PHOENIX SERVICES LIMITED PARTNERSHIP Plaintiff vs. JOHNS HOPKINS HOSPITAL Defendant	* * * * * *	IN THE CIRCUIT COURT FOR BALTIMORE CITY Case No.: 24-C-03-01663

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MEMORANDUM OPINION

The stakes are very high for both parties in this matter. Phoenix Services Limited Partnership ("Phoenix") collects and disposes medical waste from Johns Hopkins Hospital ("JHH") and other area hospitals, physicians and medical institutions in the Baltimore-Washington area. The relationship between JHH and Phoenix is governed by a Waste Supply Agreement dated November 16, 1989 and First Amendment dated November 15, 1994 (referred to collectively as "the Agreement"). The Agreement sets forth the conditions under which JHH can suspend or, eventually terminate the contract. In summary, if JHH gives Phoenix notice that there is a "Major Backup" as defined by the Agreement, Phoenix must arrive at JHH within three hours with sufficient tractors, trailers, equipment and personnel to clean it up. If Phoenix does not, JHH may issue a Notice of Suspension and Phoenix then has a maximum of 30 days to provide JHH with a certificate from "the Independent Engineer stating that [it] has made changes . . . sufficient to prevent [a] recurrence." If it does not provide such a certificate, JHH may terminate the Agreement without penalty.

Around 4:00 p.m. on January 15, 2003, JHH issued a Notice of Major Backup and on the next day, January 16th, issued a Notice of Suspension. On February 14, 2003, Phoenix

provided JHH with a Certificate from the Independent Engineer; however, on February 25, 2003, JHH gave Phoenix a Notice of Termination of the Agreement stating that the Certificate provided by the Independent Engineer did not provide the required reasonable assurance. Phoenix filed this declaratory action seeking a declaration that: (1) there was no basis for a Notice of Major Backup; (2) if there was, JHH did not provide Notice in accordance with the Agreement; (3) in any event, Phoenix remedied the backup as required by the Agreement, and therefore, there was no basis for JHH to issue a Notice of Suspension; (4) JHH failed to properly serve the Notice of Suspension; and (5) JHH was not authorized to reject the Independent Engineer's Certificate and thus could not terminate the contract without paying a penalty. JHH filed a counterclaim seeking the mirror opposite declarations.

JHH provides 24% of the total waste stream coming to Phoenix and if Phoenix does not collect medical waste from JHH, it will collapse and the other participating hospitals, physicians and institutions would have to find an alternative waste disposal system. If JHH was not authorized to terminate the contract for cause, it must continue with the contract as written or pay as much as $5 million to buy out its obligations under the Agreement.

The case was tried to the Court over 7 days, and the parties submitted Post Trial Memoranda.

FINDINGS OF FACTS

Medical Waste Associates Limited Partnership ("MWA"), Phoenix's predecessor,[1] designed and constructed a medical waste facility (the "Facility") in Hawkins Point with two

[1] At the time of the Agreement, the entity was still WMA, and therefore, this Opinion refers to Phoenix as WMA when quoting from the Agreement.

large incinerators and created a system for collection and transportation of unsegregated[2] medical and general waste from hospitals to the Facility (the "Transportation System"). The project was financed by industrial revenue bonds, and MWA entered into longterm agreements with the founding hospitals, including JHH, to ensure that it would have sufficient revenue to service the debt. Each of the founding hospitals guaranteed that it would pay for the processing of a specified minimum tonnage of waste for a twenty year period. Before the end of the twenty year period, a founding hospital would have to make a substantial payment to buy out the Agreement.

MWA was poorly managed, and in 1994, after only three years, JHH suspended deliveries of waste to Phoenix.[3] MWA sought to raise capital to improve the Facility and the Transportation System. Grotech Capital Group, a venture capital firm, agreed to invest sufficient funds to improve the Facility and Transportation System, contingent upon the execution of the First Amendment. The First Amendment included terms for Sanctions and Suspension that were not in the original Waste Supply Agreement. Simultaneous with the signing of the First Amendment, MWA filed a bankruptcy petition and submitted a subsequently approved Plan of Reorganization that included MWA changing its name to

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[2]Unsegregated waste includes both medical waste and general waste. Unsegregated waste must be treated as medical waste.

[3]Although the original Waste Supply Agreement had no provision for suspension, conditions were so bad that JHH determined that it had to suspend supplying waste to MWA for health and safety reasons. MWA did not challenge the legality of that suspension.

Phoenix.

In 1996, after receiving a certification from the Independent Engineer as required by the Agreement, JHH ended the suspension and resumed supplying waste to Phoenix. The parties disagree vehemently about the history of Phoenix's performance since 1996, but this Court finds it unnecessary to make factual findings about that history. Factual findings on the key events involved in this litigation are made throughout the Opinion.

FIRST AMENDMENT

The key terms of the First Amendment are summarized and set out here. The First Amendment permits JHH to initiate a suspension period after certain conditions are met. The first condition is that Phoenix fails to make specified "Complete Scheduled Pickups." The second is that the failure causes at least 50 carts of waste to be backed up at JHH. The third is that JHH gives Phoenix a written Notice of Major Backup. The fourth is that Phoenix then fails to fulfill certain conditions within three hours of the notice. Finally, JHH must give Phoenix Notice of Suspension.

After the Notice of Suspension is issued, the Suspension continues until JHH "receives *reasonable assurances* in the form of a *certificate of the Independent Engineer* stating that MWA has made changes to the Transportation System or the Facility sufficient to prevent the recurrence of a failure to comply with the agreed upon schedule of pickups." (Emphasis added.) Failure of Phoenix to "provide such certified assurance . . . shall constitute an event of Default. . . ."

> (1) [I]f at any time . . .
>
> (A) MWA fails to make
>
> (i) three Complete Scheduled Pickups (for purposes of this Section, a Complete Scheduled Pickup shall mean the arrival of

an empty trailer with the capacity to haul 48 carts, as described on Exhibit I hereto) for which Sanctions are applicable under Exhibit G within a one week period or

(ii) three Complete Scheduled Pickups within a day for which Sanctions are applicable under Exhibit G, and

(B) the failure causes more than 50 carts of waste to be backed up at the Waste Supplier's facilities, and

(C) the Waste Supplier gives MWA a written notice of cause for suspension (which may be by facsimile) stating that, at the time of the notice, the pickups have not been made and MWA's failure to remedy the situation will result in suspension (the concurrence of events (A), (B) shall collectively constitute a "Major Backup"), and

(D) within three hours after receipt of the notice, MWA has not arrived at the Waste Supplier's loading facilities with sufficient tractors, trailers, equipment, and personnel to effect the prompt removal of all waste that was to have been removed by the missed or partial pickups, the Waste Supplier may, by the issuance of a notice of suspension not later than 30 hours after the Major Backup, cause the initiation of a suspension period. The suspension period shall continue until the Waste Supplier receives reasonable assurances in the form of a certificate of the Independent Engineer stating that MWA has made changes to the Transportation System or the Facility sufficient to prevent the recurrence of a failure to comply with the agreed upon schedule of pickups. The failure of MWA to provide such certified assurance within the sooner of (i) 30 days (or such longer period not to exceed 60 days, as the Independent Engineer certifies to be needed to implement the corrective changes with due diligence) from the notice or (ii) the date agreed to by both parties shall constitute an event of Default under the Waste Supply Agreement which, not withstanding any other provision (including, without limitation, Section 14.1) of the Waste Supply Agreement to the contrary, shall give Waste Supplier the option of terminating the Waste Supply Agreement without penalty upon notice given during the suspension period.

I. BURDEN OF PROOF

Citing *United States v. Franze*, 686 F. 2d 1238, 1248 (7th Cir. 1982), JHH argues it does not have the burden of proof because Phoenix put on its evidence first and did not point out during the trial that JHH has the burden of proof. This Court disagrees. JHH has the burden of proving that Phoenix breached the contract and that it was justified in terminating the contract for cause. In ***Tricat Industries, Inc. v. Harper,*** 131 Md. App. 89 (2000), **the Court** held that the jury was properly instructed that the burden of proof was on the employer to show that he had terminated an employee for cause.

> **The circuit court instructed the jury that the burden of proving that appellee had been terminated for cause was on appellants. Appellants assert that this improperly shifted the burden of proof and explain that the existence of cause was not an affirmative defense, as characterized by the court, but was a reason why appellants were not liable for breach of contract. We perceive no error.**

Id. at 119. *See also* ***Contracts Materials Processing, Inc. v. Kataleuna GmbH Catalysts,*** **164 F. Supp.2d 520, 536 (D. Md. 2001) (citations omitted) (holding that in Maryland the party defending the termination of a contract has the burden of proving that the other party breached the contract**); *Foster-Porter Enters. v. De Mare*, 198 Md. 20, 29 (1951) (manufacturer who defended termination of agreement based on alleged breach had the burden of proving a breach sufficient to justify termination).

Thus, the burden was on JHH to prove that: (1) there was a Major Backup on January 15, 2003; (2) Phoenix failed to bring sufficient personnel and equipment to cure the Major Backup within the required three hours; and (3) its rejection of the Independent Engineer's Certificate was valid because the Certificate failed to provide reasonable assurance that it had made changes sufficient to prevent a recurrence.

2. The Language in the Agreement

In interpreting a written contract, the Court must first examine the language, and if it is "plain and unambiguous, . . . [then the] court must presume that the parties meant what they expressed." *Taylor v. NationsBank*, 365 Md. 166, 179 (2001). Thus the test "is not what the parties to the contract intended it to mean, but what a reasonable person in the position of the parties would have thought it meant." *Id.* S*ee also Langston v. Langston*, 784 A.2d 1086, 1095 (2001) ("[I]f a written contract is susceptible of a clear, unambiguous and definite understanding, its construction is for the court to determine.);" *Dep't. of Economic and Community Development v. Attman/Glazer P.B. Co.*, 323 Md. 592, 605 (1991) ("Test of ambiguity of contract is whether, considering character of contract, its purpose, and facts and circumstances of parties at time of execution, language used in the contract, when read by reasonably prudent person, is susceptible to more than one meaning.")

The Agreement is clear and unambiguous, therefore, the Court does not rely on any of the extrinsic evidence concerning the parties' intent.

III. THE SUSPENSION

A. MAJOR BACKUP

1. PHOENIX'S MOTION TO CONFORM ITS ANSWER TO THE COUNTERCLAIM TO THE EVIDENCE AT TRIAL

JHH argues that this Court need not decide if there was a Major Backup because Phoenix admitted in its pleadings and in other documents that there was a Major Backup. Phoenix disagrees, but in any event, moved to amend its answer to conform to the evidence. JHH vehemently objects to the amendment because the motion was made six weeks after the conclusion of the trial and two weeks after the parties filed post-trial briefs.

In support of its argument that Phoenix admitted to a Major Backup in its pleadings, JHH begins with Phoenix's Amended Complaint which states:

> On January 15, 2003, at 3:37 p.m., JHH faxed to Phoenix written notice of cause for suspension of the contract pursuant to the First Amendment to the Agreement.****Pursuant to the terms of the Agreement, Phoenix was required within 3 hours to bring sufficient personnel and equipment to the Hospital to affect the prompt removal of any waste.*

(Emphasis added.) JHH argues that the highlighted language is an admission that there was a Major Backup. This Court disagrees. That language is simply an acknowledgment that upon receipt of the Notice, under the terms of the Agreement, Phoenix was required to take certain actions.

JHH next points to Phoenix's response to JHH allegations in Paragraph 62 of its Answer to Amended Complaint and Counterclaim for Declaratory Judgment. JHH alleged:

> By January 14, the issue had not been resolved. Phoenix missed scheduled pick-ups at 4:00 p. m., 8:00 p. m. and 10:45 p.m., ... The three missed pickups combined with the substantial accumulation of waste constituted a Major Backup under the Amendment.

In its answer to that paragraph, Phoenix stated:

> Phoenix denies the allegations of Paragraph 62, except as specifically admitted herein. *** Phoenix denies the last sentence of Paragraph 62 as it is the conclusion of law. *Phoenix admits that the scheduled pick-ups at 4:00 p.m., 8:00 p.m., and 10:45 p.m. on January 14 were not made.*

(Emphasis added.) Phoenix states that the highlighted language is only an admission that the "specific pickups were not made, per the schedule," not an admission that the events constituted a Major Backup.[4] Phoenix moves to amend its Answer to Paragraph 62 to read:

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[4]Phoenix further states that it filed Supplemental Answers to Interrogatories a month before trial stating that it did not miss three pickups on January 14th and highlighted this position in its

Supplemental Pretrial Memorandum. Phoenix also relies upon the manifests and the scale tickets to show that it did not miss the pickups that day, but the meaning of those documents is a factual matter addressed later in this Opinion.

> Phoenix admits that the scheduled pick-ups at 4:00 p.m., 8:00 p.m., and 10:45 p.m. on January 14 were not made *at the times set out in the schedule; however, Phoenix missed a total of only two pickups on January 14, under the terms of the First Amendment.*

The Court will deny Phoenix's request to amend Paragraph 62 to conform to the evidence. While Rule 2-341 contemplates that amendments will be liberally granted, this Court finds that it would be prejudicial to JHH to permit an amendment on a hotly contested fact after all the evidence is in and the parties have filed extensive Post Trial Memoranda. *See* ***Mattvidi Associates Ltd. Partnership v. NationsBank of Virginia, N.A.*** **100 Md.App. 71, 83 (1994)** (“**Amendments are to ‘be freely allowed when justice so permits,’ Md.Rule 2-341(c), and to be denied only if ‘prejudice to the opposing party or undue delay results.’**” **(*citing Robertson v. Davis,* 271 Md. 708, 710 (1974)). However,** the Court finds that Phoenix has only admitted that the specified pickups were not made. Its response to Paragraph 15 is not an admission that there was a Major Backup.

In contrast, the Court will permit an amendment to Paragraph 63 even at this late hour. JHH argues that Phoenix's response to Paragraph 63 is an admission that it had received the letter giving notice of the Major Backup at 3:22 p.m. In response to paragraph 63, Phoenix stated that it “admits receipt of the referenced letter . . . and states that the letter is a document with independent legal significance, which speaks for itself.” *All* of the evidence at trial, including that from JHH's internal documents, clearly shows that the 3:22 p.m. time was an error. Therefore, the amendment will be permitted as it does not prejudice JHH.

Finally, JHH points to Phoenix's response to paragraph 64 where it “denie[d] that it did not meet its obligation with sufficient equipment and personnel to remove the Major Backup within three hours.” The referenced statement in response paragraph 64 follows a

detailed description of Phoenix's view of what occurred that day and cannot under any circumstances be properly characterized as an admission.

2. "COMPLETE SCHEDULED PICK-UPS"

The first question that must be addressed to determine if there was a Major Backup is whether there was a failure to make pickups as defined by the Agreement. Specifically, the evidence must show that Phoenix failed to make:

> (i) three Complete Scheduled Pickups (for purposes of this Section, a Complete Scheduled Pickup shall mean the arrival of an empty trailer with the capacity to haul 48 carts, as described on Exhibit I hereto) for which Sanctions are applicable under Exhibit G within a one week period or
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> (ii) three Complete Scheduled Pickups within a day for which Sanctions are applicable under Exhibit G

JHH argues that, as stated in the letter giving Notice of Major Backup, Phoenix failed to make five scheduled pickups: the 4:00 p.m., 8:00 p.m., and 10:45 p.m. pickups on January 14th and the 7:00 a.m. and 12:30 p.m. pickups on January 15th. Phoenix argues that none of those pickups was "missed."

JHH argues that a "Complete Scheduled Pick-up" means "the arrival of an empty trailer with the capacity to haul 48 carts, as described on Exhibit I . . . ," and that the pickups, must be pickups for which "Sanctions are applicable under Exhibit G." Exhibit G provides for sanctions for late pickups and defines when a pickup is late.

> <u>Sanctions</u>. The applicable sanctions (the "Sanctions") for late pickups are calculated as follows:

Number of Minutes Late (1)	Total Amount of Sanction(2)
1-60	$ 50.00
61 or more	

> (1) Lateness will be measured by the number of minutes beyond the end of the allowable pickup window. [Because JHH] receive[d] 5 or more pickups daily the window . . . end[ed] 1 hour after the scheduled delivery time. ***

JHH argues that if Phoenix is late enough in making a pickup so that sanctions could apply, than Phoenix has failed to make a "complete schedule[d] pick-up[]."

Phoenix on the other hand argues that in order for their to be a failure to make a pickup, the pickup must be "missed." The Agreement also provides for Sanctions for "missed" pickups and defines how the number of "missed Pickups" is to be calculated:

> Missed Pickups. MWA shall pay or credit to the Waste Supplier an amount equal to the Disposal Fee for the waste relating to each missed pickup for which a Sanction is applicable, even if such waste is eventually picked up by MWA. For hospitals having 1 or more scheduled pickups per day, the number of *missed pickups for a day* is the excess, if any, of the number of scheduled pickups for the day over the number of actual pickups for which a Sanction is applicable that occurred during the day.

(Emphasis added.) The Agreement defines a day as "the 24 hour period beginning at 6:00 a.m."

Relying on the testimony of Richard Montgomery, Chairman of the Board, Phoenix argues that an operating week is Monday through Saturday and that the Agreement does not prohibit Phoenix from making up, later in the same week, a delivery that was missed during a given day. Thus, according to Phoenix, a pickup that is made up later in the week may not be counted as a pickup that it "fail[ed] to make." Phoenix argues:

> the provision means that Phoenix has the chance to make up missed pickups within the operational week, so long as it does

> not miss a total of three pickups or more over the course of the week, but if it misses three in one day, . . ., those circumstances fulfill the "missed pickup" prong of the Major Backup test, no matter how many pickups Phoenix makes the rest of the week.

Phoenix's interpretation is intriguing, but not convincing. As pointed out by JHH, the Agreement does not refer to pickups "within an operating week," but to pickups "within a one week period." The "customary, ordinary and accepted meaning," of "within a one week period" is seven consecutive days. *See* ***Atlantic Contracting & Material Co., Inc. v. Ulico Cas. Co.,*** **380 Md. 285, 301 (Md. 2004) ("Our primary consideration, when interpreting a contract's terms, is the 'customary, ordinary, and accepted meaning' of the language used.").** *See also* ***Beale v. American Nat. Lawyers Ins. Reciprocal*** **379 Md. 643, 660 (Md. 2004)**.

Phoenix argues that JHH is simply wrong in taking the position that "a late pickup is the same as a failure to make a pickup, within the meaning of the term 'Major Backup.'" In support of this argument, Phoenix points out that the Agreement refers to a "failure to make" a scheduled pickup, not a "failure to be on time." Phoenix continues:

> If mere lateness constituted a "failure to make" a pickup, there would be no reason to define an operational day, or the number of missed Pickups in a day, as the contract does; nor would there be a schedule of monetary sanctions for pickups that occurred more than 61 minutes after the schedule time.

Although the Agreement does refer to "failure to make" a scheduled pickup, not a "failure to be on time," it states that the concern is a failure to make "three Complete Scheduled Pickups, . . .for which Sanctions are applicable." Sanctions are applicable for missed and for *late* pickups: "[t]he applicable sanctions (the "Sanctions") *for late pickups* are calculated . . . ." Thus, under the plain language of the Agreement, a late pickup *is the same* as a failure to make a pickup under the Major Backup provision. Further the Agreement used the word

"scheduled," and a pickup that is late, is not "scheduled." As discussed below at pages 23-25, this is one of many of the instances where the Agreement has very strict time requirements. The phrase "complete *scheduled* pickup[]" makes clear that the concern is not limited to pickups that are "missed," but also includes pickups that are not made "on schedule" and for which Sanctions are applicable.[5]

Finally, Phoenix argues that a pickup is late only if JHH gives "written notice (a 'Late Notice') . . .within 24 hours after the pickup in question," and absent such written notice, the provisions relating to a Major Backup do not apply because the Late Pickup provision of the Agreement provides that "No Sanction shall be applicable unless a late Notice of the pickup is given in accordance with this Exhibit G." This Court rejects that argument. The language providing that the first criteria for a Major Backup is Phoenix's failure to make "three Complete Scheduled Pickups . . .for which Sanctions are applicable under Exhibit G," is a definition of sanctionable conduct by Phoenix that can initiate a Major Backup Notice.

In contrast, the reference in the Late Pickup provision to a "Late Notice" refers to a prerequisite to the imposition of a monetary sanction. It is not a part of the definition of what is sanctionable conduct. The Late Notice provides an opportunity for Phoenix to "contest the applicability of the sanction," which it could not do in the absence of Notice:

> The Waste Supplier shall give MWA written notice (a 'Late Notice") of any pickup to which it believes an intermediate Sanction is applicable within 24 hours after the pickup in question. MWA may contest the applicability of the intermediate Sanctions to any pickup for which a late Notice is received. No sanction shall be applicable to a pickup unless a Late Notice is given in accordance with this Exhibit G.

[5]The Major Backup provision also applies to Missed Pickups because by the terms of the Agreement Sanctions apply to Missed Pickups. It also applies because whenever Phoenix missed a pickup it also failed to make a "Complete Scheduled Pickup."

A different Notice of late pickups is required when the late pickups form the basis of an alleged Major Backup. Under those circumstances JHH must give:

> MWA a written notice of cause for suspension . . . stating that, at the time of the notice, the [late] pickups have not been made and MWA's failure to remedy the situation will result in suspension.

Phoenix's argument that this interpretation is incorrect, because it means that the provision about missing three pickups within one day is surplusage, does not lead this Court to a different result. The language of the Agreement makes clear that time was crucial; thus repetitive provisions relating to time are not surprising. See pages 23-25 21 below.

3. FAILURE TO MAKE "THREE COMPLETE SCHEDULED PICK-UPS"

Phoenix correctly argues that JHH may only rely upon the alleged missed pickups that it cited in its letter giving Notice of Major Backup: the 4:00 p.m., 8:00 p.m., and 10:45 p.m. pickups on January 14th and the 7:00 a.m. and 12:30 p.m. pickups on January 15th. As discussed above, this Court finds that because Phoenix has in fact admitted that it failed to make the 4:00 p.m., 8:00 p.m., and 10:45 p.m. pickups on January 14th , thus it has admitted that it failed to make "three Complete Scheduled Pick-ups." This Court will nonetheless make findings of fact as to those pickups to minimize the need for a retrial in the event that an appellate court disagrees with this Court's denial of the Motion to Conform its Answer to the Counterclaim to the Evidence at Trial.

Mike Plank, President of Phoenix and Richard Montgomery, Chairman of the Board of Phoenix testified the Notice of Major Backup provision did not apply because as shown by

the manifests and the scale tickets, Phoenix made three pickups on January 14th, and nine on January 15th. This testimony is based on an interpretation of the Agreement that this Court rejects and is not credible because it is inconsistent with the contemporaneously prepared

Transportation Logs which show when pickups were scheduled to occur and when they actually did occur. Those Logs[6] show the following for the applicable dates:

Tuesday January 14, 2003

Scheduled Pickup Time	Leave Yard	Arrive Yard	Comments
16:00	23:10	00:45	1-15-03 D shift
20:00	21:15	22:55	1-15-03 D
22:45	20:10	22:30	11(sic)-15-03 D

Wednesday January 15, 2003

Scheduled Pickup Time	Leave Yard	Arrive Yard	Comments
7:00	20:30	21:40	
12:30	18:25	20:15	

Those Logs clearly show that Phoenix was over 61 minutes late for those five scheduled pickups.

The Court rejects Planks' testimony that this information was recorded incorrectly in the Logs. As JHH points out the Transportation Log consistently reflects from November 4, 2002 through January 15, 2003 that pickups were regularly made the day after they were scheduled to occur. Plank's testimony that he did not know how the Logs were kept is rejected by the Court.

In sum, the Court finds that Phoenix "fail[d]s to make (i) three Complete Scheduled Pickups . . .for which Sanctions are applicable . . .within a one week period, or (ii) ..within a day."

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[6]The Transportation Logs for January 14th , January 15th and January 16th are in Appendix A.

4. BACKUP OF MORE THAN 50 CARTS OF WASTE

One of the criteria for a Major Backup is that as a result of "the failure [to make three Complete Scheduled pickups] more than 50 carts of waste [is] backed up at [JHH]." Relying on a letter from Phoenix's counsel prepared and sent after the cleanup, JHH argues that the cleanup removed 375 carts. Based on the fact that the pickup schedule alternated between picking up 60 and 42 carts, JHH argues that the sanctionable pickups resulted in between either 246 or 264 of the 375 carts not being picked up because five missed pickups mean that either 246 carts (three trailers carrying 42 and two carrying 60), or 264 carts (three of 60 and two of 42) were not picked up. Thus, JHH argues there were more than 50 carts of waste backed up.

This Court rejects that analysis. Mike Plank, Phoenix's President testified that the information in that letter was wrong and the actual pickup is what is shown by the manifests. The manifests show the number of carts and boxes picked up, and most importantly they show the weight of the waste picked up. This Court agrees and finds that the manifests are a more accurate reflection of the amount of waste picked up during the cleanup. As Phoenix points, out because carts should average 95 pounds, the Court should not count the number of actual carts Phoenix used. Instead the Court should look at the weight of the waste picked up during the cleanup to determine if there was a backup. To do the comparison in carts, the weight must be divided by 95, the average weight carts should be under the terms of the Agreement. Phoenix should not be penalized because it put more than 95 pounds in some of the carts or because it put some of the waste in boxes instead of carts. Thus, to determine if there was over 50 carts backed up, the Court must determine if there was more than 4750 pounds of waste (50 carts weighing an average of 95 pounds each (50 x 95)) backed up.

The manifests show that there were nine pickups for the cleanup:

TIME OF RETURN TO PHOENIX	WEIGHT OF WASTE	EQUIVALENT NUMBER OF CARTS ASSUMING 95 LBS.
19:35	2,400	25
20:15	6,260	66
21:38	7,260	76
22:55	5,640	59
00:14	5,320	56
01:43	6,380	67
2:57	6,940	73
5:09	4,840	51
5:54	5,200	55
TOTAL	**50,240**	**528**

The Court finds that the total waste picked up during the clean up was 50, 240 pounds, which is the equivalent of 529 carts.[7] 50,240 pounds or 529 carts is clearly more than 4750 pounds or 50 carts.

Phoenix argues that there are several reasons for the amount of waste collected unrelated to its failure to complete some scheduled pickups: (1) JHH employees did not load the bags into carts and have the carts on the dock as required by the contract; (2) the backup waste should not include waste that was brought to the dock by JHH employees during the cleanup; (3) JHH employees loaded fewer than 42 or 60 carts on the trailers; and (4) JHH employees did not fill carts with sufficient waste, i.e. 95 pounds per cart.

[7]Because of rounding the number on the chart is 528, not 529

The Agreement provides that JHH must have the waste "available on the loading dock in carts or in the trailers left on-site." Some of the waste Phoenix picked up during the clean up was on the floor and had not been bagged by JHH. This Court agrees with Phoenix that it was under no obligation to pick up waste from the floor; however, according to Michael Plank, only 15 to 20% of the waste picked up was on the floor. Excluding 20% of the waste Phoenix picked up that night leaves 40,192 pounds, the equivalent of 423 carts, more than the 4750 pound, 50 cart minimum for a Backup. Phoenix is also correct that it was under no obligation to remove waste that was brought to the dock while it was cleaning up. The Transportation Log shows that two of the pickups during the cleanup were the regularly scheduled 8:00 p.m. and 10:45 p.m. pickups, which would account for 9,690 pounds, the equivalent of 102 carts. This Court finds that at most 9,690 pounds, the equivalent of 102 carts arrived during the cleanup. That still leaves 30,502 pounds, the equivalent of 321 carts, attributable to the backup.

During the cleanup, JHH employees were not required to fill carts brought to JHH to remove waste that was backed up. For regular pickups, Phoenix is only required to pickup waste in carts and on the dock, but when there is Notice of a Major Backup, Phoenix must come to the site with "sufficient tractors, trailers, equipment, and personnel to effect the prompt removal of all the waste that was to have been removed by the missed or partial pickups." The Agreement requires that Phoenix "drop everything" to respond to the Major Backup. It does not require that JHH employees "drop everything" to help. Thus, JHH employees were not required to fill carts and load them on trailers brought to clean up the

backup. Phoenix was required to pick up the waste that was bagged but not in carts before the cleanup began.

While the evidence does show that during the time period from December 2, 2002 through the January 8, 2003 12:30 p.m. pickup, the number of carts picked up from JHH was significantly lower than 42 or 60, beginning with the January 8th 12:30 p.m. pickup through the January 14th pickups, in most instances the number of carts picked up was 42 or 60. The same is true for weight. From January 8th through January 15th, there were 27 pickups and only six were less then an average of 100 pounds a cart and the weights of those were 88, 92, 99, 84, 96 and 55. Thus, weight was not at issue at the time of the backup.

5. FORCE MAJEURE

The Agreement provides that Sanctions do not apply if "a Force Majeure prevents MWA's trucks or trailers from making a timely pickup." A Force Majeure is defined as

> An act of God, act of a public enemy, natural disaster or condition, fire or other cause not within the control of the party claiming that its performance should be excused by reason thereof. . .

Phoenix argues that the Backup was caused by two force majeures: (a) a January 11, 2003 failure of one of the incinerators at Phoenix while the other was off-line (not in service) for regularly-scheduled maintenance, thus causing both incinerators to be down; and (b) on January 15, 2003, a pickup truck blocked Phoenix's egress from the dock so it could not haul away the trailer containing carts of waste.

The Agreement provides that sanctions do not apply to " any pickup if the loading dock is not available for MWA's truck or trailer." Thus, Phoenix was not responsible for the truck blocking egress, but that was neither a force majeure nor the cause of the Major

Backup. The illegally parked truck made it impossible to remove a trailer filled with carts that are not included in the Major Backup. Further, the Major Backup was not caused by the hour and twenty minute delay that resulted from the illegally parked truck.

The Court rejects Phoenix's argument that the failure of one of the two incinerators while the first was down for maintenance caused the Major Backup. Both incinerators were down from midnight January 11th until the early morning of January 13th. Phoenix points out that this outage occurred just as it was recovering from an emergency outage of one of its incinerators from 6:30 a.m. on January 8th until shortly after midnight on January 9th. The Agreement required Phoenix to have a Backup System:

> In recognition of its responsibility to fulfill its obligations to accept and remove acceptable Waste in accordance with the Waste Supply Agreement MWA shall, at its expense, provide redundancy in its waste acceptance and transportation services and shall apprise the Waste Supplier of the use of such Backup Systems.

There had been a continuous discussion between the parties during 1996 and 2003 concerning backup plans, but Phoenix did not have such a plan for JHH in January 2003.

The failure to have and/or implement a Backup Plan as required by the Agreement was not "[a]n act of God, act of a public enemy, natural disaster or condition, fire or *other cause not within the control of the party* claiming that its performance should be excused by reason thereof. . . ." As discussed below, after the Backup, one of the recommendations of the Independent Engineer was that Phoenix have a Backup Plan for JHH during an incinerator outage. That recommendation is a further recognition that not having a Backup Plan was not outside of Phoenix's control, and thus was not a force majeure.

B. SERVICE OF NOTICE OF MAJOR BACKUP

Phoenix argues that JHH failed to comply with the Notice requirement because the Waste Supply Agreement provides that all notices be sent to Phoenix's counsel, Neil J. Ruther, and that JHH did not send the Notice to Ruther. The First Amendment provided that notices could be faxed and the time for action is based upon Phoenix's "receipt of the notice." The Notice of Major Backup was faxed to Plank, Phoenix's President, and faxed and hand-delivered to Ober, Kaler, Grimes & Shriver, addressed to Ruther. Ruther, who no longer worked at Ober, Kaler, Grimes & Shriver, did not receive the Notice until the next day when Phoenix, not JHH, sent it to him.

Under the Waste Supply Agreement each party designated a person to receive Notice. Phoenix made the following designation:

> Neil J. Ruther, Esquire
> Ober, Kaler, Grimes & Shriver
> 1600 Maryland National Bank Building
> 10 Light Street
> Baltimore, Maryland 21202
> 301-685-1120

The Agreement also provided that "Each party shall have the right, from time to time, to designate a different person and/or address *by notice given in conformity with this section*." (Emphasis added.) That section required that any change in designation be in writing: "The authorized representative of each of the parties for the purposes hereof shall be the persons designated below or such other persons the parties may from time to time designate *in writing* . . ." (emphasis added). There was no evidence that Phoenix at any time gave "notice in conformity with" the above section that Ruther had a different address.

Plank received the Notice by 3:50 p.m. at the latest, thus, the Notice of Major Backup was valid. The fact that Ruther received it later is not JHH's fault because Phoenix had not given the requisite written notice of change of address.

C. ARRIVAL AT JHH WITHIN 3 HOURS

The Agreement provides that "within three hours" after it has received the Notice of Major Backup, Phoenix must arrive at JHH "with sufficient tractors, trailers, equipment, and personnel to effect the prompt removal of all waste that was to have been removed by the missed or partial pickups." Thus, while Phoenix was not required to complete the pickup within three hours, it was required to have all the tractors, trailers, equipment, and personnel needed to do so at JHH within three hours. JHH argues that the waste of the five uncompleted pickups was at least 246 carts, and even considering the 1 hour and 20 minute delay caused by the illegally parked truck, Phoenix failed to meet its obligation. Phoenix does not argue that it had all the necessary tractors, trailers, equipment, and personnel at JHH within three hours. Rather, Phoenix argues that time was not of the essence, and further that it was physically impossible to get everything there within three hours.

1. TIME OF THE ESSENCE

The phrase "time is of the essence" does not appear in the Agreement, but time was clearly of the essence. There is no requirement that the phrase "time is of the essence" be in the Agreement in order for time in fact to be of the essence. In ***String v. Steven Development Corp.,*** **269 Md. 569, 575-576 (1973), the Court of Appeals stated:**

> Whether time is to be considered as of the essence of the contract, must, of course, depend upon the intention of the parties. When this intention is expressed in clear and unambiguous terms, the contract must speak for itself, and the

> liability of the parties must be determined by the plain and obvious meaning of the language used.

(Citation omitted.) "Timely performance often is an absolute requirement even if the contract does not contain the talismanic phrase 'time is of the essence.'" *Elda Arnhold and Byzantio, L.L.C. v. Ocean Atlantic Woodland Corp.*, 284 F.3d 693, 699 -700 (7th Cir. 2002).

The First Amendment could not be clearer that time is of the essence in this Agreement. The First Amendment begins with a recitation that the "Capital Improvement Program includes improvements to the Transportation System, which are *designed to meet the schedules* for waste pickups from [JHH] *in a reliable manner.*" (Emphasis added.) The First Amendment did not even go into effect until the Independent Engineer had "identified those portions of the Capital Improvement Program that are needed before MWA can *provide reliable service*," and certified that the Program has been completed. There are detailed time tables for the imposition of Sanctions for late and missed pickups (set out at pages 10-11 above). The First Amendment added detailed provisions providing positive and negative consequences in connection with an "On-Time Pickup Rate."

> <u>Payments or Deposits</u> ***[I]f the On-Time Pickup Rate for all Founding Hospitals for a month is less than 90%, within 5 Business Days after the end of the month MVA shall, in addition to the Sanctions, deposit $5,000 into the Transportation Improvement Fund. *** If the aggregate On-Time Rate for all pickups of all of the Founding Hospitals is less than 90% for two consecutive months, MWA shall, upon the request of the Operating Committee established under the Prime Agreement, cause the Independent Engineer to determine the cause of the deficiency in service and identify improvements to the Transportation System which would remedy the deficiency. *** If the On-Time Rate for the Aggregate Guaranteed Annual Tonnage of all Founding Hospitals for the prior six months exceeds 97%, MWA may, after transferring to the Capital Maintenance Fund an amount equal to the transfers made to the Transportation Improvement Fund from the Capital Maintenance Fund, release all remaining funds in the

> Transportation Improvement Fund and apply them to any lawful purposes.

Furthermore, the introduction to the section providing for a Notice of Major Backup and Notice of Suspension emphasizes the need for strict performance under the terms of the First Amendment:

> (b) MWA acknowledges that Waste Supplier has suspended performance under the Waste Supply Agreement pursuant to the Letter as provided in the Letter. ***In consideration of the rescission of the Letter, *MWA recognizes that it has an obligation not again to impair the Waste Supplier's expectation of receiving performance under this Agreement*
>
> (1) Accordingly, if at any time after the Effective Date,
>
>> (A) MWA fails to make [three Complete Scheduled Pickups which cause 50 carts of waste to be backed up, JHH may give a Notice of Major Backup]

Finally, it is clear from the language of the Agreement providing for Notice of Major Backup and Notice of Suspension that time is of the essence. There is a clearly defined time period for the "three Complete Scheduled Pickups," a clearly defined time period for what is to occur after receipt of the Notice of Major Backup, and a clearly defined time period for JHH to issue a Notice of Suspension and for Phoenix to respond to it.

2. IMPOSSIBILITY OF PERFORMANCE

Phoenix's argument that it could not get more than one trailer at the dock at any given time fails to excuse it from having enough trailers and carts there within three hours. JHH argues, with evidence to support its argument, that more than one trailer could fit in the dock at a time. Even if only one trailer could fit in the dock, during the time that the illegally parked truck prevented egress from the dock, Phoenix could have delivered carts and personnel to JHH. At minimum, Phoenix could have been preparing trucks, carts and

personnel so that they would have been ready to leave the plant immediately upon learning that the illegally parked truck had moved. It did neither. The illegally parked truck was gone by 5:20 p.m. The first Phoenix truck did not arrive until 7:00 p.m., *one hour and forty minutes later.* It only takes an average of 20 minutes to go between Phoenix and JHH.

Because the illegally parked truck was gone by 5:20 p.m., all the tractors, trailers, equipment, and personnel needed to be at JHH by 8:20 p.m. at the latest. The first truck that arrived only contained 36 carts. Assuming that only one trailer could fit into the dock at a time, there was no reason not to have a 60 cart trailer at the dock and another 60 cart trailer waiting nearby. Plank acknowledged that the first trailer that arrived had only 36 carts because Phoenix did not have enough carts to send 60. Phoenix argues that it was unreasonable to expect it to line up trucks and trailers during rush hour. It was not. In any event, Phoenix did not begin until after rush hour was over and never came close to lining up trucks and trailers.

3. FAILURE TO PERFORM WITHIN THREE HOURS

As explained above, the Court has found that 30,502 pounds, the equivalent of 321 carts of waste backed up at the time of the Notice. (*see* discussion at pages 15-16 above). Therefore, under the terms of the Agreement, equipment to move 30,502 pounds of waste needed to be at JHH no later than 8:20 p.m., three hours after the illegally parked truck moved. The Transportation Logs and the manifests show the time that trucks arrived at Phoenix and the weight of the waste. For regularly scheduled pickups, there is a trailer at the dock with 42 or 60 empty carts to be loaded with bagged waste by JHH employees. When a truck arrives to pick up waste, it picks up the trailer with the filled carts and leaves a trailer with 60 or 42 empty carts. Thus, a truck returns to Phoenix with carts that it did not bring to

JHH. The truck is at the dock only long enough to make the exchange, and it then takes approximately 20 minutes for the truck to return to Phoenix. During the cleanup essentially the same thing occurred except the number of carts varied and Phoenix, not JHH, employees were filling the carts.

The chart on the next page, based on the manifests, the Transportation Logs, and the testimony of the witnesses shows that before the Notice of Backup was sent or received, a truck had brought a trailer with 36 carts to JHH. Therefore, the cleanup began with 36 carts. Based on the testimony of the witnesses, the Court is convinced that the truck that returned those filled carts to Phoenix arrived at JHH at 7:00 p.m. That truck is not listed on the Transportation Log so it is not clear how many empty carts it brought to Phoenix when it arrived. It returned to Phoenix at 7:35 p.m. with the 36 carts. Another truck left Phoenix at 6:25 p.m. and brought 33 empty carts. Each truck that followed picked up waste, and brought empty carts.

The fourth truck left Phoenix at 9:15 p.m. and returned at 10:55 p.m. It brought 36 empty carts and some boxes. Based on the amount of waste, there was still not enough carts and/or boxes at JHH to pick up all the backed up waste. The next truck that went to JHH is not listed on the Transportation Log so there is no way of determining the exact time that it left Phoenix or the number of carts it brought to JHH. The Court finds that it did not leave Phoenix before the preceding truck arrived, i.e. 10:55 p.m; therefore, the *earliest* that it got to JHH was 11:15 p.m., and it may have had sufficient carts to complete the removal of the backed up waste. If it did, it was too little, too late. As discussed above, all of the equipment and personnel for the cleanup needed to be at JHH no later than 8:20 p.m., three hours after the illegally parked truck had moved. Eleven fifteen (11:15 p.m.) was almost six hours after

the 8:20 p.m. deadline, almost three hours too late.

Thus, Phoenix did not get "sufficient tractors, trailers, equipment, and personnel" to JHH "to effect the prompt removal of all waste that was to have been removed by the missed or partial pickups" within 3 hours of receipt of the Notice of Major Backup.

SCHEDULED PICKUP TIME	TIME TRUCK LEFT PHOENIX (# OF EMPTY CARTS DROPPED OFF AT JHH)	TIME TRUCK RETURNED TO PHOENIX	WEIGHT OF EACH LOAD	CUMULATIVE WEIGHT OF WASTE PICKED UP	COMMENTS THIS INFORMATION IS BASED ON COMPARING THE INFORMATION ON THE MANIFEST TO THAT ON THE TRANSPORTATION LOG. (THE JANUARY 15TH AND JANUARY 16TH LOGS ARE ATTACHED)
N/A	N/A	JAN. 15TH 19:35	2,400	2400	NOT LISTED ON TRANSPORTATION LOG. Before the Notice of Backup was sent, the carts that this truck picked up had been delivered to JHH by the truck that was scheduled to make January 14th 12:30 p.m. pickup (which arrived on January 15th at 3:30 p.m.).
JAN. 15TH 12:30	JAN. 15TH 18:25 (33)	JAN. 15TH 20:15	6,260	8660	
JAN. 15TH 7:00	JAN. 15TH 20:30 (33)	JAN. 15TH 21:38	7,260	15,920	
JAN. 14TH 20:00	JAN. 15TH 21:15 (36)	JAN. 15TH 22:55	5,640	21,560	
N/A	N/A	JAN. 16TH 00:14	5,320	26,880	NOT LISTED ON TRANSPORTATION LOG
JAN. 15TH 16:00	**JAN. 16TH 00:45 (60)**	**JAN. 16TH 01:43**	**6,380**	**33,260**	
JAN. 15TH 20:00	JAN. 16TH 1:30 (36)	JAN 16TH 2:57	6,940		
JAN. 15TH 22:45	JAN. 16TH 3:40 (42)	JAN. 16TH 5:09	4,840		
N/A	N/A	JAN. 16TH 5:54	5,200		NOT LISTED ON TRANSPORTATION LOG

IV. THE CERTIFICATE

Phoenix argues that the Court's analysis should begin and end with the Certificate of the Independent Engineer because, even assuming there was a Major Backup, and that the Notice of Suspension was valid and properly issued, JHH received "reasonable assurances in the form of a certificate of the Independent Engineer stating that MWA has made changes to the Transportation System or the Facility sufficient to prevent the recurrence of a failure to comply with the agreed upon schedule of pickups." Therefore, pursuant to the terms of the Agreement, the suspension period ended. JHH argues: (1) the Certificate is defective because it was not prepared by a licensed engineer; (2) it is facially defective because it does not give the certification required by the Amendment; (3) the judgment of the Engineer is not binding because the analysis was superficial and exhibited favoritism toward Phoenix; and (4) the Certificate does not provide the objectively reasonable assurances required by the Agreement. Thus, the Certificate was appropriately rejected by JHH.

This Court concludes that if the Certificate did, on its face, provide reasonable assurance, that would end the suspension. However, for the reasons that follow, this Court concludes that the Certificate does not provide "reasonable assurances . . . that MWA has made changes to the Transportation System or the Facility sufficient to prevent the recurrence of a failure to comply with the agreed upon schedule of pickups."

A. CHALLENGE TO THE CERTIFICATE

Analogizing the Independent Engineer to an arbitrator, Phoenix argues that the "judgment of the Independent Engineer" is "dispositive of the issue," and JHH has no right to challenge the finding of the Independent Engineer. In support of its argument, Phoenix relies on cases where the Court of Appeals has recognized that contracting parties may agree that

certain questions or issues will be resolved by an engineer or other third party, and that determination may not be challenged absent fraud, mistake, or bad faith. *See e.g. Laurel Race Course, Inc. v. Regal Construction Co., Inc.*, 274 Md. 142, 152-54 (1975). Therefore, according to Phoenix, if the Independent Engineer issues a certificate that on its face provides reasonable assurances, JHH cannot challenge it, and the suspension period is terminated.

On the other hand, JHH argues that the contract requires Phoenix, not the Independent Engineer, to give the reasonable assurance. JHH further argues that while a certificate may be evidence of such assurance, it is not conclusive, and therefore, JHH may challenge whether in fact the Certificate gives reasonable assurance. According to JHH, the cases relied upon by Phoenix are distinguishable because they involved contracts that included express and unambiguous language making a third party the final decisionmaker. In *J.A. La Porte v. Mayor and City Council Council of Baltimore*, 13 F. Supp. 795, 799 (D. Md. 1936); for instance, the contract stated:

> To prevent disputes and litigation, the Chief Engineer shall in all cases determine the amount, quality and acceptability of work and materials which are to be paid for under the contract; shall determine all questions in relation to said work and materials and the performance thereof, and shall in all cases decide every question which may arise relative to the fulfillment and the construction of the terms and provisions of the contract. *His determination, decision and estimate shall be final and conclusive in respect to the fulfillment thereof* . . .

13 F. Supp. at 797 (emphasis added). *See also Hughes v. Model Stoker Co.*, 124 Md. 283 (1914) (finding inspector's determination binding where contract states, "[t]o prevent disputes and litigations, the inspector of buildings shall in all cases determine all questions in relation to said work . . . His estimates and decision shall be final and conclusive"); *City of Baltimore*

v. Allied Contractors, 236 Md. 534, 538 (1964) (determination binding where contract declared, "[t]o prevent disputes and litigations, the Director will be the referee in case any question shall arise . . . and his determination, decision, and/or estimate shall be final and conclusive upon the Contractor . . ."); *Charles Burton Builders v. L & S Construction*, 260 Md. 66 (1970) (Determination binding where contract clearly provided, "[t]he Engineer shall in all cases determine the amount, quality and acceptability of the work to be paid for under the contract, and shall decide all questions in relation to said work. His decision and estimate shall be final and conclusive, and in case any question shall arise between the parties touching the contract, such decision and estimate shall be a condition precedent to the right of the Contractor to receive payment under that part of the contract which is in dispute.").

JHH argues that in contrast to the language of the contracts in those cases, the language in the Agreement does not explicitly give the Engineer "final and conclusive" authority to resolve the dispute concerning whether Phoenix has provided reasonable assurance "in order to avoid litigation." In further support of its argument that the Independent Engineer's is not a final arbitrator, JHH points to a provision of the original Agreement which provides for binding arbitration of certain issues.

> All claims, disputes and other matters in question (the "Issues") between MWA and Waste Supplier arising out of, or relating to, the enforcement or interpretation of Articles 3, 4, 5, 6, 7 or 12 of this Agreement, but not including any termination of this Agreement based upon any alleged breach of such provisions, shall be resolved [by arbitration]
>
> ***
>
> (c) The agreement to arbitrate contained in this Section shall be specifically enforceable under the Maryland Arbitration Act as amended. *The award rendered by the arbitrator(s) shall be final,* and judgment may be entered upon and in

> accordance with applicable law in any court having jurisdiction thereof.

(Emphasis added.) JHH argues that the fact that the parties used explicit language requiring binding arbitration for certain disputes but did not use it in § 13(b)(1), shows that the Independent Engineer is not a binding arbitrator and JHH has the right to challenge whether the Certificate actually provides reasonable assurances.

Arbitration is "the process by which the *parties to a dispute submit their differences* to the judgment of an impartial person or group appointed by mutual consent or statutory provision." AMERICAN HERITAGE DICTIONARY 124 (2d. c. ed. 1982) (emphasis added). *See also* Maryland Uniform Arbitration Act, Cts. & Jud. Proc. §§ 3-201 et. seq. There *are* some instances where the Agreement provides that the Independent Engineer acts as an arbitrator. For example, the Independent Engineer is responsible for resolving disputes regarding the base weight of each cart used to transport waste: "[T]he "Base Weight" per cart shall be an amount determined by MWA . . . and acceptable to Prime, or, if MWA and Prime cannot agree . . . , the Base Weight . . . shall be an amount determined by the Independent Engineer." Further, unless the parties agree upon the appropriate number, the Independent Engineer decides what constitutes a "reasonable reserve" of equipment: "the Transportation System for the Waste Supplier shall . . . provide a reasonable reserve as determined by the Independent Engineer unless the parties agree upon the appropriate number."

In contrast to those provisions, for purposes of the certificate of reasonable assurance in section 13(b)(1), the Independent Engineer is not an arbiter and thus the arbitration cases relied upon by JHH do not apply. Under section 13(b)(1), the Independent Engineer does not resolve a "dispute" between the parties. The parties do not "submit their differences" to the Independent Engineer for the Independent Engineer to make a "judgment" as to which side is

correct. The Independent Engineer does not determine if the prerequisites for issuing a Notice of Suspension have been satisfied.[8] Thus, the Engineer does not determine whether Phoenix failed to make "Complete Scheduled Pickups"; whether the "failure cause[d] more than 50 carts of waste to be backed up"; whether "a written notice of cause for suspension" was given as required by the contract; whether "within three hours after receipt of the notice," Phoenix "arrived . . . with sufficient tractors, trailers, equipment, and personnel to effect the prompt removal of all waste that was to have been removed by the missed or partial pickups. . ."; or whether a "a notice of suspension" was issued "not later than 30 hours after the Major Backup."

In fact, there is no requirement that the parties have any "differences." The parties may be in total agreement on the prerequisites to the Notice of Suspension, including total agreement on what needs to happen to remedy the problem. Or they may be in disagreement. In either event, the Independent Engineer's task is not to solve the disagreement. The Independent Engineer simply determines what, if any, changes Phoenix must make. If the Independent Engineer decides changes are necessary, the Independent Engineer also determines whether Phoenix has made those changes. The Independent Engineer then determines whether *in its judgment* the changes provide "reasonable assurances . . . to prevent the recurrence of a failure to comply with the agreed upon schedule of pickups."

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[8]Thus, the Certificate issued explicitly states that "the Independent Engineer does not take a position on the validity of the NOS issued by the Waste Supplier."

Section 13(b)(1) is one of many instances where the Independent Engineer has a role which does not involve acting as an arbiter, i.e., the Independent Engineer is not resolving a dispute. The date of implementing the terms of the First Amendment was determined by several factors including (1) "certificate of the Independent Engineer stating that the JHH Capital Improvement Program has been completed;" and (2) "a certificate of the Independent Engineer . . .to the effect that the equipment necessary to operate the Transportation System is in place and the test. . . has been performed and satisfied." Neither JHH nor Phoneix was authorized to challenge these determinations. Another provision of the Agreement provides that Phoenix "may make changes, alterations, modifications or deletions to the Capital Improvement Program if MWA delivers to Prime a certificate of the Independent Engineer [with certain specified provisions]." There is nothing that authorizes a party to challenge that certificate if it is issued. Under another provision the Independent Engineer is authorized to approve or recommend the expenditure of funds from the Transportation Improvement Fund to improve the Transportation System: "MWA may use amounts in the Transportation Improvement Fund only to pay the costs of improvements to the Transportation System recommended or approved by the Independent Engineer. . ." No party has authority to challenge the Independent Engineer's recommendation or approval.[9]

In none of the instances cited above does the Independent Engineer resolve "differences" between the parties, but the Independent Engineer's decision is final and

[9]Additionally, when replacing the cart design, MWA could request that "the Independent Engineer certifies that the [new] design . . .is reasonable. . ." Unlike the other cited provisions, in this instance the Independent Engineer's involvement is determined solely at the discretion of MWA.

conclusive. Contrary to JHH's argument, there is nothing to suggest that JHH may challenge the certificate of reasonable assurance in section 13(b)(1) if, on its face, it provides "reasonable assurance."

B. "THE INDEPENDENT ENGINEER"

JHH argues that the Certificate is invalid because it was produced by an Independent Engineer, Dr. Herbert Kosstrin, who is not a licenced engineer in Maryland. JHH argues that the Court cannot accept the Certificate as valid because it would amount to enforcing an illegal contract, i.e., a contract calling for a non-licensed engineer to practice engineering. "A contract is illegal if either the formation or performance is prohibited by constitution or statute." *DeReggi Construction Co. v. Maite*, Md. App. 648, 663 (2000). *See also Medes v. McCabe*, 372 Md. 28, 39 (2002) ("[A] contract conflicting with policy set forth in a statute is invalid to the extent of the conflict between the contract and that policy."). Under Maryland law, it is illegal to practice engineering without a licence. MD. BUS. OCCUPATIONS & PROFESSIONS CODE SECTIONS 14-501 and 14-502.

In support of its argument that Dr. Kosstrin served as the Independent Engineer, thereby engaging in engineering, JHH points out that Dr. Kosstrin did most of the leg work, signed the cover letter and that no licenced engineer signed the Certificate. First of all, as a factual matter, contrary to JHH's argument, R.W. Beck, and not Dr. Kosstrin, was the Independent Engineer. The Certificate is on R. W. Beck's letterhead and is signed R.W. Beck. The first sentence of the Certificate explicitly provides that the engineering firm R.W. Beck is the Independent Engineer: "This certificate is being provided by R.W. Beck, Inc., in its role as the Independent Engineer (the "Independent Engineer") pursuant to Section 13(b)(1)(D) of the First Amendment of the Waste Supply Agreement . . . ." JHH's letter

rejecting the Certificate refer to it as: "Beck's certificate;" "Beck's conclusions;" "Beck's reason[ing];" "Beck's analysis;" and "Beck's calculation[s]".

Furthermore, as pointed out above, the Agreement provided that the First Amendment went into effect, based in part, on certain certifications from an Independent Engineer. That Independent Engineer was R. W. Beck. Additionally, R.W. Beck played a major role in the decision of JHH to enter into the First Amendment as evidenced by Beck's letter dated April 20, 1994 which is attached to the First Amendment. That letter, like the Certificate in dispute, is signed "R.W. Beck."[10]

Second, the Agreement does not require, and the licensing provisions relied upon by JHH do not require that a licenced engineer sign the Certificate. It is sufficient that the Certificate was signed "R.W. Beck." The fact that Dr. Kosstrin did most of the leg work does not make the Certificate invalid and even if Dr. Kosstrin did all the work, the Certificate is provided by R.W. Beck.[11] If JHH was of the view that R. W. Beck was not qualified as the Independent Engineer, JHH could have said so before it signed the Agreement. Finally, JHH has failed to point to any provision in the Amendment calling for an illegal act, i.e., a violation of a statute or regulation. The Agreement contemplates that the Certificate would be provided by an Independent Engineer; it does not require that an unlicenced engineer

[10]The letter is signed R. W. Beck and Associates and the Certificate is signed R.W. Beck, Inc.

[11]Similarly this Court is responsible for any decision it issues regardless of how much of the actual work was done by the Judge's law clerk or secretary.

practice engineering.

C. Objective Reasonable Assurances

JHH argues that the Certificate is facially defective because it does not make the certification required by the Agreement. Phoenix argues that the Agreement does not require that the certificate be "unconditional," and in any event, this argument should be rejected because it was not articulated by JHH at the time of the Notice of Termination. This Court agrees with JHH. The Agreement provides that "The suspension period shall continue until the Waste Supplier receives reasonable assurances in the form of a certificate of the Independent Engineer stating that MWA *has made changes* to the Transportation System or the Facility . . . ." "Has made" is in the past tense and requires that the changes have been completed before the certificate is issued. It is also clear that the Independent Engineer is certifying that it is satisfied that the changes have been made.

The Certificate does not on its face provide "reasonable assurance." The relevant language of the Certificate states:

> Based on the Independent Engineer's review of the backup plan, the configuration of the facility, the length of previous dual incinerator outages, and the current waste generation of the waste supplier in *assuming* that MWA 1) properly operates and maintains the Facility including the timely implementation of renewals and replacements, 2) actually initiates the back-up plan as soon as it cannot process the Waste Supplier's deliveries, and 3) barring a force majeure type event, the Independent Engineer is up the opinion that MWA via its revised backup plan, which includes the procurement of additional dedicated storage for the Waste Supplier at the Facility, has made changes to the Facility sufficient to prevent the recurrence of a failure to comply with the current agreed upon schedule of pickups.

(Emphasis added.) The Certificate does not provide any assurance that changes *have been made* which will prevent a reoccurrence. This failure is crucial because the point of the Independent Engineer's certification is to relieve JHH from having to rely on plans that may

or may not come to fruition. An examination of the Certificate reveals the defects. The first and most crucial defect is the word "*assuming*." Assumption is defined as "[a] statement accepted or supposed true without proof or demonstration." AMERICAN HERITAGE DICTIONARY 136 (2d. c. ed. 1982). Thus, the Certificate effectively begins by stating that it accepts or supposes, *without proof or demonstration* "that MVA" will or is taking certain steps. As the Certificate is written it would be impossible for any party to hold R. W. Beck accountable if the assumptions fail to come true because R. W. Beck has certified nothing.

Second, the suppositions that it makes are that some events will take place *in the future* but there is *nothing* in the certification that gives *any* assurance that MWA will in fact do what is assumed. The statement that the Independent Engineer is "*assuming* that MWA 1) properly operates and maintains the Facility including the timely implementation of renewals and replacements, [and] 2) actually initiates the back-up plan as soon as it cannot process the Waste Supplier's deliveries," is meaningless.[12] Nor is there *any* indication that the Independent Engineer has any expectation based on the factors outlined at the beginning of the sentence that the assumptions will come to fruition. It may well be that the assumptions are in fact well-founded, but as *assumptions* they do not give *any* reasonable assurance. Obviously, the Independent Engineer is of the view that reasonable assurance exists only if the assumptions are true. Yet, because assumptions are by definition "accepted or supposed

[12]The Court does not focus on the assumption that there will not a "force majeure." Article 1.15 of the Agreement defines Force Majeure as "[a]n Act of God, act of a public enemy, natural disaster or condition, fire or other cause not within the control of the party claiming that its performance should be excused by reason thereof . . . ." Thus, this assumption is simply a recognition of the uncertainty of life, similar to the assumption that most people make that when they go to bed at night, that they will wake up the next morning. By definition, a force majeure event is an event unlikely to occur.

true without proof," the Independent Engineer undermines the opinion it provides.

Finally, as if to underscore that its opinion is based on unproven suppositions, the Independent Engineer opines "that MWA via its revised backup plan, which *includes the procurement* of additional dedicated storage for the Waste Supplier at the Facility," has made changes . . . sufficient to prevent the recurrence of a failure to comply with the . . . schedule of pick-ups." The phrase "includes the procurement" is so vague that it is unclear whether the plan is to get additional storage in the future or if additional space has already been procured.

The Court wants to make clear that it *is not* finding as argued by JHH that the assumptions are problematic because they are "inconsistent" with "recent and past history." "Recent and past history," is not relevant to whether the Certificate provides reasonable assurance. The Certificate must stand on its own, and that is what makes the defects so crucial. With the assumptions and vague language, to put it bluntly, the Certificate is not worth the paper on which it is written.

Phoenix argues that the "caveat" that Phoenix would "properly operate and maintai[n] the Facility" is a "standard disclaimer[]." In support of this argument, Phoenix points to the 1994 letter of R.W. Beck where it stated that it would issue its certificate that the Capital Improvement Program had been completed on the assumption that "MWA properly operates and maintains the Facility including the timely implementation of renewals and replacements." What Phoenix overlooks is that the actual certificate of completion issued in October 1996 did not leave the Independent Engineer any "wiggle room." It stated clearly and unequivocally:

> [W]e are of the opinion that Phoenix has substantially completed

> the material elements of the Capital Improvement Program. Further, we certify that those elements of the Capital Improvement Program which have been modified and those elements which have not been completed are not expected to have a material affect on the operation of the Facility and the delivery of services by Phoenix under the Waste Supply Agreement.

The difference between that language and the language in the Certificate involved in the current controversy highlights the defect in the language in the Certificate issued in 2003.[13]

5. Bad faith

[13] The Court granted JHH's Motion in Limine excluding evidence of how Phoenix picked up JHH's trash after the Notice of Termination was issued, because the determination of whether the Certificate provides reasonable assurance must be made on the face of the Certificate.

Phoenix argues that it was costs, not service that lead JHH to issue the January 15th Notices.[14] According to Phoenix, as of late 2002, JHH had been looking for years to get out of the Agreement to save JHH money, potentially as much as $400,000 a year. JHH tried to change the Agreement with Phoenix and engaged in discussions with other waste disposal companies that promised cost savings. JHH concluded that cancelling "for cause" was the least expensive way out of the Agreement. In particular, Phoenix points to a January 2, 2003 note scheduling an internal JHH meeting for January 15, 2003 to discuss Phoenix, and a January 9th e-mail where Kenneth Grant, JHH's Vice-President, recommended to Judy Reitz, JHH's Chief Operating Officer that JHH "move forward with the termination of our agreement with Phoenix." Reitz' response was that they would meet on the 15th "to agree to an action plan." Thus, Phoenix argues, "JHH was looking for an opportunity to get rid of Phoenix, and made its decision to terminate the contract not only before Phoenix had a chance to respond to the Notice of the Major Backup, but even before the notice was issued." Finally, Phoenix points out that in its termination letter, JHH stated, "We are available to meet with . . . Phoenix to discuss the possibility of a continuing business relationship under a new legal agreement with different legal terms."[15]

JHH counters that it was tolerant of Phoenix for a long time and could have issued a Notice of a Major Backup on December 5, 6, 7, 13, 14, 19, and/or 20, 2002, and/or January 8-10, 2003. JHH also points out that the Reitz e-mail referred to above states: "I would like

[14]Because the Court finds that JHH's motive in terminating the Agreement is irrelevant, the "facts" discussed in this section of the Opinion are allegations, not findings.

[15]Phoenix also states that the fact that the Notice of Suspension was prepared and ready to be sent out before the Notice of Major Backup went out, is evidence of bad faith. That is not bad faith, that is preparation.

you to join our Work Group. *The vendor [i.e. Phoenix] is unreliable so we have to break the contract.*" Thus according to JHH, the discussion about terminating the Phoenix Agreement centered around what JHH viewed as Phoenix's poor performance. JHH also argues that Phoenix's poor performance has already placed its continued existence in jeopardy as evidenced by its auditors "substantial doubt about the Company's ability to continue as a going concern." In addition, JHH points out that it loaned Phoenix money to purchase carts.

This Court does not address the factual allegation of bad faith because it agrees with JHH that assuming the truth of all of Phoenix's allegations, the Notice of Termination is still valid. The crux of Phoneix's argument is that JHH was motivated by financial considerations because JHH decided "the contract was financially disadvantageous . . . *i.e.* it had agreed to pay too much." Courts have consistently held that "one cannot characterize self-interest as bad faith." *Phoenix Mutual Life Ins. Co. v. Shady Grove Plaza L.P.,* 734 F. Supp. 1181, 1190 (D. Md. 1990) (citation omitted). *See also Sammarco v. Anthem Ins. Companies, Inc.*, 723 N.E. 2d 128, 136 (Ohio App. 1998) ("Legitimate economic interest cannot give rise to claims of bad faith or unfair dealing. . .).[16]

CONCLUSION

For the reasons stated above, Phoenix's Motion to Conform Its Answer to the Counterclaim to the Evidence at Trial will be granted in part and denied in part; JHH's objection to Phoenix's Exhibit 117 is overruled and; and the Court will issue a declaratory

[16]This is the United States where gross national product is measured in dollars and cents, in contrast to the Kingdom of Bhutan which measures gross national happiness. (His Majesty King Jigme Singye Wangchuck proclaimed that "gross national happiness is more important than gross national product" because "happiness takes precedence over economic prosperity in our national development process."). http://www.pbs.org/frontlineworld/stories/bhutan/gnh.html

judgment declaring the rights of the parties under the Agreement consistent with this Opinion.

Dated: June 18, 2004

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Judge Evelyn Omega Cannon

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