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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.

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. 4 REGARDING THE AVAILABILTY OF LEGAL DAMAGES UNDER THE GROUND LEASE

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

On November 21, 2023, this Court invited the parties to provide further briefing regarding the legal (contract) damages available to OBOT in the alternative to specific performance. The contractual language relevant to this issue is clear: in Sections 22.1 and 24.1 of the Ground Lease OBOT waived any claim to "consequential," "incidental," or any other category of damages beyond "actual damages incurred . . . as a direct result of [the City's] default." Ex. 68-91-92 (§22.1); *see also* Ex. 68-92 (§24.1, stating that the parties' waiver of consequential damages is part of consideration for contract). In light of this language, the issue is whether the lost future profits damages that OBOT claims as an alternative contract remedy to specific performance—approximately $145 million in lost profits stemming from a sublease it negotiated with a third party (that has never before operated a bulk terminal business)—are consequential damages, or actual damages, as OBOT now argues.

OBOT is wrong. California law is clear that lost profits from a future third-party business relationship are typically consequential, not actual damages. It is not enough to say, for example, that this was a development contract and the City has interfered with that development, therefore OBOT should get its estimated lost future profits. Here, the damages OBOT seeks are textbook consequential damages, because they do not *necessarily* result from the terms of the Ground Lease, but rather arise from a different, third-party sublease and are unique to circumstances reflected in OBOT's relationship with its sublessee.[1] To be clear: *nothing* about the amounts set forth in the ITS Sublease (which provide the entire basis for OBOT's lost profits claim) is reflected or required by any term of the Ground Lease. *Everything* about these damages results from circumstances unique to OBOT and its third-party contracts. As such, these damages are not available to OBOT under the plain consequential damages waiver in this contract.

[1] OBOT has repeatedly confirmed in discovery that its damages were limited to those set forth by its proposed expert, accountant Peter Brown. *See, e.g.*, Plfs' Supp. Response to Special Interrogatories (Set One), dated May 5, 2023 at 7:13-15 ("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."); *see also* City Motion in Limine filed 11/22/23. The City therefore uses Mr. Brown's calculations as context for purposes of addressing this threshold legal issue.

DISCUSSION

I. OBOT has waived any claim to damages beyond its actual damages.

The City and OBOT agreed to a mutual waiver of consequential damages. Ex. 68-92 (§24.1, "Waiver of Consequential Damages"). OBOT further agreed to an unambiguous waiver of any claim to consequential damages in the provision of the lease defining its *exclusive, sole, and absolute* remedies. Ex. 68-91-92 (§ 22.1, Default by Landlord; Tenant's Exclusive Remedies) (limiting OBOT "to offset or deduct *only* from the Rent becoming due hereunder, the amount of all actual damages incurred by Tenant as a direct result of Landlord's default" and stating that "*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 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)"). This Court's power to award damages as a remedy is constrained by this plain language, as waivers of this nature are commonly enforced in California. *E.g.*, *Artukovich v. Pac. States Cast Iron Pipe Co*. (1947) 78 Cal.App.2d 1, 4; *CAZA Drilling (California), Inc. v. TEG Oil & Gas U.S.A., Inc*. (2006) 142 Cal. App. 4th 453, 466.

OBOT previously argued in this case that the *mutual* consequential damages waiver by the parties is unenforceable as a waiver of liability against public policy. Nothing about this waiver forecloses this Court's liability determination. This argument is specious, particularly given the option for specific performance as a contract remedy. Contracting parties are free in California to limit their damages, as OBOT and the City agreed to do here as part of the deal they negotiated in 2016. OBOT cannot get out of that waiver now by claiming it is <u>*unfair*</u>. *E.g., Erlich v. Menezes* (1999) 21 Cal. 4th 543, 558 ("[W]hen two parties make a contract, they agree upon the rules and regulations which will govern their relationship; the risks inherent in the agreement and the likelihood of its breach. The parties to the contract in essence create a mini-universe for themselves, in which each voluntarily chooses his contracting partner, each trusts the other's willingness to keep his word and honor his commitments, and in which they define their respective obligations, rewards and risks. Under such a scenario, it is appropriate to enforce only

such obligations as each party voluntarily assumed, and to give him only such benefits as he expected to receive; *this is the function of contract law*.") (emphasis added).

II. The lost future profits OBOT seeks are consequential damages.

OBOT attempts to circumnavigate its plain waiver of consequential damages by arguing that the lost profits it seeks are instead actual contract damages "directly" caused by the breach. That argument woefully misreads the relevant caselaw and mischaracterizes the damages that OBOT attempts to recover.

First, all contract damages are "generally limited to those within the contemplation of the parties when the contract was entered into or at least reasonably foreseeable by them at that time; consequential damages beyond the expectation of the parties are not recoverable. [Citations.] This limitation on available damages serves to encourage contractual relations and commercial activity by enabling parties to estimate in advance the financial risks of their enterprise." *Erlich v. Menezes* (1999) 21 Cal.4th 543, 550. Then, within foreseeable contract damages there are two further subcategories: "general damages (sometimes called direct damages) and special damages (sometimes called consequential damages)." *Lewis Jorge Constr. Mgmt*, 34 Cal.4th at 975 (citing Williston on Contracts and Dobbs, Law of Remedies). General or actual damages are those that flow "directly and *necessarily*" from the terms of the agreement. *Id.* at 968 (emphasis added). As the Supreme Court explained, these damages are "the direct and immediate fruits of the contract" and "are part and parcel of the contract itself, entering into and constituting a portion of its very elements; something stipulated for, the right to the enjoyment of which is just as clear and plain as to the fulfillment of any other stipulation." *Id*. at 971. Actual damages would include, for example, the rent due to the City pursuant to express contract terms setting forth that rent, if OBOT had breached. Actual contract damages could include, from OBOT's perspective, the money spent by OBOT to comply with the specific step-by-step development requirements agreed upon by the parties in contract (*see* Section 6.2), prior to the City's breach.

Special or consequential damages are "losses that do not arise directly and inevitably from any similar breach of any similar agreement." *Id*. Rather, they are "secondary or derivative losses arising from circumstances that are particular to the contract or to the parties." *Id*. The

California rule is that consequential damages can be recoverable as contract damages "if the special or particular circumstances from which they arise were actually communicated to or known by the breaching party (a subjective test) or were matters of which the breaching party should have been aware at the time of contracting (an objective test)." And, as discussed above, they may be waived. *Artukovich,* 78 Cal.App.2d at 4.

The quintessential example of special damages under California law is lost future profits, because those damages usually depend on circumstances unique to the parties' particular circumstances, beyond the express terms of the contract at issue, and specific to the future efforts of the parties. *See Lewis Jorge*, 34 Cal.4th at 970 (reversing Court of Appeal determination that lost future profits were a "natural and probable" consequence of the breach of the construction contract at issue); *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*, 35 Cal.App.4th 1679, 1697 ("…consequential damages such as lost profits…") *see also Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 773–74 (recognizing that "where the operation of an unestablished business is prevented or interrupted," the occurrence of lost profits is inherently "*uncertain, contingent and speculative*.").[2]

The Court in *Lewis Jorge* allowed that unearned profits have at times been considered actual or general damages, but recognized those cases were "purely profits unearned *on the very contract that was breached*." *Lewis Jorge,* 34 Cal.4th at 971 (emphasis added). The Ground Lease does not contemplate future payments *by the City to OBOT* that OBOT now seeks as lost because of a breach. The City's breach here at issue did not prevent OBOT from earning profit owed pursuant to some term of the Ground Lease; rather, OBOT contends that the breach prevented OBOT from earning profit pursuant to a different, collateral contract: the ITS sublease.

Longstanding California law is also clear that consequential damages include those profits

[2] Both the City and OBOT were well aware that lost profits are consequential damages, having so agreed in the DA. *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).

"*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). This is because such profits "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." *Id.* at 245. That is exactly what OBOT seeks here: profits from its third-party contract with ITS, entered into years after the Ground Lease was signed.[3] Simply put, actual damages are damages that would accrue if the same breach of the same type of contract occurred between *completely different parties*. *See Lewis Jorge*, 34 Cal.4th at 968. That is obviously not the case here—the $145 million in lost profits that OBOT seeks "aris[e] from circumstances that are particular to the contract or to the parties." *Id.* The lost profits are unique both to the third-party contract negotiated between OBOT and ITS, *and* to the particular relationship between OBOT and ITS, *and* to ITS' ability to generate those funds through its own third-party agreements over 66 years.

The cases OBOT cites in its trial brief do not change this conclusion. *None* of these cases analyze the distinction between actual and consequential damages (because none involved an express consequential damages waiver), and *none* condone the recovery of lost profits stemming solely from a third-party contract. *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. Whether courts have ever awarded lost profits as contract damages misses the point, entirely.

The City incorporates prior arguments with respect to the unavailability of one further category of actual damages claimed by OBOT as out-of-pocket expenses (federal litigation fees).

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[3] Mr. Brown determined the amount of expected profit to OBOT *entirely* from the 2018 ITS Sublease. 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."). Likewise, Mr. Brown concluded that any OGRE lost profits were contingent on ITS's construction and operation of the bulk terminal. OGRE's lost profits are not available in this phase of trial, given that the Court has made no determination that OGRE is a third-party beneficiary of the West Gateway Ground Lease (a contract with an *express* no third-party beneficiaries clause). Regardless, the consequential damages waiver equally applies to exclude any derivative lost future profits claim asserted by OGRE, and the City addresses the Plaintiffs' lost profits in this brief subject to and without waiving any arguments with respect to OGRE's underlying claims.

Dated: November 27, 2023

Respectfully submitted,

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