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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.	Consolidated Case Nos. RG18930929 / RG20062473 Unlimited Civil Case/Assigned to Dept. 514 (Hon. Noël Wise) **CITY OF OAKLAND'S PHASE TWO (REMEDIES) TRIAL BRIEF** Action Filed: December 4, 2018 Trial Date: July 10, 2023 Cont. Trial Date: Nov. 28, 2023
CITY OF OAKLAND Counter-Plaintiff, v. OAKLAND BULK AND OVERSIZED TERMINAL, LLC, and CALIFORNIA CAPITAL INVESTMENT GROUP, Counter-Defendants.	

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INTRODUCTION

At the November 16, 2023 Case Management Conference, this Court requested briefing on three issues regarding the scope of the upcoming remedies trial, which the parties submitted on Monday, November 20, 2023: 1) Whether OBOT has the right to proceed to trial on alternative contract remedies; 2) Whether OBOT can seek incidental damages along with an order of specific performance; 3) Any further constraints on the scope of OBOT's claimed incidental damages. On November 21, 2023, this Court issued an order permitting OBOT to present evidence on two alternative remedy scenarios: 1) specific performance and "incidental" damages; and 2) lost future profits as contract damages.

The Court's November 21, 2023 Order permitting OBOT to proceed on these theories is contrary to the plain language of the Ground Lease, in which OBOT has waived *both* incidental damages and consequential damages that include the lost profits claimed here:

> **"[I]n 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 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)…"

Ex. 68-91-92, Section 22.1 (Default by Landlord; Tenant's Exclusive Remedies).

The Court is not correct that the impact of this ruling permitting OBOT to proceed on these theories at trial on the parties' preparation and presentation of evidence is "minimal" in light of the need for expert testimony on lost profits (and all the rules of evidence that attend such testimony), including necessitating the City calling as a witness an expert to respond to OBOT's lost profit claims (which are expressly *waived*), and for this Court to resolve myriad issues with respect to the patent inadmissibility of much of OBOT's speculative, unsupported, and inadmissible lost profits "evidence."

The City renews its request that this Court resolve these issues prior to permitting OBOT to present evidence on remedies it has plainly waived, and requiring the City and Court to expend resources responding to and resolving those claims and the substantial evidentiary objections they will generate. In addition, as will also be explained below, if the Court is going to permit these

monetary remedies to be tried, the City has filed a motion in limine today to limit OBOT to the damages that it actually disclosed in discovery in this case, and not to present new calculations, theories, or evidence never before disclosed and on which the City will be prejudiced in responding at trial.

The City submits this trial brief addressing the legal issues that remain to be addressed at the upcoming continued trial on OBOT's remedies in light of this Court's rulings.

First, the City discusses below in Section I the legal standards applicable to the scope of an order of specific performance, which limit the remedy to an order extending the Initial Milestone deadline that OBOT missed by a reasonable amount of time for performance. *See* Ex. 68-31-33, 84-85 (§§ 6.1, 16.1). As further explained herein, the only relief that this Court may properly consider, given the nature of the contract breach the Court identified, is an extension of OBOT's Initial Milestone deadline. The Court lacks authority to grant other relief that OBOT appears to be requesting, including extension of the Commencement Date (which amounts to a restart of the entire contract) or enforcing other provisions of the Ground Lease besides the force majeure provision.

Next, in Section II, the City discusses legal issues raised by the claim for "incidental damages." The Court also should hold that incidental damages are unavailable to OBOT, both because they were expressly waived in the Ground Lease and because OBOT's failure to state its intent to seek this remedy until this stage of the litigation waived any such relief. Even if such relief were not waived, at the very least OBOT plainly cannot seek compensation for attorneys' fees from the *federal* case, which it claims as "delay" damages here.

In Section III, the City discusses the dispositive legal issues that foreclose OBOT's attempt to claim lost future profits as contract damages in this case, and the substantial questions presented by OBOT's "expert" testimony. The Ground Lease provision waiving consequential damages precludes any relief in the form of lost profits (which, regardless of any waiver, must be specifically pled, and they were not). Moreover, OBOT's expert's opinions setting forth such alleged damages are entirely speculative and otherwise inadmissible, and OBOT faces a steep

climb that it cannot complete to meet the requirements imposed for lost future profits evidence in *Sargon Enterprises, Inc. v. University. of Southern California* (2012) 55 Cal.4th 747, 774.

Finally, in Section IV, the City addresses issues with respect to witnesses, exhibits, and other trial logistics.

BACKGROUND

The City will not restate the evidence and issues presented in the first phase of this trial with respect to liability. As pertains to OBOT's proposed remedies, the relevant history is as follows:

As the Court is aware, OBOT expressly agreed to "sole and exclusive" remedies in the Ground Lease for any City default. In those provisions OBOT expressly waived all "incidental" and "consequential" damages. Ex. 68-91-92 (Ground Lease §§22.1, 23.1, 24.1). OBOT agreed that the only monetary relief available would be "actual damages directly caused by the City's default" applied as an offset to future rent. Ex. 68-91 (§22.1). These waivers were a "material part of the consideration for this Lease." Ex. 68-92 (§24.1).

OBOT's operative First Amended Complaint pleads the following remedies: specific performance, injunctive relief, and damages. 12/11/2020 FAC at 17-28. OBOT's complaint does not plead any equitable monetary relief incident to performance, and did not plead lost future profits at all let alone with specificity. *Id.* (in particular, *see* FAC ¶¶103-107, pleading unspecified "damages" that do not expressly include lost profits).

OBOT pled a claim of "Specific Performance" seeking a series of orders from the Court. *Id*. at 24. With respect to an extension of time, OBOT specifically pled that it seeks an order extending the contract's Commencement Date in light of alleged events of Force Majeure:

> In particular, the City shall extend the Commencement Date, as defined in the Lease, for two years with a further continuing extension for so long as the City fails to comply with its contractual obligations.

FAC at 25:5-8 (¶140(b)). OBOT's original pre-trial brief did not specify any extension requested by OBOT. June 21, 2023 Plaintiffs' Trial Brief at 2. In OBOT's proposed Statement of Decision, OBOT described the extension it seeks as "at least a 31-month extension" of the "Initial

Milestone Date." Sept. 25, 2023 Plaintiffs' PSOD at 3, 53, 84, 94-95. At the November 16, 2023 CMC, OBOT confirmed that the extension of the Initial Milestone that it seeks is something between one day and 2.5 years. Trial Trans. 4326:21-25 ("THE COURT: Does everybody agree that the bookends for the amount of time before the initial milestone has to be performed is somewhere between one day, I will call it, two years and 180 days? MR. LEE: Yes.").

Because OBOT did not plead damages with any specificity in its Amended Complaint, the City sought this information in discovery. FAC at 18 (¶107), 20 (¶119), 22 (¶131). In discovery, OBOT produced two expert reports calculating certain damages by an accountant hired for this litigation, Peter Brown,[1] and OBOT confirmed that it relies *entirely* on the amounts and calculation of "economic damages" by Mr. Brown.[2] Mr. Brown's reports calculate the following "economic damages": out-of-pocket expenses alleged to have been caused by the delay in performance, and lost future profits for OBOT and OGRE.

In those reports, Mr. Brown calculated a total of $5.3 million in out-of-pocket expenses claimed by Plaintiffs (consisting entirely of attorneys' fees paid to litigate the prior federal litigation; additional "payroll" expenses; and repair/maintenance costs).[3]

In addition to out-of-pocket expenses, Mr. Brown (who is an accountant hired for purposes of this litigation, is not an economist, and admitted in deposition that he is unqualified to opine on commodities markets) calculated approximately $17 million in "lost" profits between

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[1] This Court provided a limited supplemental window for pre-trial discovery between the prior discovery period that closed December 15, 2021 and the new trial date of July 10, 2023, and Mr. Brown supplemented his expert report during that window. The City provided a responsive report, and both sides deposed the respective experts on the supplemental reports.

[2] All of OBOT's and OGRE's Interrogatory Responses and PMQ deposition testimony responded to questions regarding the amount and basis for damages claims (or refused to respond to questions regarding damages claims) by stating the damages are set forth in Mr. Brown's reports. *See* the accompanying City's Motion in Limine precluding evidence of damages beyond any identified in discovery and Declaration of counsel in support.

[3] Mr. Brown's reports are out-of-court hearsay and plainly are not admissible evidence. Notwithstanding these basic rules of evidence, OBOT has included Mr. Brown's reports on its exhibit list. The City describes the content of Mr. Brown's reports for the purpose of discussing the legal issues raised by OBOT's anticipated offered evidence at trial, subject to and without waiving any and all evidentiary objections to Mr. Brown's opinion testimony.

2018 and 2023, and another more than $100 million in "lost profits" through the life of the 66-year Ground Lease. The methodology used by Mr. Brown for both lost profit calculations was the same: the amount of expected profit to OBOT from the 2018 ITS and OGRE Subleases. Mr. Brown thus did not calculate any revenue or profit to OBOT from any of its own business operations or activities under the Ground Lease, other than money from the subleases, on the apparent basis that OBOT informed Mr. Brown that it intends to perform via the sublease and expects ITS to perform. To support his speculation regarding ITS' ability to pay 66 years into the future, Mr. Brown made predictions based on information provided to him by OBOT on whether the terminal would be financed and constructed, and how it would be operated, and he speculated regarding the availability of commodity throughput to calculate the rent to be paid by ITS to OBOT over the years.

The City has prepared responsive reports from its own expert, economist Jonathan Borck, which explain the profound flaws in Mr. Brown's methodology, which could be rendered moot by the scope of Mr. Brown's testimony offered or allowed at trial.

The Court's Order of November 21, 2023 unfortunately inadvertently could be misinterpreted by OBOT to invite it to submit calculations that OBOT's expert has not conducted, based on evidence that OBOT has not produced or relied on, for amounts that OBOT has never claimed at any point in this litigation as damages (including but not limited to damages for timeframes that Mr. Brown *did not calculate*). If the Court is going to permit evidence on these waived forms of damages, the City respectfully requests that OBOT's evidence at trial be confined, as required by long-standing California law, to its discovery responses, as set forth in the accompanying motion in limine filed today.

DISCUSSION

I. OBOT's Specific Performance Requests

A. Extension of the Initial Milestone Deadline

The only appropriate relief that OBOT may now seek is an extension of the Initial Milestone deadline. The appropriate time period, which will be somewhere between one day and 2.5 years will be resolved by the evidence presented at the next stage of the trial.

There is no dispute that the Ground Lease authorizes OBOT to seek specific performance. Ex. 68-80 (§20.1). Even where a contract authorizes that relief, a party must meet the requirements of California law. To "obtain specific performance after a breach of contract," a plaintiff must prove five elements: (1) a legal remedy would be inadequate; (2) the underlying contract is both reasonable and supported by adequate consideration; (3) the existence of mutuality of remedies; (4) "contractual terms which are sufficiently definite to enable the court to know what it is to enforce"; and (5) a "substantial similarity of the requested performance to that promised in the contract." *Real Est. Analytics, LLC v. Vallas* (2008) 160 Cal.App.4th 463, 472; *see also* Civ. Code §§ 3390, 3392. As previously addressed on the record at the November 16, 2023 CMC, and in prior briefing to this Court, the City does not contest the availability of specific performance under these standards in the form of an order rescinding the contract termination and extending contract deadlines.[4] The parties now dispute the proper scope of such an order.

California law is clear that the contract terms must govern the scope of the equitable remedy of specific performance. *See Henderson v. Fisher* (1965) 236 Cal.App.2d 468, 473 ("[T]he performance which the court is asked to compel must be substantially identical to that promised in the contract."); *Mueller v. Chandler* (1963) 217 Cal.App.2d 521, 523 ("The terms must be so clear that the court can determine what the contract is and be able to require that the specific thing agreed to be done shall be done."); *see, e.g.*, *Lewis v. YouTube, LLC* (2015) 244 Cal.App.4th 118, 127; *Union Oil Co. of California v. Greka Energy Corp.* (2008) 165 Cal.App.4th 129, 136 ("The contracts gave notice of [the defendant's] obligations and are designed to allocate the risks.") (internal quotation omitted). Equity permits the Court to *specifically* enforce the provisions at issue, not the contract in general (discussed further below).

This Court's Proposed Statement concluded that the City breached the Ground Lease by enforcing the Initial Milestone deadline in Section 6.1 of the Ground Lease (which triggered the automatic early termination provision in that section) because it failed to grant a force majeure

[4] The City reserves all rights with respect to the underlying liability determination and as to the appropriate scope of any specific performance order, but as explained at the November 16, 2023 CMC, does not contest the availability of specific performance under this applicable standard.

extension of time pursuant to Section 16.1. The Force Majeure provision and definition therefore provide the relevant parameters for this Court's specific performance order:

> 16.1 Delay Due to Force Majeure. For all purposes of this Lease, a Party whose performance of its obligations hereunder is hindered or affected by events of Force Majeure shall not be considered in breach of or in default in its obligations hereunder to the extent of any delay resulting from Force Majeure, provided, however, that the provisions of this Section 16.1 shall not apply to Tenant's obligation to pay Rent, including Additional Rent.
>
> Force Majeure …The delay caused by Force Majeure *includes not only the period of time during which performance of an act is hindered, but also such additional time thereafter as may reasonably be required to complete performance of the hindered act.*

Ex. 68-84, 132 (§16.1; Art. 40 (Definition of "Force Majeure")) (emphasis added).

There is no dispute here that the "performance" of OBOT's "obligations" that the Court found "hindered" by the City was OBOT's compliance with the requirements of the Initial Milestone deadline. The question for the Court to resolve with respect to OBOT's request for specific performance is therefore to the length of the force majeure extension of the Initial Milestone deadline that this Court's order will provide to OBOT. Granting an extension of the contract deadline at issue is a valid exercise of this Court's equitable power. *See, e.g.*, *Gibson v. River Farms Co. of California* (1942) 49 Cal.App.2d 278, 283 ("We are of the opinion the extensions of time for the defendant to perfect its title to land involved in that suit were lawfully authorized as a just prerogative of a court of equity. These orders did not have the effect of changing substantial terms of the interlocutory decree. They merely extended the time for enabling the defendant to follow the procedure prescribed by the decree …"). The City also agrees that consistent with the language of the contract, because the time "during which" performance was hindered has already passed, the appropriate extension should be measured by the time "as may reasonably be required to complete performance of the hindered act." Ex. 68-132 (Art. 40). Thus, the upcoming trial should address this question.

With respect to the extension of the Initial Milestone deadline, as a matter of contract interpretation, what is "reasonable" should be considered in relation to the terms of the contract, and in particular, the parties' already agreed upon timeframe for performance. Civil Code

§§1636, 1638, 1639, 1641. It would not be reasonable, in the context of this contract, to conclude that a reasonable amount of time "to complete performance" is, for example, *longer* than the longest period of time agreed upon by the parties for completion of that performance. OBOT conceded as much at the November 16, 2023 CMC. Trial Trans. 4326: 21-25.

There remains the question of whether it would be reasonable, under this contract, for OBOT to be provided the six-month performance period to which it agreed for the Initial Milestone (180 days from the Commencement Date, *see* Ex. 68-33 §6.1.1.1), or an *additional* two years for performance available under the tolling provision, *see* Ex. 68-17 §1.7.2. The evidence taken in Phase One was undisputed that the City already granted OBOT two years of tolling (and thereby already granted OBOT two years of free rent), which expired February 16, 2018 (prior to the events that this Court found constitute events of force majeure after the May 15, 2018 federal court decision). OBOT must demonstrate at trial why it is reasonably necessary to be provided an additional two years beyond the contract's original performance period to be able to meet the Initial Milestone deadline, given the two years of free rent already provided, and the scope of the force majeure claims recognized by this Court. The City reserves further argument regarding the reasonableness of the length of the remedy requested by OBOT in light of the admissible evidence to be presented.

B. Other Specific Performance Orders

As discussed above, the Court's order of specific performance should be tailored to the breach that it found: the termination of the contract in light of a failure to grant a force majeure extension of the Initial Milestone deadline. OBOT previously indicated that it intends to ask the Court for specific performance orders beyond such an extension. The Court should reject that relief, including moving the Commencement Date of the entire contract, or ordering the City to generally or specifically perform other contract provisions, as beyond its authority to remedy the breach at issue.

First, the Court lacks authority to grant OBOT's request to change the contract's Commencement Date, effectively restarting the *entire* contract. The Court's goal here must be, as with any contract remedy, to put the parties back in the position they would have been had the

City not breached, *i.e.*, had the City *granted* OBOT's force majeure extension of time in September 2018. At that time, the Commencement Date had already passed. And the force majeure provision expressly grants an extension of time for OBOT's performance "obligations," but does not authorize restarting the contract Commencement Date. Ex. 68-84 (§16.1). That Commencement Date, which was unambiguously set by contract and has already passed, is not a deadline for any OBOT's performance obligation at all.

OBOT's attempt to move the Commencement Date appears to be a transparent move to restart all of the contract obligations, including rent. But OBOT agreed, in particular, that force majeure would *not* extend rent, and it cannot obtain that which it has expressly waived. Ex. 68-84 (§16.1: "[P]rovided, however, that the provisions of this Section 16.1 shall not apply to Tenant's obligation to pay Rent, including Additional Rent."). Further, because the Court's proposed decision regarding the City's breach does not find any breach by the City with respect to any other contract deadline, the Court lacks authority to order extensions of all other deadlines of obligations not at issue here.

In sum, changing the Commencement Date or other dates would effectively rewrite the contract, which this Court cannot do in the name of an equitable remedy. *E.g.*, *De Anza Enterprises v. Johnson* (2002) 104 Cal.App.4th 1307, 1322 (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"). While the Court's equitable authority is generally understood to be broad, in a contract case that authority is tied to the terms of the contract the Court is enforcing.

Second, to the extent that OBOT now seeks as an equitable remedy, orders enforcing any other provision of the Ground Lease beyond the force majeure provision, that would also exceed this Court's authority to remedy the breach at issue. And, any particular order could not, of course, exceed the language of what the parties actually agreed to, as discussed by this Court at the November 16, 2023 CMC. The Court should not permit, at the upcoming phase of trial, evidence that goes to enforcing other provisions of the Ground Lease against past or future hypothetical breaches. Because OBOT has not yet identified the substance of the particular

orders it seeks in this case (notwithstanding the City's many requests), the City reserves all further arguments with respect to any such requested relief.

Finally, OBOT has also suggested that it could seek an order generally requiring the City to perform all aspects of the Ground Lease. California law does not permit such an order in a contract such as this that contemplates performance through a complex series of steps over 66 years. It is not appropriate nor warranted for the Court to assume the role of an ongoing *monitor* of a complex contract, because the performance that is to be ordered is *specific*, not general: "[The] courts of equity will not decree the specific performance of contracts which by their terms stipulate for a succession of acts whose performance cannot be consummated by one transaction, but will be continuous and require protracted supervision and direction." *Long Beach Drug Co. v. United Drug Co.* (1939) 13 Cal.2d 158, 171; *see also Pac. Elec. Ry. Co. v. Campbell-Johnston* (1908) 153 Cal. 106, 117 ("[Courts] will not decree specific performance when the duty to be performed is a continuous one, extending possibly over a long period of time and which, in order that the performance may be made effectual, will necessarily require the constant personal supervision and oversight of it by the court."). Foreshadowing the current dispute by over one hundred years, the California Supreme Court explained: "Particularly is this true with reference to *the construction and operation of railroads…*" *Pac. Elec. Ry. Co.* 153 Cal. at 117 (emphasis added). While there has been some reformation of the old standard precluding any court monitoring of contracts that contain multiple steps for performance (which the Ground Lease undeniably does), courts have continued to apply a feasibility requirement in general and have reaffirmed the application of this barrier to general specific performance orders in the context of construction and development contracts. *E.g.*, *Okun v. Morton* (1988) 203 Cal.App.3d 805, 820–21 (recognizing rule prohibiting specific performance of ongoing contract enforcement continues to apply to construction and development contracts).[5]

[5] To the extent that Plaintiffs argue that such an order is necessary in light of the City's prior breach of contract, the courts have long rejected that type of argument for imposing ongoing monitoring duties on the courts: "Every action for specific performance is predicated upon the refusal of the defendants to perform the terms of a contract which the plaintiff considers equity

In sum, this Court should not play the role of contract monitor, nor can this Court grant, in the name of equity, *more* than what the contract would have allowed had the City perfectly performed in 2018. All that OBOT is entitled to here is specific performance rescinding the termination and authorizing a reasonable extension of time to comply with the Initial Milestone.

II. Incidental Damages

OBOT has doubly waived monetary damages "incidental" to an equitable remedy of specific performance. The Court has invited further briefing on this issue by the close of business the day before the start of trial, Monday, November 27, 2023. 11/21/23 Order at 4. The City respectfully requests a ruling as soon as possible to prevent the waste of the parties and the Court's resources on trial on issues that have been plainly and expressly waived by the Plaintiffs.

A. Contract Waiver

The plain language of the "sole and exclusive" remedy provisions to which OBOT agreed in the Ground Lease waives any monetary relief other than "actual damages," *including specifically waiving "incidental" damages*. Ex. 68-91-92. OBOT cannot now seek "incidental" damages it expressly waived. *E.g.*, *De Anza,* 104 Cal.App.4th at 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…").

California courts routinely 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). This case is not unique and the Court lacks authority to grant any exception to this rule. 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

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should compel him to perform. So that refusal to do so is of no moment as far as the right to such specific performance is concerned." *Pac. Elec. Ry.*, 153 Cal. at 116.

agreement that the parties reached as part of their negotiation, and assumption of risk on both sides, is binding.

The Court has no power in equity to alter the plain terms of this contract, including remedies that OBOT has consciously and expressly chosen to waive as consideration for the City's entering into a 66-year lease. *See, e.g.*, *Bailard v. Marden* (1951) 36 Cal.2d 703, 708; *see also De Anza*, 104 Cal.App.4th at 1322. OBOT cannot cry foul now, in hindsight, for the choice it made that facilitated an agreement that has permitted it to obtain this valuable land. The Court must enforce this agreement, not rewrite it. For this reason alone, OBOT cannot present evidence of incidental damages at trial.

B. Litigation Waiver

As previously briefed to this Court, OBOT raised this new form of remedy, an equitable award of damages incidental to the delay in performance, for the first time following this Court's Proposed Decision.[6] The caselaw OBOT has now invoked to justify its claim to equitable incidental damages has been available to it for this entire case, and so OBOT's failure to raise this form of relief has waived it; courts in California have long enforced such waivers. *E.g.*, *Chase v. Blair* (1930) 105 Cal. App. 744, 746 (failure to plead delay damages incidental to specific performance forecloses relief); *see also Lewis Jorge Constr. Mgmt., Inc. v. Pomona Unified Sch. Dist.* (2004) 34 Cal. 4th 960, 975 (all special damages *must* be specially pled, per the rule of *Hadley v. Baxendale*). OBOT has plainly waived this remedy, and it will severely prejudice the City to have to respond now to calculations or evidence that have never been provided to it prior to trial. It would a profound error of law to permit OBOT to present evidence, calculations, and

[6] 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. And OBOT's expert has not calculated the incidental damages that the Court's Order describes. 11/21/23 Order at 4. OBOT and OGRE's concession that they seek only damages set forth by their expert must be enforced, see accompanying City Motion in Limine and Declaration in Support, filed herewith.

argument at trial on damages beyond what it has claimed to date in discovery in this case, and the City has moved in limine today accordingly.

C. OBOT Cannot Claim Federal Litigation Fees as Incidental Damages in this Case

Even if the Court were to permit OBOT to present evidence on these waived damages, it should not permit any evidence regarding the federal litigation fees that OBOT has claimed. Among the three types of "out-of-pocket" costs calculated by OBOT's "expert" Mr. Brown as part of the delay damages are nearly $5 million in attorneys' fees from the federal case. But 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, as previously briefed, OBOT waived any claim to attorneys' fees as a prevailing party in the federal litigation by not litigating those fees in that case. Second, as also previously briefed, res judicata plainly bars any claim against the City for fees incurred in that case.

Third, OBOT cannot show causation for fees incurred in litigating the federal dispute, which predates this lawsuit. OBOT cannot plausibly 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 v. Pooley* (1990) 218 Cal.App.3d 289, 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).[7]

III. OBOT's Lost Profits Contract Damages

The Ground Lease expressly and unambiguously waives consequential damages, and OBOT therefore should not be permitted to present evidence at trial regarding these waived damages. *See* Ex. 68-91-92 (§§22.1, 24.1). The lost profits claimed by OBOT in this case as contract damages are not actual damages *necessitated* by the terms of the Ground Lease; they are consequential damages that turn on third-party contracts that did not exist at the time the Ground Lease was entered into and which depend on the viability, over a 66-year lease and sublease, of an entirely unestablished business. *See Lewis Jorge*, 34 Cal.4th at 975; *Greenwich S.F., LLC v. Wong* (2010) 190 Cal.App.4th 739, 758; *Resort Video, Ltd. V. Laser Video* (1995) 35 Cal.App.4th 1679, 1697. And, as special damages, lost profits *must* be specifically pled, and they were not. *Lewis Jorge*, 34 Cal.4th at 975.[8]

There is no dispute here that OBOT's "lost profits" are predicated *entirely* on its profits from its third-party contract with ITS, signed two and a half years after the Ground Lease (and after the City called OBOT in default). The law is clear: "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*. at 245 ("[F]or 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*.") (emphasis added). The

[7] 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 all of its evidentiary burdens.

[8] Both the City and OBOT were well aware at the time of the Ground Lease that lost profits are 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).

cases which OBOT relies on that conclude lost profits can be contract damages do not resolve the question of whether they are an actual or consequential type of contract damages, because *none* of them involve a consequential damages waiver. *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. It matters not that other courts have held, in situations where the parties have not waived this type of contract damages, that they can be available as damages for a contract; that misses the point, entirely.

This Court must enforce the plain terms of this contract. The City respectfully requests, again, that at trial OBOT's presentation at trial be limited to the evidence that pertains *only to those remedies that it has not expressly waived*. The City will accept this Court's invitation to provide further briefing on this issue on the eve of trial, but again respectfully requests a ruling as soon as possible that forecloses the need to defend OBOT's substantial expert "opinion" evidence (which consists of inadmissible unsupported speculation and conjecture). Among other things, absent such a ruling, the City will be required to call a responsive expert.

Moreover, even if the Court permits OBOT to present evidence regarding contract damages that it has in fact contractually waived, in the alternative to its claim for specific performance, the California Supreme Court has set the bar for proving such lost future profits damages incredibly high. OBOT's "expert" testimony cannot conceivably match OBOT's burden here, which requires OBOT to prove lost profits with "*reasonable certainty*" as to both the occurrence and extent. *See Sargon Enterprises,* 55 Cal.4th at 774. *Sargon* requires that such damages are only recoverable "where the evidence makes reasonably certain their occurrence and extent." *Id.* at 773–74 (*citing Grupe*, 26 Cal.2d at 692–93). And, as the Supreme Court further explained, establishing lost future profits to a reasonable certainty is nearly impossible "where the operation of an unestablished business is prevented or interrupted," because in that case, as here, the occurrence of lost profits is inherently "uncertain, contingent and speculative." *Id*. (citing *Grupe*, 26 Cal.2d at 692–93); *accord Parlour Enterprises, Inc. v. Kirin Group, Inc*. (2007) 152 Cal.App.4th 281, 288 ("[L]ost anticipated profits for an unestablished business whose operation is

prevented or interrupted are generally not recoverable because their occurrence is uncertain, contingent and speculative.").[9]

Like all other evidence, the expert opinion that OBOT relies on must be admissible. OBOT has signaled, by way of its exhibit list, that it believes that Mr. Brown's expert reports and the underlying materials are somehow exempt from the rules of evidence; they are not. OBOT cannot offer Mr. Brown's hearsay reports as "evidence." Nor can Mr. Brown offer opinion testimony on subjects for which he, as an accountant hired for purposes of this litigation, is profoundly and admittedly unqualified. Nor can OBOT meet the *Sargon* burden by relying on hearsay, testimony that is grounded in speculation or conjecture, or otherwise lacks admissible foundation, or any other form of inadmissible evidence. OBOT's presentation on "lost profits" will present this Court will ensure nearly constant evidentiary objections to resolve—all of which is entirely unnecessary because these damages have been waived.

The City reserves all substantive and evidentiary objections and arguments with respect to OBOT's presentation of "expert" opinion and underlying evidence in support of these damages.

IV. Witnesses and Evidence

The City has confirmed that it intends to call as witnesses at the upcoming trial, only as necessary to respond to OBOT's proof, Mr. Tagami, Mr. McClure, and the City's responsive expert economist Jonathan Borck. The City reserves the right to call any witness on either party's witness list as needed to respond to OBOT's proof.

The City will also designate relevant prior deposition testimony and will introduce those admissions as necessary to respond to OBOT's proof.

[9] There is no dispute that ITS is an unestablished business: the evidence during the First Phase of trial established that ITS was created for the purposes of entering into the sublease with OBOT in 2018 and had no employees, corporate structure, or assets as of the time of that sublease (other than a $7 million loan required to pay OBOT for the sublease, and the evidence will show it subsequently defaulted on, entering into bankruptcy, to be now controlled by the financiers who provided that loan). ITS is not and has never been an entity that has ever constructed or operated any bulk commodity terminal.

The City and Plaintiffs exchanged additional exhibits not previously disclosed on the party's exhibit lists as required by the Court on November 20, 2023. The City will provide Plaintiffs with its evidentiary objections to Plaintiffs' approximately *100 new exhibits*, which are, to a document, entirely inadmissible (including some material never previously disclosed in discovery, and other material that clearly exceeds the scope of the damages calculated by their expert, as discussed in the accompanying motion in limine filed herewith today).

CONCLUSION

The City respectfully requests this Court require the upcoming remedies phase of trial be limited consistent with California law to those "sole and exclusive" remedies that OBOT agreed to in the contract; to not permit the Court's equitable powers be used to rewrite those express contract remedies that were negotiated as consideration for this contract; and to preclude OBOT from presenting evidence (and thereby requiring the City to respond) that pertains *only to damages that OBOT has waived.*

Dated: November 22, 2023

Respectfully submitted,

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