

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
LYNCHBURG DIVISION**

BANKER STEEL COMPANY, LLC,)	
)	
Plaintiff,)	
)	Civil Action No. 6:10cv00005
v.)	
)	
HERCULES BOLT COMPANY, INC.)	By: Hon. Michael F. Urbanski
)	United States Magistrate Judge
Defendant.)	

REPORT AND RECOMMENDATION

This matter is before the court on defendant’s Motion for Summary Judgment (Dkt. #43). Plaintiff Banker Steel Company, LLC (“Banker Steel”) brings this action for breach of contract, breach of warranty of merchantability, and breach of implied warranty of fitness for a particular purpose. By Order dated January 24, 2011, all dispositive motions were referred to the undersigned for report and recommendation pursuant to 28 U.S.C. § 636(b)(1). The issues have been fully briefed and were argued by counsel at a hearing held on February 24, 2011. For the reasons stated herein, it is **RECOMMENDED** that defendant’s motion for summary judgment be **DENIED**, with the exception of Banker Steel’s claim for recovery of attorney’s fees and costs, as to which it is **RECOMMENDED** that defendant’s motion for summary judgment be **GRANTED**.

I.

This case involves the sale of threaded steel rods from Hercules Bolt Company, Inc. (“Hercules Bolt”) to Banker Steel used to support a large steel and glass atrium being constructed as part of the Gaylord National Resort and Conference Center in Oxon Hill, Maryland (the “Gaylord Project”). The Perini/Tompkins Joint Venture (“PTJV”), the general

contractor, hired Banker Steel as the steel subcontractor for the Gaylord Project. In the \$27 million subcontract, Banker Steel was responsible for the steel fabrication, installation and erection of the atrium roof.

Banker Steel ordered certain component parts to support the atrium roof, including threaded steel rods and clevises, from Hercules Bolt, a bolt manufacturing company in Nashville, Tennessee. Pursuant to a Purchase Order dated July 28, 2006, Hercules Bolt agreed to supply the steel rods and clevises for the atrium roof of the Gaylord Project for a total cost of \$336,696.82.¹ Banker Steel alleges in this lawsuit that Hercules Bolt breached its contract and warranty obligations by manufacturing and supplying certain steel rods that were not threaded correctly.²

In April 2007, Banker Steel, through its subcontractor, Memco, Inc. (“Memco”), began to erect the steel trusses forming the structure of the atrium roof, including the steel rods manufactured by Hercules Bolt. On September 5, 2007, two steel rods manufactured by Hercules Bolt separated from the clevis at the H4 truss of the lower atrium roof after the truss had been installed. The rod-clevis separation caused the H4 atrium truss to collapse, damaging a portion of the lower atrium truss system and adjacent building components. Investigation revealed that the separation occurred because the steel rods sold by Hercules Bolt had been

¹ The Purchase Order, on a Banker Steel form, is terse and contains no detailed terms and conditions. There is no reference to any limitation of consequential damages or contractual indemnity. Attachment (“Att.”) 12 to Banker Steel Summary Judgment Brief (Dkt. #55). In rather stark contrast to this terse Purchase Order, the prime contract between Gaylord and PTJV and the subcontract between Banker Steel and PTJV are sophisticated commercial agreements. Atts. 3 and 7 to Hercules Bolt Statement of Undisputed Facts (Dkt. #45).

² The Amended Complaint alleges, in three counts, breach of contract, breach of the implied warranty of merchantability and breach of the implied warranty of fitness for a particular purpose. The Amended Complaint does not contain an implied indemnity claim. See Amended Complaint (Dkt. #20).

threaded improperly.³ After the failure, Banker Steel surveyed the remaining steel rods, 90% of which were determined to be out of design specification. Because of the widespread problem with the threading on the rods supporting the atrium roof trusses, PTJV required Banker Steel to correct the problem. See Att. 19 to Banker Steel Summary Judgment Brief (Dkt. #55).

Subcontractors for Banker Steel installed steel plating on certain rod/clevis connections and welded all of the others. See Atts. 24, 28 and 30, at 17-22, to Banker Steel Summary Judgment Brief (Dkt. #55). Banker Steel claims direct damages for this remediation effort in the amount of \$2,654,239.01 (“\$2.6 million”).

Of this \$2.6 million claim for repair and retrofit work, Hercules Bolt disputes two items, an \$854,780.62 charge from Memco, and a \$118,327.52 charge from another subcontractor, EPA Coat. Banker Steel settled its claims with Memco by entering into a Claims Prosecution and Liquidation Agreement on August 17, 2009. See Att. 16 to Hercules Bolt Statement of Undisputed Facts (Dkt. #45). The agreement provides that Banker Steel would shoulder the burden of pursuing the claim against Hercules Bolt, and Memco would be paid based upon the amount of Banker Steel’s recovery. No such agreement was entered into with EPA Coat, and its bill remains outstanding. See Rule 30(b)(6) Deposition of Banker Steel (Gregory R. Nichols) at 25, Att. 55 to Banker Steel Summary Judgment Brief (Dkt. #55).

After the atrium roof truss collapse, litigation ensued between Banker Steel and PTJV in the Circuit Court of Prince George’s County, Maryland over payment for Banker Steel’s work and PTJV’s claim for backcharges caused by the atrium roof truss collapse and remediation. Banker Steel filed mechanic’s liens against PTJV for payment of \$6,787,469.00 (“\$6.7 million”) owed on the work performed pursuant to the subcontract. PTJV counterclaimed, alleging that it

³ There is no real dispute that the rods were not threaded according to specification. See Atts. 18 and 28 to Banker Steel Summary Judgment Brief (Dkt. #55). There is a factual dispute, however, as to whether Banker Steel should have inspected the rods and caught the threading disparity prior to their installation.

encountered numerous defects, deficiencies and delays regarding Banker Steel's performance of its work, including those attributable to the truss failure. See Counter-affidavit in Support of Answer to Petition at ¶ 7, Att. 14 to Hercules Bolt Statement of Undisputed Facts (Dkt. #45). PTJV claimed that many of its subcontractors were required to perform additional work as a result of the truss failure, resulting in millions of dollars of backcharges.⁴ Of the backcharges alleged by PTJV, \$5,366,308.00 ("\$5.3 million") were specifically related to the truss failures and repairs. See Att. 48 to Banker Steel Summary Judgment Brief (Dkt. #55). Jason Benfield was a PTJV Project Manager, and submitted an affidavit indicating that he personally reviewed invoices, correspondence, job reports and costs records for the Gaylord Project to compile a list of backcharges against Banker Steel. In his affidavit, Benfield states that "[t]he backcharges that I identified as of November 2008 as resulting from the Collapse and/or the repairs of the Atrium truss system and the Rod/Clevis connections exceeded \$5.3 million." Aff. of Jason Benfield ¶ 38, Att. 2 to Banker Steel Summary Judgment Brief (Dkt. #55). While Banker Steel certainly notified Hercules Bolt of the problems with its steel rods, see Att. 31 to Banker Steel Summary Judgment Brief (Dkt. #55), there is no evidence that Banker Steel statutorily vouched in Hercules Bolt into the Maryland state court litigation or otherwise involved it in the settlement of that litigation.

In the meantime, a dispute arose between Gaylord and PTJV over payment for the entire Gaylord Project. On September 10, 2008, Gaylord issued a Report on Construction Cost Overruns of the Gaylord National Resort and Convention Center. See Att. 45 to Banker Steel Summary Judgment Brief (Dkt. #55). The report was highly critical of PTJV.

⁴ As Banker Steel explained in its Rule 30(b) deposition, such backcharges are amounts billed to PTJV by its subcontractors that PTJV asserts are the responsibility of Banker Steel due to the truss failure. See Rule 30(b)(6) Deposition of Banker Steel (Chesley F. McPhatter, III) at 56, Att. 10 to Hercules Bolt Statement of Undisputed Facts (Dkt. #45).

The conclusions of this investigations are: (1) PTJV consistently over billed for the work; (2) PTJV agreed to an aggressive schedule that was further impacted by delays to the atrium, building structure, building exterior and interior guest room construction caused by the failures of its subcontractors; (3) PTJV failed to manage the work of the subcontractors; (4) PTJV failed to schedule the work of the subcontractors (or even to use an industry standard critical path schedule); (5) PTJV failed to forecast (and apparently did not know what the project was going to cost, even months after completion[]); and (6) PTJV consistently put its interest first despite its fiduciary duty to Gaylord.

Id. at 7. In sum, Gaylord concluded that “[t]he project was delivered late, in poor condition and grossly over budget.” Id. at 9. Among many other items, the report was critical of PTJV for the truss failure, resulting in delay in completion of the overall project. Id. at 32-34. Eventually, Gaylord identified more than \$43 million in increased costs associated with the truss failure. See Att. 51 to Banker Steel Summary Judgment Brief (Dkt. #55).

In December 2008, PTJV and Gaylord resolved their differences, with PTJV giving up \$33 million which it claimed it was due from Gaylord for work performed on the Gaylord Project. According to the affidavit of PTJV’s Jason Benfield, “Perini/Tompkins intended to pursue Banker Steel for a majority of this \$33 Million in costs, damages and losses, which were related to and resulted from the Collapse, and/or the subsequent repairs to the Atrium truss system and the Rod/Clevis connections.” Aff. of Jason Benfield ¶ 40, Att. 2 to Banker Steel Summary Judgment Brief (Dkt. #55).

As set forth in the depositions and affidavits of those persons involved in the settlement of the PTJV/Banker Steel dispute, Banker Steel sought \$6.7 million from PTJV under its subcontract. PTJV responded by identifying \$5.3 million in backcharges due to the truss failure and notified Banker Steel “that there were tens of millions of more damages relating to the rod failure.” Rule 30(b)(6) Deposition of Banker Steel (Gregory R. Nichols) at 31, Att. 55 to Banker

Steel Summary Judgment Brief (Dkt. #55). Banker Steel's Nichols testified that given this "bigger potential issue," id. at 33, it determined to settle with PTJV without any money changing hands. As part of the settlement, Banker Steel walked away from its claim for the \$6.7 million owed under the subcontract, and PTJV walked away from its claim for the \$5.3 million in backcharges and the tens of millions in additional damages claimed to be related to the truss failure. Id. at 28-29. Banker Steel and PTJV entered into a Claims Liquidation and Cooperation Agreement on June 1, 2009. See Att. 53 to Banker Steel Summary Judgment Brief (Dkt. #55). The Hercules Bolt rod failure leading to the roof truss collapse figures prominently in this agreement. Id. at 1, §§ R-4 through R-6. PTJV and Banker Steel agreed to cooperate in the prosecution of claims for the roof truss failure, with each party pursuing claims through their own insurers and others in privity with them. As such, Banker Steel agreed to pursue the claim against Hercules Bolt. Id. at 3. The parties agreed that proceeds from these roof truss failure claims were to be pooled and agreed upon a formula by which the proceeds of the pool were to be allocated. Id. at 4. By this mechanism, Banker Steel was able to liquidate the large threatened liability to PTJV for the roof truss collapse. Id. at 3. Donald W. Banker, CEO of Banker Steel, explained the rationale for the settlement with PTJV as follows:

114. In reaching this settlement, I had to evaluate the likely outcome if the case proceeded to a trial. Banker Steel had no defense to liability. The rods supplied by Hercules were out of specification and had caused the truss failure and ensuing repair work. These were undisputed facts. It was obvious to all involved that the truss failure had significantly impacted the Project schedule and delayed the close-in of the atrium. I had lived through these events and knew that there was a substantial impact on the schedule, the other subcontractors, and Gaylord as a result of the delays and eventual acceleration of work on the Project resulting from the truss failure. It was also apparent that the truss failure and the ensuing schedule acceleration impacted the ability of Gaylord to assume occupancy of the facility in a normal manner.

115. During a year of litigation, Banker Steel had gone to great expense and effort to gather information and assess the liabilities associated with the truss failure. By this point, I knew that the preliminary list of truss failure backcharges (totaling \$5,366,308) represented just a fraction of the overall liability associated with the truss failure. This was an important factor in my decision to settle upon the terms I did. Gaylord and PTJV both agreed that the total impact of the truss failure on the Project exceeded \$40,000,000. The Gaylord report, in particular, provided a reasoned analysis to support that conclusion.

Aff. of Donald W. Banker ¶¶ 114-115, Att. 1 to Banker Steel Summary Judgment Brief (Dkt. #55).

On August 17, 2009, Banker Steel reached agreement with its structural steel erection subcontractor, Memco, concerning Memco's claim against Banker Steel for repair and remediation work following the September 5, 2007 truss failure. Memco had invoiced Banker Steel \$854,780.62 for that work. Banker Steel and Memco agreed to settle the Memco claim as between each other. Banker Steel would pursue the Memco claim against Hercules Bolt at its expense, and Memco would receive payment according to a formula based on the amount of Banker Steel's overall recovery for the roof truss failure. See Claims Prosecution and Liquidation Agreement at 4-6, Att. 16 to Hercules Bolt Statement of Undisputed Facts (Dkt. #45).

II.

Pursuant to Federal Rule of Civil Procedure 56(a), summary judgment is proper only where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). In determining whether summary judgment is appropriate, the court must view the facts, and inferences to be drawn from those facts, in the light most favorable to the non-moving party. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio

Corp., 475 U.S. 574, 587–88 (1986) (quoting United States v. Diebold, Inc., 369 U.S. 654, 655 (1962)). The non-moving party “cannot create a genuine issue of material fact through mere speculation or the building of one inference upon another.” Beale v. Hardy, 769 F.2d 213, 214 (4th Cir. 1985) (citing Barwick v. Celotex Corp., 736 F.2d 946, 963 (4th Cir. 1984)).

Nevertheless, where the record taken as a whole “could not lead a rational trier of fact to find for the non-moving party, disposition by summary judgment is appropriate.” Teamsters Joint Council No. 83 v. Centra, Inc., 947 F.2d 115, 119 (4th Cir. 1991) (citing Matsushita Elec., 475 U.S. at 587, and Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248–49 (1986)).

III.

Hercules Bolt moves for summary judgment on a number of grounds. First, Hercules Bolt contends that it is not liable for the rod failure because Banker Steel knew or should have known that the rods were improperly threaded and defective before they were installed. In response, Banker Steel argues that Hercules Bolt cannot excuse its breach of contract and warranty by pointing to Banker Steel’s separate obligation to inspect.

Second, Hercules Bolt argues that Banker Steel cannot prove that its damages were within the contemplation of the parties at the time of the July 28, 2006 Purchase Order (“Purchase Order”). Hercules Bolt classifies both categories of damages, the \$2.6 million in retrofit and remediation charges and the \$5.3 million backcharge settlement with PTJV, as consequential damages. Hercules Bolt maintains that both the \$2.6 million and \$5.3 million, as consequential damages, were not reasonably foreseeable and thus, are not compensable. Banker Steel counters that its damages are properly classified as direct damages flowing from the breach of contract and warranty. Banker Steel contends that even if the court determines that any of the

alleged damages are consequential, a factual issue exists as to whether those claimed damages were within the contemplation of the parties at the time the Purchase Order was accepted.

Third, Hercules Bolt argues that Banker Steel has failed to prove its damages with reasonable certainty. As to the retrofit and remediation damages, Hercules Bolt claims that Banker Steel cannot prove that the entire \$2.6 million is recoverable because it has not yet incurred the \$854,780.62 due Memco and the \$118,327.52 due EPA Coat. Additionally, Hercules Bolt argues that the \$5.3 million in damages for the PTJV backcharges is not compensable because Banker Steel never verified the legitimacy or accuracy of these backcharges. In response, Banker Steel argues that both Memco and EPA Coat performed repair work at Banker Steel's request to repair the damage from the failed truss and retrofit the remaining bolt/clevis connections to prevent further failures. As such, Banker Steel was legally obligated to pay the charges billed by Memco and EPA Coat. Further, Banker Steel contends that Hercules Bolt's breach of implied warranty yields an implied obligation to indemnify it for damages associated with the failed roof truss rods. Thus, Banker Steel asserts that it need only prove actual liability and that its settlement with PTJV was reasonable in order to recover the \$5.3 million in damages resulting from the resolution of PTJV's claims.

A.

Hercules Bolt first argues that summary judgment is appropriate because Banker Steel knew or should have known that the bolts were improperly threaded and defective before they were installed. Citing one case involving seed potatoes, Moon v. Washington-Beaufort Land Co., 147 Va. 912, 917, 133 S.E. 498, 499 (1926), Hercules Bolt argues that “[w]here a party is entitled to the benefit of a contract, and can save himself from loss arising from a breach of it at a trifling expense or with reasonable exertions, it is his duty to do it” Hercules Bolt contends

that Banker Steel was required to comply with all laws and regulations and warranted that its work was of good quality and free from defects. As such, Banker Steel was required to carefully inspect the rods to make sure that threads were within design specifications before they were installed.

The Moon case cited by Hercules Bolt does not support its summary judgment argument. In Moon, a purchaser of seed potatoes sued the seller for breach of warranty, claiming that the potatoes were of poor quality and were not of the type specified. When the bags of seed potatoes were delivered, the purchaser's general manager looked at them and discovered they were "mighty bad looking stuff," 147 Va. at 916, 133 S.E. at 499, both in terms of quality and consistency. This inspection occurred prior to the time the potatoes were planted and at a time when "good seed potatoes could have been purchased near by at Norfolk on a falling market." Id. Based on the fact that the purchaser knew the potatoes were bad, the Virginia Supreme Court readily concluded that consequential damages could not be awarded.

Moon does not yield the same result in this case. Unlike in Moon, there is no evidence in this case that Banker Steel knew the rods were improperly threaded. Rather, there is a genuine issue of material fact as to whether Banker Steel should have known that the steel rods were defective before they were installed. That issue must be resolved by the jury.

B.

Hercules Bolt next argues that both the repair costs and backcharges are consequential damages and are not compensable because they were not foreseeable or contemplated at the time the Purchase Order was accepted. In response, Banker Steel counters that both the repair damages, specifically the charges incurred by Memco and EPA Coat, and the damages resulting from the settlement of the backcharges asserted by PTJV, are direct damages. Even if

characterized as consequential damages, Banker Steel argues that these damages were foreseeable, and, as such, are recoverable in this action.

Both the Uniform Commercial Code, as adopted by statute in Virginia, and Virginia common law address the definition of direct and consequential damages.⁵ “While the UCC, as adopted by statute in Virginia, controls the measure of damages for breaches of contract and breaches of warranty involving sales of goods, the Supreme Court of Virginia continues to use the common law definition of direct and consequential damages.” Kraft Foods North America, Inc. v. Banner Eng’g & Sales, Inc., 446 F. Supp. 2d 551, 572 (E.D. Va. 2006). Numerous Virginia Supreme Court cases indicate that Virginia does in fact continue to use the common law definition in classifying damages as either direct or consequential. See R.K. Chevrolet, Inc. v. Hayden, 253 Va. 50, 56, 480 S.E.2d 477, 481 (1997) (using the common law definition of consequential damages to determine whether the trial court erred in classifying lost profits as consequential); see also Pulte Home Corp. v. Parex, Inc., 265 Va. 518, 526, 579 S.E.2d 188, 192 (2003) (using the common law definition of consequential damages in making the determination that damages sought as indemnification were consequential).

⁵ The parties rely upon Virginia law in setting forth their respective arguments concerning the classification of damages and whether those damages are recoverable. “Under Virginia’s choice of law rules, [q]uestions concerning the validity, effect, and interpretation of a contract are resolved according to the law of the state where the contract was made.” Kraft Foods, 446 F. Supp. 2d at 566 (quoting Seabulk Offshore, Ltd. v. American Home Assur. Co., 377 F.3d 408, 419 (4th Cir. 2004)). “A contract is made when the last act to complete it is performed.” Id. “Yet, even assuming, arguendo, the contract was made in Virginia, this, too, does not end the choice-of-law analysis because . . . settled Virginia law holds that where . . . a contract is made in one jurisdiction but performed in another, the law of the place of performance governs the contract.” Hunter Innovations Co. v. Travelers Indem. Co. of Connecticut, --- F. Supp. 2d ---, 2010 WL 4840399, at *4 (E.D. Va. Nov. 19, 2010). Hercules Bolt accepted the Purchase Order by delivering the rods. See Kraft Foods, 446 F. Supp. 2d at 566 (finding that because seller of electric impedance pipe heating systems “accepted the contract when it delivered the goods, whether conforming or nonconforming, to the Richmond plant . . . the contract was made in Virginia and Virginia’s substantive law applies”). The delivery of the rods to Banker Steel’s Virginia plant constitutes the final act for purposes of contract formation. Because the contract was both made and performed in Virginia, Virginia’s substantive law applies to Banker Steel’s breach of contract and breach of warranty claims. Virginia law also applies to the implied indemnity claim. See Roy v. Star Chopper Co., Inc., 442 F. Supp. 1010, 1015 (D.C.R.I. 1977) (“With regard to the claim for indemnity based on an implied obligation arising out of the sale of machinery, Rhode Island’s conflict-of-law rules for contract cases should be followed.”)

Under Virginia law, “[w]hether damages are direct or consequential is a matter of law for decision by the court.” Pulte Home, 265 Va. at 526, 579 S.E.2d at 192. “Direct damages are those which arise ‘naturally’ or ‘ordinarily’ from a breach of contract; they are damages which, in the ordinary course of human experience, can be expected to result from a breach.” Roanoke Hosp. Ass’n v. Doyle & Russell, Inc., 215 Va. 796, 801, 214 S.E.2d 155, 160 (1975). Consequential damages, on the other hand, “arise from the intervention of ‘special circumstances’ not ordinarily predictable.” Id. Direct damages are compensable, whereas consequential damages are compensable “only if it is determined that the special circumstances were within the ‘contemplation’ of both contracting parties.” Id. While the classification of damages as direct or consequential is a matter of law, the determination of “[w]hether special circumstances were within the contemplation of the parties is a question of fact.” Id. In this regard, it is not necessary for the parties actually to foresee the type of consequential damages; rather, the parties need only know or have reason to know of the special circumstances. Virginia Polytechnic Inst. & State Univ. v. Interactive Return Serv., Inc., 267 Va. 642, 655-56, 595 S.E.2d 1, 8 (2004).

The first category of damages sought by Banker Steel consists of \$2.6 million, which Banker Steel alleges resulted from the repair costs related to the failure at the H4 truss and the costs associated with repairing the other defective rod-to-clevis connections. Hercules Bolt argues that these costs are properly defined as consequential damages resulting from the breach. In support of its argument, Hercules Bolt asserts that much of the repair work was a preemptive measure because only 15% of the rods were tested before the determination was made to retrofit all of the rods and clevises. Hercules Bolt Summary Judgment Brief at 11 (Dkt. #44).

Banker Steel is correct in asserting that the \$2.6 million in repair costs are properly classified as direct damages. The costs related to the rod failure at the H4 truss flowed directly from the alleged breach – Hercules Bolt’s failure to provide the rods in accordance with the specifications provided by Banker Steel. If Hercules Bolt failed to supply the rods in accordance with the specifications contained in the Purchase Order, it should have expected that Banker Steel would have to repair any failure resulting from the out of tolerance rods. Thus, the repair costs related to the rod failure at the H4 truss fall within Virginia’s definition of direct damages: “damages which, in the ordinary course of human experience, can be expected to result from a breach.” Roanoke Hosp., 215 Va. at 801, 214 S.E.2d at 160. “The measure of direct damages is the cost to complete the contract according to its terms, or as in this case, the cost of repair to meet the contract terms.” TransDulles Ctr., Inc. v. USX Corp., 976 F.2d 219, 226 (4th Cir. 1992), citing Barr v. Macglothlin, 176 Va. 474, 11 S.E.2d 617, 621 (1940); Lochaven Co. v. Master Pools By Shertle, Inc., 233 Va. 537, 357 S.E.2d 534, 538 (1987). See also Florida Power & Light Co. v. Westinghouse Elec. Corp., 597 F. Supp. 1456, 1473-75 (E.D. Va. 1984), rev’d on other grounds, 826 F.2d 239 (4th Cir. 1987).

The costs associated with repairing the other defective rod-to-clevis connections are likewise direct and not consequential. The Supreme Court of Virginia has addressed direct versus consequential damages in the context of damages arising from delay in the completion of a construction project. In Roanoke Hospital, plaintiff hospital association sought damages stemming from an unexcused delay in completion of a fourteen-story addition to its facilities. Id. at 157. In classifying damages resulting from the alleged breach of the construction contract, the court held that “interest costs incurred and the interest revenue lost during such an extended term are predictable results of the delay and are, therefore, compensable direct damages.” Id. at 161.

The court distinguished these damages from increased interest rates, which “are not caused by delays in completion of construction contracts,” but by “variable pressures and counter-pressures affecting supply and demand in the money market.” Id. Because increased interest rates were not caused by the delay in completion of the construction contract, the court properly classified those damages as consequential.

Banker Steel is correct in asserting that the costs associated with the other defective rod-to-clevis connections are predictable results of the alleged breach and thus, are more akin to the interest costs incurred and interest revenue lost in Roanoke Hospital than damages resulting from increased interest rates. After the discovery that 90% of the rods tested were defective, the decision was made to remedy a potentially dangerous situation by welding and installing steel plates on the other rod-to-clevis connections. Banker Steel, concerned over the prospect of other atrium roof truss failures, decided that it was prudent to weld and brace the existing rod-to-clevis connections. See Att. 28 to Banker Steel Summary Judgment Brief (Dkt. #55). Charles Eroh, Hercules Bolt’s engineering expert, agreed, stating that the repairs needed to be done because “[t]he out of tolerance condition called into question the ability of the trusses to sustain their design loads.” Deposition of Charles Eroh at 45-46, Att. 27 to Banker Steel Summary Judgment Brief (Dkt. #55). Eroh stated that the “repair details represent[ed] a reasonable and prudent engineering remedy to the out of tolerance threads on the truss bottom chord rods which were discovered during the inspections after the incident.” Id. at 45. The repairs resulting from the uncertainty and potential danger that existed as a result of the out of tolerance rods were a predictable result of the alleged breach. If Hercules Bolt failed to supply the rods in accordance with the specifications contained in the Purchase Order, it should have expected that repair and

retrofit work would be necessary to remedy any defect. Thus, the costs associated with repairing the other defective rod-to-clevis connections are properly classified as direct damages.

The second category of damages sought by Banker Steel consists of \$5.3 million for backcharges assessed by PTJV as a result of the rod failure. Hercules Bolt argues that the costs assessed by PTJV are dependent on its contracts with various other subcontractors, and, as such, more closely resemble the variable interest rates in Roanoke Hospital. Hercules Bolt Summary Judgment Brief at 13 (Dkt. #44). Banker Steel counters that backcharges assessed for delay “are even more prototypical and predictable types of damages due to a major construction disruption” and are therefore direct damages. Banker Steel Summary Judgment Brief at 26 (Dkt. #55).

Consequential damages are damages that do “not flow directly and immediately from the act of the party, but only from some of the consequences or results of such act.” Pulte Home, 265 Va. at 527, 579 S.E.2d at 193. Such damages “arise from the intervention of ‘special circumstances’ not ordinarily predictable.” Roanoke Hospital, 215 Va. 801, 214 S.E.2d at 160. Again, the Benfield affidavit states that the \$5.3 million in backcharges asserted by PTJV were due to the atrium roof truss collapse and repairs. Given the context in which the rods and clevises were to be used, to support roof trusses on a large hotel construction project, it cannot be concluded from the record in this case that subcontractor backcharges attributable to the roof truss collapse and repair arise from the intervention of special circumstances not ordinarily predictable. As such, the backcharge damages attributable to the roof truss collapse and repair are direct, and not consequential damages. See Ryan Inc. E. v. Toll Bros., Inc., 43 Fed. Appx. 601, 2002 WL 1832004, at *3 (4th Cir. Aug. 12, 2002) (“Unlike consequential damages, which ‘arise from the intervention’ of special circumstances ‘not ordinarily predictable,’ Ryan’s claimed damages were alleged simply to be the extra costs for labor and equipment brought on

by having to perform work out of sequence and thus were the ‘natural’ and ‘ordinary’ result of Toll’s breach of contract.”) (quoting Roanoke Hosp., 215 Va. at 801, 214 S.E.2d at 160).

Even if either of these categories of damages are deemed to be consequential, however, summary judgment remains inappropriate. The rods and clevises at issue in this case were not off the shelf parts. They were custom ordered and manufactured for a specific purpose, to connect certain components of the atrium roof truss system at the Gaylord Project.

Consequential damages are recoverable in a breach of warranty action when they are foreseeable at the time of contracting. Beard Plumbing and Heating, Inc. v. Thompson Plastics, Inc., 254 Va. 240, 244, 491 S.E.2d 731, 733 (1997); RMA Lumber, Inc. v. Pioneer Mach., LLC, No. 6:08cv0023, 2008 U.S. Dist. LEXIS 86293, at *22-25 (W.D. Va. Oct. 24, 2008). Hercules Bolt cannot credibly argue that there is no genuine issue of material fact that repairs and remediation of the roof truss system were unforeseeable from the failure of the rod and clevis connection causing the collapse of a roof truss. Nor can it be credibly maintained that costs associated with work done by other subcontractors resulting from the truss collapse are unforeseeable as a matter of law in the context of a complicated commercial development such as the Gaylord Project. As such, whether the repair and backcharge damages are characterized as direct or consequential, the court cannot recommend granting Hercules Bolt’s summary judgment motion. Even if Banker Steel’s backcharge damages are categorized as consequential, the issue of foreseeability is for the jury to resolve.

C.

Hercules Bolt argues that Banker Steel cannot prove its claimed damages with reasonable certainty. In a breach of contract action, [t]he plaintiff bears the burden to establish the element of damages with reasonable certainty.” Sunrise Continuing Care, LLC v. Wright, 277 Va. 148,

154, 671 S.E.2d 132, 135 (2009). Damages that are contingent, speculative, and uncertain cannot be established with reasonable certainty and thus, are not recoverable. Id. Banker Steel must prove the amount of its damages “by using a proper method and factual foundation for calculating damages.” Saks Fifth Ave., Inc. v. James, Ltd., 272 Va. 177, 189, 630 S.E.2d 304, 311 (2006). Thus, Banker Steel must “furnish evidence of sufficient facts to permit the trier of fact to make an intelligent and probable estimate of the damages sustained.” Kraft Foods, 446 F. Supp. 2d at 573 (quoting Estate of Taylor v. Flair Prop. Assocs., 248 Va. 410, 448 S.E.2d 413, 416 (1994)).

Hercules Bolt argues that Banker Steel cannot prove a sizeable portion of the \$2.6 million in repair and remediation expenses because Banker Steel has not yet paid for those expenses. Relying on two Virginia cases involving recovery of medical bills written off by health care providers, Hercules Bolt argues that because Banker Steel has not yet “incurred” the charges of two subcontractors, Memco and EPA Coat, amounting to \$854,780.62 and \$118,327.52, respectively, Banker Steel may not recover for them in this lawsuit.

The cases cited by Hercules Bolt are inapposite. In State Farm Mut. Auto. Ins. Co. v. Bowers, 255 Va. 581, 500 S.E.2d 212 (1998), an automobile insurer brought suit against an insured for overpayment of medical payments coverage. Bowers, a State Farm insured, was injured in an automobile accident. Bowers submitted various claims for reimbursement to State Farm for medical expenses, including a claim for \$1,586 for physical therapy services. State Farm mistakenly paid Bowers \$31,586, and once it realized its mistake, sought to collect the \$30,000 overpayment from Bowers. Bowers refused to repay State Farm, claiming that he spent the money. As a putative legal basis for his refusal to repay State Farm, Bowers contended that he had incurred additional medical expenses that should be offset against the \$30,000

overpayment. Included in the offsets claimed by Bowers were amounts of medical expenses written off by providers pursuant to a participating provider agreement with his health insurer, Blue Cross/Blue Shield of Virginia. Employing the definition of “incurred” contained in the medical expense payment provisions of the state insurance code, the Supreme Court rejected Bowers’ argument, reasoning that he has neither paid nor is legally obligated to pay the medical bills written off by health care providers participating with Blue Cross. Hercules Bolt argues from Bowers that “written off expenses could not be recovered.” Hercules Bolt Summary Judgment Brief at 19. The problem with Hercules Bolt’s argument, of course, is that Banker Steel’s subcontractors have not “written off” monies owed to them for the repair of the atrium roof. Rather, they simply have agreed that they will defer payment until after Banker Steel recovers from Hercules Bolt in this case.

Nor does Acuar v. Letourneau, 260 Va. 180, 531 S.E.2d 316 (2000), support Hercules Bolt’s position. In Acuar, the Supreme Court distinguished Bowers, holding that application of the collateral source rule will not allow a defendant in a personal injury action to reduce the amount of medical expenses claimed as special damages in a personal injury suit based on provider write offs. Again, there is no suggestion from the facts of this case that either of the Banker Steel subcontractors, Memco or EPA Coat, have written off their claim against Banker Steel. Rather, Memco has agreed to a recovery out of any settlement or judgment in this action,⁶ and EPA Coat has not yet pressed the issue. As such, it is appropriate for the jury to decide

⁶ At oral argument, Hercules Bolt argued that damages associated with the Memco repair work were not reasonably certain as Memco, in its settlement agreement with Banker Steel, agreed to accept a percentage of its claim based on the total amount of Banker Steel’s recovery, the so-called “pot.” In this settlement agreement, Banker Steel assumed the obligation and costs associated with prosecuting the claim for damages associated with the truss failure, including the amounts billed by Memco for its repair work. The work performed by Memco is a finite sum, and is not rendered indefinite, contingent or speculative by virtue of the fact that Banker Steel and Memco agreed up front how, between themselves, to allocate the risk and burden of recovering these monies. To conclude otherwise would impermissibly chill the ability of parties to allocate risk and settle disputes.

whether Hercules Bolt is liable to Banker Steel for the repair and retrofit the atrium trusses, including the work done by Memco and EPA Coat.

D.

Hercules Bolt also contends that Banker Steel has failed to prove that it was damaged to the tune of \$5.3 million for the PTJV backcharges, and that “Banker Steel accepted [PTJV’s] assessment of backcharges in a business settlement without any verification and now seeks to pass them on to Hercules Bolt.” Hercules Bolt Summary Judgment Brief at 22 (Dkt. #44). Hercules Bolt claims that because Banker Steel failed to perform due diligence as to the PTJV backcharges, it cannot prove that PTJV actually incurred those damages. Furthermore, “[t]he mere fact that Banker Steel was able to negotiate a reduced settlement to \$5.3 million in assessed backcharges does not eliminate its duty to prove that its damages were incurred and related to the rod failure and is not sufficient to prove damages.” Hercules Bolt Summary Judgment Brief at 22-23 (Dkt. #44). In response, Banker Steel contends that it has the right to recover the \$5.3 million in damages resulting from the settlement with PTJV based upon an implied contract for indemnity, and that, in essence, this implied indemnity theory reduces its burden to prove damages.⁷

Although the Banker Steel Purchase Order issued to Hercules Bolt does not contain an indemnification clause, Banker Steel claims that implied contract of indemnity exists. Generally, courts are unwilling to read an implied indemnity obligation into the parties’ contract, absent unique factors or a special relationship between the parties. TransDulles, 976 F. 2d at 228;

⁷ Hercules Bolt asserts the Banker Steel cannot now raise, for the first time on summary judgment, its implied indemnity claim. Citing Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009), Hercules Bolt contends that Banker Steel has not properly set forth a claim for indemnification “without having pled implied indemnity or any facts to support such a claim.” Reply to Banker Steel Summary Judgment Brief at 7 (Dkt. #59). The court cannot agree. The facts of this case are amply pled, plausibly suggesting an entitlement to relief. As such, Banker Steel’s implied indemnity theory does not run afoul of either Iqbal or Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007).

DiMarco Constructors, LLC v. Staunton Plaza, LLC, No. 5:09cv00001, 2009 WL 2058686, at *3 (W.D. Va. July 14, 2009); Bd. of Dirs. of Birdneck Villas Condo. Ass'n v. Birdneck Villas, LLC, 73 Va. Cir. 175, 2007 Va. Cir. LEXIS 77 (Va. Cir. Ct. Apr. 2, 2007); Dacotah Mktg. & Research, LLC v. Versatility, Inc., 21 F. Supp. 2d 570, 580 (E.D. Va. 1998).

“In the contracts context, equity is more hesitant to imply an indemnity right, because if the parties desired to create an indemnitor-indemnitee relationship, they could have done so expressly in the contract.” Hanover Ins. Co. v. Corpro Cos., Inc., 312 F. Supp. 2d 816, 821 (E.D. Va. 2004). In the construction context, other Virginia courts have declined to find the existence of an implied contract of indemnity. TransDulles, 976 F.2d at 228 (holding that an architect’s obligation to satisfy county regulations when designing a building does not give rise to a right to implied contractual indemnification when the builder must later pay the building owner for the cost of bringing the building into compliance with those regulations); Stone Ridge Condo. Unit Owners’ Ass’n v. J.M. Turner & Co., Inc., 62 Va. Cir. 280 (Va. Cir. Ct. July 14, 2003) (finding no special contractual relationship between a condominium association and the architect who designed the condominiums); Birdneck Villas, 73 Va. Cir. at 175, 2007 Va. Cir. LEXIS at *10 (finding no special contractual relationship between a general contractor and parties who provided framing materials, stucco, and vinyl siding for a construction project).

There are no unique factors or special circumstances in this case. Banker Steel issued a plain vanilla Purchase Order to Hercules Bolt for provision of the specified rods and clevises. Nothing in that Purchase Order or otherwise in their relationship suggests any sort of unique or special obligation. As the Fourth Circuit concluded in TransDulles, “this simple contract supplies no basis to find an implied contract for indemnification.” TransDulles, 976 F.2d at 228. See also Birdneck Villas, 73 Va. Cir. at 180-81, 2007 Va. Cir. LEXIS 77 at *10 (Circuit Court

for the City of Virginia Beach declined to find implied indemnity contract claim brought by a general contractor against several subcontractors supplying framing, siding and roofing supplies and services, allegedly resulting in defects to two condominium units, reasoning that “we have nothing but a simple contract between the parties, which does not give rise to a special relationship”).

The case of Superior, Inc. v. Behlen Mfg. Co., 738 N.W. 2d 19 (N.D. 2007), bears certain similarities to this case. Superior, in the business of building grain bins, issued a purchase order to Behlen for a certain grade of bolts. Superior used the bolts supplied by Behlen to assemble a grain bin, which subsequently collapsed, spilling fifty thousand bushels of wheat. Much as here, investigation revealed that the collapse resulted from Behlen’s provision of bolts not up to the specifications set forth in the purchase order. Because of statute of limitations concerns, Superior couched its claim against Behlen for indemnity, rather than breach of contract. Following the Second Circuit’s decision in People’s Democratic Republic of Yemen v. Goodpasture, Inc., 782 F.2d 346, 351 (2d Cir. 1986), the Supreme Court of North Dakota rejected the implied contractual indemnity claim, reasoning as follows:

In this case, Superior and Behlen entered into a contract for the sale of bolts. Behlen allegedly breached this sales contract by delivering nonconforming grade two bolts. Superior used these nonconforming bolts to build a grain bin for a third party, which collapsed and resulted in damages. Superior argues that its claim against Behlen is for indemnity, not for breach of a sales contract. However, Superior does not point to any facts which would indicate a special relationship between the parties giving rise to a right of implied indemnity. Nor has Superior shown any unique or special factors indicating that Superior and Behlen intended Behlen to be ultimately liable.

Superior, 738 N.W. 2d at 25. The court added that “because implied contractual indemnity is an equitable remedy, it cannot be mechanically applied in every case involving a breach of contract

where the non-breaching party becomes liable to third party.” Id. at 26. Because Superior had an adequate remedy at law for breach of warranty under the Uniform Commercial Code, the court declined to find that it had an implied indemnity claim against Behlen, the bolt supplier.

Similarly, the Fourth Circuit in Int’l Surplus Lines Ins. Co. v. Marsh & McLennan, Inc., 838 F.2d 124, 127-28 (4th Cir. 1988), declined to read an implied contract of indemnity into an ordinary brokerage arrangement, reasoning as follows:

While Marsh & McLennan may have owed some fiduciary duties both to the City and to ISLIC, there was nothing in the arrangement or in the parties’ dealings from which an indemnity agreement could be implied. If an implied contract for indemnification were found here, it is possible that every insurance broker would, in effect, become an insurer. Such a result would do violence to existing indemnity law. We conclude there could be no implied contract for indemnity in this case.

Int’l Surplus, 838 F.2d at 128.

The Fourth Circuit distinguished the situation of an ordinary insurance brokerage relationship from those cases involving the sort of special or unique relationship where courts determined an implied contract of indemnity to exist. For example, the sort of special or unique relationship giving rise to an implied contract of indemnity was found to exist at admiralty based on “non-delegable duties imposed in maritime law by the seaworthiness doctrine,” Maritime Overseas Corp. v. Ne. Petroleum Indus., Inc., 706 F.2d 349, 353 (1st Cir. 1983); Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp., 350 U.S. 124, 133-34 (1956), or between shipper and carrier based on obligations imposed by federal statutes and regulations. General Elec. Co. v. Moretz, 270 F.2d 780 (4th Cir. 1959), cert. denied, 361 U.S. 964 (1960).⁸

⁸ Banker Steel does not argue for equitable indemnity, nor does it appear that such a tort concept is applicable to this case. Although the Virginia Supreme Court recognized a claim for equitable indemnity in Carr v. Home Ins. Co., 250 Va. 427, 429, 463 S.E.2d 457, 458 (1995), “[a] prerequisite to recovery based on equitable indemnification is the initial determination that the negligence of another person caused the damage.” Banker Steel

No mention is made in either the Fourth Circuit's opinions in TransDulles or Int'l Surplus of the Whittle case upon which Banker Steel predicates its implied contract of indemnity argument. Whittle v. Timesavers, Inc., 614 F. Supp. 115 (W.D. Va. 1985), was a products liability case involving the sale of a used sander. From this sale, the district court found an implied warranty of merchantability to exist and further held that "[w]hile there is no specific Virginia authority directly on point, I believe that where there has been a breach of an implied warranty of merchantability that an implied contract for indemnity will lie." Id. at 119; see also RML Corp. v. Lincoln Window Prods., Inc., 67 Va. Cir. 545, 563, 2004 Va. Cir. LEXIS 363, *40-41 (Va. Cir. Ct. Apr. 1, 2005) (sustaining a demurrer, the trial court stated that an implied contractual indemnity need not be separately pleaded, rather, plaintiff "may proceed with its claim for indemnity as the relief sought under its breach of implied warranties cause of action").

Banker Steel argues that under such an implied indemnity cause of action, its burden of proving damages is reduced, requiring it to prove only that Hercules Bolt is actually liable to it and that its settlement with PTJV was reasonable. Jennings v. United States, 374 F.2d at 987 (4th Cir. 1967). Jennings does not address whether a right to indemnification exists under the circumstances of this case. Rather, it addresses the quantum of proof required to maintain an indemnification claim. Jennings, a Maryland diversity case, arose out of an automobile accident on an icy parkway maintained by the United States. Jennings' car skidded on a patch of ice and lost control, killing him and injuring his passenger and the occupants of an oncoming vehicle. Jennings' insurer, GEICO, settled with the injured parties. Meanwhile, Jennings' widow brought a Federal Tort Claims Act action against the United States for negligent construction and maintenance of the parkway, and a judgment was rendered against the United States. GEICO

makes no negligence claim against Hercules Bolt. See Stone Ridge, 62 Va. Cir. at 282, 2003 Va. Cir. LEXIS 118 at *4.

then sought indemnification from the United States for the monies it paid to settle the personal injury suits against Jennings' estate. It was undisputed that GEICO did not put the United States on notice of the actions against Jennings' estate, and the United States had no opportunity to participate in the settlement. As a consequence of the lack of notice, GEICO was required to prove more than probable liability on the part of the United States. Rather, GEICO was required to prove "actual legal liability." 374 F.2d at 987.

Banker Steel maintains that because Hercules Bolt's rods were manufactured out of specification, actual liability is established. Once this determination is made, Banker Steel argues from Jennings that all it need do is prove that its settlement with PTJV is reasonable.

Banker Steel's analysis misses a step, however, leapfrogging over its obligation to prove that the failure of the rods supplied by Hercules Bolt caused Banker Steel's losses. Even if allowed to proceed on an implied indemnity theory, Banker Steel does not get a free pass at proving causation. There was no issue as to causation in Jennings, and that case does not stand for the proposition that the implied indemnity remedy obviates the need to prove causation. Proof of actual liability necessarily includes a determination that the PTJV settlement amount of \$5.3 million is causally related to the rod failure. Because Banker Steel settled its dispute with PTJV without vouching in Hercules Bolt or otherwise providing it with an opportunity to defend the Maryland state court action, even under an implied indemnity theory, Banker Steel cannot recover the amount of its settlement with PTJV without proving that Hercules Bolt was liable for the rod failure and caused Banker Steel's losses.

Instructive in this regard is the Molvik & Olsen Elec., Inc. v. Int'l Brotherhood of Elec. Workers, Local 191, No. C83-1399R, 1985 WL 14178 (W.D. Wash. Jan. 18, 1985), case cited by Hercules Bolt. Just as in this case, Molvik involved backcharges imposed by a general

contractor on its subcontractor. As with Banker Steel, the subcontractor, Molvik, did not perform any detailed investigation into the amount of the backcharges and “accepted the \$16,000 figure without asking for any proof or any backup documents.” Id. at *2. Molvik settled the general contractor’s backcharge claim and proceeded to sue the defendant labor union, alleging that any delay on the project giving rise to the backcharges was due to the union’s illegal picketing. The court concluded that the mere fact of the settlement alone did not entitle Molvik to recover from the union.

Suffice to say, this Court finds that Molvik’s position that the mere fact that it agreed to settle for the \$16,000 figure would immediately render the union liable for these backcharges, without any proof at all that these backcharges were indeed caused by the union, is patently and inherently unjust. The union must have the opportunity of showing any lack of justification for the charges themselves. In short, they must have the opportunity to show whether or not the damages were caused by the picketing of the union and if the amount is indeed a reasonable one.

Id.; accord Blockston v. United States, 278 F. Supp. 576, 592, n. 22 (D. Md. 1968) (“It should also be noted that even if this were a situation where an indemnity clause should be implied, as in the stevedoring cases or the General Electric case, the burden would still rest on the government to prove that the proximate cause of Blockston’s injury was the breach of implied warranty by Hydrothern, and not some intervening cause.”); see also American Laminates, Inc. v. J. S. Latta Co., 980 S.W.2d 12, 18 (Mo. Ct. App. 1998) (Indemnity clause in purchase order did not obligate indemnitor to pay unreasonable backcharges).

Just as Banker Steel argues in this case, Molvik contended that “the mere fact that it had to pay the backcharges to [the general contractor] should immediately qualify that amount as having been caused by the illegal picketing and that, therefore, the union should be completely liable for whatever Molvik has had to pay.” Id. Banker Steel asserts that because it paid \$5.3

million to PTJV, Hercules Bolt should be liable for that amount. But simply proving the amount of the settlement is not enough. Banker Steel must prove that the rod failure caused the \$5.3 million in damages it seeks to recover from Hercules Bolt.

E.

In that regard, Hercules Bolt argues that Banker Steel cannot prove the amount of the PTJV backcharges with reasonable certainty. Hercules Bolt argues that Banker Steel cannot meet the reasonable certainty standard as regards the PTJV backcharges because Banker Steel settled the backcharge claim without verifying the amount of the backcharges or determining that the various PTVJ subcontractors actually had been paid. Indeed, Hercules Bolt asserts that the subcontractor with the largest chunk of the backcharges, comprising roughly \$3 million of the \$5.3 million claim, Naturalite, denied these amounts. In short, Hercules Bolt argues that the PTJV backcharges are nothing more than a speculative claim asserted by PTJV, to which Banker Steel agreed without performing any due diligence.

In support of its argument, Hercules Bolt cites a New York case where the court rejected a similar backcharge claim due to a lack of supporting documentation. In Intermetal Fabricators, Inc. v. The Losco Group, Inc., No. 97 Civ. 3519, 2000 WL 1154249 (S.D.N.Y. Aug. 14, 2000), Losco, a general contractor sued Intermetal, a steel subcontractor, for breach of two subcontracts. Losco alleged that Intermetal abandoned its work, delaying construction and resulting in the termination of the subcontracts. Intermetal brought suit seeking to recover the value of the steel work in place at the time of its termination. Losco counterclaimed for various backcharges attributable to Intermetal's failings. With respect to certain of the backcharges, the court found, following a bench trial, that Losco "has failed to provide any documentation, other than [its] own December 1996 change orders, related to these costs, including when they were incurred, who

performed the work, and whether defendant actually incurred these costs.” Id. at *13. Damages were awarded for certain other backcharges, the court finding that “credible testimony at trial and documentary evidence establish[ed] that plaintiff’s failure to adequately and timely complete a large portion of the steel work on the project” resulted in the additional work performed and costs incurred as a result of that work. Id. at *15. While Intermetal stands for the general proposition that damages must be proven with reasonable certainty, it is not particularly helpful in resolving the summary judgment issue in this case as it was a decision rendered after trial.

A recent decision out of New York is more closely on point. Underpinning & Found. Skanska, Inc. v. Travelers Cas. & Sur. Co. of America, 726 F. Supp. 2d 339 (S.D. N.Y. 2010). Underpinning & Foundation Skansko, Inc. (“Underpinning”), a pile driving subcontractor sued Travelers, issuer of a payment bond for Urban Foundation Engineering, LLC (“Urban”), an excavating contractor, for nonpayment of monies due on a construction project in Manhattan. Travelers, on behalf of Urban, claimed that it was entitled to various setoffs because of Underpinning’s failure to complete its work in a timely manner. Much like Banker Steel in this case, the subcontractor, Urban, claimed that its subcontractor, Underpinning, was liable for various backcharges asserted by the general contractor HRH as a result of Underpinning’s failings. Just as Hercules Bolt does in this case, Underpinning argued that summary judgment should be awarded to it because Urban did not incur the backcharges and failed to provide documentation to support them. While the facts of the settlement between the project owner, general and foundation subcontractors differ somewhat from the facts of this case, the court reached the conclusion that while Urban’s “documentary and evidentiary deficiencies may prove problematic to Travelers’” claim at trial, 726 F. Supp. 2d at 354, the court could not conclude that Underpinning was entitled to summary judgment. The same is true here.

There is a genuine issue of material fact as to whether Banker Steel can prove with reasonable certainty that the \$5.3 million in backcharges claimed by PTJV were caused by the failure of the Hercules Bolt rods. On the one hand, Hercules Bolt argues that Banker Steel cannot prove that the backcharges are related to the rod failure because Banker Steel has admitted that it did nothing to verify the accuracy of the backcharges or even ascertain whether they were paid. Indeed, the subcontractor responsible for the bulk of the backcharges, Naturalite, denied many of them. See Banker Steel Response to Request for Admission No. 19, Att. 5 to Hercules Bolt Summary Judgment Brief (Dkt. #45). Certainly, there were construction delay backcharge issues between PTJV and Banker Steel unrelated to the Hercules Bolt rod failure. See Banker Steel Response to Request for Admission No. 42, Att. 5 to Hercules Bolt Statement of Undisputed Facts (Dkt. #45); Rule 30(b)(6) Deposition of Banker Steel (Chesley F. McPhatter, III) at 111, Att. 10 to Hercules Bolt Statement of Undisputed Facts (Dkt. #45); Att. 49 to Banker Steel Summary Judgment Brief. Further, Hercules Bolt has questioned the validity of PTJV's backcharges, citing the fact that Gaylord was roundly critical of its financial management of the project. Hercules Bolt references a letter from Gaylord, Bennett Westbrook, Senior Vice President of PTJV, dated May 2, 2008, critical of PTJV bookkeeping and questioning the appropriateness of its backcharges, as follows:

Pursuant to my earlier letter, the investigation is underway. Al Beams is leading a team that is investigating and reconciling the records. This task has been made unduly complicated by what I am told is the extremely poor condition of your job records and especially your job accounting system. We are finding numerous errors and basic failures to reconcile amounts billed to amounts approved. Further, it seems from the information being provided to me that PTJV has not back charged subcontractors appropriately. Our investigation is not complete due to these factors, but we expect to have some initial conclusions to present to you next week.

See Deposition of Bennett Westbrook at 70-71, Att. 18 to Hercules Bolt Statement of Undisputed Facts (Dkt. #45).

On the other hand, simply because Banker Steel settled with PTJV before verifying the claimed backcharges does not mean that Banker Steel cannot prove at trial that these backcharges were caused by the rod failure. Indeed, the affidavit of PTJV's Jason Benfield speaks directly to this point.

38. Prior to November 2008, I personally reviewed invoices, correspondence, job reports and cost records for the Project to compile a list of backcharges that Perini/Tompkins asserted against Banker Steel as of November 2008. As part of my review of these invoices, correspondence, job reports and cost records, I also identified which of these backcharges were related to the Collapse, and/or the repair of the Atrium truss system and the Rod/Clevis Connections. The backcharges that I identified as of November 2008 as resulting from the Collapse and/or the repairs of the Atrium truss system and the Rod/Clevis connections exceeded \$5.3 Million. Perini/Tompkins provided this list to Banker Steel during a meeting which took place on November 4, 2008 in Washington, D.C.

See Aff. of Jason Benfield ¶ 38, Att. 2 to Banker Steel Summary Judgment Brief (Dkt. #55).

Benfield's testimony at trial that this amount of damages was caused by the rod failure, if credible and adequately documented, could support a reasonably certain jury verdict for Banker Steel.

In its reply brief, Hercules bolt argues that because Banker Steel's Rule 30(b)(6) deponents admitted that Banker Steel settled with PTJV without verifying the accuracy of the PTJV backcharges, Banker Steel is bound to that testimony and cannot prove its damages. While the court agrees that Banker Steel is bound to the testimony of its Rule 30(b)(6) deponents, that does not mean that Banker Steel cannot otherwise prove its damages. While the Banker Steel Rule 30(b)(6) deponents said that they did not verify the PTJV backcharges, they

did not testify that Banker Steel could not prove the amount of these backcharges with reasonable certainty from other sources. Certainly, the Benfield affidavit is just such a source.

It appears, therefore, that there is a genuine issue of material fact as to the proper amount of damages caused by the rod failure and whether Banker Steel can prove its claimed damages with reasonable certainty. As such, summary judgment for Hercules Bolt is not recommended on this issue.

IV.

Finally, Hercules Bolt asserts that Banker Steel may not collect its attorney's fees and costs in the Maryland litigation with PTJV. The general rule in Virginia is that in the absence of any contractual or statutory provision to the contrary, each party must bear its own attorney's fees. Hiss v. Friedberg, 201 Va. 572, 577, 112 S.E.2d 871, 876 (1960); Gilmore v. Basic Indus., Inc., 233 Va. 485, 357 S.E.2d 514, 517 (1987); TransDulles, 976 F.2d at 228-29. Banker Steel points to a narrow exception to this general rule found in Hiss, where the Supreme Court of Virginia held that the prevailing party in an initial breach of contract action could obtain reimbursement for attorney's fees from a third party whose breach of an attorney-client employment contract necessitated the institution of the initial action. Hiss, 201 Va. at 577, 112 S.E.2d at 876.

In TransDulles, the Fourth Circuit distinguished Hiss, and implicitly limited that exception to the circumstance where the party seeking recovery of attorney's fees prevailed in the earlier action. Id. Given the nature of the walk away settlement between Banker Steel and PTJV, it is difficult to characterize Banker Steel as prevailing. Following TransDulles, the narrow Hiss exception does not apply to this case. As such, it is **RECOMMENDED** that Hercules Bolt's motion for summary judgment be **GRANTED** on this point.

V.

Accordingly, it is **RECOMMENDED** that Hercules Bolt's Motion for Summary Judgment (Dkt. #43) be **DENIED**, with the exception of Banker Steel's claim for recovery of attorney's fees and costs expended in the Maryland state court suit with PTJV. As to that claim, it is **RECOMMENDED** that Hercules Bolt's Motion for Summary Judgment be **GRANTED**. These **RECOMMENDATIONS** are based on the following conclusions, detailed above:

(1) There is a genuine issue of material fact as to whether Banker Steel should have known that the steel rods supplied by Hercules Bolt were defective before they were installed.

(2) The repair costs and backcharges are properly characterized as direct damages. Even if deemed consequential, however, a genuine issue of material fact exists as to whether the repair/retrofit costs and backcharges were foreseeable at the time of contracting.

(3) Simply because Banker Steel has not yet paid Memco and EPA Coat does not render charges associated with their work uncertain and not recoverable.

(4) There are no unique factors or special relationship warranting the imposition of an implied contract of indemnity between Hercules Bolt and Banker Steel. Even if such a claim were deemed to exist, Banker Steel is not relieved of its obligation to prove that the backcharges imposed by PTJV were caused by the defective rods. On the existing record, a genuine issue of material fact exists as to whether Banker Steel can prove with reasonable certainty the amount of the backcharges caused by the rod failure.

(5) Because Banker Steel did not prevail in the Prince George's County, Maryland, litigation with PTJV, it may not recover its attorney's fees and costs expended there.

The Clerk of the Court is directed immediately to transmit the record in this case to the Honorable Norman K. Moon, United States District Judge. Both sides are reminded that

pursuant to Rule 72(b) they are entitled to note any objections to this Report and Recommendation within fourteen (14) days hereof. Any adjudication of fact or conclusion of law rendered herein by the undersigned not specifically objected to within the period prescribed by law may become conclusive upon the parties. Failure to file specific objections pursuant to 28 U.S.C. § 636(b)(1)(C) as to factual recitations or findings as well as to the conclusions reached by the undersigned may be construed by any reviewing court as a waiver of such objection.

The Clerk is directed to send copies of this Report and Recommendation and accompanying Order to all counsel of record.

Entered: May 6, 2011

/s/ Michael F. Urbanski

Michael F. Urbanski
United States Magistrate Judge