JAMS ARBITRATION
No. 1220049392

MARINA CITY CLUB CONDOMINIUM OWNERS ASSOCIATION,
Claimant and Respondent by Counterclaim,

and

ESSEX MARINA CITY CLUB, LLC; ESSEX MARINA CITY CLUB, L.P.,
Respondents and Counterclaimant.

FINAL AWARD

Counsel:

Ricardo P. Cestero, Esq.
Daniel Stone, Esq.
Greenberg Glusker Fields Claman & Machtinger LLP
1900 Avenue of the Stars, Suite 2100
Los Angeles, CA 90067-4590
310/553-3610 310/553-0687 (fax)
rcestero@greenbergglusker.com
Counsel for Claimant

Paul S. Malingagio, Esq.
David DeGroot, Esq.
Sheppard, Mullin, Richter & Hampton LLP
333 South Hope Street, 48th Floor
Los Angeles, CA 90071-1448
213/620-1780 213/620-1398 (fax)
pmalingagio@sheppardmullin.com
Counsel for Respondents

Arbitrator:

Richard Chernick
JAMS
555 West Fifth Street, 32nd Floor
Los Angeles, CA 90013
213/253-9790 213/620-0100 (fax)
rchernick@jamsadr.com

Place of Arbitration: Santa Monica, California

Date of Final Award: December 16, 2015

THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the Settlement Agreement dated June 30, 1994 (Ex. 5), and having examined the submissions, proof and allegations of the parties, and having issued an Interim Award, now finds, concludes and issues this Final Award as follows:

I. Introduction and Procedural Statement

The Marina City Club ("MCC") is an apartment and condominium complex located on land leased form the County of Los Angeles in Marina del Rey, California. Respondents ("Essex") are the successors to the original developers of MCC (J.H. Snyder & Co.), having purchased Snyder's interests in 2004. Claimant Condominium Association represents the 600 individual condominium owners (actually Sublessees of Respondents, who are the Master Lessees of the County and Master Sublessors) ("COA"). MCC is a large, mixed use complex consisting of 600 condominium units and 101 rental apartments (Promenade Apartments) owned and operated by Respondents together with extensive recreational (including 302 boat slips, pools, tennis courts, health and fitness club, *etc*.) and parking facilities and a variety of commercial users. *See* Ex. 35. MCC is managed day-to-day by Seabreeze Management Co.

These parties are subject to several operative documents (described in some detail below) which establish their respective rights. Key provisions address how expenses for the operation, maintenance and repair of MCC are to be shared between them and how disputes regarding those issues are resolved. A dispute arose in 2014 between Essex and COA regarding the sharing of the cost of three major repairs claimed to be needed in MCC ("Proposed Repairs"). A Demand for Arbitration was filed on October 14, 2014, and a Response and Counterclaims on January 8, 2015. The Demand and the Counterclaims each seek a declaration regarding the sharing of the cost of the Proposed Repairs to MCC, as described more fully below.

The Arbitrator was selected as the sole arbitrator pursuant to the arbitration provision of the Settlement Agreement between the parties' predecessors-in-interest (Ex. 5, ¶¶ 1, 2, 6). Various orders were issued regarding the procedure for the arbitration. Order dated January 12, 2015; Order dated April 3, 2015. A Final Status Conference was conducted on August 18, 2015.

The Evidentiary Hearing. The hearing was conducted on August 25-27, 2015. Each side offered documentary evidence at the hearing, and such evidence was admitted without objection (Ex. 3-8, 10-12, 14, 23, 28, 29, 32-34, 36, 37, 39, 40, 42-44, 46, 49, 53, 57, 63, 65, 67-69, 503-506, 509, 511, 512, 514, 525, 575, 583, 595, 604, 639, 668-675, 678, 680-683,708, 736, 737, 752, 767, 769, 802, 804, 805, 832-835, 862, 863, 865, 872, 876 and 991-998).

Each side called witnesses and cross-examined opposing witnesses: Mark Fleishman, Nate Holden, Mark Baldus, Alexandria Pollock, Adam Berry, Karen Seemann, Jerome Simonoff, John Laurain (expert), John Van Trigt (expert) Coral Hansen (expert), Gerald Kelly and John Ellis (expert). The hearing was reported by Pamela A. Stitt, CSR No. 6027.

At the conclusion of the presentation of evidence, the parties stated that they had no further evidence to offer as to this phase of the proceeding; the cause was argued orally on August 27, 2015. Thereafter, Respondents filed a letter brief as to arbitrability on September 3, 2015, and Claimant filed a response on September 11, 2015. The matter (as defined in Scheduling Order No. 2, ¶ 2(b))[1], was submitted for decision on the latter date.

The Interim Award found substantially for Claimant; it determined that Claimant was the prevailing party and set the process for submission of a fee application. That issue is determined below.

II. Facts

The factual findings that follow are necessary to the Award. They are derived from admissions in the pleadings and the testimony and evidentiary exhibits presented at the hearing. To the extent that these findings differ from any party's position, that is the result of determinations by the Arbitrator as to credibility and relevance, burden of proof considerations, legal principles, and the weighing of the evidence, both oral and written.

Matter in Dispute. Essex has proposed to MCC's Management Council (created by the Operative Documents and described below) that the following major repairs are necessary: reroof the Promenade Apartment; repair the Boat Owner's Garage and repair the Promenade Garage (including seismic repairs). The nature of each Proposed Repair is addressed below to the extent it bears on the question of allocation of responsibility for the funding of the respective repair. As the documents reveal, there are operative provisions between the parties that define a "shared area" and how shared area expenses are to be borne by the respective parties. Here, Essex contends that all of the Proposed Repairs are to shared areas and their cost therefore ought to be allocated 86.6% to COA and 13.4% to Essex, which is the default allocation of Ex. M (Ex. 4) where there is no other agreed allocation. COA believes that the operative documents require a different allocation based on the percentage of direct use of the respective elements of the Proposed Repair sites within MCC by COA vs. Essex. Their competing requests for declaratory relief track these positions.

[1] "The issues of the amount of attorneys' fees and costs to which any party may be entitled . . . shall be bifurcated and determined subsequent to the Hearing. The entitlement, if any, to an award of attorneys' fees and costs . . . shall be determined as part of the Hearing." Order dated April 3, 2015, ¶ 2(b). (The reference to punitive damages in this Order was erroneous; no party sought such damages in this proceeding.)

Operative Documents. The Second Amended and Restated Master Lease ("Master Lease") between the County and Snyder is dated in 1987 (Ex. 503, 504). The Master Sublease between Snyder and the Condominiums is dated in 1988 (Ex. 506). An Amendment was executed in 1992 (Ex. 4), and, after litigation between COA and Snyder (including a bankruptcy proceeding), the parties entered into the Settlement Agreement (Ex. 5). Provisions of each of these documents are germane to the issue of how and to what extent repair and maintenance expenses of MCC are shared as between Essex and COA and how that allocation shall be determined. The COA owners are not parties to all of these agreements, but each owner signed an Assignment and Assumption of Sublease upon the purchase of their respective units, binding them to all of the operative documents. *E.g.*, Ex. 8, 511.

The Settlement Agreement (at § 1) establishes a Management Council composed of two representatives each from Essex and COA with a fifth "neutral" position. That position, at all relevant times, has not been filled or was not functional. Section 6 of the Settlement Agreement provides that the Management Council is charged with the responsibility to review records of the management company relating to the allocation as between the Towers Common Areas and the Shared Common Areas of any income or expense item set forth in the MCC budget. In the event of an impasse in the allocation of shared expenses, the Settlement Agreement further provides that

> any and all disputes among the parties concerning the reasonableness, accuracy or propriety of any such allocation shall be resolved by arbitration in the manner set forth in paragraph 2, subject to the County's existing rights regarding determination of such allocation and any rights that any of the parties may have to negotiate with the County concerning, or lobby the County for, a modification thereof.

Ex. 5, § 6. *See also* § 1, which defines any matter which is subject to a deadlock between the COA representatives and the management representatives as subject to arbitration pursuant to § 2 (which provides the process to be followed in any arbitration):

> Notwithstanding the forgoing, with the consent of a majority of the Asssociation Representatives and the Debtor Representatives, which consent may be revoked at any time, the Board of Directors and the Debtor may defer or discontinue the appointment of the Independent member; provided, however, that, if at any time any two or more members of the Management Council (other than the Independent member) so request, an Independent Member shall be appointed or re-appointed. At such times as there is no Independent member of the Management Council, in the event of deadlock or a tie vote among the members of the Management Council, the subject matter that gave rise to such deadlock or tie vote shall be subject to arbitration as set forth in paragraph 2, below. In addition, in the event that the Debtor Representatiaves and the Association Representatives elect to have an Independent member on the Management Council but canot agree upon a mutually acceptable Independent Member, such

Independent Member shall be appointed by arbitration as set forth in paragraph 2, below.

Key Provisions. The key provisions of the Operative Documents that must be interpreted to answer the allocation question presented by the Demand and Counterclaims are as follows:

Master Lease: § 10.01.D provides in part:

10.01.D. Operation of Three (3) Towers.

(i) Lessee [Essex] shall remain responsible for the maintenance, repair, restoration and operation of the three (3) towers containing the Apartments Approved for Prepaid Subleases [condominiums] and shall operate and maintain such towers as an integrated part of its overall operation of the Premises. Lessee shall establish and maintain a capital fund reserve account with respect to the Apartments Approved for Prepaid Subleases in accordance with the Approved Operation Budget, a copy of which is attached hereto and incorporated herein as Exhibit M. This fund shall be used for the purpose of maintaining the Premises as required by this Lease, and for replacement of functional building systems, but funds so collected may only be used for maintenance or refurbishment of those portions of the Premises and for the three (3) towers, as provided in Exhibit M, and only a proportionate amount of such total costs shall be borne by the Prepaid Sublessees [COA] as provided for in Exhibit M.

(2) Lessee shall be entitled to charge Sublessees for their proportionate share of the actual costs of operation, in accordance with the Approved Operation Budget and for their share of the capital fund reserve, but all such money collected shall be used for maintenance, replacement and rehabilitation with no premium or collection charge accruing to Lessee. This provision shall not affect Lessee's right to charge (a) a transfer fee and obtain a profit therefor as provided in subsection 5.12.D, and (b) a reasonable management service fee; provided such service fees shall not exceed the fees customarily charged for such services by nonrelated management companies.

Ex. 503, 504 (emphasis supplied)

The Master Sublease, at § 4.2.2 provides in part:

4.2.2. Operating Expenses.

"Operating Expenses" shall mean actual and estimated costs, direct and indirect, of maintenance, management, operation, repair, renovation, and replacement (subject to the provisions of Article 10 below) and other similar costs or expenses of or with respect to the Property including, without limitation: the costs of any repairs to the Property and payment for all centrally metered utilities, water

charges, and mechanical and electrical equipment in or on the Property; payment of all charges for any and all utilities which serve individual apartment units but which are subject to a common meter; any costs of trash collection and removal; the costs of sanitary and storm sewer systems, including maintenance thereof and payment of sewage disposal charges to the County or other public agency; the costs of road, walk and parking lot maintenance and operation; the costs of management and administration by Sublessor or the Management Company, including, without limitation, a reasonable management fee (if the Property is managed by Sublessor), and compensation paid by Sublessor to the Management Company or other managers; costs of accountants, attorneys and other employees; the costs of all gardening, security and other services benefiting the Property; the costs of insurance (including but not limited to fire, casualty, rental interruption and liability insurance), worker's compensation insurance, and other insurance covering the Property; and the costs of any other item or items incurred by Sublessor or the Management Company in good faith for any reason whatsoever in connection with the Property for the maintenance, management, operation, repair and replacement of the Property. Operating Expenses shall also include all taxes, including but not limited to property taxes and possessory interest taxes, and general and special assessments (including betterment assessments and improvement bonds of governmental authorities and political subdivisions) and other charges of any description, whether in addition to or in substitution for taxes or assessments levied, which are now or which may hereafter be levied against all or any portion of the Property, and a Condominium Sublessee's obligation to pay a portion of such taxes and assessments shall be in addition to the obligation to pay taxes and assessments set forth in Section 4.3 below.

Operating Expenses shall also include the costs of funding and maintaining the subleasehold condominium regime's share of a capital fund reserve account in accordance with the Approved Operation Budget attached as Exhibit M to the Master Lease. These funds shall be deposited into a separate account and Sublessor shall be allowed to use such finds for the purposes of maintaining the Property and for replacement of functional building systems, but funds so collected may only be used for maintenance or refurbishment of those portions of the Property as provided in Exhibit M to the Master Lease, and only a proportionate amount of such total costs shall be borne by the Condominium Sublessees as provided in such exhibit. Any interest earned on such funds shall become a part of such fund.

Operating Expenses shall not include (i) any items or sums not incurred as costs or expenses in connection with the Property; or (2) that portion of any costs described in this Section which is allocable to those facilities comprising the Property other than the residential units, which costs and their allocation are set forth in Exhibit E hereto ("Non-Residential Cost Allocation").

Ex. 506 (emphasis supplied)

Exhibit M to the Master Lease (Ex. 3, and, as amended in 1992, Ex. 4) contains agreed allocations of expenses between Essex and COA. Ex. M, as amended in 1992, is attached hereto as "Exhibit A." It creates allocations for certain specific categories of expenses based on estimates of direct use (*e.g.,* elevators and electrical), but for many categories of expenses it adopts the default (agreed) allocation of 86.6 percent and 13.4 percent for COA and Essex respectively, including, importantly, the last line of the spread sheet – "Replacement Reserves." (The earlier version of Ex. M had a different default allocation because the Club Facilities had a 10 percent allocation of shared common area expenses which was eliminated in 1992 and redistributed, somewhat unequally, to Essex and COA (*see* Ex. 4).)

In addition to the spread sheet allocations themselves, several of the footnotes to Ex. M contain important provisions which are of assistance in determining the parties' mutual objective intent in the allocation of shared area expenses:

> INTRODUCTION
>
> The following footnotes are an integral part of the schedules relating to allocation of expenses for the Marina City Club after the sale of long term leaseholds to the public. In certain categories, there are assumptions made which require further support and clarification, and as such may be changed by receipt of updated information. The account descriptions are meant to follow the order of the attached schedules.
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> ***
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> ALLOCATION OF UNIT MAINTENANCE, EXPENSE BETWEEN TOWER UNITS AND PROMENADE UNITS
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> The 101 units owned by the developer will be responsible for a pro-rata share of all common area maintenance expenses. Certain cost centers are allocated based on assumptions related to direct use, but in most cases, the allocations are based on 13.4% of costs to the promenade unites and 86.6% of costs to the tower units. The allocation percentages are based on the total square footages of the promenade and tower units.

Ex. 3[2]

Finally, Ex. B to the Settlement Agreement (Ex. 5) defines the term "Project" and identifies the areas that are not included within the definition of "Towers Common Area" or "Shared Common Area." This Ex. B is attached hereto as "Exhibit B."

[2] If the allocation had been based on number of units rather than square footage of the respective structures, the outcome would have been about the same – 101/701 is 14.4 percent and 600/701 is 85.6 percent.

The Parties' Course of Dealing. Both sides cite prior events which they claim constitute a course of dealing that informs the meaning of these provisions as they relate to the allocation of maintenance and repair of shared common areas and particularly the Proposed Repairs.

Claimant cites the consistent allocation of responsibility to Essex and its predecessor for maintenance of the Promenade Apartments, from the operation of which they retain all economic benefits. During limited periods the maintenance crew supervised and paid by Seabreeze Management Company (which works only on shared areas) would perform some maintenance on the Promenade Apartment roof, but generally all of the work relating to the Promenade Apartments has been performed by maintenance crews directed exclusively and paid entirely by Essex or its predecessor. (When the County required repairs to the exterior railings of the Apartments, COA refused to share in that expense and Essex effected and paid for those repairs. *See* Ex. 14 (Kelly (Essex rep to Management Council) letter acknowledging that Essex agreed to be solely responsible for the "cost of repair, maintenance, replacement of any component of the Promenade from the exterior finish to the inside, and including the balconies and railings" if COA agreed to assume similar responsibility for the towers. This was not an admission but a proposal that was not accepted. *See* Ex. 14, 583.)

Respondents point to the parties' consistent practice of allocating expenses between them over several years in accordance with Ex. M and without consideration of any perceived or actual benefit or direct usage.[3] From Respondents' perspective this included extensive renovation of smoke detectors, CO2 detectors and fire control panels in the Towers buildings; replacement of carpeting in the Promenade Apartments and Towers buildings and refurbishment of the laundry rooms in the Promenade Apartment building. This issue is further addressed below both in § III.A and § III. B.

Other material facts are addressed in the Analysis, below.

III. ANALYSIS

Claimant bears the burden of proof by a preponderance of the evidence.[4] California law applies, as provided in the Settlement Agreement, (Ex. 5, § 13).

A. Principles of Interpretation.

It is the obligation of a court or arbitrator to ascertain the objective intent of the parties (Cal. Civil Code § 1636) from the "plain meaning" of the words they choose to use in their agreement, if that is possible (Cal. Civil Code § 1638) in order to give effect

[3] Some of these allocations were objected to by COA, but to no avail.

[4] Respondents' declaration seeks application of the parties "default" allocation provision; to the extent Claimant is unsuccessful in proving its entitlement to relief, effectively the default would apply without regard to the declaration sought by Respondents in the Counterclaim.

to their mutual (objective) intentions at the time of contracting. If contractual language is clear and explicit, it governs. *Bank of the West v. Superior Court*, 2 Cal. 4th 1254, 1264 (1992). The disputed provisions must be read in their entirety, and a meaning that encompasses and is consistent with all of the pertinent provisions should be determined if possible (Cal. Civil Code § 1641; *Zalkind v. Ceradyne, Inc*., 194 Cal. App. 4th 1010, 1027 (2011)), avoiding an interpretation that would render part of the agreements surplusage. *Ticor Title Ins. Co. v. Rancho Santa Fe Ass'n*, 177 Cal. App. 3d 726, 730 (1986).

None of these parties actually participated in the creation of the Operative Documents. Nevertheless, they have operated together with the direction and guidance of these documents, and extrinsic evidence may be helpful in determining the meaning they have given to an otherwise ambiguous clause. *Pacific Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co*., 69 Cal. 2d 33, 37-39 (1968). Such evidence might include as well the object, nature and subject matter of the contract and the circumstances under which it was made. *Western Camps, Inc. v. Riverway Ranch Enterprises*, 70 Cal. App. 3d 714, 723 (1977). The construction given to the contract by the acts and conduct of the parties with knowledge of its terms, and before any controversy has arisen as to its meaning, is admissible on the issue of the parties' objective intent. *Winet v. Price*, 4 Cal. App. 4th 1159, 1165 (1992); *Universal Sales Corp. v. Cal. Etc. Mfg. Co*., 20 Cal. 2d 751, 761 (1962). *See also* CACI 318; Cal. Civil Code §§ 1647, 1648.

B. Are the Proposed Repairs to a "Shared Common Area"?

The Settlement Agreement gives jurisdiction to the Management Council over those areas of the Project that are within the Towers Common Area and the Shared Common Area. Ex. B to the Settlement Agreement defines those areas in the negative by specifying what is not included in those two categories. (*See* Ex. B.) Pertinent to this dispute, Ex. B lists the "areas clearly marked as boat slip tenant parking underneath tennis courts 5 and 6, consisting of approximately 102 spaces" and, "Within the Promenade Apartments "Interior apartment rental areas, Public restroom areas [and] Residential office space." Thus, those areas are not "Shared Common Areas."

The parties dispute (i) whether or not each of the Proposed Repairs is to a Shared Common Areas and (ii) whether or not a determination that the area is "shared" precludes a finding as to direct use that would make the allocation other than the default percentage allocation of Ex. M.[5] Issue (i) is addressed in this Section; Issue (ii) is addressed in § III.C, below.

Findings regarding the Proposed Repairs:

1. Promenade Apartment Roof.

[5] The parties have failed to point to any provision of Ex. M that prescribes an allocation other than the default allocation for any of the Proposed Repairs.

This structure is not identified in Ex. B, so it is in that sense definitionally a "shared common area." The Arbitrator finds, however, that the Promenade Apartment roof is in fact not a Shared Common Area based on the absence of any use or interest in that area by COA and because Respondents enjoy the entire economic benefit of the Promenade Apartments as to which the roof is an essential appurtenant structure to that use.[6]

Routine maintenance of the roof has been performed from time to time by the management company maintenance staff (2004-2009 and 2014-present). Between 2009 and 2014 routine maintenance was provided by Essex's maintenance staff. Baldus TR 120-122, 143. No explanation was offered for this somewhat inconsistent practice.

The effect of these findings is addressed in §§ III.C and D, below.

2. Boat Owners' Garage.

(Upper) Level 2 is substantially or entirely excluded as a Shared Common Area by Ex. B: "areas clearly marked as boat slip tenant parking underneath tennis courts 5 and 6, consisting of approximately 102 spaces . . ." The portion of this level that is not occupied by boat owners and their guests[7] is occupied by the car wash, a commercial tenant of Essex.[8] Thus, this level is entirely in the control and operated for the economic benefit of Essex. It is therefore entirely the responsibility of Essex. *See* TR 386-387 (Seemann).

(Lower) Level 3 contains 161 spaces and is subject to a variety of uses. A majority of the spaces are controlled by Essex and are made available to its commercial tenants. Eleven spaces are controlled by Claimant and COA receives the economic benefit of the rental of those spaces. Some of the spaces are used by Seabreeze Management as parking for its employees and some of its subcontractors. Visitors are also directed to this level. There is also a storage area that is shared space and an area used by the "common area" maintenance crew as directed by the management company. Given the varied uses of this level of the Boat Owners' Garage, it is not possible to make any reasonably precise allocation of use as between COA and Essex.

The effect of these findings is addressed in §§ III.C and D, below.

3. The Promenade Garage.

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[6] Respondents (somewhat under duress) fixed the exterior railings and balconies on the Promenade Apartments when COA refused to agree that these structures were shared common area. (The County had cited these structures as a potential default under the Master Lease and Essex was therefore compelled to make the repairs without participation of the COA in order to avoid a default under the Master Lease.)

[7] There is a dispute as to the actual number of spaces, but whatever the number, Essex controls all of them.

[8] The fact that COA owners may patronize the car wash does not change the nature of its use by a commercial tenant of Essex.

Both levels are shared but are predominantly within the control of Essex and operated for its benefit. The evidence established that about 22 percent of the spaces are used exclusively by Claimant and the remaining 78 percent are controlled by Respondent. *See* Ex. 32-34, 37. The upper level of the garage also had storage lockers which were controlled by Respondent and rented to individual Promenade Apartment tenants. These structures were removed about a year ago, revealing some of the structural damage which is the subject of the Proposed Repairs.[9]

The effect of these findings is addressed in §§ III.C and D, below.

4. The Top Decks of both Garages. These areas are conceded by both sides to be shared and there is no basis for any allocation other than the default percentage. See § III.C and D, below.

C. Do the Operative Documents Permit/Require Allocation on any Basis Other than 86.6 and 13.4 Percent for Areas not Specifically Accorded a Different Allocation in Ex, M?

Ex. M has been followed by the parties throughout the life of the project, and as well with the modifications effected in 1992 when the existing arrangements were amended (Ex. 4). The changes to the default allocation in that Amendment were agreed by both sides at that time.

The Management Council was created in 1994 by the Settlement Agreement in order to regularize the budgeting and management process for the Towers Common Area and the Shared Common Area. Ex. 5 and Ex. B thereto. The Settlement Agreement also created a resolution process (either a neutral fifth member or arbitration) to avoid an impasse between the two sides. The parties and their predecessors were certainly aware of the fact that the management of a complex such as MCC could be significantly harmed by an operating structure that effectively allowed one side to obstruct or delay significant necessary budgeting and management decisions, such as the need for major replacement or repair of an element of MCC.

The framework for the sharing of maintenance and repairs was created by Ex. M in its original form. For those items that have specific allocations, they were based on assumptions and calculations as to the extent of direct use. *See* Ex. M, Footnote quoted above headed "Allocation of Unit Maintenance Expenses between Tower Units and Promenade Units." Ex. M acknowledges in the Introduction (also quoted above) that some of the allocation decisions were based on "assumptions that may require further support and clarification and as such may be changed by receipt of updated information." Ex. M, Introduction. This no doubt addressed categories where specific allocations had

[9] It is suggested by Claimant that the maintenance of the lockers hid the effects of water intrusion damage and thus made the damage worse because it was only discovered after the lockers were removed. The Arbitrator does not believe that these facts affect the issue of the allocation of repair expenses which are the subject of this proceeding because *inter alia*, they are irrelevant to the allocations contemplated by Ex. M.

been made[10] as well as those where there was insufficient information to make a specific allocation that therefore defaulted to the 86/13 split. Thus, the parties recognized that circumstances might change or additional information might be obtained that would allow a more precise or different allocation based on the parties' respective direct use of particular line items. This necessarily applies as well to the "Replacement Reserves" line of Ex. M which is directly applicable to the Proposed Repairs.

This interpretation of the Operative Documents squares with the provisions of the Settlement Agreement which created the Management Council and imposed either a tie-break process or arbitration wherever the parties dispute the "reasonableness, accuracy or propriety of such allocation" (¶ 6) or arbitration where there is "a deadlock or a tie vote among the members of the Management Council [as to] the subject matter that gave rise to such deadlock or tie vote . . ." (¶ 1).[11]

This interpretation is also wholly consistent with a solution that addressed the parties' prior difficulties in reaching agreement on issues of allocation of expenses and repairs. The fact that the Settlement Agreement provisions have not previously been invoked to resolve an impasse in the manner sought by COA is attributable to the ability of the parties either to work out these issues in many cases or, in some cases, the choice of a party simply to forego the resolution process and to bear the expense entirely (as was the case of the Promenade Apartment railing repairs). It is also a function of the lack of a major expense or repair that was not able to be resolved by mutual agreement, as distinguished from the situation presented by the Proposed Repairs here.[12]

Thus, to the extent reliable and reasonably precise information exists to assess the direct use of a Shared Common Area, the parties are free to agree on an allocation different than the default allocation of 86/13. The Management Council, as part of its budget review process is where such issues should be addressed. To the extent the parties are unable to reach agreement on such issue, the arbitration process is intended to resolve such disputes.

Arbitrability of this Dispute: The parties do not dispute that this arbitration was properly commenced pursuant to the Settlement Agreement, ¶¶ 1, 2, 6. Claimant asserts

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[10] For example, "Maintenance" in Ex. M provides "it is possible that other developer activities may encounter similar costs and, in fact, there may be a responsibility for such costs." Other line items (e.g. Air Conditioning") recognize that "an analysis of each cost will be made to determine cost responsibility." *Id*.

[11] *See also* the provisions of ¶ 6 of the Settlement Agreement, which contemplate that the Management Council shall "confer with the Management Company . . . relating to the allocation . . . as between the Towers Common Areas and the Shared Common Areas:

> The Management Council will be governed by an annual operating budget prepared by the Management Company for the Management Council's approval. It is further understood and agreed that the Management Council shall have the final approval of the operating budget submitted by the Executive Council described in Paragraph H, hereinafter. Debtor, the Board of Directors and the members of the Management Council shall have the right to confer with the Management Company concerning and to review records of the Management Company relating to the allocation of as between the Towers Common Areas and the Shared Common Areas of any income or expense set forth on such budget.

[12] The Settlement Agreement contains a "no waiver" provision as well. Ex. 5, ¶ O.4.

that the parties' impasse as to the allocation issue is an arbitrable dispute such that the Arbitrator may determine whose interpretation of the Operative Documents is correct and what allocation is reasonable and proper. This necessarily incudes interpreting and applying the provisions of Ex. M to determine whether the proper allocation for the Proposed Repairs is something other than the default 86/13 split. Respondents assert that the Arbitrator may correct an erroneous allocation made by the Management Council (such as a mathematical or other error) but may not alter Ex. M and the default provision. This of course begs the question because it assumes the conclusion that the 86/13 allocation is immutable, which is the precise issue tendered for decision by the declaration Claimant seeks in this proceeding.[13]

Of course, because arbitration is a favored method of resolving disputes under the state and federal arbitration acts, *Moses H. Cone Memorial Hospital v. Mercury Construction Corp*., 460 U.S. 1 (1983); *Armendariz v. Foundation Health Psychcare Services, Inc.*, 24 Cal. 4th 83 (2000), arbitration clauses are interpreted broadly as to scope. *Coast Plaza Doctors Hosp. v. Blue Cross of California*, 83 Cal. App. 4th 677, 687 (2000). For example, the reference in ¶ 1 to "any and all disputes" suggests a broad form clause as to which the parties seem to have intended that any doubts as to scope be resolved in favor of arbitrability.

The language relied on by Respondents is in ¶ 6 – the Arbitrator may arbitrate "any and all disputes among the parties concerning the reasonableness, accuracy or propriety of such allocation." "Such allocation" refers not directly to Ex. M, but to the language in ¶ 6 – "the allocation as between the Towers Common Area and the Shared Common Areas." The issue of allocation is precisely what this dispute is about and makes this dispute fully arbitrable. But to the extent this clause may be limited in scope (a conclusion which appears not to be warranted), it is only a part of the arbitration agreement between the parties. Paragraph 1 addresses the creation of the Management Council and its structure (2 representatives from each side and, perhaps a fifth member), and contemplates the possibility that there would be an impasse if the vote on an issue were 2-2:

> At such time as there is no Independent Member of the Management Council, in the event of a deadlock or a tie vote among the members of the Management Council, the subject matter that gave rise to such deadlock or tie vote shall be subject to arbitration as set forth in paragraph 2, below.

Ex. 5 (emphasis supplied)

[13] Respondents concede that the Arbitrator has the authority to determine the scope of his own jurisdiction. *See* JAMS Rule 11(b), which was effectively incorporated into the parties' settlement Agreement when they selected the JAMS Rules and JAMS administration. *Greenspan v. LADT, LLC,* 185 Cal. App. 4th 1413 (2010); 191 Cal. App. 4th 486 (2011). Thus, if the Arbitrator adopts an interpretation of the operative documents with which Respondents disagree, it is a mere legal error rather than an act in excess of his power.

Thus, any matter that results in a deadlock on the Management Council is subject to arbitration. The respective responsibility for the Proposed Repairs as between COA and Essex is such a dispute.

Respondents concede that the Arbitrator has the power to determine a dispute as to whether a particular repair is to a shared area and whether a particular expense was correctly categorized as between different line items on Ex. M, but not to determine if a particular expense is "direct' or "allocable" and then to make that determination as to the extent of usage. This fine distinction is not supported by the language of the Settlement Agreement nor the footnotes to Ex. M.

There can be no doubt that the issue of the allocation of repair costs for the Proposed Repairs is deadlocked or tied 2-2 (as reflected in this arbitration itself). Thus, the dispute is arbitrable and the Arbitrator may decide that issue, which is broader grant of authority than that relied on by Respondents and contained in § 6.[14]

D. Based on the Above Findings, What is the Proper Allocation of the Cost of the Proposed Repairs?

The Arbitrator carefully considered the expert testimony of Claimant's appraisal expert, who valued the garage structures in an attempt to assess a reasonable direct use percentage. This testimony is rejected as speculative and without sufficient evidentiary basis on which to reach a reasonable, accurate or proper allocation under the Settlement Agreement.

Based on the factual findings above, the Arbitrator determines the parties' respective responsibility for the Proposed Repairs as follows:

1. Promenade Apartment Roof: Respondents shall bear the entire expense of this Proposed Repair.

2. Boat Owners' Garage: The roof is a shared common area and the default allocation applies. The Upper Level of the Garage is solely controlled by Respondents and is therefore their sole responsibility. The Lower Level is a shared common area and the default allocation applies. Thus, if Claimant bears 86.6 percent of two levels (173/300) and Respondents bear 13.4 percent of two levels and 100 percent of one level (126.8/300), Claimant must bear 57.8 percent of the aggregate expense of the Proposed Repairs of this structure and Respondents 42.2 percent.

3. Promenade Garage: The roof is a shared common area and the default allocation applies. The Upper and Lower Level of the Garage are shared based on their direct use – 22 percent for Claimant and 78 percent for Respondents. Thus, if Claimant bears 86.6 percent of one level and 22 percent of two levels (130.6/300) and Respondents

[14] The County approved the Settlement Agreement which confers on the parties, without further County participation, the right and obligation to arbitrate arbitrable disputes. Thus, this interpretation of the scope of the arbitration provision does not require any further County "approval" or participation.

bear 13.4 percent of one level and 78 percent of two levels (169.4/300), Claimant must bear 43.5 percent of the aggregate expense of the Proposed Repairs of this structure and Respondents 56.5 percent.

E. Attorneys' Fees and Costs.

The Settlement Agreement provides that the Arbitrator may award to the prevailing party all costs and actual attorneys' fees incurred in the arbitration together with all JAMS fees. *See also* JAMS Rules 24(f) and (g). The Arbitrator determines that Claimant is the prevailing party.

Claimant submitted an application for fees and costs on or about November 16, 2015. It included detailed declarations of counsel documenting and supporting Claimant's application of an award of fees of about $386,000 and costs of about $55,000 for a total of $441,000, all as detailed below. Subsequent submissions added $13,772 in fees for the review of the opposition and preparation of a reply and participation in the final hearing.

Respondents complained that the application did not include the actual billing statements and underlying time records and claimed that they must be produced. In response, Claimant asserted that its application, containing detailed declarations, was legally and factually sufficient and that the submission of original billing records would only require expensive and unhelpful redaction of extensive privileged entries the costs for which Respondents would not (unconditionally) agree to reimbursement. After several exchanges, the Arbitrator ruled that Claimant was not obligated to provide (redacted) records and that the issue of the sufficiency of the declarations would be determined in the course of ruling on the application.

Respondents' opposition is dated December 3, 2015, and Claimant's reply is dated December 11, 2015. A hearing was conducted on December 15, 2015.

Claimant's Application.

1. Legal and factual sufficiency of the Application: There is no requirement that actual billing records be submitted so long as counsel's declaration adequately describes the nature and extent of the work performed. *PLCM Group v. Drexler*, 22 Cal. 4th 1084 (2000). As described below, the declarations do, for the most part, adequately support the application.

2. Reasonableness of the rates charged: This issue is not disputed; Claimant's rates for all counsel and paralegals are more than reasonable. Given the qualifications of counsel and the obvious experience and skills demonstrated in the hearing, the Arbitrator has no doubt that the rates are more than justified.

3. Necessity and reasonableness of the hours billed: Counsel describe in declarations in detail the nature of the work performed in each phase of the case. The Arbitrator observed the legal work at the hearing, in prehearing filings and post hearing briefing, and, just as important, the obvious preparation which went into the hearing presentation – essentially the great majority of the work itemized in the evidence submitted. The Arbitrator regards all such work as reasonable and necessary. Counsel also described the necessary (extensive) document discovery and related document review. That issue is addressed below.

4. Relation of fees and costs billed to the outcome – contextual reasonableness: This was a difficult case with a complex underlying legal structure (governing documents) and a complex remedial aspect. The relevant records are extensive and go back many years. The case was hard-fought with skillful counsel on both sides. The outcome was more or less a total victory for Claimant in difficult circumstances and with an outcome that was not obvious to the Arbitrator until the very end of the process. The outcome was aided by the advocacy of counsel and makes the fees billed largely appropriate by any measure.

5. Costs: In addition to the usual costs, Claimant engaged two experts – an appraiser and an accounting expert. Both were believed by counsel to be reasonably necessary and each billed reasonable fees for their work. The fact that the Arbitrator rejected the testimony of the appraiser does require scrutiny of this cost (see below). The rejection of his testimony was based on the different methodology for the ultimate remedy adopted, but parts of the appraiser's factual presentation were somewhat helpful to the Arbitrator. All other costs, including JAMS fees and related charges, are recoverable as well.

Respondents' Opposition. A number of material points are raised:

1. The Agreement and applicable law require a finding of reasonableness of fees both as to rates and hours expended. The Arbitrator agrees and believes that Claimant met that burden.

2. Claimant bears the risk of choosing not to produce actual time records (whether redacted or not). The Arbitrator agrees; a careful review of the evidence submitted in support of the fee application has been made.

3. The claimed more than 1,000 attorney and paralegal hours are summarized in some detail, by functional category, in the declarations. With the exception of document review, the Arbitrator has percipient knowledge of the majority of activities which are reflected on the application and is satisfied that the hours,

in the aggregate, are reasonable in number. The description of the discovery process, including document review of the substantial records produced for inspection, supports the hours attributable to that activity. It is not the function of a court or arbitrator to review billing records line by line or entry by entry (although lawyers sometimes try to impose that burden). Rather, a general review of work performed as measured against the magnitude of the case and the issues necessarily addressed should suffice in order for the trier of fact to discharge his responsibility to determine the sufficiency of the evidence offered to support the fee application. The deletion of an entry here or there based on a finding of duplication of effort or inadequate description of a task is not a productive exercise for opposing counsel or the Arbitrator.

4. The "gestalt" approach to reasonableness – whether $441,000 should have been expended in a three-day arbitration (Opposition at pp. 5-6) – is both misleading and fails to appreciate the result achieved. This was an important dispute for both parties not only in terms of the magnitude of the dollars involved but also the consequential effect on future dealings. The Arbitrator would surmise that each side's counsel spent similar efforts in this matter; staffed the matter similarly, and performed similar work in both its nature and its extent. Counsel were of similar experience and seniority, and based on the Arbitrator's familiarity with the legal community generally and with Respondent's law firm in particular, he would be astounded if the aggregate fees and costs incurred Respondents differed materially from those incurred by Claimant.

5. The "simplicity" of the proof that was ultimately accepted by the Arbitrator (Opposition at pp. 7-8) ignores the alternate approaches to liability and damages offered by both sides. It is unfortunately the case that what appears at the end is rarely the first or only approach; the function of skilled counsel is to approach a matter broadly to assure that nothing is missed, even though the conclusion may later appear to be clear and simple.

6. The parties disagree about the justification for hours of legal time spent reviewing historical records and financial data. The dispute is both as to whether so much time was actually expended in this effort (565 hours) and, even if it was, whether that was a "productive" effort. The Arbitrator accepts Claimant's representations about the extent and nature of this work. The review of these records ultimately may not have proven to be particularly helpful, but litigation of this nature some review had to be done. (The review was conducted primarily by lower rate professional staff.) The declarations do not adequately justify the extent of review, and the 565 hours seems excessive. The Arbitrator therefore finds 125 such hours not to have been reasonably necessary. At the average rate of $350/hour, this is a deduction of $43,750.

7. Experts. The appraisal testimony of Mr. Laurain and the related damage model were rejected by the Arbitrator (see discussion at p. 14, above). The fee of this expert should be reduced by one-half for this reason. It was a legitimate effort by Claimant to try to quantify the portions of the proposed repairs that should be borne by each party; that the Arbitrator chose another methodology justifies the reduction. Claimed costs are therefore reduced by $8,250. The Arbitrator rejects the suggestion that the time expended by counsel in working with the expert and in presenting this remedial theory should not be compensated.

8. Pre-litigation demand letter. It is appropriate to compensate the work of counsel prior to the commencement of this proceeding and directly related to the prosecution of the claims. No deduction is warranted.

9. Possible duplication of work occasioned by trial continuance. Respondents fail to support this theory; *see* reply memorandum and declaration of Claimant.

Conclusion: Claimed fees of $43,750 and claimed costs of $8,250 are not allowed. The remainder of all fees and costs claimed are allowed in the net amount of $403,721.64.

FINAL AWARD

1. Claimant MARINA CITY CLUB CONDOMINIUM OWNERS ASSOCIATION has established its right to a declaration as to the allocation of Proposed Repair costs as follows:

   a. Promenade Apartment Roof: Respondents shall bear the entire expense of this Proposed Repair.

   b. Boat Owners' Garage: The roof is a shared common area and the default allocation applies. The Upper Level of the Garage is solely controlled by Respondents and is therefore their sole responsibility. The Lower Level is a shared common area and the default allocation applies. Therefore Claimant shall bear 57.8 percent of the aggregate expense of the Proposed Repairs of this structure and Respondents 42.2 percent.

   c. Promenade Garage: The roof is a shared common area and the default allocation applies. The Upper and Lower Level of the Garage are shared based on their direct use – 22 percent for Claimant and 78 percent for Respondents. Therefore Claimant shall bear 43.5 percent of the aggregate expense of the Proposed Repairs of this structure and Respondents 56.5 percent.

2. Respondents' request for declaration is not established and is denied.

3. Claimant is entitled to an award of attorneys' fees and costs against Respondents in the amount of $403,721.64..

This award resolves all issues submitted for decision in this proceeding.

DATED: December 16, 2015

_____
Richard Chernick
Arbitrator