SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

WILSHIRE VERMONT HOUSING PARTNERS, LP, Plaintiff, vs. TAISEI CONSTRUCTION CORPORATION, et al., Defendants. AND RELATED CROSS-ACTIONS	Case No. BC504178 Proposed Statement of Decision Interpreting Statute of Limitations Provisions in Prime Contract (Cal. Rules Ct. 3.1591, and 3.1590 (f)-(g)) Hearing Date: October 19, 2016 Bifurcated Mini-trial *Brisbane* Issue

This is a construction defect case involving a seven-story mixed-use residential and commercial "affordable housing" development built on the site of the MTA's Wilshire Vermont Station (Project). The Project was substantially completed as of August 22, 2007. Plaintiff Wilshire Vermont Housing Partners LP was the owner/developer of the Project. Pursuant to a multi-part written agreement (Prime Contract), Wilshire Vermont paid the general contractor,

defendant Taisei Construction Corporation (Taisei or Contractor), more than $65 million to oversee construction of the Project.

Wilshire Vermont filed this construction defect action on March 27, 2013 against Taisei and various subcontractors (Subcontractors) who worked on the Project. Wilshire Vermont alleges there were latent defects caused by defendants' defendants' work on the Project caused by defendants' negligence, breach of contractual promises to provide non-defective work, and/or breach of fiduciary duties and that Taisei breached warranties by failing and refusing to correct the defects. Although the statutes of limitations governing its causes of action had lapsed by the time Wilshire Vermont filed suit, it contends its action was nevertheless timely because it has alleged the rule of discovery exception to the statutes of limitation (Sixth Amended Complaint, ¶ 164.) and filed suit within three or four years of discovering the defects (and within the 10 year limitations period for latent defect claims set forth in Code of Civil Procedure Section 337.15).

Citing *Brisbane Lodging, L.P. v. Webcor Builders, Inc*. (2013) 216 Cal.App.4th 1249 (*Brisbane*), Taisei and the Subcontractors contend that, under a provision in the Prime Contract (Paragraph 13.7.1.1 of the General Conditions) between Wilshire Vermont as "Owner" and Taisei as "Contractor," Wilshire Vermont expressly agreed that all statutes of limitations for these claims commenced to run either upon Substantial Completion or Final Certificate of Payment and thereby waived California's equitable rule of discovery exception to the statutes of limitations. The Court set December 15, 2015 as the date for a bifurcated "mini-trial" to determine whether or not, under *Brisbane*, Wilshire Vermont's construction defect action is time-barred as a matter of law. The issue, as framed by the parties, was based on a perceived conflict between the specified accrual dates for statutes of limitations set forth in Article 13.7.1.1 of the June 4, 2004 Prime Contract and a Paragraph 4(c) in the (unsigned) Contractor Guarantee ("Guarantee") incorporated into the

Contract Documents as Exhibit M.[1] The Court has issued several previous tentative rulings[2] and invited further briefing with respect to each of them. The Court now issues a final decision.

Interpreting the Prime Contract, the Court finds, as a matter of law, that in General Conditions 13.7.1.3, Wilshire Vermont preserved its right to assert latent defect breach of warranty claims upon discovery to the full extent permitted under Section 337.15. Wilshire Vermont agreed, however, in General Conditions13.7.1.1 and 13.7.1.2 that the statute of limitations for all non-warranty claims would commence to run not later than Substantial Completion (for conduct occurring before Substantial Completion) or Final Certificate of Payment (for conduct occurring between Substantial Completion and Final Certificate of Payment).

I. The Parties Contentions Regarding the Prime Contract

The Prime Contract consists, in relevant part, of the following documents:

- A modified version of the 1997 AIA Standard Form of Agreement Between Owner and Contractor where the basis for payment is the Cost of the Work Plus a Fee with a negotiated Guaranteed Maximum Price (Standard Form or SF) (TCC.087191-087221);

- A modified version of the 1997 AIA General Conditions of the Contract for Construction (General Conditions or GC) (TCC087222 – 087286);

- An unsigned Contractor Guarantee (Guarantee) on Taisei's letterhead attached as Exhibit M (TCC087432-433).

[1] There is no dispute that the June 4, 2004 Prime Contract attached as Exhibit 2 to the Edward Schroeder Declaration is the operative agreement between Wilshire Vermont and Taisei.

[2] The Court's decision on this matter has been, unfortunately, delayed as a result of an approximately six month period during which the Court was assigned, pro tem, to sit in Division Three of the Court of Appeal.

Taisei and the subcontractors (particularly Proulx) ("Defendants") ask the Court to interpret the language in 13.7.1.1 of the Standard Form (TCC087282) as requiring Wilshire Vermont to file any suit for damages allegedly caused by latent defects in construction by August 22, 2011 (not later than four years after Substantial Completion). Because this action was filed later than August 22, 2011, Defendants contend it is time-barred. Their arguments rest on unmodified AIA form language in 13.7.1 of the General Conditions.[3]

That provision is one of three provisions in the General Conditions addressing alternative dates when the statute of limitations "shall commence to run":

> 13.7 Commencement of Statutory Limitation Period
>
> 13.7.1 As between the Owner and Contractor:
>
> .1 **Before Substantial Completion**. As to acts or failures to act occurring prior to the relevant date of Substantial Completion,[4] any applicable statute of limitations shall commence to run and any alleged cause of action shall be deemed to have accrued in any and all events not later than such date of Substantial Completion.
>
> .2 **Between Substantial Completion and Final Certificate for Payment.** As to acts or failures to act occurring subsequent to the relevant date of Substantial Completion and prior to issuance of the final Certificate for Payment, any applicable statute of limitations shall commence to run and any alleged cause of action shall be deemed to have accrued in any and all events not later than the date of issuance of the final Certificate for Payment; and
>
> .3 **After Final Certificate for Payment.** As to acts or failures to act occurring after the relevant date of issuance of the final Certificate for Payment, any applicable statute of limitations shall commence to run and any alleged cause of action shall be deemed to have accrued in any and all events not later than the date of any act or failure to

[3] A January 2016 article notes that the 1997 version of 13.7.1 was revised to eliminate language interpreted in *Brisbane* as a waiver of the 10-year statute of limitations and the 2007 version provides, "[t]he Owner and the Contractor shall commence all claims and causes of action . . . within the time period specified by applicable law, but in any case not more than 10 years after the date of substantial completion . . . ." *The Effect of Brisbane on the Construction Defects Statute of Limitations*, 38 LALAW 14 (January 2016).

[4] The Standard Form provides, in Paragraph 12.2.1, that the Architect must issue a "certificate of Substantial Completion" setting for the date upon which substantial Completion has been achieved and itemizing the items of Work yet to be completed or corrected. There is no dispute that August 22, 2007 was the date of Substantial Completion.

> act by the Contractor pursuant to any Warranty provided under Paragraph 3.5[5], the date of any correction of the Work or failure to correct the Work by the Contractor under Paragraph 12.2, or the date of actual commission of any other act or failure to perform any duty or obligation by the Contractor or Owner, whichever occurs last.

Defendants contend 13.7.1.1 applies to and bars Wilshire Vermont's claims in this case. They argue this Court is bound by *Brisbane*'s interpretation of 13.7.1.1 as an enforceable agreement between sophisticated parties (Owner and Contractor) to have all potential claims accrue as of the dates of Substantial Completion or Final Certificate of Payment.

Defendants are correct that the single provision construed in *Brisbane* (1997 version, General Conditions 13.7.1.1) appears (unmodified) in the Prime Contract between Owner and Contractor in this case. *Brisbane* enforced 13.7.1.1 as an agreement to waive the rule of discovery exception and the extended limitations period (statute of repose) for all latent defect claims including claims for breach of warranty, breach of contract and negligence. Based on "the policy principles applicable to the freedom to contract afford sophisticated contracting parties the right to abrogate the delayed discovery rule by agreement," *Brisbane concluded* and that [u]nder the clear language of [13.7.1.1], [the owner's] action [against the general contractor] was untimely." *Id*. at 1254. Defendants argue that this Court is bound to follow *Brisbane*.

Wilshire Vermont disagrees, pointing out that the General Conditions are only part of the Prime Contract and the parties' agreement in the (unsigned) Guarantee attached as Exhibit M and incorporated into the Prime Contract compels a contrary result. The Guarantee, prepared on Taisei's letterhead, states (in relevant part) as follows;

> "This ***Guarantee*** is being made pursuant to and as part of the General Construction Agreement dated TBD (which together with all documents comprised therein, is hereafter

[5] Under Paragraph 3.5 of the General Conditions, Taisei warranted, inter alia, "that the Work [would] be free from defects . . . [and] conform to the requirements of the Contract."

referred to as the "Contract) by and between [Wilshire Vermont] as Owner and [Taisei.] as Contractor. In furtherance of the Contract . . . ***Contractor covenants, warrants and guarantees as follows:***

> 1. ***Contractor hereby unconditionally guarantees that all work performed*** . . . pursuant to the Contract Documents or otherwise required under the Contract [is] in accord with the Contract. As of the date of this Guarantee, *the work performed is* ***free from defects*** . . . and will remain so through the period of this Guaranty. In furtherance of such Guarantee, upon written notice from Owner of a claim under this Guarantee, Contractor will promptly, at its own cost and expense, provide labor, and materials and supervision to repair and make good, to Owner's satisfaction, any and [defects] which arise out of or result . . . from (a) work, materials or equipment at variance from that called for by the Contract, (b) any imperfect or defective work materials or equipment furnished by the Contract or (c) any other guarantee provided for in the Contract Documents or otherwise in the Contract."
>
> 4. ***If the [defect] be latent*** – i.e., not apparent by reasonable inspection – the period of this Guarantee with respect thereto shall cover such events and shall extend to . . . ***(c) the date by which any action may be filed under California law with respect thereto***.
>
> 6. This ***Guarantee*** shall be in addition to all rights acquired by the Owner through ***other guaranties*** made by the Contractor pursuant to the work performed and all materials and equipment which are the subject hereof. In addition, any equipment or other ***guaranties or warranties secured by the Contractor*** (whether or not limited to the time period provided by this Guarantee) shall also inure to the benefit of Owner.
>
> 7. This instrument is in addition to and not in derogation of the Contract, and the provisions of the Contract shall remain in full force and effect. Terms used in this instrument shall have the same meanings as in the Contract . . . .
>
> 8. This instrument is for the benefit of the Owner . . . and all persons claim through the Owner . . . and may be enforced . . . in any court of competent jurisdiction or otherwise as provided for in the Contract.

Wilshire Vermont contends the more specific language in the Guarantee controls and that the language in ¶ 4(c) makes all claims alleged in Wilshire Vermont's lawsuit, filed within four years of alleged discovery of defects, timely because they comport with California's rule of discovery exception and were timely under Section 337.15.

Taisei and the Subcontractors counter that, without a signature, the Guarantee is not enforceable because "black letter law" requires an offer to be accepted before a contract is formed. It also argues the unsigned Guarantee is barred by the Statute of Frauds and cannot alter Article 13.7.1.1's commencement period because the Guarantee states, "[t]his instrument is in addition to and not in derogation of the Contract and the provisions of the Contract shall remain in full force and effect."

II. Analysis

Wilshire Vermont's claims against the defendants in this action are based on their allegedly defective or non-conforming work in connection with construction of the Project. There is no dispute that work was essentially completed when the Project achieved Substantial Completion on August 22, 2007. Plaintiff's March 27, 2013 Complaint alleging breach of contract, negligence and breach of fiduciary duty claims, was filed more than three or four years after the conduct giving rise to those causes of action, making the action untimely unless Wilshire Vermont bargained for an exception under the Prime Contract or otherwise qualifies for an exception to the statutes of limitations as a matter of law. This decision addresses and decides whether, as a matter of law, language in the Prime Contract (particularly General Conditions 13.7.1.1) and/or the holding in *Brisbane* render all of Wilshire Vermont's causes of action untimely. This decision is based on the language in the Prime Contract. The Court has not received or considered any other evidence.

The Court does not, in this decision, decide whether any alleged defects giving rise to Wilshire Vermont's causes of action were latent or patent defects; whether the facts and circumstances of Wilshire Vermont's allegedly late discovery satisfy the rule of discovery

exception under California law; or whether Wilshire Vermont gave Taisei timely and adequate notice of any the latent defects when it allegedly discovered them. Nothing in this decision precludes Taisei or any Subcontractor from pleading or proving at trial that Wilshire Vermont engaged in conduct supporting an estoppel, waiver or other equitable defense to enforcement of the provisions of the Prime Contract interpreted in this decision. The Court is not adjudicating any claims or defenses as between Taisei and the Subcontractors or any claims or defenses as between Plaintiff and the Subcontractors.

To decide whether Wilshire Vermont agreed all statutes of limitations would commence to run not later than the Final Certificate of Completion, the Court interprets the Prime Contract. It is, of course, the prerogative of the Court to interpret a contract as a matter of law and the Court does so in compliance with the ordinary rules of contract interpretation. The task is daunting in this case because the 64-page Standard Form, 31-page General Conditions and multiple Exhibits comprising the Prime Contract are voluminous. The AIA form language in the Prime Contract, most of which was modified by the parties (with modifications underlined in the signed version of the Prime Contract), is dense, convoluted and, in some places, technical. The drafters were not always consistent in their use of phrases and terminology in the various parts of the Prime Contract. Interpreting the contract is accordingly a complicated and exceedingly tedious process. Nevertheless, a close reading and comparison of the various provisions in the Prime Contract reveals that there is actually no conflict between 13.7.1 and the language of the Guarantee. To the contrary, 13.7.1 and other related provisions, memorialize the parties' intention to ensure that Wilshire Vermont preserved all of its rights to pursue warranty claims against Taisei for any defects in construction for as long as permitted under California law.

The key to finding harmony between 13.7.1 and the language of the Guarantee is to accept and understand Taisei's dual promises (1) to oversee the Work (construction of the project in accordance with the plans and specifications) in consideration for progress payments culminating in the Final Certificate of Payment, and also (2) to stand behind the Work by providing warranties/guarantees promising to repair and correct defects discovered in final inspections as well as latent defects discovered thereafter. The commencement of the running of statutes of limitations for these additional promises (the warranties) is expressly governed by 13.7.1.3 rather than 13.7.1.1. The Court concludes the Prime Contract (General Conditions) 13.7.1.3 preserved Wilshire Vermont's right to file latent defect breach of warranty claims discovered after the Final Certificate of Completion and that such claims accrued (the statute of limitations commenced to run) upon discovery. All non-warranty latent defect claims are governed by the accruals set forth in 13.7.1.1 and are untimely.

A. Wilshire Vermont Preserved Its Right to Sue for Breach of Warranty Based on Late-Discovered Latent Defects.

In *Brisbane*, the court specifically addressed and interpreted the language in the General Conditions 13.7.1.1. It did not identify, address or interpret the form language of 13.7.1.3 or any other relevant provision in the AIA form agreements. Although *Brisbane* involved an owner's action against a general contractor, *Brisbane* based its conclusion on seven non-California cases, none of which involved an Owner versus Contractor dispute. To the contrary, all of the cases involved owners who sued architects for damages arising out of latent defects in projects designed and/or engineered by the architects: *Harbor Court Associates v. Leo A. Daly* (4th Cir. 1999) 179 F.3d 147; *Old Mason's Home v. Mitchell* (Ky.Ct.App. 1995) 892 S.W.2d 304, 305-07; *College of Notre Dame v. Morabito* (2000)132 Md.App. 158; *Northridge Homes, Inc. v. John W. French &*

Associates, Inc. (Mass.Super.Ct. 1999) 10 Mass.L.Rptr. 690; *Oriskany Central School District v. Edmund J. Booth Architects* (N.Y.App.Div. 1994) 206 A.D.2d 896, aff'd 1995, 85 N.Y.2d 995; *Gustine Uniontown v. Anthony Crane Rental* (2006) PASuper 12. In each of these cases, the court construed language similar to 13.7.1.1 and concluded the limitations period for the owners' actions against the architects commenced as of the date of substantial completion. The determination in *Brisbane* that the parties agreed statutes of limitations would commence to run upon Substantial Completion was based entirely and exclusively on the form language in 13.7.1.1. Although the same form language in 13.7.1.1 is included in the Prime Contract between Wilshire Vermont and Taisei, their agreement also contained 13.7.1.3, a provision that is not discussed in *Brisbane*.

As noted above, *Brisbane* relied on out of state cases construing the limitations periods for owners' actions against architects rather than owners' actions against general contractors. It is important to note, as a starting point, that in the AIA form language of the Prime Contract, the Contractor's provided warranties not provided by the Architect. Using the AIA form language in the General Conditions, Wilshire Vermont and Taisei agreed the Architect's role was to "guard the Owner against defects and deficiencies in the Work" (GC 4.2.2) and the Architect would "not be responsible for the Contractor's failure to perform the Work in accordance with the requirements of the Contract Documents" or for any "acts or omissions of the Contractor or Subcontractors . . . or any other persons or entities performing [the Work[6]]." (GC 4.2.3) By contrast, Taisei agreed (in modified, non-form AIA language) to be responsible for performing the work according to the Contract Documents and to be responsible for the subcontractors' Work. Specifically, Taisei promised, as Contractor, to "fully execute the Work described in the Contract Documents. . . to the

[6] "The term "Work" (according to the Prime Contract, General Conditions 1.1.3 (modified)) includes all references to Work in the Contract Documents and all construction and administrative services required by the Contract Documents . . . [including] labor, materials, equipment and services provided or to be provided by the Contractor to fulfill the Contractor's obligations and complete the Project to the Owner's . . . satisfaction."

satisfaction of the Owner" (Standard Form 2.1) and also promised "the Contractor, while performing the Work, shall not deviate from . . . the Plans and Specifications and other Contract Documents." (Standard Form 2.2.) In sharp contrast to the Architect (who was permitted to disclaim responsibility for subcontractors), Taisei agreed "Contractor shall be liable for the entire Project and all Work performed by the Contractor and [all Subcontractors]" (Standard Form 2.2) and "responsible and liable to the Owner for all acts or omissions of its Subcontractors . . . ." (Standard Form 10.10.) These additional promises, guaranteeing that the Work conformed to the Contract Documents and warranting to make good on any errors or omissions by the subcontractors by providing repairs, created warranties that placed Taisei in a far different position than the Architect under the Prime Contract (and presumably a far different position than the architects in the ten non-California cases construing the AIA form contract in the out of state cases cited in *Brisbane*.)

Taisei's promises to warrant the Work are detailed in two discrete provisions in the General Conditions 3.5 (entitled "Warranty"). The first, 3.5.1, embodies the Contractor's unconstrained promise to provide conforming and non-defective work and to satisfy claims with respect to the Work: "Contractor warrants to Owner and Architect . . . that the Work will be free from defects . . . and that the Work will conform to the requirements of the Contract Documents" (noting that non-conforming work "may be considered defective"). In language modifying the form AIA General Conditions that was not present in *Brisbane*, Taisei further agreed, in 3.5.1, that this warranty would be governed by the "applicable statute of limitations" and that any Claim against Taisei or a subcontractor could be asserted at any time permitted by law: "Notwithstanding anything in Subparagraph 4.3.2 [addressing claims arising during the Work], *any claim* by the Owner against the Contractor, or any Sub-Subcontractor, supplier [etc.] *pursuant to this*

Subparagraph 3.5.1 may be made at any time within the time period specified in the applicable statute of limitations."

The court presumes, of course, that the drafters of the Prime Contract were aware of all applicable laws. There is evidence, however, that when the parties referred to the "applicable statute of limitations" in 3.5.1 they had the ten-year limitation period in Section 337.15 in mind because, in the very next sentence, the parties expressly identified and referred to "latent defects." Specifically, the parties agreed (in modified rather than form AIA form language) that except for personal injury and property damage claims, no statute of limitations – particularly the limitations period for latent defects -- would "commence to run" prior to Final Completion: "Except with respect to personal injury and property damage claims resulting directly from an accident during construction (*it being understood this exception does not include resultant latent defects*) no statute of limitations *shall commence to run* earlier than Final Completion." (Emphasis added.) Thus, with express reference to latent defects, the drafters of the Prime Contract agreed in 3.5.1 that no applicable statute of limitations (including any that applied to causes of action based on latent defects) would commence to run earlier than Final Completion for breach of warranty claims.

Moreover, it is reasonable to interpret the parties' agreement to preserve all "applicable statute of limitations" in 3.5.1 as an agreement to preserve the right to assert a latent defect breach of warranty in accordance with Section 337.15. Although Taisei and the Subcontractors correctly argue Section 337.15 is better described as a "statute of repose" than a "statute of limitations," there is no language in the Prime Contract suggesting the parties' reference to the "the applicable statute of limitations" was intended to exclude Section 337.15. The term "statute of repose" does not appear in the Prime Contract. Nor does it appear in the Code of Civil Procedure. Section 337.15 is in the same Chapter of the Code (Chapter 3) as the statutes of limitations for negligence

(Section 337.1), breach of contract (Section 337) and various other claims (Sections 335.1 – 349.4), all introduced by Section 335 which states, "The periods described for the commencement of actions other than for the recovery of real property, are as follows." It is therefore reasonable to interpret "statutes of limitations" under the Prime Contract to include Section 337.15 and to memorialize the parties the parties' agreement and expectation that Wilshire Vermont was not relinquishing any right under California law to file late-discovered claims.

Taisei's contention the parties agreed, in 13.17.1.1, that the limitations period for breach of warranty claims based on *latent* defects would commence to run before the date of Substantial Completion places General Conditions 13.7.1.1 directly in conflict with 3.5.1 which states it *shall not* commence to run until after Final Completion. Because we must assume that the drafters wrote all provisions in the Prime Contract to operate in harmony rather than in conflict, the alleged conflict between General Conditions 3.5.1 and General Conditions 13.7.1.1 is powerful evidence that Taisei's proffered interpretation is incorrect.

There is no conflict, however, if one interprets the parties' reference to "latent defects" in 3.5.1 as evidence that the parties intentionally distinguished between "latent defects" in 3.5.1 and "defects" in 3.5.2. The logical inference is the parties used "defects" to mean patent defects, discoverable by inspection when the project was substantially complete. Paragraph 3.5.2 opens with the statement, "All Work shall be guaranteed for a period of (1) year after the date of Substantial Completion of the work unless otherwise agreed in writing by the Owner and the Contractor." There is evidence the parties intended this one year guarantee period following Substantial Completion (referred to as the "one (1) year corrections period in General Conditions 12.2.2.1.2) as a period when the Contractor and Subcontractors would correct and restore to "new" condition any and all *patent* defects (nonconforming or defective work visible upon inspection)

because the parties agreed, in General Conditions 3.5.5, to examine the property together for *defects* before the one year corrections period elapsed: "Thirty (30) days prior to expiration of the one (1) year warranty period, the Contractor shall notify the Owner in writing to schedule a Project walk-through. The *Owner* and Contractor shall walk through the project *in order to list deficiencies* which must be corrected before the expiration of the warranty period."

The parties made clear in 3.5.2 ("Written Warranty") that the one-year guarantee for the correction period intended to limit Taisei's obligation to correct patent defects identified in final inspection but did not abrogate the Section 337.15 ten-year limitation on late discovered *latent* defect breach of warranty claims permitted under 3.5.1. The parties did so by specifying that, as a condition of final payment, Taisei would deliver and obtain from each Subcontractor (who otherwise had no contract or privity of contract with the Owner) *a written warranty to the Owner (Exhibit M)* agreeing to the maximum allowable limitations period for latent defects: "[i]f the [defect] be latent" the limitations period would be "the date by which any action may be filed under California law with respect thereto." (Guarantee, ¶ 4(c).) And, as in 3.5.1, the parties also made clear, in the last sentence of 3.5.2, that the promise of a one year guarantee was not intended to place any limitation on the time for presentation of warranty claims, including latent defect claims: "The warranties [in 3.5.2] shall not be construed to modify or limit in any way *any rights any rights or actions which the Owner may otherwise have against the Contractor by law, statute or in equity*."

The language in the Guarantee, which was, of course, drafted and agreed upon before the parties signed the Prime Contract, restates, in summary form, the various warranties Contractor provided in the Contract Documents for purposes of providing a convenient two page form for the Subcontractors to copy, sign and deliver as the "written warranty" Taisei promised to obtain from

the Subcontractors in 3.5.2. The Guarantee also memorialized the parties' definitions of patent and latent defects and their agreement that the rule of discovery exception was preserved: "If the damage, defect, imperfection or fault in the work, materials or equipment be latent – i.e., not apparent by reasonable inspection - the period of this Guarantee with respect thereto shall cover such evens and extend to . . . (b) *a reasonable time after the same has been discovered* and notice thereof sent to the Contractor, or (c) the date by which any action may be filed under California law with respect thereto." (Guarantee ¶ 4). It also plainly preserved Wilshire Vermont's right to assert latent defect breach of warranty claims to the fullest extent permitted by law.

The language in General Conditions 13.7.1.3 (entitled "Commencement of the Statutory Limitations Provision") is consistent with the Court's interpretation of 3.5.1 and 3.5.2 because 13.7.1.3 reconfirms the parties' agreement to give the Owner the benefit of the maximum limitations period for latent defect breach of warranty claims allowable under California law. While 13.7.1.1 applies to "any act or failure to act" occurring prior to the relevant date of Substantial Completion, 13.7.1.3 specifically addresses warranty claims. In 13.7.1.3, the parties agreed "any applicable statute of limitations shall commence to run . . . in any and all events not later than the date of any act or failure to act *by the Contractor pursuant to any Warranty provided under Paragraph 3.5* . . . or any other failure to perform any duty or obligation by the Contractor or Owner . . . or any other act or failure to perform any duty or obligation by the Contractor to owner, whichever comes last." By the plain language of this provision, which incorporates and is consistent with 3.5.1, no statute of limitations for breach of warranty based on a latent defect can commence to run before the Contractor breaches a warranty by failing or refusing to correct a latent defect (after receiving proper notice from the Owner).

The provisions in the General Conditions addressing repairs (GC 12.2 "Correction of Work") contain additional provisions consistent with this Court's interpretation of the Prime Contract as precluding the accrual of any statute of limitations for breach of warranty claims earlier than the Certificate for Final Payment and preserving the rule of discovery exception and the ten-year limitations period in 337.15 for breach of warranty claims. For example, 12.2.1, which articulates the Contractor's obligation to correct nonconforming work, specifies the Contractor's obligation to correct problems discovered after Substantial Completion: "Contractor shall promptly correct Work rejected by the Owner or the Architect or failing to conform to the Contract Documents whether discovered before *or after* Substantial Completion" (noting that for non-conforming work discovered prior to Substantial Completion, Taisei's obligation was to repair to "like new" condition). In General Conditions 12.2.1 ("Correction of Work" "Before or after Substantial Completion"), Taisei promised, "Contractor shall promptly correct work rejected by Owner or Architect or failing to conform to the requirements of the Contract Documents *whether discovered before or after Substantial Completion and whether or not . . . completed*" and to bear the cost of such repairs. (Emphasis added) Under 12.2.2.1 ("Correction of Work" "After Substantial Completion"), Taisei promised to make corrections for non-conforming Work, noting that the promises in 12.2.2.1 were "*In addition to and without limiting the Contractor's obligations under [the warranty provision] Paragraph 3.5. . . .*"[7]

In 12.2.5, the parties were careful to explain that none of the promises in 12.2 "shall be construed to establish a period of limitation with respect to other obligations which the Contractor might have under the Contract Documents" specifying that 12.2.2.2 did not affect commencement

[7] That provision goes on to provide, "if . . . within one year after the date of Substantial Completion . . . or after the date for commencement of the warranties established in Subparagraph 9.9.1 [pertaining to partial occupancy] *or by the terms of an applicable special warranty required by the Contract Documents*, *if any of the Work is found not in accordance with the Contract Documents, the Contractor shall correct it promptly [after receiving written notice.]*"

of any statute of limitations: "[the one-year period for correction under 12.2.2.2] relates only to the specific obligation of the Contractor to correct the Work and has no relationship to the time within which the obligation to comply with the Contract Documents may be sought to be enforced, nor to the time within which proceedings may be commenced to establish the Contractor's liability with respect to the Contractor's obligations other than specifically to correct the Work." (General Conditions 12.2.5)

Thus, unlike the architects in the many cases cited in *Brisbane*, Taisei agreed not only to perform acts necessary to achieve completion of the project, it also provided warranties agreeing to repair and replace any defects discovered before or after the Final Certificate for Payment and to the maximum extent permitted by law. Therefore, the relevant provision for breach of warranty claims is not the provision construed in *Brisbane* (13.7.1.1. addressing acts or failures to act before substantial completion), it is 13.7.1.3 which addresses accrual of breach of the warranties set forth in 3.5.1. Under 13.7.1.3, the limitations period for latent defect breach of warranty claims does commence to run unless and until the defect is discovered.

B. The Guarantee Is an Enforceable Agreement

Alternatively, the Court finds that Guarantee in Exhibit M is enforceable as against Taisei because, in several provisions of the Prime Contract (General Conditions 1.1.1 and 1.1.2 and Standard Form 15.1.7), the parties expressly incorporated Exhibit M into the Contract Documents and the Contract for Construction. As an additional warranty and representation "which . . . shall survive execution and delivery of this Agreement . . . and the final completion of the Work," Taisei agreed in Standard Form 14.25 (7) that "as a material inducement to the Owner to execute this Agreement," Taisei represent[ed] and warrant[ed] that the . . . terms of this Agreement, General

Conditions and Exhibits are valid, accurate and binding upon the Contractor to the fullest extent applicable under the law."

Although Exhibit M is not signed, it is nevertheless enforceable because both Owner and Contractor duly signed the Prime Contract thereby agreeing to incorporate Exhibit M into the Contract Documents and representing, under Standard Form 14.25 (7), Exhibit M was "valid, accurate and binding" on Taisei. Because Taisei signed the Prime Contract, Taisei's statute of fraud claim fails. To the extent the Guarantee is arguably discrepant with 13.7.1.1 (notwithstanding the Court's finding it is not discrepant), the Court finds the Guarantee (and General Conditions 12.2 and 3.5.1) predominate because the parties agreed, in the event of any discrepancy among the terms in their agreement, the contract should be interpreted in favor of the Owner and against the Contractor. Specifically, after defining the "Contract Documents" to include Exhibit M (Standard form Article 1) the parties agreed, in Article 1.1(8)(v), "where conflict exists within or between parts of the Contract Documents, the more stringent or higher quality requirements upon Contractor shall apply." Therefore, to the extent Taisei and subcontractors contend there is a conflict between the two limitations provision, the "more stringent" limitations period articulated in 3.5.2 must yield to the more expansive provisions of 3.5.1 and the Guarantee.

Defendants argue the Guarantee is not enforceable because the plaintiff in this action is a limited partnership (Wilshire Vermont Housing Partners LP) a different entity than the plaintiff limited liability company (Wilshire Vermont LLC) identified as the "Owner" in the Guarantee. Without reaching the factual question whether Wilshire Vermont LLC is a successor in interest to Wilshire Vermont LP, the Court finds the Guarantee enforceable notwithstanding the discrepancy in names because Paragraph 8 of the Guarantee defines Owner to mean "either Owner, Landlord or

Tenant or others claiming through them, or any of them." Paragraph 8 also states, "This instrument is for the benefit of the Owner (as defined in paragraph 7 above) and all persons claiming in or through the Owner, and the successors and assigns of the foregoing, and may be enforced by them or any of them in any court of competent jurisdiction . . . ." Because, as the plaintiff in this action, Wilshire Vermont LLC seeks to enforce the Guarantee, Wilshire Vermont LLC is "claiming in and through" Wilshire Vermont LP and therefore has standing to enforce the Guarantee.

Taisei and the Subcontractors contend the Guarantee in Exhibit M was a blank form rather than an enforceable agreement, pointing out that the Prime Contract attached other forms that failed to create any enforceable obligations. The Court finds the Guarantee is not a meaningless blank form because the language of the Guarantee identifies the Project and parties (Taisei and Wilshire Vermont), and articulates all material terms, specifying various rights, promises and guarantees. The other forms attached to the Prime Contract are merely forms either because they fail to identify more than one party or apply to future transactions (future promises to be made in exchange for future consideration not yet fixed). One of them, the Payment Application Form in Exhibit Q, has a prominent water mark saying "SAMPLE FORM" confirming the parties' intentions to use it as a form and is written for (unidentified) subcontractors who will, in the future, submit requests for payment. The form letter attached as Exhibit P is a sample enclosure letter that Taisei intends to use to elicit future subcontracts and attaches a Long Form Subcontract Agreement with a date denominated TBD for the future (unidentified) subcontractors to sign.

In contrast, the Guarantee is not blank with respect to any material term. It names the Project ("Wilshire Vermont Apartment Project"), the Owner with its mailing address (Wilshire Vermont) and the Contractor with its mailing address. The Guarantee identifies the General

Construction Agreement ("Contract") between Wilshire Vermont and Taisei for that Project and sets forth Taisei's guarantee of "all work performed . . . pursuant to the Contract Documents." The term Contract Documents is a defined term in the Standard Form. Under Article I (entitled "The Contract Documents") the Standard Form states that the "Contract Documents" consist of the Standard Form, the General Conditions and the Project Specifications and Drawings. In Article 15.1.7, the Standard Form identifies "Other Documents" forming part of the "Contract Documents" identifying Exhibit M and the other Exhibits "attached hereto and incorporated herein." It is therefore reasonable to reasonable to interpret the Guarantee as memorializing an agreement contemporaneous with and complementary to the other Contract Documents containing promises for future performance even if the parties contemplated delivery or re-delivery of the Guarantee upon substantial completion.

To argue the Guarantee is not an enforceable contract, Taisei points out the unsigned Guarantee's effective date is denominated "TBD" and the line for insertion of a date in the signature block is blank. Taisei fails, however, to identify law or case law supporting its argument that the dates are material terms or terms that had to be determined, at the outset, as a condition to the enforceability of the Guarantee. The Court finds that it is not reasonable to invalidate the Guarantee because it is undated and has no effective date especially where, as here, the parties fully performed under the Prime Contract. Moreover, as Wilshire Vermont points out, if the date of substantial completion was the "effective date" for the Guarantee, that date was not known when the contract was executed but was certain to occur if the parties fully performed. Moreover, in 13.25 (7), Taisei agreed it would be "binding" and that its representation in that regard was an inducement for Wilshire Vermont to sign the Prime Contract.

If the "effective date" was the date when the Prime Contract was executed, its omission is consistent with the omission of a date of execution in the Prime Contract. The only signatures in the Prime Contract are on the last page of the Standard Form (TCC087221). The signatures are not dated and the Court is unable to find an "effective date" specified anywhere in the Standard Form or the General Conditions. Under these circumstances, there is no reason to believe that the date in the Guarantee was material. The fact that the warranties would not take effect until construction was complete did not prevent the parties from agreeing, in advance, that, upon completion, the warranties for latent defects would be fully enforceable to the full extent permitted by law.

Noting that the parties designated Exhibit M as a "Contract Document" (Article 1.1.1), Taisei urges the Court to interpret language in Article 1.5.1 ("[t]he Contract Documents . . . shall be signed by the Owner and Contractor") as a requirement that Taisei and Wilshire Vermont sign the Guarantee upon completion of the project as a prerequisite to its enforceability. While the Court agrees the Guarantee's signature lines memorialize an intention to execute and deliver the Guarantee upon completion of construction with guarantees from the subcontractors, the Court finds the Guarantee is nevertheless enforceable because it was expressly incorporated into the Prime Contract which was duly signed by Emery Molnar, Taisei's Senior Vice President. The Court does not read General Conditions Article 1.5.1 as requiring anything more than a single signature. Although the word "Documents" is plural, the defined term "Contract Documents" is a (single) defined term. The Court therefore interprets 1.5.1 ("[t]he Contract Documents shall be signed by the Owner and Contractor") to mean that a single signature anywhere in the Contract Documents is sufficient.

Furthermore, it is not reasonable to interpret the Prime Contract as memorializing the parties' intention to incorporate the promises made by Taisei in the Guarantee as surplusage or as blank form for future use when the parties to the Guarantee were also parties to the Prime Contract and agreed on all the language in Exhibit M. Nor is it reasonable to conclude the parties agreed to impose greater responsibility for defective work on the Subcontractors (who were not parties to the Prime Contract) than the Contractor agreed to assume. Moreover, on a practical level, it would make little sense for an owner to exact promises and warranties to provide non-defective, conforming Work from the general contractor and, at the same time, give the general contractor discretion to renege on those promises (by declining to sign the Guarantee) after the project was completed and after the owner paid out most of the $65 million contract price.

From a legal standpoint, the argument that the parties agreed the Guarantee would not be enforceable unless and until it was signed is not persuasive because the Owner's promises in 3.5 (which the Court finds are consistent with the promises in the Guarantee), were necessarily a material inducement for Wilshire Vermont to execute the Prime Contract and to pay $65 million in consideration. If Taisei retained discretion to fail or refuse to sign the Guarantee in the future (reneging on promises to make good on the Work under the Prime Contract if latent defects were later discovered), one would expect to find language in the Prime Contract memorializing the future consideration to be paid to Taisei to induce it to execute the Guarantee. There is no evidence of any future consideration to be paid in exchange for Taisei's future execution of the Guarantee. To the contrary, the contract price and terms for payment in exchange for completion of Work are all specified in the Prime Contract. The promise to pay $65 in consideration secured Taisei's promise to perform in the future by warranting all Work performed and repairing patent and latent defects.

The Subcontractors argue that from "a practical standpoint, a contractor's warranty can only be made after construction is completed and as a condition of the receipt of the Final Payment" citing Standard Form 12.2.1 and 3.5.2 and 3.5.3 of the General Conditions." (Subc. Br. Filed 9/7/16, p. 3.) Although, in 12.2.1, Wilshire Vermont conditioned its delivery of Final Payment on "the [Contractor's delivery] to the Owner . . . (ii) all warranties and guaranties in connection with the Work," that promise was not inconsistent with its delivery of an enforceable Guarantee when the Prime Contract was executed. It is more reasonable to interpret 12.2.1 as addressing Taisei's promise to deliver a tidy package assembling all subcontractor guarantees and equipment warranties (the "Close-Out Package[8]) and the Guarantee when the Project was completed than as addressing Taisei's discretion after Substantial Completion to accept or reject, the promises articulated in the Guarantee.

Moreover, the Subcontractors' argument is not supported by the language in the Prime Contract. Nothing in 3.5.2 requires Taisei to later deliver a *signed* Guarantee. Under that provision, Taisei only agreed to provide a written warranty: "As a condition precedent to final acceptance of the Work by the Owner and prior to receiving final payment for the Work by the

[8] The Subcontractors also urge the Court to receive, into evidence, the "Close-Out Package" which apparently includes the binders of guarantees and warrantees assembled and delivered by Taisei when the Project was completed. The Prime Contract does not incorporate the Close-Out Package. The Court therefore regards the Close-Out Package as extrinsic evidence that cannot be considered for purposes of interpreting the Prime Contract. Under 14.15, the parties agreed the Prime Contract was "intended by the parties to be a final expression of their understanding" and agreed, "The parties further intend that the Contract Documents constitute the complete and exclusive statement of their terms and that *no extrinsic evidence whatsoever may be introduced in any judicial proceeding involving the Contract Documents* . . . ." (Emphasis added.) The Court similarly rejects the defendants' arguments that paragraph 1.2.3 (providing that "words which have well-known technical or construction industry meanings" are to be interpreted according to those meanings") and/or paragraph 1.5.3 ("words which have well-known technical or construction industry meanings are used in the Contract Documents in accordance with such recognized meanings) can be interpreted as allowing the Court to consider extrinsic evidence such as the Close-Out Package. The defendants offer the Close-Out Package not to prove the meaning of a technical or industry term but rather to present course of conduct evidence in an effort to persuade the Court the parties intended that Taisei would deliver a formally executed Guarantee prior to Final Payment. As noted above, the Court's decision accepts, arguendo, that the parties intended Taisei would deliver a set of binders containing all guarantees including its own signed Guarantee, but nevertheless interprets language in the Prime Contract as incorporating the Guarantee into an enforceable agreement notwithstanding Taisei's failure to deliver it in signed form before accepting full consideration for the Work.

Contractor, the Contractor *shall warrant in writing* to the owner that it will repair or replace any or all Work" and promised that each subcontractor would do the same. The Court notes that 3.5.3.1, which similarly requires, as a condition of final payment, Taisei's delivery of binders containing the subcontractors' warranties and, under General Conditions 3.5.3.2, the "Contractor's warranty," also fails to specify that the Contractor's warranty must be "signed." The parties' failure to specify delivery of a signed Owner's warranty in these provisions is consistent with the Court's conclusion no further signature *from Taisei* (as opposed to the Subcontractors) was required when Taisei assembled and delivered the package of materials specified in General Conditions 12.2.1.

Accepting, arguendo, that Taisei promised to formally sign the Guarantee and deliver the signed Guarantee to the Owner along with signed guarantees from each of the subcontractors as a condition of final payment (and that Taisei failed to do so), a question before the Court is whether the Guarantee is nevertheless enforceable as incorporated into the signed Primed Contract. The language of General Conditions 9.4.3 supports the Court's interpretation of the Guarantee as an enforceable promise even if the parties so intended. In that provision, the Contractor agreed "the final Certificate for Payment will constitute a further representation by the Contractor that the conditions precedent to the Contractor being entitled to final payment . . . have been fulfilled." For the additional reasons noted above, the Court concludes the Guarantee articulates enforceable promises of future performance in exchange for future payment of the $65 million in consideration specified in the Prime Contract. Having received the $65 million, Taisei was obligated to perform under the warranty provisions in the Prime Contract, including the Guarantee. The Contract Documents included the Guarantee and created an integrated and executed written agreement enforceable against Taisei. Alternatively, Exhibit M is enforceable because it constituted an offer

made by Taisei when the parties signed the Prime Contract and accepted when Wilshire Vermont performed under the Prime Contract by making payments. (Restatement (Second) Contracts § 50.)

C. Wilshire Vermont Failed to Preserve the Rule of Discovery Exception for Non-Warranty Claims Arising out of Latent Defects

As explained above, the Prime Contract preserved Wilshire Vermont's right to assert claims for breach of warranty based on latent defects discovered after the statute of limitations governing breach of contract claims lapsed. Wilshire Vermont has, however, pled non-warranty breach of contract causes of action and non-contract causes of action for negligence and breach of fiduciary duty that are untimely unless Wilshire Vermont pleads and proves facts supporting a rule of discovery exception to the statutes of limitations governing these causes of action. The Court therefore examines the language of the Prime Contract to ascertain whether Wilshire Vermont agreed to waive the rule of discovery exception for tort and non-warranty breach of contract causes of action.

Although the Court presumes the drafters of the Prime Contract were fully cognizant of relevant provisions of California law and familiar with the rule of discovery exception to statutes of limitation and the statute of repose for latent defects (Section 337.15) limiting the time to file late discovered latent defect claims, there is no language in the Prime Contract memorializing any agreement to waive the rule of discovery exception *per se*. This is important because to find a waiver, the Court must conclude there was a knowing and intelligent relinquishment of a specific right. Where, as here, the right is well established and the words describing it (e.g., "rule of discovery exception") are terms of art for California attorneys, the absence of any specific waiver of the "rule of discovery exception" or waiver of "late discovery" claims is evidence the parties did not intend such a waiver.

Taisei argues, and the Court is now persuaded, Wilshire Vermont's acceptance of specified accrual dates in 13.1.7.1 necessarily constituted a waiver of its right to any later accrual for non-warranty claims under the rule of discovery. As noted above, General Conditions 13.7.1.1 states, "As to acts or failures to act occurring prior to the relevant date of Substantial Completion, any applicable statute of limitations shall commence to run and any cause of action shall be deemed to have accrued in any and all events not later than such date of Substantial Completion." To the extent a latent defect claim arises out of work performed before Substantial Completion, this provision limits the time for filing such claims to three or four years after Substantial Completion. In General Conditions 13.7.1.2, the parties similarly specified accrual for conduct occurring after Substantial Completion and prior to the Final Certificate of Payment.

In 13.7.1.3, the parties addressed conduct after Final Certificate of Completion, including breaches of warranties. It was logical to categorize breaches of warranties as involving conduct after Final Certificate of Completion because warranty claims could not accrue unless and until the Owner discovered a defect and the Contractor breached a warranty by failing or refusing to correct the defect. Thus, in 13.7.1.3, the parties agreed, "As to acts or failure to act occurring after [issuance of] the final Certificate for Payment, any applicable statute of limitations shall commence to run and any alleged cause of action shall be deemed to have accrued in any and all events not later than the date of any act or failure to act by the Contractor pursuant to any warranty provided under Paragraph 3.5 . . . ." Under 3.5.1, the parties agreed breach of warranty claims could be made "at any time within the applicable statute of limitations." By also confirming the warranties "shall not be construed to modify or limit in any way any rights or actions which the Owner may otherwise have against the Contractor by law, statute *or in equity,*" the parties preserved Wilshire Vermont's right to assert the equitable rule of discovery exception to any

applicable statute of limitations. This notion is underscored by language in the Guarantee which reiterates, "the period of this Guarantee" as to "latent defects" shall extend to . . . a reasonable time after the [latent defect] has been discovered and notice thereof sent to the Contractor [or] the date by which any action may be filed under California law with respect thereto." These provisions preserved Wilshire Vermont's right to assert latent defect breach of warranty claims upon discovery, provided proper notice was given beforehand. In other words, the parties agreed the accrual period for breach of warranty claims would commence to run upon discovery of the latent defect.

The more difficult question is whether the Prime Contact also preserved Wilshire Vermont's right to assert the rule of discovery exception for non-warranty claims such as the breach of contract, negligence and breach of fiduciary duty claims based on allegedly defective or non-conforming Work asserted in this case. To resolve that question, the Court again examines the language of the Prime Contract as a whole.

It is important to note, at the outset, that unlike its breach of warranty claims, which could not ripened unless and until the Contractor failed or refused to correct the Work (after receiving notice), Wilshire Vermont's breach of contract, negligence and breach of fiduciary duty claims arising out of Taisei's allegedly defective or non-conforming Work necessarily rest on "acts or failure to act" occurring either "prior to the relevant date of Substantial Completion" under 13.7.1.1 or, conceivably, "subsequent to the date of Substantial Completion and prior to issuance of the final Certificate for Payment" (13.7.1.2.) It is important to note that the language in 13.7.1.1 and 13.7.l.2 is strongly directive, declaring that causes of action based on conduct in the identified time periods "*shall* be deemed to have accrued, *in any and all events*" before Substantial Completion or before the Final Certificate for Payment. Construction-related conduct (Taisei's

conduct before the Final Certificate for Payment) is not covered under 13.7.1.3 because 13.7.l.3 only addresses post-construction conduct ("acts or failure to act" after issuance of the final Certificate for Payment") including breaches of warranty. Therefore, Wilshire Vermont's contention it preserved the rule of discovery exception for non-warranty claims must find support in provisions other than 13.7.1.3.

The language in General Conditions 4.3.1 does not support Wilshire Vermont's contention it preserved the rule of discovery exception for tort claims. In that provision, the parties defined "Claim" and then specified, in 4.3.2, the time for giving notice of Claims, specifying that these provisions did not impact the warranty provisions in 3.5: "Subject to and in no way limiting the time for Owner to make claims pursuant to Section 3.5, Claims by either party must be initiated within 21 days after occurrence of the event giving rise to such Claim or within 21 days after the claimant first recognized the condition giving rise to the Claim, whichever is later." While this provision is consistent with Wilshire Vermont's preservation of the rule of discovery exception for latent defect breach of warranty claims in 3.5.1, it does not modify or in any way contradict the language in 13.7.1.1 addressing accrual of non-warranty causes of action based on construction-related conduct.

In the provisions of General Conditions 12.2 addressing the one-year Correction of Work period, the parties specified (in 12.2.2.3) that nothing in paragraph 12.2 "shall be construed to establish a period of limitations with respect to other obligations the Contractor might have under the Contract Documents" and that the one year limitations period for corrections "has no relationship to the time within which the obligation to comply with the Contract Documents may [otherwise] be commenced to establish the Contractor's liability with respect to the Contract

obligations. . . ." This disclaimer does not alter or modify the accrual periods defined in General Conditions 13.7.1.1 and 13.7.1.2.

In ¶ 4(c) of the Guarantee, the parties agreed "the period of this Guarantee" shall extend to . . . (b) a reasonable time after [a latent defect] has been discovered . . . or (c) the date by which any action may be filed under California law with respect thereto." The words, "the period of *this Guarantee"* express the term of a contractual warranty confirming that, consistent with 3.5.1, warranty claims could be filed upon discovery. As phrased, it does not preserve the rule of discovery exception for non-warranty claims or otherwise undermine the language of 13.7.1.1.

At the October 19, 2016 hearing, Wilshire Vermont argued that the words "any claim" in 3.5.1 should be interpreted to allow non-warranty as well as warranty claims to be asserted "at any time." The Court is not persuaded by this argument because it disregards important language in the same sentence: "*any Claim* by the Owner . . . . *pursuant to this Subparagraph 3.5.1* may be made at any time within the time period specified in the applicable statute of limitations." Even if "statutes of limitations" is interpreted to include the Section 337.15 statute of repose, this language is expressly limited to Claims "pursuant to" the 3.5.1 warranty provision. It is not reasonably to interpret this language as applying to assertion of any non-warranty claims.

The same language in 3.5.2 also fails to support Wilshire Vermont's position. That provision states, "The warranties shall not be construed to modify or limit, in any way, any rights or actions which the Owner may otherwise have against the Contractor by law or statute or in equity." This disclaimer does not confer any rights on the Owner, it merely specifies that the warranty provision does not abridge any rights the Owner otherwise has. For conduct occurring before Substantial Completion or Certificate of Final Payment, Wilshire Vermont agreed in 13.7.1.1 and 13.7.1.2 to deem accrual to commence upon the dates of Substantial Completion or

Certificate of Final Payment. The language in 3.5.2 cannot reasonably interpreted as modifying the restrictions in these provisions.

The language of General Conditions 9.4.3 also fails to support Wilshire Vermont's position that it preserved the rule of discovery exception for assertion of non-warranty claims. Under that provision, the Contractor agreed "the final Certificate for Payment will constitute a further representation by the Contractor that the conditions precedent to the Contractor being entitled to final payment . . . have been fulfilled." By accepting final payment, the Contractor represented it supplied an enforceable Guarantee, the "condition precedent" identified in 3.5.2. As noted above, the Guarantee addresses warranties and claims for breach of warranty. It does not address non-warranty claims or otherwise modify or contradict the accrual periods set forth in 13.7.1.1.

The Contractor's representation and warranty in Standard Form 14.25 (7) that the terms of the Prime Contract (including exhibits) "are valid, accurate and binding upon the Contractor to the fullest extent applicable under the law" likewise fails to memorialize any language preserving Wilshire Vermont's right to assert non-warranty claims later the statutory limitations periods (three or four years) calculated in accordance with the accrual dates specified in 13.7.1.1 and 13.7.1.2.

Exhibit P to the Prime Contract, a form agreement for Taisei and its Subcontractors, undermines Wilshire Vermont's contention because it states, in ¶6.4, addressing warranties, "Nothing herein shall be construed to relieve the Subcontractor from the responsibility to correct any latent defects, which shall remain the Subcontractor's responsibility for the duration of any applicable statute of limitation of the state in which the work was performed." (TCC087467.) This provision obligating the subcontractor to correct deficiencies is consistent with Taisei's agreement, in 13.7.1.3, that latent defect breach of warranty claims would accrue after the Certificate of Final Payment, commencing upon discovery of such defects.

Wilshire Vermont's citation to *Berman v. Dean Witter & Co.* (1975) 44 Cal.App.3d 999 is not persuasive. In that case, the court construed the language "any controversy arising out of or relating to this contract" to embrace negligence claims rooted in the parties' contractual relationship. The decision is inapposite because the Prime Contract does not contain and this Court does not construe analogous language.

III. Conclusion

Wilshire Vermont did not agree the statute of limitations for potential breach of warranty claims against Taisei would commence to run upon the date of Substantial Completion or Final Certificate of Payment. To the contrary it bargained for and preserved, in General Conditions 13.7.1.3, its equitable right to have the limitations period for latent defect breach of warranty claims commence to run upon discovery of the latent defect subject only to the 10 year limitations period under Section 337.15. With respect to non-warranty claims, Wilshire Vermont agreed the applicable statutes of limitations for construction-related work would commence to run not later than the Final Certificate of Payment. Any Wilshire Vermont non-warranty cause of action against Taisei for damages arising out latent defects discovered after the statute of limitations for that cause of action lapsed per the deemed accrual dates in 13.7.1.1 and 13.7.1.2 is therefore time barred.

IV. Further Proceedings

Any party may file, within 20 days after issuance of this Proposed Statement of Decision, additional briefing (not longer than 10 pages) specifying objections to the Proposed Statement of Decision or issues the Court has failed to address. (Cal. Rules Ct. 1591, 1590.) After 20 days

have lapsed, the Court will either execute this Proposed Statement of Decision as its (final) Statement of Decision or deem the matter will be deemed submitted.

Because the Court is no longer assigned to Department 307, this Court will not conduct any further hearings or engage in any additional activity in this case. The Court thanks and commends all counsel for their diligence, patience and civility in the handling of this matter.

Dated: November 16, 2016

_____

AMY D. HOGUE
JUDGE OF THE SUPERIOR COURT