GLOUCESTER CITY ORGANIC RECYCLING, LLC *Plaintiff,* v. CITY OF GLOUCESTER CITY *Defendant/Third-Party Plaintiff,* v. SOUTHPORT RENEWAL, LLC *Third-Party Defendant.*	:	SUPERIOR COURT OF NEW JERSEY LAW DIVISION / CAMDEN COUNTY DOCKET NO. CAM-L-620-21 *Civil Action* (CBLP) **ORDER**

THIS MATTER having been opened to the Court on cross-motions for summary judgment, and the Court having heard oral argument on March 22, 2024, and for the reasons set forth in the attached Memorandum Decision,

IT IS on this 22nd day of May, 2024 **ORDERED** that the motions are granted in part and denied in part as follows:

1. GCOR may not seek the recovery of expenses incurred by Organic Diversions;
2. The City's motion to bar recovery for other expenses claimed is DENIED;
3. The City's motion to bar recovery for damages allegedly sustained prior to August 15, 2019 is DENIED;
4. The City's motion seeking to bar recovery of lost profits as speculative is GRANTED;

5. The City's motion to bar the opinions of GCOR's expert Ms. Sommerville is DENIED;
6. The City's motion seeking dismissal of the claims for specific performance is GRANTED;
7. The City's motion seeking dismissal of the civil rights claims is GRANTED;
8. The City's motion seeking dismissal of GCOR's claims for breach of the implied covenant of good faith and fair dealing is DENIED;
9. The remainder of the City's motion seeking summary judgment is DENIED;
10. GCOR's motion seeking dismissal of the City's claim for tortious interference is GRANTED;
11. GCOR's motion for summary judgment in all other respects is DENIED; and
12. Southport's motion seeking summary judgment is DENIED.

STEVEN J. POLANSKY, P.J.Cv.

REASONS SET FORTH IN THE ATTACHED MEMORANDUM DECISION

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

GLOUCESTER CITY ORGANIC RECYCLING, LLC	:	SUPERIOR COURT OF NEW JERSEY LAW DIVISION / CAMDEN COUNTY
Plaintiff,	:	
v.	:	DOCKET NO. CAM-L-620-21
	:	*Civil Action*
CITY OF GLOUCESTER CITY	:	
	:	(CBLP)
Defendant/Third-Party Plaintiff,	:	
	:	**MEMORANDUM DECISION**
v.	:	
SOUTHPORT RENEWAL, LLC	:	
Third-Party Defendant.	:	

Decided: May 22, 2024

Jeffrey M. Brennan, Esquire, Baron & Brennan P.A. and Aileen Brennan, Esquire, Hill Wallack, LLP, Attorneys for Plaintiff Gloucester City Organic Recycling, LLC.

James M. Graziano, Esquire and Amy E. Pearl, Esquire, Archer & Greiner, Attorneys for Defendant/Third-Party Plaintiff, City of Gloucester City.

Robert S. Baranowski, Esquire and Megan Knowlton Balne, Esquire, Hyland Levin Shapiro LLP, Attorneys for Third-Party Defendant, Southport Renewal, LLC.

STEVEN J. POLANSKY, P.J.Cv.

I. INTRODUCTION

Before the Court are three summary judgment motions.

First, Defendant/Third-Party Plaintiff, City of Gloucester City ("the City") moves for partial summary judgment against Gloucester City Organic Recycling, LLC ("GCOR"), seeking the following relief: (1) Dismissing GCOR's breach of contract claim to the extent it has not suffered damages; (2) Striking Ms. Sommerville's report and testimony as a "net opinion"; (3) Dismissing GCOR's claims to an additional sublease on the Gloucester Titanium Property ("GT Property"); (4) Dismissing GCOR's claims for specific performance; (5) Dismissing GCOR's civil rights claims; and (6) Dismissing GCOR's claim for breach of the implied covenant of good

faith and fair dealing. The City also moves for partial summary judgment against Third-Party Defendant, Southport Renewal, LLC ("Southport"), seeking an Order holding that Southport is liable for breach of contract for failure to manage the wetlands permit.

GCOR opposes this motion, asking the Court to deny the City's motion for the following reasons. First, GCOR states that there are no genuine issues of fact with respect to the damages which GCOR sustained as to GCOR's breach of contract claim. Second, they argue Ms. Sommerville's report and testimony are not "net opinions" because the opinions are supported by adequate facts. Third, GCOR properly exercised the lease option for the Gloucester Titanium property. Fourth, specific performance is appropriate. Fifth, the City's motion regarding GCOR's civil rights claims should be denied as a matter of law. Finally, the City's motion regarding GCOR's breach of implied covenant of good faith and fair dealing should be denied as a matter of law.

Southport also opposes this motion, asserting that Southport is not liable for breach of contract because the City did not fund the wetlands mitigation work under the permit, and the permit was issued based on an erroneous contamination report by the City's contractor.

The second motion is a motion for partial summary judgment filed by GCOR against the City, arguing that there are no genuine issues of material fact as to the following claims: (1) breach of contract, (2) breach of the covenant of good faith and fair dealing, (3) promissory estoppel, (4) the continuing operative status of the Redevelopment Agreement, (5) the remedy of specific performance, (6) relief under 42 U.S.C. § 1983, (7) relief under the New Jersey Civil Rights Act, (8) implied covenant of good faith and fair dealing, and (9) lack of any conduct constituting tortious interference by GCOR.

The City opposes this motion, stating that that first, there are genuine issues of material fact that preclude summary judgment at this stage as to the breach of contract and breach of covenant of good faith and fair dealing. Second, specific performance is inappropriate. Third, GCOR has not met the legal standard for promissory estoppel. Fourth, the Redevelopment Agreement between the City and GCOR is of no force and effect because the Redevelopment Agreement lacks required elements. Fifth, GCOR has not asserted that it has been deprived of a civil right implicated by the relevant statutes. Sixth, GCOR failed to perform under the Redevelopment Agreement.

The third motion is a motion for summary judgment filed by Southport against the City, seeking an Order granting the following: (1) Declaratory judgment holding that Southport properly exercised its contractual right to terminate the Redevelopment Agreement and the City's retaliatory claims against Southport be dismissed as an attempt to rewrite the plain terms of the contract; (2) Judgment entered as a matter of law dismissing the City's claim of Breach of Covenant of Good Faith and Fair Dealing; (3) Judgment entered as a matter of law dismissing the City's claim of promissory estoppel; and (4) Judgment entered as a matter of law dismissing the City's claim for contribution.

The City opposes this motion, arguing that there are genuine issues of material fact that preclude summary judgment at this stage regarding all claims listed in the summary judgment motion.

The Complaint, filed by GCOR against the City, alleges the following:

1. Count I – Breach of Contract
2. Count II – Breach of Covenant of Good Faith and Fair Dealing
3. Count III – Promissory Estoppel

The City's Counterclaim alleges the following against GCOR:

1. Count I – Breach of Contract
2. Count II – Breach of Covenant of Good Faith and Fair Dealing
3. Count III – Tortious Interference

The City's Third-Party Complaint alleges the following against Southport:

1. Count I – Breach of Contract
2. Count II – Breach of Covenant of good Faith and Fair Dealing
3. Count III – Promissory Estoppel
4. Count IV – Contribution

Southport's Counterclaim seeks the following relief against the City:

1. Declaratory Judgment

Subsequent to oral argument and based upon agreements made at the time of argument, the following issues were resolved by consent as follows:

> 1. Count II (Breach of Duty of Good Faith and Fair Dealing) of the City of Gloucester City's (the "City") Amended Counterclaim against Gloucester City Organic Recycling, LLC ("GCOR") be and hereby is dismissed; and
>
> 2. Count III (Tortious Interference) of the City's Amended Counterclaim against GCOR be and hereby is dismissed; and
>
> 3. Count III (Promissory Estoppel) of the City's Third Party Complaint against Southport Renewal, LLC ("Southport") be and hereby is dismissed; and
>
> 4. Count IV (Contribution) of the City's Third Party Complaint against Southport be and hereby is dismissed; and
>
> 5. The City consents to entry of judgment on Southport's Counterclaim that the Redevelopment Agreement between Southport and the City has been terminated.

II. BACKGROUND

The facts alleged are as follows, including each party's perspective as to disputed facts.

In 1997, the City began efforts to redevelop an area known as Southport, which ultimately resulted in the designation of the Southport Redevelopment Area as an area in need of redevelopment. Within the Southport Redevelopment Area, there was a property designated as

Block 120, Lot 2 on the Gloucester City Tax Map, referred to as the "GCOR Property" or the BP property.

The Initial Redevelopment Agreement

The City entered into a redevelopment agreement with GCOR (the "Initial Redevelopment Agreement"), which designated GCOR as the redeveloper of the Property on October 3, 2013. The Initial Redevelopment Agreement contemplated GCOR's construction of an approximately 190,000 square foot organic recycling facility, which would process organic materials into electricity, liquid fuels and compost. It also contemplated the execution of a lease agreement for the property. The Initial Redevelopment Agreement requires GCOR to obtain all necessary permits and approvals for the construction and the operation of the Project.

Specifically, the Initial Redevelopment Agreement provided the following in relevant part:

2. GCOR shall construct a building in accordance with approved plans with construction to begin within 90 days after the last to occur of the following events: (i) the City's acquisition of the property; (ii) the execution of a lease between the City and GCOR that is acceptable to the parties, in their respective sole discretion (and which shall include the provisions in paragraph 3 hereinbelow regarding acceptance the City's municipal yard waste and supply of compost by GCOR; (iii) the City's delivery of the property in accordance with paragraph 4 hereinbelow; (iv) the receipt by GCOR, beyond all applicable appeal periods, of all necessary permits and approvals for the construction and operation of the Project.

...

4. The City shall deliver to GCOR the project site, including with utilities to the outbounds of the site and all off site improvements to enable the tenant to develop the site ready for construction for its intended use, with the environmental remediation completed.
5. GCOR shall obtain all necessary governmental approvals.

GCOR contends that under the Initial Redevelopment Agreement, GCOR was to obtain governmental approvals for the project, but the City was obligated to obtain any permits or approvals necessary to fully remediate the property.

Permits

On January 11, 2013, the New Jersey Department of Environmental Protection ("NJDEP") issued a Freshwater Wetlands General Permit No. 4 ("GP4") authorizing environmental remediation on the Property. Around this time, the City applied for and obtained a permit from the United States Army Corps of Engineers ("USACE") to undertake wetlands mitigation work.

During the same approximate time period the City made applications to NJDEP, the City also made applications to the United States Army Corp of Engineers ("USACE") for jurisdictional determinations and other approvals necessary to facilitate the off-site wetlands mitigation required in connection with remediation of the Property. On or about February 21, 2013, the USACE issued a letter authorizing the wetlands mitigation work pursuant to

Department of the Army Nationwide Permit 27 and 38 ("NWP"). The NWP authorization provided for a two year period of efficacy from the date of issuance

Amended Redevelopment Agreement

The City and GCOR then entered into an Amended Redevelopment Agreement. This amendment significantly reduced GCOR's lease rates and also contemplated the City's acquisition of the GT Property, which the City eventually acquired. Under that agreement, GCOR could exercise an option to obtain a leasehold interest in a portion of the GT Property, provided it met certain enumerated criteria, including (1) proper notice, (2) defining the metes and bounds of the leasehold with the City and identifying the necessary permits for the leasehold. The Amended Redevelopment Agreement states the following in paragraph 7:

> Within six months of the City obtaining title to the Gloucester Titanium Site, GCOR must give the City written notice of its intent to acquire a leasehold on such land. The parties will determine the location and boundaries of the proposed leasehold. The parties will work together to acquire the necessary permits. When the City has obtained such permits that are the landowner's responsibility for the project, GCOR shall have a two year period to construct the project. When the project is operating, or at the end of the two year period, whichever is earlier, GCOR shall begin paying rent and a PILOT payment based upon the cost per acre as established in paragraph 3 of this agreement for whatever acreage GCOR might use.

The Amended Redevelopment Agreement otherwise contained or adopted the same provisions as the original Redevelopment Agreement and superseded that agreement.

GCOR claims that under the Amended Redevelopment Agreement, GCOR had the option to obtain a leasehold interest in a portion of the GT Property. GCOR asserts that the City mischaracterizes the nature of the notice needed to exercise that option. They argue the notice does not require a metes and bounds description or identification of permits.

Ground Lease Agreement

On February 1, 2016, GCOR executed a ground lease agreement (the "Initial Ground Lease") for the City's leasing of the Property to GCOR. The Initial Ground Lease, in relevant part, provided the following (emphasis added):

> Responsibility of Lessor. Prior to the Rent Commencement Date, Lessor shall deliver the Premises to Lessee with the following: (i) all water, sewer and utility hookups and infrastructure necessary for the Lessee to operate its facilities at the Premises, (ii) all off-site Improvements, (iii) complete environmental remediation of the Premises to the NJDEP's satisfaction including, but not limited to, compliance with all federal, state or local laws, regulations, ordinances, permits, licenses, approvals, administrative or judicial rulings, orders or agreements (and proof thereof) that the environmental remediation to the Premises has been completed, and (iv) pay for all costs and be responsible for all operations, maintenance, reporting, compliance and any other requirements associate with the Remedial Action Work Plan ("RAWP") or other environmental plan for the Premises.

An exclusivity provision is also included in the Ground Lease, Section 29.O:

> During the term of this Lease, Lessor shall not: (a) directly or indirectly (including, without limitation, through any municipal agent of Lessor), transfer, lease, sublease, or license any real property within the City of Gloucester to be operated in a manner which, in the reasonable judgment of Lessee, would compete with Lessee's business or permitted use of the Premises as stated in this Lease, nor (b) issue any license or permit to any person or entity, which would permit such person or entity, in the sole but reasonable judgment of Lessee, to compete with Lessee's business or permitted use of the Premises as stated in this Lease.

On the same date GCOR and the City executed the Initial Ground Lease, GCOR served the City with notice of its intent to acquire a leasehold on the GT Property. The notice of intent did not identify the size of the proposed leasehold on the GT Property. The notice of intent did not identify the metes and bounds of the proposed leasehold. The notice of intent did not identify the permits that would be necessary for the leasehold. The notice of intent did identify on a map the portion of the property GCOR sought to lease.

On September 16, 2016 GCOR sent a letter to the City of Gloucester "conditionally" accepting the property. The letter stated the following:

> Please consider this formal notice under the Ground Lease dated February 1, 2016 set forth above. Please be advised that GCOR has completed its inspection of the Premises pursuant to Section 7(B)(1) and conditionally accepts the Premises based upon the work performed and the condition of the Premises delivered by the City and the accuracy of the information received from the City as of the above date. GCOR reserves its right to require the City to remedy any defects with regard to the Premises for which GCOR did not have the actual knowledge of based upon the condition of the Premises delivered by the City and the accuracy of the information received from the City. GCOR shall not be responsible for any delays and/or costs incurred as a result of any defects with regard to the Premises for which GCOR did not have actual knowledge of based upon the condition of the Premises delivered by the City and the accuracy of the information received from the City.

On May 4, 2022, counsel for GCOR sent a letter to Howard Long, solicitor for the City, asking the City to define the metes and bounds of the leasehold. This letter was sent approximately a year after litigation had commenced. The letter did not seek to identify the permits necessary for the Leasehold.

GCOR contends that the identification of the metes and bounds necessary for the proposed leasehold was not required, and that the letter did state that GCOR would "work with the City to determine the location and boundaries" of the proposed leasehold, along with determining "the necessary permits of the proposed leaseholds.

Between March 2016 and August 2018, the City and GCOR amended the Ground Lease Agreement twice. Neither amendment modified the City's responsibilities under the Ground Lease Agreement. The second amendment specifically required GCOR to obtain all permits and approvals by a date certain, December 31, 2018. The City alleges that GCOR did not obtain all permits and approvals as required.

GCOR contends that while the second amendment contained a date certain for obtaining approvals and permits, the second amendment also allowed GCOR to waive approvals or to extend the deadline for obtaining approvals.

Southport Joins the Project

During 2012, Rocco D'Antonio, who was the sole member of GCOR, allegedly informed the City that he would withdraw from the Redevelopment Agreement if the City did not fire its environmental consultants. The City claims Mr. D'Antonio told the City that it should hire a new entity named Southport Renewal, LLC to manage the remediation efforts in the Southport Redevelopment Area. Southport was composed of four individuals/entities with connections to Mr. D'Antonio. This included Mr. D'Antonio himself, who held a 25% interest in Southport.

GCOR contends that Mr. D'Antonio only introduced Southport Renewal members to the City, and denies the City's characterization of the composition of Southport. Mr. D'Antonio alleges he only did the outreach, which resulted in the individual members joining Southport.

The City and Southport executed a redevelopment agreement on October 3, 2013. Pursuant to the agreement, Southport was responsible for managing the Wetlands Permits. Southport was aware that the Wetland Permits had an expiration date and billed the City for and received from the City in excess of $2 million related to work that was supposed to include wetlands mitigation. Southport claims that due to the discovery of contamination more extensive than represented, most or all of these funds were spent on environmental remediation.

GCOR denies the allegation that the Redevelopment Agreement between the City and Southport only placed on Southport the responsibility for "wetland mitigation activities" to the extent that funding was available, whereas the Redevelopment Agreement and the Ground Lease Agreement entered into between the City and GCOR unconditionally required the City to implement the wetlands mitigation. GCOR admits that $2 million was paid for remediation of the contaminated soil, but denies any suggestion that the $2 million should have paid for all of the required remediation and wetlands mitigation.

Permits Expire

Nearly a year after the parties executed the second amendment to the Ground Lease, the NJDEP wrote a letter on May 21, 2019 to T&M Associates, the environmental consultant tasked with facilitating the City's obligations under the Redevelopment Agreement and the Ground Lease. That letter explained that the permits the NJDEP issued in 2013 were expired and that the NJDEP had not approved or finalized the mitigation project the permits contemplated. The City claims it was unaware of this, having relied upon Southport, the consultant recommended by GCOR to manage the wetlands mitigation. The City claims Southport allowed the permits to expire.

GCOR denies the allegation that the City was unaware of the permit expiration, as the City was the named permittee and the responsible party for the required wetlands mitigation under the Redevelopment Agreement and the Ground Lease which it executed with GCOR. Further, they point to testimony from former City Administrator Jack Lipsett that some members of the governing body threw the permit in the trash.

When the 2013 NJDEP permits expired, GCOR thereafter scaled down the originally contemplated 190,000 square foot food waste processing facility by nearly two-thirds to accommodate the City's claimed financial challenges. GCOR further agreed to subdivide Block 120, Lot 2 so as to enable a separate cannabis business on the property to generate additional revenue to fund wetland mitigation. GCOR agreed to allow the City to receive tens of thousands of dollars in nonrefundable option fees from three potential cannabis licensees to pay for wetland permit fees despite the project never coming to fruition.

Following the expiration of the Wetlands Permits, the City and GCOR executed a third amendment to the Ground Lease (the "Third Amendment") in August 2019. Under the terms of that agreement, the City and GCOR "recognize that the prior terms and compliance therein are reset, and [the parties] agree that no default or breach for either party has occurred and [to] the extent it has, are hereby waived including but not limited to the Lessor's obtainment of certain necessary Freshwater Wetlands permits prior hereto."

New GP4 Permit Acquired

On April 23, 2020, the City acquired a new GP4 permit. That permit was conditional, as it indicated that the NJDEP would not accept the submitted wetlands mitigation plan and that an acceptable plan was required. The wetlands mitigation plan had been prepared by T&M Associates, which was a subcontractor hired by Southport and/or at the direction of Mr. D'Antonio.

GCOR alleges that the City never obtained approval for the required wetland mitigation plan.

Cost of the Wetlands Mitigation:

GCOR claims that the cost of the wetlands mitigation measures associated with remediation of the Property was originally estimated to cost between $700,000.00-$1,000,000.00. The cost of credits to satisfy the wetlands mitigation associated with the remediation of the Property was originally estimated at approximately $1,800,000.00. USACE representatives then subsequently advised GCOR that they did not believe that actual wetlands mitigation measures were feasible in this instance, and that the purchase of credits was necessary to satisfy the wetlands mitigation requirement associated with the NJDEP permits for the GCOR Project.

GCOR alleges that it repeatedly requested that the City address the wetlands mitigation requirement associated with the NJDEP permits so that GCOR could proceed with of the GCOR Project on the Property as contemplated by the Redevelopment Agreement, as amended, and the Ground Lease, as amended.

The City's Financial Issues

The City asserts that having already spent over $2 million to pursue wetlands mitigation activities that never occurred, the City informed GCOR that it could not move forward with the project because it did not have and could not raise adequate funds to pay for the wetlands mitigation.

GCOR responds that in 2012, the City adopted an ordinance which authorized the City to borrow $5,000,000.00 in support of the redevelopment of the Southport Redevelopment Area. Of the amount authorized by the 2012 ordinance, the City spent less than half – $2,250,000.00 – and left the balance untouched. GCOR alleges that sometime in 2012, the City determined that it would not finance the remediation of the project site but did not communicate this decision to GCOR, who continued to rely on the Redevelopment Agreement as written. GCOR claims the funds provided were spent on remediation at the site.

GCOR's Corporate Structure

GCOR was created specifically as a special purpose entity to develop the Property and to obtain grants and funding that would not be available to Organic Diversions ("OD"). OD was not an owner of and held no interest in GCOR. GCOR was not an owner of and held no interest in OD. They are separate and distinct entities. Mr. D'Antonio is the sole member of OD and GCOR. OD was not a party to any written agreement with the City.

GCOR contends that all City officials understood the relationship between OD and GCOR as confirmed by former City Administrator Jack Lipsett's deposition testimony that he considered them to be one in the same.

Exclusivity

GCOR alleges that the City breached their agreement when it entered into discussions with other developers who had expressed interest in the Southport redevelopment area, including the BYKA Sustainability Group, Inc. ("BYKA"). BYKA has proposed the development of a waste processing facility in the Southport redevelopment area, including on the Gloucester Titanium Property. BYKA's proposed facility would utilize a Plasma Enhanced Gasification System to process the organic fractions of a wide variety of materials (including hazardous waste) to produce Syngas which would then be converted to end products including electricity and liquid fuels. The proposed GCOR recycling facility would also process organic materials into electricity and liquid fuels.

Notice of Default

On December 21, 2020, GCOR served the City with a Notice of Default in accordance with Sections 15 and 19 of the Ground Lease Agreement. The Notice of Default recited the City's failure to address its environmental obligations required by Section 5.B of the Ground Lease Agreement. The Notice of Default also recited the Ground Lease Agreement's exclusivity provision established by Section 29.0 which prohibits the City from transferring, leasing, sub-leasing or issuing any license or permit to any person or entity competing with GCOR's business or intended use of the Subject Property. The Notice of Default demanded that the City cure its default within 30 days pursuant to Section 15 of the Ground Lease including by finalizing a mitigation plan which can be approved by NJDEP, developing a proposal to implement the approved-plan and securing the necessary funding to implement the plan. After more than 30 days had elapsed after the issuance of the Notice of Default and the City having failed to cure its breach, GCOR filed the instant suit.

GCOR's Damage Claim

GCOR alleges that it has incurred "soft costs" which have been lost due to the City's alleged actions and/or omissions. These "soft costs" include various professional fees (including legal fees, consulting fees and other fees) that GCOR claims it incurred related to the Property. GCOR's attorneys confirmed that the documents produced were the totality of the documents related to the alleged "soft costs." These are the same documents that were provided to Joyce Sommerville, who GCOR intends to present to testify to the purported damages it has incurred. GCOR and/or Mr. D'Antonio provided a spreadsheet to Ms. Sommerville which they say reflects all of the soft costs for which GCOR was seeking reimbursement in this action. GCOR provided no additional information or proof of any "soft costs." Ms. Sommerville concluded that GCOR had incurred all of the "soft costs" listed on the spreadsheet and asserted her conclusion that GCOR was entitled to recover all of the costs listed in the spreadsheet.

The City alleges that there were various entries in the spreadsheet for which neither the City nor Ms. Sommerville were provided evidence that a cost was incurred (i.e., no invoice, bill, etc.). Ms. Sommerville did not substantiate these claimed costs, other than look at the spreadsheet provided by Mr. D'Antonio. Ms. Sommerville admitted that she had not asked for checks or wire transfers and had not verified whether amounts actually were paid or may have been forgiven or written off by the purported vendor. The total unverified amount GCOR is claiming for these costs is $738,937.37.

The City also alleges that there is no written documentation that obligates GCOR to reimburse OD for any costs expended by OD. There are three promissory notes on which GCOR and OD are signatories. The lender did not sign or execute the promissory notes. GCOR never received any money under the promissory notes, and the terms of the promissory notes only require repayment of funds given by the lender to GCOR. Ms. Sommerville included these promissory notes totaling $115,000 in the damage claim.

GCOR's Experience in the Industry

GCOR was created as a special purpose entity to develop the Property and thus allegedly has no prior experience in recycling food and/or yard waste. OD is not engaged in the process of recycling food and/or yard waste, but rather hauls waste from producers to processors. To date, GCOR has not constructed a facility to process food and/or yard waste and GCOR has not obtained the necessary permits to construct a facility to do the same.

GCOR contends that GCOR's managing member Rocco D'Antonio has a 14-year history of operations in the food waste industry with OD, and services more than 100 customers at over 300 different locations with approximately 500 individual collections occurring each week. Additionally, in his capacity as the Chairman of the New Jersey Food Council's Environmental Committee D'Antonio participated in the drafting of the Food Waste Recycling and Food Waste-to-Energy Production Law, N.J.S.A. 13:1E-99.122.

GCOR further contends that GCOR obtained all permits and approvals with the exception of building permits, which permits would be useless absent the City's performance of its wetlands mitigation obligation. GCOR applied for and obtained Class B & C recycling permits and air pollution control permits from NJDEP.

GCOR spent substantial sums of money in furtherance of the project contemplated by the Redevelopment Agreement and the Ground Lease which it entered into with the City, and incurred substantial liabilities in reliance on the City's promised performance. GCOR took significant steps to mitigate the damages, specifically, in March 2012 when the City advised that it lacked the funds to continue the wetlands evaluation work, GCOR paid over $20,000 in furtherance of the City's obligation to its consultant to keep the project moving forward.

Ms. Sommerville's Report

The City alleges that Ms. Sommerville's report lacks research and supporting facts. Specifically, Ms. Sommerville relied on a single year of tax returns and a document that purported to be a profit and loss statement for OD as the basis for her lost profits claim. Further, the City alleges that Ms. Sommerville did not rely on any documents that showed that GCOR had any contracts with suppliers of food or yard waste. Ms. Sommerville did not assess the impact of potentially competing businesses on the development of a food/yard waste recycling facility on the project. Ms. Sommerville did not look at the costs of the facilities to which OD delivered food waste for the cost structure of running a food waste recycling facility in New Jersey. For the costs and revenues, Ms. Sommerville only looked at an email from McGill Environmental Systems which was provided to her by Mr. D'Antonio. The numbers in the email were for a facility in North Carolina that already is operating, and Ms. Sommerville did nothing to substantiate the numbers.

GCOR denies these facts, arguing that Ms. Sommerville is not required to validate the costs incurred by GCOR. Further, GCOR denies that a promissory note is required to be executed by a lender or that an affirmative payment of money to a borrower is required to create an obligation.

Southport's Involvement

Southport and the City entered into a Redevelopment Agreement (the "Southport Agreement") on October 3, 2013 for certain Blocks and Lots. Except for remediation and property disposition obligations, the Agreement does not cover or include Block 120, Lot 2 (the GCOR Property, also known as the BP site).

The Southport Agreement in relevant part provides the following:

II. Redeveloper's Obligations

A) Remediation. Redeveloper shall be responsible for:
   1. For the Redevelopment Area Properties **owned** by the City, Redeveloper will fund, manage, and perform completion of all remediation required consistent with NJDEP regulations for redevelopment of the properties, including completion of any further investigation, preparation of RAW or RAW addenda, and performance of Remedial Actions for each Redevelopment Area Property, or portion thereof.
   2. For the Additional Properties **not currently owned** by the City, Redeveloper will, in cooperation with the City, conduct All Appropriate Inquiry (AAI) and/or other such environmental due diligence as deemed necessary in the

sole discretion of the Redeveloper, and prepare a remedial action cost estimate sufficient for the City and Redeveloper to determine the viability of conducting remediation and redeveloping the property. The parties will jointly determine whether to proceed with acquisition of any of the Additional Properties, prior to conducting any remediation on any additional Properties.

...

D) Budget. The Redeveloper shall not be required to perform any remediation work on any Redevelopment Area Property or any portion of any Redevelopment Area Property, including the BP site and the wetland mitigation required to remediate the BP Site, until such time as the parties agree on a budget or budgets (each a "Budget") for the work, which will include a source of funding to complete the work.

...

III. The City's Obligations

C) The City shall obtain title to the Gloucester Titanium Property which is a condition precedent to Redeveloper's obligation to conduct remediation or wetland mitigation work on such property. Alternatively, the City can obtain consent from Gloucester Titanium for the required access to conduct the Remediation and/or wetland mitigation work on terms satisfactory to Redeveloper, which will satisfy this condition precedent. The parties must agree upon a Budget for the Remediation of this property, in the event that the City condemns this property.

...

IV. Funding

A) Redeveloper shall establish a checking account designated as the Southport Remediation Fund ("SRF"). Redeveloper shall control said account but shall not make disbursement without the approval of the City, which approval shall not be unreasonably withheld.

B) The SRF will be funded with any funds obtained by either of the parties which arise out of the environmental condition of the subject properties, including but not limited to insurance proceeds, remedial grants, remedial loans, and/or settlement monies obtained by or from prior owners or responsible parties associated with any and all parcels covered by his Agreement (including the BP Site and any Additional Properties) and/or income derived from the importation of remedial and/or construction fill material. These funds specifically include any remaining balance of the settlement monies received by the City for the BP Site and any monies received in future settlements regarding any of the Additional Properties.

...

D) In the event that there are insufficient funds in the SRF to complete the remediation of the BP Site or the wetlands mitigation activities required for the remediation of the BP Site, the parties shall confer to discuss how additional funds shall be secured to cover the costs of the remediation and/or wetland mitigation. Should the parties not be able to identify or agree upon a funding source, Redeveloper shall have the right, but not the responsibility, to fund the shortfall and such costs shall become "SR Recoverable Costs", which shall be repaid by the City from the City's share of any proceeds derived from the sale or lease of any of the Redevelopment Area Properties, Additional Properties, or the BP Site, as discussing Section VI below.

Southport alleges that it diligently pursued its obligations under the Southport Agreement. Between 2013 and 2019, Southport provided the City with budgets for tasks approved by the City. In 2016, Southport discovered that the historic data contained in the Remedial Investigation Report upon which the Remedial Action Plan was based was inaccurate. The report was provided by the City. It was discovered that the actual concentrations of contaminants at the former CBS property were much higher than indicated. This new data required remediation of a much larger area and off-site disposal of material, which increased the budget significantly.

During 2016 and 2017, Southport continued to try to obtain funding and provided the City with updates. The City declined to apply for funding from the NJ Environmental Infrastructure Trust. The parties continued to confer on funding through 2019.

By March 23, 2021, there was neither an approved budget nor source of funding to complete the work that is the subject of the Southport Redevelopment Agreement. Southport sent a letter to the city terminating the Redevelopment Agreement pursuant to Section VII A and B. The City has acknowledged that the Southport Redevelopment Agreement has been canceled and the City no longer intends to proceed under that Agreement.

The City contends that there was an approved budget between Southport and the City from December of 2014 through 2019. The City believed that the budget for Southport to do the work was the $2 million plus the regenerating fund. According to the City, Southport had the approval from the City to submit the application for funding to NJ Environmental Infrastructure Trust, but Southport failed to so. Southport had permission to find grant money and/or funding for the project.

The City believes that Southport was responsible for finding development opportunities for the Redevelopment Area, for managing the permitting in the Redevelopment Area, and for generating fill to provide income to the SRF.

III. ANALYSIS

Pursuant to Rule 4:46-2, summary judgment is appropriate when the pleadings, depositions, etc. and other documents or affidavits establish no genuine issue as to any material fact that the moving party is entitled to judgment as a matter of law. A genuine issue of material fact exists when the competent evidentiary materials presented when viewed in a light most favorable to the non-moving party are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party. Brill v. Guardian Life Insurance Company, 142 N.J. 520, 540 (1995).

A. Breach of Contract

The City moves for partial summary judgment against GCOR, seeking an Order dismissing GCOR's claims for breach of contract. GCOR opposes the motion and moves for summary judgment, seeking an order granting summary judgment as to GCOR's clams for breach of contract against the City.

"A contract is an agreement resulting in obligation enforceable at law. . . . To be enforceable as a contractual undertaking, an agreement must be sufficiently definite in its terms that the performance to be rendered by each party can be ascertained with reasonable certainty." W. Caldwell v. Caldwell, 26 N.J. 9, 24-25 (1958) (citing Friedman v. Tappan Dev. Corp., 22 N.J. 523, 531 (1956)). "The polestar of contract construction is to discover the intention of the parties as revealed by the language used by them." Karl's Sales & Serv. v. Gimbel Bros., 249 N.J. Super. 487, 492 (App. Div. 1991). "Generally, the terms of an agreement are to be given their plain and ordinary meaning." M.J. Paquet v. N.J. DOT, 171 N.J. 378, 396 (2002). "[W]here the terms of a contract are clear and unambiguous there is no room for interpretation or construction and the courts must enforce those terms as written." Karl's Sales, 249 N.J. Super. at 493 (citing Kampf v. Franklin Life Ins. Co., 33 N.J. 36, 43 (1960)); see also Cty. of Morris v. Fauver, 153 N.J. 80, 103 (1998).

To prevail on a claim for breach of contract, a party must prove: (1) the parties formed a contract; (2) the plaintiff "did what the contract required [it] to do"; (3) the defendant "did not do what the contract required [it] to do"; and (4) the defendant's "breach, or failure to do what the contract required, caused a loss to the plaintiff." Globe Motor Co. v. Igdalev, 225 N.J. 469, 482 (2016).

The City argues that GCOR's breach of contract claim should be dismissed to the extent it has not suffered damages. First, GCOR seeks to recover damages for costs and expenses that were allegedly incurred by another entity. Second, GCOR seeks to recover for costs and expenses that were never paid and/or are no longer due and owning. Third, GCOR seeks to recover amounts it incurred for a time period during which it has allegedly waived claims against the City. Finally, GCOR seeks to recover highly speculative "lost profits" that fail to meet the standard of reasonable certainty.

1. **The City claims that GCOR did not incur the vast majority of the expenses it is claiming as damages.**

Only a party that actually incurs damages may recover such damages. Murphy v. Implicito, 392 N.J. Super. 245, 267 (App. Div. 2007). A party should not reap a windfall. MMU of New York, Inc. v. Greisser, 415 N.J. Super. 37, 49 (App. Div. 2010).

The City argues that a majority of the "soft costs" damages alleged by GCOR were reflected in documents provided that show a different entity, OD, paid most of these expenses. Further, GCOR's expert did not identify any expenses that actually were paid by GCOR. The City believes that GCOR has produced no evidence that it actually incurred the costs claimed by its expert, Ms. Sommerville. While OD was owned by the same sole shareholder as GCOR, it is a separate corporate entity.

GCOR opposes the motion, arguing that the City clearly understood the function of GCOR as a special purpose entity and the alter ego of OD. They explain that the utilization of a special purpose entity is a common practice in commercial real estate development. The essential idea is to create a company for a specific project. A special purpose entity serves various purposes and is typically associated with a parent company. In this case, GCOR was formed to obtain special tax credits available with the contemplated redevelopment in Gloucester City. The City is alleged to have understood the relationship between GCOR and OD, which is evidenced by Resolution #329, adopted on December 21, 2010, which explained that the City was made aware that OD wished to construct and/or operate a recycling facility within Gloucester City. Additionally, during his deposition, former City administrator Jack Lipsett confirmed that the City considered GCOR and Organic Diversion to be the same company. When asked "did you understand Organic Diversion and Gloucester City Organic Recycling, LCC to be in essence the same company?", Lipsett answered affirmatively.

A plaintiff who is successful on a claim for breach of contract is entitled to "compensatory damages for such losses as may fairly be considered to have arisen naturally from the defendant's breach of contract". Wade v. Kessler Institute, 343 N.J. Super. 338, 352 (App. Div. 2001). A necessary element of a breach of contract claim is that the plaintiff themselves must prove that they sustained damages are a result of the breach. Murphy v. Implicito, 392 N.J. Super. 245, 265 (App. Div. 2007). GCOR asserts that the majority of invoices for which recovery is sought are addressed to OD and were paid by OD. While there is evidence from which a jury could find that the City was aware that GCOR served as a special service entity working in conjunction with OD, it is clear that OD is not a party in this matter. No evidence has been presented that any agreement exists requiring GCOR to reimburse OD for expenses billed to and paid by OD. OD is not a party to this contract or to any contract with the City that is relevant to this litigation.

Since OD is not a party in this case, GCOR cannot recover any of the alleged damages suffered by OD, and thus the damages in the instant case are limited to the damages that GCOR directly incurred or paid. The City's motion for summary judgment on the breach of contract claims is granted as to damages incurred by OD, but denied as to the damages incurred directly by GCOR. All claims for damages incurred by OD but sought by GCOR are dismissed.

2. The City argues that GCOR cannot recover for expenses that it cannot prove were paid or are due and owning.

The City argues that GCOR has not provided proof of any payment submitted, nor that there were any documents submitted that any of the unpaid expenses at issue are due and owing. The City focuses on the three promissory notes that purport to show that GCOR owes money to the Wastewater Opportunity Fund. The total amount is $115,000. While GCOR signed the promissory notes, the lenders did not. Further, the City argues that there is no evidence that the lender has any intention of seeking payment under these documents, nor that the lender is entitled to repayment. The City believes that no money was ever disbursed, thus no money is owed. Finally, the promissory notes are over six years old. As promissory notes are contractual agreements and the statute of limitations to bring a contractual claim in New Jersey is six years, it is argued the statute of limitations has run on all three of the promissory notes.

GCOR responds that the damages are well supported by numerous invoices and by the testimony of GCOR's managing member Rocco D'Antonio. But for the City's breach and other wrongful conduct, the project would have come to fruition and all of the lenders and vendors could have been paid. They argue money damages are necessary to address both the items for which monies were spent as well as the outstanding liabilities in order put GCOR in as good a position as it would have been had the City performed. GCOR further disagrees with the City's statute of limitations argument, as GCOR believes no court has made a ruling in this regard and that the defense is purely speculative.

"[A] party who breaches a contract is liable for all of the natural and probable consequences of the breach of that contract." State v. Ernst & Young, L.L.P., 386 N.J. Super. 600, 617 (App. Div. 2006) (quoting Pickett v. Lloyd's, 131 N.J. 457, 474 (1993). "Compensatory damages are designed 'to put the injured party in as good a position as he would have had if performance had been rendered as promised.'" 525 Main St. Corp. v. Eagle Roofing Co., 34 N.J. 251, 254 (1961) (quoting 5 *Corbin on Contracts* § 992, p. 5 (1951); 1 *Restatement of Contracts* § 329 comment a (1932)). Compensatory damages should be in an amount reasonably within the contemplation of the parties at the time the contract was formed and sufficient to put the injured party in the same position it would have enjoyed if the breaching party had performed, no better position and no worse. Donovan v. Bachstadt, 91 N.J. 434, 444-45 (1982); Magnet Res., Inc. v. Summit MRI, Inc., 318 N.J. Super. 275, 292-93 (App.Div.1998).

The Supreme Court has explained, "[when] the damages flowing from defendant's breach of contract are not ascertainable with exactitude, such is not a bar to relief. Where a wrong has been committed, and it is certain that damages have resulted, mere uncertainty as to the amount will not preclude recovery -- courts will fashion a remedy even though the proof on damages is inexact." Kozlowski v. Kozlowski, 80 N.J. 378, 388 (1979) (citing Albemarle Paper Co. v. Moody, 422 U.S. 405, 418-419 (1975)).

There are issues of fact as to whether GCOR received any monies under the unsigned promissory note. GCOR claims that it did receive funds although the date on which the funds may have been received is unknown. It is not necessarily the date on which the note is signed which

controls when the statute of limitations begins to run. Rather, it is the date on which there has been a breach of the promissory note, if an enforceable note exists, which controls.

These fact issues preclude a determination by the court as a matter of law that GCOR did not obtain any money under the promissory note nor that GCOR may be obligated for some repayment. For these reasons, summary judgment with respect to this issue is denied.

3. The City argues that GCOR is not entitled to damages it incurred prior to 2019.

The City argues that GCOR waived any claims for breach of contract or resulting damages prior to August 15, 2019 – the date of the Third Amendment to the Ground Lease. The language of the Third Amendment of the Ground Lease reads as follows:

> The parties hereto recognize that the prior terms and compliance therein are reset, and the Lessor and Lessee agree that no default or breach for either party has occurred and [to] the extent it has, are hereby waived including but not limited to the Lessor's obtainment of certain necessary Freshwater Wetlands permits prior hereto.

GCOR opposes, arguing that the foregoing paragraph's references to "reset," "default or breach" and "Lessor's obtainment of certain necessary Freshwater Wetlands permits prior hereto" specifically referred to the permits that had been obtained in 2013 which the City allowed to lapse. GCOR did not view this paragraph as a waiver for future claims for subsequent defaults or breaches. Further, GCOR served a notice of default in December 2020 based on the City's failure to abide the terms of the second series of permits from NJDEP obtained in April 2020.

"An effective waiver requires a party to have full knowledge of his legal rights and intent to surrender those rights." Knorr v. Smeal, 178 N.J. 169, 177 (2003) (citing W. Jersey Title & Guaranty Co. v. Industrial Trust Co., 27 N.J. 144, 153 (1958). "The intent to waive need not be stated expressly, provided the circumstances clearly show that the party knew of the right and then abandoned it, either by design or indifference." Ibid. (citing Merchs. Indem. Corp. of N.Y. v. Eggleston, 68 N.J. Super. 235, 254 (App. Div. 1961), aff'd, 37 N.J. 114 (1962)).

Courts may not "remake a better contract for the parties than they themselves have seen fit to enter into, or to alter it for the benefit of one party and the detriment of the other." Ibid. (citing James v. Fed. Ins. Co., 5 N.J. 21, 24 (1950)). "A court has no power to rewrite the contract of the parties by substituting a new or different provision from what is clearly expressed in the instrument." E. Brunswick Sewerage Auth. v. E. Mill Assocs., Inc., 365 N.J. Super. 120, 125 (App. Div. 2004).

Here, the Third Amendment to the Ground lease was signed on August 15, 2019. At this point in time, the 2013 permits had expired. Based on the "plain and ordinary meaning" of the amendment, the parties agreed that no default or breach occurred, and waived the Lessor's obligation to obtain permits *prior* to the signing of the Third Amendment. This is clearly and unambiguously stated by the language "prior hereto." GCOR waived all rights to pursue a breach of contract claim based on any conduct prior to August 15, 2019. This includes the City's responsibility for the 2013 permits, which had lapsed. However, this does not include the City's

responsibilities that were revived in the Third Amendment of the Ground Lease. Specifically, the Third Amendment provides the following:

> APPROVALS PERIOD. Lessee and Sublessee shall make commercially reasonable efforts to obtain in final and unappealable form, all permits and approvals including, but not limited to, Department of Environment Protection permits, zoning, site plan, subdivision, construction and building permits, highway occupancy permits and licenses required in order to construct and operate the improvements and uses contemplated by Section 6 supra ("Approvals"). Provided, however, upon Lessor's obtainment of certain necessary Freshwater Wetlands permits which had been previously obtained but expired, Lessee and Sublessee shall have twelve (12) months to obtain the Approvals. ...

Based on this language, the City (the Lessor) was to obtain the Freshwater Wetlands permits, which both parties agree had previously expired. On April 23, 2020, the City acquired a new GP4 permit. However, the permit was conditional, as it stated that the NJDEP would not accept the submitted wetlands mitigation plan and that an acceptable plan was required. The wetlands mitigation plan had been prepared by T&M Associates, which was a subcontractor hired by Southport and/or at the direction of Mr. D'Antonio.

The alleged default before the Court is based on the Notice of Default GCOR served the City on December 21, 2020. GCOR alleges that the City never obtained approval for the required wetland mitigation plan. GCOR's Notice of Default recited the City's failure to address its environmental obligations required by Section 5.B of the Initial Ground Lease Agreement. The Notice of Default also recited the Ground Lease Agreement's exclusivity provision as established by Section 29.0 which prohibits the City from, inter alia, transferring, leasing, sub-leasing or issuing any license or permit to any person or entity competing with GCOR's business or intended use of the Subject Property.

Based on the language of the Third Amendment, the City's obligation to obtain the Wetlands permits was revived and GCOR only waived their right to claim a breach of contract claim based upon conduct prior to August 15, 2019. There was no waiver for any default occurring after that date. Nor was there any waiver of the right to seek recovery of expenses incurred prior to that date as a result of a later breach.

Therefore, the City's motion for summary judgment against GCOR's breach of contract claims is denied. Evidence at trial will be limited within these parameters.

4. The City argues that GCOR is not entitled to lost profits as such claims are speculative and cannot be shown with a reasonable degree of certainty.

The City argues that GCOR cannot establish damages with a reasonable degree of certainty, as required in Weiss v. Revenue Building & Loan Association, 116 N.J.L. 208 (E.& A. 1936). This case focused on a new business's lack of experience as an important factor in a court's inquiry into whether lost profits may be established. The standard under this case is reasonable certainty. The City draws the Court's attention to the underlying data used to calculate the lost profits: One year of data during a COVID-19 year for a company that ran a different operation than that proposed by GCOR that was used to project 30 years of lost profits. Profits, losses, or

projections for existing companies that were operating organic waste recycling facilities were not used.

GCOR opposes, relying upon Schwartz v. Menas, 251 N.J. 556 (2022). They assert that GCOR retained Ms. Sommerville as an expert and she determined a net annual income from existing operations, projected the net annual income for the expanded operations based on data obtained from an existing waste processing facility, extrapolated to project the net annual income over the 30-year term of the Ground Lease Agreement, and then applied a discount factor to obtain the net present value of the loss. GCOR argues that GCOR's proposed organic waste recycling facility is not a new business, but rather an expansion of an existing business, OD. OD has a 14-year history of operations in the waste industry and services more than 100 customers at over 300 different locations with approximately 500 individual collections occurring each week.

Under Schwartz, a case specific inquiry into whether lost profits may be established with a reasonable degree of certainty is required. Schwartz, 251 N.J. at 561. "In its role as gatekeeper, a trial court should carefully scrutinize a new business's claim that, but for the conduct of the defendant, it would have gained substantial profit in a venture in which it had no experience. If a new business seeks lost profits that are remote, uncertain, or speculative, the trial court should bar the evidence supporting that claim and should enter summary judgment pursuant to Rule 4:46-2." Id. at 577. See also Desai v. Board of Adjustment of Town of Phillipsburg, 360 N.J. Super. 586, 595-96 (App. Div. 2003).

Here, GCOR had not yet built its organic waste recycling facility. As a new business, claimed lost profits must be established with a reasonable degree of certainty. Ms. Sommerville's report is partially based on operational data from a company that hauled waste from Point A to Point B and did not engage in the process of recycling food/yard waste. Further, the data that was used was from a single year of tax returns and a profit and loss statement related to 2020, COVID-19 year operations. This single year was used to project 30 years of operations.

In this case, we are dealing with a project which has been over the course of years substantially reduced in scope. There are many uncertainties regarding whether the GCOR property will or ever satisfy the requirements for issuance of building permits. Pre-conditions include site remediation and wetlands mitigation. Further, no definitive description of the option of that portion of the option property to become part of the leasehold has been negotiated or agreed upon by the parties. This project is not only a brand new project for GCOR, but also for its sole shareholder who was involved in a related business but not one that would engage in the specific activities proposed for GCOR. GCOR has presented no evidence reflecting the anticipated profits from similar businesses.

Therefore, the Court finds that the claim for lost profits is speculative and does not meet the standard required by Schwartz.

B. The City asks the Court to strike Ms. Sommerville's report and testimony as a "net opinion."

The City argues that Ms. Sommerville's report and testimony should be stricken as a "net opinion." The city asserts that Ms. Sommerville relied on three things to reach her conclusion: (1) one year of operating information for a waste hauling company that did not engage in the process of food or yard waste recycling; (2) a single email from a company with numbers related to operations and costs, which Ms. Sommerville did not verify, and (3) the word of Mr. D'Antonio, which Ms. Sommerville also did not verify.

The City further alleges that Ms. Sommerville ignored or did not seek out information related to the following: (1) operational information (costs, revenues, etc.) for existing food waste/yard waste recycling or processing facilities in or around New Jersey; (2) the impact of competition (e.g. on pricing and demand) from the soon-to-be built large facility in eastern Pennsylvania and the existing facilities to which OD currently delivers; (3) any actual plans or drawings for a "scaled down" facility; (4) any actual plans that would have shown what building(s) and equipment would have been necessary (thus making it impossible to determine the cost of construction); (5) any actual, current demand analysis in the market; (6) direct information from anyone in the industry; (7) any statements or documents by any company that would indicate that it would send food waste or yard waste to a new GCOR facility; (8) cost estimates from any engineers or architects regarding construction of a "scaled down" facility, or (9) the labor pool available to work at a new facility.

GCOR opposes the motion, asserting that Ms. Somerville made clear in both her report and in her testimony when she was deposed that she relied upon numerous sources to formulate her conclusions in this matter. Further, Ms. Sommerville had extensive discussions with Rocco D'Antonio, who has been involved in the organic waste recycling industry for 14 years.

New Jersey Rule of Evidence 702 requires an expert witness to be qualified by knowledge, skill, experience, training or education. An expert must provide a factual or scientific basis for his or her opinion. Jimenez v. GNOC, Corp., 286 N.J. Super. 533, 540 (App. Div.), certif. denied, 145 N.J. 374 (1996). An expert's bare conclusions, unsupported by factual evidence, are inadmissible as a net opinion. Vuocolo v. Diamond Shamrock Chemical Company, 240 N.J. Super. 289, 300 (App. Div. 1990), certif. denied, 122 N.J. 333 (1990).

There must be some evidential support offered by the expert. A standard which is personal to the expert only is a net opinion. Kaplan v. Skoloff & Wolfe, P.C., 339 N.J. Super. 97, 103 (App. Div. 2001). An expert must explain the methodology and demonstrate that both the factual basis and the methodology are reliable. Townsend v. Pierre, 221 N.J. 36, 55 (2015). This is commonly referred to as providing the why and wherefore to support the opinion rather than providing mere conclusions. Pomerantz Paper Co. v. New Community Corp., 207 N.J. 344, 372-373 (2011). The net opinion rule does not mandate that an expert organize or support an opinion in any particular manner. Townsend, 221 N.J. at 54. The obligation of the expert remains to identify the factual basis for their conclusions, explain their methodology and demonstrate that both the factual bases and the methodology are reliable. Townsend, 221 N.J. at 55.

An expert's opinion constitutes a net opinion when it purports to set out a standard of care, but fails to reference any authority or material supporting the existence of that standard. Buckelew v. Grossbard, 87 N.J. 512, 524 (1981). Where the expert presents testimony from which the jury could find that consensus of a particular profession involved recognizes the existence of the standard defined by the expert, the opinions offered are not a net opinion. Taylor v. Delosso, 319 N.J. Super. 174, 180 (App. Div. 1999).

The net opinion does not mandate an expert organize or support an opinion in a particular manner that opposing counsel deems preferable. Townsend v. Pierre, 221 N.J. at 54. An expert's proposed testimony should not be excluded merely "because it fails to account for some particular condition or fact which the adversary considers relevant." Creanga v. Jardal, 185 N.J. 345, 360 (2005) (quoting State v. Freeman, 223 N.J. Super. 92, 116 (App. Div. 1988)). An expert is not required to audit the information received. That information must be of the type reasonably relied upon by experts in the field.

Here, the fact that Ms. Sommerville did not verify the invoices, checks, or other data provided to her to complete her assessment and report does not make her opinions net opinions. Under the net opinion rule, Ms. Sommerville only needs to be able to identify the factual bases for her conclusions, explain her methodology, and demonstrate how it is reliable. It is under cross-examination that the City may try to point out what they believe to be flaws in Ms. Sommerville's testimony. Based on the information provided to the Court, Ms. Sommerville's testimony is not a net opinion. These are credibility issues for the jury.

This Court has determined that the claim for lost profits fails to meet the reasonable certainty test required by Schwartz. Further, this Court has ruled that GCOR may not recover damages incurred by OD. Accordingly, Ms. Sommerville's testimony will be limited to remaining damages to the extent they were incurred by GCOR.

C. The City seeks an Order granting summary judgment in favor of the City, dismissing GCOR's claims to an additional sublease on the GT Property.

GCOR asserts that it is entitled to a lease of five acres on the GT Property. The City seeks summary judgment on this claim, arguing that GCOR failed to comply with the terms of the Amended Redevelopment Agreement to obtain any leasehold interest on the GT Property.

In relevant part, the Amended Redevelopment Agreement requires:

> Within six months of the City obtaining title to the Gloucester Titanium Site, GCOR must give the City written notice of its intent to acquire a leasehold on such land. The parties will determine the location and boundaries of the proposed leasehold. The parties will work together to acquire the necessary permits. When the City has obtained such permits that are the landowner's responsibility for the project, GCOR shall have a two year period to construct the project.

The City's understanding of the agreement is as follows: (1) within six months of the City obtaining title to the GT Property, GCOR had to give the City notice that it wished to exercise the option on the GT Property and then (2) the parties were then to work to "determine the location

and boundaries of the proposed leasehold." The City acknowledges that GCOR met the first requirement, but argues they did not meet the second requirement. GCOR sent a letter to the City, dated February 1, 2016, which notified the City of GCOR's intent to acquire a leasehold on the GT Property. However, GCOR never sought to define the boundaries or permits necessary to exercise its lease option. The February 1, 2016 letter specifically recognized that GCOR needed to work with the City to "determine the location and boundaries and the necessary permits of the proposed leasehold." GCOR finally sought to set the metes and bounds of this purported leasehold in a May 4, 2022 letter to City Solicitor Howard Long after this dispute was in litigation. The City believes that by virtue of asking to define the leasehold area, GCOR admitted that the location and boundaries had not been determined. Therefore, GCOR never properly exercised its purported right to a leasehold interest.

GCOR responds, arguing that former City Administrator Jack Lipsett confirmed that as early as January 14, 2015 the City had documents, including an actual map, outlining the boundaries of the Gloucester Titanium property that would be subject to the leasehold. Lipsett further explained that the boundaries were delineated through the collaborative efforts of GCOR and the City's professional consultants. Lipsett allegedly endorsed GCOR's incorporation of the additional property into the project.

GCOR further argues that the Amended Redevelopment Agreement specifically obligated the City to obtain the permits "that are the landowner's responsibility." The City, as the landowner, failed to obtain these permits after discovering in 2016 that the level of radiological contamination in the ground was significantly higher than what the City's professional consultants previously reported. The City failed to abide its responsibility under the Amended Redevelopment Agreement to obtain "such permits that are the landowner's responsibility for the project." The City's failure in this regard prevented all further progress.

Here, the Amended Redevelopment Agreement clearly provides two requirements for GCOR to exercise the lease option. "GCOR must give the City written notice of its intent to acquire a leasehold on such land. The parties will determine the location and boundaries of the proposed leasehold. The parties will work together to acquire the necessary permits." It is undisputed that the first requirement was met by GCOR. However, it is disputed whether GCOR and the City determined the location and boundaries of the leasehold. This is a fact issue, as the City certifies that GCOR never sought to define the boundaries or permits necessary to exercise its lease option until its May 4, 2022 letter. GCOR points to City Administrator Lipsett's testimony as evidence that GCOR and the City have defined the area, including producing an actual map.

Material issues of fact exist precluding summary judgment.

D. The City seeks an Order dismissing GCOR's claim for specific performance.

The City argues that GCOR's claims for specific performance should be dismissed as (1) it has not met the relevant standard and (2) courts are loathe to force individuals and entities in situations such as this to enter into long-term relationships. The City argues that specific performance is harsh and oppressive because the City has no available funds to pay for the wetlands mitigation, has no present ability to raise the funds to pay for the wetlands mitigation,

and has no realistic plan to identify a legitimate source of funding to pay for the wetlands mitigation. Further, GCOR has admitted that it does not know exactly what it will be constructing, i.e. it has no building plans or engineering design. They argue the City relied on Southport, who are experts, and paid them $2 million for the mitigation. The City argues it would be inequitable to allow GCOR to punish the City for the inability of those experts to remediate contamination. Further, the business relationship between GCOR the City has entirely broken down. Finally, any specific performance would be subject to the discretion of the NJDEP. "The established rule in New Jersey is: "[s]pecific performance will not be decreed where compliance rests upon the will or discretion of an uncontrolled third party, particularly a governmental body." Ridge Chevrolet-Oldsmobile, Inc. v. Scarano, 238 N.J. Super. 149, 156-57 (App. Div. 1990).

GCOR opposes, asserting that the City did have the financial means to complete the wetlands mitigation. Specifically, the City had $2,750,000 of authorized debt available. The City unconditionally obligated itself to complete the remediation and any associated mitigation for the GCOR property.

For a plaintiff to establish the right to specific performance, they "must demonstrate that the contract in question is valid and enforceable at law," Marioni v. 94 Broadway, Inc., 374 N.J. Super. 588, 598-99 (App. Div. 2005) (citing Jackson v. Manasquan Sav. Bank, 274 N.J. Super. 136, 144 n. 8 (Law Div. 1993), "that the terms of the contract are 'expressed in such fashion that the court can determine, with reasonable certainty, the duties of each party and the conditions under which performance is due,'" Ibid. (quoting Salvatore v. Trace, 109 N.J. Super. 83, 90 (App. Div. 1969) aff'd o.b., 55 N.J. 362 (1970)), "and that an order compelling performance of the contract would not be 'harsh or oppressive.'" Id. at 599 (quoting Stehr v. Sawyer, 40 N.J. 352, 357 (1963)). Such "oppression may result not only from the nature of the contractual undertaking but also from the situation or relations of the parties exterior to and unconnected with the terms of the contract itself or the circumstances of its conclusion." Id. at 618 (internal quotations omitted). A party must generally also show that they were "'ready, desirous, prompt and eager' to perform as required by the contract." Id. at 605 (quoting Stamato v. Agamle, 24 N.J. 309, 316 (1957)).

A greater degree of certainty is required in an action for specific performance. The standard is reasonable certainty of the terms. Barry M. Dechtman, Inc. v. Sidpaul Corp., 89 N.J. 547, 552 (1982). If specific performance will cause great hardship or manifest injustice, it should not be granted. K&J Clayton Holding Corp. v. Keuffel & Esser Co., 113 N.J. Super. 50, 55 (Ch. Div. 1971); Kilarjien v. Vastola, 379 N.J. Super. 277, 284-85 (Ch. Div. 2004); Marioni v. 94 Broadway, Inc., 374 N.J. Super. 588, 599 (App. Div. 2005).

Where monetary damages are insufficient on their own, the court must then determine if specific performance is equitable. The court is required to do more than merely determine whether the contract is valid and enforceable; the court of equity must also 'appraise the respective conduct and situation of the parties, Friendship Manor, Inc v. Greiman, 244 N.J. Super. 104, 113 (App. Div. 1990), the clarity of the agreement itself notwithstanding that it may be legally enforceable, Salvatore, 109 N.J. Super. at 90, and the impact of an order compelling performance, that is, whether such an order is harsh or oppressive to the defendant, Stehr, 40 N.J.

at 357, or whether a denial of specific performance leaves plaintiff with an adequate remedy, Fleischer v. James Drug Stores, Inc., 1 N.J. 138, 146-47 (1948). Underlying this principle is that damages are an inadequate remedy. Mesa Development Corp., VIII v. Meyer, 260 N.J. Super 363, 367 (App. Div. 1992) (citing Centex Homes Corp., v. Boag, 128 N.J. Super. 385, 389 (Ch. Div. 1974)). Factors to take into account include: "how clearly...the parties expressed their contractual undertaking," the impact of compelling specific performance and the way the parties acted toward one another. Marioni, 347 N.J. Super. at 601.

This is not a case where specific performance is being sought with respect to the transfer of real property only. GCOR also seeks specific performance for the City to expend significant public money towards site remediation and wetlands mitigation. The redevelopment agreement does not require that the City fund 100% of these costs. Rather, it requires good faith efforts to fund such costs and to obtain grants or other monies from third parties to pay for such costs. Under the amended redevelopment agreement, the project has been scaled down, and as of this date no plans for a facility have been drawn. The Court finds that under these circumstances, it would be inequitable to order specific performance. Further, the court concludes that monetary damages would be adequate. This Court should not force the City and its taxpayers to incur $2.7 million dollars in debt for a project which may never be built. Additionally, the lack of any metes and bounds description for the GT property mitigates against granting specific performance.

Therefore, the City's motion for summary judgment on the issue of specific performance is granted, and the claims for specific performances in GCOR's complaint are dismissed with prejudice.

E. The City seeks an Order dismissing GCOR's civil rights claims.

The City moves for GCOR's federal and state civil rights claims to be dismissed. The City argues that generally, courts are hesitant to convert normal contractual claims against state actors into constitutional claims and further, GCOR did not identify the specific, constitutional right of which it claims it was deprived. Additionally, the City argues that GCOR's Section 1983 claim fails because it does not plead any facts which give rise to a plausible claim against the City. Municipal liability under Section 1983 attaches only "when execution of a government policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury". Monell v. New York City Dept. of Social Services, U.S. 658, 694 (1978).

GCOR opposes, arguing that GCOR's leasehold interests in Lots 1 and 2 which the City purported to terminate with a letter from its counsel constitute protected property interests under the Fourteenth Amendment as well as under Article 1, Paragraph 1 of the New Jersey Constitution. See American Marine Rail, LLC v. City of Bayonne, 289 F.Supp.2d 569, 581-82 (D.N.J. 2003).

Under the Due Process Clause of the Fourteenth Amendment of the United States Constitution, state officials may not deprive an individual of life, liberty, or property, without due process of law. U.S. Const. art. XIV. "The Due Process Clause guarantees more than fair process"; it "provides heightened protection against government interference with certain

fundamental rights and liberty interests." Gormley v. Wood-El, 218 N.J. 71, 98 (2014) (quoting Washington v. Glucksberg, 521 U.S. 702, 719–20, (1997)).

Article 1, paragraph 1 of the New Jersey Constitution contains "a grant of fundamental rights" and "safeguards values like those encompassed by the principles of due process and equal protection." Greenberg v. Kimmelman, 99 N.J. 552, 568 (1985). For constitutional due process claims, New Jersey courts apply the "standards developed by the United States Supreme Court under the federal Constitution." Roman Check Cashing, Inc. v. N.J. Dep't of Banking and Ins., 169 N.J. 105, 110 (2001) (citations omitted).

Plaintiffs seek to establish a claim for civil rights violations under section 1983. The statute provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C.A. § 1983.

In Section 1983 actions, a court must first identify the state actor, or "person acting under color of law," causing the alleged deprivation. Rivkin v. Dover Twp. Rent Leveling Bd., 143 N.J. 352, 363 (1996). Then, a court must "identify a 'right, privilege or immunity' secured to the claimant by the Constitution or other federal laws of the United States." *Ibid.* In this case, the state actors are the Board and the Township, who plaintiffs allege deprived them of their property; a deprivation of a substantive due process right guaranteed in the Fourteenth Amendment. A similar analysis is required for the state claim for violation of constitutional rights.

The Fourteenth Amendment provides that "no State shall 'deprive any person of life, liberty, or property, without due process of law.'" Am. Marine Rail NJ, LLC v. City of Bayonne, 289 F. Supp. 2d 569, 581 (D.N.J. 2003) (quoting U.S. Const. amend XIV). To prevail on a substantive due process claim arising from a municipal land use decision, a plaintiff must first prove that he or she has a property interest protected by due process. Woodwind Estates, Ltd. v. Gretkowski, 205 F.3d 118, 123 (3d Cir. 2000), overruled on other grounds, United Artists Theatre Circuit, Inc. v. Twp. of Warrington, 316 F.3d 392 (3d Cir. 2003); DeBlasio v. Zoning Bd. of Adjustment, Twp. of W. Amwell, 53 F.3d 592, 600 (3d Cir.), cert. denied, 516 U.S. 937, 116 S. Ct. 352, 133 L. Ed. 2d 247 (1995); Am. Marine Rail, supra, 289 F. Supp. 2d at 581; Cherry Hill Towers, L.L.C. v. Twp. of Cherry Hill, 407 F. Supp. 2d 648, 654 (D.N.J. 2006). Second, a plaintiff must establish that "the government's deprivation of that property interest 'shocks the conscience.'" Cherry Hill Towers, supra, 407 F. Supp. 2d at 654; Rivkin, supra, 143 N.J. at 366; Plemmons v. Blue Chip Ins. Servs., Inc., 387 N.J. Super. 551, 568 (App. Div. 2006).

The claims asserted here are an attempt to make a garden variety breach of contract claim into a civil rights action. The conduct here of the municipality does not shock the conscientious of the Court. The conduct of the City may or may not have been a breach of the contract, but it does not rise to the level of a deprivation of property without due process of law. For these reasons, the motion for summary judgment as to the claim for violation of plaintiff's civil rights will be granted.

F. The City seeks an Order dismissing GCOR's claim for breach of the implied covenant of good faith and fair dealing.

The City seeks summary judgement, dismissing GCOR's claim for breach of the implied covenant of good faith and fair dealing. The City argues that GCOR has failed to prove the City acted with bad faith or without any legitimate purpose in its performance of either the Ground Lease, as amended, or the Redevelopment Agreement, as amended. Further, the City argues that Courts reject and dismiss claims for breach of the implied covenant of good faith and fair dealing where the conduct giving rise to that claim is the same as that which gives rise to a claim for breach of contract. See, e.g., Oravsky v. Encompass Ins. Co., 804 F. Supp. 2d 228, 238-39 (D.N.J. 2011) (dismissing plaintiff's covenant of good faith and fair dealing claim because it was "virtual identical" to his breach of contract claim"). Thus, the City believes the breach of implied covenant of good faith and fair dealing claim should be dismissed because it is duplicative of the breach of contract claim.

GCOR opposes, asserting that there are ample facts that support GCOR's claim for breach of the implied covenant of good faith dealing. For example, GCOR points to the City's governing body throwing permit correspondence from NJDEP into the trash, the City never undertaking any efforts to secure funding for remediation, the City not submitting the application with the New Jersey Infrastructure Trust, and that the City communicating with other potential redevelopers for the GCOR property as early as 2020.

New Jersey courts recognize that every contract contains an implied covenant of good faith and fair dealing. Iliadis v. Wal-Mart Stores, Inc., 191 N.J. 88, 109 (2007); Sons of Thunder, In Thunder c. v. Borden, Inc., 148 N.J. 396, 420 (1997). That implied covenant prevents either party from doing "anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." Ass'n Grp. Life, Inc. v. Catholic War Veterans of U.S., 61 N.J. 150, 153 (1972).

This implied duty of fair dealing does not "alter the terms of a written agreement." Rudbart v. N. Jersey Dist. Water Supply Comm'n, 127 N.J. 344, 366 (1992). It also does not provide a plaintiff with additional damages for the breach of an express term of a contract. Wade v. Kessler Inst., 172 N.J. 327, 343-44 (2002) (holding a plaintiff's pleading erroneously suggested that a defendant "breaching a literal term of the [contract]," could "also could be found separately liable for breaching the implied covenant of good faith and fair dealing when the two asserted breaches basically rest on the same conduct").

"Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party."

Brunswick Hills Racquet Club, Inc. v. Rt. 18 Shopping Ctr. Assocs., 182 N.J. 210, 224 (2005) (quoting Wilson, 168 N.J. at 245). The party asserting a breach of implied covenant claim "must provide evidence sufficient to support a conclusion that the party alleged to have acted in bad faith has engaged in some conduct that denied the benefit of the bargain originally intended by the parties." Id. at 225 (citation omitted).

Nonetheless, a defendant can be liable for a breach of the implied covenant "without violating an express term of a contract." Sons of Thunder, 148 N.J. at 422-23. A "plaintiff may be entitled to relief under the covenant if its reasonable expectations are destroyed when a defendant acts with ill motives and without any legitimate purpose." Brunswick Hills, 182 N.J. at 226. The plaintiff may also "get relief if it relies to its detriment on a defendant's intentionally misleading assertions." Ibid.

Our Supreme Court has acknowledged that it is "mindful of the potential pitfalls in enforcing the covenant of good faith and fair dealing," and that if it is construed "too broadly, it 'could become an all-embracing statement of the parties' obligations under contract law, imposing unintended obligations upon parties and destroying the mutual benefits created by legally binding agreements.'" Brunswick Hills, 182 N.J. at 231 (quoting Northview Motors, Inc. v. Chrysler Motors Corp., 227 F.3d 78, 92 (3d Cir. 2000)). The Court further "warned that 'an allegation of bad faith or unfair dealing should not be permitted to be advanced in the abstract and absent an improper motive.'" Ibid. (quoting Wade, 172 N.J. at 341).

Here, there are facts supporting the claim that the City did not act in good faith. First, the City allegedly had the funds available via the authorized debt, but chose not to spend the money on the remediation. When they made this decision, they allegedly did not notify GCOR that they were no longer planning on funding the project. Second, there is evidence that the City spoke to other redevelopers as replacements for GCOR. Based on these facts, there is evidence from which the fact finder could conclude that the conduct of the City breached the covenant of good faith in fair dealing in making it impossible for conditions of the agreements to be met.

Accordingly, the motion for summary judgment with respect to this claim is denied.

G. GCOR Seeks an Order granting summary judgment as to Count III of Defendant's Counterclaim because no genuine issues of material fact exist with respect to the lack of conduct constituting tortious interference by Plaintiff.

Count III of the City's Counterclaim asserts that GCOR tortiously interfered with the City's ability to redevelop the properties which are the subject of this litigation. GCOR argues that this claim is contradicted by the testimony of City officials. Specifically, former City Administrator Lipsett explained that if GCOR or its principal had communications with NJDEP, he had no knowledge that those alleged communications adversely impacted the City. Further, Lipsett and Former Mayor Spencer testified that they did not know about any alleged financial damage caused by GCOR.

The City does not oppose this position. As such, the Court will grant summary judgment as to Count III of Defendant's Counterclaim and dismiss the claim with prejudice.

H. The City seeks an Order finding as a matter of law that Southport is liable for breach of contract for failure to manage the wetlands permit.

The City seeks summary judgment, holding that Southport is liable for breach of contract for failure to manage the wetlands permit. The City argues that Southport, hired at the request Mr. D'Antonio, was responsible for managing the wetlands permits that the City possessed related to the Property. The permits expired, and now the City wants to hold Southport responsible.

Southport opposes and filed their own motion for summary judgment. Southport argues that the wetlands permit expired because the City did not fund the wetlands mitigation work required under the permit, and the permit was issued based on an erroneous contamination report by the City's contractor, RT Environmental Services, Inc. Actual concentrations of contaminants were much higher than indicated in the Remedial Investigation Report, and necessitated remediation of a larger area and off-site disposal of contaminated material in accordance with NJDEP standards, which significantly increased the budget. The City knew Southport stopped work under the GP4 permit, and even now the City admits that it did not have the money to fund the project. Therefore, any failure to renew the permit could not be considered a material breach because the City lacked the funds to execute the work required under the permit, and the City directed Southport to stop work until a source of funding was identified. Southport contends that the City never agreed to a budget or a source of funding to complete the remediation.

The Redevelopment Agreement requires Southport to fund, manage and perform completion of all remediation required consistent with NJDEP regulations including further investigation and performance of remedial action. Similar responsibilities exist with respect to additional listed properties. The redeveloper was further obligated to implement the permitted wetland mitigation obligations required for the BP site and those to be implemented at the Gloucester Titanium site. The redeveloper was not required to perform any work until such time as the parties agreed on a budget for the work which was to include a source of funding to complete the work. The City was required to engage a licensed site remediation professional for remediation of the properties. The City further was required to obtain title to the Gloucester Titanium property.

Based on the clear and unambiguous reading of the Southport Agreement, Southport was not required to perform any remediation until the parties agreed on a budget, which included a source of funding. Southport claims that there was never an agreed upon budget, while the City argues that there was an agreed upon budget for the years 2014 through 2019. While the City asserts that Southport was required to manage all permits under the agreement, this is neither clear nor unambiguous in the agreement. There remain genuine issues of material fact as to the respective obligations of the parties under the agreement, as well as whether the parties met their obligations.

Therefore, both the City's and Southport's motions for summary judgment as to the breach of contract claim are denied.

I. Promissory Estoppel

"Promissory estoppel is made up of four elements: (1) a clear and definite promise; (2) made with the expectation that the promisee will rely on it; (3) reasonable reliance; and (4) definite and substantial detriment." Toll Bros., Inc. v. Bd. of Chosen Freeholders of Burlington, 194 N.J. 223, 253 (2008) (citation omitted). A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

Where an agreement is unenforceable because of a lack of essential terms, a party may still be entitled to the reasonable value of his services based on the promise. See Restatement (Second) of Contracts § 90 comment d (where the promise central to a claimed expectation interest is unenforceable because of lack of definitiveness, "relief may sometimes be limited to restitution or to damages or specific relief measured by the extent of the promisee's reliance rather than by the terms of the promise"). Any remedy is limited to the extent of the detrimental reliance on the promise, and not to the extent of the parties expectations.

Here there are issues of fact which could conceivably support a claim for promissory estoppel. Accordingly, the summary judgment motion on this issue is denied.

IV. CONCLUSION

For these reasons, the Court will enter an Order as follows:

The City of Gloucester City's motion for summary judgment is granted in part and denied in part. GCOR may not seek recovery for monies paid or costs incurred by Organic Diversions who is a non-party to this litigation. The Court further finds that the lost profits claim for the intended new business is speculative and therefore dismissed. The Court further grants summary judgment dismissing GCOR's claims for specific performance and violation of their civil rights. In all other respects, the City's motion for summary judgment is denied.

The City's motion seeking summary judgment holding Southport liable as a matter of law for breach of contract is denied, as issues of fact exist precluding summary judgment.

The motion for summary judgment of GCOR is granted as to the claims alleging tortious interference and denied as to all other relief sought.

The motion for summary judgment of Southport to the extent it has not been addressed by consent is denied.