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SUPERIOR COURT OF CALIFORNIA
COUNTY OF HUMBOLDT

APEX DIRECTIONAL DRILLING LLC, an Oregon Limited Liability Company authorized to do business in the State of California,

Plaintiff,

v.

CITY OF EUREKA, a California Charter Law City, and DOES 1 TO 50,

Defendants.

Case No. DR140297

COMPLAINT FOR DAMAGES FOR BREACH OF CONTRACT FOR CONSTRUCTION OF PUBLIC WORK; BREACH OF DUTY OF GOOD FAITH AND FAIR DEALING; BREACH OF WARRANTY AND FRAUDULENT CONCEALMENT

For its complaint against Defendant City of Eureka, Apex Directional Drilling LLC ("Plaintiff") alleges as follows:

PARTIES

1. Plaintiff is, and at all times herein mentioned was, an Oregon limited liability company duly authorized to engage in business in the State of California.

2. Plaintiff is, and at all times herein mentioned was, a duly licensed contractor under the laws of the State of California authorized to engage in the business of horizontal directional drilling ("HDD") throughout the state of California. HDD is a steerable underground boring system for the installation of pipes, conduit, or cable in a shallow arc using a surface-based drilling rig. HDD is a cost-effective and environmentally preferable alternative to surface trenching. Plaintiff is an expert in HDD and one of the leading HDD contractors in the nation.

3. At all times herein mentioned, Defendant City of Eureka ("Defendant City") was and now is a chartered city, existing as such in the County of Humboldt under its charter and the laws of the State of California.

4. Plaintiff is ignorant of the true names and capacities of Defendants sued herein as DOES 1 to 50, inclusive, and therefore sues these Defendants by such fictitious names. Plaintiff will amend this Complaint to allege their true names and capacities when ascertained.

The City's Sewer Project

5. Defendant City is currently undertaking a substantial public works project to improve a major wastewater pipeline connection for treatment of municipal sewage. This case involves a competitively-bid contract for performing HDD in a substantial part of that public works project. The part of the project at issue here is known as the Martin Slough Force Main Drill Project, Bid No. 2013-26 (the "Project").

6. The HDD work to be performed on the Project consisted of using HDD to bore a 42-inch diameter tunnel for installation of a 26-inch diameter sewer pipe over 4,000 feet in length (almost a mile long) and in a general east – west direction through an upland area called Pine Hill, to connect the Martin Slough sewer project on the east side of Pine Hill to its west side, from where it would run under Highway 101 and into Defendant City's sewage treatment plant. In places the bore path/tunnel is more than 145 feet below the surface.

The Geotechnical Baseline Report

7. Defendant City sought bids for performing the Project. As part of informing potential bidders about the Project, the City presented basic information about the scope of the Project, its design specifications, and the anticipated soil conditions. This information was the fundamental basis and the key representation upon which potential bidders, including Plaintiff, relied.

8. Specifically, the City made available to Plaintiff and other potential bidders a document entitled "Geotechnical Baseline Report" (the "GBR"). The GBR provided in part:

> Bidders should use the baseline data presented herein and the surface conditions observed during site visits as the basis for bids. Therefore, a principal purpose of this GBR is to establish baseline conditions from which to determine where "differing site conditions" have been encountered once construction ensues. Where actual site conditions vary substantially from those defined herein, an adjustment to the Contract Terms may be warranted.
> [GBR, p. 1].

9. One critically important factor in HDD work generally is the subsurface conditions in which the drilling will occur. In order for HDD to be feasible for a project of this scope, the soil must be "competent" and "stable." If the subsurface conditions do not feature competent and stable soil, a project of this scope will be challenging and risky, or perhaps even impossible.

10. Soil competency and stability was especially important in this Project, for three reasons. First, the nearly mile-long bore is unusually long for projects which incorporate pipe made from high-density polyethylene ("HDPE"), rather than steel. HDPE, a form of plastic, is not as strong as steel and is therefore more vulnerable to failure during the process of pulling the pipe back through the bore hole where soil conditions have compromised the integrity of the tunnel walls. The HPDE pipe is akin to a big, plastic hose, and if the tunnel walls have collapsed, the HPDE may simply break apart when stressed by soil resistance in the pull back process. Second, due to the length, diameter, and weight of the nearly mile-long HDPE pipe, large, heavy and very powerful HDD equipment is used. This equipment includes the large 500,000 pound capacity drill rig; the drill stem (each of the over 140 30-foot segments required for this Project weighs nearly 900 pounds); the tooling, consisting of the drill "bit," motor to run the drill bit, steering system tools and housing (these tooling components weigh up to 8000 pounds); and the reamers used to expand the bore hole once the initial bore is completed (these weigh up to 3500 pounds each). Third, the shape of the bore as designed had a significant curve plus vertical contour up and down, making the bore very complicated. In order to control an underground drill and steer it around a curve, it is essential that the soil formation be stable and dense enough to provide resistance to the drill tooling to provide for good steering response. Because of the limited layout provided

for the Project at the bore exit point, it was critical to adhere to the bore profile, which in turn required stable and competent soils to permit accurate steering.

11. The GBR was prepared by SHN Consulting Engineers & Geologists, Inc. ("SHN"). During the bidding and work process, the City was represented by SHN, who served as lead engineer on the Project, and who purportedly has performed numerous projects in the area. The geologist on the Project was Roland Johnson, an employee of SHN. The City's employee representatives on the Project were Kurt Gierlich, Retired City Engineer/Project Manager and Charles Roecklein, City Engineer and a former employee of SHN.

12. In the GBR, the City and SHN informed bidders, including Plaintiff, that for the majority of the length of the Project, the soils in which the work would be performed would be stable and competent "Hookton formation" soils. The GBR characterized the Hookton formation soils as stable and well-suited to HDD work. This was of critical importance because HDD operations for this job require "competent" soil, such as are found in the Hookton formation, meaning soil that has sufficient stability and density to enable the drilling equipment to be controlled and steered, and for the resulting bore hole to remain intact and not collapse. The GBR and its authoritative description of the soil formation through which the HDD work would be performed was a material inducement to Plaintiff's decision to bid on the Project. Plaintiff would not have bid on the Project if it had known the true soil conditions.

13. The GBR also contained results and data from only a single test bore hole which, according to the City and SHN, showed "hard drilling" and "high blow" counts, critical information that indicates stable soil conditions. The GBR directed contractors' attention to the evidence of subsurface conditions indicated by this single bore. In fact, this single bore sample, referred to as the Meyers-1 bore, was actually located a significant distance from the actual HDD bore path. To confirm that the GBR accurately reflected actual Project soil conditions, Plaintiff asked the City if it was certain that soils in the Project path were competent and stable. The Project geologist, Roland Johnson, with years of local

project experience, repeatedly assured Plaintiff that he was certain based on his analysis and extensive experience that the Project soils were stable and competent Hookton formation soils. Plaintiff reasonably relied on the City's representations in the GBR, including the promise that a contract adjustment was available in the event of differing soil conditions, and on Mr. Johnson's assurances of stable and competent Hookton conditions, in deciding to bid on the Project.

The Contract is Awarded to Plaintiff and Work Commences

14. The City gave notice and accepted bids for the Project. Plaintiff was the low qualified bidder. In fact, the only other bidder was Wahlund Construction, Inc. Wahlund does not have expertise in HDD, and so arranged for a subcontract relationship with another HDD company that had never been to the job-site. Wahlund's bid to the City was nearly $6.5 million – approximately $2.8 million more than Plaintiff's bid. Wahlund's bid ensured that the City's bid process satisfied public bidding requirements that at least two bids are received. Additionally, Wahlund submitted a bid to be a subcontractor for Plaintiff. On or about July 24, 2013, the City, acting through action taken by its City Council and by virtue of the authority granted by the City's Charter and the laws of the State of California, entered into a written contract with Plaintiff (the "Contract") for the Project. A true and correct copy of the Contract is attached to this Complaint as Exhibit A and is made a part hereof by reference.

15. On July 24, 2013 the City gave Plaintiff notice to proceed under the Contract, directing Plaintiff to commence work on the Project. However, even before the project started, the City changed material factors of the project, including not allowing Plaintiff to use an important lay-down area to stage the nearly mile-long continuous HDPE pipe at the west end of the project and imposing previously unknown and restrictive environmental wet-land compliance requirements. The City further prohibited Plaintiff from using standard navigational equipment employed to steer the drill, despite contrary assurances, as explained later in this Complaint.

16. Thereafter, Plaintiff in all respects attempted to comply with the conditions and provisions of the Contract and began HDD operations on the east side of the Pine Hill

uplands, heading in generally a westerly direction, all as directed in the Project specifications provided by Defendant City and as supervised and directed by its project inspectors and SHN engineers. The City's representatives, including SHN, were on the construction site daily, and directed and approved each and every step of Plaintiff's efforts on the Project.

Plaintiff Encounters Unstable Soil Conditions

17. In the original Project work plan, the City's bore path design called for an initial drilling angle of 1.4 degrees. For many reasons, this plan was not feasible. First, the design would require use of outdated and obsolete drilling technology that is no longer even available in the marketplace. The drill rigs available in the marketplace are not designed to initiate a 1.4 degree angle, which is too slight of an angle for successful operation of a modern drill rig. Second, the design specified placement of the drill rig in a submerged position below the ground water level in an area that often flooded, creating concerns about both water damage to the expensive drilling equipment and environmental contamination. Third, the original design did not provide for enough "cover," as it was too shallow and was highly likely to result in hydraulic fractures which would leak drilling fluids into the environmentally sensitive wetlands area.

18. Because the City's bore path design was not feasible, Plaintiff proposed a more realistic, steeper drilling path at a seven degree angle, along with an entry point repositioned forward by approximately 100 feet. The redesigned, steeper drilling angle would, assuming the representations of the GBR were accurate, logically get the bore into the stable, competent Hookton soils sooner. Defendant City and its engineers approved this design revision and all associated submittals.

19. Based on the GBR, Plaintiff expected to begin drilling the bore in a shallow, near-surface layer of marine estuarine deposits, which are wet, organic materials (bay mud), in which steering the drill is impossible. The original Project design called for driving steel casing from the bore entrance, at the original design angle of 1.4 degrees, for a distance of approximately 285 feet. The steel casing protects the drill rig and allows drilling in unstable soil by providing a hard barrier around the bore path to prevent the tunnel walls from

collapsing. According to the City's engineers and the GBR, after proceeding for approximately 285 feet at an angle of 1.4 degrees, the bore would be in stable and competent soils, and therefore no further casing would be required. With the revised drilling angle of seven degrees, along with repositioning the entry point forward approximately 100 feet, the bore would achieve greater depth sooner, and, if the City's engineers were correct, would be in the predicted stable and competent soils even sooner, thus allowing the casing to be shorter.

20. After Plaintiff began its initial work on the Project, it discovered that the extent of the surface marine estuarine layer of wet, organic material (bay mud) went far deeper than was predicted in the definitive data set forth in the GBR. As work progressed over several days, it became clear to everyone that the Project bore profile was not in stable, competent Hookton formation soils at all. In fact, contrary to what the GBR stated, Plaintiff found that it was drilling in bay mud and then in flowing sands that held significant amounts of water.

21. Plaintiff promptly and repeatedly informed Defendant City's project personnel and engineers that the conditions onsite were not as had been represented. Plaintiff also directed the City's project personnel to inspect materials discharged to the surface during the HDD process and recorded in the Project's daily drilling logs, which plainly showed that the material encountered in the bore was flow-sand, not stable, competent Hookton soils. The non-conforming soil conditions were also independently confirmed and documented in soil analysis reports that were performed several times per day by independent third parties. The City had daily access to these analyses and its engineers (SHN) were provided these analyses daily, as they required by contract. Additionally, these conditions were discussed repeatedly, on at least a daily basis, with City and SHN officials, as the flow-sands encountered were making it nearly impossible to steer the drill steel within the intended bore path. Plaintiff provided formal written notice of the differing site conditions on January 16, 2014 as a matter of formality, but the City and its engineers had been repeatedly made aware of the actual site conditions being encountered from the very beginning of HDD operations,

including in numerous other written communications, meetings and construction site visits.

22. The flowing sand conditions encountered were extremely unfavorable for HDD operations as required for this Project, because sand will easily collapse, making it difficult or impossible to steer or control the HDD drilling equipment or to keep the bore hole open after it has been drilled so that the HDPE pipe can be installed.

23. Defendant City's engineers and geologist were apprised of and observed the non-conforming soil conditions on a continual basis at the job site. They were also provided with, and had access to, daily logs maintained by Plaintiff's HDD operators and other personnel, including the independent fluids engineers, the independent steering and control engineers, and the drill rig operators, which contemporaneously detailed the conditions Plaintiff was encountering.

SHN Directs Plaintiff to Continue

24. After installing approximately 200 feet of casing at the bore entrance, Plaintiff was still encountering unsuitable soil conditions that were not competent or stable and had still not hit the stable and competent Hookton soils described in the GBR and repeatedly promised by Mr. Johnson.

25. Defendant City's engineers, with complete awareness of the physical evidence reflecting the non-conforming soil conditions, directed Plaintiff to drive the casing even further and deeper, in the stated hope that the operation would soon encounter stable and competent Hookton formation soils. Plaintiff informed the City's engineers that if the bore went deeper, they would not be able to follow the bore path specified in the Project design.

26. After installing approximately 280 feet of casing, Plaintiff had still not hit the stable and competent Hookton soils promised in the GBR, despite being deeper per SHN's instructions.

27. The City's engineers then suddenly directed Plaintiff to stop installing the casing, and they claimed that the bore had reached the anticipated stable and competent Hookton soils. The City's engineers gave this direction with full knowledge that the soil conditions Plaintiff was still encountering did not match the conditions specified in the GBR,

but Plaintiff had no choice but to follow the directions of the City's engineers, as required by the Contract documents. When Plaintiff began its drilling operations, and pushed its drill tooling beyond the protective casing, however, the drill tooling simply sank into the unstable, flow sand. The City's engineers ordered Plaintiff to pump grout and other material into the bore hole in order to continue drilling, which was an acknowledgement of the non-competent soils being encountered. However, when the City and its engineers were presented with a change order for this additional work caused by the differing soil conditions, the change order was denied.

28. Because of the unexpected soil conditions at the site, Plaintiff's bore went deeper than anticipated, which required a revised bore path for the Project. The City and its engineers were aware of this revision and approved it before Plaintiff could continue with its operations.

29. The non-conforming soil conditions also caused Plaintiff other significant and expensive problems in attempting to follow the daily directions of the City's engineers. Among other things, Plaintiff encountered excessive quantities of water, far more than anticipated in the contract documents, which requires extra handling and increases job costs. The excessive quantities of water created muddy conditions and standing water in the entry pit, also increasing costs; but the City denied Plaintiff's claims for reimbursement for those costs. The flowing sand caused the drill motor to sink, and caused the initial conventional drill tooling to break off from the drill stem and become lost in the flowing sand, all increasing job costs, including the substantial cost of obtaining replacement tooling on an emergency basis. Because the unstable soil made it impossible for Plaintiff to steer the bore along the original bore profile with conventional tooling, Plaintiff, at the direction of the City's engineers, tried different and lighter tooling on multiple occasions to address the different than expected soil conditions.

30. Plaintiff attempted various alternative techniques at the City and its engineers' direction to address the non-conforming soil conditions and excessive water, such as pumping grout at the termination of the initial casing and changing bentonite solutions in

drilling fluids to create greater stability, but the City subsequently rejected a change order to authorize the additional costs required. The City also eventually rejected Plaintiff's billing for the excess water it was encountering, even though the Contract provided a line item specifically for these additional costs. Thus, while the City and its engineers were demanding that Plaintiff continue to drill through the unstable flow sand, they were simultaneously refusing to accept change orders necessitated by the unexpected flow sand conditions. Against all evidence and continued warnings to the contrary, the City continued to falsely insist that the drill path was in stable, competent soils.

The City Refuses to Apply the GBR Differing Site Conditions Criteria

31. Even after the true soil conditions were unquestionably known, Defendant City, through its project inspectors and engineers, falsely claimed that the HDD bore was in a stable and competent Hookton formation. Even though this was objectively and demonstrably false, Defendant City refused to consider that "Differing Site Conditions" existed requiring adjustment to the Contract.

32. The GBR, made part of the Contract, provided the following criteria for the determination of "Differing Site Conditions Claims:"

A. There must be a difference between reasonably anticipated and encountered conditions.

B. There must be a difference between reasonably anticipated and encountered construction performance.

C. There must be a demonstrable cause-and-effect relationship between the different conditions and construction performance.

D. There must be a definitive impact on time and costs.

E. All contract conditions must be fulfilled, including reliance, notice, and mitigation.

F. No other factors (self-inflicted) can have caused the difference between anticipated and encountered performance.

[GBR, p. 2].

33. All the GBR criteria for determining differing site conditions were plainly satisfied in the Project. First and most fundamentally, there was an enormous difference between the reasonably anticipated conditions, which were those set forth in the GBR, and the actual conditions Plaintiff encountered. Instead of the stable and competent soil conditions of the predicted stable, and competent Hookton formation, the conditions throughout the length of the bore were wet and sandy, and thus incompetent and unstable. This led directly to the second criterion, a significant difference between the reasonably anticipated construction performance and the actual construction performance. The HDD operation was frustrated and stymied at every step of the Project, despite the significant experience and expertise of Plaintiff's Project team. Work that was reasonably expected to be completed in three weeks ended up requiring over sixteen weeks – a 500% increase in time and costs.

34. The remaining criteria of the GBR Differing Site Conditions were also readily established here. There is a clear and demonstrable cause and effect relationship between the flowing sand and the myriad problems and increased costs Plaintiff experienced in the Project, and a definitive impact on time and costs. Plaintiff fulfilled all of its contract conditions, and no other factor caused the difference between the anticipated Project performance and Plaintiff's actual experience on this Project.

35. Yet despite Plaintiff's requests, and despite the early and overwhelming evidence that the site conditions were not as represented, the City and SHN flatly refused to acknowledge the Differing Site Conditions. Instead of admitting that the GBR was inaccurate and fixing the mistake when first recommended, the City stubbornly directed Plaintiff to finish the bore regardless of the actual conditions, while refusing to agree to reasonable change orders necessitated by the unexpected soil conditions.

36. The City and SHN refused even to conduct an investigation in response to Plaintiff's claims that the soil conditions were not as they had been represented. The City's failure to conduct such an investigation, despite significant evidence showing the true conditions at the site, was unjustified and in bad faith.

37. The City's original plans for this HDD work were fundamentally flawed and its engineer's design was defective, in numerous respects. First, the original plan called for an entry angle of 1.4 degrees for the casing, which was not feasible. Second, the geotechnical preparation for the Project was inadequate. Third, the GBR was inaccurate and wrong on the findings most significant for the Project. Fourth, the City changed the original pipe layout area prior to starting work and, as revised, the layout area was insufficient. Fifth, the revised pipeline layout became unusable because of the differing site conditions. Finally, the original design was defective with respect to the final exit angle, which was too flat and resulted in very little cover material through the final 200 feet of the bore path, creating a high risk of hydraulic fracture in environmentally sensitive wetlands. All in all, the City's Project design fundamentally lacked constructability.

38. In addition, the City refused to allow Plaintiff to use the guidance method appropriate and necessary for this Project. This Project required a "wire-line" system for guiding the underground drilling. A wire-line system uses copper wires in a grid formation placed on the ground surface over the designed bore path. An electronic signal is transmitted from a beacon located near the drill bit head. This electronic signal, together with the copper wires situated over the bore path on the ground, is used to provide information to a steering operator to determine precisely where the drill bit head is located. This guidance system is critical in order to steer the drill along the intended bore path. A significant and material change in scope to this Project was the fact that the City, having failed to obtain the promised private property easements required, would not allow the copper wires to be placed on over 800 feet of ground surface. This area was at the most critical part of the intended bore path – at and along the 40 degree bend radius of the intended bore path. Despite reminding the City and its engineers that the underground drilling system required copper wire on the surface along the entire bore path for steering, Plaintiff was told, in no uncertain terms, to continue its work and steer "blind." As a result, Plaintiff had no choice but to steer "blind" – i.e., Plaintiff had to guess where the drill bit head was located and steer based on virtually no critical steering information. This resulted in significant additional time and expense,

because it took several attempts to successfully guide the drill head along the intended bore path. As a result, there was excessive wear on the drill bit motor, causing it to fail several days later, thus requiring a restart of the boring process after over six weeks of performing the pilot bore. The City and its engineers denied Plaintiff the means and methods on which it had based its bid and which were critical to allow Plaintiff to execute its contractual duties.

The Parties Negotiate Change Orders But the City Delays and then Reneges

39. On Sunday, January 12, 2014, the HDD bore exited on the west side of the Pine Hill upland. Due to the unanticipated soil conditions, the bore had taken Plaintiff over sixteen weeks to complete. The Project plan had projected three weeks for this phase of the Project. Due to delays and unexpected difficulties, Plaintiff has incurred hundreds of thousands of dollars in unanticipated costs. Remarkably, the actual exit location was only 35 yards west from the planned exit location, even though the unstable soil conditions, combined with the lack of the copper "wire-line" navigation system, had made it impossible for Plaintiff to follow the original bore path.

40. Although the initial bore had been completed, it was apparent that the hole was collapsing and the subsurface conditions would make it very risky to attempt to pull back the proposed plastic/HPDE sewer pipe through the bore (the excess tension that could be caused by a collapsing bore tunnel could easily cause the plastic/HDPE pipe to pull apart). Virtually the entire length of the bore (a 4,000 foot long tunnel 42 inches in diameter) was in loose, wet and flowing sand that was not stable or competent. The bore never hit stable, competent Hookton formation soils, contrary to the representations of the City and its engineers.

41. Defendant City, while on one hand stating that work should proceed, on the other hand directed that all further work on the Project be suspended, to allow for the redesign of the Project in light of the non-conforming soil conditions which had led to the altered exit location, and to allow it to obtain necessary permits for the layout area's new location.

42. While the City suspended work on the Project, Plaintiff continued to advise

the City that Plaintiff and its subcontractors were incurring substantial downtime charges and expenses which were unsustainable and would require change orders and additional compensation. The City flatly refused to discuss these additional costs despite rental and other continuing expenses that amounted to thousands of dollars per day.

43. Plaintiff also informed the City that time was of the essence because of rapidly deteriorating conditions at the Project site. Plaintiff's drill steel remained in the ground at the site, and Plaintiff warned the City that if it was left in the ground for any length of time, it might become irretrievably stuck in the unstable, sandy soil.

44. Plaintiff provided Defendant City with additional, formal notice of Plaintiff's potential claims against the City, but the City continued to delay making any decision.

45. Finally, in late January 2014, Plaintiff and Defendant City negotiated two substantial additive change orders. These new change orders revised the design for Phase I of the Project for the installation of steel casing at the exit end of the bore path, and awarded Plaintiff Phase II of the Project. As a result, the City would compensate Plaintiff for the additional costs incurred in Phase I of the Project as a result of the changed soil conditions, and provided for a new Project completion deadline.

46. The parties reached agreement on the scope of these change orders, which were documented and executed by Plaintiff. The City agreed to and signed the Change Orders. This is reflected in the Eureka City Council Agenda Summary dated April 29, 2014, which states: "The change order was negotiated and signed by both parties but the work was never fulfilled."

47. For the change orders relating to the casing installation, Plaintiff in good faith immediately began work related to this change order despite not having the signed change order in hand. Plaintiff ordered product, arranged for outside service vendors required for this portion of the project, rented equipment needed, mobilized a crew back to the Project and began work on this portion of the Project. Soon thereafter, because of the nearly three weeks it took before Plaintiff could start back to work because of delays caused by the City, when Plaintiff attempted to remove its drill steel from the bore, it found that the drill steel

was stuck in the ground.

48. The reason the signed change order for Phase II of the Project was "never fulfilled" was that the City never actually provided the signed change order to Plaintiff, or authorized Plaintiff" to begin work. First, the City did not have the permits needed in order for Plaintiff to begin the work. Second, after over two weeks of coordination between Plaintiff and the City after this change order was signed by Plaintiff, the City communicated to Plaintiff that Phase II of the Project could not be started until at least the end of March, 2014. Finally, the City then attempted to add new terms and conditions to the change order it had already accepted and that Plaintiff had signed. All the while, Plaintiff's equipment remained idle, waiting for the signed change order and the required permits from the City.

49. On April 29, 2014, the City awarded Wahlund Construction, Inc., without competitive bid, the Phase II portion of the Martin Slough Force Main Drill Project.

FIRST CAUSE OF ACTION

BREACH OF CONTRACT

50. Plaintiff hereby incorporates each and every allegation of paragraphs 1 to 49 above, and makes them a part of this Count 1 by reference.

51. Defendant City breached the Contract in numerous regards, including without limitation the following:

A. By providing incorrect information of material importance regarding the soil conditions and pipe laydown area for the Project;

B. By directing Plaintiff to continue proceeding with the HDD bore according to the flawed original plans, despite the clear and unambiguous evidence that the Project was not in stable and competent soils;

C. By delaying and ultimately failing to take appropriate action and make appropriate decisions regarding the Project after the objective determination that the Project was not in stable and competent soils necessary for HDD operations;

D. By failing to enter into appropriate change orders in light of the differing soil conditions, as required by the terms of the GBR and the Contract; and

E. By failing to undertake appropriate investigation into Plaintiff's assertions regarding soil conditions on the Project.

52. As a result of Defendant City's breach of the Contract, Plaintiff has suffered damages as follows:

A. Direct lost profits in the amount of $430,000;

B. Additional Project costs in the amount of $2,100.000; and

C. Additional lost profits due to excessive time on job, lost bonding capacity, inability to obtain jobs requiring bonding, excessive demands on management time, in the amount of $3,000,000, or such greater amount as is proven at trial.

53. Prior to the commencement of this action, and on or about May 14, 2014 Plaintiff presented to Defendant City a claim for damages in the sum of $6,280,000 for breach of the Contract, Breach of Implied Duty of Good Faith and Fair Dealing, Breach of Warranty and Fraudulent Concealment, which was otherwise sought in this complaint. A true and correct copy of the claim is attached to this Complaint as Exhibit B and is made a part hereof by reference.

54. On or about May 21, 2014, Defendant City rejected the claim in its entirety.

SECOND CAUSE OF ACTION

BREACH OF CONTRACT

55. Plaintiff hereby incorporates each and every allegation of paragraphs 1 to 54 above, and makes them part of this Count 2 by reference.

56. In or about January 2014, Plaintiff and the City agreed to terms for a new contract in the form of a change orders for additional casing and Phase II of the Project.

57. Pursuant to that agreement, Plaintiff was awarded Phase II of the Project, and the specifications, terms and conditions applicable to Phase II, and the remaining casing installation work on Phase I, were established.

58. Plaintiff and the City agreed to and signed the change order, as reflected in the City of Eureka City Council Agenda Summary dated April 29, 2014.

59. Plaintiff was willing and able to perform under the change order.

60. Subsequent to signing the change orders, the City breached the contract and refused to honor its commitments to Plaintiff. The City reneged on its signed contract and awarded the work on the remainder of Phase I and Phase II to another contractor.

61. As a result of Defendant City's breach of the Contract, Plaintiff has suffered damages as follows:

A. Lost profits in the amount of $750,000;

62. Prior to the commencement of this action, and on or about May 14, 2014, Plaintiff presented to Defendant City a claim for damages in the sum of $6,280,000 for breach of the Contract, Breach of Implied Duty of Good Faith and Fair Dealing, Breach of Warranty and Fraudulent Concealment, which was otherwise sought in this complaint. A true and correct copy of the claim is attached to this Complaint as Exhibit B and is made a part hereof by reference.

63. On or about May 21, 2014, Defendant City rejected the claim in its entirety.

THIRD CAUSE OF ACTION

BREACH OF IMPLIED DUTY OF GOOD FAITH AND FAIR DEALING

64. Plaintiff hereby incorporates each and every allegation of paragraphs 1 to 63 above, and makes them a part of this Count 3 by reference.

65. As a contracting party, the City owed Plaintiff the duty to discharge its contractual obligations in good faith.

66. The City breached its duty of good faith in multiple respects, including without limitation:

A. By providing incorrect information of material importance regarding the soil conditions and pipe laydown area for the Project;

B. By directing Plaintiff to continue proceeding with the HDD bore despite the clear and unambiguous evidence that the Project was not in stable and competent soils;

C. By delaying and ultimately failing to take appropriate action and make appropriate decisions regarding the Project after the objective determination that the Project

was not in stable and competent soils necessary for HDD operations;

D. By failing to enter into appropriate change orders in light of the differing soil conditions, as required by the terms of the GBR and the Contract; and

E. By failing to undertake appropriate investigation into Plaintiff's assertions regarding soil conditions on the Project.

67. As a result of Defendant City's breach of the Contract, Plaintiff has suffered damages as follows:

A. Direct lost profits in the amount of $1,180,000;

B. Additional Project costs in the amount of $2,100,000; and

C. Additional lost profits due to excessive time on job, lost bonding capacity, inability to obtain jobs requiring bonding, excessive demands on management time, in the amount of $3,000,000, or such greater amount as is proven at trial.

68. Prior to the commencement of this action, and on or about May 14, 2014, Plaintiff presented to Defendant City a claim for damages in the sum of $6,280,000 for breach of the Contract, Breach of Implied Duty of Good Faith and Fair Dealing, Breach of Warranty and Fraudulent Concealment, which was otherwise sought in this complaint. A true and correct copy of the claim is attached to this Complaint as Exhibit B and is made a part hereof by reference.

69. On or about May 21, 2014, Defendant City rejected the claim in its entirety.

FOURTH CAUSE OF ACTION

BREACH OF WARRANTY AND FRAUDULENT CONCEALMENT

70. Plaintiff hereby incorporates each and every allegation of paragraphs 1 to 69 above, and makes them a part of this Count 4 by reference.

71. Defendant City issued the GBR to Plaintiff for the purpose and with the express intention that Plaintiff a) would reasonably believe the statements contained therein; b) would reasonably rely on them; and c) would reasonably act on them, including the assurance that if the soils were as represented in the GBR and that if not Plaintiff would be granted a Differing Site Conditions adjustment to the Contact; in reliance thereon, Plaintiff

submitted a bid for the Project and entered into the Contract.

72. Defendant City represented and impliedly warranted to Plaintiff that the Project, as designed and specified, was possible to execute from an engineering standpoint and that it was possible from an engineering standpoint to adequately control and complete a HDD project through the soil conditions under the Pine Hill uplands. Plaintiff a) reasonably believed this representation and implied warranty; b) reasonably relied on it; and c) reasonably acted on it in submitting a bid for the Project and entering into the Contract.

73. Defendant City represented and impliedly warranted to Plaintiff that the GBR was prepared by methods and procedures that met the professional standard of care in the preparation of such studies and such documents. Plaintiff a) reasonably believed this representation and implied warranty; b) reasonably relied on it; and c) reasonably acted on it in submitting a bid for the Project and entering into the Contract.

74. These representations were false and misleading in that: a) the behavior of the soils depicted in the GBR were materially incorrect and inconsistent with the actual soil behavior; b) even so Defendant City did not intend to allow a Differing Site Conditions adjustment to the Contract; c) the Project, as designed and specified, was engineered such that it was not possible to fully execute it in the unstable soil conditions that were beneath Pine Hill, and in the existing unstable soil conditions it was not possible to adequately control and complete the HDD under the Pine Hill uplands as required by the Project's design; and d) the GBR was deficient, in that it was not prepared by methods and procedures complying with the standards established by the American Society of Civil Engineers ("ASCE"), Geotechnical Baseline Requirements for Underground Construction, which sets forth the professional standard of care for the preparation of such studies and such documents. Specifically, the GBR findings were vague and imprecise, contrary to the ASCE guidelines.

75. Defendant City, at all times herein mentioned, acted negligently and recklessly and had no reasonable basis for the GBR instructing Plaintiff to bid the Project under the assumption that the soils underlying the Herrick Road uplands was competent and stable Hookton formation soils, suitable for HDD.

76. By reason of its misrepresentations and concealment, as herein alleged, Defendant City breached its implied warranty that the plans and specifications were correct alleged, Defendant City breached its implied warranty that the plans and specifications were correct and Plaintiff, as a result, was unable to perform according to the Contract provisions.

77. As a result of Defendant City's breach of warranty and concealment and its failure to issue a Differing Site Conditions adjustment to the contract as required by the GBR, Plaintiff has suffered all of the damages heretofore alleged.

78. Prior to the commencement of this action, and on or about May 14, 2014, Plaintiff presented to Defendant City a claim for damages in the sum of $6,280,000 for breach of the Contract, Breach of Implied Duty of Good Faith and Fair Dealing, Breach of Warranty and Fraudulent Concealment, which was otherwise sought in this complaint. A true and correct copy of the claim is attached to this Complaint as Exhibit B and is made a part hereof by reference.

79. On or about May 21, 2014, Defendant City rejected the claim in its entirety.

WHEREFORE, Plaintiff prays judgment against Defendant City as follows:

1. For damages in the sum of $6,280,000, or such greater amount as is proven at trial;

2. For pre-judgment and post-judgment interest on all damages awarded;

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

DATED: 5/22, 2014

Respectfully submitted;

HARLAND LAW FIRM LLP

John S. Lopez
Attorney for Plaintiff Apex Directional Drilling LLC

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