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County of Alameda

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12 OAKLAND GLOBAL RAIL ENTERPRISE, LLC, *and Counter-*
Defendant CALIFORNIA CAPITAL & INVESTMENT GROUP

13 SUPERIOR COURT OF CALIFORNIA

14 IN AND FOR THE COUNTY OF ALAMEDA

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

19 Plaintiffs,

20 v.

21 CITY OF OAKLAND, a California municipal
corporation,

22 Defendant.

23 CITY OF OAKLAND,

24 Counter-Plaintiff,

25 v.

26 OAKLAND BULK AND OVERSIZED
TERMINAL, LLC, and CALIFORNIA
27 CAPITAL INVESTMENT GROUP, INC.

28 Counter-Defendants.

Consolidated Case Nos. RG18930929 /
RG20062473

Unlimited Civil Case / Assigned to
Judge Noël Wise, Dept. 514

**PLAINTIFFS' SUPPLEMENTAL
TRIAL BRIEF RE LEGAL DAMAGES
AND LOST PROFITS**

Trial Date: July 10, 2023 (Phase 1)
November 28, 2023 (Phase 2)

1 Under both of Plaintiffs’ alternative damages scenarios, OBOT seeks to recover actual
2 damages consisting of (1) lost rental income that their sublessee, Insight Terminal Solutions (“ITS”)
3 would have paid had the City honored the parties’ Ground Lease; and (2) out-of-pocket damages.
4 OGRE seeks to recover lost revenue from rail services that were required under the Ground Lease
5 and its sublease. OBOT’s lost rents and out-of-pocket damages total \$19.1 million under Scenario
6 1, and total \$159.6 million through the 66-year life of the Ground Lease under Scenario 2.¹ The
7 evidence will demonstrate that these amounts are recoverable as Plaintiffs’ actual damages.²

8 The parties agree that “actual damages directly caused by the City’s default” are available
9 as a remedy under the Ground Lease. (GL §§ 22.1 (Ex. 68-91); City 11/22/23 Trial Brief at 3:11-
10 13.) They also agree that Section 24.1 of the Ground Lease (Ex. 68-92) is a waiver of consequential
11 damages. They disagree on whether the lost profits that Plaintiffs seek constitute actual or
12 consequential damages. Lost profits are inherently neither actual nor consequential damages; they
13 may be either depending on the circumstances. *See Lewis Jorge Constr. Mgmt. v. Pomona Unified*
14 *Sch. Dist.*, 34 Cal. 4th 960, 968 (2004). Their character depends on whether they flow directly from
15 a breach of contract (actual or general damages) or whether they are secondary or derivative losses
16 not contemplated by the contract (consequential or special damages). *Id.* at 968-69. The lost profits
17 at issue here are actual damages for several reasons.

18 ***First***, the damages Plaintiffs seek were foreseeable and contemplated by the parties. It is
19 undisputed that the City was aware when it executed the Ground Lease that OBOT would contract

21 ¹ Plaintiffs seek actual damages, including lost profits, from June 2018 forward. As explained in
22 OBOT’s concurrently filed supplemental brief on past damages, lost profits prior to entry of
23 judgment are available in equity as incident to specific performance. In this case, that is a distinction
24 without a difference because lost profits are also available as legal, actual damages prior to and
25 after entry of judgment. In its November 22, 2023 trial brief, the City incorrectly asserts that OBOT
26 seeks past lost profits in equity only and that OBOT’s claim for legal damages is limited to future
27 lost profits. To be clear, OBOT contends that it is entitled to past damages in both equity and law.
28 OBOT’s claim for future lost profits is legal only.

² Plaintiffs acknowledge that the Court’s November 21, 2023 Order limits damages to the period
after the May 16, 2018 Federal Decision. For the reasons advanced in Plaintiffs’ concurrently filed
Supplemental Trial Brief Re Past Damages, Plaintiffs’ contend that the fees and costs incurred in
the Federal litigation should be recoverable as past damages; that amount (\$4.6 million) is included
in the above numbers and in Plaintiffs’ concurrently filed Summary Damages Tables.

1 with one subtenant to develop and operate the rail portions of the Project (OGRE) and another to
2 develop and operate the terminal (TLS or its successor). (*See, e.g.*, Ex. 38 (TLS Basis of Design
3 submitted July 2015); 68-114 (expressly contemplating OGRE as subtenant).) Armed with that
4 knowledge, the City executed the Ground Lease with the understanding that terminating it would
5 also end OBOT’s ability to collect revenue through its subtenants. The City’s knowledge at the
6 time of contracting is key because the distinction between actual (general) and consequential
7 (special) damages is one of foreseeability. *See Resort Video Ltd. v. Laser Video, Inc.*, 35 Cal. App.
8 4th 1679, 1697 (1995) (“First, general damages are ordinarily confined to those which would
9 naturally arise from the breach, or which might have been reasonably contemplated or foreseen by
10 both parties, at the time they made the contract, as the probable result of the breach. Second, if
11 special circumstances caused some unusual injury, special damages are not recoverable therefor
12 unless the circumstances were known or should have been known to the breaching party at the time
13 he entered into the contract.”). The City’s knowledge at the time of contracting means that the
14 damages at issue here are not unusual or surprising; and that they actual rather than consequential.

15 **Second**, there also is no dispute that the City had notice of ITS’ sublease and the amounts
16 OBOT stood to receive under that sublease. The Ground Lease required OBOT to provide notice
17 of the sublease to the City. (*See* Ex. 68 § 12.4.) Consistent with that provision, OBOT provided the
18 City with the ITS sublease in September 2018. (Ex. 237; Ex. 801.) Thus, the Ground Lease ensured
19 that the City would have notice of the rental income OBOT stood to receive under any sublease
20 and of the liability the City would face should it decline to honor the Ground Lease.³

21 **Third**, each case the City cites either supports Plaintiffs’ claim for lost profits or is
22 inapposite. The City cites an 1897 case—*Shoemaker v. Acker*, 116 Cal. 239—for the proposition
23 that lost profits are remote rather than direct if they rely on a new contract with a third party such
24 as a sublease. (City 11/20/23 Trial Brief Re Damages at 9:6-13; City 11/22/23 Trial Brief at 14:14-
25 15:3.) But *Shoemaker* speaks only of contracts that a party might have “consummated with the

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27 ³ Indeed, in her Phase 1 testimony, Deputy City Administrator Lake testified that she was “shocked
28 and concerned” by the rent provisions in the ITS Sublease. (RT at 3746:6-11.) OBOT had also
provided the City with notices of other subleases, including a sublease with TLS’s predecessor, IES
earlier in 2018, and the sublease with OGRE two years before that. (*See* Ex. 137.)

1 proceeds of the contract sued on” and only if those contracts were “not stipulated for or
2 contemplated by the parties to the contract sued on.” 116 Cal. at 245. The proposition that the City
3 and OBOT did not stipulate for or contemplate OBOT’s subleases strains credulity. The City was
4 aware of OBOT’s plan to sublease the premises before the Ground Lease existed and was already
5 working with TLS (ITS’s predecessor) and OGRE at the time.⁴

6 The City cites three other cases for the proposition that lost profits from third-party contracts
7 are consequential damages. (City 11/20/23 Trial Brief Re Damages at 9:1-5; City 11/22/23 Trial
8 Brief at 14:4-14.) The first case, *Lewis Jorge Construction Management*, discusses the issue in the
9 context of a contractor suing for breach of contract and seeking “profits it might have earned on
10 other unawarded construction contracts.” 34 Cal. 4th at 975. This case does not concern unrelated
11 and unawarded contracts that OBOT was unable to earn because of the harm the City caused to
12 OBOT; as detailed further below, it concerns actual, signed subleases that the parties to the Ground
13 Lease contemplated and accounted for in their contract.

14 The second case, *Resort Video Ltd.*, addresses the speculative nature of prospective orders
15 and demand for resort promotional video presentations and resort credits, not the nature of
16 traditional lost profits as actual or consequential damages. 35 Cal. App. 4th at 1697-98.

17 Similarly, the third case, *Greenwich S.F., LLC v. Wong*, is about the requisite certainty
18 required to recover lost profits as consequential damages, not about whether the type of lost profits
19 at issue here constitute actual or consequential damages. 190 Cal. App. 4th 739, 758-59 (2010). To
20 the extent the case opines on whether lost profits constitute consequential damages, it does so only
21 in the narrow context of damages available under Civil Code Section 3306 for breach of an
22 agreement to convey an estate in real property. *Id.* at 758. Section 3306 is not at issue here.

23 As to whether Plaintiffs can demonstrate lost profits with the required degree of proof, that
24 will be the subject of trial and post-trial briefing after the evidentiary record is closed. At most, the

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26 ⁴ Indeed, the City’s theory of the case during the liability phase and in post-trial briefing was that
27 OBOT intended to fulfill its obligations through subleases, starting with TLS in 2014, and that its
28 reliance on subtenants constitutes a business decision that made OBOT solely responsible for the
Project’s delay. The City’s theory, while incorrect, demonstrates its knowledge of the role
subtenants were to play in the Project before it entered the Ground Lease with OBOT.

1 City's arguments go to the weight of the evidence of lost profits not its admissibility.

2 **Fourth**, the Ground Lease expressly contemplates that OBOT would sublet the premises.
3 Article 12 (Ex. 68-73-85) includes a robust set of provisions that govern OBOT's subleases and
4 assignments. These provisions provide for OBOT to enter subleases and collect rents; and they
5 terminate OBOT's right to collect rents if the City calls default. Section 12.2 provides: (1) OBOT
6 assigns its right to collect rents from subtenants to the City as security for its own rent obligations;
7 (2) the assignment is subject to OBOT's right to collect rents until default; and (3) OBOT's right
8 to collect rents is reinstated if it cures the default. (Ex. 68-72; *accord* GL § 19.4 (Ex. 68-90)
9 (landlord's right to assume subleases after tenant default).) The Ground Lease contemplates the
10 subleases; provides provisions for their content, approval, and performance; and terminates
11 OBOT's ability to collect rents upon the City's notice of default. OBOT's claimed lost profits are
12 actual damages because its inability to collect rents flows directly and necessarily from the City's
13 termination of the Ground Lease.

14 **Fifth**, in addition to the dozens of provisions in Article 12, the Ground Lease includes more
15 than 20 other provisions that expressly govern OBOT's subleases. *See* GL §§ 3.4 at Ex. 68-25
16 (**requiring tenant to sublease** portions of the premises that contain initial improvements), 4.1.1 at
17 Ex. 68-25-26 (addressing the impact of subleases on possessory tax), 4.1.2 at Ex. 68-26 (same),
18 10.5 at Ex. 68-58 (subleases terminated in the event of total condemnation), 10.6.1 (tenant
19 termination based on substantial condemnation also terminates subleases), 10.7.1 at Ex. 68-59
20 (similar for partial condemnation), 11.1 at Ex. 68-65 (prohibition on tenant created liens other than
21 subleases), 15.1.4 at Ex. 68-79-80 (requirement to include certain covenants in subleases), 15.5.1
22 at Ex. 68-81 (requirement that subleases comply with environmental remediation requirements),
23 19.2.2 at Ex. 68-88 (withholding consent to sublease is not a termination of the Ground Lease
24 without written notice of intent to terminate), 19.3.4 at Ex. 68-90 (right to sublet continues until
25 event of default), 19.4 at Ex. 68-90 (landlord right to assume certain subleases), 25.1 at Ex. 68-93-
26 94 (tenant obligation to use reasonable efforts to cause retail subtenants to issue estoppel
27 certificates), 30.1.2 at Ex. 68-96 (limited landlord right to terminate subleases), 33.4 at Ex. 68-100
28 (limited landlord right to enter subleased premises), 34.5 at Ex. 68-103 (mortgage may attached to

1 tenant interest in subleases), 34.10.4.1 at Ex. 68-107 (similar), 34.10.6 at Ex. 68-108 (assignment
2 of subleases to mortgagee), 37.1.2 at Ex. 68-112 (requirement to include non-discrimination clause
3 in each sublease), 37.8.1 at Ex. 68-114 (expressly contemplating OGRE sublease), 38.19 at Ex. 68-
4 124 (disclosure of financial information pertaining to subleases). Not only did the parties
5 contemplate that OBOT would enter subleases, but they also negotiated dozens of terms to govern
6 those subleases. This is not a case that relies on special circumstances peculiar to the Ground Lease.
7 The contract provides for the creation of subleases, requires them in certain instances, mandates
8 content, and governs multiple aspects of the sublandlord-subtenant relationship.

9 **Sixth**, with respect to OGRE’s lost profits, they stem from lost revenues that would have
10 been earned from providing unit train service and indexing (unloading) rail cars over the dump
11 pits—the type of rail services that the City contemplated long before the Ground Lease was
12 executed. (*See* Ex. 331-27-30 (Peter Brown’s initial expert report).) The City’s argument that lost
13 profits are unavailable in this case has centered on OBOT and ITS, ignoring OGRE’s claim. It is
14 beyond dispute that terminating the Ground Lease, which governs development and operation of
15 the ship-to-rail terminal, would directly and necessarily damage the ability to perform the rail
16 services contemplated in the Ground Lease.

17 For the above reasons, as well as the reasons stated in the brief Plaintiffs filed on June 21,
18 2023 in opposition to the City’s original motion in limine on lost profits and those stated in the
19 pretrial briefs Plaintiffs filed on November 20, 2023 and November 22, 2023, Plaintiffs have not
20 waived their right to seek recovery of lost profits. The lost profits they seek in this case are actual
21 damages expressly permitted under the Ground Lease.
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Date: November 27, 2023

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