

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF IOWA  
CENTRAL DIVISION**

|  |   |                      |
|--|---|----------------------|
| Pella Corporation,                                 | ) |                      |
|  | ) | Case No. 4:19-cv-209 |
| Plaintiff,   | ) |                      |
| v.   | ) |                      |
|  | ) |                      |
| Apogee Enterprises, Inc., and EFCO<br>Corporation, | ) | <b>COMPLAINT</b>     |
|  | ) |                      |
| Defendants.  | ) |                      |

Plaintiff Pella Corporation, for its complaint against Apogee Enterprises, Inc. and EFCO Corporation, states and alleges as follows:

**Nature of the Case**

1. Pella Corporation (“Pella”) brings this action to seek damages and specific performance relief for breaches of an agreement pursuant to which Pella sold the shares of its wholly-owned subsidiary, EFCO Corporation (“EFCO”), to Apogee Enterprises, Inc. (“Apogee”).

2. Despite having purchased and taken control of EFCO over two years ago, on June 12, 2017, Apogee has refused to make post-closing annual purchase price payments due under the parties’ agreement. Apogee has also failed to fulfill its agreement to fully remove Pella from obligations as indemnitor for construction bonds and other obligations of EFCO.

3. Pella seeks damages, *inter alia*, for (1) the post-closing purchase price payments that Apogee is obligated but has failed to make; and (2) for specific performance directing Apogee to fulfill its obligations to remove Pella from such indemnity and other obligations.

**Parties**

4. Pella Corporation is an Iowa corporation with its principal place of business in Pella, Iowa.

5. On information and belief, Apogee Enterprises, Inc. is a Minnesota corporation with its principal place of business in Minneapolis, Minnesota.

6. On information and belief, EFCO Corporation is a Missouri corporation with its principal place of business in Monett, Missouri.

### **Jurisdiction and Venue**

7. This Court has subject-matter jurisdiction over this case under 28 U.S.C. § 1332 because complete diversity of citizenship exists between the parties and the amount in controversy exceeds \$75,000, exclusive of interest and costs.

8. Venue is appropriate in this forum under 28 U.S.C. § 1391 because a substantial part of the events giving rise to the claims occurred in this judicial district. Additionally, under the Agreement, Pella, Apogee, and EFCO agreed to irrevocably submit to the exclusive jurisdiction of any federal court sitting in the State of Iowa.

### **Factual Allegations**

#### **A. EFCO Wins the Work for the Wanda Project.**

9. At the time of the initial events that gave rise to this case, EFCO was a subsidiary of Pella, and was engaged in the business of manufacturing, selling, and installing aluminum extrusions, windows, window and curtain walls, and storefront and entry systems for non-residential or multi-family structures.

10. In the Summer of 2015, EFCO submitted initial, and thereafter updated, bids for work on the construction of a residential high-rise building known as the Wanda Vista Tower Project, at or near 363 East Wacker Drive in Chicago, Illinois (the “Wanda Project”).

11. The James McHugh Construction Co. (“McHugh”) is the general contractor for the Wanda Project.

12. McHugh awarded the work for the curtain walls for the Wanda Project to EFCO under a subcontract dated October 3, 2016 (the “Wanda Subcontract”). The Wanda Project remains under construction.

**B. EFCO and Pella Sign a General Contract of Indemnity with Travelers.**

13. On January 26, 2016, EFCO, Pella, and Travelers Casualty and Surety Company of America, St. Paul Fire and Marine Insurance Company (“Travelers”), executed a General Contract of Indemnity (the “GCI”). Travelers, EFCO, and Pella entered into the GCI so that EFCO could obtain bonds from Travelers for EFCO’s work, including on projects like the Wanda Project.

14. Under the GCI, EFCO and Pella agreed to indemnify Travelers against any loss occasioned by the issuance of bonds on behalf of EFCO. Under the GCI, EFCO and Pella are jointly and severally liable to Travelers with respect to the bonds and related matters addressed in the GCI. This includes bonds related to the Wanda Project (as described below), as well as other bonds provided by Travelers for EFCO’s benefit on other projects (the “Additional Bonds”).

15. With respect to the obligations owed to Travelers, the GCI made EFCO and Pella jointly and severally liable to Travelers for payments and related performance obligations. The payments for which they were jointly and severally liable to Travelers included all premiums and required EFCO and Pella, among other things, “[t]o deposit with [Travelers], on demand, the amount of any reserve against such Loss which [Travelers] is required, or deems it prudent to establish whether on account of an actual liability or one which is, or may be, asserted against it and whether or not any payment for such Loss has been made.” Promises and Agreements, §§ 1 & 2(b). The GCI covers the Wanda Bond and the Additional Bonds.

**C. EFCO Signs the Wanda Bond, Assuming Primary Responsibility for All Obligations with Respect to the Wanda Project and the Wanda Bond.**

16. On February 1, 2017, Travelers, as surety, entered into a performance bond and a payment bond (bond number 106661205), in the amount of \$68,598,527, regarding the Wanda Project (collectively the “Wanda Bond”). EFCO is the “Principal” under the Wanda Bond. EFCO, as Principal under the Wanda Bond, has primary responsibility for the performance and payment obligations with respect to the Wanda Bond.

17. As part of the conditions for EFCO receiving the Wanda Bond, EFCO agreed to “indemnify and save harmless [McHugh] of and from any and all loss, damage, and expense, including costs and attorney’s fees, which [McHugh] may sustain by reason of failure so to do.”

**D. Apogee Fails to Make Post-Closing Payments Owed to Pella Under the Parties’ Stock Purchase Agreement**

18. On April 28, 2017, Pella, EFCO, and Apogee entered into a Stock Purchase Agreement (the “Agreement”) for Pella’s sale of the outstanding stock of EFCO to Apogee.

19. Pella, EFCO, and Apogee closed the sale on June 12, 2017 (the “Closing Date”). Under the Agreement, Apogee agreed to pay Pella \$2.5 million on each of the one-, two-, and three-year anniversaries of the Closing Date.

20. In the Agreement, Apogee expressly agreed that each of those annual \$2.5 million payments is “non-contingent,” and that Apogee would make such payments “in full as and when due.”

21. Specifically, section 2.1(b) of the Agreement provides that on the one-, two-, and three-year anniversaries of the Closing Date, Apogee will pay Pella \$2.5 million. Apogee agreed to make these payments “regardless of any dispute that may exist with respect to any of the Parties.” § 2.1(b). Apogee further agreed that “such payments under this Section 2.1(b) are non-contingent and [Apogee] will make such payments in full as and when due as stated above.” *Id.*

Apogee also agreed that “in furtherance of the foregoing, such payments under this Section 2.1(b) are not subject to any adjustment, offset, set off right or other reduction by or on behalf of [Apogee] or any of [Apogee]’s Other Indemnified Persons.” *Id.* The full, operative language of Section 2.1(b) of the Agreement is copied here, with emphasis added:

(b) Additionally, by wire transfer of immediately available funds to the account that Seller designates in writing, (1) on or before the date that is one year after the Closing Date, Buyer will pay to Seller the amount of \$2,500,000, (2) on or before the date that is two years after the Closing Date, Buyer will pay to Seller the amount of \$2,500,000 and (3) on or before the date that is three years after the Closing Date, Buyer will pay to Seller the amount of \$2,500,000. **Notwithstanding any other term herein, and without implying any contingency not expressly stated herein for any other payment hereunder, regardless of any dispute that may exist with respect to any of the Parties, Buyer acknowledges and agrees: (A) such payments under this Section 2.1(b) are non-contingent and Buyer will make such payments in full as and when due as stated above; and (B) in furtherance of the foregoing, such payments under this Section 2.1(b) are not subject to any adjustment, offset, set off right or other reduction by or on behalf of Buyer or any of Buyer’s Other Indemnified Persons.**

22. The first payment of \$2.5 million was due on June 12, 2018. Apogee has not made that payment and refuses to do so.

23. The second payment of \$2.5 million was due on June 12, 2019. Apogee has not made that payment and refuses to do so.

24. The third payment of \$2.5 million is due on June 12, 2020. On June 4, 2019, Apogee’s counsel informed Pella’s counsel that Apogee would not be making any future installment payments of \$2.5 million.

25. Apogee has therefore breached its contractual obligations to make the required payments due on June 12, 2018, and June 12, 2019, causing Pella \$5 million in contractual damages to date. Apogee has also anticipatorily breached its obligation to make the last \$2.5

million payment currently due on June 12, 2020, entitling Pella to an additional award of damages in the amount of \$2.5 million.

**E. EFCO And Apogee Fail To Secure The Release Of Pella From The GCI, The Wanda Bond, And The Additional Bonds, As Required By The Agreement**

26. Apogee also agreed, in section 6.2(a) of the Agreement to—at Apogee’s own expense—use commercially reasonable efforts to (1) secure the unconditional release of Pella and its affiliates from all “Seller Collateral,” i.e., letters of credit, bonds, and other such obligations of EFCO, and (2) return to Pella such “Seller Collateral” meaning, in each case, Apogee’s arranging and bearing the cost of, the “placement of any backstop or replacement standby or substitute letter of credit, guaranty, insurance policy, bond or similar instrument or other Contract,” or arranging, and Apogee bearing the cost of, the “placement of any substitute amount as collateral or other guarantee.” The full text of section 6.2(a), with emphasis added, is set forth below:

**6.2 Seller Collateral, Letters of Credit, Bonds and Certain Similar Items.**

(a) **Replacement and Return.** In addition to the matters in Section 6.1, in preparation for Closing and also to the extent not accomplished at Closing then additionally **as soon after Closing as is reasonably practical, at Buyer’s expense** (regardless of whether before, at or after Closing), **Buyer will use its commercially reasonable efforts to** do the following, as applicable based on the form of any item of Seller Collateral, and Seller will use commercially reasonable efforts to cooperate with Buyer with respect to the same:

(1) **secure the unconditional release of Seller and each applicable Affiliate of Seller with respect to all Seller Collateral; and**

(2) **return to Seller all such Seller Collateral (in each case including Buyer arranging, and bearing the cost of, the placement of any backstop or replacement standby or substitute letter of credit, guaranty, insurance policy, bond or similar instrument or other Contract, or Buyer arranging, and bearing the cost of, the placement of any substitute amount as collateral or other guarantee).**

27. The Agreement defines “Seller Collateral” as “any letter of credit or collateral given to the issuer thereof, escrowed or similarly held amount, guaranty, insurance policy, bond or other similar collateral or instrument or other Contract (including any indemnity agreement with any contractor or owner, or any general agreement of indemnity with any surety) that was entered into or given by [Pella] (or any Affiliate of [Pella]) or with respect to which [Pella] (or any Affiliate of [Pella]) is obligated, in each case if with respect to any existing or contingent obligation of [EFCO].” Agreement at § 6.2(c). “Seller Collateral” thus includes the GCI, Wanda Bond, and Additional Bonds. *Id.*, p. 11, § 4.8(c), Schedule 4.8(c).

28. The Agreement required Apogee to begin such actions when the Agreement was entered into on April 28, 2017, and requires Apogee to continue until such actions are complete and Pella is relieved of all related obligations.

29. As EFCO is now a wholly owned subsidiary of Apogee operating under its direction and control, EFCO is bound to take all steps necessary to assist Apogee in effecting its obligations under the Agreement.

30. Further, EFCO is specifically contractually bound to assist in effecting the required release of Pella pursuant to Section 6.6 of the Agreement.

31. To date, neither Apogee nor EFCO complied with their obligations under the Agreement to secure the unconditional release of Pella from the GCI, the Wanda Bond, and the Additional Bonds.

32. Apogee declined to accept a specific offer that Travelers made on February 1, 2018, to swap Apogee for Pella as indemnitor under certain conditions.

33. On May 21, 2018, Pella demanded that EFCO cover the entire letter of credit as required under the GCI and Wanda Bond, because EFCO is the principal and has primary responsibility for the obligations under the Wanda Bond. EFCO failed to do so.

34. On May 21, 2018, Pella also demanded that Apogee provide the letter of credit demanded by Travelers, which is identified in the Agreement as one of the actions Apogee must take to secure the unconditional release of Pella under § 6.2(a)(1) & (2) of the Agreement. Apogee has failed to do so.

35. Since Pella's May 21, 2018 demand letter, Pella's counsel has repeatedly requested that Apogee and EFCO take actions necessary to secure the unconditional release of Pella from the GCI, the Wanda Bond, and the Additional Bonds. Despite this, Apogee has failed to satisfy its obligations under the Agreement.

**COUNT I**  
**BREACH OF CONTRACT**  
(As Against Apogee)

36. Pella realleges and incorporates the foregoing paragraphs as though fully set forth herein.

37. The Agreement is a valid and enforceable contract.

38. Apogee's refusal to make annual post-closing payments due to Pella of \$2.5 million on June 12, 2018, and June 12, 2019, are breaches of Section 2.1(b) of the Agreement.

39. Pella has been damaged by Apogee in connection with those breaches in an amount of at least \$5 million to date, plus pre-judgment interest thereon.

40. In addition, and in the face of a demand from Pella for payment of the now past due \$5 million, Apogee anticipatorily breached the Agreement by stating that it similarly will not pay the third \$2.5 million payment due on or before June 12, 2020. As a result, Pella is entitled to judgment in the additional amount of at least \$2.5 million

41. As a remedy for these breaches, Pella seeks all appropriate relief, including but not limited to \$5 million in contractual damages to date, plus pre-judgment interest thereon, together with an additional award of damages in the amount of at least \$2.5 million for Apogee's anticipatory breach of the payment obligation due on June 12, 2020.

**COUNT II**  
**BREACH OF CONTRACT**  
(as against Apogee and EFCO)

42. Pella realleges and incorporates the foregoing paragraphs as though fully set forth herein

43. Apogee has also breached Section 6.2(a) of the Agreement, which requires Apogee to (with emphasis added):

**[A]t Buyer's expense ... use its commercially reasonable efforts to** do the following, as applicable based on the form of any item of Seller Collateral, and Seller will use commercially reasonable efforts to cooperate with Buyer with respect to the same:

(1) **secure the unconditional release of Seller and each applicable Affiliate of Seller with respect to all Seller Collateral; and**

(2) **return to Seller all such Seller Collateral (in each case including Buyer arranging, and bearing the cost of, the placement of any backstop or replacement standby or substitute letter of credit, guaranty, insurance policy, bond or similar instrument or other Contract, or Buyer arranging, and bearing the cost of, the placement of any substitute amount as collateral or other guarantee).**

44. Schedule 4.8(c) of the Agreement specifically identifies the GCI, the Wanda Bond, and the Additional Bonds as part of the Seller Collateral from which Apogee agreed to use these efforts to secure Pella's unconditional release.

45. Pella has demanded that Apogee take efforts consistent with the Agreement to secure Pella's unconditional release from the GCI, Wanda Bond, and Additional Bonds. For

example, Pella has demanded that Apogee obtain a letter of credit to cover and secure the GCI and Wanda Bond. Pella has demanded that Apogee replace Pella as indemnitor under the indemnity agreement with Travelers.

46. While acknowledging its duty to do so, Apogee has failed to take the required actions necessary to secure Pella's unconditional release from the GCI, the Wanda Bond, and the Additional Bonds, including by refusing to take actions expressly contemplated in the Agreement.

47. Apogee also refused a specific offer that Travelers made on February 1, 2018, to swap Apogee for Pella as indemnitor. Accepting Travelers' offer was required under the agreement to secure the unconditional release of Pella from the GCI, the Wanda Bond, and the Additional Bonds, but Apogee failed to do so.

48. Due to Apogee's refusal to secure Pella's unconditional release from the GCI, the Wanda Bond, and the Additional Bonds, Pella has been and continues to be irreparably harmed.

49. Section 9.3(g) of the Agreement recognizes that the parties may be irreparably damaged if a party breaches the Agreement, and it allows the other party to seek an injunction and other equitable relief (without posting any security) to prevent or stop a breach.

50. As a result, Pella is entitled to an award of specific performance, directing Apogee and EFCO to obtain Pella's release from the above-referenced obligations without further delay and by a date certain, together with any and all other legal or equitable damages or relief to which Pella is entitled resulting from Apogee's and EFCO's breach of this obligation.

**Relief Requested**

WHEREFORE, Pella demands judgment in its favor and against Apogee and EFCO as follows:

- a. An award of \$5 million in contractual damages (to date), plus pre-judgment interest against Apogee;
- b. An order that Apogee has anticipatorily breached its obligation to pay \$2.5 million on or before June 12, 2020, and an additional award of damages in the amount of \$2.5 million against Apogee;
- c. An order of specific performance declaring that Apogee and EFCO must secure Pella's unconditional release from the GCI, the Wanda Bond, and the Additional Bonds, without further delay and by a date certain;
- d. Post-judgment interest under 28 U.S.C. § 1961;
- e. Judgment for costs of this suit and an award of attorney's fees under the terms of the Agreement, which are included in the Agreement's definition of Losses and for which Apogee must indemnify, defend and hold harmless Pella under § 9.2 of the Agreement; and
- f. Any other relief as the Court deems just and equitable.

Respectfully submitted,

Dated: July 12, 2019.

FAEGRE BAKER DANIELS LLP

/s/ Terri L. Combs

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