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OAKLAND BULK AND OVERSIZED TERMINAL, *Plaintiff*
OAKLAND GLOBAL RAIL ENTERPRISE, LLC, *and Counter-Defendant* CALIFORNIA CAPITAL & INVESTMENT GROUP

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA

ADMINISTRATION BUILDING COURTHOUSE

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

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR ATTORNEYS' FEES AND COSTS

Reservation No.: 091774930178
Date: April 3, 2024
Time: 10 a.m.
Dept.: 21
Judge: Honorable Noël Wise

Filed Concurrently With:
(1) Reply Declaration of Barry W. Lee.

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

I. INTRODUCTION

It is undisputable that in this case, Plaintiffs obtained greater relief on the contract actions than the City. Plaintiffs achieved a simple, unqualified defensive win against the City's contract claims, while the City took nothing, and prevailed on every affirmative contract claim against the City other than anticipatory breach, which the Court did not reach after finding the City breached the Lease. The law is clear: "the party prevailing on the contract ***shall*** be the party who recovered a ***greater relief*** in the action on the contract." Civ. Code § 1717(b)(2) (emphasis added). The City calls this a "mixed result" case hoping to invoke the Court's discretion to determine that no prevailing party exists. According to the City, Plaintiffs did not prevail because the Court did not issue every declaration sought, agree with every force majeure claim, or award lost profits damages. But the test requires more than simply listing items Plaintiffs lost. Litigants always advance multiple theories, often in the alternative. Plaintiffs' theories provided different paths to the same result: save the Lease and Plaintiffs' valuable future economic rights under it; and if the Lease cannot be saved, recover compensation for the loss. Concurrently, Plaintiffs defeated the City's litigation objective: end OBOT's Lease and presence in the West Gateway.

Plaintiffs prevailed and are entitled to fees and costs as a matter of law. The City's arguments to the contrary invite error. The only issue is the *amount* of attorneys' fees and costs to be awarded. The amounts sought are reasonable in the context of this case. To the extent any fees or costs are not available as a matter of right, the Court has discretion to award them, and should exercise that discretion here. Failure to do so would ignore the parties' contractual intent, reward the City's bad faith, and encourage future breaches. The City defaulted on the Lease. It should not now be permitted to escape its bargained-for promise to cover Plaintiffs' fees and costs incurred enforcing the Lease, including its broad cost-shifting provision. Plaintiffs respectfully request that the Court find that Plaintiffs are the prevailing parties, and award $11,636,226.86[1] in attorneys' fees, $718,988.89 in costs, and $427,341.97 in additional fees and costs so far incurred in 2024.[2]

[1] This amount does not include fees ($177,813.17) incurred by OBOT from Baldr Advisors, LLC ("Baldr").

[2] Reply Declaration of Barry W. Lee ("Reply Lee Decl.") ¶ 2.

II. PLAINTIFFS' MOTION SHOULD BE GRANTED IN ITS ENTIRETY

A. Plaintiffs Are the Prevailing Parties and Entitled to Fees

The City argues that Plaintiffs did not prevail because they did not obtain everything they sought. That is not the test. The law defines prevailing party as "the party who recovered a greater relief in the action on the contract." Civ. Code § 1717(b)(2). Plaintiffs are the ***only*** parties who obtained relief on the contract claims. The City's opposition fails for seven additional reasons.

First, the City misapplies the California Supreme Court's decision in *Hsu*. The test is comparative. "The prevailing party determination is to be made . . . *only by a comparison of the extent to which each party has succeeded and failed* to succeed in its contentions." *Hsu v. Abbara*, 9 Cal. 4th 863, 876 (1995) (emphasis added; marks omitted). The City fails to analyze (or even identify) its objectives, ignores that it wholly failed to obtain any of its goals, and argues only that Plaintiffs did not obtain everything sought in the operative complaint or the remedies phase of trial.

Second, by any comparison, Plaintiffs obtained the greater relief. The parties' main litigation objectives have been the same since day one. Plaintiffs sought to preserve the Lease and related rights and investment, and develop the terminal without the City's unlawful obstruction;[3] the City sought to terminate the Lease and push OBOT out of the West Gateway permanently.[4]

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[3] *See* 11/20/2023 Plfs. Trial Brief Re Remedies at 1:11-13 ([W]hile Plaintiffs have indicated a preference for the first scenario [i.e., specific performance], Plaintiffs have not yet made an election …); RT 4274:13-19 (Mr. Lee's explanation on behalf of Plaintiffs that Plaintiffs prefer scenario one equitable remedies to scenario two legal damages); RT 4426:5-12 (Mr. Tagami's testimony that OBOT believed it could and intended to comply with the Lease if the Court ordered specific performance). Even had the Court awarded legal damages, Plaintiffs likely would have elected specific performance. They had to put on a damages case to account for the possibility that they would not win specific performance with a sufficient extension of time for OBOT to perform. Plaintiffs also sought clarification on the types of damages recoverable under the Lease in light of competing language that allows for recovery of actual but not consequential damages.

[4] *See* City Compl. ¶¶ 39-50, 57-60 (alleging that OBOT and CCIG breached the Lease and the Lease and Development agreement were subsequently terminated); 6/21/2023 City Trial Brief, p. 5 ("The City sues to enforce the early termination provisions by way of specific performance, including the provision requiring OBOT to immediately return the land."); 9/25/2023 City Proposed SOD, p. 3 ("The contract made clear that time was of the essence, and provided for a serious remedy if construction did not commence by the deadline: the City was authorized to terminate the Ground Lease."), p. 7 ("Because none of OBOT's contentions therefore meet the standard required by the plain terms of this contract to extend the deadline, the City had the contractual right to declare OBOT in default and to terminate the Ground Lease in light of OBOT's failure to perform.");10/6/2023 City Response to Plfs. SOD, p. 5 ("The City was well within its contractual rights in 2018 to decide that Phil Tagami and his business partners had not and were not going to deliver the project they had promised, to call OBOT on its default, and to terminate this contract."); RT 73:24-74:02 (City opening statement: "And then in November the city invoked

Plaintiffs achieved their objective; the City did not.

Third, and relatedly, these cases were about more than money. Plaintiffs' successful vindication of their Lease rights is dispositive. *See Rancho Mirage Country Club Homeowners Ass'n v. Hazelbaker*, 2 Cal. App. 5th 252, 261 (2016) (plaintiffs who obtained order forcing homeowners to bring property into compliance with CC&Rs prevailed); *Almanor Lakeside Villas Owners Ass'n v. Carson*, 246 Cal. App. 4th 761, 767-69 (2016) (plaintiff who obtained small fraction of damages sought but cemented non-monetary rights prevailed).

Fourth, even if the case were about only money, a party prevails if it establishes contractual liability and wins a fraction of the requested amount—even a dollar judgment can suffice. *E.g.*, *Regency Midland Constr., Inc. v. Legendary Structures Inc.*, 41 Cal. App. 5th 994, 1000 (2019) (winning less than requested is only "pertinent in a damages-only trial, where the defendant *stipulates* to liability" (emphasis original)); *de la Cuesta v. Benham*, 193 Cal. App. 4th 1287, 1296 (2011) (plaintiff that obtained less than sought, but more than nothing prevailed); *Ajaxo Inc. v. E*Trade Grp. Inc.*, 135 Cal. App. 4th 21, 59 (2005) (plaintiff prevailed after awarded "a fraction" of damages sought).

Fifth, the City's argument hinges on this case being the type of mixed result case that would justify a finding that no party prevailed. But this case is nothing like the City's cited mixed result cases. In *Marina Pacifica Homeowners Ass'n v. S. Cal. Fin. Corp.*, 20 Cal. App. 5th 191 (2018), the plaintiff sought to invalidate and recover an assignment fee the defendant charged on a real property interest. The Court invalidated the defendant's method to calculate the fee, but the defendant cemented its right to collect it when calculated properly. *Id.* at 202-03; *see also Nasser v. Super. Court*, 156 Cal. App. 3d 52, 60 (1984) (plaintiff sought declaratory relief to exercise lease option and pay lower rent; defendant secured right to charge higher rent than plaintiff requested).[5]

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the contractual provision and terminated the Ground Lease in view of [OBOT's] failure to meet the construction deadline and to perform."), 102:7-16 (City opening: "They were asking for a complete do over, having failed utterly to move the project forward over the two and a half years that the city provided. And that, your honor, is why the city terminated the Ground Lease. . . . All of the evidence is going to show there was no excuse for OBOT's failure to perform. The West Gateway Ground Lease is over.").

[5] *City of L.A. Dep't of Airports v. U.S. Specialty Ins. Co.*, 79 Cal. App. 5th 1039 (2022) is inapposite. The plaintiff city proved breach but took a pyrrhic victory, winning only $1; the trial court found

Here, the City did not cement any right. Its loss was complete.

The City's other cited mixed result cases are distinguishable. *See Harris v. Rojas*, 66 Cal. App. 5th 817, 819, 825-26 (2021) (discussing contract damages and no other remedy); *Olive v. Gen. Nutrition Ctrs.*, 30 Cal. App. 5th 804, 827-28 (2018) (plaintiff sought damages only and the defendant did not have an affirmative claim); *Berkla v. Corel Corp*., 302 F.3d 909, 912-13, 919-20 (9th Cir. 2002) (analyzing only monetary recovery and no other remedy). No case involved an award of specific performance or analyzed the percentage of damages won as an ***alternative*** remedy. The City's cited mixed result cases looked to the percentage of damages won because that's all those cases were about. Here, the City ignores its own failed lawsuit, stating only in a footnote that its loss "is not dispositive." Isn't it? Plaintiffs obtained an unqualified win on the City's lawsuit, and on their lawsuit, they won the contract claims and secured the Lease for six decades. On these facts, the result is so lopsided that it would be an abuse of discretion to not find that Plaintiffs prevailed. *See generally de la Cuesta*, 193 Cal. App. 4th.

Sixth, the City's mixed result analysis hinges on giving more weight to the remedy Plaintiffs did not elect than the one Plaintiffs did elect. That makes no sense. From the outset, Plaintiffs acknowledged that they could not obtain both specific performance and future lost profits damages. The judgment in this case awards Plaintiffs the right to earn over the next 60-plus years the same future revenue the Court declined to award as damages. By prevailing on their specific performance claim, Plaintiffs effectively preserved their right to recover the same amounts over the life of the lease that they alternatively sought as future lost profits in a discounted-to-present-value lump sum. None of the City's cited cases finds that a successful Plaintiff was not the prevailing party simply because it lost its *alternative* remedy theory.

Seventh, the Lease includes its own standard for liability for fees and costs. The parties agreed that, in the event of a dispute, "*the defaulting Party or the Party not prevailing in such dispute*" is required to pay the other side's fees and costs. (Ex. 68, pp. 121-22 (emphasis added).)

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that neither party prevailed. *Id.* at 1042. On appeal, the defendant claimed it prevailed and that the city (despite being the non-breaching party) should pay its fees and costs. *Id.* at 1041, 1045-46. The city there did not appeal the finding that neither party prevailed. The case has no application here.

The City defaulted (and Plaintiffs did not). (SOD I at 2:20-23, 86:9-11, 89:3-90:16, 94:13-14.) Under the Lease's plain terms, the City's default alone is the predicate for fee recovery.

The City argues that Plaintiffs cannot enforce a definition of prevailing party distinct from Section 1717. The City cites two cases; neither of which supports that purported rule. *PLCM Grp. v. Drexler*, 22 Cal. 4th 1084 (2000) focuses on whether in-house counsel are entitled to fees under Section 1717—they are—and courts' discretion when calculating the amount of fees. *Id.* at 1090, 1094-97. The case does not apply to this issue. *Walker v. Ticor Title Co. of Cal.*, 204 Cal. App. 4th 363 (2012) includes a single statement like the City's purported rule, but only as dictum. *Id.* at 373. *Walker* addresses whether courts can consider the financial impact of a fee award when deciding the amount of fees, not the definition of prevailing party. *See id.* at 370-71, 373-74. And the context of the statement is narrow: a contract cannot create a unilateral right to recover fees and costs because "[t]he primary purpose of section 1717 is to ensure mutuality of remedy for attorney fee claims under contractual attorney fee provisions."[6] *Santisas v. Goodin*, 17 Cal. 4th 599, 611 (1998).

Plaintiffs agree the fee provision must be mutual. Plaintiffs prevailed because they proved the City's default; had the City proved it did not default, it would have prevailed. That's all the City's cited cases require. The Court should enforce the contract. *See* Code Civ. Proc. § 1021.[7]

B. Mr. Sanders' In-House Counsel Fees Are Recoverable

The City attacks the fees incurred for Mr. Sanders' time as in-house counsel on two grounds: a lack of documentation and time spent on matters other than this litigation. Both arguments fail.

On documentation, the Lease expressly contemplates recovery of in-house attorney fees,

[6] *Walker* cites only *Santisas* for the rule. *Santisas* does not hold that parties cannot agree to a standard for a fee award in a contract or to their own definition of prevailing party. The contract in that case *did not* even define the term "prevailing party." *Santisas*, 17 Cal. 4th at 609. The Supreme Court analyzed a unilateral fee provision that if enforced as written, would only award attorneys' fees to a party that successfully enforced a contract, while a party that successfully defended would not recover fees. *Id.* at 611. In such situations, Section 1717 does not supplant the contract; it ensures "mutuality of remedy" by permitting a successful defendant to recover "fees whenever the opposing parties would have been entitled to attorney fees *under the contract* had they prevailed." *Id.* (emphasis added). Parties also cannot contract to permit a defendant to recover fees spent on causes of action that a plaintiff voluntarily dismissed. *Id.* at 617.

[7] The City also argues that Plaintiffs did not secure every declaration sought or win every force majeure claim. That misses the point. The purpose of the declaratory relief claims was to preserve the Lease and Development Agreement, and the purpose of the force majeure claims was to secure a 2.5-year extension of the Initial Milestone Date. Plaintiffs achieved both objectives.

and does not impose any obligation to keep time records or maintain any other documentation. Section 38.13 provides that the reasonable fees of in-house counsel shall be based on the fees regularly charged by private attorneys with the equivalent number of years of experience in the subject matter area of the law for which the in-house counsel services were rendered and practiced in the City of San Francisco and full-service law firms. (Ex. 68, p. 122.) That's it.

Further, under California law "time records are not required . . . [and] there is no required level of detail that counsel must achieve" to recover its fees. *Syers Props. III, Inc. v. Rankin*, 226 Cal. App. 4th 691, 699 (2014).[8] "It is well established that . . . trial courts have discretion to award fees based on declarations of counsel describing the work they have done and the court's own view of the number of hours reasonably spent." *Id.* at 698 (citing *Raining Data Corp. v. Barrenechea*, 175 Cal. App. 4th 1363, 1375-76 (2009)). Evidence in the form of a declaration supporting the number of hours spent on a matter is sufficient to support a request as to the total number of hours. *See City of Colton v. Singletary*, 206 Cal. App. 4th 751, 786 (2012) (attorney declaration and work filed with court are sufficient evidence for court to determine amount of fees to be awarded).

Here, Mr. Sanders, under penalty of perjury and as a licensed attorney who credibly testified during trial, signed a declaration attesting to the number of hours he worked during the litigation. He conservatively estimated that he worked between 50 to 60 hours a week while serving as in-house counsel; detailed the type of work he did in support of Plaintiffs' litigation goals; and estimated that 60% of the hours worked during this period are attributed to this dispute.[9] (Sanders Decl. ¶¶ 3, 6.) The City does not and cannot question Mr. Sanders' veracity.

A reasonable review of the record, including Manatt's time records and Mr. Sanders' declaration, supports the calculation. Mr. Sanders attended depositions; managed, collaborated, and strategized with Manatt; drafted and revised pleadings, correspondences, and written discovery; and attended hearings, settlements, and mediations; among other work. (*Id.* ¶ 6.) And the fact that

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[8] *See, e.g.*, *PLCM Grp.*, 22 Cal. 4th at 1098 ("We do not want a trial court, in setting an attorney's fee, to become enmeshed in a meticulous analysis of every detailed facet of the professional representation. It . . . is not our intention that the inquiry into the adequacy of the fee assume massive proportions, perhaps dwarfing the case in chief.") (cleaned up).

[9] The City argues that Mr. Sanders' role included general counsel work that is unrelated to litigation, which is the exact reason for a 40% reduction in the request for his time.

Mr. Sanders did not argue on behalf of OBOT in front of this Court, or any other court, is irrelevant. Manatt's time records reflect hundreds of entries that expressly reference work with Mr. Sanders.[10] This evidence demonstrates that Mr. Sanders, as counsel, touched nearly every aspect of this case, which makes sense given his long-term role as Plaintiffs' trusted counsel.

As to the City's argument that Mr. Sanders' time while at Baldr includes work as client rather than counsel, in order to preserve the attorney-client privilege and in acknowledgment that Mr. Sanders spent time preparing to and testifying as a fact witness, Plaintiffs withdraw their request for all Baldr fees ($177,813.17). As to the time while working in-house, Mr. Sanders testified that the work was as general counsel, he listed the type of work included in his estimate—all as counsel, and he discounted his time to account for other work. (Sanders Decl. ¶¶ 3, 6.) Mr. Sanders' time while General Counsel and any related in-house paralegal time is recoverable.[11]

C. The Venable and Lowenstein Fees Are Recoverable

Venable's fees incurred by OGRE[12] and passed on to OBOT are recoverable for two reasons. First, OBOT incurred the fees to enforce Plaintiffs' rights under the Lease, which is all that is required under the law and the language of the Lease. More specifically, in order to complete the build-out of the rail network required under the Lease, various approvals and authorizations were required from the Surface Transportation Board ("STB"). OBOT retained Venable to handle the STB proceedings, which the City initially supported but later opposed. A review of the billing records shows that many of the fees incurred *came after* the City terminated the Lease and that the work performed by Venable stemmed directly from the City's representation to the STB that it had

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[10] *See, e.g.*, App'x, Ex. G, pp. 3, 5, 13-15, 17-18, 25-26, 28, 34, 36, 38, 46-48, 57-59, 73, 75-77, 91-92, 97, 102, 117, 156, 164, 168, 177, 184, 199, 201, 213, 219, 226, 232-33, 242, 271, 295, 324, 341, 360, 379, 389-90, 402-05, 413-14, 420, 423, 429-33, 439-40, 442-44, 446-47, 453-57, 464-466, 469-472, 474, 481-482, 486, 489-490, 494, 497-498, 507-510, 512-513, 515, 517, 519-520, 537-38, 541, 544-47, 549, 579, 611, 615, 617-18, 635.

[11] Messrs. Tagami and Sanders' declarations support incurred paralegal fees, which were calculated in a similar way to Mr. Sanders' time. (Tagami Decl. ¶ 5; Sanders Decl. ¶ 6.)

[12] The City's argument pertaining to OGRE's standing is moot. The City made the same argument in its October 1, 2021, motion for summary judgment. The Court denied that motion and determined that OGRE has standing to sue the City under the Lease as an express subtenant. (January 6, 2022 Order Denying City's Motion for Summary Judgment.) OGRE was included as a party to the contract causes of action in Plaintiffs' First Amended Complaint. And the Court found in its November 22, 2023 Statement of Decision that OGRE is wholly owned by CCIG (which also owns OBOT) and that OGRE is OBOT's subtenant under the Lease. (SOD, p. 1.)

done as much. (App'x, Ex. P.) Second, the California Supreme Court has construed the term "incurred" as used in Section 1717 to mean generally to "become liable for" a fee, "i.e., to become obligated to *pay* it." *Trope v. Katz*, 11 Cal. 4th 274, 280 (1995) (emphasis added). Here, OBOT became *liable* to *pay* the fee, as it was the source of payment. (Tagami Decl. ¶ 11.) By virtue of the reciprocity provision of Section 1717, OBOT is entitled to the award. *See* Civ. Code § 1717(a).

OBOT is also entitled to recover the fees incurred for Lowenstein's representation of ITS in this lawsuit for the same reasons. OBOT had an interest in ITS responding to third-party discovery because that discovery was reasonably necessary for OBOT to advance its case and vindicate its Lease rights, and it paid for these fees. This is all the contract and the law require.

D. Manatt's Time Is Reasonable

The City tries to further limit Plaintiffs' recovery by claiming that three categories of time "overreach" the bounds of reasonableness: (1) fees expended to prove damages, (2) administrative staff time, and (3) travel time. These fees are allowable.

First, as to damages, courts have discretion to compensate a successful plaintiff for time spent on unsuccessful legal theories, provided such time was reasonably incurred. *Sweetwater Union High Sch. Dist. v. Julian Union Elementary Sch. Dist.*, 36 Cal. App. 5th 970, 997 (2019) ("Litigants in good faith may raise alternative legal grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee.") (citation omitted). Here, the fees allocable to the remedies phase were reasonably incurred for all the reasons articulated here and in Plaintiffs' Opposition to the City's Motion to Tax Costs. (*See* Plfs. Opp. to Mot. to Tax at 5:18-6:21.)

Second, staff time may be awarded as attorneys' fees. *See Ellis v. Toshiba Am. Info. Sys., Inc.*, 218 Cal. App. 4th 853, 890 (2013) (awarding fees for staff time); *Salton Bay Marina, Inc. v. Imperial Irrig. List*., 172 Cal. App. 3d 914, 951 (1985) ("[S]ecretarial and paralegal services, are includable within an award of attorney fees."). Manatt properly assigned work to the persons with the appropriate billing rate for the work, demonstrating the fees' reasonableness, and not the opposite as the City contends. *Cf. Save Our Uniquely Rural Cmty. Env't v. Cnty. of San Bernardino*, 235 Cal. App. 4th 1179, 1186-1187 (2015) ("trial court could reasonably have

determined that billing at partner rates [for clerical work] was excessive").

Third, attorneys' fees for travel time may be awarded if the court determines that the time was reasonably incurred. *Roe v. Halbig*, 29 Cal. App. 5th 286, 312-13 (2018). Attorneys Rodriguez, Smith, and Eiritz were staffed on the case because of their skills and expertise (and because other attorneys in Manatt's San Francisco office were not available), and Sovisal Theam, joined the legal team three days before trial due to a family emergency that prevented Plaintiffs' local paralegal from handling the case during the liability phase. (Reply Lee Decl. ¶ 3.) Plaintiffs' staffing decisions were reasonable given the circumstances. And the Lease expressly allows recovery of travel time and costs. (Ex. 68, Art. 40, p. 127.)

E. An Overall Reduction of Fees Is Not Appropriate

In a last-ditch attempt to reduce the fee award, the City cites a slew of unpublished, federal, and inapposite cases. *See, e.g.*, *Antelope Valley Health Care Dist. v. Citadel Props. Lancaster, LLC*, 322 Fed. App'x 523, 525 (9th Cir. 2009); *Citrus El Dorado LLC, v. Stearns Bank*, 2016 WL 7626583, at *15 (C.D. Cal. Apr. 18, 2016) (25% reduction to lodestar reasonable where tort based claims unsuccessful); *Iguaçu, Inc. v. Filho*, 2014 WL 3668574, at *6 (N.D. Cal. July 23, 2014) (50% reduction appropriate where prevailing party's success was "so limited it called into question its entitlement to any fees at all"). As discussed above in Section II.A, Plaintiffs obtained the greater relief (in fact, the only relief) on the contract action, and thus are the prevailing parties and entitled to their fees and costs as a matter of law and contract. The award should not be reduced.

F. Extra-Statutory Costs Have Not Been Waived

The City's argument that Plaintiffs should be denied their "extra-statutory costs" re-hashes its motion to tax costs and relies on the City's incorrect view that in order to recover those costs, Plaintiffs had to "include them in the Costs Memorandum." (Opp., p. 15.) That arguments fails.

First, it fails for the same reasons stated in Plaintiffs' Opposition to the City's Motion to Tax, which Plaintiffs incorporate by reference here. (*See* Motion to Tax Opp. at 6:23-10:13.) *E.g.*, *Thrifty Payless, Inc. v. Mariners Mile Gateway, LLC*, 185 Cal. App. 4th 1050, 1066 (2010) (where sophisticated parties negotiate a cost-shifting provision, no category of cost is per se unrecoverable); *Arntz Cont. Co. v. St. Paul Fire & Marine Ins. Co.*, 47 Cal. App. 4th 464, 492

(1996) (it is the role of the court to discern and uphold the parties' intent); *Grouse River Outfitters Ltd. v. Oracle Corp.*, 2019 WL 6682842, at *8 (N.D. Cal. Dec. 6, 2019) ("Limiting contract costs to taxable costs makes no sense because the prevailing party already is entitled to statutory costs [under Section 1033.5].").[13]

Second, even if certain costs are unavailable under Section 1033.5—which is not the case—they are available under the express terms of the Lease and Plaintiffs' recovery under Section 1717. The City conflates the statutory costs available under Section 1033.5 with the costs available based on the parties' arms-length negotiations. The Lease contains a broad cost-shifting provision that clearly entitles Plaintiffs, as the prevailing party to "any and all costs and expenses" incurred "in enforcing or establishing its rights" under the contract. (Ex. 68, § 38.13, p. 122.)

Plaintiffs prevailed on, and the City lost, every contract claim in this case. The same contract at issue in those claims provides that the City, as defaulting party, is liable for Plaintiffs' costs. The Court should give effect to the contract and award all costs reasonably incurred.[14]

III. CONCLUSION

For the reasons stated above and in Plaintiffs' related papers, Plaintiffs respectfully request an award of $11,636,226.86 in attorneys' fees, $718,988.89 in costs, and $427,341.97 in additional fees and costs incurred in January and February 2024.

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[13] A recent Court of Appeal decision addresses the *Thrifty Payless* holding (and district split) that it is unnecessary to specially plead and prove expert witness fees in non-jury cases where expert fees are expressly identified as recoverable costs in a cost-shifting provision. *Applied Med. Distrib. Corp. v. Jarrells*, 2024 WL 1007523 (Cal. Ct. App. Mar. 8, 2024) (certified for publication). *Applied* distinguished and did not follow *Thrifty Payless* because (1) the parties' agreement did not expressly provide for the recovery of expert witness fees; and (2) there was a jury trial. *Id.* at *15. In stark contrast, here, (1) the Lease specifically lists "expert witness fees and costs" as recoverable and thus the City was on notice of its liability for those fees (Ex. 68, p. 127), and (2) the Court, not a jury, will decide the amount of expert fees to be awarded. Thus, the rationale for proving expert fees at trial adopted in *Applied* and other competing authorities is wholly inapplicable.

[14] The City summarily states that these costs are "convenient" or "excessive" (in addition to being prohibited by statute) yet cites to no case holding the same.

Date: March 25, 2024

MANATT, PHELPS & PHILLIPS, LLP

By: _____
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