SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA

HAYWARD HALL OF JUSTICE

Oakland Bulk & Oversized Terminal, LLC, et al., Plaintiff, v. City of Oakland, Defendant.	Nos.: RG18930929, RG20062473 **STATEMENT OF DECISION RE DAMAGES**
City of Oakland, Counter-Plaintiff, v. Oakland Bulk & Oversized Terminal, LLC, et al., Counter-Defendant.	

This is the Court's final Statement of Decision on damages.[1] The Court issued its proposed Statement of Decision regarding damages on December 11, 2023. (Cal. R. Ct. 3.1590(c)(1).) On December 18, 2023, by stipulation and in accordance with Rule of Court 3.1590(g), each Party filed written objections and comments to the proposed Statement of Decision, which the Court considered.

I. INTRODUCTION

This case involves a contract dispute regarding the redevelopment of an old army base located south of the Bay Bridge toll plaza, along the San Francisco Bay, in the City of Oakland (City). After considering numerous potential projects, the City decided the land would be used for a bulk commodity marine terminal (Project). The City entered into a series of agreements (including the December 4, 2012 Army Base Gateway Redevelopment Project Lease Disposition and Development Agreement (LDDA), the July 16, 2013 Development Agreement, and the February 16, 2016, Army Base Gateway Redevelopment Project Ground Lease for West Gateway (Ground Lease or Lease))[2] with Oakland Bulk and Oversized Terminal, LLC (OBOT)[3] to develop the Project.

"[W]ord spread that the developer was making plans to transport coal through the terminal. Many people in Oakland expressed concern about this." (*Oakland Bulk &*

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[1] "A statement of decision need not address all the legal and factual issues raised by the parties. Instead, it need do no more than state the grounds upon which the judgment rests, without necessarily specifying the particular evidence considered by the trial court in reaching its decision." (*Muzquiz v. City of Emeryville* (2000) 79 Cal. App. 4th 1106, 1124–25.) Accordingly, the trial court need not respond "point by point" to the issues posed by the Parties requesting the statement of decision." (*Pannu v. Land Rover N. Am., Inc.* (2011) 191 Cal. App. 4th 1298, 1314 n.12.)

[2] The Court periodically refers to these documents collectively as the contracts or the agreements.

[3] OBOT is a wholly owned subsidiary of California Capital Investment Group (CCIG). Oakland Global Rail Enterprise LLC (OGRE) is owned by CCIG and is OBOT's subtenant. CCIG and Prologis formed a joint venture (Prologis CCIG Oakland Global) and the City selected that entity as the master developer for the Project. Because OBOT is the successor in interest to Prologis CCIG Oakland Global for the purposes of the Project, the Court refers to these entities collectively in this action as OBOT. OBOT and the City are collectively referred to as the Parties.

Oversized Terminal, LLC v. City of Oakland (2018) 321 F. Supp. 3d 986, 988.) "The Oakland City Council responded by adopting two measures [on June 27, 2016]: (i) an ordinance that bans coal operations at 'bulk material facilities' in Oakland; and (ii) a resolution that applies the ordinance to this terminal, through a finding by the City Council that coal operations at the terminal would pose a substantial danger to the health and safety of people in Oakland." (*Id.*)

On December 7, 2016, OBOT filed an action in the U.S. District Court for the Northern District of California. (*See* Docket, *Oakland Bulk & Oversized Terminal, LLC v. City of Oakland*, No. 16-CV-07014-VC.) As amended on June 14, 2017, OBOT's complaint in the federal case alleged the Oakland City Council's resolution applying the ordinance to the Project was a breach of the Development Agreement. (*See Oakland Bulk*, 321 F. Supp. 3d at 988.) On May 15, 2018, the federal court ruled for OBOT, concluding "the resolution adopted by the City Council applying the coal ordinance to this shipping facility constitutes a breach of the development agreement, it is invalid and the City may not rely on it to restrict operations there." (*Id.* at 989; *see also* Statement of Decision re Liability § III.A, Nov. 22, 2023 (restating entirety of opinion).)[4]

The City terminated the Ground Lease on November 22, 2018. OBOT then filed this action for breach of contract. The City in turn filed an action for breach of contract against OBOT, and the two matters were consolidated.

The Court bifurcated the issue of liability and held a bench trial that began on July 10, 2023, and concluded on October 11, 2023. The Court issued its proposed Statement of Decision on October 27, 2023, regarding the Parties' respective claims of liability for breach of contract. On November 22, 2023, the Court issued its final Statement of Decision on liability in which the Court found in favor of OBOT.

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[4] On May 26, 2020, the U.S. Court of Appeal for the Ninth Circuit affirmed the Northern District's order. (*Oakland Bulk & Oversized Terminal, LLC v. City of Oakland* (9th Cir. 2020) 960 F.3d 603.)

The Court then held a bench trial on the issue of damages. That trial began on November 28, 2023, and concluded on December 1, 2023.

II. OBOT'S ALTERNATE CLAIMS FOR RELIEF

OBOT presented evidence in support of two claims for relief: a claim for an equitable remedy and a claim for a legal remedy. Plaintiffs described these alternate claims for relief as follows:

As an equitable remedy, OBOT claimed it was entitled to:

- A declaratory judgment by the Court finding that OBOT is not in default of either the Development Agreement or the Ground Lease, and that both contracts remain in effect.
- An award of specific performance requiring the City to comply with all its obligations under the Development Agreement and the Ground Lease, and extending OBOT's deadline to perform its obligations under the Development Agreement and the Ground Lease by 30 months.
- An award of $19,300,000.00 in damages for the period between February 16, 2016, through December 31, 2023.

As a legal remedy, OBOT claimed it was entitled to:

- A declaratory judgment by the Court finding that OBOT is not in default of the Development Agreement or the Ground Lease and that both contracts remain in effect.
- An award of $159,600,00.00 in damages for the period between February 16, 2016, and the expiration of the Ground Lease.[5]

[5] For the legal remedy, OBOT claimed $115,000,000.00 in damages, and OGRE claimed $44,600,000.00 in damages.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Underlying Rulings and Stipulations

The following rulings and stipulations predicate this proposed Statement of Decision regarding damages:

1. In 2018, the federal court determined that the City could not use the coal ordinance to restrict coal operations at the terminal. While the Federal Decision recognized that perhaps the City could issue a valid ordinance restricting coal operations at the Project in the future, the City has not done so as of the date of this Statement of Decision. The City has also not presented the Court with any evidence that there are any new federal or state laws that would currently restrict coal operations at the Project. Nevertheless, the question of what commodities (including coal and soda ash) may eventually be handled at the future terminal is not before this Court, and the Court makes no findings as to that issue.
2. During the trial the City agreed that (subject to its right to appeal this Court's decision finding in favor of OBOT on its breach of contract claims against the City) OBOT is entitled to a declaratory judgment. As a result, the Court does not analyze this matter further.[6]
3. The Parties stipulated that (subject to the City's right to appeal this Court's decision finding in favor of OBOT on its breach of contract claims against the City) OBOT is entitled to the remedy of specific performance. For the purposes of the remedy phase of trial, the only remaining issue as to specific performance is the amount of additional time the Court may award OBOT to commence construction of

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[6] In the City's post-trial briefing, the City asserted that the "Court already ruled on Plaintiff's declaratory relief claim" in the November 22, 2023 Statement of Decision and OBOT's request for "further declaratory relief is an improper request for reconsideration." (City's Trial Br. re Dec. Relief 1:4–6, Dec. 4, 2023.) While the Court made findings of fact and conclusions of law in the Statement of Decision on liability, for clarity and completeness the Court incorporated a declaratory judgment in this Order.

the Project as set forth in section 6.1.1.1 of the Ground Lease (defined as "Initial Milestone Date").[7]

B. Additional Time

As noted above, OBOT requested an extension of the deadline under section 6.1.1.1 of the Ground Lease. In its post-trial brief, the City correctly stated, "The scope of any such remedy is governed by the contract terms at issue. The force majeure definition sets the parameters: 'such additional time thereafter as may reasonably be required to complete performance of the hindered act,' and all parties agreed the range is bounded at the upper end by the contract at two and a half years." (City's Trial Br. re Remedies 1:3–8, Dec. 4, 2023 (citations omitted).) After noting that the evidence was "mixed" regarding what amount of additional time is reasonably required, the City stated it "defer[red] to the Court's exercise of equitable discretion as to the length of the extension." (*Id.* 1:12–13.)

During Mr. Tagami's testimony, he referenced a Project timeline (provided to the Court as a demonstrative aid) that detailed the tasks that would need to be completed to meet a new Initial Milestone Date of June 2, 2026, assuming a start date of January 5, 2024. (Tr. 4437:11–15, 4445:25–4446:8.) This timeline works out to almost exactly two years and five months.

Mr. Tagami acknowledged he had previously testified during the liability phase of the trial that a period of less than two-and-a-half years might be sufficient. However, he explained that when he estimated 12 to 14 months, he was referencing a construction

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[7] OBOT also asked the Court to award it an extension of time to meet the deadline in Section 6.3.1 of the Ground Lease (Pursuit of Additional Funds). The compliance date in Section 6.3.1 can be extended "pursuant to Force Majeure events" but only if that event occurs after February 16, 2016, and "only if notice is provided within thirty (30) days of the event triggering the claim of Force Majeure." (Ex. 68 at 42 (§ 6.3.1).) The Court received no evidence that OBOT provided timely notice to the City asserting a claim of force majeure under section 6.3.1. (*See* Ex. 191 at 7 (Letter from Mr. Tagami to William Gilchrist, Director, Planning and Building Department (Aug. 28, 2018) (discussing events that occurred in 2015).) Accordingly, the Court finds OBOT is not entitled to additional time to perform its obligations under section 6.3.1, and the Court does not address this issue further.

schedule. He added that OBOT would need additional time to advance the Project because several of the nonprofits and contractors with which OBOT worked in 2016 are no longer in business; and some OBOT employees, who had substantial Project knowledge, had since left the company. (Tr. 4419:19–4422:22.)

Additionally, since his prior testimony, Mr. Tagami said several things made him conclude that OBOT would need more time to meet a new Initial Milestone Date, including the press release the City issued following the Court's proposed Statement of Decision concerning liability (*see* Ex. 1003 (Oakland City Attorney, Press Release re OBOT Shipping Lawsuit Results in Disappointing Outcome for City of Oakland (Oct. 30, 2023)), and the City's presentation at the Oakland Builders Alliance forum (Ex. 1002 (Oakland Presentation (Nov. 9, 2023)). (Tr. 4419:19–4422:22, 4425:23–4426:4.) Mr. Tagami suggested that the City's recent communications demonstrated the City's continued unwillingness to support the Project going forward.[8]

The Project is a large and complex development, and the Parties' pace of moving the Project forward was not swift—even at its inception. The Court therefore views it as prudent, when considering among the range of time estimates to advance the Project that were proposed at trial, to conclude that the higher side of that range is reasonable and necessary for the Parties to meet their contract obligations. The Court finds two years and six months is the amount of time that section 6.1.1.1 (Initial Milestone Date) of the Ground Lease should be extended due to events of Force Majeure.

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[8] As to the last point, OBOT asked this Court to assume that past is prologue: Because the City breached the Development Agreement and the Ground Lease in the past, and because the City has consistently stated it would take measures to prevent the Project from moving forward if coal is an included commodity, the City will not act in good faith as a party to the Development Agreement and the Ground Lease going forward. For those reasons, OBOT asked this Court not only for the maximum amount of time to extend the dates in the Ground Lease but also sought to have this Court include language in the declaratory judgment requiring the City to fulfill its legal obligations.

The Court declines to make those assumptions or issue such orders. The Parties have the legal obligations set forth in the Development Agreement, the Ground Lease, and the related contracts. The law requires the Parties to move forward with those agreements in good faith. If either Party does not, perhaps that will be the subject of future litigation. But that is not the subject of this litigation.

C. Monetary Damages

1. Scope of Monetary Damages Pursuant to the Parties' Contracts

The LDDA, Development Agreement, and the Ground Lease collectively frame the Parties' rights and obligations for the Project.[9] (*See* Civ. Code § 1642 ("Several contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together.").) The Development Agreement and the Ground Lease delineate the Parties' respective equitable and legal remedies in the event of default. In the Development Agreement, section 8.7, titled "Remedies," states in relevant part:

> Upon the occurrence of an Event of Default, each Party shall have the right, . . . to (a) bring any proceeding in the nature of specific performance, injunctive relief or mandamus, and/or (b) bring any action at law or in equity as may be permitted by Laws or this Agreement. Notwithstanding the foregoing, however, neither Party shall ever be liable to the other Party for any consequential or punitive damages on account of the occurrence of an Event of Default (including claims for lost profits, loss of opportunity, lost revenues, or similar consequential damage claims), and the Parties hereby waive and relinquish any claims for punitive damages on account of an Event of Default, which waiver and relinquishment the Parties acknowledge has been made after full and complete disclosure and advice regarding the consequences of such waiver and relinquishment by counsel to each Party.

(Ex. 7 at 40 (emphasis added).)

Section 22.1 of the Ground Lease, titled "Default by Landlord; Tenant's Exclusive Remedies," states in relevant part:

> Upon the occurrence of default by Landlord . . . Tenant shall have the exclusive right: (a) to offset or deduct only from the Rent becoming due hereunder, the

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[9] The Development Agreement and the various iterations of the LDDA are collectively referenced more than 100 times in the Ground Lease. (*See generally* Ex. 68.) For example, in section 5.2.1 of the Ground Lease, titled "City Approvals," the Parties agreed that "nothing herein shall be deemed to limit or amend the rights and obligations of [OBOT] or [the] City under the Master Plan, PUD or Development Agreement as they pertain to the Permitted Uses, the Scope of Development and the review and approval of planned Improvements, or any other provision thereunder." (*Id.* at 29 (§ 5.2.1); *see also, e.g.*, *id.* at 34 (§ 6.2), 46 (§ 7.2), Art. 40.)

> amount of all actual damages incurred by Tenant as a direct result of Landlord's default . . . ; and (b) to seek equitable relief . . . ; provided, however,(i) in no event shall Tenant be entitled to offset from all or any portion of the Rent becoming due hereunder or to otherwise recover or obtain from Landlord or its Agents any damages (including, without limitation, any consequential, incidental, punitive or other damages proximately arising out of a default by Landlord hereunder) or Losses other than Tenant's actual damages as described in the foregoing clause (a); (ii) Tenant agrees that, notwithstanding anything to the contrary herein or pursuant to any applicable Laws, Tenant's remedies hereunder shall constitute Tenant's sole and absolute right and remedy for a default by Landlord hereunder (including but not limited to any default by Landlord under Section 36.2) . . . .

(Ex. 68 at 91–92 (emphasis added).)

Given the amount of time and legal scrutiny that went into the negotiation and execution of these documents, it is not surprising that section 8.7 of the Development Agreement and section 22.1 of the Ground Lease are consistent and clear as to OBOT's exclusive remedies if the City defaults. The Parties agreed that in the event of the City's breach, OBOT is entitled to equitable or legal relief, including actual damages only and not incidental or consequential damages, including "lost profits, loss of opportunity, lost revenues, or similar consequential damage claims[.]" (Ex. 7 at 40 (§ 8.7).)

Although these provisions already demonstrated the Parties' unambiguous intentions as to the scope and limits of monetary damages, the Ground Lease also includes the proverbial belt and suspenders in section 24.1, titled "Waiver of Consequential Damages." That provision states: "As a material part of the consideration for this Lease, and notwithstanding any provision herein to the contrary, neither Party shall be liable for, and each Party hereby waives any claims against the other for, any consequential damages incurred by either Party and arising out of any default by the other Party hereunder."[10] (Ex. 68 at 92 (§ 24.1).)

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[10] Although the Ground Lease does not repeat the language from section 8.7 of the Development Agreement that explicitly excludes "claims for lost profits, loss of opportunity, lost revenues, or similar consequential damages," nothing in sections 22.1 and 24.1 is contrary to section 8.7 of the Development Agreement, nor is there any language in the Ground Lease that indicates the Parties intended for

2. OBOT's Claims for Monetary Damages by Category

OBOT used a series of eight tables (Damages Tables) to summarize its claimed monetary damages. The tables were employed as demonstrative aids and were not introduced into evidence. OBOT claimed it had three categories of "actual" damages, which it divided into categories defined by date:

- February 2016 through May 2018 ($4,600,000.00);
- June 2018 through December 2023 ($14,500,000.00); and
- January 2024 through February 2082 ($140,500,000.00).

OBOT used these categories for both its equitable and legal remedy. The only distinction is that in OBOT's claim for an equitable remedy of specific performance, it limited its claim to the first two categories (ending December 2023) for a grand total of $19,100,000.00, and in its claim for a legal remedy it included all three categories (through February 2082) for a grand total of $159,600,000.00. The Court addresses each category separately.

a. February 2016 through May 2018

OBOT's claim for damages in this category are solely attributable to one item: the legal fees it incurred in the federal action. Mr. Tagami testified that OBOT spent $4.6 million on legal fees between February 16, 2016, and May 15, 2018. (Tr. 4484:21–4485:12, 4487:16–23, 4487:25–4488:6.)

Assuming there was a contractual or statutory basis for doing so, OBOT could have sought attorneys' fees in the federal action. But OBOT's time to request an award of

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"consequential damages" to have different meanings in the related contracts. (*Compare* Ex. 7 at 40 (§ 8.7), *with* Ex. 68 at 92 (§§ 22.1, 24.1).) OBOT presented no evidence to the contrary. As such, reading the Ground Lease against the backdrop of the Development Agreement, the Court reasonably concludes that the Parties understood the consequential damages waived in the Ground Lease included "lost profits, loss of opportunity, lost revenues, or similar consequential damages." (*See* Civ. Code § 1642 ("Several contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together.").)

reasonable attorneys' fees in the federal action has passed. Under the Federal Rules of Civil Procedure, a prevailing party must file a motion for attorney's fees "no later than 14 days after the entry of judgment." (Fed. R. Civ. P. 54(d)(2)(B)(i).) Judge Vince Chhabria entered the district court court's judgment on May 23, 2018. (*See* Judgment, *Oakland Bulk*, No. 3:16-cv-07014-VC (N.D. Cal. May 23, 2018).) OBOT chose not to move for attorneys' fees and forfeited its right to claim those fees.[11]

OBOT also cannot seek attorneys' *fees* it expended in the federal action as *damages* in this state action. As the California Supreme Court unequivocally noted: "In California, 'attorney's fees *qua* attorney's fees'—that is, the fees 'attributable to the bringing of the . . . action itself'—are not an element of damages.'" (*Pulliam v. HNL Auto. Inc.* (2022) 13 Cal. 5th 127, 141 (quoting *Brandt v. Super. Ct.* (*Standard Ins. Co.*) (1985) 37 Cal. 3d 813, 818).) "Instead, they are defined as 'costs.'" (*Id.* (quoting Code Civ. Proc. § 1033.5(a)(10).) OBOT presented no authority to this Court that unrequested costs from previous litigation can metamorphosize into actual damages in a current legal action. On this separate basis, the Court finds that the legal fees OBOT incurred in prosecuting its 2016 case against the City are not actual damages in this matter, and OBOT is not entitled to recover them.[12]

If the Court is incorrect as to both points above, the Court must assess whether the attorneys' fees requested by OBOT from the federal litigation were reasonable. (Ex. 68 at 127 (Art. 40, defining "Attorney's Fees and Costs" as "reasonable").) OBOT argued (and

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[11] Attorneys' fees may be recovered under the "tort of another" theory. "A person who through the tort of another has been required to act in the protection of his interests by bringing or defending an action against a third person is entitled to recover compensation for the reasonably necessary loss of time, attorney's fees, and other expenditures thereby suffered or incurred." (*Elec. Elec. Control, Inc. v. L.A. Unified Sch. Dist.* (2005) 126 Cal. App. 4th 601, 616.) OBOT did not make this argument. Even if it had, the theory does not apply to this case: OBOT is not seeking attorneys' fees from the City because the City's tortious actions required OBOT to bring or defend an action against a third person; instead OBOT's dispute with the City stems from the Parties' disagreement regarding their contracts.

[12] The City separately argued that OBOT cannot now recover the previous fees both based on res judicata and because those fees, which occurred prior to May 15, 2018, cannot be damages that flow from the City's post-May 15, 2018 breaches of contract that this Court found in the liability phase of this action. (City's Obj. to Proposed Statement of Decision at 6:17–26, Dec. 18, 2023.) The Court agrees.

Damages Table 2 stated), that "50% of OBOT's Legal and Professional Fees incurred related to the Federal trial" were $4,618,364.00, which OBOT "rounded" to $4.6 million. Based on the scope of the Federal Decision, the Court has little doubt that OBOT expended a significant amount of money litigating the federal case. However, OBOT did not provide this Court with a single piece of supporting evidence describing the hours, hourly rates, or related costs, including expert hours and fees, that OBOT was billed in that litigation. The Court has no information demonstrating why OBOT decreased its "claim" by 50 percent—whether because OBOT believed the fees were at least partially unreasonable or unrecoverable or because another entity paid them.

Further, even had OBOT provided the underlying documentation, because Judge Chhabria (and not this Court) presided over the federal action, and this Court neither received nor reviewed the full underlying record in that matter, this Court has no context to determine whether those fees were reasonable. Therefore, as an additional, separate basis, the Court denies OBOT's claim for $4.6 million in historic legal fees because OBOT failed to demonstrate that its attorneys' fees and costs in the federal action were reasonable.

b. June 2018 through December 2023

OBOT's claim for damages in this category are broken into three segments that it summarized in Damages Table 1 as: "Actual Out-of-Pocket Damages" of $600,000.00, "OBOT Actual Damages" of $19,300,000.00, and "OGRE's Actual Damages" which OBOT expressed as a negative number of $5,400,000.00 and credited to the City, for a grand total of $14,500,000.00. OBOT further described each of these categories in Damages Tables two through four.

i. Damages OBOT characterized as "Actual Out-of-Pocket Damages"

In its arguments (and as noted on Damages Table 2), OBOT asserted it spent $331,700.00 for "50% of Legal and professional Fees incurred related to Federal Trial," $274,7001.00 for "Payroll—Additional staff time and expenses incurred from the breach date through November 2021 due to the City's breaches," $5,000.00 for "Extra Costs due to Illegal Dumping—K-Rail Barriers," and $37,982.00 for "Extra Costs due to Illegal Dumping—Repair & Maintenance," for a total amount of $649,424.00, which OBOT "rounded" to $600,000.00.

Mr. Tagami testified that OBOT spent $331,740.00 between May 16, 2018, and December 31, 2023, in legal and professional fees associated with the federal litigation. (Tr. 4484:21–4485:12, 4487:16–23, 4487:25–4488:6.) Although the Court received no evidence on this point, based on the dates, the Court assumes those fees and costs were associated with defending the City's appeal of the Federal Decision to the U.S. Court of Appeals for the Ninth Circuit.

The Court incorporates the above analysis regarding OBOT's claims for $4.6 million for 50 percent of its legal fees for the federal action between February 2016 and May 2018, and similarly concludes OBOT is not entitled to its legal fees for the period between June 2018 and December 2023 for three separate reasons.

First, OBOT chose not to seek attorneys' fees for the federal appeal. The Ninth Circuit's local rules dictate that "a request for attorneys' fees shall be filed no later than 14 days after the expiration of the period within which a petition for rehearing may be filed."

(9th Cir. R. 39-1.6(a).) The Ninth Circuit issued its opinion on May 26, 2020.[13] Again, OBOT did not move for attorneys' fees and forfeited its right to claim those fees.[14]

Second, the Court finds that the legal fees OBOT incurred in prosecuting the federal appeal are costs and not actual damages in this matter, and OBOT is not entitled to recover them. (Code Civ. Proc. § 1033.5(a)(10).)

Third, even if the Court is incorrect as to either of its previous findings on this point, the Court still needs to assess whether the attorneys' fees requested by OBOT in the federal appeal were reasonable. Based on the scope of the Ninth Circuit's decision affirming the Federal Decision, the Court has little doubt that OBOT expended a significant amount of money litigating the federal appeal. However, OBOT did not provide this Court with any evidence describing the hours, hourly rates, or related costs that OBOT was billed in that appellate litigation. The Court received no information that explained why OBOT decreased its "claim" by 50 percent—whether because OBOT believed the fees were at least partially unreasonable or unrecoverable, or because another entity paid them.

Further, even had OBOT provided the underlying documentation, because justices sitting on the Ninth Circuit (and not this Court) presided over the federal appeal, and because this Court has neither received nor reviewed the full appellate record in that matter, this Court has no context to determine whether those fees were reasonable. Therefore, as an additional and separate basis, the Court denies OBOT's claim for $331,740.00 in historic legal fees because OBOT failed to demonstrate that its attorneys' fees and costs in the federal appeal were reasonable.

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[13] The Court took judicial notice of the records of the Ninth Circuit. (*See* Evid. Code § 452(d).)

[14] OBOT filed an initial bill of costs on June 4, 2020, but for reasons not presented in this action, OBOT elected not to take further action to recover those costs or its legal fees then. (*See* OBOT's Bill of Costs, *Oakland Bulk & Oversized Terminal, LLC v. City of Oakland*, No. 18-16105 (9th Cir., June 4, 2020); *see also generally* Docket, *Oakland Bulk*, No. 18-16105.)

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Mr. Tagami testified that OBOT spent $274,701.00 in Project-related staff costs during this period. (Tr. 4485:13–19, 4488:8–13.) He also testified that OBOT spent $5,000.00 in 2022 for barriers to prevent ongoing illegal dumping in certain areas of the Project. (Tr. 4485:20–4486:4, 4488:15–21.) Finally, Mr. Tagami testified that OBOT spent $37,982.00 between October 2022 and April 2023 for clean-up caused by illegal dumping of hazardous materials. (Tr. 4485:5–7, 4487:2–14, 4488:23–4489:3.) During the City's cross-examination of Mr. Tagami, there were suggestions that Insight Terminal Solutions (ITS) had—or, perhaps, was supposed to—reimburse OBOT for staff costs and for the costs to secure and maintain the Project premises. (*See* Tr. 4544:2–3, 4546:18–4547:5, 4577:2–18.) However, the City ultimately elicited no testimony or provided other evidence that clearly controverted Mr. Tagami's testimony that OBOT had in fact paid those amounts between June 2018 and December 2023. (*See id.*)

The Court therefore finds that OBOT is entitled to $317,683.00 for actual damages incurred during that time.[15]

ii. Damages OBOT characterized as "Actual Damages"

In its arguments (and as noted on Damages Table 3), OBOT claimed it had "actual damages" of $19,300,000.00 in lost profits from June 2018 through December 2023. OBOT

[15] At trial, OBOT argued it should recover these damages even if it elects an equitable remedy. The Court rejects that argument. First, the Parties waived the right to recover "incidental damages." (*See* Ex. 68 at 91–92 (§ 22.1).) Second, even if not explicitly waived by the Ground Lease, OBOT did not present the Court with evidence that demonstrated these "actual damages" were lost because of the City's breach, that such expenses would have been unnecessary had OBOT been able to proceed with advancing the Project in 2018, or that the expenses are for materials or time that OBOT will need to be "replace" once the Project resumes (assuming OBOT elects an equitable remedy). Accordingly, the Court does not award these damages in conjunction with an award of specific performance.

calculated that amount by adding its "But-for[16] Revenues (OBOT's Lost Rents from ITS and OGRE)" that it totaled at $35,723,447.00, and subtracting "Actual (Mitigating) Revenues" of $11,739,989.00 plus its "But-for Expenses" of $4,678,723.00, for a grand total of $19,304,735.00, which OBOT "rounded" to $19,300,000.00. On Damages Table 4, OBOT totaled OGRE's financial impact during the same period. OBOT concluded (presumably because the Project would not yet have been operational) that OGRE would have no revenue and would only have expenses (including rental payments to OBOT, taxes, rail improvements, etc.) totaling $5,401,042.00, which OBOT "rounded" to $5,400,000.00. In Damages Table 5, OBOT subtracted "OGRE Actual Damages" from "OBOT Actual Damages" for a total of $13,900,000.00.[17]

As set forth above, the Development Agreement and Ground Lease clearly state the Parties' agreement regarding the scope of monetary damages in the event of default. "[I]n no event shall [OBOT] be entitled" to recover incidental or consequential damages; this prohibition includes "claims for lost profits, loss of opportunity, lost revenues, or similar consequential damage[s]." (Ex. 7 at 40 (§ 8.7); *see also* Ex. 68 at 91–92 (§ 22.1).) If the City breached, OBOT's "exclusive" remedy was "actual damages incurred by [OBOT] as a direct result of [the City]'s default." (*Id.* at 91.)

OBOT claimed $13,900,000.00 as damages from June 2018 through December 2023. This amount reflects *profits* OBOT stated it would have earned, based on "*revenues*" it should have received (less expenses it assumed it would have incurred), all which flow from the terms contained within subleases it separately negotiated with ITS and OGRE. The Parties' contracts do not permit OBOT to recover these amounts as "actual damages" resulting from the City's default.

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[16] As used throughout OBOT's Damages Tables, the Court understood OBOT's use of "but-for" to mean what OBOT would have received if not for the City's breach of the Ground Lease.

[17] In Table 5, OBOT added the full $600,000.00 (*see supra* Section III.C.2.b) and listed a grand total of $14,500,000 in the June 2018 through December 2023 column.

If the Court is incorrect and the plain language of the Parties' contracts does not automatically preclude—as a monetary remedy for breach—damages for unreceived "revenues" and "profits," then the Court must analyze this issue further. The Court must consider whether those "revenues" and "profits" are permissible under the contracts as "actual damages" or impermissible as "consequential damages."

Contractual damages are frequently divided into two broad categories, "general damages," which are sometimes called direct damages (and are what the Court finds most closely aligned to what the Parties refer to as "actual damages")[18] and "special damages (sometimes called consequential damages)." (*Lewis Jorge Constr. Mgmt., Inc. v. Pomona Unified Sch. Dist.* (2004) 34 Cal. 4th 960, 968.) "General damages are often characterized as those that flow directly and necessarily from a breach of contract, or that are a natural result of a breach." (*Id.*) "Because general damages are a natural and necessary consequence of a contract breach, they are often said to be within the contemplation of the parties, meaning that because their occurrence is sufficiently predictable the parties at the time of contracting are 'deemed' to have contemplated them." (*Id.* (quoting Calamari & Perillo, The Law of Contracts (2d ed. 1977) § 14–5, 525).)

"Unlike general damages, special damages are those losses that do not arise directly and inevitably from any similar breach of any similar agreement." (*Id.*) "Instead, they are secondary or derivative losses arising from circumstances that are particular to the contract or to the parties." (*Id.*; *see also Ash v. N. Am. Title Co.* (2014) 223 Cal. App. 4th 1258, 1270; *FAA v. Cooper* (2012) 566 U.S. 284, 301 (stating "the converse of general

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[18] The Parties' contracts do not refer to "general damages." Instead, the Ground Lease references other forms of damages, most notably for the purposes of this analysis, "actual damages" and "consequential damages." (*See* Ex. 68 at 91–92 (§ 22.1); *see also* Ex. 7 at 40 (§ 8.7, referring to "consequential damages").) "'[A]ctual damages' is a term synonymous with compensatory damages." (*Saunders v. Taylor* (1996) 42 Cal. App. 4th 1538, 1544 (quoting *Weaver v. Bank of Am.* (1963) 59 Cal. 2d 428, 437); *see also DeLisi v. Lam* (2019) 39 Cal. App. 5th 663, 682 ("'[A]ctual damages' are simply compensatory damages, as opposed to nominal, exemplary or speculative.").) Black's Law Dictionary defines "general damages" as "compensatory damages for harm that so frequently results from the tort for which a party has sued that the harm is reasonably expected and need not be alleged or proved." (*Damages*, Black's Law Dictionary (11th ed. 2019).)

damages is special damages.").) "Special damages are recoverable if the special or particular circumstances from which they arise were actually communicated to or known by the breaching party (a subjective test) or were matters of which the breaching party should have been aware at the time of contracting (an objective test)." (*Id.* at 968–69.) "Special damages 'will not be presumed from the mere breach' but represent loss that 'occurred by reason of injuries following from' the breach." (*Id.* at 969 (quoting *Mitchell v. Clarke* (1886) 71 Cal. 163, 168).) "Special damages are among the losses that are foreseeable and proximately caused by the breach of a contract." (*Id.*) "[F]oreseeability is to be determined as of the time of the making of the contract." (*Ash*, 223 Cal. App. 4th at 1270 (citing Farnsworth on Contracts).) "The loss must have been foreseeable as a probable result of the breach." (*Id.*) "[I]t is foreseeability only by the party in breach that is determinative." (*Id.*)

"Lost profits from collateral transactions as a measure of general damages for breach of contract typically arise when the contract involves crops, goods intended for resale, or an agreement creating an exclusive sales agency." (*Lewis Jorge*, 34 Cal. 4th at 971–72.) "The likelihood of lost profits from related or derivative transactions is *so obvious* in these situations that the breaching party must be deemed to have contemplated them at the inception of the contract." (*Id.* at 972 (emphasis added).) "Lost profits, if recoverable, are more commonly special rather than general damages." (*Id.* at 975 (quoting 3 Dobbs, Law of Remedies (2d ed. 1993) § 12.4(3), pp. 76–77).)

The Ground Lease includes various provisions that would apply if OBOT elected to sublease the property.[19] For example, there is language regarding estoppel certificates

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[19] In its objections to the Court's proposed Statement of Decision regarding damages, OBOT claimed that section 3.4 of the Ground Lease *mandated* OBOT to execute subleases. (OBOT & OGRE's Obj. to Proposed Statement of Decision 5:11–14, Dec. 18, 2023.) OBOT overstated the language of the Ground Lease. Section 3.4, titled "Premises Must Be Used," only requires that OBOT "use all portions of the Premises containing completed Initial Improvements continuously during the Term in accordance with the Scope of Development, the Regulatory Approvals, and the Permitted Uses and shall not allow any such

(*see* Ex. 68 at 93–94 (§§ 25.1, 26.1), as well as a provision that obligated OBOT to assign to the City "all rents and other payments of any kind, due or to become due from any or present or future Subtenant as security for Tenant's obligation to pay Rent hereunder." (*Id.* at 72 (§ 12.2, Assignment of Sublease Rents).) In addition, section 19.4, titled "Continuation of Subleases and Other Agreements," provides that the City "shall have the right, at its sole and absolute option, to assume any and all Subleases and agreements by [OBOT] for the maintenance or operation of the Premises." (*Id.* at 90.) These examples demonstrate the Parties' understanding that OBOT could, and likely would, enter into subleases with third parties. It was therefore reasonably foreseeable that if the City breached, its default would have consequences on both OBOT and its subtenants. Lost profits was among those potential consequences, which explains why the Parties agreed that "lost profits" would be excluded as a remedy in the event of default.

But even if lost profits were not specifically excluded in the contracts, OBOT presented insufficient evidence regarding the various components that contributed to its $13,900,000.00 damages calculation for the June 2018 through December 2023 time frame. Specifically, OBOT did not distinguish between money it would have received in monthly sublease rental payments pursuant to its subleases (which perhaps could be characterized as actual or general damages akin to those that would have inevitably flowed from the breach of "any similar agreement") and money it may have received based on "secondary or derivative losses arising from circumstances . . . particular to the contract or to the parties." Table 3 references approximately $25,000,000 for "Balloon Rent" and "Lease Take Down Payments," which are ostensibly tied to the unique, financial

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portions of the Premises or any part thereof to remain unoccupied or unused . . . without the prior written consent of Landlord, which consent may be withheld in Landlord's sole and absolute discretion." (Ex. 68 at 25.)

obligations set forth in subleases that OBOT entered into with third parties.[20] OBOT also subtracted $11,739,989 from what OBOT calls "But-for Revenues." It is unclear whether that reduction is partially for money OBOT received from ITS between June 2018 and December 2023 for "Base Rent" (although that amount exceeds what OBOT claimed ITS owed for "Base Rent"), or for something else. The bottom line is this: The evidence the Court received on this point was inscrutable. The Court therefore finds, as a separate basis from the Court's finding above, that OBOT's claim for $13,900,000.00 for lost profits is impermissible because OBOT did not establish what, if any of that amount constituted "actual damages" resulting from the City's breach of contract.

Even if the Court is incorrect as to both points above, OBOT's claim for $13,900,000.00 as "actual damages" from June 2018 through December 2023 is not recoverable because OBOT failed to demonstrate with any reasonable probability that it would have received those amounts; instead, the evidence demonstrated those projections were uncertain, moving targets. "No damages can be recovered for a breach of contract which are not clearly ascertainable in both their nature and origin." (Civ. Code § 3301.)

As support for all the monetary damages alleged by OBOT in this phase of the trial, OBOT relied almost exclusively on the testimony of Mr. Tagami and one expert, Mr. Peter Brown. Mr. Brown is a CPA who has a Bachelor of Science in managerial economics and an MBA. (Tr. 4643:24–4644:22.) He is accredited in business valuation and has a certified financial forensics designation. (Tr. 2645:10–18.) For much of his career, Mr. Brown worked at various accounting firms, including Arthur Anderson, until he joined GHL Advisors in 2020 primarily conducting forensic accounting investigations.

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[20] The Court notes that OBOT did not enter into its sublease with OGRE until June 26, 2018 (Ex. 162 at 4) and did not enter into its sublease with ITS until September 24, 2018 (Ex. 801 at 1). Both subleases were negotiated and executed years after the Parties entered into the Development Agreement and the Ground Lease; after the federal court issued the Federal Decision finding the City breached the Development Agreement; and even after a portion of the time OBOT claimed it was entitled to "actual damages" in this litigation (this category of damages begins on June 1, 2018).

(Tr. 4643:24–4645:9.) Mr. Brown was designated as an expert in "quantifying economic damages in commercial disputes." (Tr. 4653:1–9.)

Both Messrs. Tagami and Brown primarily, and at times exclusively, referenced the figures noted on OBOT's Damages Tables when testifying about specific monetary damages claimed by OBOT. Mr. Brown testified that the figures contained in the Damages Tables for June 2018 through December 2023 were based on the data contained in OBOT's subleases with ITS and OGRE. (Tr. 4661:14–22 (testifying he prepared the tables to reflect the amounts OBOT allegedly suffered between 2016 and 2023), 4664:3–11.)

The OBOT-ITS sublease obligated ITS to make various categories of payments to OBOT including Base Rent under the Ground Lease, Sublease Base Rent, Balloon Rent, and Sublease Bonus Rent. (Ex. 801 at 19–30 (§§ 2.2, 2.3, 2.4, 2.5, 2.13).) Although Mr. Brown relied on the monetary terms of the subleases as originally drafted, Mr. Tagami testified that since entering into the sublease, OBOT and ITS had renegotiated those sublease terms: Some payments ITS owed OBOT were deferred (not waived), and other payments were reduced. Specifically, in their first memorandum of understanding (MOU), OBOT and ITS modified ITS's rental obligations by deferring the Ground Lease Base Rent and Balloon Rent payments, reducing the Sublease Base Rent payment, and resolving an outstanding issue about the Sublease Bonus Rent payments. (*See* Ex. 962 (OBOT & ITS's 1st MOU (Dec. 21, 2020)); *see also* Tr. 4525:2025–4528:24 (Tagami).) In their second MOU, OBOT and ITS again modified ITS's rental obligations by further deferring Balloon Rent payments, and a True Up Payment. (*See* Ex. 344 (OBOT & ITS's 2d MOU (Mar. 9, 2022)); *see also* Tr. 4529:10–4531:6 (Tagami).) As of the time of trial, Mr. Tagami indicated that OBOT and ITS were in discussions about executing a third MOU concerning ITS's rent payments under the sublease to account for several contingencies. (Tr. 4532:11–4539:9.)

The testimony the Court received regarding the subleases, and OBOT's previous and ongoing negotiations with ITS in particular, was ambiguous and vague. Mr. Tagami

testified that if OBOT elects the remedy of specific performance, ITS would be responsible (subject to the MOUs) to repay any amounts that were deferred. Yet there was no testimony that clearly (or even equivocally) explained what amounts if any ITS would pay if OBOT proceeded with the remedy of specific performance versus a monetary remedy; when (if ever) ITS would pay those unknown amounts; or, how those unknown amounts would likely further change because, as Mr. Tagami stated, "[e]verything is on the table." (Tr. 4539:9.)

Even under the newly negotiated financial terms between OBOT and ITS—which to be clear, were never explained to the Court during trial, not included in the Damages Tables, not shared with OBOT's expert, and not incorporated into the very calculations OBOT relied upon to seek "actual damages" for this time period—the evidence did not show that but-for the City's breach it was reasonably certain that ITS would have paid, in full, whatever rental payments it may have owed OBOT from June 2018 through December 2023. OBOT and ITS's past practices indicate a willingness and ability to modify sublease terms as circumstances evolve. While that nimbleness and flexibility may be beneficial and perhaps necessary to advance this Project in the complicated political and legal environment OBOT finds itself, it yields a range of uncertain financial outcomes. Considering that history and the realities faced by complex construction projects such as this one, the Court finds OBOT did not establish with any reasonable likelihood that it lost specific rental payments owed under the subleases it negotiated (and renegotiated) because of the City's default. Therefore, the Court finds, as a separate basis from the Court's findings above, that OBOT is not entitled to its claim for $13,900,000 as "actual damages" from June 2018 through December 2023.

c. January 2024 through February 2082

In its arguments (and as described on Damages Tables 5-8), OBOT claimed that if it elects the legal remedy, it has "Actual Damages" of $140,500,000.00 in lost profits from

January 2024 through February 2082.[21] As reflected on Damages Table 7, OBOT calculated that amount by adding its "But-for Revenues (OBOT's Lost Rents from ITS and OGRE)" that it totaled at $778,543,179.00 as "Net Lost Revenues," and subtracting its "Net But-for Expenses" of $167,712,022.00, for an "Actual Damages" subtotal of $610,831,157.00. OBOT then further subtracted $520,344,152.00 as a "Discount for Present Value of Future Cash Flows" for a "Present Value" total of $90,487,005.00, which OBOT "rounded" to $90,500,000.00.

On Damages Table 8, OBOT totaled the "Actual Damages Sought by ORGE with Legal Award" for the same period. OBOT claimed OGRE would have received $2,176,727,871.00 in "Last Mile Service paid by U.P." plus $380,320,407.00 in "Indexing paid by ITS" for a total "Net Lost Revenues" of $2,557,048,278.00. OBOT then listed 13 "Anticipated Expenses," which it totaled at $1,671,468,017.00 for "Net But-for Expenses." The "net" expenses were subtracted from the "net" revenues for a "Subtotal: Actual Damages" of $885,580,261.00. OBOT further subtracted a "Discount for Present Value" of $835,559,781.00 for a "Present Value" of $40,020,480.00, which OBOT "rounded" to $50,000,000.00. In Damages Table 5, OBOT added "OGRE Actual Damages" from "OBOT Actual Damages" for a total of $140,500,000.00.

The Court incorporates the analysis from above regarding OBOT's claims for $13,900,000.00 in damages for lost profits between June 2018 and December 2023. The Court similarly concludes OBOT is not entitled to the $140,500,000.00 damages it seeks in lost profits for the period from January 2024 through February 2082 for three separate reasons.

First, as noted above, the Development Agreement and Ground Lease do not allow OBOT to recover consequential damages, including those for "lost profits, loss of

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[21] During trial, OBOT did not explain how or why it selected February 2082 (58 years and one month from the Judgment) as the final date for calculating actual damages under a legal remedy.

opportunity, lost revenues, or similar consequential damage[s]." (Ex. 7 at 40 (§ 8.7); *see also* Ex. 68 at 91–92 (§ 22.1).) OBOT's "exclusive" remedy was "actual damages incurred by [OBOT] as a direct result of [the City]'s default." (Ex. 68 at 91 (§ 22.1).)

Second, as discussed above, even if lost profits were not specifically excluded as a remedy in the contracts, the Court finds that the $140,000,000.00 OBOT claims as "Actual Damages" from January 2024 through February 2082 are not, in fact, "actual" or "general" damages but are instead properly characterized as "special" or "consequential" damages, which are precluded under the Development Agreement and the Ground Lease. Like OBOT's previous calculations, these figures are based on revenues OBOT asserted it would have received over the next 56 years, according to the original terms of subleases that OBOT had with ITS and OGRE (even though those sublease terms were already modified as embodied in two MOUs). Those subleases do not arise "directly and inevitably from any similar breach of any similar agreement" but instead are "secondary or derivative losses arising from circumstances that are particular to" this Project and OBOT's subleases with ITS and OGRE. (*Lewis Jorge*, 34 Cal. 4th at 968.) The Court therefore finds as a separate basis from the Court's finding above, that OBOT is not entitled to recover $140,500,000.00 as "actual damages" resulting from the City's breach of contract.

If the Court is incorrect as to both points above, OBOT's claim for $140,500,000.00 as "actual damages" from January 2024 through February 2082 are not recoverable because OBOT failed to demonstrate with any reasonable probability that it would have received those amounts. The minimal evidence the Court received was based on layers of unsound assumptions, unsubstantiated and incorrect data, and unexplained conclusions.

Even if lost future profits are permissible damages that OBOT can recover under the Development Agreement and the Ground Lease, as analyzed below, OBOT failed to demonstrate that those lost profits were reasonably likely to occur. (*See Sargon Enters., Inc. v. Univ. S. Cal.* (2012) 55 Cal. 4th 747, 773–74 (stating lost profits are only "recoverable [as damages] where the evidence makes reasonably certain their occurrence

and extent.") (quoting *Grupe v. Glick* (1945) 26 Cal. 2d 680, 693).) The Court looks to the analysis in *Sargon* and related cases for legal guidance on this point.

In *Sargon*, a small dental implant company with modest profits sued the University of Southern California for breach of contract for USC's failure to conduct clinical tests of a new implant the company had patented. (*Id.* at 753.) The company claimed, due to USC's breach, it was entitled to damages ranging from $220 million to over $1 billion for lost profits. (*Id.*) At an evidentiary hearing, the trial court heard from the company's primary witness, Mr. Skorheim, who was proffered as an expert. Mr. Skorheim was a business and industry analyst, CPA, and forensic accountant. (*Id.* at 755.) Mr. Skorheim's opinion relied upon many materials including deposition transcripts, financial information from the company and its competitors, and market analyses of the dental implant market. (*Id.* at 755–67.) At an evidentiary hearing, Skorheim provided comparative data for those entities, and then made numerous assumptions about how the company would grow as an innovator over future years. (*Id.*) The trial court excluded Skorheim's testimony, finding among other things that he lacked qualifications and expertise in the dental implant industry to support his opinions, his opinions were "not based upon matters upon which a reasonable expert would rely," and his opinions regarding lost profit damages were "pure speculation" that relied upon "unreasonable assumptions." (*Id.* at 766–67.) The Court of Appeal reversed the trial court's decision. The Supreme Court, in turn, reversed the Court of Appeal. The Supreme Court noted that the calculation of lost profits does not require "mathematical precision;" what is required is "reasonable certainty." (*Id.* at 774–75 (quoting *Lewis Jorge*, 34 Cal. 4th at 975); *see also* Civ. Code § 3301 ("No damages can be recovered for a breach of contract which are not clearly ascertainable in both their nature and origin.").)

In *Sargon*, the court looked to *Greenwich S.F., LLC v. Wong* (190 Cal. App. 4th 739) in which lost profits were found to be "uncertain, hypothetical and entirely speculative." (*Sargon*, 55 Cal. 4th at 775.). The court noted that in *Greenwich*, the "plaintiffs sought lost profits for breach of a real property sales agreement. They 'presented evidence of lost

profits through the testimony of [a] real estate appraiser,' who testified about what the property would have been worth had it been developed according to the intended plans and specifications." (*Id.* at 775 (quoting *Greenwich*, 190 Cal. App. 4th at 749).) The *Greenwich* court found the award of $600,000.00 in lost profits to be unsupported because the projections were "not proven with the requisite *reasonable certainty*." (*Id.* (quoting *Greenwich*, 190 Cal. App. 4th at 760).) Further, the "existence of plans for a development does not supply substantial evidence that the development is reasonably certain to be built, much less that it is reasonably certain to produce profits." (*Id.* (quoting *Greenwich*, 190 Cal. App. 4th at 763).) "The lost profits claim was based on the assumption that [plaintiffs] would have constructed the residence according to the plans and specifications without changes and that the venture would have been profitable. These assumptions were inherently uncertain, contingent, unforeseeable, and speculative. The proposed real estate development project here involved numerous variables that made any calculation of lost profits inherently uncertain." (*Id.* (quoting *Greenwich*, 190 Cal. App. 4th at 766).)

Here, OBOT's claim of lost profits was substantially based on the testimony of Mr. Brown. Mr. Brown has no experience or expertise in the development of bulk commodities terminals, the rail industry, or the commodity markets for coal and soda ash (Tr. 4758:13–4763:7), and OBOT did not call any other expert to provide foundational testimony about those topics. And unlike Mr. Skorheim in *Sargon*, Mr. Brown did not conduct a comparative market analysis of any other bulk commodities terminals (including those in California that transport coal) and provided no information regarding the profitability or lack thereof for those entities. (Tr. 48378:22–4838:23.) He also provided no range of projected financial outcomes for OBOT over the ensuing decades. (Tr. 4839:7–4841:1.)

Mr. Brown stated that "the sufficiency of the facts and data used by the expert are critical to the creditability of the opinion" and that "one of the common areas of challenge to the sufficiency of the facts and data includes excessively relying on client-provided data with no independent analysis." (Tr. 4757:16–4757:1.) Yet that very issue is one of the

flaws of Mr. Brown's opinion: Mr. Brown uncritically relied upon the Basis of Design, the Ground Lease, the original ITS Sublease, and the OGRE Sublease to calculate the estimated revenues of OBOT and OGRE.[22]

Mr. Brown testified that he estimated OBOT's future lost profits of $90 million based on "the lease payments that are being made by ITS and OGRE to OBOT, [minus] OBOT's costs related to those lease payments." (Tr. 4672:25–4673:18.) As to OGRE, Mr. Brown estimated future lost profits of $50 million, based on damages "related to the short line rail service that OGRE was going to be providing to the terminal." (Tr. 4673:19–4674:21.) Mr. Brown arrived at these figures by estimating OBOT's and OGRE's revenues using the Basis of Design, the Ground Lease, the ITS Sublease, and the OGRE Sublease, subtracting OBOT's and OGRE's expected costs, and applying a negative 12% discount rate, to account for "risk." (Tr. 4697:2–17, 4708:14–4702:9, 4712:22–4723:15, 4734:16–4749:18.)

Mr. Brown's calculations for OBOT's future lost profits were based on his assumption that the Project would be built exactly as described in the initial Basis of Design, even though the Basis of Design was a preliminary document that required an iterative, collaborative process with the City to advance the Project Design.[23]

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[22] The City spent substantial time during the damages phase of trial and numerous pages in post-trial briefing arguing that portions of Mr. Brown's testimony should be excluded because he improperly relied on data that was case-specific hearsay, unauthenticated, and not admitted into evidence in violation of *People v. Sanchez* ((2016) 63 Cal. App. 2d 430). Mr. Brown's testimony was largely based on his interpretation of the Basis of Design, the Ground Lease, and OBOT's subleases with ITS and OGRE, all of which are in evidence. To the extent Mr. Brown mentioned he talked to other people, reviewed other case-specific documents (that were not in evidence), or testified without explaining the basis for his opinion, his testimony, while earnest, was so brief, vague, and speculative that the Court could not, and—importantly—did not rely on it. For example, Mr. Brown's testimony regarding the "General and Administration" expense in Table 7 was "General administration expenses are a percentage of recurring revenues. The total for that is $35,013,017." (Tr. 4716:18–20.) Mr. Brown then moved on to another topic. As a result, the Court does not further address the City's *Sanchez* arguments.

[23] The Court noted in the previous Statement of Decision regarding liability that when OBOT prepared the Basis of Design, it was unclear which of 15,000 bulk commodities would eventually be shipped through the terminal.

Nevertheless, Mr. Brown assumed (per the Basis of Design) that the Project would exclusively handle coal and soda ash at an annual rate of 5 million metric tons and 1.5 metric tons, respectively.[24] (Tr. 4672-829:14–4830:4.) When asked how he calculated OBOT's future revenues, he stated that he used a rate of $200 per car, and the number of rail cars per year "comes straight out of the basis of design." (Tr. 4735-4736.) He stated that unit trains "for both coal and ash are 104 cars long each. There are 437-unit trains for coal projected, and 160-unit trains for soda ash." (Tr. 4736:5–17.) As the Court understood his testimony, Mr. Brown assumed, without any explanation, that these same 597 coal and soda ash filled trains would run every year, uninterrupted, until February 2082, which informed numerous of his calculations, including "Net Lost Revenues" to OGRE of approximately $2.5 billion.

Mr. Brown explicitly and implicitly made many additional assumptions about the Project and its future operations that made his conclusions regarding lost profits speculative and unreliable. These include but are not limited to his assumptions that: the terminal will be commissioned on February 2025; the demand for coal will not decrease between now and 2082; no future federal, state or local regulations regarding fossil fuels will have any negative financial impact on the Project for 56 years; the Project will never handle any commodities other than coal or soda ash; transports by ship or rail will never be disrupted (meaning no acts of war, earthquakes, storms, labor disputes, pandemics, or political controversies will ever impact the constant flow of coal or soda ash); etc.
Mr. Brown's uncritical reliance on the preliminary data provided in the initial Basis of Design undermines any possible finding that his calculations regarding OBOT's future lost profits are reasonably certain. Instead, his assumptions and his findings are

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[24] Although OBOT informed the Court that Mr. Brown was "not testifying as an expert on the supply of coal," Mr. Brown testified that he had "looked at a number of statistics that are published by the United States government" and satisfied himself that "there is a sufficient supply of coal over the life of the lease." (Tr. 4685:15–4687:10.)

"inherently uncertain, contingent, unforeseeable and speculative." (*Greenwich*, 190 Cal. App. 4th at 743.)

Mr. Brown also assumed that the ITS and OGRE subleases would remain in place, unmodified, until February 2082. (Tr. 4763:18–4764:1, 4767:6–4770:12.) As discussed earlier, this assumption was not just potentially faulty, it was wrong. By the time Mr. Brown testified, OBOT had already twice changed the financial terms of its sublease with ITS (via two MOUs) and was in negotiations to modify the terms a third time. Because Mr. Brown was unaware of those changes, he did not consider them in his financial calculations for OBOT's lost profits. (Tr. 4773:3–9, 4784:11–4786:18, 4787:19–4789:13.)

There were many other issues that caused the Court to doubt the reliability of OBOT's claim for lost profits for the Project. For example (as noted above), Mr. Brown failed to analyze the profits and losses of other bulk commodity terminals, such as Long Beach, Vancouver, Pittsburg, Stockton, or Richmond. (Tr. 4837:13–4838:23.) This data could have better informed Mr. Brown's findings (and ultimately the Court) about OBOT's projected revenues and expenses over the duration of the lease. In addition, some of the financial information OBOT presented was simply inexplicable. For example, in Damages Table 8, OBOT called its $2.5 billion figure "Net Lost Revenues." It begs the question: If this figure is "net," what is the gross amount, and where is the data or analysis that

supports the gross figure?[25] For these reasons, the Court separately finds that OBOT's claim for lost profits is speculative and not reasonably certain.[26]

V. OBOT'S ALTERNATE REMEDIES

The Court finds the following alternative awards of relief are supported by the evidence:

A. Equitable Remedy

The Court will enter judgment in favor of OBOT as follows:

- OBOT is not in default of the Ground Lease for failure to meet the Initial Milestone deadline of August 14, 2018.

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[25] In its objection to the proposed Statement of Decision concerning damages, the City requested that the Court make the following statement of law: "An expert opinion based on speculation and conjecture is *inadmissible* as a matter of law." (City's Obj. 7:11–12.) The City also requested the factual finding that "Mr. Brown's opinions are inadmissible and excluded under this standard." (*Id.* at 7:12–13.)

The Court agrees with the City's statement of the law concerning the Court's gatekeeping role under section 801 of the Evidence Code. However, unlike USC in *Sargon*, it does not appear that the City objected to Mr. Brown's testimony as speculative *before* the beginning of the damages phase of trial. (*See* Docket; *see also Sargon*, 55 Cal. 4th at 761–67.) Thus, the City did not invoke the Court's gatekeeping function, and the Court will not rule on a motion to exclude that the City did not make. The City also did not identify any authority that supports the contention that the Court can exclude an expert's testimony if the Court finds that the expert's testimony was unreliable and speculative *after* taking the expert's testimony as evidence. Even if the Court is incorrect, the point is moot because, as set forth in this Statement of Decision, the Court did not rely on Mr. Brown's testimony.

[26] OBOT noted that the Court "appear[ed] to reject future lost profits altogether, omitting discussion of the relative higher certainty in calculating damages closer in time to the breach; the front-loaded nature of Mr. Brown's damages calculation . . . and the role of the discount rate to account for future uncertainty." The Court disagrees with OBOT's premise that because most of its projected revenues were for years at the beginning of the lease term, those revenues are necessarily more certain. As noted above, there are many factors that made OBOT's revenue projections uncertain. Further, the Court finds that the flat, 12-percent discount rate Mr. Brown used was insufficiently explained and inadequate to forecast multiple, compounding uncertainties. (*See* Tr. 5004:10–25, 5005:22–5007:11 (Mr. Borck) (explaining how even if each step in an eight-step project 90 percent is certain, the outcome of the project could still be as low as 43 percent).)

- The City's termination of the Ground Lease on November 22, 2018, was unlawful, invalid, and is rescinded. The City's corresponding termination of the Development Agreement with respect to the West Gateway property is also, therefore, rescinded.
- Section 6.1.1.1 (Initial Milestone Date) of the Ground Lease is extended, due to events of Force Majeure, by a period of two years and six months from the date of judgment.

B. Legal Remedy

The Court will enter judgment in favor of OBOT as follows:

- OBOT is not in default of the Ground Lease for failure to meet the Initial Milestone deadline of August 14, 2018.
- The City's termination of the Ground Lease was unlawful, invalid, and is therefore rescinded.
- OBOT releases and relinquishes its rights to develop the Project pursuant to the Development Agreement, the Ground Lease, and the related contracts.
- The Court awards OBOT $317,683.00 for actual damages incurred from June 2018 through December 2023.

C. Election

OBOT must (per the Parties' stipulation) file its proposed judgment (electing either the equitable or legal remedy in conformity with this Statement of Decision) within seven days of this decision, or January 5, 2024, whichever is later.

Dated: December 22, 2023

Noël Wise
Judge of the Superior Court
Noël Wise / Judge

SUPERIOR COURT OF CALIFORNIA COUNTY OF ALAMEDA	Reserved for Clerk's File Stamp **FILED** Superior Court of California County of Alameda 12/22/2023 Chad Finke, Executive Officer / Clerk of the Court By: Melissa Callender Deputy M. Callender
COURTHOUSE ADDRESS: Hayward Hall of Justice 24405 Amador Street, Hayward, CA 94544	
PLAINTIFF/PETITIONER: Oakland Bulk And Oversized Terminal, LLC et al	
DEFENDANT/RESPONDENT: City of Oakland et al	
CERTIFICATE OF ELECTRONIC SERVICE CODE OF CIVIL PROCEDURE 1010.6	CASE NUMBER: RG18930929

I, the below named Executive Officer/Clerk of Court of the above-entitled court, do hereby certify that I am not a party to the cause herein, and that on this date I served one copy of the Final Statement of Decision Re Damages entered herein upon each party or counsel of record in the above entitled action, by electronically serving the document(s) from my place of business, in accordance with standard court practices.

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Chad Finke, Executive Officer / Clerk of the Court

Dated: 12/22/2023

By: Melissa Callender

M. Callender, Deputy Clerk

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CODE OF CIVIL PROCEDURE 1010.6