

## **AGENDA**

### **FLORIDA GULF COAST UNIVERSITY BOARD OF TRUSTEES VIRTUAL MEETING**

**Thursday, May 11, 2023      9:30 a.m. to (estimated) 10:30 a.m.**

**Virtual Access: [www.fgcu.edu/boardcast](http://www.fgcu.edu/boardcast)**

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#### **NOTES:**

- 1. Indicated times within the agenda are approximate and are subject to change. Agenda items may be taken out of order at the call of the Chair and with the concurrence of the Board.***
- 2. Public comment on action items must be sent by email to [treynold@fgcu.edu](mailto:treynold@fgcu.edu), no later than 5 p.m. on Wednesday, May 10, 2023. Comments will be read into the record during the meeting.***

9:30 a.m.	<b>Call to Order, Roll Call, and Opening Remarks – Chair Blake Gable</b>
9:35 a.m.	<b><u>Action (Includes Public Comment):</u> <a href="#">Settlement Agreement between Florida Gulf Coast University Board of Trustees and Manhattan Construction Company</a> – Vice President and General Counsel Vee Leonard (TAB #1)</b>
10:20 a.m.	<b>Old Business – Chair Blake Gable</b>
10:25 a.m.	<b>New Business – Chair Blake Gable</b>
10:30 a.m.	<b>Closing Remarks, and Adjournment – Chair Blake Gable</b>

**(END)**

**AGENDA INDEX**  
**FGCU Board of Trustees**  
**May 11, 2023**

<b>Tab #</b>	<b>Item</b>	<b>Action/Information</b>
1	Settlement Agreement between Florida Gulf Coast University Board of Trustees and Manhattan Construction Company	Board Action

ITEM: 1

**Florida Gulf Coast University Board of Trustees  
May 11, 2023**

**SUBJECT:** Settlement Agreement between Florida Gulf Coast University  
Board of Trustees and Manhattan Construction Company

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**PROPOSED BOARD ACTION**

Approve proposed Settlement Agreement with Manhattan Construction Company

**BACKGROUND INFORMATION**

See Executive Summary

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**Supporting Documentation Included:** (1) Executive Summary and (2)  
Proposed Settlement Agreement

**Prepared by:** Matthew Lines of Isicoff Ragatz

**Legal Review:** Vice President and General Counsel Vee Leonard (April 26,  
2023)

**Submitted by:** Vice President and General Counsel Vee Leonard

**FLORIDA GULF COAST UNIVERSITY BOARD OF TRUSTEES**

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***EXECUTIVE SUMMARY  
OF  
DISPUTE WITH MANHATTAN CONSTRUCTION COMPANY***

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On August 22, 2017, Florida Gulf Coast University (“FGCU”) hired Manhattan Construction, Inc. (“Manhattan”), as construction manager for a project known as “Academic Building 9” or “AB9” on the FGCU campus. AB9 was intended to serve as a starting point for a roll out of new facilities on the east end of FGCU’s campus and to establish a new identity for FGCU as a whole. With 116,000 square feet, AB9 was to be the largest building on campus with classrooms, laboratories, lecture halls, academic offices and student gathering spaces. AB9 was to be the future home of FGCU’s unique academic program known as the “Integrated Watershed and Coastal Studies” or “Water School.” In addition, AB9 was intended to focus on other environmental sciences and STEM (science, technology, environmental and mathematics). AB9 also was to provide additional space for research and teaching labs, as well as classroom space. AB9 was slated to open for students beginning in the Spring 2022 academic semester.

The contract required Manhattan to provide to FGCU preconstruction and construction phase services with respect to the AB9 project. During the design phase, Manhattan’s services included, *inter alia*, advice on site use and improvements, selection of materials, building systems and equipment and methods of project delivery. Manhattan also was responsible to provide recommendations on relative feasibility of construction methods, time for procurement of materials and other “value engineering.” Manhattan also was to prepare a detailed estimate of construction cost. Manhattan was to develop a project construction schedule providing for all major elements such as phasing of construction and times of commencement and completion required of each trade contractor. The schedule was to include purchase of equipment and materials requiring long lead time and to expedite and coordinate delivery of purchases. Manhattan was to schedule and conduct monthly meetings of the construction team and prepare and distribute minutes of such meetings.

On June 1, 2020, the construction phase of the project began with a projected deadline of November 1, 2021 for “substantial completion” and December 1, 2021 for “final completion.” These dates were calculated to permit FGCU to use AB9 beginning in the Spring 2022 academic semester. To ensure timely completion, the parties agreed to liquidated damages in the amount of \$7,300 for each calendar day that the substantial completion deadline was not met due to delay by Manhattan. The contract also provided a daily additional charge payable to Manhattan of approximately \$4,100 per day of delay that was caused by FGCU. Another section of the agreement prohibited Manhattan from recovering any damages for delay and limited Manhattan’s remedy to an extension of the deadlines for completion and further provided that even if the prohibition was legally unavailable Manhattan’s delay damages claims would be capped at \$200 per day.

The AB9 project was not completed by November 1, 2021. The parties disputed the reason for this delay but continued to work together to complete the project. Numerous design and scope of work changes were made during this time. On June 17, 2022, the project achieved substantial

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completion. Thereafter, a long punch list was generated. As of the date of this summary, it is understood that the punch list has been exhausted and/or that FGCU will no longer be looking to Manhattan with respect to any remaining items thereon.

On June 1, 2020, the Guaranteed Maximum Price (“GMP”) for the AB9 project was set to \$34.3 million. On July 2, 2020, the GMP was amended to \$49 million. During the project, numerous change orders were agreed to by the parties bringing the GMP to \$39,930,141.29 through pay application 25 dated July 5, 2022. Thereafter, the parties disputed the amounts payable with both FGCU and Manhattan claiming large amounts to be due for the delay of the project completion. At the time that the parties began disputing each other’s claims, as of the last voluntary payment made, FGCU had paid Manhattan a total of \$35,507,071.41. FGCU claimed an entitlement to approximately \$1.6 million in liquidated damages and Manhattan claimed an entitlement to approximately \$900,000 in delay damages.

The contract required the parties to execute proper change orders for any changes to the price of the contract or the deadlines by which work was to be completed. During construction, FGCU executed authorization requests (“ARs”) presented to it by Manhattan. FGCU’s execution of those ARs followed the architect’s review and approval of them. The parties later reduced a number of these executed ARs into formal change orders, adjusting the contract price. After the parties began to dispute the impact of the delays on the project, FGCU refused to issue a change order to document a set of executed ARs that Manhattan claimed provided it with 117 days of additional time to achieve substantial completion. The executed ARs also included an additional charge for work completed in the approximate amount of \$230,000. FGCU asserted that it had put Manhattan on formal notice of the requirement to properly document and obtain an extension of the contractual deadlines by two letters sent on November 10, 2021 and December 2, 2021. Manhattan countered that the ARs in question were executed after that date and had been agreed to by all parties.

With the parties in a substantial disagreement over the impact of the delays, FGCU proactively hired outside counsel to review the matter and to advise as to how best to proceed. Eventually FGCU arranged for a pre-suit mediation with Manhattan with a very experienced construction mediator. At the time of the mediation, FGCU was withholding approximately \$4,430,000 that was owed under the construction contract. On April 14, 2023, the mediation was conducted. After a full day session, in the early evening, the parties agreed to resolve the issues in exchange for a single final payment from FGCU to Manhattan in the amount of \$4,750,000. Because that result was achieved by the compromise of numerous contested issues between the parties, there is no precise methodology for how that number was calculated. Instead, it took into account the relative strengths of each party’s position with respect to the delay issues and other smaller contested issues on the project. However, in broad terms, FGCU owed Manhattan \$4,430,000 unless that amount was increased or decreased based on a court’s determination of fault as to the delay issues. In this regard, ARs had been executed for 117 days of additional time and \$230,000 of additional work. If FGCU were to win on all of the contested points, its best result would have been liability to

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Manhattan for approximately \$2,830,000 plus statutory interest on that amount under state law. If Manhattan were to win on all contested points, FGCU would have been liable to Manhattan for \$5,560,000 plus statutory interest on that amount under state law. Additionally, each party would have had to pay their own attorneys' fees, court costs and expert expenses. It is estimated that these costs and expenses would have been significant. All involved in the mediation believed the result to be the best deal that was possible to be struck between the parties at that time. Because FGCU is governed by a Board of Trustees, the settlement was made fully contingent upon approval by the Board of Trustees within 45 days of the mediation.

## **RELEASE AND SETTLEMENT AGREEMENT**

This Release and Settlement Agreement (the “Agreement”) is made effective the 14th day of April, 2023 by and among the following parties: (i) Manhattan Construction Company (“Manhattan”) and (ii) Florida Gulf Coast University Board of Trustees (“FGCU”) [Manhattan and FGCU are referred to collectively herein as the “Parties”].

WHEREAS, Manhattan and FGCU were parties to that certain Agreement Between Owner and Construction Manager dated August 22, 2017 as amended by the General Conditions of the Contract for Construction, Amendment 1 dated June 1, 2020 and Amendment 2, dated July 2, 2020 (the contract, general conditions, amendment 1 and amendment 2 are referred to collectively herein as the “Contract Documents”), whereby FGCU hired Manhattan to serve as the construction manager with respect to a construction project (the “Project”) on the FGCU campus known as “Academic Building 9” or “AB9”;

WHEREAS, a dispute arose between Manhattan and FGCU concerning the Project;

WHEREAS, the parties disclaim any and all liability to each other with respect to the dispute between them over the Project; and

WHEREAS, the Parties desire to settle the dispute in accordance with the terms and conditions of this Agreement.

NOW, THEREFORE, in consideration of the above recitals and the mutual representations, covenants and agreements contained herein, the Parties agree as follows:

1. The above Recitals are incorporated by reference into this Agreement.

### **SETTLEMENT PAYMENT**

2. Cash settlement payment. In the event that the “Qualifying Event,” as that phrase is defined in paragraph 3 below, does not timely occur, no payment shall be made of any kind and this Agreement shall then be automatically void *ab initio* and of no force or effect. In the event that the “Qualifying Event,” as that phrase is defined in paragraph 3 below, does timely occur, on or before seven (7) days thereafter, FGCU shall pay or cause to be paid to Manhattan FOUR MILLION SEVEN HUNDRED FIFTY THOUSAND AND NO CENTS (U.S. \$4,750,000.00) (the “Settlement Payment”). If the Settlement Payment is made by check, its shall be made payable to the order of “Manhattan Construction Company” and delivered as follows:

Manhattan Construction Company  
Attn: Mary Stein  
3705-1 Westview Drive  
Naples, FL 34104

or shall be made by wire transfer as follows:

Routing Number: 021000021

Should FGCU elect to make payment by wire, FGCU agrees to verbally confirm the wiring instructions with Ray Brown at phone number (918) 878-3341.

### **QUALIFYING EVENT**

3. This Agreement is contingent upon and subject to the actual and formal approval of and acceptance by FGCU's Board of Trustees within 45 days of the effective date set forth above (the "Qualifying Event"). In the event that the Qualifying Event timely occurs, and only in that event, this Agreement shall be final and binding between the parties. In the event that the Qualifying Event does not timely occur, this Agreement shall be void and of no further force or effect.

### **RELEASES**

4. Manhattan hereby remises, releases, acquits and forever discharges FGCU, as well as its parents, subsidiary and affiliated entities, and all of their respective insurers, attorneys, employees, directors, officers, trustees, agents, successors and assigns, of and from all causes of action, claims, counterclaims, suits, debts, sums of money, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, executions, claims for attorneys' fees, claims for costs, claims and demands whatsoever, in law or in equity, which either Manhattan ever had, now has, or which Manhattan can, will or may have against FGCU for, upon, or by reason of any matter, cause or thing whatsoever from the beginning of the world to the date of these presents arising out of or related to the work performed by Manhattan on the Project.

5. FGCU hereby remises, releases, acquits and forever discharges Manhattan, as well as its parents, subsidiary and affiliated entities, and all of their respective insurers, surety(s), attorneys, employees, directors, officers, trustees, agents, successors and assigns, of and from all causes of action, claims, counterclaims, suits, debts, sums of money, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, executions, claims for attorneys' fees, claims for costs, claims and demands whatsoever, in law or in equity, which either FGCU ever had, now has, or which FGCU can, will or may have against Manhattan for, upon, or by reason of any matter, cause or thing whatsoever from the beginning of the world to the date of these presents. Notwithstanding the forgoing, FGCU does not release Manhattan from (i) the requirement to provide close out documents on the Project including, without limitation, manuals, and/or (ii) warranty claims related to Manhattan's work on the Project and/or on the labor and/or materials incorporated into the Project related to Manhattan's work.

### **NON-DISPARAGEMENT**

6. Each party agrees that it shall not issue any defamatory or disparaging press release or other public statement concerning the other Party that is harmful to them or their business, business reputation or personal reputation. Each party further agrees that it will advise its personnel, who were involved in the administration of the Project and/or would have an expectation to know, of this Agreement and of this paragraph and instruct them that they shall not make, publish, or communicate to any person or entity or in any public forum any defamatory or disparaging

remarks, comments, or statement concerning the other Party, that is harmful to them or their business, business reputation or personal reputation. This Section does not, in any way, restrict or impede the Parties from providing factually accurate testimony and/or representations in the course of complying, responding to, and/or participating with any judicial process, applicable law, insurance reporting, regulation and/or a valid order of a court or tribunal of competent jurisdiction or an authorized government agency, provided that such compliance does not exceed that required by the law, regulation, or order.

## NOTICES

7. All notices, demands, requests, consents or other communications required or permitted to be given or made under this Agreement shall be in writing and shall be sent (i) postage prepaid, by certified mail, return receipt requested and e-mail or (ii) by personal delivery to the intended recipient and e-mail, at the below addresses:

As to FGCU to:

Vee Leonard  
Vice President and General Counsel  
Florida Gulf Coast University  
10501 FGCU Boulevard South  
Edwards Hall 114  
Fort Myers, Florida 33965-6565  
[vleonard@fgcu.edu](mailto:vleonard@fgcu.edu)

With a copy to:

Eric D. Isicoff, Esq.  
Matthew L. Lines, Esq.  
ISICOFF RAGATZ  
601 Brickell Key Drive, Suite 750  
Miami, Florida 33131  
Fax: (305) 373-3233  
[isicoff@irlaw.com](mailto:isicoff@irlaw.com)  
[lines@irlaw.com](mailto:lines@irlaw.com)

As to Manhattan to:

Matt Jones, Senior Vice-President  
Manhattan Construction (Florida), Inc.  
3705-1 Westview Drive  
Naples, Florida 34104  
[MJones@manhattanconstruction.com](mailto:MJones@manhattanconstruction.com)

With a copy to:

Geoffrey Lutz, Esq.  
Resnick & Louis  
3157 North Alafaya Trail  
Orlando, Florida 32826  
[Glutz@rlattorneys.com](mailto:Glutz@rlattorneys.com)

Notice shall be deemed to have been made upon proof of actual delivery.

8. The Parties represent that they have full mental and physical capacity and authority to enter into, execute and perform this Agreement and to compromise the claims or potential claims referred to herein. The Parties represent that they are the lawful owners of all claims being settled herein and have not assigned or transferred any of the claims released herein.

9. The Parties represent that: (i) they have completely read and fully understand this Agreement and have voluntarily accepted the terms contained herein for the purposes of making a full and final compromise adjustment and settlement of any and all claims disputed or otherwise, and for the express purpose of precluding forever any further or additional claims arising out of all matters identified herein; and (ii) they have determined that this settlement is fair and reasonable under all the circumstances and that this determination is based solely upon their independent judgment after an opportunity to consult with counsel of their choice and, that in making this determination, they have had an adequate opportunity to discuss and assess the merits of all claims or potential claims.

#### **EXECUTION AND CONSUMMATION**

10. The Parties agree to the following manner of execution and consummation of this Agreement:

- a. Manhattan, through counsel, shall provide an executed copy of this Agreement to counsel for FGCU;
- b. FGCU will present the copy of this Agreement that has been executed by Manhattan to its Board of Trustees to determine whether the "Qualifying Event," (as that phrase is defined in paragraph 3 above) will timely occur;
- c. In the event that the Qualifying Event does not timely occur, counsel for FGCU shall notify counsel for Manhattan of same; or
- d. In the event that the Qualifying Event timely occurs, a fully executed copy of this Agreement shall be provided to counsel for Manhattan and the Settlement Payment shall be made within the time and in the manner set forth in paragraph 2 above.

11. Termination of Contract Documents. Except as otherwise set forth herein, the Contract Documents are terminated, and the only remaining obligations are those contained within this Agreement.

12. Agreement in Counterparts. This Agreement may be executed in several counterparts and all so executed shall constitute one Agreement, binding on all the parties hereto, notwithstanding that all the parties are not signatories to the original or the same counterpart. The Parties may deliver executed signature pages to this Agreement via facsimile, electronic mail (including .pdf or any electronic signature complying with the U.S. federal ESIGN Act of 2000, *e.g.*, [www.docusign.com](http://www.docusign.com)) or other transmission method including Rsign. No Party may raise as a defense to the formation of enforceability of this Agreement, and each Party forever waives any such defense, either (a) the use of a facsimile, email, or other transmission method to deliver a signature, or (b) the fact that any signature was signed and subsequently transmitted by facsimile, email, or such other transmission method.

### MISCELLANEOUS

13. The Parties hereby agree and acknowledge that each Party shall bear his, her or its own attorneys' fees and costs that were incurred in the Project, dispute over the Project, the mediation of the dispute over the Project and/or in connection with the negotiation and/or preparation of this Agreement.

14. This Agreement is deemed entered into in Lee County, Florida and shall be construed and interpreted in accordance with the laws of the State of Florida.

15. This Agreement contains the entire agreement between the Parties with respect to the matters addressed herein and the terms of said agreement may not be modified except by a written agreement duly signed by each Party. Modification of this Agreement must be by a written agreement signed by all Parties.

16. The exclusive venue for any such dispute shall be any court of competent jurisdiction in Lee County, Florida.

17. Waiver of Trial by Jury. EACH PARTY HEREBY IRREVOCABLY WAIVES ITS RIGHT TO A JURY TRIAL IN CONNECTION WITH ANY SUIT, ACTION OR PROCEEDING IN CONNECTION WITH ANY ACTION TO ENFORCE THIS AGREEMENT.

18. I/We further confirm and state that I/We have carefully read the foregoing Release and Settlement Agreement and had an opportunity to consult with legal counsel of our choice, know the contents thereof, and sign our name below as our own free act.

19. The person executing this Agreement on behalf of each of the Parties that is a legal entity is an authorized representative of such legal entity with full power and authority to bind the legal entity to this Agreement.

Manhattan Construction Company	Florida Gulf Coast University Board of Trustees
_____	_____
(Sign)	(Sign)
By: _____	By: <u>Blake Gable</u>
(Print Name)	(Print Name)
Its: _____	Its: <u>Chair</u>
(Print Title)	(Print Title)
Date: _____	Date: _____