach of contract; (2) declaratory judgment; (3) indemnification; and (4) subrogation. (*See generally* Answer & Counterclaims, ECF No. 73). JE Dunn and the Surety Defendants then filed the instant Motion for Partial Summary Judgment, (ECF No. 103).

II. LEGAL STANDARD

The Federal Rules of Civil Procedure provide for summary adjudication when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show 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). Material facts are those that may affect the outcome of the case. *See Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248 (1986). A dispute as to a material fact is genuine if there is a sufficient evidentiary basis on which a reasonable fact-finder could rely to find for the nonmoving party. *See id.* "The amount of evidence necessary to raise a genuine issue of material fact is enough 'to require a jury or judge to resolve the parties' differing versions of the truth at trial.'" *Aydin Corp. v. Loral Corp.*, 718 F.2d 897, 902 (9th Cir. 1983) (quoting *First Nat'l Bank v. Cities Serv. Co*., 391 U.S. 253, 288–89 (1968)). "Summary judgment is inappropriate if reasonable jurors, drawing all inferences in favor of the nonmoving party, could return a verdict in the nonmoving party's

favor." *Diaz v. Eagle Produce Ltd. P'ship*, 521 F.3d 1201, 1207 (9th Cir. 2008). A principal purpose of summary judgment is "to isolate and dispose of factually unsupported claims." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986).

In determining summary judgment, a court applies a burden-shifting analysis. "When the party moving for summary judgment would bear the burden of proof at trial, it must come forward with evidence which would entitle it to a directed verdict if the evidence went uncontroverted at trial. In such a case, the moving party has the initial burden of establishing the absence of a genuine issue of fact on each issue material to its case." *C.A.R. Transp. Brokerage Co. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (internal citation and quotation marks omitted). In contrast, when the nonmoving party bears the burden of proving the claim or defense, the moving party can meet its burden in two ways: (1) by presenting evidence to negate an essential element of the nonmoving party's case; or (2) by demonstrating that the nonmoving party failed to make a showing sufficient to establish an element essential to that party's case on which that party will bear the burden of proof at trial. *Celotex Corp.*, 477 U.S. at 323–24. If the moving party fails to meet its initial burden, summary judgment must be denied, and the court need not consider the nonmoving party's evidence. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159–60 (1970).

If the moving party satisfies its initial burden, the burden then shifts to the opposing party to establish that a genuine issue of material fact exists. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574, 586 (1986). To establish the existence of a factual dispute, the opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient that "the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 631 (9th Cir. 1987). However, the nonmoving party "may not rely on denials in the pleadings but must produce specific evidence, through affidavits or admissible

discovery material, to show that the dispute exists," *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1409 (9th Cir. 1991), and "must do more than simply show that there is some metaphysical doubt as to the material facts," *Orr v. Bank of America*, 285 F.3d 764, 783 (9th Cir. 2002) (quoting *Matsushita*, 475 U.S. at 586). "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient." *Anderson*, 477 U.S. at 252. In other words, the nonmoving party cannot avoid summary judgment by relying solely on conclusory allegations that are unsupported by factual data. *See Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). Instead, the opposition must go beyond the assertions and allegations of the pleadings and set forth specific facts by producing competent evidence that shows a genuine issue for trial. *See Celotex Corp*., 477 U.S. at 324.

At summary judgment, a court's function is not to weigh the evidence and determine the truth but to determine whether there is a genuine issue for trial. *See Anderson*, 477 U.S. at 249. The evidence of the nonmovant is "to be believed, and all justifiable inferences are to be drawn in his favor." *Id*. at 255. But if the evidence of the nonmoving party is merely colorable or is not significantly probative, summary judgment may be granted. *See id.* at 249–50.

Fed. R. Civ. P. 56(d) provides that "[i]f a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may: (1) defer considering the motion or deny it; (2) allow time to obtain affidavits or declarations or to take discovery; or (3) issue any other appropriate order." To obtain relief under Rule 56(d), nonmovants must show "(1) that they have set forth in affidavit form the specific facts that they hope to elicit from further discovery, (2) that the facts sought exist, and (3) that these sought-after facts are 'essential' to resist the summary judgment motion." *State of Cal. v. Campbell*, 138 F.3d 772, 779 (9th Cir. 1998).

III. DISCUSSION

JE Dunn and the Surety Defendants contend they are entitled to summary judgment on: (1) SMM's claims against JE Dunn and the Surety Defendants for breach of contract; (2) JE Dunn's counterclaim against SMM for breach of contract (partial summary judgment as to liability only); (3); SMM's claim against JE Dunn for conversion; and (4) JE Dunn's counterclaims against SMM based on assignment of SMM subcontractor claims to JE Dunn, indemnity and subrogation. (Partial MSJ 1:28–2:4). The Court begins by examining whether JE Dunn and the Surety Defendants are entitled to summary judgment on the breach of contract claims.

A. Breach of Contract Claims

Relying primarily on *Metric Systems Corp. v. McDonnell Douglas Corp.* ("*Metric*"), 850 F. Supp. 1568 (N.D. Fla. 1994), JE Dunn and the Surety Defendants contend that the express terms of the Subcontract obligated SMM to continue working notwithstanding the existence of any claim or dispute, and that its decision to abandon the project thereby constitutes a breach of the Subcontract. (Partial MSJ 20:4–22:25); (Reply 2:10–8:5, ECF No. 123). In response, SMM advances that the Subcontract's dispute resolution procedure is inapplicable because JE Dunn's conduct surrounding the removal of its superintendents and ASI drawings resulted in JE Dunn anticipatorily repudiating the Subcontract. (Resp. 15:20–19:2).

Under Nevada law, to prevail on a breach of contract claim, a claimant must show: "(1) formation of a valid contract; (2) performance or excuse of performance by the plaintiff; (3) material breach by the defendant; and (4) damages." *Laguerre v. Nevada Sys. of Higher Educ.*, 837 F. Supp. 2d 1176, 1180 (D. Nev. 2011) (citing *Bernard v. Rockhill Dev. Co.*, 734 P.2d 1238, 1240 (Nev. 1987)). One party's material breach of a contract excuses any future performance by the non-breaching party. *Cain v. Price*, 415 P.3d 25, 29 (Nev. 2018) (citing Restatement (Second) of Contracts § 237 (Am. Law Inst. 1981)).

Anticipatory breach occurs when "one party to the contract, without justification and prior to a breach by the other party, makes a statement or engages in conduct indicating that it will not or cannot substantially perform its duties under the contract." *Shaw v. CitiMortgage*, 201 F. Supp. 3d 1222, 1250 (D. Nev. 2016) (citing *Nev. Power Co. v. Calpine Corp.*, No. 04-cv-1526, 2006 WL 1582101, at *10 (D. Nev. Jun. 1, 2006)); *see also* NRS § 104.2610 (anticipatory repudiation ensues when "either party repudiates the contract with respect to a performance not yet due the loss of which will substantially impair the value of the contract to the other"). Anticipatory repudiation may be express, where a party indicates a "definite unequivocal and absolute intent not to perform a substantial party portion of the contract," or implied, where a party "acts in such a manner as to make future performance under the contract impossible." *Shaw*, 201 F. Supp. 3d at 1250. The existence of repudiation is determined by "the total factual context" of each case. *Covington*, 566 P.2d at 817.

In *Metric*, McDonell Douglas Corp. ("MDC") awarded a subcontract to Metric Systems to equip Air Force planes with an on-board loading ("OBL") device. 850 F. Supp. at 1572. The subcontract set out procedures for the submitted disputes and contained a disputes clause stating that "[p]ending the final resolution of any dispute involving this contract, Subcontractor agrees to proceed with performance of this contract . . . in accordance with MDC's instructions." *Id.* at 1571–72.

Over the performance of the contract, MDC expressed concern that Metric was falling behind schedule. *See id.* at 1573. Metric assured MDC over several weeks that it was on schedule, but ultimately admitted that could not meet contract deadlines. *Id.* at 1573–74. MDC suspended progress payments and issued a cure notice requiring Metric to submit a plan to remedy its deficient performance. *Id.* at 1574. Instead of submitting a plan, Metric responded with a letter blaming the schedule delays on MDC's inconsistent specifications and requests for out-of-scope work. *Id.* at 1574–75. Metric next notified MDC that it had stopped work and

would only continue under a cost-plus basis. *Id.* at 1575–76. The Air Force subsequently sent a cure notice to MDC requesting a corrective action plan for the failure to timely deliver the OBL. *Id.* at 1576–77. Metric suspended work for over a month before MDC terminated Metric's subcontract based on Metric's halted performance. *Id.*

Metric filed suit claiming that MDC first breached the contract by imposing out-of-scope changes, suspending progress payments, and wrongfully terminating for default. *Id.* at 1577. MDC filed a motion for summary judgment, arguing that Metric repudiated or breached the contract by halting work in violation of its duty to proceed under the dispute resolution clause. *Id.* at 1577–78. The district court noted that the parties' numerous allegations of breach and blame for the inability to timely deliver the OBL raised factual disputes that could not be resolved by summary judgment. *Id.* at 1578.

The court, however, found these disputes immaterial in resolving MDC's motion. *Id.* Interpreting the contract, the court found that Metric had a duty to proceed with performance pending resolution of its disputes under the contract as a matter of law. *Id.* at 1578–79. Instead of complying with that duty and providing a corrective action plan in response to MDC's cure notice, Metric responded by imposing conditions rather than proceeding with work. *Id.* at 1583. Accordingly, there was "no genuine factual issue as to what Metric did . . . . .:it stopped work and told MDC it would only resume . . . [on] a cost-plus basis or if Metric's claims for substantial additional compensation were paid." *Id.* Based on that fact, the court found that "Metric's act of halting performance in contravention of its duty to proceed constituted both an anticipatory repudiation and a material breach of the [subcontract]." *Id.* The court found that MDC's subsequent termination for default was therefore justified and granted summary judgment on Metric's breach of contract claims. *Id.* at 1584, 1586.

The United States District Court for the Southern District of South Carolina reached a similar outcome in *Tetra Tech EC/Tesoro Joint Venture v. Sam Temples Masonry, Inc.* ("*Tetra*

Tech"). No. 3:10-cv-1597, 2012 WL 368607 (D. S.C. Feb. 3, 2012). In *Tetra Tech*, the court analyzed a dispute between the prime contractor and a subcontractor following the Government's rejection of the jointly proposed corrective action plan. The contracting officer for the United States Army Core of Engineers provided Tetra Tech, the prime contractor, with a list of deficiencies and direction to provide a corrective action plan to cure deficiencies related to the work of STM, Tetra Tech's subcontractor. *Id.* *1. STM and Tetra Tech worked to submit a corrective action plan, which was ultimately rejected by the Government. *Id.* The Government then directed Tetra Tech to remove the work installed by STM, and STM indicated to Tetra Tech that it would not comply with the directive. *Id.* Tetra Tech sent notice to cure letters to both STM and its surety, North American Specialty Insurance Company ("NAS") on January 29, 2010. *Id.* at *2. Tetra Tech subsequently declared STM in default for failing to comply with the directive to remove its work and notified the subcontractor's surety of its intent to remedy the deficient work under the bond. *Id.* In March 2010, STM sought to have the Government accept a less costly remedy, and Tetra Tech assisted STM in that proposal. *Id.*

For several weeks, the Government expressed disapproval that removal of the defective work had not taken place, but Tetra Tech continued to convey information to the Government "which might lead to withdrawal of the directive to remove and replace" the defective work and offered to assist STM to submit a pass-through if justified. *Id.* at *2-3. Despite repeated direction from the Government and Tetra Tech to remove the deficient work, both NAS and STM refused to comply, insisted on alternatives, and maintained that Tetra Tech should have to pay a change order to STM for the remedy work that Tetra Tech could then pass through to the Government. *Id.* at *14. Tetra Tech notified STM and NAS of its intent to employ a replacement subcontractor to perform the work, to which STM objected. *Id.* at *14. Tetra Tech ultimately had another subcontractor replace the work and filed suit against NAS and STM to

recover procurement costs. *Id.*

The district court noted that the disputes clause in the parties' subcontract dictated that "STM was required to comply with Tetra Tech's written notice directing it to perform work pending a decision on any dispute." *Id.* at *10-11. The court found that STM's failure to comply with its duty to proceed as directed constituted a breach of the contract and waived its arguments regarding the work of the replacement subcontractor. *Id.* at *11. The court also noted that STM's action in hiring a replacement subcontractor was justified under the contract and a proper act in mitigation of additional damages under the subcontract. *Id.* at *12 & n.12.

The conclusion in *Metric* and *Tetra Tech* is in-line with a long series of cases holding that the same or similar dispute resolution clauses undercut a party's ability to rely on the doctrine of anticipatory repudiation to terminate the agreement based on a breach that the offending party contests. *See, e.g., Recon/Optical, Inc. v. Gov't of Israel*, 816 F.2d 854, 856–57 (2d Cir. 1987); *Holland Const. Corp. v. Bozzuto Contracting Co.*, No. 8:17-cv-00937, 2020 WL 4338883, at *8 (D. Md. July 28, 2020); *JJK Grp., Inc. v. VW Intern., Inc.*, No. 13-cv-3933, 2015 WL 1459841, at *5 (D. Md. Mar. 27, 2015); *Steve Kirchdorfer, Inc. v. United States*, 220 Ct. Cl. 560, 564 (1981). "This rule is true notwithstanding that the offending party ultimately may be determined to have been in breach at the time of the assertion of anticipatory repudiation: by contracting to continue performance, the aggrieved party has effectively divested itself of the opportunity to utilize the other party's breach as the basis for termination." Stephen A. Hess, Anticipatory Repudiation, 14 No. 1 Am. Coll. Constr. Lawyers 2 (2020).

In this case, the Subcontract of the parties contained a dispute resolution procedure like the contract in Metric and Tetra Tech, requiring SMM to proceed with work as directed by JE Dunn, even if it believed JE Dunn's directives were erroneous. (Subcontract at 15, 29–32, 53, Ex. 3 to Kaldahl Decl. to Ex. A to Partial MSJ). And like *Metric*, the record is clear that genuine disputes of fact exist as to whom the delays were attributable and whether SMM

completed certain items in a satisfactory manner. Despite these similarities, however, the Court finds that this case is distinguishable from *Metric* in a material way. Specifically, genuine disputes of fact exist as to whether SMM was forced into nonperformance by JE Dunn's conduct. That is, unlike the subcontractors in *Metric* and *Tetra Tech* who refused instructions and instead stopped work until certain conditions were met, SMM did not halt performance and demand that JE Dunn acquiesce to its conditions. Instead, the record lends itself to the inference that SMM was forced to cease working, and then replaced, because of JE Dunn's actions. When JE Dunn asked whether SMM intended to resume work after JE Dunn removed SMM's second superintendent, SMM stated that it intended to continue work and would send a new superintendent to start the following Monday, after the holiday weekend. But despite this information, JE Dunn told SMM that it would be taking over SMM's remaining work. Under these conditions, the Court is unable to conclude that the Subcontract's dispute resolution procedure clause precludes SMM's breach of contract claims.

The Court finds helpful an observation made by the United States District Court for the District of Columbia in *Vermont Marble Co. v. Baltimore Contractors, Inc.*, helpful. 520 F. Supp. 922 (D.D.C. 1981). In *Vermont Marble Co.*, a stonework subcontractor rescinded a subcontract with a prime contractor because of alleged delays in the preparation of a worksite. *Id.* at 923. A provision in their subcontract provided that if the subcontractor was delayed in the performance of its work, it "shall" submit a claim in writing to the prime contractor. *Id.* at 924. The court found this language to be mandatory, and, since the subcontractor had not submitted a claim, it held that rescission was not an option available to the subcontractor. *Id.* In *dicta*, the court stated that "even 'unreasonable' delays are not material breaches of this subcontract" which would justify rescission. *Id.* at 928. It noted, however, that rescission would be an available remedy if the dispute resolution procedure failed of its purpose. *Id.* According to the court, this could occur if the prime contractor "refused to pay a properly

presented claim." *Id.*

The obligation to continue to perform work pursuant to a dispute resolution procedure may not be binding in all circumstances. Courts have found that subcontractors may be justified in their decision to stop work, despite the clause, if the dispute resolution process fails its purpose because of its futility, unavailability, or the contractor's lack of justification for terminating the subcontract.[3] For example, assume a contractor and subcontract enter into an agreement with a dispute resolution procedure that requires the subcontractor to continue working if the parties have a disagreement. The subcontractor begins working, but the contractor (for whatever reason) begins obstructing its subcontractor from performing. Because of the contractor's actions, the subcontractor cannot perform and must cease operations. Citing the delay in performance, the contractor quickly assumes the subcontractor's work and replaces the subcontractor with another company.

Under these circumstances, the dispute resolution procedure has effectively failed in its purpose, and it would be futile to require the subcontractor to continue working and exhaust for two reasons. First, the subcontractor cannot *continue* working if the contractor has *already stopped* and prevented it from working. Again, this is unlike *Metric*, *Tetra Tech*, and other cases where the dispute resolution procedure applied because the subcontractor refused to

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[3] *See Granite Computer Leasing Corp. v. Travelers Indem. Co.*, 894 F.2d 547, 552 (2d Cir. 1990) (noting a subcontractor may be justified in stopping work under a contract despite a dispute resolution clause if "the disputes resolution procedure had failed of its purpose"); *Prowest Diversified, Inc. v. United States*, 40 Fed. Cl. 879, 884 n.6 (1998)

> Defendant also contends that the Disputes clause imposed a duty on plaintiff to proceed with its performance and that its failure to do so was substantial justification for repudiating the contract. The court finds this argument irrelevant and unpersuasive. As noted above, the court's findings of fact expose defendant's lack of justification for terminating the contract due to plaintiff's failure to return to work on December 17, 1993. The disputes clause cannot impute substantial justification on defendant's overwhelmingly unjustified acts.

continue working until the contractor acquiesced to certain demands. The delay in performance in the hypothetical above is attributable to the contractor instead of the subcontract. Second, and related to the first, there is no work for the subcontractor to return to if the contractor has replaced the subcontractor. Continued exhaustion of the procedure is futile. In other words, exhaustion of the dispute procedure resolution is effectively unavailable where the contractor replaces the subcontractor before an appeal can be filed and reviewed.

The Court finds the facts of this case are like the foregoing hypothetical and distinguishable from *Metric* and *Tetra Tech*. SMM expressed that it remained ready, willing, and able to work throughout the parties' disputes over the ASI drawings and superintendent removals. SMM did not inform JE Dunn that it would cease performance until JE Dunn modified its conduct. Instead, SMM only stopped working when JE Dunn removed two superintendents and refused to offer safety training to the third superintendent, thereby precluding SMM from working under Section 3.3 of the Subcontract. Viewing the record in the light most favorable to SMM, JE Dunn used the delay in work caused by *its* removal of SMM's superintendents to supplement, and then completely replace, SMM's role in the project before any meaningful resolution could be reached through the dispute procedure. This conduct raises factual questions of whether JE Dunn anticipatorily repudiated the Subcontract by "act[ing] in such a manner as to make future performance under the [Sub]contract impossible." *Shaw*, 201 F. Supp. 3d at 1250. Accordingly, JE Dunn and the Surety Defendants are not entitled to summary judgment on SMM's breach of contract claim and JE Dunn is not entitled to partial summary judgment as to liability on its breach of contract claim against SMM.[4]

[4] The Surety Defendants further contend they are entitled to summary judgment on SMM's breach of contract claim because "SMM materially breached the Subcontract" by ceasing work in violation of the dispute resolution procedure. (Partial MSJ 22:10–25). For the reasons stated above, the Surety Defendants are not entitled to summary judgment on SMM's breach of contract claim.

B. Conversion Claim

Conversion is "a distinct act of dominion wrongfully exerted over another's personal property in denial of, or inconsistent with his title or rights therein or in derogation, exclusion, or defiance of such title or rights." *M.C. Multi-Fam. Dev., L.L.C. v. Crestdale Assocs., Ltd.*, 193 P.3d 536, 542 (Nev. 2008) (quotation omitted). "[C]onversion is an act of general intent, which does not require wrongful intent and is not excused by care, good faith, or lack of knowledge." *Id.* at 542–43 (quotation omitted).

JE Dunn contends that SMM's conversion claim fails for three reasons: (1) the economic loss doctrine ("ELD") bars the claim; (2) SMM cannot prove that JE Dunn's conduct was wrongful; and (3) SMM never demanded that JE Dunn return the TPF modules to SMM. (First Partial MSJ 23:6–8). Because the Court finds SMM's conversion claim is barred by the ELD, its examination begins and ends with this argument.

"The economic loss doctrine marks the fundamental boundary between contract law, which is designed to enforce the expectancy interests of the parties, and tort law, which imposes a duty of reasonable care and thereby encourages citizens to avoid causing physical harm to others." *Calloway v. City of Reno*, 993 P.2d 1259, 1263 (Nev. 2000) (quotation omitted) (*overruled on other grounds by Olson v. Richard*, 89 P.3d 31 (Nev. 2004) (en banc)). The economic loss doctrine prohibits unintentional tort actions in which the plaintiff seeks to recover purely economic losses. *Terracon Consultants W., Inc. v. Mandalay Resort Group*, 206 P.3d 81, 86 (Nev. 2009) (en banc). The economic loss doctrine does not bar actions seeking damages for pecuniary losses that are "accompan[ied by] personal injury or property damage." *Terracon*, 206 P.3d at 86.

In *Giles v. General Motors Acceptance Corp.*, the Ninth Circuit concluded that the plaintiffs' fraud and conversion claims were not barred under Nevada's ELD as duplicative of their claims for breach of contract merely because the claims were "intertwined with" the

parties' contract. 494 F.3d 865, 879 (9th Cir. 2007). *Giles* involved an action brought by a car dealership against its financing company. *Id.* at 880. The financing company had placed a hold on the dealership's open accounts after the dealership failed to pay the financing company certain amounts owed. *Id.* at 879. The dealership contended that the financing company had no right to hold funds in its open accounts, alleging conversion. *Id.* In its defense, the financing company argued the conversion claim was "intertwined with the parties' prior contracts" and therefore should be dismissed. *Id.* at 880. The Ninth Circuit rejected this argument, reasoning that the conversion claim was not duplicative because the parties' agreements did not cover the challenged transaction and the alleged wrongful taking did not duplicate a contract claim. *Id.* Thus, the *Giles* court reasoned that an "independent duty imposed under tort law" existed "not to take [] property without legal authority to do," and therefore "the economic loss doctrine does not bar recovery for breach of that duty." *Id.* *Giles* establishes that the ELD may bar a conversion claim if there is a contract delineating the rights and duties of each party that covers the alleged damage and conduct. Accordingly, the Court's inquiry concerns whether SMM's alleged damages arises from a legal duty imposed by tort law, independent of the Subcontract, or whether the conversion claim seeks relief arising from a breach of the Subcontract.

JE Dunn submits that SMM's conversion claim arises from the Subcontract because SMM's Amended Complaint uses identical factual allegations to support its breach of contract and conversion claims. (Partial MSJ 25:1–15); (Reply 11:1–14). JE Dunn's argument is well-taken. SMM's breach of contract claim is based, in part, on JE Dunn "unlawfully seizing SMM's TPFs without proper compensation and then structurally altering them, resulting in the diminution of their value." (First Am. Compl. ¶ 17, ECF No. 71). SMM's conversion claim, in turn, is limited to a single assertion that in "the alternative or additionally, JE Dunn has unlawfully converted the TPFs owned by SMM" by "wrongfully exert[ing] dominion or control over the TPFs owned by SMM in denial of or inconsistent with SMM's title or rights in the

TPFs . . . .” (*Id.* ¶ 23).

SMM’s Amended Complaint does not include allegations differentiating its conversion claim from its bargained for expectations under the Subcontract. *See Oak Street Funding, LLC v. Ingram*, 511 Fed. App’x 412, 418 (6th Cir. 2013) (comparing the allegations underlying the plaintiff’s breach of contract and conversion claims in determining the plaintiff “fail[ed] to allege a violation of a legal duty that is separate and distinct from contractual obligations” resulting in the ELD precluding plaintiff’s conversion claim). Instead, these allegations lend themselves to the inference that SMM is suffering an economic loss from the breach of an express or implied contractual duty under the Subcontract. “A party that has a contractual expectation of payment cannot ‘duplicate[] [the] breach of contract claim’ with a conversion claim.” *Nevada State Educ. Ass’n v. Clark Cnty. Educ. Ass’n*, 482 P.3d 665, 674–75, 675 n. 8 (Nev. 2021) (*Wechsler v. Hunt Health Sys., Ltd.*, 330 F. Supp. 2d 383, 431–32) (S.D.N.Y. 2004). Here, SMM seeks recovery on its conversion claim for the same alleged transgressions asserted under its breach of contract claim. Accordingly, the Court finds that SMM’s conversion claim is supplanted by the ELD and JE Dunn is entitled to summary judgment.

C. Indemnity & Subrogation Claims

SMM does not contest the “actual amounts that JE Dunn and/or the Sureties paid in good to resolve the payment-bond claims asserted by SMM’s subcontractors . . . in the total amount of $675,995.49 for offset or credit purposes to be applied against SMM’s damages claims at trial,” but contests liability for anything above this amount (Resp. 23:19–21). In Reply, JE Dunn acknowledges the “determination of JE Dunn’s entitlement to recover the full value of the assigned claims from SMM will need to await trial.” (Reply 14:17–19).

Because the parties do not dispute the issue, the Court GRANTS JE Dunn summary judgment on its indemnity, subrogation, and assignment claims up to $675,995.49 and DENIES summary judgment to the extent it seeks recovery more than this amount.

IV. CONCLUSION

IT IS HEREBY ORDERED that JE Dunn and the Surety Defendants' Motion for Partial Summary Judgment, (ECF No. 103), is **GRANTED in part** and **DENIED in part**. Summary judgment is GRANTED as to SMM's conversion claim and as to JE Dunn's indemnity and subrogation claim up to $675,995.49 for offset or credit purposes to be applied against SMM's damages claims, if any, at trial. Summary judgment is DENIED as to the parties' respective breach of contract claims and JE Dunn's indemnity and subrogation claim to the extent it seeks recovery exceeding $675,995.49.

DATED this 15 day of March, 2024.

Gloria M. Navarro, District Judge
UNITED STATES DISTRICT COURT