CASE NO. 21-CV-640

IN THE DISTRICT OF COLUMBIA
COURT OF APPEALS

UNITED HOUSE OF PRAYER FOR ALL PEOPLE
OF THE CHURCH ON THE ROCK OF THE APOSTOLIC FAITH,

Appellant,

v.

RESTORATION DOCTOR, LLC,

Appellee.

On Appeal (following remand by this Court in 17-CV-1013)
from D.C. Superior Court Case No. 2015 CA 002450 B
The Honorable John Campbell, Superior Court Judge, Presiding

REPLY BRIEF FOR APPELLANT UNITED HOUSE OF PRAYER FOR ALL PEOPLE OF THE CHURCH ON THE ROCK OF THE APOSTOLIC FAITH

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

Appellant United House of Prayer for All People of the Church on the Rock of the Apostolic Faith ("UHP") hereby submits its Reply Brief in this appeal. For the reasons stated herein and in UHP's Opening Brief, the Superior Court's August 16, 2021 Judgment Order (reinstating its August 23, 2017 Judgment) and Order on Remand should be reversed and vacated, with instructions to the Superior Court to enter judgment in favor of UHP.

INTRODUCTION

This appeal is before the Court because UHP was severely overcharged to restore its Church in Baltimore, in an amount that had no basis in the Work Authorization Agreement, insurance estimates, or Maryland law. *See* UHP Br. at 34-39. UHP was later sued to collect on that amount, first by an entity that did not exist, and later by Restoration Doctors, LLC ("RD-Plural"), which claimed to be a successor to the contracting entity, Restoration Doctor, LLC ("RD-Singular"). UHP demonstrated in the Superior Court that the parties to the Agreement had actually contracted to have the restoration work done for a signifcantly lower amount, and that RD-Plural, which was not a party to the relevant Agreement, was not a successor and therefore had no standing. Despite the evidence, the Superior Court disagreed with UHP, and entered judgment in favor of RD-Plural. For the reasons stated herein and in UHP's opening Brief, RD-Plural's attempts to defend that judgment are unavailing, and the Superior Court's ruling in favor of RD-Plural should be reversed.

ARGUMENT

I. The Open-Ended Price Terms Were Not Valid or Enforceable.

The Agreement, which did not specify price terms, cannot be used as a basis to justify the price overcharged in October 2013 for the restoration services. UHP Br. at 30-34. RD-Plural admits there was an open price term for the mitigation and the restoration work, and insists that UHP be forced to pay whatever amount RD-Plural deemed appropriate. RD Br. at 42-44. That contravenes controlling Maryland law, which requires the inclusion of price terms for a contract to be enforceable.

RD-Plural attempts to defend the Agreement's open price terms by simply denying Maryland law, wrongly claiming that "UHP has not presented any authority for the proposition that a contract is unenforceable simply because it does not specify its end price."[1] RD Br. at 46. This assertion is contravened by UHP's Brief, where UHP **did** cite binding Maryland authority to that effect.[2] *See* UHP Br. at 30-31.

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[1] None of the other contractual pricing arrangements that RD-Plural claims justify open price terms – *i.e.*, "cost plus," "a time and material contract with an upset or guaranteed price," or sale of materials and supplies at an agreed price – involve the type of completely open-ended terms at issue here. *See Mayor & City Council of Ocean City v. Purnell-Jarvis, Ltd.*, 586 A.2d 816, 820 n.5 (Md. Ct. Spec. App. 1991) (cost-plus contract involves "the contractor agree[ing] to build the structure for the cost of the materials and labor, *plus an agreed percentage of those costs* as profit") (emphasis added). And *Steiner Constr. Co. v. Comptroller*, 121 A.2d 838 (Md. 1956), addresses tax issues, and says nothing about contract enforceability.

[2] RD-Plural cites a few state court cases for the proposition that "[a]n open price term does not necessarily prevent a contract from being formed or enforceable." RD Br. at 45-46 (citing *ID Elec. Inc. v. Gillman*, 402 P 3d 802 (Utah 2017); *Goodman v. Physical Res. Eng'g, Inc*., 270 P.3d 852 (Ariz. Ct. App. 2011); *MBH Inc. v John*

Maryland law is clear: all *material* terms in a contract must be defined, and price – which is undefined in the Agreement – is a material term. *See Falls Garden Condo. Ass'n, Inc. v. Falls Homeowners Ass'n, Inc.*, 107 A.3d 1183, 1191 (Md. 2015); *Advance Telecom Process LLC v. DSFederal, Inc.*, 119 A.3d 175, 186 and n.6 (Md. Ct. Spec. App. 2015) (agreement not enforceable because it "did not set forth the material terms that the contemplated subcontract would contain," including the services to be performed and price); *Goldstein v. Miles*, 859 A.2d 313, 329 (Md. Ct. Spec. App. 2004) (defendant's promises "were not enforceable" because they "did not contain any material terms of the sale" including price). Thus, under Maryland law, the "blank-check" price term in the Agreement cannot be used as a basis to justify the prices charged to UHP for the restoration work.[3] *See* UHP Br. at 33-34.

RD-Plural's other arguments regarding enforceability (RD Br. at 43-46) are unavailing. First, RD-Plural claims that UHP agreed to an open-ended and limitless price because the Agreement states that "I understand it is impractical to give an accurate quote for services before completion." RD Br. at 43. But as UHP has

Otte Oil & Propane Inc., No. A-00-287, 2001 WL 880683 (Neb. Ct. App. Aug. 7, 2001); *Fischer v CTMI, LLC*, 479 S.W. 3d 231 (Tex. 2016). These cases do not apply Maryland law, and conflict with Maryland law on undefined price terms.

[3] RD-Plural claims that UHP "contends that it has no obligation to pay for the work and materials that it received – a fully restored building[.]" RD Br. at 43-44. To the contrary, UHP paid over $530,000 for RD-Singular's services, and did not receive a "fully restored building."

explained, that clause referred to the mitigation phase, not the restoration phase, because once the mitigation work (extraction of water and waste) was complete, the scope and costs for restoration repairs were reasonably ascertainable prior to commencement of the restoration work. UHP Br. at 32-33. Indeed, that it precisely what the F.B. Davis estimate from Traveler's did. App. at 320:5-12; UHP Br. at 18.

RD-Plural does not address that point, nor does it refute Mr. Darakhshan's *own testimony* that once the mitigation phase ended, it was "a little bit easier" to estimate costs for the restoration phase compared to the mitigation phase, because at that point, "we are into the project, we know what was taken out" of the building (App. at 223:19-23), and by extension what had to be replaced. Even the Superior Court, in finding against UHP, suggested that "in jobs like this . . . the full scope of work" could become "apparent" once the work had begun. App. at 436:13-15. The notion that the restoration costs were indeterminable is simply wrong.

Second, RD-Plural distorts Maryland law by claiming that in the Maryland Court of Appeals' decision in *Falls Garden*, "the Court determined that an enforceable contract existed even though it contemplated future resolution of open terms[]" in a letter of intent regarding parking spaces. RD Br. at 44. To the contrary, the court held that "[t]he Letter of Intent in issue is inclusive and definite as to all material terms" – including the length of lease, the number of parking spaces, the location, and the price. *Falls Garden Condo.*, 107 A.3d at 1192-93. The only

contingency was the need for approval by one of the parties' board of directors. That was not sufficiently material so as to render the letter of intent unenforceable. *Id.* at 1193. Thus, *Falls Garden* does not support the result that RD-Plural seeks here.

Third, RD-Plural compares cases using UCC "gap fillers" to the use of Xactimate software to calculate the October 2013 final invoice. RD Br. at 45. But Maryland law holds that "[t]he UCC does not apply to service contracts or to materials used or supplied in connection with the performance of such contracts."[4] *DeGroft v. Lancaster Silo Co., Inc.*, 527 A.2d 1316, 1321 (Md. Ct. Spec. App. 1987). Here, the predominant purpose of the work done at the church was to provide services – *i.e.*, mitigation of the flood damage and restoration.[5] RD-Plural's reliance on *Limberg v. Sanford Med. Ctr. Fargo*, 881 N.W.2d 658 (N.D. 2016) to justify the use of gap-filler provisions is unavailing, because in that case, the price terms for the hospital services contract at issue "were controlled by language within the contract" that obligated patients "to pay 'all charges related to services provided by [the

[4] Maryland law is clear that construction contracts such as the one in this case are not within the UCC's ambit, because their "main purpose" is to provide services, not goods. *See Chlan v. KDI Sylvan Pools, Inc.*, 452 A.2d 1259, 1262 (Md. Ct. Spec. App. 1982) (UCC did not apply to contract for construction of in-ground pool; *Coakley & Williams, Inc. v. Shatterproof Glass Corp.*, 778 F.2d 196 (4th Cir. 1985) (services contract for installation of glass and therefore not subject to UCC).

[5] Because the UCC does not apply, *Oglebay Norton Co. v. Armco*, 556 N.E.2d 515 (Ohio 1990) is not controlling. That case relied on Ohio's version of the UCC in holding that an open price term could be filled with a "reasonable price."

hospital],' according to [the hospital]'s payment guidelines." 881 N.W.2d at 661. No reference to the Xactimate estimates can be found in the Agreement here.

RD-Plural argues that the Xactimate estimates are reliable and even favorably quotes UHP's previous briefing below on that issue, in an effort to prop up its own use of Xactimate for the October 2013 invoice. RD Br. at 24-25 (quoting App. at 394). But RD-Plural omits the context of UHP's argument, as well as a crucial fact: the F.B. Davis restoration estimate – which RD-Plural repeatedly denigrates – also relied on Xactimate. App. at 321:13 – 322:13. As UHP explained in the same brief that RD-Plural selectively quotes, there were significant differences between the two estimates: the F.B. Davis estimate was done in August 2012, just prior to the restoration work being performed, while the October 2013 Flood Doctor invoice was sent seven months after the work was finished and was filled with "bid items" that had the effect of bypassing or defeating the fair market value costs that serve as the foundation of the Xactimate calculus. *See* App. at 389, 395-397. The October 2013 invoice therefore did not reflect a reliable use of "gap-fillers" as RD-Plural contends.

In short, RD-Plural's attempt to reimagine Maryland law on contract enforceability is meritless. The open price terms in the Agreement do not constitute UHP's assent to a virtually unlimited price for restoration of its Baltimore church. The parties had to agree separately on those price terms – which they did when RD-Singular performed the restoration work based on an insurance estimate.

II. The Insurance Estimate Was Binding on the Parties Because RD-Plural Performed the Work Without Protest or a Counter-Offer.

As for the price terms for the restoration work – *i.e.*, the estimate for $282,504.36 – RD-Plural misrepresents UHP's argument. First, the parties established a course of dealing whereby the price for the mitigation services was based on an estimate approved by Traveler's for approximately $165,000. UHP Br. at 17. Even the Superior Court, which ruled in RD-Plural's favor, recognized that as an "undisputed" fact. App. at 438:2-5 ("It's undisputed that the eventual price [for the mitigation phase] that was negotiated with the plaintiff's assistance with Traveler's was a hundred and sixty-five thousand dollars approximately[]").

RD-Plural attempts to distract from this undisputed fact by claiming that UHP's course-of-dealing argument rests on an earlier and much lower estimate from Traveler's for the mitigation services (*see, e.g.*, RD Br. at 7, 23, 46, 47). But that "$50,000-$75,000" estimate has never been the basis for UHP's argument, nor has UHP even mentioned it. To be clear, the parties exchanged price amounts for the mitigation services, and the insurance company's proposed price (approximately $165,000) was accepted by RD-Singular. RD-Plural even admits to the negotiations with the insurance company during the mitigation phase of the project. *See* RD Br. at 24-25. That back-and forth negotiation set the stage for the later estimate for the restoration services to be accepted by RD-Singular through performance.

RD-Plural also ignores that RD-Singular received the estimate and *performed the work*, thus constituting acceptance of the estimate under Maryland law.[6] *See* UHP Br. at 35-37. RD-Plural claims that the insurance adjustor James Hanrahan "testified" that there was no agreement by the parties regarding the estimate and points to a May 2014 email exchange in which Hanrahan says he received no written correspondence from RD-Singular accepting the F.B. Davis estimate. RD Br. at 9 (citing App. at 1047-1048). But that misses the point, because given that RD-Singular did not protest the estimate and *performed* the restoration work, there was otherwise no need for an express verbal acceptance of the estimate, as RD-Plural contends.[7] RD Br. at 48. In any event, Hanrahan does not indicate in the email that there was no agreement between UHP and RD-Plural. In fact the email *confirms* that RD-Plural never protested the estimate after receiving it. *See* App. at 1047 ("If there is a disagreement on scope or price, the contractor would notify the insured, and the insurance company. I was never notified of any differences.").

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[6] RD-Plural argues that UHP does not contest the Superior Court's ruling regarding RD-Plural's prices. RD Br. at 4, 43. Not so; by arguing that the insurers' estimate is the price the parties agreed to (UHP Br. at 34-39), UHP challenges that ruling.

[7] RD-Plural does not cite to any portion of Hanrahan's testimony where he said there was no agreement between *UHP* and RD-Singular. Instead, RD-Plural refers to Hanrahan's testimony where he stated that there was no agreement between RD-Singular and *Traveler's*. See RD-Plural Br. at 29, 48 (citing App. at 349-350). That also is irrelevant, because the basis for the agreement was RD-Singular's acceptance of the estimate through performance. And Hanrahan states in the same testimony that he "couldn't testify to what anyone else agreed to." App. at 350:1-2.

RD-Plural also insists that "silence and inaction upon receipt of an offer do not constitute acceptance of the offer." RD Br. at 48. But Mr. Darakhshan was not "silent" as to the insurance estimate; he accepted it by performing the work. Further, the work continued for months, through February 2013, *without any mention of price by Mr. Darakhshan*, and he waited an additional eight months to deliver the final invoice. In short, the F.B. Davis estimate, and not the final invoice, represented the agreed-upon amount for the restoration work set forth in the estimate.

III. RD-Plural Is Not RD-Singular's Successor and Thus Had No Standing

The Superior Court erred by holding that RD-Plural was RD-Singular's successor. RD-Plural does not challenge that it has the burden to establish standing. *See* UHP Br. at 40. It largely relies on Frank Darakhshan's self-serving testimony to show its "successor" status. But the fact remains: there is no direct documentary evidence that RD-Plural "succeeded" to anything. The relevant Virginia State Corporation Commission records do not list RD-Plural as a successor, and there is no document transferring the interests of RD-Singular to RD-Plural. Given this lack of corroboration, RD-Plural's claim that "[t]he online records from the VSCC were entirely consistent with and corroborated the testimony of Frank Darakhshan on all points" (RD Br. at 35) is an exaggeration at best.

Moreover, contemporaneous records show that RD-Plural never asserted its "rights" until March 2017 – four years after RD-Singular completed its work on the

project. Meanwhile, "Flood Doctor" and "Restoration Doctor Inc." claimed those rights in the interim. RD-Plural attempts to explain away these instances as being mere "mistakes" or caused by technology issues. *See, e.g.*, RD Br. at 16, 32, 37. But RD-Plural does not, and cannot, explain why (1) Frank Darakhshan, *in a handwritten note*, directed UHP to make a payment to "Flood Doctor Inc." (App. at 266:14-17; App. at 937); (2) Paragon Law Firm sent a demand letter to UHP on behalf of Flood Doctor Inc. demanding payment to Flood Doctor Inc. (App. at 1204-1207); (3) the Plaintiff referred to itself as "Restoration Doctor, Inc." throughout the initial discovery period; (App. at 1330-1336); (4) the Amended Complaint also named "Restoration Doctor Inc." as the plaintiff (App. at 1220-1226); or even why (5) it took four years for RD-Plural to assert its "rights." *See* UHP Br. at 41-43.

Left without corroborating documentary evidence – and in the face of contravening evidence showing that RD-Plural did not possess any rights – RD-Plural attempts to bolster the weight of Mr. Darakhshan's self-serving testimony by citing case law relying on certain factors (*e.g.*, whether RD-Plural used the same employees and the same equipment, worked on the same types of projects, and used the same website and bank account) that purportedly "prove" RD-Plural's successorship status. *See* RD Br. at 32-34. But as UHP explained in its Brief, these same cases, also relied upon by the Superior Court, either dealt with successor *liability* (not whether a corporate plaintiff may sue to enforce the debts of its

predecessor) or are distinguishable on their facts.[8] *See* UHP Br. at 44 and n.22. Moreover, RD-Plural could have provided documentary evidence to support some of these factors but chose not to do so. There was no documentary evidence before the court that RD-Singular's employees "were the same as RD-Plural's employees" or that RD-Plural used "the same insurance as RD-Singular, and the same bank accounts as had been used by RD-Singular".[9] RD Br. at 34. As for RD-Plural's claim that the entities shared tax ID numbers, RD-Plural only produced documentary evidence as to its *own* tax ID number – not RD Singular's. *See* App. at 657-659.

Nor can RD-Plural argue that it acquired the rights under the Agreement through an "equitable assignment" from RD-Singular. *See* RD Br. at 35 n.16. Under Maryland law, an equitable assignment "gives the assignee a title which, although not cognizable at law, equity will recognize and protect[.]" *Montgomery Cty. v. May Dep't Stores Co.*, 721 A.2d 249, 259 (Md. 1998). However, there are two conditions: (1) "[t]here must undoubtedly be a purpose to pass a present interest[,]" *id.*, and (2) those against whom the assignment is enforced must have "knowledge or notice of

[8] The only new case that RD-Plural cites on this point, *Citizens Suburban Co. v. Rosemont Dev. Co.,* 244 Cal. App. 2d 666, 675, 53 Cal. Rptr. 551, 557 (Dist. Ct. App. 1966), is quoted out of context. *See* RD Br. at 33. There, the court noted that "[a] clause binding 'successors and assigns' is designed to eliminate the necessity for an express assumption of burdens." No such clause is at issue in this case.

[9] The then-named Plaintiff, Restoration Doctor Inc., refused to produce bank records during discovery, claiming that it "no longer has access to the records requested" because it "closed the bank account it used at the time." App. at 1333-1334.

the existence of the assignment" when their rights were obtained. *Baltimore Am. Ins. Co. of New York v. Ulman*, 170 A. 202, 206 (Md. 1934). Here, neither condition is met. There was no testimony at the evidentiary hearing that RD-Singular intended to "assign" its rights under the Agreement to RD-Plural, and in fact, Flood Doctor claimed the rights under the Agreement well after RD-Plural supposedly held them. And as Mr. Darakhshan admitted, he never informed UHP as to any "assignment" to RD-Plural. App. 606:4-9; 609:13 – 610:7. Further, Apostle Thompson testified that UHP had no knowledge of any alleged assignment. *Id.* at 669:15 – 670:1.

Finally, RD-Plural claims that "UHP laid no foundation to establish that Virginia requires limited liability companies to identify themselves as successors, or that there is any requirement that RD Plural was under any legal or contractual obligation to have such a writing."[10] RD Br. at 36. Once again, this ignores that it was RD-Plural's burden to establish that it was the successor to RD-Singular and thus had standing to sue. Even setting aside that fact, there was abundant evidence in the record disproving that RD-Plural succeeded to anything. *See supra* at 9-10.

[10] RD-Plural frames UHP's argument as "because RD Plural's VSCC identification number was not the same as RD Singular's identification number, RD Plural cannot be RD Singular's successor." RD Br. at 35-36. That is not what UHP argues. The point is that there were two entities on remand claiming to be the Plaintiff – "Restoration Doctors LLC" (ID# S8617278) and "Restoration Doc LLC" (ID# S4543825). Their separate ID numbers demonstrate they are separate entities. UHP Br. at 45 n.25. RD-Plural claims that the VSCC does not assign unique identification numbers to corporate entities, but the the relevant statute speaks for itself. *See* Va. Code §§ 13.1-1050.A.2; 13.1-1050.4.B.1; 13.1-1052.A.2; 13.1-1056.A.1.

IV. The Statute of Limitations on RD-Plural's Claims Has Run.

As discussed in UHP's opening brief, RD-Plural's suit is barred by the statute of limitations because both the Complaint and Amended Complaint were filed by a non-entity (Restoration Doctor Inc.) and were therefore void *ab initio*, leaving nothing to which RD-Plural's "substitution" of itself as a party could relate back. UHP Br. at 46-48. RD-Plural counters with three arguments: (1) RD-Plural's substitution is supposedly valid because the rules allow for relation back in these circumstances; (2) UHP acknowledged the debt, thus suspending the limitations period, and (3) UHP waived this argument. All three arguments fail.

A. RD-Plural Ignores that the Complaint and Amended Complaint Were Void *Ab Initio*, Leaving Nothing to Relate Back to.

The "relate back" principle under Superior Court Rule 17(a) cannot save RD-Plural's suit, because both Complaints were filed by a non-entity and were therefore nullities. RD-Plural argues that it should not be penalized for what it says was an "honest mistake" in naming a non-existent entity as the plaintiff. RD Br. at 39. As a preliminary matter, it is true that that Superior Court Rule 17(a) and Rule 15(c), taken together, liberally allow for relation back of a complaint when the wrong person or entity has been named, and the real party in interest is subsequently substituted. *Zuurbier v. MedStar Health, Inc.*, 895 A.2d 905, 908 (D.C. 2006). But neither Rule speaks to whether relation back is permitted when the named party in

the complaint *is a non-entity*, thus rendering the initial complaint a nullity.[11] RD-Plural sidesteps this issue, treating the substitution as simply involving one valid corporate entity for another, rather than the void *ab initio* filing of a complaint by a non-entity in the first instance. Previous jurisprudence strongly suggests that this distinction is critical, and prohibits the "relate back" effect that RD-Plural seeks here.

RD-Plural relies on this Court's ruling in *Strother v. Dist. of Columbia*, 372 A.2d 1291 (D.C. 1977), arguing that if the defendant was on notice during the limitations period that the plaintiff sought to bring a claim, "then there is no cognizable prejudice" if plaintiff is permitted to amend the complaint.[12] RD Br. at 39. But as UHP has noted, *Strother* involved different circumstances from those at issue here. UHP Br. at 47 n.26. In *Strother*, the amended complaint was permitted to relate back to the original because the plaintiff had originally sued in a different capacity – individually and *on behalf* of his father's estate – but later amended to sue

[11] The only instance where RD-Plural addresses this issue is a vague reference to *Martinez v. Segovia*, 62 P.3d 331 (N.M. 2002), and its sweeping claim that "[m]odern views of pleading and of the capacity to sue and be sued have replaced archaic nullity jurisprudence, particularly where the party asserting the nullity bar is not prejudiced." RD Br. at 39 (citing 62 P.3d at 334). Setting aside that *Martinez* is a non-binding case from a New Mexico state court, there is a key distinction: there, the original named plaintiff, a decedent, had been a real legal person and at one point possessed rights that could be vindicated by a subsequent party in interest. Here, Restoration Doctor Inc. never existed and consequently never had any "rights."

[12] UHP is prejudiced by being forced to overpay an entity having no rights to payment in the first instance for services not even rendered by that entity.

as administrator of the estate. To be clear, the plaintiff had the capacity to sue in *either* role, but was required to sue as administrator under the relevant statute. 372 A.2d at 1294-95. Here, Restoration Doctor Inc. had no capacity to sue at all, because it was nonexistent when both the Complaint and the Amended Complaint were filed.

The holding in *Strother* was therefore limited to the particular question before the Court in that case and did not address the issue here. As this Court explained in *Hartford Accident & Indem. Co. v. Dist. of Columbia*, 441 A.2d 969 (D.C. 1982), the decision in *Strother* only "resolved the narrow issue of whether an amendment seeking to change the legal capacity in which the plaintiff brings suit relates back to the date of the original filing."[13] 441 A.2d at 972 n.5. Consequently, it did not settle whether the substitution of a party can relate back when the original complaint is filed by a non-existent entity and is therefore a nullity.

However, that issue was addressed in *Int'l Tours & Travel, Inc. v. Khalil*, 491 A.2d 1149 (D.C. 1985), when this Court suggested that *Strother* does not apply when the original complaint is a nullity. In *Int'l Tours*, the Court held that the original complaint, filed by a company's President and CEO (Wadhwa) without the

[13] The other cases cited by RD-Plural also did not involve a non-entity filing the complaint. *See Francis v. Recycling Sols., Inc.*, 695 A.2d 63, 76 (D.C. 1997) (plaintiff sued individually and court denied motion to substitute another plaintiff); *U.S. ex rel. Wulff v. CMA Inc.*, 890 F.2d 1070, 1075 (9th Cir. 1989) (plaintiff sued as real person in both complaints but court denied relation back); *Hess v. Eddy*, 689 F.2d 977 (11th Cir. 1982) (plaintiff initially sued individually and as administratix of husband's estate but was not yet administratix when first complaint was filed).

company's authorization, *was* valid (and that an amended complaint could relate back) because the company's board of directors retroactively authorized the lawsuit. Therefore, the Court held, "[w]e cannot conclude as a matter of law that Wadhwa's filing suit on [the company's] behalf was a nullity" because it was "ratified by [the company's] directors." 491 A.2d at 1154. "*That being the case*," this Court explained, "the rule of *Strother* applies." *Id.* (emphasis added). Put differently, had the complaint been a nullity, *Strother*'s relation-back rule would not have applied.

The Maryland Court of Appeals' ruling in *Stein v. Smith*, 751 A.2d 504, 506 (Md. 2000), is also informative on this issue. In *Stein*, after the relevant statute of limitations expired, the plaintiff amended its complaint to substitute another party in place of a defunct corporation. The Court held that "[b]ecause the original complaint was filed by a nonentity and was a nullity, there was nothing to which the amended complaint could relate back." 751 A.2d at 506. That same principle should govern here, and even moreso given that Restoration Doctor Inc. never existed.

RD-Plural complains that *Stein* does not apply because it was decided under Maryland's corporations law.[14] RD Br. at 40. But even the law of Virginia, where RD-Plural is incorporated, holds that "'when a party without standing brings a legal

[14] RD-Plural argues that Maryland law "is not applicable to determine capacity" under Rule 17(b). RD Br. at 40. But it is undisputed that Restoration Doctor, Inc. (a nonexistent entity and the original named plaintiff) had no capacity to sue. Whether *RD-Plural* had "capacity" to bring suit is irrelevant to whether its substitution as a party could relate back to a complaint filed by a non-existent entity.

action, the action so instituted is, in effect, a legal nullity,' and thus cannot toll the statute of limitations." *Casey v. Merck & Co., Inc.*, 722 S.E.2d 842, 846 (Va. 2012) (citing *Harmon v. Sadjadi*, 639 S.E.2d 294, 299 (Va. 2007); *Braddock, L.C. v. Bd. of Supervisors*, 601 S.E.2d 552, 555 (Va. 2004)). Here, it is undisputed that the non-entity "Restoration Doctor Inc." did not exist and therefore had no standing.

In short, both Complaints were filed by non-entities and were void *ab initio*, leaving nothing for RD-Plural's substitution to relate back to. Without the benefit of relation back, the statute of limitations has run on RD-Plural's claims.

B. UHP Never "Acknowledged" the Debt.

Seeking to evade the statute of limitations issue entirely, RD-Plural argues that "acknowledgment of a debt barred by limitations removes the bar to pursuing the remedy[]" and that the limitations period did not expire because UHP purportedly acknowledged a debt to RD-Plural. RD Br. at 37. It is true that under Maryland law, acknowledgment of a debt "both tolls the running of limitations and establishes the date of the acknowledgment as the date from which the statute will now run." *Jenkins v. Karlton*, 620 A.2d 894, 905 (Md. 1993). However, "[t]he acknowledgment must be a clear, distinct, and unqualified admission." *Potterton v. Ryland Grp., Inc.*, 424 A.2d 761, 764 (Md. 1981) (citation omitted); *see also Hall v. Barlow*, 272 A.2d 386, 391 (Md. 1971) (same). RD-Plural argues that "[a]n acknowledgement need not expressly admit the debt, it need only be consistent with

the existence of the debt." RD Br. at 37. But *Doughty v Bayne*, 160 A.2d 609 (Md. 1960), the case RD-Plural cites, says no such thing; it plainly states that "the acknowledgment must be a clear, distinct, and unqualified admission." *Doughty*, 160 A.2d at 611. Here, UHP made no admission as to any alleged debt, much less one that was "clear, distinct, and unqualified."

RD-Plural points to the check that UHP sent to "Restoration Doctor Inc." in September 2016 for $150,970.19 (RD Br. at 38), but that check did not carry with it any admission – unqualified or otherwise – that UHP owed additional sums to *RD-Plural*. Indeed, one of the fundamental bases for this apppeal is that UHP does not owe what RD-Plural claims it does. Further, RD-Plural cannot rely upon emails between counsel or pretrial deposition testimony. None of these constitutes a "clear, distinct, and unqualified" acknowledgment of anything, and in any event, such communications cannot be found in either the trial record or the appeal record – and RD-Plural provides no citation. Because the purported debt was never acknowledged by UHP, the statute of limitations continued to run.

C. UHP Did Not Waive Its Statute of Limitations Defense.

RD-Plural's second possible escape hatch from its statute of limitations problem is to argue that UHP waived it by not raising it in the first appeal. To the contrary, just as it had done in the trial court, UHP clearly raised the statute of limitations issue in its opening brief in the first appeal. In that brief, UHP argued:

> Because the initial Complaint was filed by a non-entity, it was void *ab initio*, leaving nothing to "relate back" to when the Amended Complaint was filed (again by a non-entity). Even [assuming that RD-Plural] properly substituted itself as plaintiff in March 2017 (which it did not), by that time the three-year statute of limitations had run on all claims.

App. at 460 (citing Appendix from first appeal, found at App. 65-69 in the present appeal). On that basis, UHP requested that this Court "vacate the judgment below on those separate grounds as well." App. at 460. In other words, UHP raised the very same argument and requested the very same relief that it requests here.

RD-Plural grudgingly admits that the issue appears in UHP's previous briefing. RD Br. at 41. Nevertheless, it insists that it "was never developed by UHP during the first appeal" – whatever that means. *Id.* RD-Plural makes no attempt to explain what level of "development" would suffice. Nor do any of the cases it cites lend any support for a waiver. In all of those cases, the issue deemed waived *was not raised at all* by the waiving party. *See Parker v. United States*, 254 A.3d 1138, 1142-45 (D.C. 2021); *United States v. Henry*, 472 F.3d 910, 913-14 (D.C. Cir. 2007); *Laffey v. Northwest Airlines, Inc.*, 740 F.2d 1071, 1089-90 (D.C. Cir. 1984).

Moreover, *United States v. Kunzman*, 54 F.3d 1522 (10th Cir. 1995), which RD-Plural cites for its claim of waiver, involved far different circumstances. In *Kunzman*, the appellant simply listed issues "without supporting argument," stated that "these issues are raised in order to preserve them on appeal," and referred the court to the pleadings and to the record. 54 F.3d at 1534. UHP made the same

argument in the first appeal as it does here regarding the statute of limitations and asked for the same relief. That precludes any "waiver" regarding this issue.

V. The Superior Court Erred in Its Calculation of Damages.

Finally, in defending the erroneous crediting of UHP's September 13, 2016 payment of $150,970.19 to interest rather than principal, RD-Plural points to its damages presentation at trial, claiming that it "set forth its methodology for calculating damages in precise detail[.]" RD Br. at 49. This misses the point. RD-Plural had *already* admitted in its Amended Complaint that the payment should have been credited to principal, as it left "a remaining balance due in the amount of $511,796.83." App. at 46. RD-Plural requested this "outstanding balance" *plus interest*. App. at 47. This was a "judicial admission of fact" that bound RD-Plural throughout the proceeding. *El Paso Nat. Gas Co. v. United States*, 750 F.3d 863, 876 (D.C. Cir. 2014); *Kreuzer v. George Washington Univ.*, 896 A.2d 238, 242 (D.C. 2006). RD-Plural does not address this argument and therefore concedes it.[15]

CONCLUSION

The Superior Court's August 23, 2017 Judgment, as well as its August 16, 2021 Order on Remand and Order Re-Entering Judgment, should be reversed and vacated, with instructions to the Superior Court to enter judgment in favor of UHP.

[15] RD-Plural's "waiver" argument falls flat, given that RD-Plural admits that UHP objected as to payments that were made. RD Br. at 50 (citing App. at 438). UHP also provided a trial presentation countering RD-Plural's numbers. App. at 404-409.

Respectfully submitted,

Dated: April 28, 2022

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Court of Appeals

REDACTION CERTIFICATE DISCLOSURE FORM

Pursuant to Administrative Order No. M-274-21 (filed June 17, 2021), this certificate must be filed in conjunction with all briefs submitted in all cases designated with a "CV" docketing number to include Civil I, Collections, Contracts, General Civil, Landlord and Tenant, Liens, Malpractice, Merit Personnel, Other Civil, Property, Real Property, Torts and Vehicle Cases.

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21 and Super. Ct. Civ. R. 5.2, and removed the following information from my brief:

1. All information listed in Super. Ct. Civ. R. 5.2(a); including:

   - An individual's social-security number
   - Taxpayer-identification number
   - Driver's license or non-driver's' license identification card number
   - Birth date
   - The name of an individual known to be a minor
   - Financial account numbers, except that a party or nonparty making the filing may include the following:

     (1) the acronym "SS#" where the individual's social-security number would have been included;
     (2) the acronym "TID#" where the individual's taxpayer-identification number would have been included;
     (3) the acronym "DL#" or "NDL#" where the individual's driver's license or non-driver's license identification card number would have been included;
     (4) the year of the individual's birth;
     (5) the minor's initials; and
     (6) the last four digits of the financial-account number.

2. Any information revealing the identity of an individual receiving mental-health services.

3. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.

4. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

5. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

6. Any other information required by law to be kept confidential or protected from public disclosure.

/s/ Paul D. Schmitt
Signature

21-CV-640
Case Number(s)

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of April 2022, I caused to be served a true copy of the foregoing Reply Brief for Appellant United House of Prayer for All People of the Church on the Rock of the Apostolic Faith, via first class mail and electronic mail on:

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