G063040

IN THE COURT OF APPEAL OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

GROVES, et al.,

Plaintiffs and Appellants,

vs.

DANA POINT HARBOR PARTNERS, LLC,

Defendant and Appellee.

Appeal from a Judgment of the Superior Court,
County of Orange
Case No. 30-2021-01222794
Hon. Lon F. Hurwitz, Judge Presiding

APPELLANTS' REPLY BRIEF

[SERVICE ON ATTORNEY GENERAL REQUIRED BY BUS. & PROF. CODE § 17209]

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I. INTRODUCTION

In *Goonewardene v. ADP, LLC*, the California Supreme Court reaffirmed the long-standing principle that third parties, under the right circumstances, may enforce a contract to which they are not a party:

> From the beginning of the 20th century, virtually all American courts applying common law contract principles have recognized that it is appropriate *under some circumstances* to permit an individual or entity that is not a party to a contract to bring an action to enforce the contract. [Citation]. Courts have struggled, however, to formulate useful, general principles to identify those circumstances in which a third party should be permitted to maintain an action for an alleged breach of a contract to which it is not a contracting party, as distinguished from the usual instance in which only the contracting parties may bring an action under the contract. [Citation] ["Few areas of contract law have consistently raised more thorny theoretical and practical difficulties for lawyers, judges, and scholars than the rights of nonparties to enforce contractual promises"].

(*Goonewardene v. ADP, LLC* (2019) 6 Cal.5th 817, 828 [internal citations omitted] [emphasis is original].)

Pursuant to *Goonewardene* and the Supreme Court's guidance therein, Appellants D. Groves, N. Papageorges, and A.J. Montrella ("Appellants" or "Tenants") have presented the appropriate "circumstances to permit an individual or entity that is not a party to a contract to bring an action to enforce the contract." They, and the class they represent, constitute third-party beneficiaries of the Master Lease between the County of

Orange ("County") and Respondent Dana Point Harbor Partners, LLC ("DPHP").

At the crux of this dispute is the Master Lease's limitations on increases for boat slip rental rates for the boaters who use the Dana Point Harbor (people like Appellants). They are the only ones who benefit from the Lease's limitations on the slip rental rates and the requirement for advance notice of the same. Thus, it is reasonable to conclude that benefiting Appellants was one of the motivating purposes of the Master Lease.

At the very least, however, the trial court should have permitted a jury to make that determination upon the consideration of the disputed facts after a full presentation of the evidence. As shown in Appellants' Opening Brief ("AOB"), the trial court erred in granting summary judgment because triable issues of material facts precluded judgment as a matter of law on the issue of Tenants' third-party beneficiary status, among others. Indeed, the first trial judge agreed with Appellants that the language limiting prices to market rates necessarily conferred a benefit on those renting slips in the marina and manifested an intent to make them direct beneficiaries, comparing the case to *Zigas v. Superior Court* (1981) 120 Cal.App.3d 827. (1 AA 33.) On reassignment, however, the subsequent trial judge did not agree. Thus, even at the trial court level among two different judges reviewing the case, there was a split of opinion as to the meaning of the Master Lease, which itself suggests there was good reason to proceed to trial for a fact determination by a jury.

Respondent's Brief ("RB"), however, essentially ignores Appellants' arguments establishing the court's reversible errors and instead focuses on its own interpretation of the Master Lease. But the court's errors in applying the proper standards on motions for summary judgment cannot be ignored – particularly relating to its treatment of the parties' respective burdens, its disparate treatment of the parties' evidence, and the improper inferences drawn therefrom. These errors require reversal of the judgment in this case.

For the reasons discussed below and in their Opening Brief, Appellant Tenants request that the Court reverse the judgment in favor of DPHP and remand for trial.

II. ARGUMENT

A. DPHP Does Not Address the Court's Errors in Applying the Summary Judgment Standard.

Conspicuously absent from DPHP's brief is any attempt to challenge Tenants' argument that the court erred in applying the standards for summary judgment. For example, DPHP simply ignores Tenants' arguments regarding the Court's improper inferences related to the interpretation of Section 11.9 or the purpose of the notices given under the Slip License Agreements as compared to the Master Lease (AOB 42-44.) In addition, DPHP did not respond to Tenants' argument that the Court failed to treat the parties' evidence with the requisite liberality or strictness required on motions for summary adjudication/judgment. (AOB 44-48.) DPHP's silence on these

points is telling: there is no justification for the trial court's failure to comply with the well-established strictures for summary judgment motions.

Instead of disputing Tenants' arguments, DPHP claims that any evidentiary errors related to the reasonableness of DPHP's pricing methodology were harmless because Tenants have no standing to challenge the reasonableness of DPHP's methodology. (RB 44, n. 14.) Apart from DPHP being wrong about Tenants' standing, this contention of harmless error is limited to evidentiary rulings related to the reasonableness of DPHP's pricing methodology. (*Ibid*.) Tenants' evidence, however, was not so limited and also included evidence relevant to the interpretation of the Master Lease. (See, e.g., AOB 38-40.) Therefore, DPHP's "harmless error" argument is fatally incomplete, and Tenants' showing of judicial error stands unrebutted.

B. DPHP's Misleading Factual Presentation, Reliance on Disputed Facts, and Faulty Legal Analysis Do Not Defeat Tenants' Showing that the Trial Court Erred by Deciding that Tenants Are Not Third-Party Beneficiaries as a Matter of Law.

DPHP's primary focus is on Tenants' status as third-party beneficiaries and whether two of the *Goonewardene* elements are met in this case: whether benefiting Tenants was a motivating purpose for the Master Lease and whether allowing Tenants to bring a breach of contract claim is consistent with the objectives of the Master Lease. While DPHP contends that the answer to

these questions is "no," DPHP's factual presentation and analysis are flawed. DPHP relies on material facts that were disputed by Tenants on the motion for summary judgment, improperly characterizes the language of the Master Lease, and misstates facts. As shown below, none of DPHP's arguments change the fact that the court erred in finding that as a matter of law Tenants were not third-party beneficiaries of the Master Lease. This was a question of fact that should have been reserved for the jury.

1. *Goonewardene* Element One: Benefit to Third Party

DPHP appears to concede that the first *Goonewardene* element is satisfied and that Tenants benefit from the Master Lease. First, DPHP fails to address this element directly despite Tenants' analysis of the same in its Opening Brief. (See RB 28-39, section B(1)(b) and (c) addressing element two and section B(1)(d) addressing the third element; AOB 54-56.) DPHP makes only a passing reference to the first element, arguing that even if Tenants could satisfy the first two elements, Tenants could not meet the third. (RB 37.) At no point, however, does DPHP dispute that Tenants benefit from the Master Lease. Therefore, on this appeal DPHP has waived any right to dispute that Element One is met. (See *Sweeney v. California Regional Water Quality Control Bd.* (2021) 61 Cal.App.5th 1093, 1143, *as modified on denial of reh'g (Mar. 18, 2021)* [refusing to consider argument on appeal because respondents had not raised the argument in the trial court or properly briefed the matter where there were only

two sentences of argument on the point, without citation to authority or to the record]; Cal. Rules of Court, rule 8.204(a)(1)(B) ["Each brief must: … [s]tate each point under a separate heading or subheading summarizing the point, and support each point by argument and, if possible, by citation of authority …."].)

2. *Goonewardene* Element Two: Motivating Purpose

As to the second element, DPHP raises several flawed arguments and misconstrues facts to claim that providing a benefit to the slip lease holders, including Tenants, was not a motivating purpose for the Master Lease.

a. *It is Tenants, not DPHP, who are reading the Master Lease as a whole.*

First, DPHP contends that the Lease must be taken as a whole (*i.e.*, all 125 pages of the multi-decade agreement) and that the Master Lease plainly states that its purpose is for DPHP to efficiently redevelop the Harbor while supporting public uses and maximizing the County's revenue, citing to section 5.3.3 and the "principal inducement" language found therein. (RB 29; 2 AA 930.) Section 5.3.3, however, which is found in Subdivision 5: REDEVELOPMENT WORK; ALTERATIONS, is essentially a "time-is-of-the-essence" provision for the redevelopment portion of the Master Lease. (2 AA 930, § 5.3.3 ["Lessee acknowledges that the principal inducement to County to enter into this Lease is the timely commencement, performance and completion by Lessee of the Redevelopment Work," and setting forth that

failure to timely commence and complete the redevelopment will be a default under the Lease].)

The only other specific section of the Master Lease cited by DPHP is the recitals to the Master Lease. (RB 29, 2 AA 884 ["County granted Lessee an option (the "Option") to lease the Property in its entirety, upon the terms and conditions more specifically provided herein, including, without limitation, the redevelopment and renovation of the Property, all in accordance with the terms and provisions hereof."].) DPHP, however, fails to note the centrality of the reconstruction of the slip holders' docks and slips for the redevelopment project. (See, e.g., 3 AA 1083 – 4 AA 1104 [marina design scheme and the site demolition and removal plan for the docks]; 4 AA 1106 [budget showing Marina costliest piece of the project]; 4 AA 1110 [showing Marina was significant portion of construction schedule].) Based on these two cited provisions and generic references to the entire Master Lease, DPHP claims the plain language of the Master Lease establishes that "***the*** relevant motivating purpose" was for "DPHP to manage and pay for the Harbor's development and, ultimately, for the County to take title to the completed Harbor improvements upon expiration of the Lease term." (RB 30 [emphasis added].)

This contention, however, shows that it is actually DPHP, not Tenants, who has failed to consider the entire 125-page Master Lease when determining whether Tenants are third-party beneficiaries. Indeed, there are other statements in the Master Lease as to its principal or primary purpose. (See, e.g., 2 AA

0911, § 3.3.1 ["The Parties acknowledge that ***County's objective*** in entering into this Lease is ***the complete and continuous use of the facilities and amenities*** located in Dana Point Harbor ***by and for the benefit of the public***, without discrimination as to race, gender, religion, or sexual orientation, and for the generation and realization by County of revenue therefrom."] [emphases added]; 4 AA 1123, Ex. G to Master Lease ["***The ultimate purpose*** of this Lease is the complete and continuous public use of the Property ***for the benefit of the public***, and all facilities and services shall be made available to the public without discrimination."] [emphases added].) Furthermore, the Master Lease provisions of Article 5, relied on by DPHP, mandate that all the provisions regarding redevelopment be "consistent with the Permitted Uses set forth in Article 3 above," which includes § 3.3.1. (2 AA 928, § 5.1(g).)

In fact, Tenants have not disputed that redevelopment and operation of the Harbor was the broad purpose of the Master Lease (see, e.g., AOB 16), and DPHP's claim that Tenants have suggested that the motivating purpose analysis for *Goonewardene* should be limited to Section 11.9 of the Master Lease is simply false. (RB 30.) But public access to and use of the Harbor, including the Marina, was obviously a central purpose of the Master Lease and must shape its entire interpretation. Similarly, it must be recognized that the redevelopment and operation of the Harbor includes the Marina, and therefore the boat slips. (See, e.g., 2 AA 888, § 1.1.51 [three components to the Property – Commercial Core, Hotel, and Marina].) Thus, the

inclusion of the boat slip holders in Section 11.9 is not a one-off mention in a 125-page lease agreement. To the contrary, the slip holders are mentioned throughout the Master Lease, and the renovation and development of the boat slips and docks is a central component of the Harbor's renovation and operation. (See, e.g., 2 AA 910, § 3.2.2(f) [environmental conditions and requirements for boat slip rental agreements]; 2 AA 971, § 11.3 [slip rent roll and slip compliance obligations]; 2 AA 972, § 11.5 [slip priority and waitlists].)

Furthermore, and critically, as noted in Tenants' Opening Brief, the motivating purpose to benefit the third party does not need to be the sole or even the primary purpose of the agreement; it just needs to be a motivating purpose. (*Prouty v. Gores Technology Group* (2004) 121 Cal.App.4th 1225, 1232 ["[T]he contract need not be exclusively for the benefit of the third-party. He does not need to be the sole or the primary beneficiary."]; *Murphy v. Allstate Ins. Co.* (1976) 17 Cal.3d 937, 943 ["although the contract may not have been made to benefit him alone, he may enforce those promises directly made for him"].) Here, the Master Lease can be reasonably read to include another motivating purpose as part of that broader purpose, namely, ensuring that public boat slip renters are provided with rates that are reasonably determined to be market rates and are given advance notice of and justification for any changes to the same.

In contrast to Tenants' comprehensive examination and understanding of the Master Lease, DPHP essentially seeks to skip over the promises made in Section 11.9 when determining

the motivating purposes of the parties. It is DPHP's approach – not Tenants' approach – that contravenes the very law cited by DPHP regarding contract interpretation and the need to consider the entirety of a contract, giving effect to every part. (See, e.g., Civ. Code, § 1641 ["The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other."]; see also *Prouty v. Gores Technology Group*, *supra*, 121 Cal.App.4th at 1233 ["[w]hether the third party is an intended beneficiary or merely an incidental beneficiary involves construction of the intention of the parties, gathered from reading the contract as a whole in light of the circumstances under which it was entered"].)

DPHP also falsely claims that Tenants argued in their Opening Brief that *Prouty v. Gores Technology Group* and *Murphy v. Allstate Ins. Co.* "empower litigants to frame an infinite number of alternative motivating purposes in isolated snippets of contractual text." (RB 30.) Unsurprisingly, DPHP does not cite a particular page of Tenants' Opening Brief because Tenants did not make that argument. DPHP's statement is more reflective of DPHP's all-or-nothing approach than Tenants' position. DPHP seems to argue, contrary to the above established law, that either there can be only one purpose to a contract (and the only purpose of the Master Lease was to benefit DPHP and the County), or else there are infinite motivating purposes. But, of course, this is not true because the Master Lease constrains the range of possible motivating purposes. To be clear, Tenants' position is simply that providing a benefit to the slip holders was

one motivating purpose of the Master Lease, which is a reasonable interpretation when considering the Master Lease as a whole.

b. *DPHP's misreads Section 11.9 and fails to demonstrate that the Master Lease is not susceptible to Tenants' interpretation.*

When DPHP finally addresses the specific language of Section 11.9, DPHP's arguments fail to show that, as a matter of law, this Section is not susceptible to the interpretation that a motivating purpose of the parties was to benefit the slip holders. Resolution of the issue should have been reserved for the trier of fact. (*Spinks v. Equity Residential Briarwood Apartments* (2009) 171 Cal.App.4th 1004, 1028 [specific mention of party by name in lease raised inference that performance was meant to benefit named party, but where extrinsic evidence of understanding is in conflict, status of third party under the lease should not be adjudicated as a matter of law]; *Prouty v. Gores Technology Group*, *supra*, 121 Cal.App.4th at 1233 [generally a question of fact whether particular third person is an intended beneficiary of a contract].)

DPHP claims that because the first part of Section 11.9 applies to all the goods and services DPHP charges the public for in the Harbor, anyone could sue under the Master Lease for unfair prices. (RB 30-31.) As an initial point, whether or not that is true, that is not the case before this Court. The boat slip holders are not purchasers of ice cream cones or Harbor souvenirs, despite DPHP's characterization. Tenants are

individuals who lease the boat slips in the Harbor, including some who live onboard those boats. But more importantly here, DPHP has never established what if any other goods or services, other than the slip rates, it sets rates for. This is important because the Section 11.9 market rate pricing restrictions apply only to prices for goods and services established by DPHP, the Lessee, not other sublessees. (2 AA 973 ["Lessee shall at all times maintain a complete list or schedule of the prices charged ***by Lessee*** for all goods and services, or combinations thereof, supplied to the public on or from the Property, whether the same are supplied by Lessee or by its Sublessees, assignees, concessionaires, permittees, or licensees. The foregoing shall ***not*** be deemed a requirement for Lessee to maintain such lists or schedules of the prices charged ***by Sublessees***. Said prices will be 'market rate' pricing as reasonably determined by ***Lessee***; provided, however that in all events prices shall be consistent with the limitations on pricing as mandated by the Tidelands Grant."] [emphases added].)

DPHP, however, presented no evidence on its motion for summary judgment that it was charging any member of the public for anything except for charges for slip rates. In fact, at the time of its motion, DPHP itself was not drawing a distinction between goods and services it charged prices for, as opposed to those set by its sublessees. DPHP's supplemental brief on the issue of Tenants' third-party beneficiary status made the bold, and erroneous, claim that Section 11.9 applied to all goods and services supplied to the public at the Harbor:

> Irrefutably, Section 11.9 applies to all goods or services supplied to the public from any portion of the harbor – in water or out. This includes food or beverages sold from businesses that lease space at the harbor, inventory in retail stores, hotel rooms and services, recreational activities, etc. Following Plaintiffs' theory that would mean that any member of the public purchasing any goods or utilizing any services would be a third-party beneficiary and be able to contest the pricing for which the good or service is offered. Such a reading defies common sense.

(4 AA 1455, lines 9-15 [emphasis in original]; see also RT 14:4-15:13.) At the time of its motion, DPHP was not correctly reading Section 11.9 of the Master Lease.

Nonetheless, despite Tenants setting forth this important distinction in their Opening Brief, DPHP still does not directly address the issue. Instead, DPHP incorrectly claims that "[n]othing in Section 11.9's pricing language offers any direct 'benefit' to the boaters" because Tenants "receive the same benefit from this language that **all other public patrons of the Harbor** receive: pricing as reasonably determined by DPHP." (RB 32 [emphasis added].) This statement, however, is simply false. All other public patrons of the Harbor do not receive reasonably determined market prices unless they are paying for goods and services charged by DPHP. To state otherwise is, to be charitable, disingenuous. Similarly, DPHP incorrectly claims that Tenants' reading of Section 11.9 would "empower any other Harbor patron to sue DPHP because they feel the Hotel or

restaurant rates should be lower, or that day boater parking fees are too high, or that vending machines in the Harbor charge more for sodas than a nearby store." (RB 32.)

While continuing to make these sweepingly false statements, DPHP now appears to admit its initial reading of Section 11.9 was incorrect by stating in its Respondent's Brief that along with slip rates, Section 11.9 would apply to other things like "surface storage fees and retail pricing set by DPHP." (RB 31.) DPHP, however, cites no portion of the record to establish under the Master Lease what goods and services DPHP actually sets rates for and fails to establish the scope of individuals who are in fact benefiting from Section 11.9 pricing limitations. Not once has DPHP pointed to its separate statement or supporting evidence to establish these facts. This is significant given the fact that judgment was entered on DPHP's motion for summary adjudication/judgment. DPHP simply failed to establish before the trial court that allowing Tenants to enforce the benefits afforded to them under the Master Lease would open the floodgates of public litigation and thus was evidence that Tenants were not third-party beneficiaries.

Furthermore, and critically, the slip holders are **the only** class of Harbor users specifically identified and owed obligations under Section 11.9 of the Master Lease. (2 AA 973.) They have a right to advance notice of the rationale for and methodology used in determining the rate increases for the boat slips. DPHP has not accounted for these distinct protections afforded to the boat slip holders as opposed to every other user of the Harbor.

DPHP also incorrectly implies that Tenants' sole ground for claiming third-party beneficiary status under the Master Lease is their general status as members of the public. (RB 31-32, citing AOB 54.) Not only is DPHP's assertion inaccurate and misleading, but DPHP elects to emphasize only a general statement of the law: while government contracts often benefit the public, the public is generally treated as incidental beneficiaries of those contracts. (RB 29, citing *Lake Almanor Associates L.P. v. Huffman-Broadway Group, Inc.* (2009) 178 Cal.App.4th 1194, 1201). Tenants do not dispute this general statement of the law. But DPHP glosses over an exception to the general rule: "individual members of the public are treated as incidental beneficiaries ***unless a different intention is manifested***." (*Ibid.* [emphasis added].) It is this exception that forms the foundation for Tenants' position. (See, e.g., *Zigas v. Superior Court*, *supra*, 120 Cal.App.3d 827 and *Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157 [cases in which persons found to be third-party beneficiaries].)

In fact, DPHP admits that under *Murphy v. Allstate Ins. Co.*, one may enforce contractual promises as a third party when those promises are made directly for that party. (RB 30-31.) In this case, Section 11.9 was made, at least in part, for the direct benefit of the boat slip tenants. (2 AA 973.) The slip rates must be "market rate" prices, as reasonably determined. Furthermore, the slip tenants had to be given advance notice of any price increase as well as the methodology for the same. (*Ibid.*) The County does not benefit from this provision; nor does DPHP. And DPHP does

not contend otherwise. No one other than the tenants benefit from slip lease pricing restrictions and the advance notice requirement.

DPHP's analysis of Section 11.9 and the Master Lease as a whole is strained, and nothing in DPHP's brief contradicts Tenants' showing that the trial court's determination that Tenants are not third-party beneficiaries was reversible error. To the contrary, DPHP's briefing supports the conclusion that the triable issues of fact remain for a jury on the issue of Tenant's third-party beneficiary status.

c. *DPHP's evidentiary arguments are meritless.*

DPHP contends that because there is only one reasonable interpretation of the Master Lease regarding the parties' motivating purpose – its interpretation – Tenants' evidence is irrelevant. (RB 33-37.) It is well-established, however, that extrinsic evidence is admissible where it is relevant to prove a meaning to which the language of the agreement, here the Master Lease, is reasonably susceptible. (*Pacific Gas & Elec. Co. v. G. W. Thomas Drayage & Rigging Co.* (1968) 69 Cal.2d 33, 37 ["The test of admissibility of extrinsic evidence to explain the meaning of a written instrument is not whether it appears to the court to be plain and unambiguous on its face, but whether the offered evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible."]; *Wolf v. Superior Court* (2004) 114 Cal.App.4th 1343, 1350, *as modified on denial of reh'g (Feb. 19, 2004)* ["Where the meaning of the

words used in a contract is disputed, the trial court must provisionally receive any proffered extrinsic evidence which is relevant to show whether the contract is reasonably susceptible of a particular meaning."].) In an attempt to avoid the consideration of Tenants' relevant evidence to show that the Master Lease is indeed susceptible to Tenants' interpretation, DPHP proclaims that the Master Lease is susceptible to only one interpretation – therefore, no extrinsic evidence is needed. But DPHP's argument is circular, and it fails to acknowledge that Tenants have offered evidence to prove the susceptibility of Section 11.9's language regarding rate limitations to a particular meaning. Moreover, even DPHP acknowledged that extrinsic evidence is relevant to determine third-party beneficiary status including evidence of surrounding circumstances and negotiations. (RB 35, citing *Garcia v. Truck Ins. Exchange* (1984) 36 Cal.3d 426, 437.)

DPHP then contends that even if the extrinsic evidence were considered, Tenants' evidence does not in fact show that the lease is susceptible to Tenants' interpretation and does not create a triable issue of fact. (RB 33.) This is not the case. DPHP's characterization and analysis of Tenants' extrinsic evidence (e.g., the June 2018 memorandum regarding Master Lease negotiations, historical Harbor management agreements and leases, and the 2001 County Minute Orders) is inaccurate and misguided.

For instance, with regard to the June 2018 memorandum (2 AA 868-880), DPHP contends that a memorandum of the

negotiations with contemporaneous edits and comments does not "contradict" the after-the-fact testimony of Thomas Miller. In an effort to bolster its position, DPHP claims that Miller was "**the** County representative who negotiated the Lease." (RB 34 [emphasis added].) DPHP, however, does not cite the record to support this fact. What the record does show is that while Thomas Miller participated in meetings and reviewed documents during the negotiations, it was actually another individual, Scott Mayer, who was the lead negotiator for the County along with Mr. Mayer's staff, and County's outside counsel. (4 AA 1423-1425.)

DPHP also claims that the language in the memorandum is different from what was ultimately included in the final Master Lease, which was executed months later, and therefore holds little value for understanding the Master Lease. But further modifications to the language do not render the negotiation process irrelevant to understanding the parties' motivating purposes. For instance, DPHP sought to strike the entire section related to pricing from the Master Lease. (2 AA 880.) The County said that this was a "deal breaker" "completely contrary to the spirit of this Lease." (2 AA 876.) The fact that the pricing language was subsequently negotiated and modified does not change the fact that the memorandum showed the importance of this provision as well as the "market" pricing and "reasonableness" language to the County's negotiations. (*Ibid.*) Ultimately, that provision made it back into the Master Lease albeit in a modified form. (Compare 2 AA 880 to 973.)

Notably, Section 11.9 (formerly 11.8) is the only section in the June 2018 Memorandum for which the County took such a determined stand, deeming its removal a deal breaker. (2 AA 868-879.) That is certainly relevant to understanding the motivating purposes of the parties and the terms of the Master Lease. It certainly raises a triable issue of disputed fact on this issue. Furthermore, the notice requirements did not change at all in subsequent amendments. The exact same notice language was put back into the Master Lease. (Compare 2 AA 880 and 973.)

None of DPHP's arguments support the conclusion that the June 2018 Memorandum is irrelevant to determining whether a contract was made for the benefit of Tenants or fails to create a triable issue of fact. In fact, as noted above, DPHP admits that such "evidence regarding the circumstances and negotiations of the parties in making the contract" is admissible for this very purpose. (RB 35, citing *Garcia v. Truck Ins. Exchange*, *supra*, 36 Cal.3d at 437.)

As for the historical Harbor management agreements, these agreements show the long history of slip lease pricing in the Harbor prior to DPHP, evidence relevant to understanding how the County had previously sought to constrain slip rentals and how it enforced such constraints over many prior years. DPHP, in an effort to distance itself from these management agreements and the limitations on pricing set forth therein, erroneously claimed that prior to the management agreements, the Harbor operated under leases, and under those leases, two entities – TBW and DPMC – had "independent discretion" to set

slip rates based on market conditions (*i.e.*, supply and demand and slip vacancies). (RB 12 and 35, citing Miller Decl., ¶ 13 at 1 AA 150-51.) This is not true, and Tenants had previously disputed this very fact. (2 AA 578, No. 16.)

The June 2001 Minute Order shows that under the TBW lease (not an operating agreement), "the rates charged by the Lessee [were] subject to the review and approval of the PFRD [Public Facilities and Resources Department] Director, and further subject to an appeal of the Director's decision to your Board …." (2 AA 819.) Furthermore, the rates were required to be "fair and reasonable." (See 2 AA 825 ["Clause 16 of the General Conditions of your lease (Control of Hours, Procedures and Prices) states that pricing shall be 'fair and reasonable' based upon a number of considerations, including 'the market prices charged by other competing and/or comparable businesses."].) This is hardly "independent discretion." DPHP, however, ignores this contradictory evidence in an attempt to distance itself and the Master Lease from a long history of restraint under both the prior management agreements and leases.

Moreover, DPHP's parol evidence argument is a red herring. DPHP claims that the County's 2001 Minute Order, the historical contracts with nonparty entities, and County resolutions cannot create a triable issue of material fact because they are barred by the parol evidence rule. But parol evidence is admissible "to prove a meaning to which the language is 'reasonably susceptible'." (*Winet v. Price* (1992) 4 Cal.App.4th 1159, 1167.) The evidence offered by Tenants was not intended to

contradict or rewrite the Master Lease but to demonstrate the meaning the words in the Master Lease should be given and to explain the context surrounding the creation of the Master Lease, including the historical context for slip rate leases.

Furthermore, both DPHP and the court relied on extrinsic evidence to support DPHP's interpretation of the Master Lease. (See, e.g., 4 AA 1479 [relying on Miller's attestations re: Section 11.9, citing Miller Decl., ¶ 25]; 4 AA 1480 [relying on Miller's attestations regarding the purpose of the notice, citing Miller Decl., ¶ 35].) Apparently, DPHP wants to allow extrinsic evidence to explain its understanding of the Master Lease, while simultaneously prohibiting Tenants from doing the same. Unfortunately, the court followed suit.

Accordingly, the June 2018 memorandum, the historical management agreements and leases, and the 2001 Minute Orders presented by Tenants create a factual dispute over whether a motivating purpose for the Master Lease was to benefit Tenants, a question which must be considered and decided by the trier of fact. The trial court, therefore, erred by deciding as a matter of the law that a motivating purpose of the contracting parties was not to provide a benefit to the Tenants.

3. *Goonewardene* Element Three: Objectives and Expectations of Contracting Parties

DPHP's primary focus in its responding brief is on the second *Goonewardene* element, but it does briefly touch on the third element: whether permitting a third party to bring its own breach of contract action against a contracting party is consistent

with the objectives of the contract and the reasonable expectations of the contracting parties. (*Goonewardene v. ADP, LLC*, *supra*, 6 Cal.5th at 830.) DPHP essentially makes two arguments that allowing Tenants to enforce the contract is inconsistent with the objectives and expectations of the County and DPHP.

First, DPHP claims that it may be subject to "unlimited lawsuits by members of the public, who transact with any businesses on the leased property (i.e., the Harbor)" and that this "is wildly inconsistent with DPHP's reasonable expectations when entering the Lease." (RB 38.) As shown above, however, this is based on a misreading of Section 11.9. Section 11.9 is limited to goods and services for which ***DPHP*** sets the rates to be charged, and DPHP has failed to establish the scope of its rate setting authority.

Furthermore, one must wonder, even if ice cream purchasers could sue under the Master Lease, whether litigation over the cost of a scoop would be the likely result of dissatisfaction with said prices. Litigation is costly, particularly where – as here – DPHP sought and was awarded attorneys' fees against Tenants. (See *Papageorges v. DPHP*, Case No. G063688 [pending appeal on award of attorneys' fees to DPHP].) Unlike the ice cream purchaser, Tenants face substantial and continuing increases to their monthly rental rates and have sought to hold DPHP responsible for failing to comply with its obligations to the Tenants under the Master Lease, including the requirement that the rates charged by DPHP be based on a reasonable

determination. Furthermore, while the marina is the *only* place in Dana Point or the surrounding area that leases boat slips, the restaurants and retailers in the harbor have multiple nearby competitors to keep their prices market rate.

Second, DPHP claims that allowing Tenants to challenge the Harbor price increases would destroy its ability to complete the redevelopment and maintain maximum revenue therefrom for the County, particularly because it will have to face challenges twice – once by the County and again by the Tenants. (RB 38-39.) As an initial point, there is no provision of the Master Lease that requires County approval of the rental increases. DPHP admits as much: "The Lease **requires only** that DPHP use a reasonable methodology to determine Harbor rates, and to provide notice to the County of that methodology. **This implicitly**, if not expressly, gives the County the right to reject the methodology used by DPHP as not reasonable before the rates go into effect." (RB 43-44 [emphases added].) In other words, DPHP must provide the rationale to the County, but the recourse for DPHP's failure to comply with its pricing obligations appears to be litigation for breach of contract. (See 2 AA 992-996, § 14, Default.) There is no set administrative procedure for review and approval. Any "approval" by the County is actually superfluous under the Master Lease. Thus, Tenants are merely seeking to enforce the Master Lease terms with the same recourse afforded to the County.

Furthermore, the County elected not to challenge DPHP's methodology and resulting rate increase. Therefore, DPHP is not

facing multiple rounds of challenges. (*Shell v. Schmidt*, *supra*, 126 Cal.App.2d 279, 290 ["It is no objection to an action by the third party that the contracting party (here the government) could also sue upon the contract for the same breach."]; *Zigas v. Superior Court*, *supra*, 120 Cal.App.3d at 838 [recognizing that litigation by the third-party would not affect the efficiency and uniformity resulting from governmental administrative procedures because no such procedure existed and lawsuits in such cases can promote the governmental interest by inducing compliance with government contracts].)

Nothing in DPHP's analysis of the third *Goonewardene* factor, here or on its motion for summary judgment below, justifies a finding by the Court that allowing Tenants to enforce the Master Lease as to the benefits afforded them is contradictory to the objectives of the Master Lease or the expectations of the contracting parties. DPHP appears to be hoping that given the County's interest in increased revenue and with litigation as the sole remedy for default, no one will be left to challenge its ever-increasing slip rates for the Harbor.

The bottom line is that the trial court erred in applying these *Goonewardene* factors, in part based on the misleading statements by DPHP. The issue of Tenants' third-party beneficiary status could not and should not have been resolved on DPHP's motion for summary adjudication/judgment.

C. The Reasonableness of DPHP's Slip Rate Determination Is a Question of Fact Improperly Decided by the Court.

DPHP claims that Tenants cannot assert a breach of contract claim against DPHP irrespective of their third-party status. (RB 39.) While the crux of DPHP's argument is not clear, DPHP appears to contend that because it is the methodology, not the prices themselves, that is subject to a reasonableness standard, and because the County alone has the right to challenge DPHP's methodology, and because the County has determined the methodology was reasonable, Tenants have no claim against DPHP. While this argument appears to be at heart another variation of DPHP's Tenants-are-not-third-party-beneficiaries argument,[1] which has already been addressed, there are several other issues with DPHP's arguments in this section of its brief.

As an initial matter, DPHP's emphasis on the difference between "market rate pricing reasonably determined" and "fair and reasonable pricing," is overblown. It is unclear how a reasonable methodology could produce an unreasonable price.

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[1] For instance, DPHP states in a footnote that because Tenants lack standing to challenge the reasonableness of DPHP's pricing methodology, Tenants' evidence regarding reasonableness is irrelevant to its claims and any errors by the trial court are harmless. But despite DPHP's assertion that this portion of the Respondent's Brief is being made "irrespective" of Tenants' third-party status, DPHP's argument regarding admissibility of evidence and judicial errors related to the reasonableness of its pricing determination is indeed contingent on finding that Tenants were not third-party beneficiaries.

Nor is it clear that "fair" means something radically different from "market rate." But semantics aside, DPHP's more significant problem is that the reasonableness of its methodology is contested. And where there are factual disputes, reasonableness is a question of fact for a jury. (See, e.g., *Peak-Las Positas Partners v. Bollag* (2009) 172 Cal.App.4th 101, 106, *as modified (Mar. 26, 2009)* [reasonableness question of fact, based on all the circumstances]; *Robinson v. City and County of San Francisco* (1974) 41 Cal.App.3d 334, 337 ["the 'reasonableness' of an act has often been held to present a triable issue of fact"];

DPHP also alleges that Tenants ignored the fact that DPHP conducted a study of the greater Southern California market. (RB 39-40.) This is not true. Tenants did not ignore this fact but presented evidence that its Orange County market rate survey was not sufficient for the County and its Southern California survey was itself unreasonable. (See, e.g., 2 AA 687-798; 800-802; 4 AA 1179, 1182.)

A timeline of the events leading up to the massive slip price increase shows there is a disputed fact as to both the reasonableness of DPHP's methodology and the County's "approval." It is uncontested that DPHP notified the County of the proposed price increase over a month prior to the increase being announced in June 2021, based on a survey dominated by Newport Beach marinas. (1 AA 414-416.)

However, on May 17, 2021, the Chief of Staff for County Supervisor Bartlett requested that DPHP provide a "comparative analysis of slip rates comparing current and projected DPH rates

to other SoCal marinas ….” (4 AA 1172.) DPHP’s SoCal marina “survey” was done in or around early July 2021. (4 AA 1179, 1181.) This “survey,” however, had at least two key flaws: 1) it lacked prices for a large number of marinas, including some close by marinas (Oceanside, Long Beach, San Pedro, Redondo Beach) and all of Ventura and Santa Barbara County, but included all the high price Newport Beach marinas; and 2) the survey did not support the announced rent increases because the average prices in some categories were up to 22% lower than the increased rents proposed by DPHP. (4 AA 1179; 1 AA 398.)

Even more problematic, DPHP apparently did not present this purported survey to the County. Instead, DPHP presented a significantly truncated version of the survey (See 4 AA 1181-82.) The email to the Supervisor’s office attached this modified version, which not only removed any reference to the missing marinas (which would have revealed the incomplete nature of the survey) but also deleted a number of other lower priced marinas so that the survey would support the price increase. (*Ibid*.)

A simple comparison of the “SoCal Average” prices in each survey shows the impact of the truncation.

Slip Size	**SoCal Avg. - Original**	**SoCal Avg. - Truncated**	**New DPHP Rate**
21	21.80	26.48	17.15
25	18.40	21.57	18.75
30	22.07	25.99	24.60
35	23.03	27.32	26.00

40	26.22	31.09	33.45
45	27.83	33.73	34.10
50	30.73	36.99	35.35
55	30.79	42.04	39.90
60	36.86	43.10	43.15
65-85	42.38	47.60	43.15

(Comparing 4 AA 1179, 1182, and 1184.) Based upon a comparison of these numbers, it is evident that the statement to the County that DPHP's proposed rates were "below or flat to the So Cal averages in most slip sizes" is only true based on DPHP's selectively crafted version of the "survey." (4 AA 1181.)

Furthermore, the letter sent to the boat slip holders on June 21, 2024, including Tenants, did not make any reference to a Southern California survey, relying instead solely on Orange County averages. (1 AA 395.) Of course, this makes sense given that DPHP's SoCal "survey" appears not to have been completed when it sent its notice to the slip holders as required by the Master Lease. Therefore, either the notice to the boaters was deficient, failing to provide boaters with the actual methodology and rationale for the increased rental rates, or the notice was accurate, relying solely on Orange County averages, and the question of the reasonableness of this methodology remains. Simply put, one way or another, DPHP's methodology and rationale and its communication of the same does not hold water.

DPHP cites Supervisor Bartlett's September 21, 2021 letter (sent 10 days before the price increase went into effect) as evidence that it fulfilled its Section 11.9 obligations. (RB 40.) DPHP, however, fails to note that it was the County that had requested a Southern California survey (rather than just an Orange County one). And, in the end, it appears the County received and relied on only the altered version of that purportedly broader survey. (1 AA 420; 4 AA 1172, 1179, 1181-82, 1184.) Thus, there are disputed material facts regarding not only the reasonableness of DPHP's surveys but the nature and scope of the County's informal "approval" of the proposed rates, including the credibility of post-hoc statements by both DPHP and the County.

The fact that the County elected not to challenge the rate increase only further supports Tenants' third-party status. DPHP actually acknowledges that "the third-party beneficiary doctrine is intended to protect third parties regarding whom specific contractual promises have been made when the contracting party does not enforce those promises itself due to either incapacity ***or inaction***." (RB 41 [emphasis added].) Inaction describes the case at hand and supports a finding of third-party beneficiary status.

DPHP, however, continues to rely on *Marina Tenants* to support its position that there is no third-party beneficiary status here. The facts in *Marina Tenants*, however, are also distinguishable. Indeed, *Marina Tenants* actually supports Tenants' contention that Tenants are third party beneficiaries.

First, the Court of Appeals in *Marina Tenants* disagreed with the trial court and found that the contractual clause requiring "fair and reasonable" rent was susceptible to the interpretation that tenants were intended beneficiaries and finding that language in the lease "appears to have been designed to benefit the Tenants." (*Marina Tenants Assn. v. Deauville Marina Devp. Co.* (1986) 181 Cal.App.3d 122, 130-32.) Second, the court ultimately concluded that the tenants could not state a cause of action because they were requesting greater rights than those possessed by the county. The language of the *Marina Tenants* lease was explicit that the county's determination was "final and conclusive" on whether the prices were "fair and reasonable." (*Id.* at 130-31 ["[I]n the event the Director … 'notifies Lessee that any of said prices are not fair and reasonable, Lessee shall have the right to confer with Director and to justify said prices. … The Lessee may appeal the determination of the Director to the Board of Supervisors, **whose decision shall be final and conclusive**.'"].) Based on this language, the Court held that because the county itself could not challenge the final and conclusive determination under the lease, the tenants could not challenge it either. Furthermore, the tenants were seeking compensation for years of past rent, but only prospective relief was afforded under the lease. (*Ibid.*)

Here, by contrast, the Tenants are seeking to enforce the same rights possessed by the County. There is no established administrative procedure which the Tenants are circumventing. There is no requirement for approval by the County let alone sole

authority for determining the reasonableness of DPHP's methodology. There is no "final and conclusive" language. In fact, Section 11.9 affords the County and the Tenants the very same notice rights. (2 AA 973.) Furthermore, Tenants here filed their Complaint prior to the rates going into effect and challenged both DPHP's and the County's failure to abide by the terms of the Master Lease. *Marina Tenant*s is inapposite. (Compare *Zigas v. Superior Court*, *supra*, 120 Cal.App.3d at 838-39 [provisions of HUD low-cost housing agreement that restricted rental fee increases were designed to protect the tenants against arbitrary increases and rendered the tenants' third-party beneficiaries to the housing agreement]; *Amaral v. Cintas Corp. No. 2*, *supra*, 163 Cal.App.4th at 1194 [living wage ordinance was clearly intended to benefit employees by requiring payment of higher wages, and employees on city contracts were intended third-party beneficiaries of city contracts requiring compliance with living wage ordinance and could sue for breach].)

In the end, DPHP's brief does nothing to undermine the potency of Tenants' arguments regarding their status as third-party beneficiaries and their challenge to the reasonableness of DPHP's methodology. The trial court erroneously granted summary adjudication on Tenants' breach of contract claim in favor of DPHP despite the fact that both the intent of the parties as to third-party beneficiaries and the reasonableness of the rental increase by DPHP are questions of fact necessarily reserved for a jury. The judgment should be reversed and remanded for trial on the merits.

D. DPHP Does Not Dispute that It Failed to Address All of Tenants' Allegations for the UCL Claim, and the Motion for Summary Adjudication Fails for this Reason Alone.

On its motion for summary adjudication, DPHP failed to address all the allegations in Tenants' complaint for DPHP's violations of California's Unfair Competition Law ("UCL") (Cal. Bus. & Prof. Code, § 17200 *et seq*.). Notably, DPHP in its brief does not challenge this argument. Rather than point to a portion of the record where it did indeed address these allegations, DPHP attempts to avoid the consequences of this failure by covering over this gap, now making arguments about Tenants' failure to identify any provisions related to dock maintenance or any harm to Tenants resulting therefrom and contending that its threatened slip fee increases did not violate the Tidelands Grant, the Public Trust Doctrine, or the Harbors and Navigation Code, Section 40. (RB 46-50; see also 1 AA 76 [DPHP's motion on the UCL claim focusing solely on the quasi-monopoly allegations]; 2 AA 0564, lines 4-24 [Tenants opposition to DPHP's motion on UCL claim raising DPHP's failure to address all of Tenants' allegations; 4 AA 1287-1288 [DPHP failing to address the inadequacy of its motion on Tenants' UCL claim, instead pointing to fn. 3 of its moving papers, which is for the breach of contract claim not the UCL violation].) DPHP, however, cannot raise facts and arguments now that it did not assert in its motion before the trial court. (See, e.g., *Brantley v. Pisaro* (1996) 42 Cal.App.4th

1591, 1601 [reviewing court will consider "only the facts properly before the trial court at the time it ruled on the motion"].)

The sole UCL allegation that DPHP focused on in its motion for summary adjudication was Tenants' allegations of a monopoly by DPHP. (1 AA 0126, UMFs 181 and 182.) DPHP did not address allegations regarding dock maintenance or threats regarding excessive slip fee rentals in violation of other provisions of law. (*Ibid.*) This failure was fatal to its motion for summary adjudication of the third cause of action. (*Jameson v. Desta* (2013) 215 Cal.App.4th 1144, 1165 [granting summary adjudication erroneous where movant did not address some of the allegations as to that cause of action in the complaint and, therefore, failed to meet its initial burden of production]; *Tesselle v. Mcloughlin* (2009) 173 Cal.App.4th 156, 172, 173 ["'[A] summary judgment motion necessarily is addressed to the pleadings," and "ignoring a key allegation" is a "fatal flaw."].)

As noted in Tenants' Opening Brief, despite this failure of DPHP to meet its initial burden, the Court erroneously faulted Tenants for having failed to produce any evidence on allegations DPHP did not challenge. (AOB 50-51.) This ruling was clearly contradictory to the established standards for summary judgment. (*Consumer Cause, Inc. v. SmileCare* (2001) 91 Cal.App.4th 454, 468 ["There is no obligation on the opposing party … to establish anything by affidavit unless and until the moving party has by affidavit stated facts establishing *every element* … necessary to sustain a judgment in his favor …."].)

There is no justification for the trial court's determination to grant summary adjudication on Tenants' third cause of action for unfair competition. DPHP failed to meet its initial burden as the moving party and its motion should be denied.

III. CONCLUSION

Nothing in DPHP's responding brief undermines the fact that Tenants have established that the trial court erred in granting summary judgment to DPHP. Triable issues of material facts remain on foundational issues like Tenants' third-party beneficiary status and the reasonableness of DPHP's pricing methodology. Furthermore, the trial court failed to comply with the mandatory strictures applied to summary judgment motions, thereby robbing Tenants of their right to present their case in full to a jury. Accordingly, Appellant Tenants respectfully request that this Honorable Court reverse the judgment issued in favor of DPHP and remand for trial on merit.

DATED: June 13, 2024 LEX OPUS

/s/ Lori L. Speak

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CERTIFICATE OF COMPLIANCE PURSUANT TO THE CALIFORNIA RULES OF COURT, RULE 8.204(c)(1)

Pursuant to the California Rules of Court, Rule 8.204(c)(1), I certify that the foregoing brief has a typeface of 13 points, is at least one-and-a-half-spaced, and based upon the word count feature contained in the word processing program used to produce that brief contains 8376 words.

DATED: June 13, 2024

/s/ Lori L. Speak
Lori L. Speak

PROOF OF SERVICE
STATE OF CALIFORNIA, COUNTY OF ORANGE

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action; my business address is 2100 N. Broadway, Suite 210, Santa Ana, California 92706.

On June 13, 2024, I served the foregoing documents described as:

APPELLANT'S REPLY BRIEF

on the interested parties in this action.

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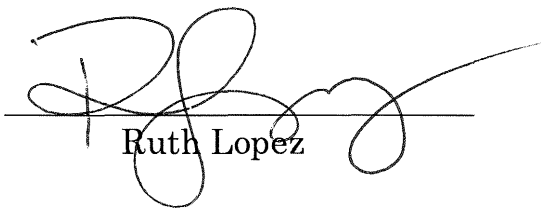

Ruth Lopez