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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 **DEFENDANT AND COUNTER-PLAINTIFF CITY OF OAKLAND'S OPPOSITION TO PLAINTIFFS' MOTION FOR ATTORNEYS' FEES AND COSTS** **Reservation No.: 091774930178** Date: April 3, 2024 Time: 10 a.m. Dept.: 21 Judge: Hon. Noël Wise
CITY OF OAKLAND Counter-Plaintiff, v. OAKLAND BULK AND OVERSIZED TERMINAL, LLC, and CALIFORNIA CAPITAL INVESTMENT GROUP, Counter-Defendants.	Action Filed: December 4, 2018 Trial Date (in Dept. 514): July 10, 2023 Cont. Trial Date (in Dept. 514): November 28, 2023 Filed Concurrently with: (1) Declaration of Counsel Danielle Leonard (2) [Proposed] Order

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INTRODUCTION

In moving for attorneys' fees as a prevailing party, OBOT fails to acknowledge two important principles of California law. First, contract fee shifting provisions do not trump Civil Code 1717, and the *statutory* definition and case law regarding prevailing party applies. Second, well-established California law interpreting Section 1717 requires this Court to measure OBOT's success not by the fact of the entry of judgment in its favor alone, but rather by comparing the relief obtained against its stated and pursued objectives, and by that measure this is plainly a *mixed* result case. Accordingly, under Section 1717, this Court has the discretion either to conclude OBOT's only partial success warrants no shifting of fees onto the City at all, or to impose a substantial reduction. There is no doubt that OBOT succeeded in some of its litigation aims by obtaining a liability ruling and specific performance remedy, but OBOT failed to achieve many of the other objectives it pursued, including its *defeated* claims for $160 million in contract damages and $20 million in damages incidental to specific performance, breach claims barred by res judicata, and rejected requests for much more expansive declaratory and injunctive relief, all issues on which *the City* prevailed. As the City explains in Section I below, notwithstanding the judgment in OBOT's favor, in light of these mixed results, this Court can determine that there is no prevailing party under Section 1717 for purposes of this fees request.

As discussed in Section II, even if the Court determines that OBOT is entitled to fees, OBOT has overreached. The City is not interested in nit-picking counsel's rates or time over the many years of this litigation, but addresses here the categories of time claimed, totaling several million dollars, for which OBOT has failed to meet its burden of proof. Next, as discussed in Section III, once the compensable time is properly calculated, it is within this Court's discretion, as the City proposes, to impose a reduction for partial success. Finally, as discussed in Section IV, OBOT now seeks over $700,000 in costs (in addition to those in its Costs Memorandum) that are not permitted by statute and that, in any event, OBOT has waived.

BACKGROUND

This case is not the unequivocal victory on *all* issues claimed by OBOT in its motion. As the Court is well aware, this litigation concerns a proposed development on the City-owned West

Gateway, on which OBOT was to build a bulk commodity terminal. OBOT initially pursued federal litigation challenging the City's legislative authority to regulate coal, resulting in a May 23, 2018 judgment, and resolved on appeal on May 26, 2020. Separately, after OBOT failed to meet its Ground Lease performance deadlines in August 2018, the City terminated that contract, and OBOT and OGRE sued the City again in this Court in December 2018.

Plaintiffs sought expansive relief against the City in this Court. Plaintiffs originally asserted seven tort claims and five contract claims. (Leonard Decl. ¶5.) Plaintiffs sought (1) over $100 million in contract damages for OBOT, unspecified additional contract damages for OGRE, and unspecified additional tort damages for both parties, (*id.*); (2) expansive specific performance orders, (*id.* ¶12); (3) wide-ranging declaratory relief pertaining to various permitting and funding issues, (*id.* ¶¶10–11); and (4) broad preliminary and permanent injunctive relief, (*id*. ¶5.)[1] Plaintiffs based their claims on allegations stretching back in time at least as far as 2015. (*Id.* ¶5.) This Court sustained the City's demurrer to the tort claims. (*Id.* ¶6.) The Court also granted in part the City's motion to strike based on res judicata. (*Id*.) While OBOT's claims were stayed by this Court pending an appeal from resolution of the pleadings motions, the City also filed its own complaint against OBOT and CCIG alleging a single breach of contract claim and seeking equitable relief pursuant to the lease. (*Id.* ¶8.) The cases were eventually consolidated. (*Id.* ¶13.)

After years of litigation, this Court held a bench trial in two phases. Over OBOT's objection, the Court limited the first phase by excluding evidence pertaining to OBOT's "continuing" breach theories subsequent to November 2018. (*Id.* ¶30.) OBOT sought to prove fourteen breaches of the Ground Lease and DA, and requested wide-ranging declaratory relief. (*Id.* ¶15–16.) Notwithstanding the Court's prior res judicata rulings, OBOT pursued breach and force majeure claims dating back to at least 2015. (*Id*.) The Court determined that the City had

[1] OBOT made 10 specific performance demands, ranging from requiring estoppel and non-disturbance agreements, to approving permits, to requiring third-party funding and rail-related agreements. (FAC ¶140.) OBOT sought an additional 19 declaratory relief orders including that the City turn over property, that the contracts do not "restrict coal," that "there is no such thing as 'Port property,'" and that no "creek protection permit" is required. (Compl. ¶229; FAC ¶136.) OBOT pursued these goals up through and after trial. (*See* OBOT's proposed SOD on Liability (filed Sept. 25, 2023) at 94–97; proposed SOD on Remedy (filed Dec. 4, 2023) at 1–2.)

breached the Ground Lease. (*See* Liability SOD (Nov. 22, 2023) at 86–95.) The Court concluded that it would base its findings regarding force majeure and the City's breach on the time period after May 15, 2018. (*Id.* at 90 n.38.) And the Court granted only one of the many requested items of declaratory relief. (*Id.* at 94; FAC ¶136; Leonard Decl. ¶32.)

The City sought to eliminate or narrow the remedies phase, including by stipulating to the availability of an extension of time. (*Id.* ¶¶35, 37.) But OBOT insisted on a trial on remedies in the alternative: (1) an equitable remedy including specific performance ordering extensions of contract deadlines and $19.3 million in incidental damages, or (2) a legal remedy of $159.6 million in contract damages. (*See* Damages SOD (Dec. 22, 2023) at 3; Leonard Decl. ¶¶34, 35.) The Court awarded zero damages in conjunction with the equitable remedy, and only $317,683 in damages as a legal remedy—*less than 0.2% of the damages sought*. Damages SOD at 3, 30. The Court held that the vast majority of Plaintiffs' claimed damages were barred by the Ground Lease, (*id.* at 15, 22–23), and that OBOT's evidence of alleged lost profits—including its unusable expert testimony—was "based on layers of unsound assumptions, unsubstantiated and incorrect data, and unexplained conclusions." (*Id.* at 19, 20, 23.) The Court extended the Initial Milestone deadline by 2.5 years (*id.* at 30), but rejected OBOT's attempt to move the Commencement Date (and thereby *all* contract deadlines), or to extend a second contract deadline. (*Id.* at 5 n.7; Leonard Decl. ¶¶36, 40.) The Court also rejected other requests for extensive additional specific performance, declaratory, and injunctive relief. (Damages SOD at 6 n.8; Leonard Decl. ¶41.)

After judgment, Plaintiffs filed a Costs Memorandum, the City filed a Motion to Tax Costs, and Plaintiffs filed the present motion for Attorney's Fees and Costs, claiming $11.8 million in fees and $718,988 in costs in addition to the Memorandum.

ARGUMENT

I. This Court Can Exercise Its Discretion to Order Parties to Pay Their Own Fees

Creating an exception to the usual rule that parties bear their own fees, Civil Code 1717 alone "gives the 'party prevailing on the contract' a right to recover … fees" where parties have so agreed by contract. (*Hsu v. Abbara* (1995) 9 Cal.4th 863, 865.) The purpose of Section 1717 is to "establish uniform treatment of fee recoveries in actions on contracts containing attorney fee

provisions." (*PLCM Grp. v. Drexler* (2000) 22 Cal.4th 1084, 1094–95.) Accordingly, section 1717, rather than any particular contract language, controls the fees inquiry. (*Walker v. Ticor Title Co. of California* (2012) 204 Cal.App.4th 363, 373.) Thus, parties to a contract "cannot, for example, enforce a definition of 'prevailing party' different from that provided in … section 1717." (*Id.*; *see also id.* at 372–373 ("[W]hile the availability of an award of contractual attorney fees is created by the contract … the specific language of the contract does not necessarily govern the award."); *Drexler*, 22 Cal.4th at 1096 ("Although the terms of the contract may be considered, they do not compel any particular award.").)

Pursuant to Section 1717, the court "shall determine who is the party prevailing on the contract" *or* determine that "there is no party prevailing on the contract for purposes of this section." (§1717(b)(1).) The court must "compare the relief awarded on the contract claim or claims *with the parties' demands on those same claims and their litigation objectives as disclosed by the pleadings, trial briefs, opening statements, and similar sources*." (*Hsu*, 9 Cal.4th at 876 (emphasis added).)[2] Liability is generally insufficient to justify prevailing party status alone. (*See City of Los Angeles Dep't of Airports v. U.S. Specialty Ins.* (2022) 79 Cal.App.5th 1039, 1044.) A party prevails as of right *only* "when the decision…is *purely* good news for one party and bad news for the other," such as when "a plaintiff … obtains *all relief requested*[.]" (*Id.* at 875–76 (emphasis added).) In contrast, "*when the ostensibly prevailing party receives only a part of the relief sought*," the determination of prevailing party is discretionary. (*Id*. (emphasis added).)

Comparing the relief claimed by OBOT against the relief actually obtained, there can be no doubt this is a "mixed" results case. OBOT sought $159.6 million in damages; it proved only $317,683, less than 0.2%; OBOT sought $19.3 million in incidental damages and proved none; OBOT sought far more expansive specific performance than it obtained. This is not a "complete victory" for purposes of Section 1717. (*Scott Co. of California v. Blount* (1999) 20 Cal.4th 1103,

[2] Courts evaluate the litigation "as a whole" under Section 1717 rather than analyzing claims and cross-claims separately. (*Frog Creek Partners v. Vance Brown* (2012) 206 Cal.App.4th 515, 540; *see also Harris v. Rojas* (2021) 66 Cal.App.5th 817, 826–27 (analyzing two related cases together).) Thus, the fact that OBOT prevailed on the City's claims is not dispositive.

1109 (plaintiff "did not achieve all of its litigation objectives, and thus is not automatically a party prevailing on the contract" where it "succeeded in establishing only about $440,000 in damages" rather than the $2 million it sought).) OBOT is therefore not entitled, as it incorrectly claims, to fees as of right. (*Hsu,* 9 Cal.4th at 876.)

Next, it is within this Court's discretion to conclude that "there is no party prevailing on the contract for purposes of this section." (§1717(b)(1); *Hsu*, 9 Cal.4th at 876.)[3] OBOT's litigation objectives are again the touchstone for this analysis. The question under Civil Code 1717 is *not whether judgment was entered for OBOT*; it is how much did it win, as compared to what it sought, and as against the issues the City won. While OBOT obtained part of the equitable remedy it sought, the City actually prevailed on many other issues: OBOT failed to obtain rulings in its favor on many of its extensive breach and force majeure claims;[4] had its claims narrowed by res judicata; failed to obtain declaratory relief and specific performance relief far beyond an extension of time (and which would have imposed obligations on the City for *decades*); and most significantly, failed to obtain the tens or hundreds of millions of dollars in damages that it sought. Courts have found no prevailing party under Civil Code 1717 where one party has won liability but received only part of the remedies it sought: *e.g., Marina Pacifica Homeowners v. S. Cal. Fin.* (2018) 20 Cal.App.5th 191, 207 (no prevailing party where plaintiff was "to pay $39 million … instead of the $97 million defendant sought"); *L.A. Dep't of Airports*, 79 Cal.App.5th at 1044 (no prevailing party where city prevailed on liability but failed to prove the claimed $3.4 million in damages); *Olive v. Gen. Nutrition Ctrs.* (2018) 30 Cal.App.5th 804, 823, 828 (no prevailing party where plaintiff won $1.1 million rather than the $23.5 million sought); *Harris*, 66 Cal.App.5th at 826 ($6,000 award on a demand for $200,000); *Berkla v. Corel Corp.* (9th Cir. 2002) 302 F.3d

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[3] The City did not contest OBOT's prevailing party status for costs because the costs statute contains a different standard for prevailing party than Civil Code 1717. (*McLarand, Vasquez & Partners, Inc. v. Downey Sav. & Loan Assn.* (1991) 231 Cal.App.3d 1450, 1456.)

[4] The rejected force majeure/breach claims include: the so-called DA binder, denying permit applications (which were never filed by OBOT), the ACTC funding, the City's positions at the STB, claims regarding amendments to the zoning process, and additional mandatory CEQA review. (*See, e.g.,* FAC ¶¶75–93; Plaintiffs' Alleged Breaches of Contract by City (July 11, 2023); Liability SOD at 53, 58.)

909, 919–20 (less than 3% of requested damages); *Nasser v. Superior Ct.* (1984) 156 Cal.App.3d 52, 59–60 (neither party prevailed when tenant prevailed on the lease, but was ordered to pay a rental amount higher than tenant requested).[5] Where, as here, a party spends years of litigation (and attorney time) pursuing unsuccessful along with successful litigation goals, the Court can conclude there is no prevailing party for purposes of Civil Code 1717 fee shifting.

II. OBOT's Fee Request Overreaches by Including Substantial Noncompensable Time

If the Court does exercise its discretion to award fees under Section 1717, the prevailing party can recover only "reasonable" fees incurred "to enforce that contract." (§1717(a).) The trial court has "broad discretion to determine the amount of a reasonable fee[.]" (*Ellis v. Toshiba Am. Info. Sys.* (2013) 218 Cal.App.4th 853, 881.) The fee setting inquiry "ordinarily begins with the 'lodestar,' i.e. the number of hours reasonably expended multiplied by the reasonable hourly rate." (*Drexler*, 22 Cal.4th at 1095.) And, "based on consideration of factors specific to the case," where the calculated award "is more than a reasonable amount," the court "shall reduce the section 1717 award so that it is a reasonable figure." (*Id.* at 1095–96.) As with the prevailing party determination, reasonableness is subject to a uniform statutory standard, per §1717, which *governs over* the "technical rules of contractual construction." (*Id.* at 1095.) The Supreme Court in *Drexler* confirmed that, for example, a court can impose a reduction in fees for factors like limited success, regardless of the particular terms of the contract. (*Id*. at 1095–96.) The party claiming fees bears the burden of proof, which requires "documenting the appropriate hours

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[5] The City is not suggesting that a party cannot prevail for purposes of Civil Code 1717 solely by obtaining nonmonetary remedies, if that is what the lawsuit is about—but that is not this case. While OBOT now calls specific performance its "preferred remedy," Mot. at 5; Greenfield Dec. at 10 n.5, that is self-serving hindsight: OBOT spent *years* pressing its damages case, including seeking $20 million as *part of* its "preferred" equitable remedy (which it now ignores). The whole premise of the remedies trial was that if the Court granted hundreds of millions of dollars in damages, the election may have been different. (*See* Plaintiffs' Trial Brief Regarding Scope of Remedies Trial (Nov. 20, 2023) at 5 (representing that "a specific performance order … limited to an extension of time … may not be preferred to damages.").) And defeating a nine-figure damages claim was without question one of the City's foremost litigation objectives, on which *it* prevailed. (*See Marina Pacifica*, 20 Cal.App.5th at 207 ("The fact that … plaintiff obtains only a reduction in its monetary obligations as claimed by defendant, does not render that reduction meaningless[.]").)

expended and hourly rates." (*Christian Rsch. Inst. v. Alnor* (2008) 165 Cal.App.4th 1315, 1320; *Ellis*, 218 Cal.App.4th at 883). And although, as discussed above, the right to fees incurred in pursuit of contract claims is governed by the uniform standards of Civil Code 1717, here the contract also limits recovery to "reasonable" attorneys' fees. (*See* Ground Lease §38.13.)

A. OBOT Has Not Met Its Burden for the Time Claimed by Skyler Sanders

OBOT requests a total of **$3,434,613.17** for the work of Skyler Sanders and his staff, of which the vast majority—**$3,256,800—**is attributed to Mr. Sanders's in-house years (2018-2022) for which CCIG and Mr. Sanders kept no time records *at all*. The remaining **$177,813.17** is for Baldr work, for which there are time records.

While there is no dispute that parties can at times recover fees for in-house counsel (*e.g.*, *Drexler*, 22 Cal.4th at 1094), OBOT ignores that it cannot merely *claim* these fees: it must *prove* them. (*Ellis*, 218 Cal.App.4th at 883.) OBOT must prove that Mr. Sanders' time was spent on this litigation rather than other matters, was performed as counsel not client, and was reasonable. (Civ. Code §1717(a); *Drexler*, 22 Cal.4th at 1093–96.) There are two significant problems here: (1) an utter lack of documentation for the vast majority of fees claimed (which prevents this Court from being able to determine what time was compensable, what tasks were performed, and the reasonableness of the time claimed for those tasks), and (2) the apparent inclusion of time spent on matters other than this litigation and when acting as client not counsel.[6]

The only evidentiary support for Mr. Sanders's in-house years is a handful of paragraphs asserting that Mr. Sanders worked generally on various aspects of the litigation, plus a single page purporting to show the dates on which Mr. Sanders received paychecks. (*See* Sanders Decl. ¶¶ 3, 6; Tagami Decl. ¶¶ 2, 5–7; Lee Decl. ¶8, Tbls. 1, 2; OBOT App'x Ex. L; *see also* Leonard Decl. ¶49.) Mr. Sanders *estimates* that he worked 7840 hours for CCIG, and *asserts* that he uniformly

[6] It is telling that Plaintiffs' hired fees "expert" does not attest to the reasonableness of Mr. Sanders's fees. (*See* Greenfield Decl.) The City objects to the admissibility of Mr. Greenfield's testimony, which is replete with inadmissible opinions and case-specific hearsay for which he lacks personal knowledge (echoing a similar approach for OBOT's prior expert), but the Court may simply disregard that declaration as unhelpful to this motion. If and when OBOT supplements its demand for "fees on fees," the City reserves a right to further respond, including objecting to any fees or costs for this Declaration as unreasonable.

spent 60% of that time "working on this litigation," but he has no contemporaneous time records and provides no attempt at reconstruction to show how many compensable hours he worked, what tasks he actually performed, and whether his time spent was reasonable. (Sanders Decl. ¶¶3, 6.)[7] Mr. Sanders's estimates defy belief. He claims that he uniformly spent over *twenty-three hours per week* on this litigation every week for nearly four years. (Leonard Decl. ¶48; Sanders Decl. ¶3.) Not only is that an extraordinary amount of time for *any* in-house counsel, but here it represents $70,000 every month for years, even during the 18 months when OBOT's claims were *stayed* by this Court and later months in 2022 during settlement negotiations, in which primary counsel Manatt's bills were, tellingly, significantly lower. *See* Lee Decl. at 20–21 (Feb. 2020: Manatt bill for *$81.50*; May 2022: Manatt bill for *$270.00*.) Mr. Sanders has made no attempt to have his blanket estimates actually reflect the demands of this litigation. This is hindsight block-billing, done not just daily, but with one entry for four years, and must be *per se* inadequate.

This is also a very far cry from the documentation courts have relied on in other cases to award fees to in-house counsel. In *Drexler*, OBOT's only cited case, the Supreme Court approved fees for in-house counsel who *conducted the trial*, and based on "a detailed reconstruction by in-house counsel of time records for all activities performed" including "specific legal tasks." (22 Cal.4th at 1089–90, 1096 & n.4.)[8] "[I]n the absence of such crucial information as the number of hours worked …, types of issues dealt with and appearances made on the client's behalf, the trial court is placed in the position of simply guessing at the actual value of the attorney's services. That practice is unacceptable and cannot be the basis for an award of fees." (*Martino v. Denevi*

[7] With respect to identifying specific tasks, OBOT says only that Mr. Sanders attended nine depositions, duplicatively alongside the counsel taking or defending, (Lee Decl. Tbls. 1, 2), and helped outside counsel with one letter, (*id*. ¶8). There is not even any documentary evidence of how much time Mr. Sanders actually *worked* for CCIG. OBOT's proffered "payroll" summaries (created for this motion) show only the paycheck dates, *see* App'x, Ex. L, which is useless.

[8] The Court cautioned that "maintaining contemporaneous records by in-house counsel of hours spent on a case involving a possible request for attorney fees would facilitate accurate calculation of the lodestar and minimize possible inaccuracies in reconstructing time spent on a matter months or even years after the fact." (*Id.* at 1096 n.4.) Mr. Sanders ignored that instruction even while litigating a case for years *in which his client sought attorneys' fees*.

(1986) 182 Cal.App.3d 553, 558; *see also Crespin v. Shewry* (2004) 125 Cal.App.4th 259, 271 ("[F]ee motions must be based on detailed time records, not on the memories of the attorneys involved."); *Ellis*, 218 Cal.App.4th at 883; *Taylor v. Cnty. of Los Angeles* (2020) 50 Cal.App.5th 205, 207 ("[C]ontemporaneous time records are the best evidence of lawyers' hourly work. They are not indispensable, but they eclipse other proofs. Lawyers know this better than anyone.").)

To be sure, California courts have not as a rule always required detailed time records, *because* the trial court generally is "aware of the nature and extent of the attorney's services from its observation of the trial proceedings and the pretrial and discovery proceedings." (*Martino*, 182 Cal.App.3d at 558.) But Mr. Sanders never appeared on any papers for any motion, never conducted a single hearing, and certainly did not act as counsel at a trial *in which testified for OBOT as a fact witness*. (Leonard Decl. ¶50.) To an unusual extent, the Court cannot directly assess Mr. Sanders's claimed legal work, because it did not observe any of that work.

The Court has further reason to doubt Mr. Sanders's "estimates." The Baldr time records include time spent as client, not as counsel, including that OBOT seeks to recover for Mr. Sanders's time spent preparing for and attending trial *as a fact witness*. (*See* Leonard Decl. ¶55.)[9] This casts grave doubt on Mr. Sanders's estimates of time spent "on the litigation," going back in time. Indeed, there are other reasons to believe that as General Counsel Mr. Sanders was acting as a client not counsel when "working on this litigation": he was designated by OBOT as a fact witness, and prepared for and was deposed as a fact witness (*Id.* ¶59); he verified the many sets of substantive interrogatory responses on behalf of OBOT, OGRE, and CCIG—as a *client*. (*id.*; C.C.P. §2030.250(b).) This Court is not required to take *on faith* that any time by an in-house counsel was spent on this case was as counsel not client.

[9] Mr. Sanders's Baldr bills show that he is claiming to have worked for many hours as *litigating counsel* in this case throughout trial. (*See* Leonard Decl. ¶¶57, 63 & Ex. H.) He was a witness, not litigating counsel. This Court ordered, specifically, that as a witness, Mr. Sanders was not allowed to observe the testimony of other witnesses. The Rules of Professional Responsibility likewise require counsel to choose between a role as lawyer and as a witness. Very concerningly, although Mr. Sanders's time records are heavily redacted, they strongly suggest that prior to and after his testimony, *Mr. Sanders reviewed trial transcripts and reviewed and commented on summaries of witness testimony*—in apparent violation of this Court's specific order. *See id.* ¶56 & Ex. E. If indeed Mr. Sanders was trying to play both roles, OBOT should not be compensated for it.

Mr. Sanders was also spending considerable time working on other matters for CCIG that may have been related to the West Gateway, but were not time spent on this litigation, including: the federal litigation (2016 through 2020), (*see* Sanders Decl. ¶1); the STB proceedings and other regulatory matters (2014-present), (*see* App'x Ex. P); and myriad contract and business negotiations (ongoing). (Leonard Decl. ¶¶51, 60, 61 & Exs. C, F.)[10] There is simply no possible way that a blanket 60/40 division of time is accurate. (*See* Leonard Decl. ¶52.) It is also very unlikely that Mr. Sanders has excluded non-compensable matters given that OBOT seeks fees for other counsel on the same matters. (*See infra* at 11 (addressing Venable fees).)

With respect to staff, OBOT has not identified a single task performed to justify the 4,464 hours of in-house paralegal time (totaling $669,600), nor has it demonstrated this staff work was not properly considered administrative or overhead, which is not compensable (*Drexler*, 22 Cal.4th at 1097.) (*See* Leonard Decl. ¶54; *El Escorial Owners' Assn. v. DLC Plastering* (2007) 154 Cal.App.4th 1337, 1366 ("[T]he declaration … did not categorize the [paralegal] hours, describe the services or state facts showing why they were necessary and reasonable.").)

The City is aware of no case—and OBOT cites none—in which a party met its burden of proof for millions in attorneys' fees for years of work of in-house counsel without any contemporaneous evidence or even a reconstruction of what the attorneys or staff were doing all those years. A court cannot, as OBOT has requested here, "rubber stamp a request for attorney fees" but instead "must determine the number of hours reasonably expended." (*Morris v. Hyundai Motor Am.* (2019) 41 Cal.App.5th 24, 38.) Because OBOT has not met its burden, this Court must deny the **$3,256,800** in fees claimed for in-house time counsel and staff in its entirety.

[10] Mr. Sanders testified in deposition that his General Counsel work included a vast array of tasks *unrelated to litigation*: "dealing with [property financing]," "drafting [and] reviewing loan agreements," "dealing with landlord/tenant issues," "dealing with contracts," "pursu[ing] new developments," "working on entitlement issues with cities," "drafting acquisition documents," "dealing with H.R. issues," "deal pursuit," "negotiating purchase and sale agreements" and generally "looking to expand our book of business"—"really any legal even tangentially related item … falls on my desk." (*Id*. ¶60 & Ex. F.) None of these activities is compensable here. Mr. Sanders' deposition testimony also calls into question the veracity of representations to this Court that CCIG hired other attorneys to perform this work for the entire time period at issue. (*Id*. ¶53.)

In addition, Mr. Sander's Baldr records contain significant non-compensable amounts. They are also so heavily redacted as to largely prevent the Court from discerning whether the time was spent on this litigation or other matters. At a minimum, the Court should also deny all of Mr. Sanders's fees associated with matters other than this litigation or as client not counsel (at least **$6,974.00**); for a trial phase in which he was not litigating counsel but a witness (**$57,648.00**); and expenses improperly included in the fees calculation (**$4,346.23**). (Leonard Decl. ¶¶62–64.)[11]

B. The Court Should Deny the Venable Fees For Separate Litigation

This Court should reject the **$121,620.15** for work performed by Venable LLP for OGRE in the STB litigation. Venable's work served OGRE's goals with respect to STB jurisdiction and common carrier status under federal law, and was not "incurred to enforce [the] contract." (§1717(a)); *Hyduke's Valley Motors v. Lobel Fin.* (2010) 189 Cal.App.4th 430, 436 (no entitlement to fees when the "gravamen" of the action was "not to enforce anyone's rights" under the contract).) OGRE can no more recover its STB fees here than OBOT can obtain its fees for the federal litigation (and this Court has equally no basis to assess this work). (Damages SOD at 11, 13.) And Venable did this work for *OGRE*, and OGRE is not a "Party" designated in the Ground Lease fees provision. (Ground Lease §38.13; *Sessions Payroll Mgmt. v. Noble Const.* (2000) 84 Cal.App.4th 671, 680 (third party beneficiary not entitled to fees under attorney fee clause).)[12]

C. The Court Should Deny Lowenstein Fees for Representation of Third Parties

OBOT's request for **$145.309.13** for fees incurred by Lowenstein Sandler LLP representing *other parties* should also be denied. OBOT cannot recover fees incurred by some other party, because those fees are neither "incurred to enforce [the] contract" nor are a "prevailing party's … reasonable attorneys' fees." (§1717(a).) Section 1717 authorizes fees only for lawyers who have an attorney-client relationship with the prevailing party. (*Cf. Drexler*, 22

[11] Costs are not fees, and by failing to claim these as costs, they are waived. *Infra* at 14–15.

[12] Mr. Tagami's statement that "*OBOT* incurred and paid" the Venable fees (Tagami Decl. ¶11) is false. All the Venable bills are directed to *OGRE*, because Venable represented *OGRE* in the STB proceedings to determine *OGRE*'s rights under federal railroad law. (*See* OBOT App'x Ex. P.)

Cal.4th at 1092, 1094; *Sands & Assocs. v. Juknavorian* (2012) 209 Cal.App.4th 1269, 1297; *Rosenaur v. Scherer* (2001) 88 Cal.App.4th 260, 287.) OBOT claims that it paid 50% of these fees by reimbursing its sublessee ITS, but that is irrelevant. (*See* Tagami Decl. ¶10.) OBOT can only recover its *own* attorney's fees, and non-parties like ITS and its affiliates cannot recover their fees via OBOT, regardless of who paid them. (*See* App'x Ex. O (PDF pp. 811, 839) (Lowenstein bills to "JMB Capital Partners Lending" and "The McConnell Group").)[13]

D. Manatt Includes Time that Was Not Reasonably Expended on these Claims[14]

OBOT seeks **$8,112,497.58** in fees for Manatt's work on this case, but has not met its burden for **$690,781.04** of this time. As an initial matter, rather than calculating a lodestar, OBOT seeks fees for Manatt that it claims were actually paid by OBOT. (Tagami Decl. ¶4; Lee Decl. ¶50.) But whether fees are actually incurred or paid by a party is not determinative of a "reasonable" fee, as OBOT implicitly recognizes in this case, since OBOT was *reimbursed by ITS* (and therefore did not ultimately pay) a substantial amount of the fees that it presents to this Court. (Leonard Decl. ¶45.)[15] The City does not contest Manatt's rates or micro-manage a review of the reasonableness of particular tasks, but the following categories do overreach:

1. OBOT should not recover fees unreasonably expended to prove damages through its expert witness that were plainly barred by contract language and which resulted in *no* usable evidence. (*See* Damages SOD at 7–8, 15, 23, and 29 n.25 (this Court "did not rely on Mr.

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[13] OBOT has not even submitted consistent evidence with respect to who paid for what. OBOT states it is claiming 50% of these fees (Tagami Decl. ¶10; Mot. at 11) but the amount claimed here is 100% of the Lowenstein bills (*see* App'x Ex. O (PDF p. 810) (stating that the $145,309.13 OBOT seeks was "paid directly by JMB Capital and 50% was reimbursed by OBOT.")).

[14] OBOT has not provided the Court with any support for the qualifications of 25 of the 34 Manatt billing attorneys and staff, totaling over $1.4 million in fees. (Lee Decl. Table 5.) The City does not challenge Manatt's rates, notwithstanding that some – $590/hour for a summer associate – are facially unreasonable. (*Andrews v. Equinox Holdings, Inc.* (N.D. Cal. 2021) 570 F.Supp.3d 803, 807 (approving $300/hour for summer associates)). The City leaves the lack of support for these billers to the Court's discretion, but does not endorse OBOT's approach as reasonable.

[15] ITS reimbursed OBOT for millions in attorneys' fees for this litigation. (Leonard Decl. ¶45.) The fees analysis does not turn on who paid the bills. (*E.g.*, *Staples v. Hoefke* (1987) 189 Cal.App.3d 1397, 1410.) But in presenting these fees as *paid by* OBOT (to support their reasonableness), OBOT omits the significant detail that it was reimbursed.

Brown's testimony."); *Meister v. Regents of Univ. of Cal.* (1998) 67 Cal.App.4th 437, 452 ("Attorney time spent on services which produce no tangible benefit for the client is not time 'reasonably spent.'"); *Sundance v. Mun. Ct.* (1987) 192 Cal.App.3d 268, 274 (trial court has discretion "to determine whether time spent on an unsuccessful legal theory was reasonably incurred").) This includes hundreds of hours spent on expert reports, depositions, related discovery, and trial time, totaling **$556,654.00**. (Leonard Decl. ¶68 & Ex. J).

2. OBOT also appears to include overhead and administrative work in its billing, which is staff work that should already be incorporated into law firms' commercial rates (*Drexler*, 22 Cal.4th at 1097) ("[P]revailing market rates necessarily take into consideration such factors as …overhead [and] the costs of support personnel…").) Spot-checking the time claimed for the "Practice Support" and "E-discovery specialist" shows that Manatt includes administrative time on items such as downloading documents and organizing files. (Leonard Decl. ¶69.) OBOT claims they would have outsourced this work to a document management vendor (Lee Decl. ¶5(e)), but that does not change its nature, and that vendor would not be a compensable cost (*see* C.C.P. §1033.5(15)). This administrative staff time totals **$72,542.04**. (Leonard Decl. ¶69.)

3. OBOT claims unreasonable travel time for associates and support staff from Manatt's Los Angeles and Washington, DC offices that it assigned to this case, for no reason other than internal staffing and convenience. The time traveling back and forth from their homes is not reasonably compensable, and totals **$61,115.00**. (Leonard Decl. ¶70 & Ex. K.)

III. OBOT's Claimed Fees Should be Reduced for Limited Success

The Court has discretion to adjust the fee award downward for a party's mixed success. (*Drexler*, 22 Cal.4th at 1095–96; *Kanner v. Globe Bottling Co.* (1969) 273 Cal.App.2d 559, 569.) The City proposes that a reduction of 25% would appropriately reflect the extent of OBOT's success and failure in this litigation as discussed above. (*Supra* at 2–6; *see Antelope Valley Health Care Dist. v. Citadel Properties Lancaster* (9th Cir. 2009) 322 F.App'x 523, 525 (25% reduction under Section 1717 where plaintiff partially succeeded on the merits, including winning its "primary claim" of specific performance of a real estate contract); *Citrus El Dorado, v. Stearns Bank.* (C.D.Cal. 2016) 2016 WL 7626583, at *15 (25% reduction under Section 1717 where

plaintiff obtained $1.2 million on its breach claim but defendant "limited [plaintiff's] recovery" and defeated linked tort claims); *Iguaçu, Inc. v. Filho* (N.D. Cal. 2014) 2014 WL 3668574, at *1 (50% reduction under Section 1717 where plaintiff won on liability and obtained $446,355 in damages, "a mere fraction of the more than $10 million" sought).) After deducting the time discussed above, the fee claim (excluding costs discussed below) would be **$7,531,031.48**. A 25% lodestar reduction is **$1,882,757.87**, resulting in an award of **$5,648,273.61**. (Leonard Decl. ¶72.)

IV. The Court Must Deny OBOT's Waived Request for Extra-Statutory Costs

OBOT now seeks an additional $718,988.89 in costs beyond those claimed in its prior Costs Memorandum. OBOT is not correct that a contract provision can act as a catch-all or back-up to that procedure, and these new costs are not recoverable via Civil Code 1717.

First and foremost, Civil Code 1717 does not provide a mechanism for the post-judgment recovery of contractual costs beyond what is permitted by the costs statute, regardless of any contract language: OBOT "cannot expand the definition of 'costs' in section 1717 to include items not permitted under section 1033.5 of the Code of Civil Procedure." (*Fairchild v. Park* (2001) 90 Cal.App.4th 919, 929–930; *see also First Nationwide Bank v. Mountain Cascade, Inc.* (2000) 77 Cal.App.4th 871, 878 ("the statutory prohibition contained in [CCP §1033.5(b)(1)] cannot be avoided by characterizing costs as an element of attorney fees").) California law is equally clear regarding what a party, like OBOT, that seeks costs beyond the costs statute pursuant to a contract provision must do: plead and prove those costs as contract damages *prior to judgment*. "Recovery of costs provided by contract must be specially pleaded and proven at trial, and not awarded posttrial," because "[t]he proper interpretation of a contractual agreement for shifting litigation costs is a question of fact that 'turns upon the intentions of the contracting parties.'" (*Hsu v. Semiconductors Sys.* (2005) 126 Cal.App.4th 1330, 1341–42.)[16] The reason underlying this doctrine is that questions of contract interpretation, including the meaning of a

[16] This proposition is well-settled. (*See Jones v. Union Bank of Cal.* (2005) 127 Cal.App.4th 542, 551; *Carwash of Am.-PO v. Windswept Ventures No. I* (2002) 97 Cal.App.4th 540, 544*; First Nationwide Bank*, 77 Cal.App.4th at 878–879*; Ripley v. Pappadopoulos* (1994) 23 Cal.App.4th 1616, 1627.) The *stipulation* to a procedure for resolving costs in *Arntz Contracting v. St. Paul Fire & Marine Ins.* (1996) 47 Cal.App.4th 464, 492, the case OBOT cites, is not to the contrary.

fees and costs provision, must be resolved at trial, not post-judgment.[17]

Moreover, OBOT has likely also waived any claim to these additional costs entirely by failing to include them in the Costs Memorandum. (*E.g., Kaufman v. Diskeeper Corp.* (2014) 229 Cal.App.4th 1, 6 n.2 ("We agree with the trial court that Diskeeper was required to file a memorandum of costs in order to recover the other costs and expenses it sought, and that Diskeeper's failure to do so worked a forfeiture regarding them."); *accord Hydratec v. Sun Valley 260 Orchard & Vineyard Co.* (1990) 223 Cal.App.3d 924, 929.) OBOT cites no case permitting a §1717 motion for *fees* to circumvent this requirement. This is particularly notable because OBOT seeks photocopying and travel costs that overlap with the type claimed in its prior memo.

Finally, almost all of OBOT's additional costs are straightforwardly prohibited by statute. The $554,221.68 in expert costs are prohibited by §1033.5(b)(1), and regardless were *not* reasonably incurred, *supra* at 12–13. (*See Davis v. KGO-T.V.* (1998) 17 Cal.4th 436, 440–41 ("[T]he court should not require the opposite party to pay for the services thus rendered.").) The $59,521.20 in Westlaw expenses are plainly barred. (*Ladas v. California State Auto. Assn.* (1993) 19 Cal.App.4th 761, 776.) The $2,947.66 in photocopying expenses are also barred, §1033.5(b)(3). The rest are either merely convenient rather than reasonably necessary ($94,816.04 in mock trial expenses, for a jury OBOT demanded but then waived on the eve of trial), or excessive ($7,482.31 including what appears to be a premium-class flight, a luxury hotel and rental car, for Mr. McClure's and Mr. Wolff's travel to trial). *See* Leonard Decl. ¶71 & Ex. L.

CONCLUSION

The Court should deny this Motion, because there was no prevailing party within the meaning of Section 1717. In the alternative, the City respectfully requests that the Court deduct $5,001,997.44 as not compensable time or costs, and then further reduce the resulting award of $7,531,031.48 by 25% resulting in a total award of no more than **$5,648,273.61**.

[17] The "Attorneys Fees and Costs" definition contains multiple ambiguities, including at least the meaning of "reasonable" with respect to costs and items like "travel time and associated costs" (whose travel: Counsel? Client? Witnesses? All?), requiring judicial resolution. OBOT appears to believe it means premium-class flights and a 7-person expert team, which was certainly *not* the City's intent.

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Respectfully submitted,

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