

1 Anne M. Lawlor Goyette (SBN 138367)
2 Griffiths • Goyette
3 330 Primrose Road, Suite 614
4 Burlingame, CA 94010
(650) 375-5960; Fax: (650) 375-5965
Anne@SpecialMasterMediator.com

5 **Referee**

7 ARBITRATION

10 THREE CAPTAINS SEA PRODUCTS,)
11 INC.,)

12 Claimant,)

13 v.)

14 SAN MATEO COUNTY HARBOR)
15 DISTRICT BOARD OF HARBOR)
16 COMMISSIONERS and SAN MATEO)
17 COUNTY HARBOR DISTRICT,)

18 Respondents.)

FINAL AWARD

Arbitration Demand: June 26, 2018

19 **Counsel**

20 George Wailes, Esq.
21 George Wailes Law Offices
22 177 Bovet Road, Suite 600
23 San Mateo, CA 94402
Counsel for Claimant

Adam Hofmann, Esq.
Simran Mahal, Esq.
Hanson Bridgett, LLP
425 Market Street, 26th Floor
San Francisco, CA 94105
Counsel for Respondents

24 **Place of Arbitration**

Burlingame, California

25 **Date of Final Award**

October 12, 2018

1 The parties appointed Anne M. Lawlor Goyette, Esq., to serve as Arbitrator of this
2 dispute pursuant to the March 13, 2013, Lease Between Three Captains Sea Products, Inc.,
3 and San Mateo County Harbor District, paragraph 34.4, and the parties' Stipulation
4 Appointing Arbitrator. Having been duly sworn and examined all submissions, proof and
5 allegations, the Arbitrator issues the following Interim Award.
6

7 **I. Introduction**

8 In March 2013, Claimant Three Captains Sea Products, Inc., renewed their lease with
9 Respondent San Mateo County Harbor District. Among other things, the 2013 lease grants
10 Three Captains the right to install a second hoist to load and unload seafood products. JTX 3
11 at p. 19, ¶9.1(b)(i). The District twice approved locations for the second hoist and twice
12 rescinded their approvals.
13

14 After the parties agreed to waive the mediation requirement in the lease, Three
15 Captains served the District with a Demand for Arbitration. JTX-151. Three Captains alleges
16 the District breached the 2013 lease and the covenant of good faith and fair dealing by
17 preventing the installation and use of a second hoist on the pier. Three Captains seeks more
18 than \$ 722,000 in damages and specific performance of the lease. JTX-158, -159
19

20 The District denies all claims and demands recovery of their attorneys' fees and costs
21 pursuant to the prevailing party provision in the lease.

22 The parties submitted pre-Arbitration briefs. The parties and their attorneys
23 participated in a site inspection with the Arbitrator, followed by an Arbitration Hearing on
24 September 4 – 7 and 10, 2018. Each side offered percipient witness testimony and
25 documentary evidence, including 166 exhibits and Declaration About Attorneys' Fees. Per
26 the parties' agreement, the hearing was not recorded by a court reporter. At the conclusion of
27 the testimony, the parties confirmed that they had no further evidence to offer. The matter
28

1 was argued by counsel for both parties and submitted for decision upon the Arbitrator's
2 receipt of Post Hearing Briefs. The parties agreed to an extension of the deadline for service
3 of the Final Award to October 12, 2018.

4 **II. Legal Analysis**

5 A party asserting a cause of action for breach of contract must prove the existence of
6 an agreement, claimant's performance or excuse for non performance of the agreement,
7 respondent's breach and resulting damages. Reighert v. General Ins. Co. (1968)
8 68 Cal.2d 822, 830, Oasis West Realty, LLC, v. Goldman (2011) 51 Cal.4th 811, 821. When
9 interpreting a contract, the court must give effect to the parties' intention "as it existed at
10 the time of the contracting" DVD Copy Control Assn., Inc., v. Kaleidescape, Inc. (2009)
11 176 Cal.App.4th 697, 712-713; Civ. Code §§1636, 1657. If a nonessential point is reserved for a
12 future agreement of the parties, "each party will be forced to accept a reasonable
13 determination of the unsettled point" Los Angeles v. Superior Court (1959)
14 51 Cal.2d 423, 433; Wong v. Grazia (1963) 60 Cal.2d 525. Any ambiguities generally are
15 construed against the party who drafted the agreement. Civ. Code §1654.

16 The covenant of good faith and fair dealing is implied in every contract. A breach of
17 the implied covenant constitutes a breach of contract.

18 The covenant is read into contracts and functions " 'as a *supplement* to
19 the express contractual covenants, to prevent a contracting party from
20 engaging in conduct which (while not technically transgressing the
21 express covenants) frustrates the other party's rights. [Citation] The
22 covenant also requires each party to do everything the contract
23 presupposes the party will do to accomplish the agreement's purposes.

24 Thrifty Payless, Inc. v. The Americana at Brand, LLC (2013)
25 218 Cal.App.4th 1230, 1244 (Citations omitted.)

26 A breach of the covenant may be found for "objectively unreasonable conduct, regardless of
27 the actor's motive." Carma Developers, Inc., v. Marathon Development California, Inc. (1992)
28 2 Cal.4th 342, 373.

1 The following analysis is based on those facts found by the Arbitrator to be true and
2 necessary to the Award. Any difference between the recitation and a party's position is the
3 result of the Arbitrator's determination as to the credibility and relevance of evidence and
4 burden of proof considerations.

5
6 **A. Request for Second Hoist**

7 Respondent San Mateo County Harbor District operates Pillar Point Harbor, including
8 a three unit fish buying building located at the end of Johnson Pier in Princeton, California.
9 Pillar Point Seafood Products occupies the southern side of the building. Larry Fortado's
10 Three Captains Seafood Products is in the center unit. David Mallory's Morningstar Fisheries
11 operates from the northern side.

12 Pillar Point Seafood Products maintains two hoists at the front of their unit, and
13 Morningstar utilizes a single hoist at the front of their unit. As outside tenants, they can load
14 and unload boats from their hoists directly to bins and deliver their product to trucks.

15 As the middle tenant, Three Captains has to unload boats with a forklift using a hoist
16 installed behind the building and then drive the forklift through the building to bins or
17 trucks. This arrangement slows down loading and unloading of boats, and creates lengthy
18 delays for fishermen. Three Captains also has to leave space in the building for the forklifts
19 to drive through and "absolutely has less use of inside of building" than the other tenants.

20 McGrath Testimony. Larry Fortado, Jason Newland Testimony.

21
22 The quantity and size of boats have increased over the years, and fishermen now often
23 wait many hours to access Three Captains' hoist. "Backlog of 15 boats ... up to 20, 25" occurs
24 during busy seasons, particularly crab season that traditionally starts on November 15. Tom
25 Faulk, Duncan MacLean, Newland Testimony.
26
27
28

1 To hear that fishermen have to go through a tunnel to unload or load
2 their crab traps is absolutely a severe hardship. It prevents, it stalls, any
3 fisherman from going out and laying their traps on the grounds in a
4 very efficient manner.

5 JTX-047 Transcript at 26:307. See also JTX-096 at pp. 27-45.

6 At one time, Three Captains had two hoists behind the fish buying building. Three
7 Captains only used the southwest hoist as back up during repairs and maintenance of their
8 northwest hoist. The area behind the building is simply too tight for the simultaneous
9 operation of two hoists, and the rarely used southwest hoist was removed more than eight
10 years ago. Larry Fortado, Scott Grindy, Newland Testimony, JTX-153 at pp. 3-5.

11 In 2012, Mr. Fortado raised Three Captains' operational issues with the District's
12 General Manager Peter Grenell. GM Grenell inspected the area and agreed that Three
13 Captains operated "at a physical disadvantage due to being in the middle of the building."
14 Peter Grenell Testimony.

15 During an April 18, 2012, meeting of Respondent Harbor District Board of
16 Commissioners, the Commission President announced that GM Grinnell was "negotiating
17 for the Board" and meeting with tenants to discuss lease renewal proposals. JTX-002 at p. 8;
18 JTX-153 at p. 44. The lessees were concerned about fees and unloading and loading charges.
19 Mr. Fortado added that he was requesting a second hoist, because, as the middle tenant,
20 Three Captains "is the only one who has to go through the building to get to the hoist and
21 needs a place to unload crab pots" JTX-002 at p. 8. See also JTX-016 at p. 54, JTX-042 at
22 p. 2. Negotiations to finalize fees and terms continued.
23
24

25 GM Grenell, Harbor Master Scott Grindy and Mr. Fortado thereafter looked at
26 possible locations for a new hoist. "It didn't make sense to put an additional hoist at the back
27 of the building, and we quickly eliminated that area as an alternative." Grenell Testimony.
28 See also JTX-004 at p. 1. The parties narrowed the options down to two possibilities, one on

1 the south side of the pier that opens out to the harbor waters and the other on the north side
2 that overlooks an impound dock. Grenell, Grindy, Fortado Testimony.

3 The three leases have many identical terms, including the same base rent, fish off-
4 loading fees and square footage in the building and at the front of each unit. Grenell,
5 McGrath Testimony. See also JTX-42 at p. 3. Consequently, GM Grenell proposed the
6 following amendment to all three leases to make “it very clear that ... all three of the lessees
7 could have a second hoist.” Grenell Testimony.

9 Tenant may provide a second winch and hoist at a location approved in
10 advance by the Harbor Master.

11 JTX-003 at p. 19, ¶9.1(b).

12 Grindy Testimony.

13 The leases do not specify a location for Three Captains’ new hoist. GM Grenell
14 testified that he “did not want to hold up the lease process for three tenants while those
15 technicalities were worked out.” He understood Harbor Master Grindy would select either
16 the south or north side location. Grenell Testimony.

17 All three tenants approved and signed the leases with the new hoist provision in
18 March 2013. Mr. Fortado testified that they “had already settled on the south side” hoist
19 location when he signed Three Captains’ lease. See also JTX-153 at 27:24-30:14

20
21 **B. The 2014 South Side Hoist Agreement**

22 On March 28, 2014, Harbor Master Grindy formally approved the south side location
23 for Three Captains’ new hoist “after careful consideration of the location of existing fire
24 protection equipment, the location of the existing freezers, and the needs of the work dock.”
25 JTX-010. See also JTX -005, -021, -015. He included a year of “use review” in the approval,
26 because he wanted a year to study the hoist’s “impact on traffic, etc.” Grindy Testimony.
27
28

1 Your installation would be 'probationary or tentative' installation and
2 location for up to 1 year as a trial for our use review. The end date of the
3 noted 1 year will be April 1, 2015. Being this is your equipment, if there is
4 a move required due to issues, the cost of location change will be borne by
5 Three Captains.

6 JTX-005.

7 Mr. Fortado understood that the approval gave him a year to "use" the hoist. Fortado
8 Testimony. Thereafter, the location could be adjusted, and the hoist bolted down elsewhere
9 on the pier if needed. Grindy Testimony. See also JTX-153 at p. 9. The approval also required
10 moving Morningstar's open-air storage space once the hoist was operational. JTX-005, -153 at
11 36:5-39:23, Fortado Testimony.

12 GM Grenell and Harbor Master Grindy advised Mr. Fortado that he only needed
13 building permits. Three Captains secured the necessary building permits and installed the
14 hoist in April 2014. Grenell, Grindy, Fortado Testimony, JTX-025 at p. 62, JTX-153 at p. 11.

15 A few months later, the California Coastal Commission (CCC) concluded that the new
16 hoist required a Coastal Development Permit. See e.g. JTX-016 at pp. 15-16. Harbor Master
17 Grindy never anticipated that a Coastal Development Permit would be required, because he
18 viewed the hoist as a maintenance item. Grindy Testimony; Resp. to Arb. Demand at 3:2-3.
19 See also JTX-153 at 63:6-17. Further, the other hoists had been operating on the pier for
20 twenty to thirty years without Coastal Development Permits. See JTX-024 Transcript at 16:9-
21 20, -152 at 43:8-44:6. The District instructed Three Captains "*not to operate the hoist until*
22 *and unless you have first provided the District evidence that it is properly permitted.*" JTX-
23 010 (emphasis in original.) See also JTX-011.

24 Three Captains submitted the appropriate paperwork, and on October 29, 2014, the
25 CCC Staff proposed a waiver of the Coastal Development Permit. JTX-007, -008, -009 -012.
26 "The proposed project will facilitate existing marine use ... It will ensure the economic and
27
28

1 commercial use of the harbor and increases the efficiency of the existing commercial fishing
2 operation.” JTX-012. CCC Staff received objections to the waiver and withdrew their
3 recommendation. JTX-013, -014. See e.g. JTX-033 at pp. 4-5, JTX-160 at pp. 24-26, JTX-161 at
4 pp. 33-35.

5
6 Three Captains ultimately completed the permit application. On February 27, 2015,
7 CCC Staff scheduled the Coastal Development Permit for a CCC approval hearing.
8 JTX-018, -019, -020.

9 Just weeks before the CCC hearing, the Commission voted to terminate approval of
10 the south side hoist. JTX-024 at p. 3. They reasoned that Three Captains was operating the
11 hoist without a permit required by the lease. JTX-026, -028, -030 at p. 6.

12
13 Three Captains has not obtained a required Coastal Development Permit.
14 ... Three Captains is operating a hoist without requisite approvals and
15 permissions ... the District is discontinuing the March 28, 2014,
16 probationary agreement, effective April 2, 2015

17 JTX-029 at p. 2.

18 Three Captains had actually never used the hoist. JTX-153 at 76:1-79:7, JTX-021, Fortado
19 Testimony.

20 CCC concluded that Three Captains’ application lacked required approval from the
21 District and closed their file. JTX-027, -056.

22 On June 2, 2015, Three Captains filed a Verified Petition for Administrative Mandate
23 and Complaint For Declaratory and Injunctive Relief. Three Captains demanded attorneys’
24 fees and “an order reversing the Respondents’ action directing it to remove an unloading
25 hoist (“Hoist”) installed, at great expense, on Johnson Pier” in violation of the lease
26 agreement. JTX-031 at 2:3-5. The “District agreed to stay removal of the hoist during the
27 pendency of the litigation.” JTX-038.

1 On February 10, 2016, Three Captains asked the new General Manager to allow the
2 hoist to remain. JTX-036. See also JTX-152 at 65:12-13, 146:3-11. GM Steve McGrath refused to
3 discuss the issue due to the pending litigation. McGrath, Fortado Testimony. In an attempt to
4 open discussions, Three Captains dismissed their Complaint with prejudice. Fortado
5 Testimony, JTX-037. Shortly thereafter, GM McGrath ordered Three Captains to remove the
6 south side hoist. JTX-038.

8 After careful review, the Arbitrator finds that the dismissal with prejudice bars Three
9 Captain's breach of contract claims relating to the District's 2015 termination of the south
10 side hoist agreement. Legendary Investors Group v. Niemann (2014) 224 Cal.App. 4th 1407,
11 1411; DKN Holdings LLC v. Faerber (2015) 61 Cal.4th 813, 816. The request to set aside the
12 dismissal is denied as untimely. C.C.P. ¶ 473.

14 C. The North Side Hoist Agreement

15 In a September 27, 2016, letter addressed to the District Commissioners, Three
16 Captains again summarized the operational issues they face as the middle tenant in the fish
17 buying building.

18 [T]he configuration of the building provides a natural advantage to the
19 outside tenants, who have installed hoists in front of their buildings at the
20 edge of the pier. Boats can come along the north and south side of the pier
21 at the building and those tenants can unload the boats using their hoist
22 directly to forklifts or a squid pump. ... Three Captains can do none of
23 this. Without a boat unloading space and hoist in front of the building, it
24 has to unload boats with a forklift and drive the forklift through its
25 building to bins or a truck. This is far less efficient and much more time
26 consuming. Three Captains has far less useable space in the building since
27 forklifts have to drive through it ... Worse, to unload squid Three Captains
28 is forced to pump the squid over Morningstar's space ... at a cost of 50%
of its profit on the squid.

JTX-042 at pp. 1-2.

1 Three Captains asked the Commission to remedy the situation by allowing them to install a
2 north side hoist at the front of the building, in the open-air storage area used by Morningstar.

3 JTX-042.

4 The Commission should move A2 [Morningstar]' storage site to where B2
5 [Three Captains] is listed

6 JTX-042 at p. 3.

7 GM McGrath included the proposal in each Commissioner's materials for the
8 October 5, 2016, Commission Meeting and posted the letter online. JTX-045 at p. 7, McGrath
9 Testimony.

10 At the October 5, 2016, Commission meeting, Mr. Fortado offered to allow
11 Morningstar to use the proposed hoist at no charge "if Morningstar would be so kind as to
12 change spots." JTX-047 Transcript at 29:13-14, 15:1-4 and p. 3; JTX-068 at p. 1, JTX-080 at p. 1.
13 The Commission acknowledged that the north site would require the District to move a dock
14 and to accelerate maintenance work on the pier, including fender piling repairs. JTX-047
15 Transcript at 4:6-12, 5:4-8, 32:4-20; JTX-045 at pp. 5-7. The Commission approved Three
16 Captains' request and authorized the hoist installation. JTX-047 at pp. 3-4. See also JTX-048,-
17 049,-054, -155.

18 **1. North Side Hoist Agreement Tabled**

19 Three Captains submitted a new Application for Coastal Development Permit for the
20 north side hoist. JTX-057. See also JTX-060,-062, -064, -067.

21 District counsel confirmed that "the District has approved Three Captains' location at
22 the north side of the pier and is ready to assist in anyway necessary to implement its
23 installation, pending Coastal Commission approval." JTX-054 at p. 1. The District agreed to
24 relocate the dock and replace deteriorated fender piles. JTX-078 – JTX-086.

1 In January 2017, GM McGrath forwarded "Lease Amendment #1" to Three Captains.
2 The Commission had affirmed the amendment one month before their approval of the north
3 side hoist. JTX-152 at pp. 24-25, JTX-040 at p. 3. In addition to detailing new fish buyer fees,
4 the document addressed use of open-air storage on the pier.

5
6 Tenant may use exterior pier deck and storage space, as shown and
7 allocated on Exhibit A; provided that Tenant's use of such space may be
8 limited or restricted by the Landlord, for instance as necessary to
9 accommodate Landlord's repair and maintenance of the pier.

10 JTX-092 at p. 2.

11 Three Captains objected that "Lease Amendment #1" Exhibit A did not show the switched
12 storage areas. JTX-061. See also JTX-050, -065. GM McGrath thereafter met with Mr. Mallory
13 and, in January 2017, he realized that any "cooperative arrangement between Larry [Three
14 Captains] and Mallory [Morningstar] was no longer" JTX-152 at 95:12-13. Months later,
15 without resolving the issue, GM McGrath executed lease documents that identify the same
16 storage area for Morningstar and Three Captains and depict the north side hoist only in
17 Three Captains' agreement. JTX-089, -090, -092, -094, McGrath Testimony. District counsel
18 nonetheless assured Three Captains that "the District will work with Morningstar to correct
19 the map" JTX-074 at p. 1.

20 On August 25, 2017, the CCC Staff recommended approval of Three Captains' north
21 side hoist and scheduled an approval hearing. JTX-096, -097.

22 Three days later, Mr. Mallory objected to switching storage spaces with Three
23 Captains. JTX-100. He did not "agree to allow Three Captains to take possession of the
24 Morningstar leased property. The proposed swap ... is a violation of the" lease terms. JTX-
25 119 at 56:20-58:13; JTX-156. GM McGrath responded that the lease "gives the District
26 authority to limit or change" the storage spaces. JTX-113 at p. 2. See also JTX-152 at 98:18-20,
27 JTX-113 at p. 3.
28

1 On August 31, 2017, contrary to earlier assurances, GM McGrath advised that the
2 Commission had not yet approved relocating the dock and had conducted no environmental
3 review. JTX-101, -109 at p. 3, -112; JTX-117, -119 at 39:13-19. CCC responded by removing
4 approval of the north side hoist from their September agenda. JTX-104 – -107, -110, -111, -114,
5 -115, -120, -138.

7 A week later, Morningstar asked for a second hoist at the south side location
8 originally requested by Three Captains. JTX-103. See also, JTX-112, -152 at 251:23-253:25. See
9 e.g. JTX-161 at pp. 39-47.

10 At the October 18, 2017, Commission meeting, GM McGrath recommended approval
11 of infrastructure work needed for installation of Three Captains' hoist. JTX-152 at 160:5-24.

13 Recommendation: Approve the relocation of the work /impound dock, the
14 placement of three additional piles, removal of up to 12 fender piles,
15 repair or replacement of three fender piles and placement of a camel.

15 JTX-118 at p. 3.

16 He confirmed that the work was "categorically exempt" from environmental review. JTX-119
17 Transcript at 38:7-10; JTX-139. GM McGrath added that dock relocation may not even be
18 necessary.

19 [P]otentially the work dock could in fact remain in its location, the reach
20 of the hoist being sufficient to load and offload vessels over that. Of
21 course, if that were confirmed, then the installation of the hoist could
22 proceed pretty much forthwith.

23 JTX-119 Transcript at 42:6-8.

24 See also JTX-116, JTX-152 at 85:6-17. If dock relocation was needed, the Commission could
25 direct staff to find a location that did not require pile driving. Also, they could "park" the
26 dock in the outer harbor while other work was being performed "to allow for the expeditious
27 placement of the hoist." JTX-119 Transcript at 40:20-41:10. GM McGrath urged the
28 Commission "to approve the ancillary actions necessary to, as expeditiously as possible,

1 effect the change requested by Three Captains.” JTX-119 at 40:21-24. Any work would be
2 “subsequent to Board approval and award of construction contracts.” JTX-119 Transcript at
3 38:5-6.

4 The Commission rejected GM McGrath’s recommendation. The Commissioners
5 focused on the storage swap as “new information” and a “total misrepresentation.” JTX-119
6 Transcript at 58:25-61:22, 43:4-21, 64:22-65:2. See also JTX-152 at 243:19-23. GM McGrath
7 testified that “on its face,” the statements were incorrect. He attempted to highlight this point
8 during the meeting.
9

10 [A]ctually explicit in the application from October 2016 – and its listed in
11 the actions taken by this Board - staff required Morningstar Fisheries and
12 Three Captains to swap their storage spaces on the pier.

13 ...

14 The application submitted by Three Captains specifically mentioned the
15 swapping of space between Three Captains and Morningstar.

16 JTX-119 Transcript at 40:11-16, 43:23-25.

17 The Board voted to go “back to the drawing board” and tabled approval of any
18 infrastructure work. JTX-119 Transcript at 64:22-65:14.

19 After careful review, the Arbitrator finds that the storage swap issue was raised and
20 discussed for more than a year before the October 2017 Commission meeting. Moreover, the
21 dispute regarding any alleged rights to use a particular storage area was due in part to the
22 District knowingly executing documents that appear to give two tenants claims to the same
23 storage area. Cf. JTX-003 at ¶10.1, JTX-092 at p. 2, JTX-152 at p. 24. The District’s refusal to
24 consider any infrastructure work to support Three Captains’ approved north side hoist
25 installation was unreasonable and frustrated and infringed on the Three Captain’s right to
26 benefits under the parties’ lease.
27
28

1 **2. North Side Hoist Agreement Terminated**

2 GM McGrath subsequently approved Three Captains’ plan to install the hoist without
3 relocation of the dock. JTX-122 – -126, -130, -153 at p. 43.

4 On January 19, 2018, the CCC Staff again recommended approval of Three Captains’
5 north side hoist. “Installation of the new hoist would upgrade existing commercial fishing
6 operations, improve the Applicant’s efficiency, and promote continued commercial fishing
7 and associated uses at Johnson Pier” JTX-141 at p. 1. CCC scheduled the matter for an
8 approval hearing.
9

10 The Commission again called a “special meeting,” and on February 5, 2018 concluded
11 that “[i]nsufficient information was presented at the October 5, 2016 meeting regarding the
12 impact of Three Captains’ additional hoist on other tenants’ operations” JTX-148
13 Transcript at 82:19-22; JTX-142, -146, -147. The Commission decided to pursue a “macro
14 design reconfiguration” coordinated with the expansion of the entire pier and rescinded their
15 2016 approval of the north side hoist. JTX-148 Transcript at 10:19; JTX-144 at p. 2. Cf. JTX-148
16 Transcript at 18:9-21.
17

18 On March 7, 2018, the CCC advised that Three Captains’ application “lacks
19 approval from the Harbor District, the underlying land owner” and closed their file. JTX-149.
20

21 With no funding, drawings or permits in place, it is undisputed that it will take years
22 to implement any pier overhaul. McGrath, Grindy, Grenell Testimony; JTX-152 at 120:24-25.

23 After careful review, the Arbitrator finds that the District amended the lease to allow
24 Three Captains to install a second hoist on the pier. The parties intended the agreement to
25 address the middle tenant’s physical disadvantages in loading and unloading fish products.¹
26

27
28 ¹ The Commission offered to allow Three Captains to re-install the hoist removed from behind the building many years ago. The offer disregards the purpose and intent of the lease provision. Grenell, Grindy Fortado Testimony; JTX-144 at p. 2; JTX-152 at 56:15-22, 114:8-24; JTX-153 at 15:14-18:17.

1 The District then approved a north side location for the second hoist. The District thereafter
2 breached the lease by blocking necessary infrastructure work and ultimately rescinding their
3 approval of the hoist. Three Captains incurred damages as a result of the District's actions.

4 **III. Award of Monetary Damages**

5 A claimant may recover damages for breach, including lost profits and expenses
6 incurred in performing the contract. Buxbom v. Smith (1944) 23 Cal.2d 535, 541, Agam v.
7 Gavra (2015) 236 Cal.App.4th 91, 105, Mendoyoma v. County of Mendocino (1970)
8 8 Cal.App.3d 873, 879; Civil Code §3300. The claimant bears the burden of proving damages
9 "with reasonable certainty." Carpenter Foundation v. Oaks (1972) 26 Cal.App.3d 784, 799;
10 Walpole v. Prefab Mfg. Co. (1951) 103 Cal.App.2d 472, 481; Civil Code § 3301. Once a breach
11 is shown, California law applies a liberal rule in allowing the court to determine appropriate
12 damages. Cal. Lettuce Growers v. Union Sugar Co. (1955) 45 Cal.2d 474, 486-87. CACI 361.

13
14 Three Captains demand \$ 490,850 in lost profits stemming from the District's failure to
15 approve a second hoist. JTX-158. After careful review, the Arbitrator finds that Claimant's
16 demand is unsupported and speculative. First, Three Captains presented conflicting
17 testimony as to whether they would have used the north hoist to pump sardines and
18 anchovies through Morningstar's premises. JTX-153 at 159:1-8, Newland, Fortado Testimony.
19 Therefore, fees paid to Morningstar are not recoverable as lost profits. Second, Don
20 Pemberton allegedly severed his relationship with Three Captains after prolonged delays
21 during the 2016 crab season. JTX-158, Fortado Testimony. Claimant showed no causal link
22 between Mr. Pemberton's departure and the District's 2017 or 2018 breach of the lease. Third,
23 while a second hoist may increase the speed of servicing boats, Three Captains offered no
24 verifiable evidence to show that any increased efficiency would reduce their expenses by
25 25% or add new customers. See e.g. JTX-019 at pp. 2-3, JTX-032 at ¶¶14-16. Three Captains'
26 demand for lost profits is denied.
27
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1 Three Captains also seeks \$ 231,385 in expenses incurred pursuing a second hoist
2 location. JTX-159 at p. 2. At the onset, this claim is reduced to roughly \$ 80,000 by deducting
3 costs related to the south side hoist and undocumented fees. From this sum, the Arbitrator
4 awards Three Captains \$ 25,000 in reasonable expenses attributable to the north side hoist
5 efforts, including permit and application fees and legal costs from October 18, 2017 to
6 February 16, 2018. Monster, LLC, v. Superior Court (2017) 12 Cal.App.5th 1214. JTX-003 at
7 p. 46, ¶35, Wailes Decl.

9 IV. Specific Performance

10 A defendant may be ordered to perform the contract if the legal remedy is inadequate,
11 and the contractual terms are “sufficiently definite to enable the court to know what it is to
12 enforce.” Tamarind Lithography Workshop, Inc. v. Sanders (1983) 143 Cal.App.3d 571, 575.
13 See also JTX-003 at p. 46, ¶34.4(h).

15 ‘Before concluding that the required certainty is lacking, however, a court
16 will avail itself of all of the usual aids in determining the scope of the
17 agreement. ... A contract is not too uncertain merely because a promissory
18 is given a choice of performing in several ways, whether expressed as
19 alternative performances or otherwise. He may be ordered to make the
20 choice and to perform accordingly, and, if he fails to make the choice, the
21 court may choose for him and order specific performance.’

22 DVD Copy Control Assn., Inc. v. Kaleidescape, Inc. (2009)
23 176 Cal.App.4th 697, 719, quoting Rest.2d Contracts, §362.

24 See also Ellison v. Ventura Port District (1978) 80 Cal.App.3d 574, 579; Civil Code §3384.

25 The District notes that Three Captains wants specific performance and made no effort
26 to show future lost profits. Δ Post Hearing Brief at 1:1718. Claimant argues that it is very
27 difficult to quantify future lost profits linked to the second hoist, because “each season
28 differs widely.” π Brief for Remedies at 2:26. See also JTX-152 at 203:20-24. Also, with no
written contracts, it would be difficult to track fishermen who decide to avoid delays at
Three Captains by going to competitors. Newland Testimony.

1 Respondent objects that specific performance is inappropriate, because the lease does
2 not clearly identify a location for the second hoist. Three Captains counters that the District
3 resolved any ambiguity when they approved the north side hoist location. JTX-89, -92. See
4 also Civ. Code §§ 1642, 1654. Further, due to the unique nature and limited available space of
5 the pier, there clearly are few installation options available. See e.g. JTX-152 at 112:13-24;
6 JTX-005, JTX-047 Transcript at pp. 3-4; Fortado, Grenell, Grindy, McGrath Testimony.

8 After careful review of the extensive written and oral evidence and legal arguments,
9 and GOOD CAUSE APPEARING, Claimant's request for a declaration instructing
10 Respondents to perform the Lease agreement is granted.

11 Reserving all rights and defenses, all parties previously agreed that any order of
12 specific performance will address installation at the south side location originally approved
13 on March 28, 2014, in lieu of the north side location approved on October 5, 2016.

14 Accordingly, **on or before Wednesday, October 17, 2018**, Respondents shall issue a
15 formal Resolution confirming that Claimant may install and use a second hoist at the south
16 side location originally approved by the Harbor Master on March 28, 2014. Moreover,
17 Respondents shall use their best efforts to support Three Captains' efforts to obtain all
18 necessary permits on an expedited basis, including but not limited to any Coastal
19 Development Permit. Gale v. Seymour (1949) 91 Cal.App.2d 727.

22 III. Award of Attorneys' Fees and Costs

23 The lease provides for an award of reasonable attorneys' fees and costs to the
24 prevailing party in an arbitration.

25 The prevailing party shall be awarded reasonable attorney's fees, expert
26 and non-expert witness costs and expenses and other costs and expenses
27 incurred in connection with the arbitration, unless the arbitrator or
28 arbitrators for good cause determine otherwise.

1 Costs and fees of the arbitrator ... shall be borne by the non-prevailing
2 party, unless the arbitrator or arbitrators for good cause determine
3 otherwise.

4 ITX-003 at §34.3(f)(g). See also Id. at §35.

5 In light of the damages award and order of specific performance, and GOOD
6 CAUSE APPEARING, the Arbitrator finds that Three Captains is the prevailing party under
7 the lease.

8 Three Captains submitted a Declaration and supporting invoices for \$ 268,772,
9 including \$ 37,602 in costs and \$ 231,170 in attorneys fees. Motion For Attorneys' Fees and
10 Costs, Waives Decl. In Support of Motion at p. 8.

11 The District only objects to the attorneys' fees portion of the claim. Opposition to
12 Motion for Attorneys Fees and Costs at 1:12-13. Among other things, the District argues that
13 Three Captains only recovered \$ 25,000 in damages on their \$ 722,000 claim. The fee demand
14 therefore should be "substantially reduced." △ Opposition to Motion for Attorneys Fees and
15 Costs at 1:11. In particular, Three Captains should not be awarded attorneys' fees for "the
16 substantial time spent trying to establish a breach that was barred by collateral estoppel" Id.
17 at 1:18-19. The District also asks the Arbitrator to take into consideration the District's
18 status as a tax-funded agency. Id. 5:8-11. Three Captains counters that their claims focused
19 on trying to install a hoist that the District promised to them in 2013. They succeeded and
20 should be fully compensated for their fees. The fact that some of their damages claims were
21 unsuccessful does not merit a reduction in their fee recovery.

22 After careful review of the parties' arguments, and GOOD CAUSE APPEARING,
23 the Arbitrator awards \$ 245,000 in reasonable costs and expenses incurred in connection with
24 the arbitration. C.C.P. §§ 1032, 1033.5; Civil Code §1717. All other demands for attorneys'
25 fees and costs are denied.
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IV. Final Award

On or before Friday, November 9, 2018, Respondents San Mateo County Harbor District Board of Harbor Commissioners and San Mateo County Harbor District shall pay to Claimant Three Captains Sea Products, Inc., the sum of \$ 270,000, including monetary damages and attorneys' fees and costs. The District also shall pay any and all outstanding Arbitrator fees.

This Final Award resolves all claims among the parties submitted for decision in this proceeding.

IT IS SO ORDERED.

Dated: October 12, 2018

Anne M. Lawlor Goyette
Anne M. Lawlor Goyette
Arbitrator