

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF ALABAMA

In Re

HORIZON SHIPBUILDING, INC.,

Case No. 02-10415-MAM-11

Debtor.

MARINE ENTERPRISES, INC.,

Plaintiff,

v.

Adv. No. 02-1078

HORIZON SHIPBUILDING, INC.,

Defendant.

**ORDER & JUDGMENT GRANTING JUDGMENT TO DEFENDANT  
AND DENYING RELIEF TO PLAINTIFF**

Jaime W. Betbeze, Mobile, Alabama, Attorney for the Plaintiff  
Irvin Grodsky, Mobile, Alabama; D.E. "Skip Brutkiewicz, Jr., Mobile Alabama,  
Attorneys for the Defendant

This matter is before the Court on the trial of an adversary proceeding involving breach of contract claims by Horizon Shipbuilding, Inc. ("Horizon") and Marine Enterprises, Inc. ("MEI") against each other. The Court has jurisdiction to hear this matter pursuant to 28 U.S.C. §§ 157 and 1334 and the Order of Reference of the District Court. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2) and the Court has the authority to enter a final order. For the reasons indicated below, the Court finds that defendant, Horizon, is entitled to a judgment against MEI but no actual damages are awarded to it.

## FACTS

Horizon, the debtor in possession, is a marine vessel construction and repair firm based in Bayou La Batre, Alabama. In March 2000, Horizon entered into a contract with SLOK Nigeria (“SLOK”) for the construction of three new offshore vessels - Hulls 41, 42, and 43. The first two vessels, Hulls 41 and 42, are 150-foot aluminum crew boats. Hull 43 is a 200-foot oil spill response vessel; it is the largest vessel Horizon has ever built. Horizon began construction on Hull 43 in June 2000, by laying its keel. Horizon solicited bids from subcontractors to perform work on its electrical and ventilation systems. On February 26, 2001, MEI submitted a bid of \$386,325.95. MEI, a wholly owned subsidiary of Jered Industries (“Jered”), is a marine shipbuilding contractor based in Vancleve, Mississippi. It provides both electrical and ventilation system services for the construction of new vessels and for the refurbishment of older vessels. Horizon accepted MEI’s bid; this was the first time the two parties had worked together.

After accepting MEI’s bid, David Williams, vice president of operations for Horizon, and David Griffin, then president of MEI, negotiated the contract. Mr. Griffin requested that MEI’s typical payment terms be included in the contract and Mr. Williams agreed to include them. Horizon issued a purchase order to MEI on March 3, 2001 in which Horizon agreed to a firm fixed price contract in the amount of \$386,325.95, to be paid “15% down with monthly progress payments for labor & material.” The purchase order provided for a specific scope of work that MEI would complete on Hull 43; work done outside the scope of the contract was subject to separate “change orders” which would become part of the original contract when they were approved by both parties. Horizon’s purchase order contained sixteen clauses under its “Purchasing General Terms and Conditions” but it did not define the method for calculating

progress payments. The purchase order's warranty provides MEI's "labor & material to be to ABS & SOLAS standards." Witnesses for both parties testified that the warranty language implies that MEI's work must meet IEEE45 and good marine practice standards as well.

Horizon and MEI disagree about the meaning of the phrase "progress payments" in their contract. Whether Horizon paid MEI timely and in sufficient amounts is at issue because of the parties differing views on this phrase. Although virtually every witness briefly testified to his understanding of the method for calculating progress payments, the Court finds the testimony of Robert Motter, David Griffin, Travis Short, and David Williams particularly relevant to this matter. Mr. Motter, the Chief Financial Officer at Jered, and Mr. Short, the owner of Horizon, both testified to their respective company's understanding of how progress payments were to be calculated. As stated earlier, Mr. Griffin of MEI and Mr. Williams of Horizon negotiated the contract.

Robert Motter testified that progress payments for labor and materials were to be calculated based upon MEI's percentage of completion of its work on Hull 43. Mr. Motter stated that Jered defines "percent complete" as how close Jered is to spending the total amount of its costs on the job. To illustrate this point, Mr. Motter stated that if Jered entered into a firm fixed price contract to provide marine services for \$100,000.00, at a cost to Jered of \$80,000.00, Jered would be entitled to 50% of the contract value, \$50,000.00, upon spending \$40,000.00, half of its costs to complete the work. According to Mr. Motter, this method of cost based accounting is a generally accepted accounting method in the marine services industry and it is used by Jered in 95% of its contracts. Mr. Motter did not participate in the negotiation or drafting of this particular contract though.

Like Mr. Motter, David Griffin testified on direct examination that progress payments were calculated based on MEI's incurred costs in completing the job. Mr. Griffin stated that MEI calculated progress based on incurred costs in virtually all of its contracts. He stated that MEI had the right to bill customers for materials received even if MEI had not installed the materials or paid its own supplier for them. He strongly stated that actual physical completion played only a very small role in determining the amount MEI would bill each month. However, on cross-examination, Mr. Griffin admitted that there were various ways and formulas to assess the amount due for progress payments. Mr. Griffin further admitted that MEI's actual physical progress should usually line up with its cost incurred.

Travis Short testified that although he did not negotiate the terms of the contract with MEI, he subsequently learned of the terms and approved of them. As president of Horizon, his approval was required on all contracts and all payments made by Horizon. He stated that his understanding of progress payments equates progress with actual physical progress rather than the cost based accounting method used by MEI. Mr. Short admitted on cross-examination that MEI did make some progress during months that Horizon did not remit any payment to MEI. Mr. Short explained that if he did not feel comfortable with MEI's work, he felt he could refuse to pay MEI under the contract. He further explained that he made payments to subcontractors based upon factors such as how much money Horizon had on hand, which subcontractors had been paid recently, and the status of completion on the job.

Similar to Mr. Short's testimony, David Williams testified that progress payments were to be calculated based upon actual physical completion of Hull 43, rather than the cost based accounting formula used by MEI. Mr. Williams stated that his understanding of progress payments relates mostly to "milestones," which are specific events of physical completion

measured by actually walking the vessel. He further stated that in the event of a progress payment dispute between the subcontractor and Horizon regarding the amount of work completed, Horizon would negotiate with the subcontractor, reach a compromise, and then make a progress payment for that amount. Mr. Williams stated that if no agreement could be reached, Horizon would not make a progress payment to the subcontractor for its work.

Based on their respective views of how progress payments were to be calculated, the parties began fulfilling their obligations under the contract. MEI began work on Hull 43 around the middle of March 2001 and Horizon made a 15% down payment on March 21, 2001 in the amount of \$57,948.89. MEI worked on Hull 43 throughout the month of April and issued a \$140,528.00 monthly progress payment invoice to Horizon on May 1, 2001. This sum, together with the down payment, was more than 50% of the entire contract price and it was billed within two months of commencement of the work. Horizon did not pay the May 1, 2001 invoice. Instead, Horizon's project manager, Ron Gunter, requested "backup" information for the invoice, including documentation of labor and materials cost to support MEI's claim that it was owed \$140,528.00 for the month of April. Horizon made no complaints regarding MEI's work quality at this time; it was only concerned with the method MEI calculated its percent complete to reach 50% completion after only two months.

MEI tried to alleviate Horizon's concerns with the large invoice by sending John Rancourt to meet with Horizon's staff. Mr. Rancourt apparently dealt mostly with Mr. Gunter because he sent him a fax "per [Mr. Gunter's] request" containing a one-page computer printout accompanied by a handwritten chart. The two documents summarized the total costs MEI had incurred at that point in the job. The handwritten chart contained two columns, one for labor and one for materials, under which the total costs for both ventilation work as well as electrical work

were listed. The computer printout contained the materials and labor costs incurred by MEI for the seven categories of work it was performing. Both documents reveal that MEI had already incurred over \$100,000.00 for material costs alone, the bulk of its May 1, 2001 invoice.

Horizon was not satisfied with this summary documentation; instead, it still sought more detailed information such as MEI's invoices and purchase orders for the materials it had purchased. There is mixed testimony from the parties regarding whether MEI provided Horizon with the detailed information it sought to justify MEI's May 1, 2001 invoice. Mr. Griffin testified that Mr. Rancourt took copies of MEI's invoices and purchase orders to his meeting with Horizon's staff and gave the copies to Mr. Gunter; however, Mr. Rancourt was never presented to the Court as a witness to verify this assertion. Mr. Gunter testified to the Court that he never received any backup information from Mr. Rancourt or anyone at MEI; without proper backup information, Mr. Gunter stated he would not approve the bill for payment. However, Mr. Gunter also testified that he is not sure if he sent the May 1, 2001 invoice to Mr. Short for payment. Mr. Short's approval is required on all Horizon's payments; if the invoice was not sent to him, it would not have been paid.

Horizon never made any payment on the May 1, 2001 invoice. Nonetheless, MEI continued to work on Hull 43 throughout the months of May, June, and July without receiving any payment of its monthly progress payment invoices. During this time, Horizon placed various change orders with MEI that brought the total contract value to \$490,419.51. MEI issued monthly progress payment invoices to Horizon in accordance with its view of the contract. As with the May 1, 2001 invoice, MEI did not provide Horizon with the backup information it desired for the June and July invoices. Horizon never complained to MEI about

any problems with MEI's work or its quality. MEI never inquired about or complained about nonpayment of its invoices. The parties continued in this course of dealing until August 2001.

Horizon made a \$35,000.00 payment to MEI on August 3, 2001 - its first payment to MEI since its initial 15% down payment of \$57,948.89 on March 16, 2001. Around this same time, Horizon contracted with MEI to perform additional work on Hull 41, a separate vessel Horizon was building for its client SLOK. Although Horizon's employees were in charge of the job, it sought MEI's help on Hull 41 to rework cable supports, known as raceways, due to Horizon's inexperience with constructing vessels required to meet ABS standards. MEI agreed to do the work on the condition that Horizon remit weekly progress payments. MEI performed work on Hull 41 during the months of August and September; it submitted invoices to Horizon totaling \$16,471.50. Mr. Motter testified that Horizon did not make any payments on these invoices. MEI completed its work on Hull 41 in September 2001; the vessel was certified under ABS standards and accepted at a later date by SLOK.

On September, 5, 2001, Horizon proposed a weekly payment schedule to the subcontractors working on Hull 43, including MEI. This offer was unsolicited; MEI had still not complained about nonpayment. Horizon made its first \$40,000.00 payment to MEI under the proposed schedule on September 6, 2001. MEI accepted the payment and continued working on Hull 43. On September 10, 2001, Jerry Burt, a representative for Horizon's customer, SLOK, arrived at Horizon's shipyard and began inspecting MEI's work on Hull 43. Mr. Burt is an employee of ABS Consulting, which was subcontracted through various entities to inspect Hull 43 on behalf of SLOK. ABS Consulting does not have any authority to certify vessels on behalf of ABS.

Mr. Burttt testified in his deposition that his job was to observe the production of Hull 43 and report any deficiencies in its construction to ABS Consulting, which would convey them to SLOK. Mr. Burttt stated that the deficiencies he was to look for consisted of work done on Hull 43 that would not meet ABS, SOLAS, IEEEE45, and good marine practice standards. After surveying Hull 43, Mr. Burttt felt the quality of the cable supports was very low. In his opinion the cable supports would not meet ABS standards because they were spaced 24 inches apart and ABS only allows 16 inches of space at the maximum. He also felt that the cable radiuses would have to be corrected, the romex connectors would have to be removed in certain areas and replaced with proper connectors, the cables would have to be tagged, the lights would have to be rebraced, and the diameter of the turns of the cables would have to be corrected.

Mr. Griffin testified that in his opinion, the 24-inch spacing of the cable supports complied with the ABS standards applicable to Hull 43. He stated that the 16-inch requirement for spacing is the 2001 standard, which does not apply to Hull 43 because its construction began in 2000. Mr. Griffin further testified that MEI was going to make many of the other corrections suggested by Mr. Burttt either when MEI finished the job or when and if ABS required MEI to make them.

Like Mr. Griffin, Bill Dyson, MEI's electrical supervisor, testified that MEI's work met ABS standards. He stated that the applicable ABS standards for Hull 43 allowed cable supports to be hung 24 inches apart. Mr. Dyson testified that subsequent to working on Hull 43, he worked on vessels on which cable supports were installed 18 inches apart. He stated that ABS certified these vessels. Additionally, he testified that Mr. Burttt's concern was with the cable supports centered on the vertical downcomer, not the 24-inch spacing. Mr. Dyson stated that he told Mr. Burttt MEI would come back and strengthen the cable supports to Mr. Burttt's

satisfaction. Furthermore, Mr. Dyson testified that he was not concerned with the spacing because an ABS surveyor who inspected Hull 43 told him the spacing was fine. Mr. Dyson stated that in his opinion, the lights on Hull 43 would not have to be rebraced. Similar to Mr. Griffin's testimony, Mr. Dyson testified that MEI would have made many of the corrections suggested by Mr. Burttt at the end of the job or when and if ABS required MEI to make changes.

MEI disagreed with Mr. Burttt regarding many of his suggestions that MEI's work did not meet ABS, IEEE45, and good marine practice standards. MEI felt that Mr. Burttt was unqualified to render opinions regarding ABS standards. Mr. Burttt was asked about his knowledge of ABS requirements in his deposition; he stated "I couldn't quote them [ABS standards] word for word, but I know where I need to look when I have to." Additionally, Mr. Burttt testified in deposition that he had never received any formal electrical training, he had never been licensed as an electrician, he had never done any electrical work himself except on land based projects, and he had never had any training in how to interpret ABS standards.

Darren Tuvelle, who was hired by Horizon to be its electrical supervisor in late October 2001, testified that Mr. Burttt's opinions regarding the poor quality of MEI's work were correct. Mr. Tuvelle stated that the cable supports did not meet ABS standards because the length between each support was greater than 16 inches. In support of Mr. Tuvelle's testimony, Horizon introduced into evidence a copy of the 2001 ABS standards ("2001 ABS") for vessels of Hull 43's type.<sup>1</sup>

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<sup>1</sup>The debtor offered Exhibit 39 and the Court received it under Fed. R. Evid. 803(17). The document is Part 4, Chapter 6, Section 3 of the American Bureau of Shipping Standards required for ABS certification. Fed. R. Evid. 803(17) excepts from the hearsay rule "market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations." The ABS Standards are such data.

Part 4, Chapter 6, Section 3, Paragraph 5.9.1(a) of the 2001 ABS gives the allowable length for cable supports; it states that “[t]he distances between supports are to be suitably chosen according to the type of cable and the probability of vibration, and are not to exceed 400mm (16in.).” The effective date provision of the 2001 ABS is found in the fourth paragraph of its Introduction, which states that “[t]he effective date of each technical change since 1993 is shown in parenthesis at the end of the subsection/paragraph titles within the text of each Part. Unless a particular date and month are shown . . . (1999) refers to 12 May 1999.” Section 5.9.1, the section requiring a 16-inch maximum distance between cable supports, contains the year 1999 in parenthesis at the end of its paragraph title. Therefore, the 16-inch requirement between supports became effective on May 12, 1999, almost a year before Horizon began construction on Hull 43.

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The rule allows admission of documents “prepared with the view that they would be in general use by an industry or members of the public having a general need to rely on information of that type.” *Conoco Inc. v. Department of Energy*, 99 F.3d 387, 393 (Fed. Cir. 1997). The standards state “straightforward objective facts, not requiring, for their statement, a subjective analysis of other facts.” (Emphasis deleted.) *White Industries Inc. v. Cessna Aircraft Company*, 611 F. Supp. 1049, 1069 (W.D. Mo. 1985). The Court realizes the parties had differing views about whether the ABS standards would be applied as written to Hull 43's electrical equipment; however, the rule clearly and objectively states a standard. That is what Fed. R. Evid. 801(17) requires for admissibility.

Courts have admitted Dun & Bradstreet reports, *Hamilton v. Accu-tek*, 32 F. Supp. 2d 47, 64, fn. 11 (E.D.N.Y. 1998); newspaper and magazine articles, *Coast Fed. Bk, FSB v. U.S.*, 48 Fed. Cl. 402, 449 (2000); websites of government entities and private companies containing interest rates, *Elliott Assoc., L.P. v. Banca de la Nacion*, 194 F.R.D. 116, 121 (S.D.N.Y. 2000); commercial brochures generally relied upon by potential purchasers of a manufacturer's product, *Susemihl v. U.S. Steamship Co. (Bahamas) Ltd.*, 859 F.2d 150 (unpublished), also at 1988 WL 97288 (4th Cir. 1988) under Fed. R. Evid. 803(17). The ABS standards are similar.

Even if the Court did not receive the actual book or website containing the standards as evidence, there was other oral evidence of these standards. Receipt of Exhibit 39 was not crucial to the Court's opinion.

Although the cable support system was Horizon's largest area of concern when it began finishing MEI's work, Mr. Tuvelle testified that Horizon had other concerns as well. He stated that Horizon had to reroute a cable located in the bilge area due to IEEE45 regulations. Horizon introduced a copy of the 1998 IEEE45 regulations into evidence; it clearly states on page 139, Section 10.3 that "[c]ables should not be located in bilges."<sup>2</sup> Witnesses for both parties dispute whether the area in which the cable was located is a bilge area though.

Mr. Tuvelle testified that Horizon had to correct other aspects of MEI's work such as repulling cable to ensure it was routed correctly, reworking holes known as "knockouts" in the junction boxes, rebracing various light fixtures, and waterproofing certain connectors. Unlike the cable support system and the cable in the bilge area, the ABS and IEEE45 regulations were not dispositive regarding these items. Additionally, witnesses for both parties testified that MEI would likely have addressed these items at the end of the job, known as the "groom out" period in the marine services industry.

The testimony of Mr. Burt and Mr. Tuvelle establishes that Horizon had legitimate concerns about the quality of MEI's work after Mr. Burt's arrival. The addition of Mr. Burt to the mix led to a quick deterioration of the relationship between MEI and Horizon even as Horizon continued to make payments to MEI on a roughly weekly basis. Horizon made its second, \$20,000.00 payment under its proposed payment plan on September 19, 2001. MEI accepted the payment and continued working. Horizon made its third, \$27,083.00 payment on September 25, 2001, followed by its fourth, \$30,000.00 payment on October 4, 2001, and its fifth, \$17,083.00 payment on October 11, 2001. Horizon made total payments to MEI of

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<sup>2</sup>The debtor offered Exhibit 41 and the Court received it under Fed. R. Evid. 803(17). The document is Paragraph 10.3, p. 139 of the IEEE45 Standards required for cables installed on marine vessels. See *supra note 1* and accompanying text.

\$134,166.00 under its proposed plan. MEI accepted all the payments made by Horizon and continued working on Hull 43.

On October 24, 2001, roughly two weeks after Horizon stopped making payments under its own proposed payment plan, MEI placed a \$228,964.77 watercraft lien on Hull 43 without notifying Horizon. The lien did not prevent MEI from negotiating with Horizon however. Horizon held a meeting with MEI to discuss Mr. Burt's findings on October 26, 2001. The parties disagreed both in this meeting as well as in subsequent letters regarding the two main issues in this case: ABS standards for certification and MEI's percent complete on the total job. MEI based its percent complete on its cost thus far incurred in completing the job; Horizon used an actual physical progress method to determine MEI's percent complete. Further, MEI disagreed with Horizon and Mr. Burt regarding the effective date provisions in the ABS code that determine which ABS standards were applicable to the construction of Hull 43. This led to disagreement between the parties about the quality of MEI's work.

On October 31, 2001, Mr. Griffin sent a letter to Mr. Short demanding that Horizon remit a \$72,455.00 payment by November 2, 2001, followed by a second \$75,000.00 payment by November 9, 2001. The letter stated that if Horizon did not remit both payments, MEI would "pull-off the contract and pursue further legal actions." This was the first time MEI demanded payment from Horizon. On the same day, Mr. Gunter sent a letter to Mr. Griffin conveying Horizon's intention to cancel eight change orders worth \$68,525.16 and begin working on those projects itself. The letter stated that Horizon would issue a purchase order in the amount of the vendor's invoices to MEI for any material MEI had already purchased for the change orders. Mr. Gunter thought Mr. Griffin agreed with the cancellations, but MEI did not subsequently indicate in writing that it intended to accept Horizon's cancellation of the change orders.

MEI pulled its employees off the Hull 43 job on November 1, 2001, due to the ongoing dispute with Horizon. Horizon learned on November 6, 2001, that MEI had placed a watercraft lien on Hull 43. In response, Mr. Short sent a letter the same day to MEI stating that Horizon would not allow MEI's employees to return to Horizon's shipyard; additionally, Mr. Short stated that Horizon would immediately take over the work MEI had been performing.

Despite the apparent impasse reached in early November, Horizon and MEI continued negotiating regarding both the percent complete of the work and ABS certification of Hull 43. On November 15, 2001, Mr. Short sent a letter to Mr. Griffin stating that Horizon had revised MEI's percent complete on the job up to 66%, from 55%, if MEI continued on the job. Mr. Short stated that Horizon estimated MEI's total contract, excluding the change orders Horizon believed were cancelled, to be \$421,935.39.<sup>3</sup> He further stated that Horizon had already paid MEI \$227,114.87, which was 53.6% of the total contract, and a payment of \$26,047.00 to MEI would bring Horizon up to date for all the labor and material costs incurred by MEI. MEI did not accept Horizon's offer.

Horizon contacted C & G Marine Consulting ("C & G") to provide an independent survey of MEI's work on Hull 43 in November 2001. Charles Gilbrect conducted the survey shortly before Thanksgiving in November 2001, for C & G. He testified that MEI had supplied 100% of the material and was 42% to 43% complete on its labor work for Hull 43 when he conducted the survey. This is lower than the 66% complete Mr. Short was willing to estimate if

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<sup>3</sup>The Court finds the actual amount of the change orders Horizon believed it had cancelled is \$68,525.16, the amount stated in Mr. Gunter's October 31, 2001 letter to Mr. Griffin. Therefore, if the value of the change orders were excluded from MEI's total contract, its value would be \$421,894.35. This \$41.04 difference makes no meaningful difference in the percentage completion calculations done by the parties and by the Court.

MEI continued on the job; however, because Mr. Gilbrect's estimate included the cost of all the materials already furnished to the job in addition to the labor provided, Mr. Gilbrect's estimate of the overall value of MEI's work was higher than Short's estimate. Mr. Gilbrect's written report stated:

The purpose of this inspection was to have a third party report of the percent complete of the Electrical, HVAC, and Ventilation work done by Marine Enterprises Inc. The report includes the percent of the job completed, quality, amount of necessary rework and work completed which is not to ABS code or the Recommended Practice for Electric Installations on Shipboard. The amount of work completed was calculated using purchase orders and change orders issued to Marine Enterprises Inc. Each item was inspected to ascertain percent complete. If item was not done to ABS codes, issued drawing or Recommended Practice for Electric Installations on shipboard. Item counted as rework. Rework time for each item was estimated and deducted from percent completed.

As the report's description stated, it contained a very thorough inventory of the material purchased by MEI, the percent of work completed by MEI on each part of the vessel, and a dollar amount corresponding to the value of the materials purchased plus the labor costs to install the materials. Mr. Gilbrect estimated MEI's "dollar amount completed" at \$319,124.70.

Mr. Gilbrect was also asked about the quality of MEI's work. He stated that in his experience of surveying 50 to 75 marine vessels of various types, the work done by MEI on Hull 43 was the worst he had seen in the industry. He stated that MEI's work did not meet good marine practice and it did not meet ABS standards for certification. Mr. Gilbrect prepared a written document titled "AREAS OF MAJOR CONCERN" for Horizon regarding his observations on MEI's work. Mr. Gilbrect listed eight areas of major concern with MEI's work; however, only a few of the items being disputed by the parties were listed. According to this document, Mr. Gilbrect was not very concerned with the cable supports, the use of romex connectors in certain areas, the cable radiuses, or the bracing of the lights on Hull 43.

During his testimony, Mr. Gilbrect stated that he was concerned with MEI's work on the cable supports, but he did not list the cable supports as a major concern because MEI could correct its work and receive ABS certification once fixed. His testimony was similar regarding the other items being disputed by the parties that he did not list as major concerns - they too could be fixed by MEI and would likely receive ABS certification once fixed. Although Mr. Gilbrect testified that, in his opinion, MEI could correct and receive certification on most of the items being disputed by the parties, he also stated that in his experience he would not pay monthly progress payment invoices that did not contain backup information, such as the ones MEI submitted to Horizon. Finally, he testified that in his opinion it would cost an additional \$350,000.00 to complete the work on Hull 43 using MEI's statistics for work hours and compensation.

In January 2002, Horizon began completing both the ventilation system work as well as the electrical system work on Hull 43. Horizon continued working on both systems throughout 2002. Horizon's witnesses testified that the electrical system work required the greatest amount of work. Mr. Tuvette testified that correcting the cable support system was the most time consuming and expensive portion of the electrical system work.

Mr. Tuvette and other Horizon employees corrected MEI's prior work to bring it in compliance with what they believed were ABS standards. Mr. Tuvette testified that he installed a hanging ladder tray system in Hull 43 to support its electrical cables. Although this system is more expensive than the type used by MEI, Mr. Tuvette stated that it was the best system to use under the circumstances. He also testified that Horizon employees repulled cables that were not tagged to ensure they were routed properly, removed the cable MEI had installed in the bilge

area, corrected the bending radius of various cables, decreased the size of the knockouts in boxes located in spray areas, and rebraced improperly hung lights.

At trial, Horizon introduced into evidence a brief three page “Cost Code Report” claiming Horizon’s cost incurred from November 1, 2001, through August 16, 2002, to complete the electrical work was \$203,353.94 and its cost to complete the ventilation work was \$18,404.50. The first page of the report summarized Horizon’s total costs, while the second and third pages gave a slightly more detailed itemization. Horizon’s report did not include the costs it incurred to complete the change orders it claimed to have cancelled.

Subsequently, Horizon introduced another copy of its “Cost Code Report”; this copy contained the same figures on the second and third page as the first report introduced by Horizon. The first page summary number for material costs had been changed to show Horizon’s cost to complete the electrical work from November 1, 2001, through August 16, 2001, was \$198,197.49. Horizon’s counsel explained that the new, lower amount, reflected a material cost that was deleted. Like the first report, this report also did not include the costs Horizon incurred to complete the change orders.

Horizon introduced into evidence a one page document claiming its cost to complete the “cancelled” change orders was \$49,106.90 through August 16, 2001. It did not provide any additional documentation to support this figure; rather, the same two pages of documentation that accompanied Horizon’s “Cost Code Report” were attached. Mr. Short testified that Horizon also incurred \$49,945.98 in fringe costs, such as health insurance, FICA, vacation pay, illness pay, and workers compensation, to complete the “cancelled” change orders.

At the time this adversary proceeding began on August 23, 2002, Horizon was still in the process of completing the electrical system work on Hull 43. It expected to complete the work

by September 2, 2002. Horizon's claim includes a \$12,281.60 projected amount to totally complete work on the vessel during September 2002; this brings Horizon's total claimed costs to complete MEI's work to \$327,936.47. MEI disputes the amount of Horizon's claim.

### LAW

In this case, on its complaint, the plaintiff, MEI, bears the burden of proving by a preponderance of the evidence that Horizon breached its contract with MEI and that MEI is due to be awarded damages. *Clark v. Liberty National Ins. Co.*, 592 So. 2d 564 (Ala. 1992); *James S. Kemper & Co. v. Cox & Assoc., Inc.*, 434 So. 2d 1380 (Ala. 1983). As to its counterclaim, Horizon bears the burden of proving MEI breached the parties' contract and MEI owes damages to it. *Id.* The contract is governed by Alabama law. *Butner v. United States*, 440 U.S. 48 (1979).

The Court must look at the following issues to reach a result in the case.

1. Was the payment term in the contract between Horizon and MEI ambiguous?
2. If it was, how should the payment term be construed?
3. Did either party breach the agreement?
4. If so, did either party waive the breach of the other party?
5. What are the damages suffered by the nonbreaching party?

#### 1.

#### Was the Payment Term in the Contract Between Horizon and MEI Ambiguous?

As shown by the testimony, Horizon and MEI had different views about the meaning of the payment term in their contract. A contract term is not ambiguous just because there is a dispute about it. *Englund's Flying Service, Inc. v. Mobile Airport Authority*, 536 So. 2d 1371 (Ala. 1988) "whether an agreement is ambiguous is a question of law for the trial court." *Yee v.*

*Stephens*, 591 So. 2d 858, 859 (Ala. 1991) (citing *Terry Cove North v. Baldwin County Sewer Authority, Inc.*, 480 So. 2d 1171 (Ala. 1985)). After review of the contract, the Court concludes that the payment term was ambiguous. The phrase “monthly progress payments for labor & material” is susceptible to several interpretations. As the parties’ positions indicate, it could mean progress based strictly on costs and it could also mean progress based in whole or part on percentage of completion.

If the payment term is ambiguous, the Court is to look to the intent of the parties and the totality of the circumstances to determine how to understand the agreement. In this case, Horizon and MEI’s actions did not always strictly support either view of the language.

Horizon stated it believed the contract required monthly payments to be made on percentage completion. However, it made no payment until August 3, 2001, and had no discussions with MEI regarding completion percentage. It just did not pay at all after requesting backup information for the May, June, and July invoices and not receiving it. When Horizon did make payments, they were weekly, not monthly, and there was no indication they bore any relationship to completion. When MEI finally requested payment in full of its invoices in October 2001, Horizon did offer to pay in full based on its calculations of MEI’s physical completion of the work.

MEI sent monthly billings based strictly upon its labor and materials costs. However, it never demanded any payment on the billings until October 2001. It also accepted without any reservation payments from Horizon that were less than full monthly invoice payments. Also, David Griffin indicated he looked at actual physical completion of a job as a component of billing. He also discussed physical completion with Travis Short in their exchange of letters about what was owed in October 2001.

As shown, the contract's payment term was ambiguous. The parties' actions do not clear up the ambiguity.

2.

If the Payment Term is Ambiguous, How Should it be Construed?

When the parties' actions do not resolve the ambiguity, courts resort to rules of construction. "Generally courts construe ambiguous language in a contract most strongly against the party who selected the language." *Krepp v. Credit Acceptance Corp. et al. (In re Krepp)*, 229 B.R. 821, 847-48 (Bankr. N.D. Ala. 1999) (citing *Lackey v. Central Bank of the South*, 710 So. 2d 419, 422 (Ala. 1998)). In this case, MEI drafted the language at issue.<sup>4</sup> Therefore, the Court concludes that the contract required monthly payments by Horizon to MEI based upon the percentage of actual physical completion of the job.

3.

Did Either Party Breach the Agreement?

The contract between MEI and Horizon contains an ambiguous payment term, but its other provisions are valid and enforceable. Horizon was required to remit monthly payment to MEI for its progress and MEI was required to build the vessel in compliance with ABS, SOLAS, IEEEE45, and good marine practice standards. If either party did not abide by these provisions, it would be in breach of contract. Breach is "the failure without legal excuse to perform any promise forming the whole or part of the contract." *Seybold v. Magnolia Land Co.*, 376 So. 2d 1083, 1085 (Ala. 1979) (citing 17 Am. Jur. 2d Contracts §441 at 897).

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<sup>4</sup>The language is in a purchase order of Horizon but the parties testified that the wording was provided by MEI.

Horizon made a 15% down payment to MEI on March 21, 2001, in the amount of \$57,948.89. Thereafter, MEI performed work during the month of April and remitted its first invoice on May 1, 2001 for \$140,528.00. Horizon did not pay MEI any amount on the invoice; instead, Mr. Gunter requested backup information, including MEI's invoices and purchase orders, from MEI to support such a large bill. Mr. Rancourt met with Mr. Gunter and Horizon's staff to provide them with backup information for MEI's invoice. Witnesses for the parties disagree regarding whether or not Mr. Rancourt ever gave MEI's invoices and purchase orders to Mr. Gunter or anyone at Horizon. The only evidence that MEI provided Horizon with any backup information is a two-page fax containing a summary of MEI's charges for labor and materials.

Mr. Griffin testified that Mr. Rancourt took copies of MEI's invoices and purchase orders to Mr. Gunter; however, Mr. Rancourt was not presented as a witness to the Court. Mr. Gunter was presented as a witness to the Court and he denied ever receiving any backup information from anyone at MEI. The Court observed him and found him to be credible; accordingly, the Court finds that MEI did not provide the type of backup information Horizon requested. Nonetheless, MEI's failure to provide the backup information Horizon requested did not entirely excuse Horizon from performing under the contract.

Under any reasonable interpretation of the contract, Horizon had to remit monthly payments to MEI for labor and material if MEI made progress and its work complied with the agreed upon construction standards. Witnesses for both parties testified that MEI did make some progress during April; they also testified that there were no complaints about the quality of MEI's work. Therefore, Horizon had to make a monthly payment in some amount to MEI.

Horizon did not make any payment on the May 1, 2001 invoice; accordingly, it was in breach of contract as of that day.

Although MEI did not receive any payment on its first invoice, it continued working and submitted a second invoice on May 31, 2001 in the amount of \$68,092.51, and a third invoice on July 5, 2001, in the amount of \$69,821.00. Horizon did not make any payment on these invoices even though it had no complaints regarding the quality of MEI's work. Based on MEI's method of calculating monthly progress payments, Horizon was \$278,441.51 behind in its payments. The large amount of this deficiency, combined with Horizon's total lack of payment to MEI, put Horizon in material breach of its contract. *See United States for the Use and Benefit of Aucoin Electric Supply Co. v. Safeco Ins. Co.*, 555 F. 2d 535, 541 (5th Cir. 1977) (holding that "the amount of the deficiency is one of the several factors to be considered in context to determine whether there was a material breach of the contract").

MEI did not declare Horizon to be in material breach of contract for failing to make any payments, even though it had the right to do so. This is important because the Eleventh Circuit Court of Appeals has held:

A material breach does not automatically and *ipso facto* end a contract. It merely gives the injured party the right to end the agreement; the injured party can choose between canceling the contract and continuing it. If he decides to close the contract and so conducts himself, both parties are relieved of their obligations and the injured party is entitled to damages to the end of the contract term (to put him in the position he would have occupied if the contract had been completed). If he elects instead to continue the contract, the obligations of both parties remain in force and the injured party may retain only a claim for damages for partial breach."

*Dunkin' Donuts, Inc. v. Minerva, Inc.*, 956 F. 2d 1566,1571 (11th Cir. 1992) (quoting *Cities Service Helix, Inc. v. United States*, 543 F. 2d 1306, 1313 (Ct. Cl. 1976). Rather than choosing

to declare Horizon in breach and sue for damages, which MEI could have done after Horizon failed to make any payment on MEI's first invoice, MEI continued to work on the vessel. Moreover, MEI was given two additional opportunities to declare Horizon in breach when Horizon failed to make any payment on either of MEI's second or third invoices. Each time Horizon failed to pay MEI for its monthly progress, MEI's choice was to continue in the contract.

MEI's choice to continue the contract with Horizon meant that its obligations to Horizon remained in effect even though it was not being paid. Under the contract, MEI's work had to comply with ABS, SOLAS, IEEEE45, and good marine practice standards. Witnesses for both parties testified that Horizon had no complaints about MEI's work during the months of April, May, June, July and August. Horizon's only complaint to MEI during this time was a dispute regarding how the parties calculated the percent complete of the work.

Horizon began to take issue with the quality of MEI's work soon after Mr. Burttt arrived at its shipyard on September 10, 2001. Mr. Burttt was the representative of Horizon's client, SLOK. Mr. Burttt surveyed MEI's work and informed Horizon that, in his opinion, MEI's work did not meet good marine practice and it would not receive ABS certification.

Mr. Burttt specifically noted that MEI's cable support system did not meet ABS standards in his opinion because the distance between the supports, 24 inches, exceeded the 16-inch maximum allowed under ABS. Much of MEI's other work also concerned Mr. Burttt. He felt that MEI's installation of a cable in the bilge area did not comply with ABS standards; additionally, he took issue with the romex connectors, the cables that were not tagged, the lights, and the diameter of the turns. Mr. Burttt's testimony alone would not have convinced the Court of the inadequacy of MEI's work in any given area or as to how the work measured up to ABS

standards. However, Horizon presented two additional witnesses, Mr. Gilbrect and Mr. Tuvelle, who gave testimony regarding ABS and good marine practice standards that was substantially similar to the testimony of Mr. Burt. The testimony of these witnesses, who were very competent to give testimony regarding ABS standards, coupled with Mr. Burt's testimony, did convince the Court by a preponderance of the evidence that MEI's work was poor in quality.

Mr. Burt's testimony regarding the quality of MEI's work was supported by the testimony of Mr. Gilbrect, the C & G surveyor whom Horizon paid to conduct an independent survey of MEI's work. Mr. Gilbrect testified that MEI's work on this vessel was the worst he had ever seen in the industry. He stated that much of MEI's work did not comply with good marine practice and it would not receive ABS certification in his opinion. Mr. Gilbrect's list of his eight areas of major concern with MEI's work was introduced into evidence. Although only a few of the items on Mr. Gilbrect's list were the same as those Mr. Burt was concerned about, Mr. Gilbrect testified that in his opinion MEI's work on the items noted by Mr. Burt was very poor and would not receive ABS certification unless MEI corrected it. The Court found Mr. Gilbrect to be extremely competent regarding his qualifications as a marine surveyor; accordingly, the Court gives great weight to his testimony regarding MEI's work.

Mr. Burt's testimony was further supported by Mr. Tuvelle, whom Horizon hired to be its electrical supervisor shortly after breaking off negotiations with MEI. Mr. Tuvelle testified that in his opinion, MEI's work on the cable supports had to comply with the 16-inch distance standard. He also testified that in his opinion, MEI improperly installed a cable in the bilge area of the vessel. Mr. Tuvelle further testified regarding a wide ranging number of items that MEI worked on which did meet ABS standards in his opinion. Mr. Tuvelle showed numerous before and after pictures of MEI's work, giving a thorough explanation of his complaints for each item.

The Court was impressed with Mr. Tuvelle's knowledge of ABS and good marine practice standards and found him to be very competent to give testimony; accordingly, the Court gives substantial weight to his testimony.

Both Mr. Griffin and Mr. Dyson testified that in their opinion, the 24-inch spacing used by MEI was proper under ABS standards. They both stated that the 16-inch spacing requirement was not applicable to MEI's work on this vessel because it did not become effective until after the vessel's construction began. They testified that they felt Mr. Burttt was not qualified to interpret ABS standards because his complaints about MEI's work were unfounded. Mr. Griffin testified that Horizon never complained about MEI's work until Mr. Burttt arrived; he stated that in his opinion, Mr. Burttt arrived after Horizon was in financial trouble and tried to get his client SLOK a Cadillac of a vessel for a Chevrolet price. The Court found Mr. Griffin and Mr. Dyson competent regarding their qualifications to give testimony regarding ABS standards. However, the weight of their testimony was diminished with Horizon's introduction of oral and written evidence about the 1998 IEEE45 regulations as well as the 2001 ABS standards.

The 1998 IEEE45 regulations clearly state that cables should not be installed in the bilge area; the 2001 ABS regulations clearly state that 16-inch spacing is required between cable supports. Both became effective on or before May 12, 1999, almost a year before construction on this vessel began. This directly contradicts the testimony of MEI's witnesses, while supporting the testimony of Horizon's witnesses, on two critical issues regarding the quality of MEI's work. Accordingly, the Court finds that the testimony of Mr. Burttt, Mr. Gilbrect, and Mr. Tuvelle, is to be given greater weight than the testimony of Mr. Griffin and Mr. Dyson.

Horizon's witnesses testified that in their opinion, MEI's work did not meet ABS and IEEE45 standards. Horizon introduced into evidence a copy of both sets of regulations to

support the testimony of its witnesses. Based upon the testimony of Horizon's witnesses and the copies of the regulations, the Court finds that MEI's work did not meet ABS, IEEE45, or good marine practice standards at the time MEI left the job. Some of the problems could only be fixed with difficulty.<sup>5</sup> Accordingly, the Court finds that MEI materially breached its contract with Horizon under the contractual provision requiring MEI's work to meet ABS, IEEE45, and good marine practice standards.

4.

If So, Did Either Party Waive the Breach of the Other Party?

The Court has found that both Horizon and MEI breached the contract at issue - Horizon did not pay MEI and MEI did not build to the standards required by the contract. The Court must now decide if either party waived the other's breach. "Waiver is the intentional relinquishment of a right. It is ascertained from the external acts manifesting the waiver, and may be found when one's course of conduct either indicates a waiver or is inconsistent with any other intention" *Nelson v. Vick*, 462 So. 2d 935, 937 (Ala. Civ. App. 1984) (citing *Givens v. General Motors Acceptance Corp.*, 324 So. 2d 277 (Ala. Civ. App. 1975)). "Whether a party has waived strict compliance with the terms of a contract is a question of fact." *Massey v. Jackson*, 726 So. 2d 656, 659 (Ala. Civ. App. 1998) (citing *Killen v. Akin*, 519 So. 2d 926, 929 (Ala. 1988)).

The contract between Horizon and MEI did not contain a waiver provision giving MEI the right to accept late payments while maintaining the right to declare Horizon in breach. Therefore, late payments accepted by MEI would be considered a waiver unless MEI reserved

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<sup>5</sup>Neither party called an actual ABS surveyor to clear up this dispute.

the right at the time of acceptance to declare Horizon in breach, which it did not. After receiving an initial down payment of \$57,948.89 on March 16, 2001, MEI worked until August 3, 2001, before receiving another payment. MEI submitted four monthly invoices through August 3, 2001; Horizon did not pay any of them.

MEI did not complain to Horizon about its lack of payment. Instead, MEI continued working and accepted a \$35,000.00 payment from Horizon on August 3, 2001. The \$35,000.00 amount did not relate to any invoice submitted by MEI; it was simply an amount Horizon thought it should pay MEI. MEI accepted the payment without reservation and continued working. On September, 5, 2001, Horizon proposed a weekly payment schedule to MEI. MEI did not expressly accept the payment schedule in writing but it did accept the roughly weekly payments of \$40,000.00 on September 6, 2001, \$20,000.00 on September 19, 2001, \$27,083.00 on September 25, 2001, \$30,000.00 on October 4, 2001, and \$17,083.00 on October 11, 2001, without any reservation of its rights.

MEI's acceptance of Horizon's payments constituted a waiver of Horizon's prior material breaches of contract. It was an "external act" that can only be reasonably construed as "inconsistent with any other action" than waiver. See *Nelson v. Vick*, 462 So. 2d at 937. Horizon's last payment to MEI was on October 11, 2001; therefore, MEI could not declare Horizon in material breach before that date. However, MEI could declare Horizon in material breach any time thereafter if Horizon failed to pay MEI "without legal excuse." See *Seybold v. Magnolia Land Co.*, 376 So. 2d at 1085.

Mr. Griffin sent a letter to Mr. Short on October 31, 2001, demanding that Horizon remit a \$72,455.00 payment by November 2, 2001, followed by a second \$75,000.00 payment by

November 9, 2001. He stated that if Horizon did not remit both payments, MEI would “pull-off the contract and pursue further legal actions.” This was both the first time MEI demanded payment from Horizon and the first time MEI threatened to hold Horizon in breach of contract for failure to pay.

Horizon did not pay MEI after it received Mr. Griffin’s October 31, 2001 letter; therefore, MEI could hold Horizon in material breach of contract if (1) Horizon owed to MEI the amount Mr. Griffin claimed *and* (2) Horizon did not have a “legal excuse” allowing it to forego payment. MEI could hold Horizon in material breach only if MEI satisfied both prongs of this analysis. The Court holds that MEI could not satisfy either of the two prongs when it made its demand for payment in the October 31, 2001 letter. Horizon could withhold payment from MEI without being held in material breach both because it did not owe MEI the amount Mr. Griffin claimed as well as because MEI’s work failed to meet ABS, IEEE45, and good marine practice standards, which the contract required.

Mr. Griffin’s October 31, 2001 letter to Mr. Short demanded that Horizon remit a total of \$147,455.00 in payments to MEI by November 9, 2001. Horizon had already made \$227,114.87 in total payments to MEI when Mr. Griffin made this demand; therefore, Mr. Short did not agree to make the \$147,455.00 in payments. Mr. Short estimated that Horizon’s \$227,114.87 in total payments was equal to 53.6% of its contract; he arrived at this figure by taking the total contract value of \$490,419.51, subtracting \$68,000.00 for the change orders Horizon “cancelled,” and then factoring in the \$227,114.87 Horizon had paid MEI. Mr. Short estimated that a \$26,047.00 payment to MEI, rather than the \$147,455.00 in payments that Mr. Griffin demanded, would pay MEI in full for the work it had completed on Hull 43 by bringing Horizon’s payments to MEI to

60% of the total contract. All of Mr. Short's calculations were based on physical completion of the work, which the Court has found is the proper calculation method.

MEI could not hold Horizon in breach of contract for failing to pay the \$147,455.00 in payments that MEI demanded if the \$26,047.00 payment suggested by Mr. Short would have brought Horizon up to the percentage of payment corresponding to the amount of work MEI had completed as of its October 31, 2001 demand letter. Although MEI suggests, perhaps correctly, that Horizon did not legally cancel the change orders it claimed were cancelled, the Court finds that a determination of that issue is unnecessary. Even if the \$68,525.16 value of the "cancelled" change orders is included when determining the percentage Horizon had paid MEI, Horizon's \$26,047.00 payment would have brought it in line with the amount of work MEI had completed.

The total contract value of the work MEI agreed to perform, including the "cancelled" change orders, was \$490,419.51. Horizon's \$26,047.00 payment would have brought its total payments to \$253,161.89, which is 51.6% of the total contract value. This percentage of payment is greater than the 42% to 43% complete that Mr. Gilbrect, the C & G surveyor, found MEI's work completion to be after conducting his survey just before Thanksgiving 2001. The Court found Mr. Gilbrect very competent regarding his skills as a marine surveyor and finds his survey of MEI's work to be the most accurate representation of MEI's percentage of completion. Therefore, the Court finds that Horizon did not owe the \$147,455.00 in payments that Mr. Griffin demanded and Horizon could not be found in breach of contract for failing to pay MEI.

Even if Horizon owed MEI the \$147,455.00 amount Mr. Griffin claimed, Horizon had a "legal excuse" to withhold payment to MEI because of MEI's poor work quality. Nonetheless, it negotiated with MEI in an attempt to complete its contractual obligations. MEI rejected Horizon's offers as too low and it walked off the job on November 1, 2001. When MEI walked

off the job, it did not have the right to payment in the amount it asserted; accordingly, MEI was in material breach as of November 1, 2001. Horizon has waived part of MEI's material breach by accepting partial performance of MEI's work. All of Horizon's prior breaches were waived by MEI, therefore, MEI is the only party in partial breach of contract. Horizon has the right to sue MEI for damages suffered in completing MEI's work.

5.

What Are the Damages Suffered by the Nonbreaching Party?

The Court has found MEI in partial breach of contract because its work failed to conform with certain standards specified in its contract with Horizon. Horizon has the right to seek damages and it has done so by filing a counterclaim against MEI. As stated in Horizon's post trial memorandum, Horizon has accepted MEI's partial performance and seeks damages by rendering itself liable to MEI on a quantum meruit theory; this equitable doctrine allows Horizon to recover from MEI an amount equal to the damages Horizon suffered in completing MEI's work minus the reasonable value of the materials and labor supplied by MEI. See *Braswell v. Malone*, 78 So. 2d 631, 635 (Ala. 1955). The Court will begin its damages analysis by determining the value of MEI's work.

Horizon made total payments of \$227,114.87 to MEI through October 11, 2001. Horizon did not make any additional payments to MEI after October 11, 2001, but MEI did complete some work on the vessel through November 1, 2001, when MEI pulled off the job. After MEI pulled off the job, Horizon took over and completed the work; it claims to have incurred \$327,936.47 in costs for labor and materials. In its post trial memorandum, Horizon suggests that the reasonable value of the materials and labor supplied by MEI can be found by subtracting Horizon's incurred completion costs, \$327,936.47, from the value of the original contract,

\$490,419.51, to arrive at a value of \$163,483.02. This is not a proper valuation under quantum meruit.

Quantum meruit damages “are measured by the reasonable value of goods and services furnished to the benefitted Defendant, and are limited to the value of the benefit gained by Defendant, regardless of the extent of the detriment to the Plaintiff.” *Post Trial Memorandum for Horizon*, p.7 (citing *American Family Care, Inc. v. Fox*, 642 So. 2d 486 (Ala. Civ. App. 1994); *Consulting Engineering Services, Inc. v. Urban Consultants, Inc.*, 372 So. 2d 861 (Ala. 1979)). MEI’s work must be valued “by the reasonable value of the goods and services furnished” to Horizon rather than the difference between the contract price and the cost Horizon incurred to complete the work. Therefore, the Court must look to the evidence presented to determine what is a reasonable value of the goods and services Horizon received from MEI. The Court finds the survey of MEI’s work conducted by Mr. Gilbrect to be the most relevant to this determination.

Horizon contracted with C & G to survey MEI’s work and determine its percent complete as well as its quality. Mr. Gilbrect conducted the survey for C & G. He submitted his findings in a report to Horizon, which indicated that MEI’s work was “substandard”; however, his report also indicated that the value of MEI’s work was \$319,124.70.<sup>6</sup> Mr. Gilbrect’s report stated that he arrived at this amount after subtracting for materials and labor rework that Horizon would have to complete. The Court found Mr. Gilbrect very competent regarding his skills as a marine surveyor and his report is easily the most detailed and thorough valuation of MEI’s work.

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<sup>6</sup>This amount, as stated earlier in this opinion, is different from the total amount Horizon offered to pay based on percentage completion, \$253,161.87 (\$227,114.87 in payments through October 11, 2001 plus Mr. Short’s suggested \$26,047.00 payment in his November 15, 2001 letter), because it includes all materials costs. Horizon did not have to buy the materials MEI had already purchased as it finished the contract.

Therefore, the Court finds the reasonable value of the materials and work supplied by MEI on Hull 43 is \$319,124.70. Horizon made \$227,114.87 in payments to MEI; accordingly, Horizon is liable to MEI for \$92,009.83 for MEI's work and materials provided for Hull 43. Horizon is also liable to MEI for \$16,471.50, the contract price for MEI's work on Hull 41, which was certified by ABS and accepted by SLOK. This brings Horizon's total liability to MEI to \$108,481.33.

Horizon may offset this amount owing to MEI against the damages it sustained as a result of MEI's breach. Horizon claims \$327,936.47 is the amount of its total costs to complete MEI's work; it calculated its claim as follows:

\$198,197.49 cost incurred to complete the electrical work on Hull 43 through 08/16/02
+ \$49,106.90 cost incurred to complete the "cancelled" change orders through 08/16/02
+ \$49,945.98 cost incurred for fringe costs to complete the "cancelled change orders through 08/16/02
+ \$18,404.50 cost incurred to complete ventilation work on Hull 43 through 08/16/02
+ \$12,281.60 projected cost to complete work on Hull 43 during September 2002
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\$327,936.47

Before it can determine the damages due to Horizon, the Court finds that certain of Horizon's claimed damages must be reduced due to principles of equity.

Horizon claims that it incurred damages in completing work on certain change orders that were part of its contract with MEI. However, Horizon stated that it "cancelled" these change orders by its October 31, 2001, letter to MEI. It now seeks to recover under quantum meruit its costs for work it "cancelled." Quantum meruit is an equitable doctrine that allows an owner to recover damages resulting from a contractor's breach. See *Braswell* at 635. In order to recover under an equity claim, Horizon must abide by the "clean hands" principle, which states that "he who seeks equity must do equity." *Lowe v. Lowe*, 466 So. 2d 969, 970 (Ala. Civ. App. 1985)

(citing *Cone v. Cone*, 331 So. 2d 656 (Ala. 1976)). The “application of the ‘clean hands’ doctrine is a matter peculiarly within the sound discretion of the trial court.” *Id.* (citing *Carter v. Carter*, 210 So. 2d 800 (Ala. 1968)).

The Court finds that it would be inequitable to allow Horizon to recover damages for completing work that it previously claimed was “cancelled.” Accordingly, Horizon’s claimed damages are reduced by \$99,052.88, the total amount claimed for completing work on the “cancelled” change orders.

Horizon’s remaining claimed damages are \$228,883.59, consisting of \$198,197.49 for costs incurred to complete the electrical work on Hull 43 through August 16, 2002, \$18,404.50 for costs incurred to complete the ventilation work on Hull 43 through August 16, 2002, and \$12,281.60 for projected costs to complete work on Hull 43 during September 2002. Horizon’s claim is reduced by the amount it owes MEI for the reasonable value of MEI’s work on Hull 43 plus MEI’s work on Hull 41 - a total of \$108,481.33. Therefore, Horizon can recover a maximum of \$120,402.26 if its claimed damages are reasonable.

Horizon bears the burden of proving that the costs incurred to complete Hull 43 were reasonable. Under Alabama law,

In every suit for recovery of expenses incurred as the result of another’s wrong, there may be recovered only such amounts expended as are reasonable under the circumstances. Proof of reasonableness of the amount claimed is incumbent upon the claimant. If the subject and nature of the expense is of common knowledge, the sum paid may sufficiently inform the jury of reasonable value in the absence of evidence to the contrary. However, if the subject and nature of the expense is not of such common knowledge as to enable the jury to properly form a judgment of reasonable value, evidence of the sum actually paid is not enough.

*Union Springs Telephone Co. v. Green*, 255 So. 2d 896, 900 (Ala. Civ. App. 1971). Horizon introduced into evidence the amount it claims to have spent completing MEI’s work -

\$327,936.47. Additionally, Horizon both put on witnesses to testify regarding the reasonableness of work that it felt was necessary to receive ABS certification as well as introduced before and after photos of the work on the vessel.

The standards of construction for marine vessels are not of common knowledge to the Court. Consequently, Horizon's introduction into evidence of the amount it claims to have spent completing work on Hull 43 is not enough to allow the Court to determine the reasonableness of Horizon's claimed damages. Horizon did introduce a brief summary of backup information to support its claimed damages, but it only contains a breakdown of Horizon's costs. This too was not enough to allow the Court to make a reasonableness determination.

The testimony of the witnesses for both parties provided the Court with its best opportunity to determine the reasonableness of Horizon's claimed damages. However, the testimony was mixed and neither side presented a witness, or any other evidence, to definitively state how much of Horizon's costs represented the minimal amount necessary to fix MEI's work to allow it to meet ABS standards and to complete the rest of the contract. The before and after pictures introduced into evidence by Horizon show an immense improvement to the Court's untrained eye, but they do not speak to the reasonableness of the work. As Mr. Griffin testified, what Mr. Burt wanted for his client, SLOK, may have been a Cadillac of a vessel for a Chevrolet price, which MEI did not have to provide.

The Court cannot determine from the evidence what work was absolutely necessary to meet certification standards and what work may have been extra. Horizon carried the burden to prove its claimed damages were reasonable; based on the evidence presented as well as the testimony of witnesses for both parties, Horizon failed to meet its burden. The Court cannot break out any exact amounts that may be due to Horizon because the amounts given by Horizon

are too broadly categorized. Accordingly, the Court cannot find that Horizon is due any exact amount for the damages it claimed in its counterclaim. Horizon was damaged by MEI's breach though, therefore, the sum of \$1.00 will be awarded to Horizon.

#### CONCLUSION

The Court concludes that both Horizon and MEI breached the contract at issue; however, Horizon's breach was waived. MEI's breach was not waived or cured. Therefore, judgment should be awarded in Horizon's favor.

IT IS ORDERED and ADJUDGED that Marine Enterprises, Inc. take nothing on its complaint and Horizon Shipbuilding, Inc. is awarded judgment against Marine Enterprises, Inc. for one dollar (\$1.00). Each party shall bear its own costs.

Dated: September 30, 2002

/s/ Margaret A. Mahoney  
MARGARET A. MAHONEY  
CHIEF BANKRUPTCY JUDGE