IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 24-661

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COROTOMAN, INC.,

Petitioner,

v.

CENTRAL WEST VIRGINIA REGIONAL AIRPORT AUTHORITY, INC.,

Respondent.

***Upon Certified Questions from the United States Court of Appeals for the Fourth Circuit*, Case No. 23-1873**

REPLY BRIEF OF PETITIONER COROTOMAN, INC.

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INTRODUCTION

Both sides agree that the gross disproportionality doctrine does or should exist under West Virginia law in a breach of contract case. The parties simply disagree about how that legal doctrine is defined.

As Corotoman explained in its opening brief, how that doctrine is defined is clear: (1) the non-breaching party (Corotoman here) has the burden to establish its cost-to-complete damages; (2) the breaching party (the Airport here) then has the burden to show that those cost-to-complete damages are grossly disproportionate to the alternative measure of diminution in value damages, so that the latter should apply; and (3) if the breaching party fails to establish gross disproportionality by failing to establish its baked-in denominator diminution in value, then the non-breaching party gets the cost-to-complete damages that it proved. It's as simple as that.

Nothing in the Airport's brief contradicts that analysis. First, the Airport simply fails to address the host of cases and treaties defining and applying the doctrine in exactly that way. The Airport just ignores the great weight of authority around the country. Second, the Airport's attempt to redefine the doctrine—so that the denominator is just the initial value of the land and not the diminution in value caused by the breach—does not just contradict all of the authorities cited by Corotoman and even by the Airport itself, but it makes no sense.

More fundamentally, the Airport's brief hinges on a simple claim: that it would be "unfair," "unjust," a "waste," or a "windfall" for Corotoman to receive the cost-to-complete damages that the parties agreed to and that Corotoman proved because the diminution in value is so much less than those damages. The problem with that claim is that there is *no evidence of it*! There is no evidence that awarding the cost-to-complete damages would be unfair, unjust, a waste, or a windfall because there is, undisputedly, no evidence of the alternative measure of diminution in

value caused by the Airport's breach. And the law is clear about what happens when there is no such evidence: the plaintiff gets the cost-to-complete damages that it proved.

Anyhow, this Court need not apply the law to the facts here. Rather, the Court only needs to answer the questions of law certified to it by the Fourth Circuit. And in doing so, the Court should simply define the gross disproportionality doctrine *exactly how it is defined around the country*.

ARGUMENT

I. Most of the Airport's Statement of the Case is fine, but nine of its assertions are irrelevant or unsupported.

The Airport does not dispute the vast majority of Corotoman's Statement of the Case, and most of its own Statement of the Case (Br. at 2–10) repeats Corotoman's recitation of the facts or adds unnecessary detail. Nine specific points merit a response:

First, the Airport asserts that the parties never understood, when they entered into the contract at issue, the significant cost of the contractual overblasting obligation. Br. at 6–7. The federal district court correctly rejected that claim, noting that the Airport had the burden to investigate the cost and related factors before it agreed to the contract and that the contractual overblasting obligation was clear. JA1295–1296 (Vol. VI). In any event, that assertion is irrelevant on appeal because the Airport has not appealed the district court's finding that it breached the contract by failing to perform the overblast. This appeal is only about damages.

Second, the Airport asserts that the land swap "part of the Settlement Agreement required FAA approval…." Br. at 8. To be clear, the Settlement Agreement itself required the land swap, full stop. That obligation was *not* conditioned on FAA approval. JA439 (Vol. IV), JA1322 ¶23 (Vol. VI). The Settlement Agreement also provided that the Airport had to obtain all necessary licenses and governmental approvals. JA444 (Vol. IV). That's why the federal district court

rejected the Airport's argument that it did not breach the swap obligation simply because the FAA didn't approve the swap, JA1295–1296 (Vol. VI), but again that's irrelevant on appeal except to highlight how the Airport blames everyone but itself.

Third, the Airport asserts that it sued its own lawyers "because of their conduct related to the Agreements," not for their failure to obtain FAA approval (Br. at 8 n.6), but the Airport's own crossclaim against its lawyers shows that it sued them for both reasons, JA1323–1324 ¶¶33–41 (Vol. VI).

Fourth, the Airport asserts that Corotoman never returned a certain $250,000 payment and never conveyed the avigation easement, which supposedly was a breach of contract by Corotoman. Br. at 8 & n.7. That assertion conflicts with the Airport's principal claim below: that there was no contract to breach to begin with. And Corotoman was always ready and able to convey that easement. JA1215 (Vol. VI), JA1387 ¶18 (Vol. VII). Anyhow, this argument is entirely irrelevant because it again goes to breach and not damages.[1]

Fifth, the Airport asserts that Corotoman never objected to the fact that the construction plans did not mention the overblasting requirement and did not bring up the overblasting issue until "halfway through" the project. Br. at 8–9. But Corotoman did bring it up, and Corotoman did so before the overblasting could have been performed (which was after the knoll was removed). JA1154–1155 (Vol. VI), JA1299 (Vol. VI), JA1827 (Vol. VIII). In any event, this is just another attempt by the Airport to re-litigate the issue of breach, which is irrelevant on appeal.

Sixth, the Airport asserts that it has paid Corotoman some money but "received nothing in exchange." Br. at 9. That's absurd. The Airport received removal of the knoll on Corotoman's

[1] Furthermore, the $250,000 payment was required by the contract signed by the parties, and it was designated as compensation to Corotoman for the Airport's use of Corotoman's airspace. JA440 (Vol. IV), JA2212–2213 (Vol. XIII). The Airport, of course, removed the knoll on Corotoman's land and has now been using that airspace for almost a decade, so the Airport received the benefit of that $250,000.

land, which greatly improved the airport's flightpath and planes are now using that new flightpath, which was the Airport's entire goal all along! But Corotoman never received what *it* wanted and bargained for—the overblasting. And other payments to Corotoman for ancillary and unrelated purposes, including the payments for repairing a slope on separate property and for a deed to a small parcel that the Airport supposedly never received (Br. at 10), are entirely irrelevant.

Seventh, the Airport asserts—without citation or explanation—that Corotoman's land has "negligible market value" and that the overblasting work "will never actually be performed." Br. at 10. But that is baseless, evidence-less speculation, and it is untrue. We don't know the market value of Corotoman's land because there is *no evidence of that* (aside from the useless 2010 appraisal). Absent that evidence, Corotoman is entitled to the cost-to-overblast damages, which is the entire reason for this appeal.

Eighth, the Airport notes that any money recovered by Corotoman in this action will go to Corotoman's bankruptcy estate. Br. at 4, 10 n.9. That is true but irrelevant, and the Airport does not explain why it supposedly is relevant. The Airport notes that the bankruptcy estate's largest secured creditor is Katherine Wellford, wife of the former principal of Corotoman, but Katherine Wellford is not the same as her husband. More importantly, although Katherine Wellford is currently a claimant against the Corotoman bankruptcy estate, her claims have not been adjudicated, and her claims are secured by land and not by any proceeds from this case; if her claims ultimately are not satisfied through the sale of real estate collateral, then she will simply be an unsecured creditor of the estate, one of many, some of which have larger claims than her. In short, when it comes to who might receive any money generated by this lawsuit, Katherine Wellford is simply one creditor among many, and she has no priority claim to that money.

Indeed, the bankruptcy estate is now in the hands of a court-appointed independent

trustee—Martin Sheehan—who has a fiduciary duty to *all* of the creditors. Mr. Sheehan is directing this case for Corotoman and is simply trying to recover damages for the benefit of all creditors.[2]

Ninth, the Airport notes that John Wellford was charged with and pleaded guilty to failing to disclose in the Corotoman bankruptcy filings a transaction that he had made, a transaction that is unrelated to the contract at issue here. Br. at 3–4. That is true and entirely irrelevant, and the Airport does not even attempt to explain why that matters in any way. That is simply an attempt to tarnish the Corotoman bankruptcy estate, which is not the same as Mr. Wellford and which has multiple other creditors whose interests are represented by an independent trustee.

This Court should ignore the Airport's many red herrings and simply answer the questions of law certified by the Fourth Circuit. And the answers to those questions are clear, as explained below.

II. Certified question one: the parties agree that the gross disproportionality doctrine does or should exist under West Virginia law in a breach of contract case.

The Airport devotes many pages of its brief to outlining the gross disproportionality doctrine generally and arguing that this Court has adopted it or should adopt it in a breach of contract case. Br. at 13–21. As Corotoman noted in its opening brief, the parties agree about that. Rather, and as explained more fully below, the parties dispute how the doctrine is defined. Nonetheless, there are a few things worth noting about that section of the Airport's brief:

First, the Airport quotes several authorities noting that the gross disproportionality doctrine compares the cost-to-complete measure of damages to the "diminution in value" or "difference in

[2] As Corotoman noted in its opposition to the Airport's motion to supplement the record with documents relating these bankruptcy issues, all of the bankruptcy documents that the Airport seeks to add now existed when the Airport filed its briefs and evidence on the damages issue at hand in the federal district court. The Airport simply chose not to file those documents, probably because they are obviously irrelevant. Hence those documents should not be part of the record now, because they were never filed in the trial court below—nor were they filed in the Fourth Circuit.

value" or "loss in value" measure of damages. Br. at 14–21 (quoting *Peevyhouse v. Garland Coal & Mining Co.*, 382 P.2d 109, 113 (Okla. 1962); *Restatement (Second) of Contracts* § 348(2) & cmt. c; *Jacobs v. Young*, 129 N.E. 889, 891 (N.Y. 1921); *BLB Aviation S.C., LLC v. Jet Linx Aviation, LLC*, 808 F.3d 389, 391 (8th Cir. 2015); *Brooks v. City of Huntington*, 234 W. Va. 607, 613, 768 S.E.2d 97, 103 (2014); *Gilbert v. Tony Russell Constr.*, 772 P.2d 242, 246 (Idaho 1989)). Those quotations are consistent with the Airport's brief's own wording, which at several points admits that the alternative measure of damages here is "diminution in value." Br. at 1, 13 n.10, 14, 21. All of that highlights why the Airport is wrong when it later and confusingly claims that the denominator of the gross disproportionality ratio is not the diminution in value of the land caused by the breach but just "the value" of the land, and specifically the 2010 pre-contract value here. That clearly incorrect argument is addressed more below.

Second, the Airport suggests in a footnote that maybe the contract at issue here is not a construction contract at all, at least not in its entirety, quoting the district court's comment about that issue. Br. at 13 n.10. One, it does not matter whether the contract here is a construction contract of another type of contract: the gross disproportionality doctrine applies the same way, and the Airport does not suggest otherwise. Two, this case is certainly a contract case, so the Airport's footnote's reference to tortious damage to real property cases is inapt, although the doctrine applies the same way there anyways. Three, the obligation of the contract at issue—for overblasting—is a construction obligation, even though it involves manipulating land and not building a structure. In short, the supposed distinction between a construction contract and non-construction contract had no bearing in the court below and has no bearing on appeal.

Third, the Airport claims that the doctrine is about "unjust enrichment." Br. at 16. While that is true in a sense, in that the doctrine is about avoiding "waste," the doctrine is completely

distinct from the separate doctrine of unjust enrichment. Thus, the Airport's citation to unjust enrichment cases (Br. at 21) is inapt—although nothing about those cases matters here because there is no "unjust enrichment" here even in the colloquial sense, as explained immediately below.

Fourth, the Airport claims that awarding the cost-to-complete damages here would be giving Corotoman a "windfall" or constitute "unjust enrichment" because Corotoman supposedly will not use any money damages to overblast, because it is in liquidation or because it supposedly is not possible to overblast the parcels because they are in a checkboard. Br. at 16–17. Corotoman already addressed all of those points in its opening brief, with detailed citations and quotations to the law, and *the Airport simply fails to address any of that*. But, to summarize:

(1) there is undisputedly zero evidence of the diminution in value here caused by the Airport's breach, so it is impossible to know or logically claim that Corotoman would be receiving a windfall by receiving the cost-to-complete damages instead of the diminution in value damages—that is the entire point of this appeal;[3]

(2) the supposed impossibility of overblasting now does not affect how the gross disproportionality doctrine is defined (or applied), and specifically the consequences of a defendant's failure to carry its burden;

(3) it is not actually impossible to overblast the parcels even now, with the Airport's permission to do so on its parcels;

(4) the Airport also breached the contract by failing to effect the parcel swap, meaning that assuming that the swap had occurred when calculating overblasting damages is placing Corotoman in the position bargained for;

(5) the law allows recovery of cost-to-complete damages even when the plaintiff does not use the money for completion, and even specifically in the gross disproportionality context, *see Info. Sys. & Networks Corp. v. City of Kansas City, Mo.*, 147 F.3d 711, 713 (8th Cir. 1998) (awarding cost-to-complete damages over diminution in value damages "even if the completion costs are not incurred"); and

[3] Moreover, Corotoman's brief noted that, if one used the 2010 appraisal's "comparison value" of development-ready land of $200,000/acre in order to somehow calculate the diminution in value—which is not possible, but simply using that number like the district court did—then the diminution in value here would be more than $8 million or more $3 million, which not a windfall at all compared to the cost-to-complete damages of a little more than $4 million. *See* Pet. Opening Br. at 34 n.5.

(6) a defendant cannot bootstrap *its own breach of contract* to then claim impossibility or impracticability and limit the plaintiff's expectation damages, *see, e.g.*, *Gaddy Eng'g Co. v. Bowles Rice McDavid Graff & Love, LLP*, 231 W. Va. 577, 583–84, 746 S.E.2d 568, 574–75 (2013). In other words, the fact that the Airport breached the parcel swap obligation dooms any attempt by the Airport to rely on the non-occurrence of that swap.

See Pet. Opening Br. at 30–40. The Airport did not address any of this in the Fourth Circuit, and it fails to address any of it again here. Because it has no response. But again, none of that affects how the gross disproportionality doctrine is defined, which is what the Fourth Circuit asked this Court to do.[4]

In a similar vein, the Airport speculates that Corotoman "undoubtedly knew" that the property swap could not occur and therefore knew that its land would not be valued in a condemnation proceeding based on the assumption of the swap occurring. Br. at 17 n.13. Corotoman already addressed that, too, and the Airport fails to rebut that. That assertion is baseless and untrue: during the original condemnation negotiations, Corotoman had every reason to expect that the swap could occur, which is why it negotiated and ultimately signed a contract expressly requiring the swap, and the swap could have and should have occurred. Anyhow, the condemnation negotiations are irrelevant: the parties signed a contract, the Airport breached it, and what matters now is damages.

Not to beat a dead horse, but the existence of a "windfall" and the claim that Corotoman is trying to cash in a "lottery ticket" is rank speculation because *there is no competent evidence of what Corotoman's land is worth now and what it would be worth overblasted*, so there is no evidence about what the diminution in value is and what a "rational person" supposedly would do with cost-to-complete damages here. There is no evidence that the diminution in value caused by

[4] The Airport's brief in the federal district court did not focus on the supposed impossibility/lack-of-swap defense, which may be one reason why the district court failed to recognize the many reasons why the supposed impossibility/lack-of-swap defense is irrelevant here.

the failure to overblast is not, in fact, quite close to the cost to complete, because there is no evidence of the value of the land had overblasting been completed or the value of the land as-is.

Fifth, the Airport relies on *BLB Aviation*. Br. at 17–18. Corotoman addresses that case below.

III. Certified question two: (a) disproportionality is the ratio of the cost-to-complete damages to the alternative measure of diminution in value, and gross disproportionality exists when that ratio is too high, (b) the breaching party bears the burden of proving gross disproportionality and the specific amount of the alternative form of damages, and (c) the consequence of the breaching party failing to meet that burden is that the plaintiff is awarded the cost-to-complete damages that they sought and proved.

A. Disproportionality is the ratio of the cost-to-complete damages to the alternative measure of diminution in value, and gross disproportionality exists when that ratio is too high.

Under the gross disproportionality doctrine in a construction contract case, the measure of damages is: (a) the cost to complete, unless (b) the cost to complete is grossly disproportionate to the difference in value between what was built and what was supposed to have been built (the diminution in value), in which case the proper award is the diminution in value amount itself. *See, e.g., Nichols Const. Corp. v. Virginia Machine Tool Co*., LLC, 661 S.E.2d 467, 473 (Va. 2008).

On pages 21 to 29 of its opening brief, Corotoman cited a host of cases from around the country and two treatises making two things clear: (1) disproportionality is defined as the ratio of cost-to-complete damages to diminution-in-value damages; and (2) the breaching defendant has the burden of establishing that ratio, meaning the burden to establish the denominator diminution in value. The Airport fails to meaningfully address *any* of those authorities. In fact, the Airport cites only two of the 17 cases, for undisputed propositions, and it misconstrues one treatise.

The Airport cites *Ross Dress for Less, Inc. v. Makarios-Oregon, LLC*, 512 F. Supp. 3d 1138 (D. Or. 2021), but only for an undisputed proposition. Br. at 14 n.11. As Corotoman's opening brief noted, that case directly supports Corotoman.

The Airport also cites *Nichols* for undisputed propositions (Br. at 16, 23), but *Nichols* too directly supports Corotoman: "In this case, [the breaching contractor] was required to proffer competent evidence either that the cost of replacement of the roof was less than [the non-breaching building owner] contended, or that an award of cost damages would be grossly disproportionate and result in economic waste." 661 S.E.2d at 473. Because the contractor in *Nichols* offered no evidence of either—as to the latter, no evidence of "the difference between the value of the [structure] properly completed according to the contract and the value of the defective structure"—it failed to carry its burden to establish gross disproportionality and thus the court awarded the owner cost-to-complete damages. *Id.* at 472–73. It's the exact same here, which is why Corotoman cited *Nichols* and noted that a similar Virginia case was cited by this Court in *Steinbrecher v. Jones*, 151 W. Va. 462, 476, 153 S.E.2d 295, 304 (1967).

In any event, the Airport argues that Corotoman has incorrectly defined gross disproportionality because the denominator is "the value" of the property and not the diminution in value. Br. at 22–24. The Airport is wrong for at least five reasons.

First, all of the cases and treatises cited on pages 21 to 29 of Corotoman's opening brief make clear that the denominator is diminution in value and not just "the value." The Airport simply fails to meaningfully address any of those authorities.[5]

Second, and as explained above, the Airport's own brief quotes multiple authorities asserting that diminution in value—not merely a snapshot of value—is the denominator. In fact,

[5] The Airport addresses only one: Section 348(2) of the *Restatement (Second) of Contracts*. There, the Airport claims that the "probable loss in value" to the property owner is somehow not the "diminution in value" of the property because both terms are used. Br. at 23–24. One, the "probable loss in value" is tantamount to the "diminution in value" as that term is used by all of the other cases and treatises. Two, the "probable loss in value" is still a *loss* in value and not one "value," as the Airport claims. Three, the Airport did not offer any evidence of "probable loss in value" just like it didn't offer any evidence of diminution in value, so even if there is a distinction, it's not relevant. (That treatise, unlike the others, does not specify who has the burden to establish the denominator, but the cases it cites put the burden on the defendant.)

the Airport's *own brief* in the Fourth Circuit explicitly admitted at one point that diminution in value is the denominator: "Instead, the District Court correctly evaluated both the 'usual' or 'standard' measure of damages in a construction case (i.e., cost of completion) and application of the 'alternative' measure of damages (i.e., diminution in value) *when a gross disproportionality exists between those two measures*." Airport Fourth Circuit Br., No. 23-1873, ECF No. 26, at 14–15 (emphasis added). The law is so clear that the Airport couldn't help but state it correctly.

Third, the Airport doesn't expressly specify which "value" supposedly is the denominator—the value before the work begins, the value after partial performance, or the value had there been full performance—but its brief cites "the value" here as the 2010 value of $186,000. Br. at 41. That is, the value of Corotoman's property 5 years before the contract was performed, 9 years before Corotoman filed suit, and 13 years before trial. The Airport doesn't even attempt to explain why the original value is what should matter, and using the original value makes no sense: if just one value mattered (instead of diminution in value), it would be the value of the property at breach or at trial, either as-is or had the contract been performed. *See, e.g.*, *Nichols*, 661 S.E.2d at 473 (relying on the lack of evidence of both the current value as-is and the current value had the contract been performed). But, again, all the authorities show that it's the diminution in value that matters.

Moreover, it would make no sense for the denominator to be simply the original value of the property. Imagine that a vacant downtown lot was worth $100,000, and the owner contracted to construct a skyscraper on it for $25 million, but the contractor breached the contract near the end, and the cost to complete was $5 million and the diminution in value was $4 million. If the denominator were the original value of the property, then the cost to complete there would *always*

be disproportionate simply because the lot was so cheap before the planned improvement, which makes no sense.

Of course, it's obvious why the Airport chose the original 2010 value as the denominator: because that is the only value in the record, and the Airport knows that there's no evidence to support the later values of the land as-is or had the land been overblasted, the difference of which is the diminution in value. But the Airport cannot impose a nonsensical and unsupported legal rule simply to excuse its failure to introduce necessary evidence.

Fundamentally, the gross disproportionality/waste doctrine is about a ratio between two different measures of damages. It forces the plaintiff to take the denominator measure if it's much smaller than the numerator measure. The doctrine does not involve a third number that is not a measure of damages at all but is just "the value" of the property.

Fourth, the federal district court below held (correctly) that the denominator was diminution in value. It said as much several times in its opinion, holding, for example, that the doctrine applies when the cost to complete is grossly disproportionate to "the loss in value." JA2280–2281 (Vol. XIV). More fundamentally, its discussion of the property's value when analyzing disproportionality recognized that the current, as-is value mattered, noting several times that there was no current, as-is value (while also incorrectly claiming that the 2010 appraisal "does provide insight" into that value). JA2282 (Vol. XIV). And again, as noted above, the Airport's own brief correctly characterized the district court's opinion as holding that diminution in value is the denominator.

Fifth, the handful of authorities cited by the Airport (Br. at 22–23) do not support its argument, and in fact they support Corotoman. While it's true that *Steinbrecher*, 151 W. Va. at 475, 153 S.E.2d at 295, and *Trenton Const. Co. v. Straub*, 172 W. Va. 734, 737, 310 S.E.2d 496,

499 (1983), mention only "the value of the structure," they did not analyze the issue or discuss which "value" matters, and the authorities that *Steinbrecher* cited—the *Am. Jur. 2d* treatise and the cases from Virginia and Washington—explicitly hold that diminution in value is the denominator, as Corotoman already noted.[6] The next case, *BRB Contractors, Inc. v. Web Water Dev. Ass'n, Inc.*, No. CV 19-4095, 2021 WL 516545, at *8 (D.S.D. Feb. 11, 2021), actually directly states that diminution in value is the denominator: "South Dakota courts have recognized that a breaching party may prove the unreasonableness or disproportionality of cost of repair damages by proving that such damages are outweighed by the diminution in value of the property resulting from the breach." So does *Nichols*, as quoted above. And *Lochaven Co. v. Master Pools by Schertle, Inc.*, 357 S.E.2d 534, 538–39 (Va. 1987), describes the denominator as the "benefit to be achieved" by completion of performance, which is another way of saying the diminution in value caused by the breach.[7]

This Court should reject the Airport's argument not just that the denominator is not diminution in value and is instead "the value," but also that "the value" is merely the 2010 value, so that the undisputed lack of diminution in value evidence punishes Corotoman instead of the Airport. It's clear who loses if there is no evidence of diminution in value here: the Airport.

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[6] *Steinbrecher* itself suggested that the denominator is diminution in value when it described the "alternate rule in some states relating to the measure of damages as being *the difference in value between what is built and what was supposed to have been built*, sometimes applied where extensive reconstruction is necessary at a cost grossly disproportionate to the value of the structure…." 151 W. Va. at 476, 153 S.E.2d at 304 (emphasis added); *see Trenton*, 172 W. Va. at 737, 310 S.E.2d at 499 (quoting that language). The Airport highlights the last part of that sentence ("the value of the structure") while ignoring the former part, ignoring what the Court meant by "value of the structure" (i.e., diminution in value), ignoring the Court's citation to the *Am. Jur.* treatise and the Virginia and Washington cases making clear that diminution in value is the denominator, and ignoring everything else noted above.

[7] Furthermore, in *Lochaven*, unlike in this case, *the defendant* proffered evidence showing that the diminution in value—the decreased value of a swimming pool due to inability to use a diving board—was disproportionate to the cost to deepen the pool a few inches to allow for a diving board. 357 S.E.2d at 538–39. Thus, *Lochaven* directly supports Corotoman both as to what the denominator is and who has the burden to establish it, just like *BRB Contractors*, *Nichols*, and all of the other cases cited by Corotoman.

B. The breaching party bears the burden of proving gross disproportionality and the specific amount of the alternative form of damages.

All of the cases and treatises cited by Corotoman make clear that, after the plaintiff has satisfied its burden to establish its cost-to-complete damages, the defendant has the burden to establish gross disproportionality by showing that the cost-to-complete damages are much greater than the alternative diminution in value damages. Again, *the Airport fails to meaningfully address any of those authorities.*

Unsurprisingly, the Airport cites *BLB Aviation*, 808 F.3d 389, which the district court cited, JA2281–2282 (Vol. XIV). That is the only case located by Corotoman that even arguably supports the Airport. That case is distinguishable on its particular and unique facts. More importantly, that court explicitly (and necessarily) relied on the evidence of diminution in value—the decrease in value of an airplane due to lack of records for maintenance undisputedly performed—when holding that the defendant carried its burden to establish that the cost to re-do the maintenance was disproportionate to that diminution in value, which makes its later holding that the plaintiff had the burden to establish the amount of diminution in value and failed to carry it confusing at best and illogical at worst. *Id.* at 393–95. That confusion and illogicality are unavoidable if a court places the burdens like that, which is probably why every other case and the treatises do not do so. Corotoman explained all of this in its opening brief, but the Airport fails to address it.

The Airport cites another case supposedly putting the burden to establish the denominator on the plaintiff, but that's misleading. In *Commercial Cabinet Co. v. Mort Wallin of Lake Tahoe*, 737 P.2d 515, 516–17 (Nev. 1987), a contractor rebuilt an entire store that had burned down for $158,058, but there were defects in the mahogany paneling, and the owner sought $344,000 or $356,000 to replace that paneling. The trial court awarded $110,000 to the owner, without any explanation of that amount. *Id.* On appeal, the owner sought the $344,000 or $356,000 again; the

contractor argued that awarding either amount would be waste, and to do so it relied on the undisputed evidence that the diminution in value denominator was, as a matter of mathematical certainty, $158,058 or less. *Id.* at 517. The court reversed the award against the contractor for $110,000 because the trial court had made no explanation at all for that award. *Id.*

On remand, the trial court found that $344,000 or $356,000 would be waste, so everyone then agreed that the plaintiff had the burden to establish both cost-of-repair and diminution in value damages. *Mort Wallin of Lake Tahoe, Inc. v. Com. Cabinet Co.*, 784 P.2d 954, 956 (Nev. 1989). The trial court awarded $10,000 for repairs and $100,000 for diminution in value. *Id.* On the second appeal, the court affirmed the finding about waste but reversed the award for $100,000 because the owner had introduced no evidence of that amount, aside from a visit to the store by the judge, which was insufficient. *Id.*

Mort Wallin is inapt. First, the parties never disputed or argued about who had the burden to establish either waste/gross disproportionality or the two measures of damages, and so neither appellate opinion discussed those burdens. Here, by contrast, who has those burdens is what matters.

Second, and just as importantly, the evidence of waste in *Mort Wallin* was undisputed and mathematically obvious: the diminution in value could not be more than the $158,058 it had recently cost to entirely rebuild the store, which was less than half of the $344,000 or $356,000 the owner sought. Consequently, although the parties and the court assumed that the contractor had the burden to establish waste, in that specific and rare situation the contractor didn't need to prove a specific diminution in value number to carry that burden. Here, by contrast, there was no evidence of waste/diminution in value at all, much less evidence that was undisputed and obvious, and so the Airport has not established waste/diminution in value. The Airport could not have

established waste/diminution in value here without two recent appraisals, or at least one recent appraisal with two valuations.

The Airport also cites *Ervin Const. Co. v. Van Orden*, 874 P.2d 549, 554 (Idaho Ct. App. 1992), but the parties there agreed that the homeowner had the burden to establish the diminution in value number, so the burden was not at issue. In fact, the homeowner there *wanted* and *sought* the greater diminution in value amount *instead* of the smaller amount of the cost to repair the minor defects, the contractor argued for the opposite, and the Idaho Supreme Court eventually held that the cost to repair and *not* diminution in value was the proper measure. *Ervin Const. Co. v. Van Orden*, 874 P.2d 506, 514 (Idaho 1993). If anything, *Ervin* supports Corotoman by making clear that the defendant has the burden to force an alternative measure of damages upon a plaintiff who has already established one measure of damages.

Even if *Mort Wallin* and *Ervin* were on point—and they are not—those two cases could not outweigh the host of cases and treatises making clear that the defendant has the burden to establish gross disproportionality and its denominator diminution in value in order to force upon a plaintiff an alternative to the default cost-to-complete measure of damages. The Airport's failure to engage with these authorities is telling, and this Court should define the gross disproportionality doctrine exactly as all of those authorities do.

The Airport also cites *Jacobs*, 129 N.E. at 891, one of the seminal cases establishing the waste doctrine more than 100 years ago, for the proposition that the property owner has the burden to establish waste and the alternative measure of damages. Br. at 28. *Jacobs* supports Corotoman, not the Airport. In that case, the construction contractor installed a different type of pipe in a house than the one called for in the contract, and the homeowner sought damages based on the cost to rip out the walls and install the correct type of pipe. *Id.* at 890–91. The opinion concluded that

predicating damages based on the cost to replace the pipe would be obvious waste, because the evidence showed that the type of pipe installed was identical to the type of pipe called for in the contract, except for the name stamped on the pipes. *Id.* Although the opinion did not explicitly discuss who had the burden to establish waste by showing that the two types of pipe were identical, it was *the construction contractor* who actually introduced the evidence that the types of pipes were identical, *id.* at 890–91, which suggests that it's the party who breaches the contract who has the burden to establish waste and force upon the non-breaching property owner the lesser amount. The property owner there got "nominal or nothing" in diminution in value damages because *the contractor* proved the equivalence of the pipes and therefore waste and therefore the small diminution in value number, *not* because the property owner did not establish the diminution in value number. *Jacobs* is one more case in the pile favoring Corotoman.

Finally, the Airport cites many cases outlining general principles of contract law, including the principles that a plaintiff has the burden to establish its damages to a reasonable degree of certainty, that it cannot speculate about its damages, and that the damages must be caused by the defendant's breach. Br. at 24–28. All of that is true and undisputed, but it misses the point. Corotoman *did* establish its damages directly caused by the Airport's breach to a reasonable degree of certainty, without speculation—by accepting the Airport's cost-to-complete calculation based on evidence that the district court found credible. The Airport did not satisfy *its* burden to show that, due to gross disproportionality, diminution in value damages should apply in lieu of cost-to-complete damages.

C. The consequence of the breaching party failing to meet that burden is that the plaintiff is awarded the cost-to-complete damages that they sought and proved.

All of the cases and treatises cited by Corotoman make clear what happens if the defendant fails to carry its burden of showing gross disproportionality by establishing that the diminution in

value is much less than the cost-to-complete damages proven by the plaintiff: the plaintiff receives those cost-to-complete damages. *See, e.g.*, *Ross Dress for Less*, 512 F. Supp. 3d at 1166; *Andrulis v. Levin Const. Corp.*, 628 A.2d 197, 206–08 (Md. 1993); 13 *Am. Jur. 2d Building, Etc. Contracts* § 74 (2023). The Airport does not argue otherwise—that is, it does not argue that if it had the burden and failed to carry it, the result would be anything other than Corotoman receiving the cost-to-complete damages that it proved.

IV. Although this Court need not reach the issue, it is undisputed that, if the Airport had the burden to establish gross disproportionality and its attendant variable diminution in value, it failed to carry it.

As Corotoman noted in its opening brief, it is undisputed that there is no evidence of diminution in value. In its response brief, the Airport does not contend otherwise. Nor does the Airport address any of the points made by Corotoman in Section IV of its opening brief. In fact, the Airport explicitly disclaims addressing any of those points. Br. at 12. Thus, the Airport has forfeited any arguments against any of those points.

Instead, the Airport argues only that Corotoman had the burden to establish diminution in value. That is wrong, as explained above. This case, just like *Ross Dress for Less*, hinges entirely on *who* had a burden that undisputedly was not satisfied. *See* 512 F. Supp. 3d at 1166 (noting that "the party who bears the burden of proof (or at least of production) loses"). The Airport did here.

In a footnote, the Airport does summarily assert that "[e]ven *if* the burden of proving gross disproportionality fell to the Airport Authority, the District Court correctly held that the cost to complete the overblasting ($4,381,080–$14,659,351) … was grossly disproportionate to the value of the Corotoman Property ($186,000)." Br. at 24 n.18 (emphasis in original). That argument assumes, however, that the denominator is just the 2010 "value of the Corotoman property," and not the diminution in value caused by the breach. But the denominator is *not* the 2010 value of the

property, it's the diminution in value, for all of the reasons explained above in Section III(A). The Airport never argues that, if it has the burden (it does) and the denominator is diminution in value (it is), then the Airport can still prevail.[8] So the Airport's summary alternative argument hinges entirely on a mistake of law.

The Airport is simply wrong that what matters is only the 2010 value, as explained above. In fact, the 2010 value does not matter at all. All that matters is the difference between the *current* value of the land as-is and the *current* value had the land been overblasted. And there is zero evidence of that, hence zero reason not to award Corotoman the damages that it proved, hence zero evidence of any supposed "windfall" to the bankruptcy estate creditors. Corotoman is correct not just on the law, but also on the equities.

CONCLUSION

This Court should answer the questions certified by the Fourth Circuit as outlined above, after which the Fourth Circuit can apply the law to the facts.

Respectfully submitted this 18th day of March 2025.

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[8] Nor can the Airport argue that going forward, because Corotoman explained the many reasons why the 2010 appraisal cannot establish the diminution in value—including because it does not even purport to establish two values, much less one value before overblasting and one value after overblasting—and the Airport's brief addresses none of those reasons and even disclaims attempting to do so.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 24-661

COROTOMAN, INC.,

Petitioner,

v.

CENTRAL WEST VIRGINIA REGIONAL AIRPORT AUTHORITY, INC.,

Respondent.

***Upon Certified Questions from the United States Court of Appeals for the Fourth Circuit*, Case No. 23-1873**

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of March, 2025, I electronically filed the foregoing "Reply Brief of Petitioner Corotoman, Inc." with the Clerk of this Court, which will send notification of such filing to the attorneys listed below:

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