BARBARA J. PARKER, City Attorney - SBN 069722
MARIA BEE, Chief Assistant City Attorney - SBN 167716
JAMILAH A. JEFFERSON, Supervising Deputy City Attorney - SBN 219027
One Frank H. Ogawa Plaza, 6th Floor
Oakland, California 94612
Telephone: (510) 238-7686
Facsimile: (510) 238-6500
jjefferson@oaklandcityattorney.org

STACEY M. LEYTON - SBN 203827
DANIELLE LEONARD - SBN 218201
JONATHAN ROSENTHAL - SBN 329638
EMANUEL WADDELL – SBN 350156
ALTSHULER BERZON LLP
177 Post Street, Suite 300
San Francisco, CA 94108
Telephone: (415) 421-7151
Facsimile: (415) 362-8064
sleyton@altber.com
dleonard@altber.com
jrosenthal@altber.com
ewaddell@altber.com

DARALYN DURIE - SBN 169825
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, CA 94105
Telephone: (415) 268-7000
Facsimile: (415) 268-7522
ddurie@mofo.com

Attorneys for CITY OF OAKLAND

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA

OAKLAND BULK AND OVERSIZED TERMINAL, LLC, a California limited liability company, and OAKLAND GLOBAL RAIL ENTERPRISE, LLC, a California limited liability company

Plaintiffs,

v.

CITY OF OAKLAND, a California municipal corporation,

Defendant.

CITY OF OAKLAND

Counter-Plaintiff,

v.

OAKLAND BULK AND OVERSIZED TERMINAL, LLC, and CALIFORNIA CAPITAL INVESTMENT GROUP,

Counter-Defendants.

Consolidated Case Nos. RG18930929 / RG20062473

Unlimited Civil Case/Assigned to Dept. 514
(Hon. Noël Wise)

CITY OF OAKLAND'S PRETRIAL BRIEF NO. 2 REGARDING THE AVAILABILITY AND SCOPE OF "INCIDENTAL DAMAGES" ACCOMPANYING A SPECIFIC PERFORMANCE ORDER

Action Filed: December 4, 2018
Trial Date: July 10, 2023
Cont. Trial Date: Nov. 28, 2023

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INTRODUCTION

Pursuant to the discussion at the Case Management Conference held on November 16, 2023, the City of Oakland submits this pre-trial brief to address two questions posed by the Court regarding Plaintiff Oakland Bulk and Oversized Terminal ("OBOT")'s claim for damages incidental to an award of specific performance:

1. Are monetary damages available as a remedy incident to specific performance?

2. If such damages are available, what are the limitations on scope, if any, with respect to the types of damages claimed by OBOT?

For the reasons set forth below in Section I, OBOT has waived any request for incidental damages, both in the plain language of the West Gateway Ground Lease (which expressly waives "incidental" damages) and again by failing to assert this as a form of equitable relief at any time in this case. As set forth in Section II, if the Court permits a claim for monetary relief incident to the remedy of specific performance notwithstanding the contract and litigation waivers (which it should not), at least two of the categories of OBOT's claimed damages are not available under the contract and applicable law.

DISCUSSION

I. OBOT Has Doubly Waived Monetary Damages "Incidental" to an Equitable Remedy of Specific Performance

OBOT explained at the November 16, 2023 case management conference that it intends to seek at trial, along with a specific performance order, OBOT's "incidental damages for the period of June 2018 until the trial." 11/16/23 Trial Trans. at 4247:4-5; *id*. at 13-21 ("in our view, the court is permitted to make a monetary award incident to specific performance. There are cases that specifically address that point and what it is or what that damage number -- they call it incidental damages; sometimes they call it an accounting. But in this type of case it is for the losses that occurred while the plaintiff was seeking specific performance, and it does apply in real estate cases and in cases involving possession of property.").

The cases OBOT appears to be invoking involve delayed sales of property, whereby the seller maintains possession of (and the ability to profit from) the land, and the purchaser

maintains possession of the purchase amount (and any interest or benefit therefrom). *See e.g*, *Ellis v. Mihelis* (1963) 60 Cal.2d 216, 219–20; *BD Inns v. Pooley* (1990) 218 Cal.App.3d 289, 298–99; *Bravo v. Buelow* (1985) 168 Cal.App.3d 208, 214.[1] In such circumstances, California has long allowed, as an additional equitable remedy, an accounting to set *both* parties in as near a position as possible as if ownership of the land had been transferred rather than delayed. *E.g*. *Bravo*, 168 Cal.App.3d at 214 (explaining: "The rule that compensation incident to a decree of specific performance is different in kind than damages for breach of contract, and that the right of recovery is predicated on equitable principles of accounting, is reflected in holdings that a defaulting seller [of property] is entitled to offsetting credit against compensation awarded to a successful plaintiff purchaser."); *id*. ("[T]he court must give credit to either party for such expenditures that it has occasioned in relation to the property, such as taxes, assessments, insurance premiums, repairs and the like.").

This is not a case involving the sale of property where the defendant either maintained ownership of the land (as a defaulting seller) or refused to pay the purchase price (as a defaulting buyer), thereby delaying a sale and transfer of ownership, and requiring a complex accounting relating back to when the transfer of ownership would have taken place. The Court concluded here that the City breached the provision requiring a force majeure extension of time of OBOT's deadlines for its obligation to develop the land it leased. OBOT leased the land from the City on February 16, 2016, and as the evidence in Phase One demonstrated, OBOT has entered into several types of contracts under which it has directly profited from its possession of the West Gateway (including, *at least*, option agreements, extensions, subleases, development management

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[1] The Court in *Ellis* explained:

> The complainant affirms the contract as being still in force and asks that it be performed. If the court orders it to be performed, the decree should as nearly as possible require performance in accordance with its terms. One of the terms is the date fixed by it for completion, and since that date is past, the court, in order to relate the performance back to it, gives the complainant credit for any losses occasioned by the delay and permits the defendant to offset such amounts as may be appropriate. The result is more like an accounting between the parties than like an assessment of damages.

Id. at 219–20. *See also Bravo*, 168 Cal.App.3d at 214 (citing cases).

agreements, and property management agreements. Exs. 25, 127, 514, 517, 549, 574, 590, 618, 620, 630, 632, 637, 638.

OBOT has never briefed this remedy (including in its trial brief filed June 21, 2023), but presumably it is relying on the language of the above-cited property sales cases stating, as *one part* of the complex accounting when a land sale is delayed, that "the buyer is entitled to the rents and profits from the time the contract should have been performed." *Bravo*, 168 Cal.App.3d 208 at 214.[2] But there is a very significant question of whether the equitable accounting remedy permitted in the unique circumstance of the failed sale of land should apply here at all, as no case has ever extended this remedy to this context. *See* Witkin, Summary of Cal. Law (10th ed. 2005) Equity, § 28 (summarizing the leading cases awarding damages incidental to specific performance, all of which involve a breached contract to sell real property). However, the Court need not resolve that legal issue, because OBOT has waived any such monetary relief for such losses "incidental" to a delay in performance in two ways.

A. Contract Waiver

The plain language of the "sole and exclusive" remedy provisions to which OBOT agreed in the Ground Lease waive any monetary relief other than "actual damages," *including specifically waiving "incidental" damages*. Ex. 68-91-92 (Section 22.1 "Default by Landlord; Tenant's Exclusive Remedies"). Section 22.1 expressly and unambiguously limits OBOT to "actual damages incurred by Tenant as a direct result of Landlord's default" imposed only as an offset to future rent, and waives all forms of special damages:

> …provided, however, (i) *in no event* shall Tenant be entitled to offset from all or any portion of the Rent becoming due hereunder or to *otherwise recover or obtain* from

[2] California law recognizes that property sales and purchases have unique rules: "The rules of damages for a breach of a contract to sell or buy real property are special and unique." *Greenwich S.F., LLC v. Wong*, 190 Cal.App.4th 739, 751 (2010); *see also Real Est. Analytics, LLC v. Vallas* (2008) 160 Cal.App.4th 463, 473 (explaining that special rules for contracts for the sale of property "arose in medieval England where land ownership was a primary indicator of the owner's social status and voting rights."). The City can find no case in which a Court has awarded equitable damages incident to an award of specific performance in the context of a force majeure delay extending deadlines with respect to a development project for which the land has been transferred by lease.

> Landlord or its Agents *any damages (including, without limitation, any consequential, incidental, punitive or other damages proximately arising out of a default by Landlord hereunder*) *or Losses other than Tenant's actual damages* as described in the foregoing clause (a);

Id. (emphasis added). OBOT cannot now seek "incidental" damages it expressly waived. *E.g.*, *De Anza Enterprises v. Johnson* (2002) 104 Cal.App.4th 1307, 1322 (rejecting lost profits as equitable relief incident to specific performance in light of contract language, recognizing that "a decree of specific performance must, as nearly as possible, order performance according to its terms" and "[t]he court did not err in refusing to add such a term to the Agreement…").

OBOT may argue that the Ground Lease permits all forms of equitable relief. But the equitable remedies available to OBOT are expressly qualified by the above quoted language waiving monetary relief including incidental damages: the "provided, however" clause in Section 22.1 applies to *both* of the two exclusive remedies set forth immediately prior, actual damages and equitable relief. *See* §22.1; *see also* §20.1 (equitable relief subject to other provisions of lease). Furthermore, to the extent OBOT argues now that what it described to the Court on November 16, 2023 as "incidental damages" are not in fact "damages" and therefore not covered by this waiver of incidental damages (11/16/23 Trial Trans. at 4247:4-5), the Ground Lease states that "in no event" will OBOT be awarded any damages or "*losses*," thereby waiving *any* form of monetary relief other than actual damages directly caused by the breach. *See* Ex. 68-91-92 (§22.1), 68-136 (Article 40, broad definition of "Losses").

California courts enforce contract limitations on remedies. *Artukovich v. Pac. States Cast Iron Pipe Co.*, (1947) 78 Cal.App.2d 1 ("In California parties may agree by their contract to the limitation of their liability in the event of a breach"; enforcing waiver of consequential damages); *CAZA Drilling (California), Inc. v. TEG Oil & Gas U.S.A., Inc*. (2006) 142 Cal.App.4th 453, 466 (same). The question is not what the parties should have or could have agreed to as a fair remedy in the context of the compromises that made this contract possible; the agreement that the parties reached as part of their negotiation, and assumption of risk on both sides, is binding. Equity *cannot* alter the express terms of this agreement to award what OBOT has waived. *See, e.g.*, *Bailard v. Marden* (1951) 36 Cal.2d 703, 708; *see also De Anza*, 104 Cal.App.4th at 1322.

B. Litigaiton Waiver

OBOT raises this new form of remedy, an equitable award of damages incidental to the delay in performance, calculated by way of an "accounting," for the first time now—far after the close of discovery and on the eve of the remedy trial. OBOT did not plead any such equitable monetary relief along with its request for specific performance and damages. 12/11/2020 FAC at 17-28. OBOT's pre-trial brief nowhere mentioned this new remedy, claiming only specific performance and contract damages. 6/21/23 Plaintiffs' Trial Brief at 5-6.

None of OBOT's discovery responses claimed any equitable monetary relief in lieu of or addition to contract damages. In discovery, OBOT confirmed that it relies entirely on the amounts and calculation of "economic damages" by its proposed expert, accountant Peter Brown.[3] Mr. Brown has calculated out of pocket expenses and "lost profits" that he opines OBOT incurred from 2018 to 2023. Neither of these calculations is the "accounting" described by the case law that OBOT invokes, which is not an "out-of-pocket" or "lost profits" analysis focused on OBOT alone, but requires a complex assessment of the respective positions of the parties with respect to the value and income from the land at issue. *E.g., Bravo*, 168 Cal.App.3d at 214-15.[4] The law is clear that the court conducting such an accounting must assess the impacts on both sides. Had OBOT claimed such a remedy at any point in this litigation, the City would

[3] OBOT repeatedly confirmed in discovery that its damages were limited to those set forth by its damages expert, Mr. Brown: "Plaintiffs OBOT and OGRE's method of calculating damages are explained in the expert report of Peter W. Brown of Green Hasson Janks LLP, served November 15, 2021 and supplemented on May 4, 2023." Plfs' Supp. Response to Special Interrogatories (Set One), dated May 5, 2023 at 7:13-15. *See also* Plfs' Supp. Response to Special Interrogatories (Set One), dated November 24, 2021 at 2:26-28; Plfs' May 11, 2023 Deposition of OBOT (PMK witness: Phil Tagami) at 257:17-20, 258:2-17; May 17, 2023 Deposition of OGRE (PMK witness: Mark McClure) at 138:11-20.

[4] That Court explained the accounting "should take into consideration, among other things, the following: the rents received by defendants during the period from the date of the conveyance of the title to the premises; any profits resulting to the defendants in their operation of the property; any losses sustained by the plaintiff because of the delay in conveyance of title; necessary expenses incurred by the defendants in the operation of the property, such as payments of principal and interest on the mortgage, property taxes, insurance, and minor repairs; the benefits to the plaintiff in retaining the use of the purchase money during the pendency of the litigation." *Id.* (quotations omitted).

have sought additional discovery and admissions regarding the appropriate calculation in this context and the facts regarding both sides of that calculation (including, at the very least, "the benefits to the plaintiff in retaining the use of the purchase money during the pendency of the litigation," *id*.), and likely would have asked its own expert to address such calculations. OBOT did not inform the City or the Court that it sought this remedy until now, and should be held to its waiver.

II. If the Court Permits Incidental Damages Notwithstanding the Contract Waiver, Several Categories of Damages Calculated by OBOT's Expert Are Not Permitted by Contract or Law

Initially, if the Court permits OBOT to present evidence notwithstanding these waivers, OBOT is confined to the existing opinions of its expert that were disclosed in discovery (rather than any new "accounting"). *Jones v. Moore* (2000) 80 Cal.App.4th 557, 565 ("When an expert deponent testifies as to specific opinions and affirmatively states those are the only opinions he intends to offer at trial, it would be grossly unfair and prejudicial to permit the expert to offer additional opinions at trial."); *accord Bonds v. Roy* (1999) 20 Cal.4th 140, 147; *Kennemur v. State of California* (1982) 133 Cal.App.3d 907, 919.

The additional reasons set forth below foreclose at least two of the categories of losses Mr. Brown calculated: attorneys' fees for the federal case and lost profits from the ITS sublease.

A. Out-of-Pocket Expenses

Mr. Brown calculated a total of $5.3 million in out-of-pocket expenses.[5] Mr. Brown initially referenced Plaintiffs' out-of-pocket expense allegations in the Amended Complaint, and explained that "Plaintiffs do not claim the entire amount as damages." PTX 331 (not in evidence). Mr. Brown then explained:

> Plaintiffs have excluded costs incurred prior to the breach date (May of 2018) as well as expected costs (*i.e.*, those costs that Plaintiffs would have reasonably incurred had the Project moved forward as expected). However, in the event that Plaintiffs have incurred

[5] Mr. Brown's reports are out-of-court hearsay and plainly are not admissible evidence. The City describes the content of those reports for the purpose of discussing the legal issues raised by OBOT's anticipated evidence at trial, subject to any and all evidentiary objections at trial.

> extra costs (i.e., costs that, "but for" the Defendant's alleged actions, Plaintiffs would not have incurred), then these costs have been included in Plaintiffs' claim for out-of-pocket costs.

Id. Mr. Brown identified three categories of such expenses: attorneys' fees for the *federal litigation*; additional "payroll" expenses; and repair/maintenance costs.

The attorneys' fees incurred by OBOT litigating the federal case cannot be claimed as "incidental" damages caused by the City's breach in *this* case, for multiple independent reasons. First, OBOT waived any claim to attorneys' fees as a prevailing party in the federal litigation by not litigating those fees in that case. Second, for all the reasons previously briefed, res judicata plainly bars any claim against the City for fees incurred in that case.

Third, OBOT cannot show causation. It is undisputed (as reflected in the Phase One evidence) that OBOT and the City were engaged in the trial and appellate litigation over the City's 2016 Ordinance and Resolution beginning in December 2016, well before the November 22, 2018 breach of the Ground Lease found by the Court in this case. OBOT cannot now contend that it would not have pursued that litigation in defending the federal decision on appeal if the City had granted OBOT the force majeure extension and not breached the Ground Lease. It is not remotely plausible and indeed, is contrary to all testimony by OBOT's witnesses in the First Phase, that OBOT would have *given up defending that appeal* if the project had gone forward (which would be the required predicate for claiming the default in this case is the but-for cause of the appellate litigation fees in that case). The federal litigation fees were not *caused* by the City's breach *in this case*, and incidental damages must have been caused by the breach at issue, under any version of the accounting discussed in cases like *Bravo*, 168 Cal.App.3d at 214–15. *See also BD Inns*, 218 Cal.App.3d at 299 ("BD Inns seeks recompense for interest lost on the notes, extension fees, and operating losses. But having obtained a decree of specific performance, it is entitled only to be compensated for that to which it would have been entitled had the contract been performed: the net purchase price."); *see also Behniwal v. Mix* (2007) 147 Cal.App.4th 621, 635 (rejecting attorneys' fees in the immediate case as category of damages "incident" to specific

performance).[6]

B. Lost Profits from the ITS Sublease 2018-2023

Mr. Brown calculates approximately $17 million in "lost" profits from money "owed" to OBOT pursuant to the September 24, 2018 ITS Sublease.[7] If these lost profits are not waived as "incidental" damages for the reasons given above, they are classic "consequential" damages, predicated on a separately-negotiated third party contract, which were also expressly waived.[8]

As the California Supreme Court has explained, "[c]ontractual damages are of two types—general damages (sometimes called direct damages) and special damages (sometimes called consequential damages)." *Lewis Jorge Construction Mgmt. v. Pomona Unified School Dist*. (2004) 34 Cal.4th 960, 975. General damages are those that flow "directly and *necessarily*" from the terms of the agreement. *Id.* at 968 (emphasis added). General or actual damages would include, for example, the rent due to the City pursuant to express contract terms, if OBOT had breached. Special or consequential damages are "losses that do not arise directly and *inevitably*" from the contract but instead are "secondary or derivative losses arising from circumstances that are particular to the contract or to the parties." *Id*. (emphasis added). The quintessential example of special damages is lost future profits, because those damages usually depend on circumstances, actors, and events beyond the express terms of the contract at issue and specific to the future

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[6] OBOT must prove that the City's default was the but-for cause of the other claimed out-of-pocket expenses. Should OBOT be allowed to seek these expenses, the City will hold OBOT to its evidentiary burdens.

[7] The methodology used by Mr. Brown to calculate OBOT's lost profits from 2018-2023 was to calculate the amount to be paid to OBOT from the 2018 ITS Sublease, minus any payments actually received. Mr. Brown thus did not estimate any revenue or profit to OBOT from any of its own business operations or activities, on the apparent basis that OBOT informed Mr. Brown that it intends to perform entirely via the ITS sublease and expects ITS to perform. As Mr. Brown admitted in deposition, OBOT's future profits that he identified depend entirely on ITS's viability as a future business. Brown Depo. at 101:25–102:7, 103:16–22 ("[A]t the end of the day, it's the ITS sublease that drives, obviously, the damages.").

[8] In addition, per the analysis in *De Anza*, lost future profits are not automatically available incident to an award of specific performance, and are "plainly inapposite" outside the context of a contract for the transfer of the ownership of property by a fixed date. 104 Cal.App.4th at 1322.

efforts of the parties. *See Lewis Jorge*, 34 Cal.4th at 975 ("Lost profits, if recoverable, are more commonly special rather than general damages, and subject to various limitations"); *see also Greenwich S.F., LLC v. Wong* (2010) 190 Cal.App.4th 739, 758 (describing lost profits "as a component of consequential or special damages"); *Resort Video, Ltd. v. Laser Video* (1995) 35 Cal.App.4th 1679, 1697 ("…consequential damages such as lost profits…").[9]

The archetypical intervening secondary event under California law that renders damages consequential rather than actual is a third-party contract. The importance of the role of contingencies like third-party contracts in consequential damages is *very* well-established: "Familiar instances of profits which are thus speculative and remote are *those which might have been realized on a new contract with a third person*." *Shoemaker v. Acker* (1897) 116 Cal. 239, 244–45 (cited favorably in *Lewis Jorge*, 34 Cal.4th at 971) (emphasis added); *id*. ("for in such a case the profits on the new contract are wholly collateral to the one broken, do not directly flow from it, and are not stipulated for or contemplated by the parties to the contract sued on").

There is no discussion anywhere in the Ground Lease of amounts of rent to be paid to OBOT under a future sublease. Ex. 68-73 (Section 12.4, addressing the rules for potential subleases). Full performance by the City provided OBOT with the opportunity, not guaranteed or *necessitated* by the Ground Lease, to earn profits either from constructing and operating the terminal itself or from other business relationships. Nor does anything in the Ground Lease *necessitate* that OBOT would ever enter into a sublease, let alone would profit in the particular amounts set forth in the ITS sublease.[10] The first time the City was informed of the future rent amounts negotiated between OBOT and ITS was the September 28, 2018 submission of that

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[9] Both the City and OBOT were well aware at the time of the Ground Lease that lost profits are typically consequential damages, having so agreed in the DA (an agreement this Court has now found to be referenced in and related to the Ground Lease). *See* Ex. 7-40 ("neither Party shall ever be liable to the other Party for any consequential or punitive damages on account of the occurrence of an Event of Default (*including claims for lost profits, loss of opportunity, lost revenues, or similar consequential damage claims*)…") (emphasis added).

[10] The substantial record from Phase One regarding the 2018 negotiation between OBOT and ITS, including the history of Mr. Siegel's debts to OBOT and CCIG, establish that the sublease rents and schedule of payments reflect circumstances unique to the relationship and history between OBOT and ITS, which are certainly not necessitated by the terms of the Ground Lease.

Sublease to the City, years after the Ground Lease was signed. Ex. 237.

Applying long-standing law, the lost profits that OBOT claims here are not profits that flow directly and necessarily from the contract terms in the Ground Lease and cannot be actual damages. These are quintessential consequential damages because they rely on circumstances specific to OBOT's relationships and contracts with its sublessee and the sublessee's ability to pay by generating revenue from future customers. OBOT's claimed lost ITS sublease rents are therefore "loss[es] that occurred by reason of injuries following from the breach." *Lewis Jorge*, 34 Cal.4th at 969; *id.* at 971 (actual damages "are based on the value of the performance itself, not on the value of some consequence that performance may produce.").

OBOT has previously cited cases in which courts awarded lost profits as contract damages. *None* of these cases analyze the distinction between actual and consequential damages (because none involved a consequential damages waiver), addressing only the general contract damages threshold question of foreseeability. *See, e.g., Stark v. Shaw* (1957) 155 Cal.App.2d 171, 180; *Nelson v. Reisner* (1958) 51 Cal.2d 161, 170; *Brandon & Tibbs v. George Kevorkian Accountancy Corp.* (1990) 226 Cal.App.3d 442, 457; *Grupe v. Glick* (1945) 26 Cal.2d 680, 683.

If OBOT wanted the City to be liable, in the event of a breach, for lost future income from a then-hypothetical future sublease, it could have negotiated a contract that said that (and given the City something in return). Instead, it negotiated exactly the opposite. The Court should enforce OBOT's express agreement that neither party "shall be liable for… any consequential damages… arising out of any default by the other Party hereunder," Ex. 68-92 (§24.1), and that it cannot "obtain" any "consequential" damages from the City s (Ex. 68-91-92 (§22.1)), and preclude OBOT from seeking what it has waived by way of a claim for "equitable" relief.

Again, equity cannot alter the plain terms of this contract. This waiver was part of the consideration for this 66-year lease, on both sides. It would exceed this Court's authority to reinstate in the name of equity a remedy that OBOT knowingly and expressly agreed to forgo in the event of a City breach.[11]

[11] The City reserves all other evidentiary and substantive arguments in response to Mr. Brown's lost profits calculations, and again will hold OBOT to its burdens of proof at trial.

Dated: November 20, 2023

Respectfully submitted,

ALTSHULER BERZON LLP
Stacey M. Leyton
Danielle Leonard
Jonathan Rosenthal
Emanuel Waddell

MORRISON & FOERSTER LLP
Daralyn Durie

By: */s/ Danielle Leonard*
Attorneys for CITY OF OAKLAND