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SUPERIOR COURT OF CALIFORNIA

IN AND FOR THE 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, INC.

Counter-Defendants.

Consolidated Case Nos. RG18930929 / RG20062473

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

PLAINTIFFS' SUPPLEMENTAL TRIAL BRIEF REGARDING PAST DAMAGES

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

The Court has tentatively ruled that "OBOT is entitled to recover damages from the date of the Federal Decision, May 15, 2018, until the date of this Court's Statement of Decision on damages; [and that] those damages are limited to Project costs or expenses incurred by OBOT that have been 'lost' and will need to be repaid or replaced in order to complete the development of the Project." (11/21/2023 Order at 4:14-18.) This brief responds to the Court's tentative date and scope limitations on Plaintiffs' recovery of past damages in equity and the City's waiver arguments.

First, OBOT should be permitted to recover out-of-pocket costs that predate the Federal Decision to the extent they correspond to an event of Force Majeure identified by the Court. This Court found that the City's breach of the Development Agreement (DA) when it applied its no-coal ordinance to OBOT without substantial evidence is an event of Force Majeure that delayed OBOT's performance. (SOD at 89:3-9.) That event, through enactment of Resolution No. 86234, occurred on June 27, 2016. (Ex. 499-9; *see also* SOD at 90:15-16 and n.38.)[1] In contrast, and as detailed in Plaintiffs' prior briefing on res judicata, the City's DA breach did not accrue as an event of Force Majeure until 2018 when the City demanded performance and terminated the Ground Lease after the Federal Litigation. (*See* OBOT 8/17/23 Resp. Brief at 2:23-3:8, 9:24-10:17, 15:6-19; 9/25/23 OBOT [Proposed] SOD at 32:7-35:9.) Plaintiffs should be permitted to recover delay costs they incurred for the City's Force Majeure act from June 27, 2016 until entry of judgment.

Second, Plaintiffs agree that they should be permitted to recover past costs incurred that they will incur again in order to complete the Project. But law *and* equity both permit more than that. As a matter of law, Plaintiffs are permitted to recover legal, actual damages together with specific performance to the extent the award does not result in double recovery. *Rogers v. Davis*, 28 Cal. App. 4th 1215, 1220-21 (1994); *accord Bowser v. Ford Motor Co*., 78 Cal. App. 5th 587, 624 (2022) (an election should be made only if obtaining both remedies would amount to double recovery). Plaintiffs' past actual damages, including lost profits, incurred prior to entry of judgment are recoverable in addition to specific performance of the Ground Lease going forward. Because the remedies concern different time frames, there can be no double recovery.

[1] *Accord Oakland Bulk & Oversized Terminal, LLC v. City of Oakland*, 321 F. Supp. 3d 986, 1010-11 (N.D. Cal. 2018), *aff'd*, 960 F.3d 603 (9th Cir. 2020).

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As a matter of equity, lost profits are recoverable as incident to an award of specific performance when the time for performance has passed. *See Rogers*, 28 Cal. App. 4th at 1220-21 (citing *BD Ins v. Pooley*, 218 Cal. App. 3d 289, 298-99 (1990); *Greenstone v. Claretian Theo Seminary*, 173 Cal. App. 2d 21, 29 (1959)). The City's cited cases agree. *E.g.*, *Ellis v. Mihelis*, 60 Cal. 2d 206, 219 (1963) ("The following general rules are applicable where damages are awarded incident to a decree of specific performance: A party to a contract for the purchase or exchange of land who is entitled to a decree of specific performance is also ordinarily entitled to ***a judgment for the rents and profits from the time he was entitled to a conveyance***." (emphasis added)).

Third, the City argues that Plaintiffs waived their right to seek damages in equity by not briefing them earlier or identifying them in discovery. Even if the City were correct, its argument would have no bearing on Plaintiffs' right to past legal damages. It also fails regardless of the damages' character as legal or equitable because it is undisputed that (1) Plaintiffs prayed for specific performance and damages in the operative complaint; (2) they disclosed that they seek past damages, including lost profits; and (3) the City examined Mr. Brown on those topics. (*See, e.g.*, FAC, Prayer ¶¶ 1, 3; Ex. 331-19-20 (Brown report (not in evidence) identifying June 2018 as the beginning of the loss period for purposes of damages calculation), Ex. 370-4-5 (Brown supplemental report (not in evidence) identifying the same); 1/12/2022 Brown Depo. at 71:24-72:4, 167:18-20, 171:6-18, 175:3-24 (City examination on Brown's damages calculation from June 2018 forward—*i.e.*, from the Federal Decision forward); City 11/20/23 Trial Brief Re Damages at 5:11-12 (conceding that Plaintiffs disclosed to the City that they seek lost profits from 2018 forward).) The City's only complaint appears to be that Plaintiffs used the term "economic" rather than "equity." But the City cites no law for the proposition that a party waives the right to recover damages for a disclosed item by not assigning a certain label to it in the disclosures. None exists.

The City also argues that Plaintiffs did not specially plead damages incident to specific performance, citing *Chase v. Blair*, 105 Cal. App. 744 (1930), for support. (City 11/22/23 Trial Brief at 12:10-13:2.) But *Chase* involved a plaintiff's failure to plead that he suffered damages. *Id.* at 745-46. *Chase* also expressly bases its holding on *Bradbury v. Higginson*, 162 Cal. 602 (1912). *Bradbury*, like *Chase*, involves a plaintiff's prayer for damages alleging that he suffered the

damage, which is not at issue here. *Bradbury*, 162 Cal. at 609. *Bradbury* also explains that a different pleading rule would apply where breach of an entire contract was alleged, as is the case here. *Id.* at 609-10. Further, there is no requirement to specially plead actual or general damages, which are the type of lost profits at issue in this case. *Castino v. Ritzman*, 156 Cal. 587, 588 (Cal. 1909); *Myers v. Stephens*, 233 Cal. App. 2d 104, 120-21 (1965); *see also Lillie v. Weyl, Zuckerman & Co.*, 45 Cal. App. 607, 609 (1920) ("The question as to how or in what manner the damage arose, other than as appears from the general allegations, is the subject of evidence rather than of pleading.").

Fourth, the City argues that Plaintiffs contractually waived their right to recover lost profits. The City relies on *De Anza Enterprises v. Johnson*, 104 Cal. App. 4th 1307 (2002) to argue that lost profits are unavailable in equity when a contract provides otherwise. (City 11/20/23 Trial Brief Re Damages at 4:3-7; City 11/22/23 Trial Brief at 9:15-21, 11:12-18.) That has no bearing on Plaintiffs' claim for legal damages. As to equity, the City mischaracterizes the case. The *De Anza* court rejected the appellant's request for a rent credit because he had identified competing start dates for the credit and failed to follow appraisal provisions necessary for the sale of the property. *Id.* at 1319, 1321-22. Neither issue applies here.

The contract provisions the City cites (22.1 and 24.1 of the Ground Lease) permit Plaintiffs to recover past damages in equity and law. Section 22.1 expressly permits recovery of both "actual damages" and "equitable relief" for the City's default. (Ex. 68-91-92.) The City highlights language in that section barring recovery of "consequential" and "incidental" damages from the City as Landlord. But that language includes an express exception: "other than Tenant's actual damages as described in the foregoing clause"; which describes actual damages as "incurred by Tenant as a direct result of Landlord's default." (*Id.*) The evidence will demonstrate that the damages Plaintiffs seek—whether characterized as legal or incident to specific performance—flow directly and necessarily from the City's default. The City's argument regarding Section 24.1, which applies only to consequential damages and not to actual or general damages, fails for the same reason. The reasons Plaintiffs' damages are actual and general rather than special are further discussed in Plaintiffs' concurrently filed supplemental brief on legal damages.

Date: November 27, 2023

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