INTERNATIONAL CHAMBER OF COMMERCE
INTERNATIONAL COURT OF ARBITRATION

IN THE MATTER OF ARBITRATION UNDER THE RULES OF ARBITRAITON OF THE INTERNATIONAL COURT OF ARBITRATION OF THE INTERNATIONAL CHAMBER OF COMMERCE

BETWEEN:

BAMBERGER ROSENHEIM LTD. (Israel)

Claimant/Counterclaim Respondent

and

OA DEVELOPMENT, INC. (United States)

Respondent/Counterclaim Claimant

Case No. 20198/RD

FINAL AWARD

I. Parties, Counsel and Arbitrator

1. Claimant/Counterclaim Respondent:

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Israel

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3. Arbitrator:

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Upon the joint nomination and agreement of the Parties, on 24 June 2014 the Secretary General confirmed Nisbet S. Kendrick, III as Sole Arbitrator in this matter pursuant to ICC Art. 13(2).

II. Rules, Governing Law and Agreement To Arbitrate

4. The arbitration was conducted pursuant to the 2012 Rules of Arbitration of the International Chamber of Commerce (cited herein as "ICC Article ___").

5. The Solicitation Agreement (defined below), includes the following arbitration agreement and stipulation of governing law:

> This agreement shall be construed in accordance with the laws of the State of New York without giving effect to choice of law principles. Any disputes with respect to the Agreement or the performance of the parties hereunder shall be submitted to binding arbitration proceedings conducted in accordance with the rules of the International Chamber of Commerce. Any such proceedings shall

take place in Tel Aviv, Israel, in the even the dispute is submitted by OAD, and in Atlanta, Georgia, in the event the dispute is submitted by Profimex.

III. Procedural History And Closure Of Proceedings

6. On 15 September 2014, the International Court of Arbitration entered a Partial Final Award in this matter adopting the submission of the Arbitrator finding that the Tribunal had jurisdiction over the Counterclaims asserted by OAD and that venue was proper in Atlanta, Georgia. The procedural history of this matter prior to September 15, 2014 is stated in the Partial Final Award.

7. From September, 2014 through 24 June 2015, the Arbitrator entered numerous case management orders, conducted hearings and ruled on motions to dismiss, motions to exclude testimony and motions to limit claims asserted in the OAD counterclaims. During that time, the scheduled hearings in this matter were continued four times upon the joint request of both Parties.

8. On 7 April 2015 and 24 June 2015, the Arbitrator conducted pre-hearing conferences with counsel for the Parties.

9. Arbitration hearings in this matter were conducted from 6 July 2015 through 10 July 2015 in Atlanta, Georgia. During hearings the Parties presented the testimony of seven live witnesses including the principals of each of the Parties and tendered numerous exhibits. The Parties also tendered into evidence the deposition testimony of twenty three additional witnesses, the affidavit testimony of four witnesses (some supplemental to deposition testimony) and the supplemental deposition testimony of principals of the Parties. In addition to pre-hearing briefs, the Parties submitted post hearing briefs and argument and submissions to support their respective claims for

attorneys fess on 12 August 2015 and rebuttal briefs to those submissions on 18 August 2015 at which time the evidence and argument in this matter was closed.

10. At its session of 23 October 2014, the Court set the time for rendering a final award in this matter as 30 June 2015. At its session of 4 June 2015, the Court extended the time limit for rendering a final award in this matter to 30 October 2015. At its session of 8 October 2015, the Court extended the time limit for rendering a final award in this matter to 30 November 2015. At its session of 5 November 2015, the Courtextended the time limit for rendering a final award in this matter to 31December 2015.

IV. Discussion, Findings And Awards

A. Parties And History Of Dealings Between The Parties

The following facts were either formally stipulated or not in dispute in the evidence presented in this matter:

11. Bamberger Rosenheim Ltd. is a limited liability company organized and existing under the laws of the State of Israel. It was undisputed that Profimex Ltd. isa wholly owned subsidiary of Bamberger Rosenheim Ltd. The Parties stipulated that, for purposes of this arbitration, Bamberger Rosenheim, Ltd. could be "also referred to as Profimex." The evidence was further undisputedthat Profimex performed all obligations of Bamberger Rosenheim, Ltd. under the Solicitation Agreement and that the defamatory statements that are the subject of the Counterclaim herein were made by principles of Profimex acting on behalf of Profimex. Based on the stipulation of the Parties, the forgoing undisputed evidence, the substance of the allegations of both of the Claimant and the Respondent were to resolve any and all claims and disputes between Profimex,

acting on behalf of Bamberger Rosenheim, Ltd. relating to or arising out of the Solicitation Agreement. In this award, the Arbitrator therefore adopts the reference to the Claimant as "Profimex" as used by both Parties in their pleadings, briefs, testimony and other evidence in this arbitration.

In matters relevant to this arbitration, that Profimex served as a "capital aggregator" which solicited individuals in Israel to invest in real estate and related businesses in several countries including the United States. Profimex was also responsible for the performance of Bamberger Rosenheim Ltd. under the Solicitation Agreement and in other matters related to this arbitration. Profimex also performed capital aggregation services for approximately twenty other deal partners similar to OAD.

Elchanan Rosenheim and Jonathan Ross, both principals of Bamberger Rosenheim and/or Profimex testified during arbitration hearings.

Itay Goren is a former principal with Profimex who preceded Mr. Ross in his duties as manager of Profimex investments. Mr. Goren's deposition testimony was tendered and admitted over objection, taking into account his unwillingness to answer certain questions about the investors with whom he was dealing after his very adversarial departure from Profimex.[1] Mr. Goren's employment with Profimex ended in October, 2011.

12. OAD is in the business of real estate acquisition, development and management in the United States.

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[1] Both parties presented witness testimony, either directly or through cross examination, that Mr. Goren, who is currently a capital aggregator in Israel who formerly worked in a management position with Profimex, successfully sued Mr. Rosenheim and Profimex for slander/defamation and termination compensation, that the verdict for compensation is on appeal and that the verdict for slander/defamation was paid.

Steve Berman, Eric Singer and Brian Granath are principals and members of OAD who testified during arbitration hearings.

13. Profimex and OAD entered into a certain Solicitation Agreement entered dated March 31, 2008 (the "Solicitation Agreement") whereby OAD appointed Profimex as its exclusive agent for securing Israeli investors for real estate projects OAD intended to purchase, develop and/or manage and sell. In general terms, the Solicitation Agreement provided an arrangement whereby OAD would present a property it wished to purchase to Profimex with a business plan showing the potential for the investment. Profimex would have the option of providing, through its investor network in Israel, a portion of the capital necessary to acquire and maintain the property. It was the intent to produce income from the acquired projects through leasing and sale at a later date. OAD and Profimex were entitled to charge various fees, some of which are in dispute in this arbitration, for services rendered in connection with the purchase, maintenance, leasing and sale of the property.

14. The Solicitation Agreement, as found to have been modified in this Award, is the only contract entered into between OAD and Profimex.

15. The Solicitation Agreement anticipated that a limited liability company would be formed to purchase each investment (the "Project Entity" or "Project Entities"). The agreement further anticipated that either OAD or an entity organized by OAD would serve as the general partner of each Project Entity and either an entity formed by investors solicited by Profimex or those investors themselves would own some of the limited partner interests in the Project Entity.

16. By way of example, the Bluegrass Lakes project was acquired by 1200 Bluegrass Lakes Partners, LP, a Delaware limited partnership in which GPBLP, LLC, an entity formed by principals of OAD, served as General Partner and Profimex Bluegrass Lakes Parkway, LP, an entity consisting of investors solicited by Profimex, and BLP Equity Group, LLC, an entity consisting of investors not solicited by Profimex, owned the non-managing interest.

17. By way of further example, the Royal Phoenix project was acquired by Royal Phoenix Partners, LP, a Delaware limited partnership in which Royal Phoenix GP, LLC, an entity formed by principals of OAD, served as General Partner and a approximately forty three individuals and entities, some of which were solicited by Profimex and some of which were solicited by OAD, owned the limited partner interests.

18. Notwithstanding a lack of privity between OAD and Profimex in the organizational documents and entities relating to the Project Entities, each prospective project and the terms of each of the Project Entities were discussed and negotiated by principals of OAD and Profimex prior to the solicitation of investments and the acquisition of a project. Further, OAD regularly reported to Profimex with regard to the operation and status of the various Project Entities in weekly telephone conferences with Itay Goren and, after his termination from Profimex, with Jonathan Ross. These communications became less frequent and less effective when the relationship between OAD and Profimex transitioned from cooperative to difficult to adversarial in 2012, 2013 and 2014.

19. Between March 31, 2008 and March 31, 2013, the inception and termination of the Solicitation Agreement, the Parties participated in eight real estate

projects pursuant to the Solicitation Agreement. Those projects, listed in order of acquisition, together with a summary description of the project and its status, are as follows:

(a) Pleasant Grove in Cary, North Carolina; Profimex sponsored entity limited partnership interest. Foreclosure 2 January 2014.

(b) Alexander Drive, Durham County, North Carolina; acquired in June 2008, 7,490 square foot office complex, direct investor limited partnership interest. Sold in 2012.

(c) Northwoods Business Center, Norcross, Georgia; acquired in July 2009, 110,000 square foot flex office complex Georgia; direct investor limited partnership interest. Continues in business.

(d) Royal Phoenix in College Park, Georgia; acquired in two separate transactions - September 2010 and December 2010; 79,867 square foot business park located near Hartsfield Jackson Atlanta International Airport; direct investor limited partnership interest. Continues in business.

(e) 111 Tri-County Parkway in Cincinnati, Ohio; acquired in March 2011, 41,930 square foot office complex, Profimex sponsored entity limited partnership interest. Continues in business.

(f) Bluegrass Lakes, Alpharetta, Georgia; acquired November 2011, office park, Profimex sponsored entity limited partnership interest. Sold 25 February 2014.

(g) 2400 Lake Park Drive, Atlanta, Georgia; acquired in May 2012; 104,964 square foot office complex; Profimex sponsored entity limited partnership interest. Continues in business.

(h) Hawthorne Center, Cincinnati, Ohio; acquired in May 2012, 134,598 office complex, Profimex sponsored entity limited partnership interest. Continues in business.

20. In mid 2012 the relationship between OAD and Profimex began to deteriorate. During that period investments began to mature and produce results that varied from very successful, such as Alexander Drive, to marginal, such as Royal Phoenix, to very unsuccessful, such as Pleasant Grove.

21. In 2012, OAD solicited the approval of a line of credit to be issued from a local bank to Royal Phoenix Partners, LP. The line of credit had been applied for and approved by the bank for several months prior to the request for approval, which approval was required of the limited partners under the Royal Phoenix organizational documents. OAD did not submit the line of credit a to Profimex until 27 December 2014 at which time it requested for virtually immediate approval. The approval request included a disclosure of proposed uses of the line of credit (including loan expenses and prospective tenant improvement costs for new tenants) and a schedule showing expenses of the project to date (including tenant improvement and related construction expenses). The proposed loan would have presumably provided operating capital that would have permitted existing funds to be used to continue to pay distributions to Royal Phoenix limited partners but would have required the Royal Phoenix property, which had previously been debt free, to be pledged as security for the proposed loan. Profimex, on

behalf of the limited partners, declined approval of the proposed loan and it was never consummated.

22. The request for the Royal Phoenix loan, including the manner and timing of the approval request very late in the loan process, was followed by an immediate and further deterioration of the communications and relationship between OAD and Profimex. The Arbitrator notes that disputes arose that are typical to a real estate development and management project that is not performing as well as projected. For example, Profimex, (presumably acting on behalf of at least some of the limited partners) objected to prior use of funds for tenant improvements and construction claiming that the use of such funds would constitute a "Major Decision" requiring limited partner approval under the limited partnership agreement. OAD, on the other hand, apparently believed that the use of such funds constituted "Project Expenses" which it was entitled, if not required, to spend as part of its duties to maintain, lease and manage the project. Although the parties each presented evidence that the other was the cause of these disputes, the fact of the disputes was not contested.

23. In early March, 2013, Profimex hired New York counsel, which issued a letter to OAD questioning the use of funds disclosed in the loan request and directing that all communication relating to Royal Phoenix be directed to counsel.[2] Although the correspondence purported invited informal discussion, it more closely resembled an

[2] Although counsel in this correspondence states that it has been hired by Profimex to represent "the Profimex investors", evidence in this arbitration showed that at least some of the Profimex solicited limited partners did not request or consent to the representation. The Arbitrator notes this discrepancy not only because it is only one of several questionable engagements of counsel by both parties in their real estate dealings but because the incorrect statement further evidences the developing dysfunctional relationship of the participants in the Royal Phoenix and other projects at that time.

indictment and included a "litigation hold" notice purportedly requiring OAD to engage in document preservation and made references to "a neutral arbitrator" suggesting that litigation or arbitration would likely result between the parties.

24. The parties stipulated that the Solicitation Agreement was terminated on March 31, 2013.

B. Profimex Claims

25. In February, 2014, the Bluegrass project was sold resulting in a very favorable return to investors. Profimex commenced this arbitration seeking two fees it claimed were due from OAD as the result of the Bluegrass sale, a "Promote Fee" that is specifically provided for under the Solicitation Agreement and a portion of the "Disposition Fee" paid to OAD from sale proceeds pursuant to the Bluegrass limited partnership agreement. The "Disposition Fee" was not provided for in the Solicitation Agreement as originally drafted but was documented by other communications between the parties as discussed below. Bluegrass also asserts a claim for attorney's fees and expenses incurred in defending OAD's counterclaims in this arbitration.

1. The Bluegrass Promote Fee

26. OAD representative testified that they refused to pay the Promote Fee because they intended to hold the money subject to a claim of set off for claims of defamation OAD intended to assert against Profimex.

27. At the pre-arbitration hearing conducted in this matter on April 7, 2015, OAD announced that it would stipulate its liability for the Promote Fee together with interest and reasonable attorney's fees associated with recovery of the Promote Fee. Pursuant to that announcement, OAD stipulated in a joint stipulation submitted by the

parties that the Promote Fee relating to the Bluegrass disposition in the amount of $296,052.00 (after Georgia State Tax withholding) interest in the amount of $34,674.58 through 2 July 2015 plus reasonable attorneys fees and expenses incurred in recovery of the Promote Fee is due from OAD to Profimex.

28. The amount of attorney's fees and expenses reasonably related to a recovery of the Promote Fee is in dispute. Profimex provided a post hearing submission asserting a claim in the amount of $70,949.49 in attorney's fees and expenses related to recovery of the Promote Fee. Profimex offered testimony that it likely would not have commenced the arbitration if the Promote Fee had been paid as agreed.

29. OAD stipulated liability for attorney's fees and costs but argued that the fees were excessive in light of that late stipulation.

30. The Arbitrator finds fees and costs as claimed by Profimex in the amount of $70,949.49 to be reasonable in light of the late stipulation of liability by OAD, the time expended by counsel, the sum claimed and the lack of any colorable defense to payment of the Promote Fee.

31. Pursuant to the evidence in this matter, including the stipulation of the Parties, the Tribunal makes an award in favor of Profimex and against OAD the amount of $401,676.07, consisting of $296,052.00 principal (after Georgia State Tax withholding), $34,674.58 as pre-award interest and $70,949.49 in attorney's fees and expenses with regard the Bluegrass Promote Fee.

2. Bluegrass Disposition Fee

32. Profimex also makes a claim to $94,500.00 representing 35% of a Disposition Fee paid to OAD pursuant to the Bluegrass limited partnership agreement plus interest and attorney's fees related to the recovery of that sum.

33. OAD argued that the Solicitation Agreement does not provide for a split of the Bluegrass Disposition Fee and that the Solicitation Agreement includes a provision providing that it can only be amended by a writing signed by the parties to that agreement.

34. Profimex offered evidence, however, of OAD's written agreement to division of the fee in the form of an email exchange between the parties that included OAD's agreement to a 35%/65% split of any Disposition Fee received by OAD with regard to the Bluegrass Project. (Hearing Exhibit 69) The email's that comprise Hearing Exhibit 69 include both the block *and* typed signatures of two OAD principals (Eric Singer and Brian Granath.

35. Email correspondence has been found to meet the requirements of the New York Statute of Frauds and to satisfy the requirement that a contract may be modified only by a writing signed by parties to the agreement. *Steven v. Publicis S.A.*, 854 N.Y.S. 2d 690 (2008); *Newmark & Co. Real Estate Inc. v. 2615 E. 17 St. Realty, LLC,*914 N.Y.S. 2d 162 (2011). See also*Bazak Int'l Corp. v. Tarrant Apparel Grp.*, 378 F. Supp. 2d 377, 388-89 (S.D.N.Y. 2005) (Agreements stated in email correspondence have been found to satisfy the "in writing" and signature requirements of contracts for the sale of goods under both the New York Uniform Commercial Code and general contract law so long as the agreement meets requirements for certainty and clear expression of the intent of the parties.)

36. The Arbitrator finds that the email correspondence, signed by the typed signagures of two OAD principals specifically agreeing to a 35%/65% split of any Disposition Fee received by OAD with regard to the Bluegrass Project, meets the requirements that the Solicitation Agreement be modified by a writing signed by the Parties.

37. Further, OAD did not dispute that it agreed in writing to a split of the Disposition Fee but argues that its agreement is not enforceable because it was not also memorialized in the Bluegrass limited partnership agreement and therefore must have been "forgotten" or "waived" by Profimex. That argument ignores the fact that OAD and Profimex entered the separate Solicitation Agreement regarding division of payments between the parties without incorporating that agreement into the organizational documents applicable to each of the Project Entities. The argument also ignores the fact that Profimex was not a direct party to the Bluegrass limited partnership agreement. The merger clause in that limited partnership agreement would therefore not eliminate Profimex's separate side agreement with OAD regarding a division of the Disposition Fee.

38. Profimex also makes a claim for attorney's fees and pre-judgment interest with regard to its Disposition Fee claim. OAD disputed Profimex's claim for attorney's fees and expenses incurred related to the Disposition Fee both as a matter of law and as a matter of evidence. Profimex did not provide authority to those claims under New York law. The Arbitrator further declines to make an award of costs of arbitration to Profimex under ICC Article 37 on this claim.

39. Based upon evidence of the written agreement by OAD to pay Profimex thirty five percent (35%) of any Disposition Fee received by OAD as the result of a sale of the Bluegrass project, and a review of the entire record on this matter, the Tribunal makes an award in the amount of $94,500.00 to Profimex. The Tribunal makes no award of attorney's fees or interest with regard to the foregoing award.

3. Profimex Claim For Defense Related Attorney's Fees And Allocation Of Expenses Pursuant To ICC Article 37

40. Pursuant to ICC Article 37 of the ICC, Profimex asserts a claim for recovery of attorney's fees a incurred in defending OAD's counterclaims and an allocation of expenses of arbitration based upon a characterization of OAD's claims as "meritless" and "without factual or legal basis".

41. In this regard, the Tribunal notes that Profimex unsuccessfully challenged the Tribunal's jurisdiction over the OAD counterclaims in this matter, unsuccessfully challenged OAD's right to assert counterclaims in this matter, unsuccessfully sought to dismiss OAD's counterclaims based on privileges not available under the circumstances of this case (prior to having disclosed to OAD the majority of the statements asserted by OAD to be defamatory), unsuccessfully sought to prevent OAD from including in it's counterclaim statements not disclosed to OAD until late in this arbitration and unsuccessfully sought to exclude the deposition testimony of Itay Goren, a former employee who himself had successfully sued Profimex for defamation.

42. Based on the foregoing, the award to Profimex for attorney' fees in the amount of $70,949.49 with regard to the stipulated Promote Fee and the findings and award entered in favor of OAD herein, Profimex's claim pursuant to ICC Article 37 for an award of attorney's fees and an allocation of expenses of arbitration is denied.

4. Summary

43. The Tribunal enters an award for Profimex and against OAD in the amount $401,676.07, consisting of $296,052.00 principal (after Georgia State Tax withholding), $34,674.58 as pre-award interest and $70,949.49 in attorney's fees and expenses with regard to the Bluegrass Promote Fee.

44. The Tribunal enters an award for Profimex and against OAD in the amount of $94,500.00 as 35% of the Bluegrass Disposition Fee.

45. Profimex's claims pursuant to ICC Article 37 for attorney's fees and expenses related to the Bluegrass Disposition Fee, attorney's fees related to a defense of OAD's counterclaims and an allocation of expenses of arbitration are denied.

C. OAD Claims

1. The Proffered Statements

46. OAD submitted a counterclaim of defamation in this matter based on six proffered statements of Profimex relating to their dealings with real estate project and Project Entities acquired and organized pursuant to the Solicitation Agreement. Based on additional statements revealed during discovery, OAD proffered approximately fifteen additional statements alleged to be defamatory. In April, after the first pre-hearing conference (conducted prior to a postponement of hearings later requested by the Parties), Profimex delivered additional documents to OAD that led OAD to proffer approximately fifty additional statements alleged to be defamatory. After considering the circumstances of that late production of highly relevant documents, many of which had to be translated for use in these proceedings, the Arbitrator denied Profimex's motion to exclude statements included in the late produced documents. OAD's counterclaim for defamation

proceeded to hearing based on seventy one proffered statements made by either Elchanan Rosenheim or Jonathan Ross on behalf of Profimex to various individuals.

47. OAD submitted Hearing Exhibit 1158 listing the proffered defamatory statements in five subject categories. Hearing Exhibit 1154, a notebook compilation of the full email communications from which the statements listed in Hearing Exhibit 1158 are excerpted, was admitted without objection. The following listing of the proffered defamatory states is extracted from Hearing Exhibit 1158:

Category 1 – Mismanaging Royal Phoenix and Northwoods/stealing from the investors.

No.	Statement	Date	Author	Published To
1.	"We are quite overwhelmed by the misdeeds uncovered by the first two audits and view their findings as sufficient proof of mismanagement and misuse of investor funds at this stage. The reports contain substantial evidence of violations of trust, responsibilities and the governing documents that support our case."	12/2/13	Ross	Shai Robkin, Byron Kopman, Howard Kaston
2.	"You saw what I sent you regarding the change in the road that Steve explicitly indicated that it was going to be beneficial to the other side of the field and detrimental to that of Royal Phoenix. Steve knew this and concealed it from us. !!! This is fraud and breach of trust because he was liable to report this fact. Who ever tells you otherwise does not understand the duty of a managing partner."	2/16/14	Rosenheim	Yossi Zidon cc: Izhak Gidron, Jonathan Ross, Matar Perry
3.	"The report is severe and it speaks for itself and so does the	10/23/13	Rosenheim	Royal Phoenix investors

	fact that we have received no reaction."			
4.	"The audit, in fact, yielded many very disturbing misuses of investor capital and general disregard by OAD to their fiduciary responsibility to safeguard investor capital."	12/1/13	Ross	Shai Robkin, Byron Kopman, Howard Kaston
5.	"There are crooks in Atlanta and there are crooks in Israel. Birds of a feather!!!!! Steve explicitly writes about the change to our detriment taking place at the airport. This is no less serious than the issue of the lawyer. Today 5738 we discovered more incriminating materials, which we handed over to the lawyers."	7/27/14	Rosenheim	Yossi Zidon cc: Jonathan Ross, Miri Sahar-Student, Ilan Sofer
6.	"During Itzik's visit to Atlanta, we discovered, among other findings, a 1,365 dollars dinner charged to entertainment expenses (partially assigned to Royal Phoenix). I wonder whom they had invited to that expensive dinner and why they charge it to the project; attorney fees for striving to prevent the investor-requested audit, charged to the investors; a substantial discount OAD's managers took on the leasing fees for their offices, owned by Northwood investors; and other irregular expenses. Honest people do not do such things. Investment managers owe their investors fiduciary responsibility, honest investment mangers do not conduct themselves like that."	10/23/13	Rosenheim	Royal Phoenix investors
7.	"Into this paperwork, OAD tried to slip, fraudulently and completely out of context, a disclaimer and disposal of all	5/5/13	Rosenheim	Israeli Northwoods and Royal Phoenix investors

	our claims against them."			
8.	"This is a ghost town acquired based on false representation, and I myself told you a year earlier about BOA."	8/27/14	Rosenheim	Baruch, Danny, Omri, Guy, Yossi, Yinon, Kobi, Lior, Chaim (last names not given)
9.	"They carry on their web of lies and take advantage of you. You ask one question about signatory rights for any expense (not approval) and they reply about something else[.] And he is still trying to blame me for being in the wrong. This is his tactic! It is crazy! We are dealing with certifiable crooks!"	2/26/14	Rosenheim	Yossi Zidon cc: Jonathan Ross, Izhak Gidron
10.	"There are good guys and bad guys here, and I can assure you that we are the good guys, and they are bad guys. We are out to save your money, and they are out to save their skin."	4/28/13	Rosenheim	Yossi Zidon
11.	"[OAD] are trying a new trick to delay or prevent the audit we are entitled to according to two signed agreements."	6/16/13	Rosenheim	Howard Kaston
12.	"OAD made unauthorized expenses, tried to hide this important information from us as representatives of the Israeli investors and was about to put our investment in this property in danger by taking a credit line/mortgage without having the authority to do so. OAD's directors have flagrantly breached their fiduciary duty vis-à-vis the investors, put the investment in actual risk and, if we had not reported it or failed to hire attorneys to protect our interests, we would have failed in our fiduciary duty we have vis-à-vis each Israeli investor."	5/5/13	Rosenheim	Israeli Northwoods and Royal Phoenix investors
13.	"By my upbringing and conduct-following values in which I	11/7/13	Rosenheim	Asher Grinbaum

	believe and by which I manage the company – they are Thieves! In addition, whoever steals once, will steal again; whoever lies once, will lie again; who ever breaches an agreement, will again breach an agreement. OAD's managers stole money from us, lied to us and breached agreements with us and for Ilan Shavit they are still good people with whom he would keep investing."			
14.	"I say 'begun' because if the auditors had been provided with all of the materials that they requested – most notably including bank reconciliations which were 'not available', the audits would have uncovered deeper investor abuse and mismanagement[.]"	12/2/13	Ross	Shai Robkin, Byron Kopman, Howard Kaston
15.	"We hold that the report discovered very serious things and clearly, it was necessary to hire the American attorney, without whom we would not have been able to carry on an audit, albeit partial."	11/25/13	Matar Perry (email attaching Profimex meeting minutes from November 2013 meeting with Brian Granath and Matt Berke)	Royal Phoenix investors
16.	"I fear that [OAD managers] have withheld significant information that should have been reported to us, and that again they have failed to live up to the ethical standards I believe in."	4/14/13	Rosenheim	All Israeli investors
17.	"Unfortunately, the conduct and actions of the OAD managers have led me to the conclusion that they are not trustworthy, and that we therefore have to proceed with the audit – a	4/14/13	Rosenheim	All Israeli investors

	prerogative ensured to us in our agreement with them."			
18.	"Rather than cooperating with the audit, as is required and customary, OAD are putting up roadblocks."	4/14/13	Rosenheim	All Israeli investors
19.	"I have learned in my life that those who lie once will lie again, and those who break an agreement once will do so again."	4/14/13	Rosenheim	All Israeli investors
20.	"It may seem personal because the tone of communication after months of being lied to and served bullshit and denied information and documents of the partnerships that are rightly ours to review."	5/16/13	Rosenheim	Shai Robkin, Byron Kopman, Howard Kaston
21.	"We do not tolerate managers lying to us or to the investors, be they Israeli or American."	5/16/13	Rosenheim	Shai Robkin, Byron Kopman, Howard Kaston
22.	"OAD has failed miserably in management of the investment."	10/7/13	Ross	Mike Berman
23.	"OAD's gross negligence in management has caused all of the damage here."	10/7/13	Ross	Mike Berman
24.	"That over and above the acute problem that we have with OAD in Pleasant Grove, we have a huge level of mistrust that started with the mismanagement of properties and progressed to serial lies and deception."	10/2/13	Ross	Mike Berman
25.	"I trusted them until I saw what they did with our money. My and your standpoint of honesty and integrity probably are far apart unless you did not read the auditors report. If you did how can you trust OAD."	12/9/13	Rosenheim	Shai Robkin
26.	"All what OAD did instead of working in cooperation with us was lying and acting dishonestly."	5/15/13	Rosenheim	Shai Robkin, Byron Kopman, Howard Kaston
27.	"However, the results of these projects is attributable	12/1/13	Ross	Shai Robkin, Byron Kopman, Howard

	exclusively to the misrepresentations, incompetency and mismanagement (to say the least) of OAD."			Kaston
28.	"I'm sorry for you if OAD has lied to you as they have to us, but learn the facts before you lay the blame."	12/2/13	Ross	Shai Robkin, Byron Kopman, Howard Kaston
29.	Profimex had "taken issue with OAD's actions in certain of the partnerships where [it feared] that expenditures were made without proper authorization and in violation of legal duties owed to the limited partners."	3/18/14	Ross	All Israeli investors
30.	"It is also now obvious that OAD's owners have been using partnership funds as their personal piggy-banks, recklessly charging their own entertainment, travel, and marketing expenses to the partnerships, and even giving itself a way-below-market rent for its professional office space at Northwoods."	5/22/14	Ross	Unknown
31.	"I have learned that an honest person does not steal a penny and the one who steals a small amount we will find bigger amounts as well. I mentioned that because some of the investors said that it is not that tragic if they stole small amounts, I think this is terrible that people are willing to look away from small stealing. I do not."	5/15/13	Rosenheim	Howard Gluckman and Olga Averin
32.	"I see charges for entertaining people that are not related to the investments, this is stealing money from the investors."	6/25/13	Rosenheim	Olga Averin and Howard Gluckman
33.	"In my books they are thieves!"	6/25/13	Rosenheim	Olga Averin and Howard Gluckman
34.	"If they submitted these	6/25/13	Rosenheim	Olga Averin and

	expenses which are not related to the business also to the IRS and cheated the IRS isn't that a felony? So they did not steal only from the investors, they did also from the US Government and if so I believe we need to report it to the authority? People like this should not be allowed to manage other people money, they are crooks!"			Howard Gluckman
35.	"I know they came to Israel for a private event while I told them NOT to come and that period as I was overseas and charge the projects for meals travel expenses car rental for the whole duration of the Israel visit (while they had only one day of investors meetings), if that is what they did which in my world it is stealing, I am sure there a lot more things of this nature."	7/8/13	Rosenheim	Olga Averin and Howard Gluckman
36.	"In fact, without hiring the lawyer we would have been unable to carryout the initial audit, which allowed us to better understand the extent of the OAD directors' dishonesty and which explains their relentless efforts to keep us from conducting that audit."	11/7/13	Rosenheim	Asher Grinbaum
37.	"The severe audit report, the additional findings and the conflict of interest in which OAD's manager find themselves today are a collection of facts that we should not overlook.	10/23/13	Rosenheim	Royal Phoenix investors
38.	"The attempt by OAD's managers to rob Profimex of the rights vested in her by virtue of the agreement regarding the project management when they asked us to sign an authorization to take a credit line."	11/25/13	Matar Perry (email attaching Profimex meeting minutes from November	Royal Phoenix investors

			2013 meeting with Brian Granath and Matt Berke)	
39.	"Read the mail below. I left only the relevant section; they tried by fraudulent tricks to get us to sign that you would have lost all your money in Royal."	4/19/13	Rosenheim	Yossi Zidon
40.	"Thus, how was it until we hired an attorney and for over half a year [?], they gave us no information, did not answer questions, acted unlawfully, disregarded their obligation to receive approvals from us, etc. etc. Now, come on, stop believing their hallucinatory excuses. They have no shred of truth."	4/19/13	Rosenheim	Yossi Zidon
41.	"And it may be worth your while why the relationships have deteriorated. Is this not upon which you should base your decision? The [sic] deteriorated because they lied, concealed information, wanted to make a lot of money at your expense."	4/28/13	Rosenheim	Yossi Zidon
42.	"At that time, we did not know how terrible the situation with them was, how dishonest they were."	4/28/13	Rosenheim	Yossi Zidon
43.	"[We] are trying to resolve the misunderstanding concerning Royal Phoenix and Northwoods. It is not so simple. And to say the least, we are dealing here with very problematic people, not only on the professional level. I am involved with them now in another transaction, and what they are doing there is an unbelievable scandal. I feel like reporting this to all the investors, so they would realize with whom we are dealing, but you	9/24/13	Rosenheim	Efrat Tolkowsky

	will surely be mad at me and say that you couldn't care less because you are not invested in that transaction."			
44.	"In any event, we are very busy [dealing] with OAD's issues[.] Jonathan and I are [together] in an investment that might [cause us to] lose the money because of OAD's scandalous activity[.]"	10/7/13	Rosenheim	Ron Guttmann, Matar Perry; cc: Yoram Dar, Jonathan Ross, Izhak Gidron, Hadass Maron
45.	"We are dealing with a band of swindlers, and you may tell them to sue me for defamation. Fortunately, speaking the truth is still permitted in the State [of Israel]. Regretfully, not many people use this option. Remember that I told only you other things we know. The issue is still under investigation, [and] as usual; we are unable to obtain a clear answer from the people in Atlanta, but only evasive answers. This is not the conduct of honest people."	10/16/13	Rosenheim	Yossi Zidon cc: Jonathan Ross, Izhak Gidron
46.	"In the meantime I have more information on prioritizing the American investors over the Israelis, and why the Americans are supporting the failing and dishonest managers (he who lies is also dishonest, if you do not think that the audit report is extremely severe).	12/10/13	Rosenheim	Yossi Zidon, Matar Perry; cc: Izhak Gidron, Jonathan Ross
47.	"These bad guys in Atlanta are counting precisely on that, the Israelis will not join hand to work together, that we would never act, and therefore they can ignore us altogether. Even the valuation offer they promised to give us for Northwoods we have not received to the present day. As usual they do not meet their obligation."	4/13/14	Rosenheim	Yossi Zidon
48.	"These people are dangerous.	4/2/14	Rosenheim	Yossi Zidon

	Only crooks behave like that. They keep acting illegally and against signed agreements."			
49.	"More importantly, unlike OAD's managers, we have no conflicts of interest with the investors' interest. Steve argues that we have never informed him what their improper actions were. The auditors' report is written in English, and its findings speak for themselves."	6/20/14	Rosenheim	Northwoods investors
50.	"Do you know what the great punishment of the liar is? It is that you do not trust him even if he tells the truth. Therefore, I simply am not willing to trust them and so we are going to act with the greatest caution."	1/14/15	Rosenheim	Baruch Ben-Zvi cc: Ilan Sofer, Elad Beker, Joanthan Ross, Izhak Gidron
51.	"As a Jewish believer, raised to 'deal in faithfulness' I am committed to more than that, and therefore I feel obligated to report [to you] that we are facing a critical junction in managing the crisis of confidence with OAD. I was hopeful that we would be at a different place, where we could make progress, but regretfully, every day new and crucial problems arise, which I am unable to handle without support from all the investors. The audit report we received speak for themselves."	4/28/14	Rosenheim	Royal Phoenix Investors

Category 2 – Frank Wilson role in Royal Phoenix purchase transaction.

No.	Statement	Date	Author	Published To
1.	"Acquisition of the property from OAD's attorney – a serious breach of fiduciary duty to; no transparency; no full disclosure"	11/25/13	Matar Perry (email attaching Profimex meeting minutes from	Royal Phoenix investors

			November 2013 meeting with Brian Granath and Matt Berke)	
2.	"Not before we showed them evidence, did OAD's manager admit that, indeed, the attorney was a trustee of the former owner of the properties. Brian said in the meeting that, at the submission of the information about the project as early as summer 2010, they had identified the seller, claimed they had updated Itai and the attorney (f). We consider this a severe breach of the fiduciary duty of OAD's managers."	11/25/13	Matar Perry (email attaching Profimex meeting minutes from November 2013 meeting with Brian Granath and Matt Berke)	Royal Phoenix investors
3.	"There is no doubt in my mind that OAD's managers continued to foil any attempt by us to separate from them a long time ago with support they received from some investors who did not comprehend the severity of their deeds, and what Steve had done is extremely severe. Not disclosing facts in an investment presentation, purchasing part of the properties from their own attorney (now they claim that he was only the seller's trustee, and even if this is true, it is equally severe) who represented us in the sale, and all the rest that you already know."	12/10/13	Rosenheim	Yossi Zidon, Matar Perry; cc: Izhak Gidron, Jonathan Ross
4.	"I understand this may be illegal at least OAD had to disclose this. This point is very important for your interim report. If Frank Wilson was OAD counsel they need to be in jail."	8/2/13	Rosenheim	Olga Averin and Howard Gluckman

5.	"There must be something wrong or even criminal" in Frank Wilson's role in Royal Phoenix transaction	7/12/13	Rosenheim	Olga Averin, Gary Meyerhoff, Howard Gluckman
6.	Profimex was never notified about Frank Wilson's relationship to Royal Phoenix seller and OAD.	7/12/13	Rosenheim	Olga Averin, Gary Meyerhoff, Howard Gluckman

Category 3 – Bank of America leaving Royal Phoenix.

No.	Statement	Date	Author	Published To
1.	"Bank of America (BOA) – OAD's managers concealed critical information. They knew that BOA was planning to leave many months prior to their notification to the investors and Profimex about the tenant's departure."	11/25/13	Matar Perry (email attaching Profimex meeting minutes from November 2013 meeting with Brian Granath and Matt Berke)	Royal Phoenix investors

Category 4 – OAD purchased a project directly competing with Royal Phoenix.

No.	Statement	Date	Author	Published To
1.	"One picture (attached to this email) is worth a thousand words. It is important to see how OAD neglects its fiduciary duty to us, the investors, and deals a "death sentence" to our investment. We understand that the new building is not 100% occupied and "tomorrow," when a tenant leaves the new building and there will be more vacancy, which property will the populate with new tenants? The conflict of interest into which OAD's managers got	10/16/13	Rosenheim	Royal Phoenix Investors

	themselves cry to high heaven."			
2.	"Tomorrow one or more tenants will leave and then it will be crystal clear that Steve and his partner Brian are in a flagrant conflict of interest [deciding] which property to populate [first], ours or the other. An honest man does not put himself in a situation in which he might be in a conflict of interest."	10/16/13	Rosenheim	Yossi Zidon cc: Jonathan Ross, Izhak Gidron
3.	"Steve's response was that the investment does not damage, because the lease agreements in the new property are long-term. I checked it out, and Steve had lied again."	10/23/13	Rosenheim	Royal Phoenix investors
4.	"Instead of catering to us, the investors, they cater to their pockets, which is illegal. A trustworthy manager would have tried to bring tenants from the building they had acquired now and tempt them with low rent to move into our building, and thus save the investment in Royal Phoenix."	10/16/13	Rosenheim	Royal Phoenix Investors

Category 5(a) – Pleasant Grove and Joe Weber.

No.	Statement	Date	Author	Published To
1.	"I am certain that we have a sufficient record of correspondence with OAD that will show how despite massive efforts to save the partnership, we were entirely stonewalled	10/2/13	Ross	Mike Berman

	by OAD, lied to by OAD, and deceived by OAD."			
2.	"I further told him that the lies and misrepresentations around Joe Weber's offer to buy the Pleasant Grove loan were making things worse."	10/2/13	Ross	Mike Berman
3.	"Either OAD's managers are hiding important information from us, or they are simply lying."	10/4/13	Rosenheim	Israeli investors
4.	"By the contents of your mail and our discussions it is clear that your brother is lying to you and putting you in quite a bad position as a result."	10/7/13	Ross	Mike Berman
5.	"I ask you to read [a Profimex email response to Steve Berman], and see how serious is our distrust of OAD's managers, who must act honestly and fairly toward the investors. Good people do not operate like this. An investment manager should not lie!"	10/4/13	Rosenheim	Israeli investors
6.	"Unfortunately transparency and honesty is not something OAD demonstrated thus far."	10/7/13	Rosenheim	Mike Berman

Category 5(b) – Pleasant Grove Land/conflict of interest.

No.	Statement	Date	Author	Published To
1.	"An investment manager may not: Provide misinformation An investment manager may not hide information An investment manager may not cancel rights vested under the purchase agreement to hard the investors' rights and benefit the investment manager. An investment manager may not prioritize his own interest over the investors' An investment manager may	01/03/14	Rosenheim	Pleasant Grove investors

	not link the sale of one property (with certain investors) with the sale of another asset (with difference investors) if this does not benefit all the investors in both transactions. I am afraid that OAD's managers have done everything they should have avoided."			
2.	"To protect [themselves] from the bank foreclosure, however, they rushed to pay the debt to the bank, [but] only on that property. They left our property hanging, and now the bank took it away. So we have another group of investors who have gone through everything with them, including another call for money, and now we lost all the money. Similarly, there too was concealment of information and fraudulent reports. I have plenty of experience with these people. They are dangerous."	2/16/14	Rosenheim	Yossi Zidon cc: Izhak Gidron, Jonathan Ross, Matar Perry
3.	"There was a buyer for this property but because of conflicts of interest they gave preference their interest of that of the investors. They had a property adjacent to ours, for which they had a buyer. The customer wanted to purchase both parts, and they preferred to keep theirs for themselves, and we have lost the investors' investments. I am telling you once more that they are a gang of conmen. Much worse than you think."	2/16/14	Rosenheim	Yossi Zidon cc: Izhak Gidron, Jonathan Ross, Matar Perry

Individual statements are identified herein by reference to category and number as shown on Exhibit 1. (For example, the first statement in category 1 on Exhibit 1is referred to herein as "Statement 1-1".)

2. Governing Law and Elements Of The Claims

48. The Parties stipulated that New York substantive law would govern the defamation claims asserted by OAD in this matter.

49. In order to recover for defamation under New York law, a claimant must prove that a defendant (i) made a false statement of a defamatory nature, (ii) concerning the claimant (iii) that was published to a third party, (iv) that was made with fault/without privilege or authorization (v) which caused damage to the claimant. *Zadi v United Bank, Ltd.*, 747 N.Y.2d 268 (2002).

50. A statement is not defamatory if it is factually true or "substantially true" or if the statement is an expression of opinion and therefore incapable of being proved to be true or false. In this arbitration Profimex asserts that all or some of the statements proffered as defamatory are substantially true or mere expressions of opinion. *Celle v. Filipino Reporter Enterprises Inc.*, 209 F.3d 163 (2d Cir. 2000).

51. Proof of actual damage is an element of a defamation claim under New York law unless the statement is defamatory *per se*. Statements held to be defamatory *per se* include statements that charge a claimant with a serious crime and statements that tend to injure another in his or her business or profession. When a defamation *per se* is otherwise proved, the law presumes general damage and impairment to the reputation of the claimant in the community. Evidence that harm occurred is required but evidence that assigns a specific dollar value to the injury is not required. *Celle v. Filipino Reporter*

Enterprises Inc., 209 F.3d 163 (2d Cir. 2000); *Davis v. Ross*, 754 F.2d 80, 82 (2d Cir. 1985); *Zadi v United Bank, Ltd.*, 747 N.Y.2d 268 (2002).

52. Some statements that would otherwise be defamatory under New York law may nevertheless protected from liability. These include statements that are afforded a privilege on the basis of either public policy or the constitutional protection. One such privilege, relied on by Profimex in this arbitration, is the "common interest privilege" that protects statements regarding a matter in which both the speaker and the claimant have a "common interest". The common interest privilege afforded some statements is not available, however, if the speaker made a statement with "malice". Malice may be proved if the speaker has made a statement with knowledge that it is false or with a reckless disregard as to it's truth ("constitutional malice") or if the speaker made the statement with hatred, ill will, spite or wanton, reckless or willful disregard of the rights of another or the injurious effect of the speaker's conduct upon another ("common law malice"). As to common law malice, the focus of the inquiry is on the speaker's motivation for making the alleged defamatory statement. The burden of proving the existence of a common interest privilege is on the speaker. If established, the burden of proving malice is on the claimant. *Liberman v Gelstein*, 605 N.E.2d 344 (1992); . *Zadi v United Bank, Ltd.*, 747 N.Y.2d 268 (2002)..

53. In analyzing the proffered statements the Arbitrator has taken into account the context of the entire communication in which the statement was made and has construed language of the statement in accord with its usual and commonly understood meaning. *Davis v. Ross*, 754 F.2d 80, 83 (2d Cir. 1985)

3. Statements Found To Be Not Defamatory

54. The Arbitrator finds that the following statements proffered by OAD not defamatory because they are expressions of opinion, are statements that merely identify a business dispute or are otherwise not defamatory in nature: 1-3, 1-10, 1-15, 1-16, 1-19, 1-29, 1-35, 1-37, 1–38, 1-43, 1-44, 1-47, 1-49, 1-51, 2-3, 5(a)-5 and 5(b)-1.

55. Statement 1-24 is a statement made by one representative of Profimex (Mr. Ross) to another representative of Profimex (Mr. Rosenheim) which refers to a possibly defamatory statement made by Mr. Ross to Mike Berman but because the proffered statement is not referenced as a quote the Arbitrator finds that there is insufficient evidence to prove publication of the defamatory words to a third party. Based on the foregoing the Arbitrator finds that OAD has not carried its burden of proof that Statement 1-24 is defamatory under New York law.

56. Statement 1-30 is a statement included in correspondence from Profimex to the OAD entities organized to manage the Northwoods and Royal Phoenix projects. No evidence of publication to a third party was submitted. Based on the foregoing the Arbitrator finds that OAD has not carried its burden of proof that Statement 1-30 is defamatory under New York law.

57. The Arbitrator finds that Statements 1-22, 1-23, 5(a)-1, 5(a)-2, 5(a)-4 and 5(a)-6, may not be the basis for a recoverable claim because the statements were published to Mike Berman, a brother Steve Berman who is a principal of OAD. Under New York law, proof of some injury resulting from a statement is an element of a claim of defamation, even if that damage attributable to that injury does not have to be proved by evidence of injury in a specific dollar amount. Having reviewed the deposition testimony of Mike Berman, the Arbitrator finds that Statements 1-22, 1-23, 5(a)-1, 5(a)-2,

5(a)-4 and 5(a)-6,which would otherwise likely have been found to be defamatory *per se*, had no effect on Mr. Berman who, in meetings with Profimex, was advocating on behalf of OAD and who testified in deposition that his opinion of OAD was not changed by Profimex's statements.

58. For reasons stated in the forgoing paragraph, the Arbitrator further finds that Statements 1-1, 1-4, 1-11, 1-14, 1-20, 1-21, 1-25, 1-26, 1-27 and 1-28 which were published to Shai Robkin, Byron Kopman and Howard Kaston (either jointly or to one of those individuals) may not be the basis for a claim of defamation despite the fact that they likely would have otherwise have been found to be defamatory *per se* because all three individuals affirmatively testified in deposition that Profimex's statement had no effect whatsoever on their opinion of or willingness to conduct business with OAD.

59. The Arbitrator finds that Statement 5(a)-3 is not defamatory because it meets the test of substantial truth. Specifically, the Arbitrator finds that OAD did not make a full disclosure to Profimex regarding the process by which it solicited the involvement of Joe Weber to provide replacement financing or to simply purchase the existing debt securing the Royal Phoenix project at a time when that property was facing foreclosure.

4. Statements Found To Be Defamatory *Per Se* And Not Protected By The Common Interest Privilege

60. The Arbitrator finds that Statements 1-17, 1-18, 1-31, 1-32, 1-33, 1-34 and 1-36 are defamatory *per se*. Specifically, as more fully discussed in paragraphs 62 through 70, below, the Arbitrator finds that the statements, each of which relate to the Prager Metis forensic review and either grossly or falsely misstate the contractual right of Profimex to conduct a "forensic" review of OAD's management affiliates in the Royal

Phoenix and Northwoods projects or the results of the Prager Metis "forensic" reviews, are untrue, were published to third parties, were defamatory in nature and both would tend and were intended to injure OAD in its business and profession.

61. The Arbitrator further finds that Statements 1-17, 1-18, 1-31, 1-32, 1-33, 1-34 and 1-36 are not protected by the Common Interest Privilege because they were made with malice as defined under both the constitution and common law.

62. In this regard the Arbitrator again notes the deteriorating relationship between OAD and Profimex in 2012 which was not aided by the late request by OAD on 27 December 2012 for approval of a working capital like of credit to be used for the Royal Phoenix project. In early 2013, Profimex, and in particular Mr. Rosenheim, was subjected to harsh criticism from at least a few of the substantial investors Profimex had solicited to participate in the Royal Phoenix entity. See, for example, trial Exhibit 535, and correspondence included with Statement 1–17, in which Mr. Rosenheim is stated to be "walking into insane legal exposure, both as Profimex and personally" and "[Y]ou personally and Profimex, for all it is worth, are responsible for all your present moves, legally and financially, and for the enormous damage they might cause . . .".

63. The Arbitrator finds that Profimex elected to "defend" itself from this criticism not by identifying legitimate market issues and competition or the admission that some investments simply do not perform as anticipated but, instead, engaged in a campaign of blame, accusation and vilification of OAD with a reckless disregard as to the truth of its statements and with ill will and a reckless and willful disregard of the rights of OAD or the injurious effect of the Profimex's statements upon OAD.

64. The Arbitrator finds evidence of malice, both "constitutional" and "common law" throughout Profimex's conduct beginning at least in early 2013 and continuing to the present.

65. By way of example, in May of 2013 Profimex decided to retain Prager Metis, it's historical accounting firm with which it had an ongoing relationship, rather than an independent firm, to conduct a forensic investigation of the operation of the Royal Phoenix and Northwoods projects.[3] Howard Gluckman, the engagement partner who initially met with Mr. Rosenheim regarding the proposed "forensic" reviews, summarized the purpose of the forensic investigations as communicated by Profimex as follows:

> Profimex wants to proceed with the two stage investigation project with Metis Group as previously discussed. Stage One is to get enough data to be able to go to Profimex investors to raise funds for further investigation. Stage Two is to get enough evidence to get OAD to resign and to be bought out.

Mr. Gluckman's recount of instructions from Profimex reveals that the "forensic investigations requested by Profimex" that became the subject of a number of the proffered defamatory statements discussed below were not an attempt to find facts or discover truth but instead were a pretext to raise money for an effort to deflect blame and criticism from Profimex and direct it to OAD.

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[3] The Arbitrator notes that the organizational documents of both those entities permitted broad scale, GAAP audits of the financial statements and dealings of both those entities in accordance with Generally Accepted Auditing Standards ("GAAS") that, unlike the forensic investigation conducted at the instance of Profimex, would have required the full cooperation of OAD. GAAS audits, however, were never requested either by Profimex or the limited partners of either of those entities despite the fact that they would likely have answered many, if not all of the questions raised through the Prager Metis forensic reviews.

66. The Arbitrator finds further support for the holding that Profimex acted with malice in the proposed summary of the investigation which Mr. Gluckman prepared for review by Olga Averin, the accountant conducting the "forensic" examination, which included the following:

> You should be aware, however, that until now our team has not seen any evidence of fraud or gross negligence. There is the matter of the one trip to Israel that should not have been charged to your investments, and there are a lot of office and administrative expenses that probably should not be charted to the projects. But in comparison to the total investment in the projects, and the annual operating expenses of each project, these amounts are not material.

67. There was no evidence that the forgoing summary was sent to Profimex but the Arbitrator finds that Mr. Gluckman's candid thoughts are an accurate statement of the results of the purported forensic investigations. For example, the Arbitrator notes the following with regard to the reports issued by Prager Metis:

- The reports made no finding of fraud or gross negligence on the part of OAD.
- One questioned expense in the amount of approximately $50.00 incurred in Israel by OAD when on a trip to meet with Israeli investors, was a clothing receipt (in Hebrew) that inadvertently was submitted for reimbursement instead of a gasoline receipt (in Hebrew) in approximately the same amount.
- The Royal Phoenix review revealed that OAD charged only 20% of one Israel trip to that partnership and there was no evidence that this was not an appropriate allocation.
- The Royal Phoenix review made a finding that one of OAD's principals received a reimbursement of $94.00 out of an actual $748.89 liquor

expense that was characterized as an employee/client entertainment expense.

- The Royal Phoenix review made a finding of an expense reimbursement to the relative of an OAD principal in the amount of $36.50 for mileage.

Although the Prager Metis forensic review reports included dozens of similarly detailed findings of very specific *de minimis* reimbursements to OAD or its principals, the Royal Phoenix review report also made a finding of a debit and transfer from OAD's bank in Atlanta to a Bamberger Rosenheim account in Israel for "Royal Phoenix Business Center Placement Fee." The report did not specify the amount of the payment to Profimex.

68. The Auditor further notes that Mr. Rosenheim continued his attempts to influence the results of the Prager Metis "forensic review" by making defamatory statements while the review was ongoing. For example, Statements 1-32, 1-33 and 1-34 are three of the many statements by Mr. Rosenheim accusing OAD of being criminals, in this instance of "stealing" and "thieves." The Arbitrator finds these statements are defamatory *per se*. The purported basis for the statement are two expenses, the $50.00 gasoline receipt discussed above and $1365.00 broker luncheon OAD conducted to market the Royal Phoenix property which, with no regard for the truth, Mr. Rosenheim characterized as "charges for entertaining people that are not related to the investments" and the IRS reporting related to these expenses.

69. The Arbitrator also notes that Marvin Willis, another accountant tendered by Profimex with regard to the Prager Metis reviews, had no prior real estate accounting experience and reached no independent conclusion regarding the Prager Metis reports other than that the non-findings in those reports seemed to be supported by

documentation. Boaz Yifat, an Israeli accountant whose testimony was also tendered by Profimex, likewise made no independent review and had no basis for any independent conclusions other than a review of the Prager Metis reports. The Arbitrator therefore found the testimony of these two proffered experts merely cumulative of the testimony of Olga Averin and the Prager Metis reports themselves.

70. In summary, the Prager Metis forensic reviews made no finding of misuse of funds, fraud, embezzlement, theft or other deceit on the part of OAD. Notwithstanding this failure, Profimex persisted in making extremely damaging statements about OAD using those characterizations, purportedly based on the "findings of the audit". These statements are consistent with Profimex's pre-investigation motives to disparage OAD in order to force it to withdraw and sell its interest, all as disclosed to Mr. Gluckman prior to commencement of the "investigation". The Arbitrator finds that these statements were made with malice, that is, with a reckless disregard as to it's truth, with ill will, spite and a wanton, reckless and willful disregard of the rights of OAD or the injurious effect of the statement upon OAD.

71. The Arbitrator finds that Statement 1-2 is defamatory *per se*. Specifically, the Arbitrator finds that the statement, relating to the geographic location of the Royal Phoenix project in relation to the Atlanta airport, both would tend and was made with an intent to injure OAD in its business and profession.

72. With regard to the location of the Royal Phoenix complex of office buildings that comprise the Royal Phoenix project, both those buildings and the Atlanta airport are (not surprisingly) in the same location today that they were in when purchased by Royal Phoenix Partners, LP. It was undisputed that the location of those buildings

was and is within walking distance and very close proximity of the Atlanta airport. It was also undisputed that, as the result of the construction of the new international terminal at the Atlanta airport, one or more roads between the Royal Phoenix complex and the airport were slightly relocated. There was no evidence found credible by the Arbitrator that the modification to this roadway was known to OAD prior to the acquisition of the Royal Phoenix complex or that the modification had any material effect on the success or lack of success of the project.

73. There was direct evidence that Mr. Rosenheim made no investigation whatsoever regarding the location of the Royal Phoenix project in relation to the Atlanta airport prior to the acquisition of the Royal Phoenix acquisition and that he has made no such investigation since that time. Mr. Rosenheim testified that he has not even accessed Google Maps or a similar mapping program to view photographs of the project and its geographic relation to the airport.

74. Notwithstanding Mr. Rosenheim's lack of investigation and due diligence regarding this apparently inconsequential issue, he made Statement 1-2 accusing OAD principal Steve Berman of "fraud and breach of trust" for failing to disclose the "change in the road."

75. Statements 1-5 (accusing OAD of being "crooks") and 1-8 (referencing a "ghost town based on false representations") also relate to the location of the Royal Phoenix complex in relation to the Atlanta airport.

76. The Arbitrator finds that Statements 1-2, 1-5 and 1-8 were made with malice, that is, with a reckless disregard as to it's truth, with ill will, spite and a wanton,

reckless and willful disregard of the rights of OAD or the injurious effect of the statement upon OAD and are therefore not protected by the Common Interest Privilege.

77. The Arbitrator finds that Statement 1-6 is defamatory *per se*. Specifically, the Arbitrator finds that the statement, relating to a broker luncheon hosted by OAD, would both tend and was made with the intent to injure OAD in its business and profession.

78. In Statement 1-6, Mr. Rosenheim states to Royal Phoenix investors that OAD charged a $1365.00 "dinner" expense as an "entertainment expense", an action that would not have been taken by "honest people."[4]

79. Evidence demonstrated that the referenced expense was, in fact, a luncheon for real estate professionals who might be interested in marketing the Royal Phoenix complex to their prospective tenant clients. The luncheon was held at a time that the Royal Phoenix property was searching for tenants and OAD was being criticized by Profimex for not taking sufficient actions to market the property.

80. The evidence further showed that Mr. Rosenheim's real complaint was that OAD should have paid for the event from its management commission and not as an expense of the project as is specifically authorized by the Royal Phoenix limited partnership agreement. The Arbitrator finds that whether the luncheon should have been charged to OAD or the Royal Phoenix project was, at most, a business disagreement and not a matter that would call into question the honesty or integrity of OAD.

[4] The Arbitrator notes that Statement 1-6, like many of the tendered statements which tend to be extended rants, also includes other unfounded accusations included within the characterization of dishonest behavior.

81. Because of the gross mischaracterization of the luncheon expense and the related statement regarding dishonesty of OAD, the Arbitrator finds that Statement 1-6, was made with malice, that is, with a reckless disregard as to it's truth, with ill will, spite and a wanton, reckless and willful disregard of the rights of OAD or the injurious effect of the statement upon OAD and is therefore not protected by the Common Interest Privilege.

82. The Arbitrator finds that Statements 1-7 and 1-39 are defamatory *per se*. Specifically, the Arbitrator finds that these statements, relating to a document submitted to Profimex in late December 2013 soliciting approval for a line of credit for the Royal Phoenix project from State Bank for that included a ratification of prior acts taken by OAD as general partner of Royal Phoenix Partners, LP, both would tend and were intended to injure OAD in its business and profession.

83. As noted above, approval for the Royal Phoenix line of credit, which had been approved by the bank months earlier, was solicited by OAD very near the end of the year when the bank's approval was set to expire. It was unclear from the evidence whether the bank or OAD required the ratification document as a condition of going forward with the line of credit loan transaction[5] or whether this was a request that originated from OAD. There was no dispute, however, that the document was submitted for Profimex to read, understand and either agree to or reject. Since Profimex did not approve the loan request, it did not sign the proposed document.

[5] The Arbitrator is aware that banks typically require a ratification of prior acts and actions related to the loan transaction as a precondition to issuing credit to insure that a loan is not being made to an entity with internal conflicts or potential litigation (like the litigation expressly threatened by Profimex) that might impact the ability to repay a loan.

84. In Statements 1-7 and 1-39, Mr. Rosenheim, on behalf of Profimex, states to numerous investors in Israel that request for the proposed ratification was "fraudulent". Whatever other criticisms might be made of the manner in which the loan approval and ratification of actions was solicited, there was no evidence presented that the solicitation was made in a manner that would constitute fraud, *i.e.*, a knowing misrepresentation or concealment of a fact upon which Profimex reasonably relied on to its detriment or damage. The requested document was, by Profimex's own admission, read, understood and rejected by Profimex.

85. In light of the lack of evidence to support the assertion of "fraudulent" behavior in Statements 1-7 and 1-39, the Arbitrator finds that Statements 1-7 and 1-39 were made with malice, that is, with a reckless disregard as to it's truth, with ill will, spite and a wanton, reckless and willful disregard of the rights of OAD or the injurious effect of the statement upon OAD and is therefore not protected by the Common Interest Privilege.

86. The Arbitrator finds that Statement 1-9, made to Yossi Zidon, an Israeli investor Profimex solicited to participate in the Royal Phoenix and Northwoods projects, is defamatory *per se*. Specifically, the Arbitrator finds that the statement, apparently relating to the manner of approving expenses and writing expense checks for the Royal Phoenix and Northwoods projects, both would tend and was made with an intent to injure OAD in its business and profession.

87. In Statement 1-9, Mr. Rosenheim accuses OAD of engaging in a "web of lies" and being "certifiable crooks" for not complying with what is suggested to be an agreement on the part of OAD to allow a Profimex representative to sign every expense

check written with regard to the Royal Phoenix and Northwoods projects. There was no evidence that OAD ever agreed to such a procedure, which would have been a radical departure from the allocation of duties under the organizational documents of both those entities, or that OAD engaged in a "web of lies" or criminal behavior regarding any expense at the subject projects.

88. In light of the lack of evidence to support the existence of an agreement as suggested by Statement 1-9 or any evidence that OAD engaged in a "web of lies" or criminal behavior, the Arbitrator finds that Statement 1-9, was made with malice, that is, with a reckless disregard as to it's truth, with ill will, spite and a wanton, reckless and willful disregard of the rights of OAD or the injurious effect of the statement upon OAD and is therefore not protected by the Common Interest Privilege.

89. The Arbitrator finds that Statement 1-13, made to Asher Grinbaum, an Israeli investor, is defamatory *per se*. Specifically, the Arbitrator finds that the statement, made in the context of attempting to convince Mr. Grinbaum that Mr. Rosenheim's view of OAD and not that of another investor (Illan Shavit) should be adopted and believed by Mr. Grinbaum, both would tend and was made with an intent to injure OAD in its business and profession.

90. Although the lengthy correspondence from which Statement 1-13 is taken includes very minor references to a few facts, it is by in large a group of conclusory allegations that OAD has lied, has breached agreements and has stolen money from "us".[6]

[6] The statement also includes the allegation that "they are Thieves!" but, in this instance, that accusation is qualified by Mr. Rosenheim as based on "his upbringing", a

91. At the time this statement was made, there was no colorable argument that OAD stole money from anyone or told any lies in its dealings with Profimex. There was evidence of differences in business judgment, document interpretation, opinions on property management practices and other issues about which reasonable business persons might disagree. There was also evidence that money was spent at one or more of the Project Entities with approval by Profimex by a method not specified in the Project Entity organizational documents. There was no evidence or claim, aside from the immaterial and misguidedly criticized expense reimbursements, that OAD converted money to its own use as opposed to having used funds in manner not approved by Profimex. As to the "not approved" project expenditures, the Arbitrator finds that the expenditures were appropriate in connection with the management and leasing of the projects (see discussion at paragraph 80, above) notwithstanding the dispute regarding whether approval was obtained or not. The Arbitrator finds that there was no good faith basis for an assertion that OAD had stolen money or told lies.

92. In making the foregoing finding the Arbitrator notes that several months after Statement 1-13 was published to Mr. Grinbaum, OAD refused to pay to Profimex and retained the Promote Fee which it later stipulated it was required to pay to OAD under the Solicitation Agreement. Profimex argues that this failure to pay constituted a theft by conversion under Georgia criminal law or larceny under New York law.[7] OAD representatives testified that the Promote Fee was withheld on the basis of a belief that it

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qualification which the Arbitrator finds cause that portion of Statement 1-13 to be a statement of opinion.

[7] Profimex provided a brief with several other possible criminal statutes implicated by OAD's refusal to tender the Promote Fee, none of which the Arbitrator found to be applicable in the circumstance of this matter.

had a right to sequester the money under a right of set off while considering prosecution of the defamation claims that it now asserts in this arbitration. In post hearing briefing, however, OAD correctly concedes that it had no legal right of set off that would justify retention of the Promote Fee after OAD's demand for payment.

93. Because Statement 1-13 was made prior to retention of the Bluegrass Promote Fee by OAD, however the Arbitrator need not determine whether retention of that fee constituted a crime under either Georgia or New York law. The statement was false at the time it was made and, as discussed above, the Arbitrator is required to construe statements in the context of the entire communication at the time the statement was made.

94. In light of the lack of evidence to support the assertions that OAD "lied to us" or "stole money from us", the Arbitrator finds that Statement 1-13, was made with malice, that is, with a reckless disregard as to it's truth, with ill will, spite and a wanton, reckless and willful disregard of the rights of OAD or the injurious effect of the statement upon OAD and is therefore not protected by the Common Interest Privilege.

95. For reasons stated above, the Arbitrator also finds that Statements 1-41 (to Yosi Zidon), 1-42 (to Yosi Zidon), 1-46 (to Yossi Zidon) and 1-50 (to Baruch Ben-Zvi), which accuse OAD of unspecified "lies", of being a "liar", or of being "dishonest" to be defamatory *per se* and not protected by the Common Interest Privilege.

96. The Arbitrator finds that Statement 1-40, made to Israeli investor Yosi Zidon, is defamatory *per se*. Specifically, the Arbitrator finds that the statement, made in the context of attempting to convince Mr. Zidon that Mr. Rosenheim's very negative

opinion of OAD should be adopted and believed by Mr. Zidon, both would tend and was made with an intent to injure OAD in its business and profession.

97. The Arbitrator makes the foregoing finding with regard to the portion of Statement 1-40 which states, as a conclusory allegation, that OAD acted "illegally".

98. As with Statement 1-13, this statement was made long before the dispute regarding the Bluegrass Promote Fee became due. With the exception of the issue of whether the failure to pay that fee when due constituted a crime, an issue which is not necessary to and not adjudicated in this Award (see discussion at paragraphs 92 and 93, above), there is no evidence that OAD engaged in any illegal conduct in its dealings with Profimex or the Project Entities.

99. Because there is not evidence to support an allegation of "illegal conduct" at the time the statement was made, the Arbitrator finds that Statement 1-40, was made with malice, that is, with a reckless disregard as to it's truth, with ill will, spite and a wanton, reckless and willful disregard of the rights of OAD or the injurious effect of the statement upon OAD and is therefore not protected by the Common Interest Privilege.

100. The Arbitrator finds that Statement 1-45, made to Israeli investor Yosi Zidon, is defamatory *per se*. Specifically, the Arbitrator finds that the statement, made with regard to the Royal Phoenix project, which not only states that OAD is comprised of a "band of swindlers" but also invites a suit for defamation as a manner of asserting the truth of that allegation, both would tend and was made with an intent to injure OAD in its business and profession.

101. The Arbitrator notes that the noun "swindler" refers to a person who cheats another out of money or assets through fraud, deceit, or other deception. As

discussed above, the Arbitrator finds that there is no evidence that supports the allegation that OAD engaged in a fraud or other deception in its dealings with Profimex. The Arbitrator finds that neither disagreement of the parties on some business decisions, nor the fact that Profimex would have conducted its property management business differently in some (unspecified) different manner than OAD, nor the fact that OAD did not comply with every demand or request made of it by Profimex nor the fact that some of the Project Entities did not perform as hoped constitute or suggest fraud, deceit, or deception on the part of OAD.

102. The Arbitrator finds that Statement 1-45, was made with malice, that is, with a reckless disregard as to it's truth, with ill will, spite and a wanton, reckless and willful disregard of the rights of OAD or the injurious effect of the statement upon OAD and is therefore not protected by the Common Interest Privilege.

103. The Arbitrator finds that Statements 2-1 and 2-2, made to Profimex solicited investors in the Royal Phoenix project, and Statement 2-6 made to representatives of Prager Metis, are defamatory *per se*. Specifically, the Arbitrator finds that the statements, which accuse OAD of a breach of fiduciary duty, were made with an intent to injure OAD in its business and profession.

104. Statements 2-1, 2-2 and 2-6, relate to the alleged failure of OAD to disclose the multiple roles of an attorney, Frank Wilson, in the acquisition of the Royal Phoenix project. The transactional documents relating to that acquisition, clearly show that Mr. Wilson served both as counsel for OAD and Royal Phoenix Partners, LP and also served as the Trustee of a trust for a third party that was the seller of the Royal Phoenix property. The evidence further demonstrated that Mr. Wilson, as counsel for

OAD, communicated directly with Profimex's counsel in Israel and shared those transaction documents prior to the closing of the Royal Phoenix purchase. Although the Arbitrator appreciates the concern about both Mr. Wilson's dual role as Trustee for the seller and counsel for the purchaser, the Arbitrator finds that there was no attempt to conceal those roles. The Arbitrator is equally concerned about the apparent failure of Profimex's own counsel to advise Profimex of the many hats Mr. Wilson wore in the Royal Phoenix transaction in light of the importance later assigned to the issue by Profimex. Notwithstanding the forgoing concerns, Arbitrator further finds that there was no evidence of any damage to Profimex or Royal Phoenix Partners, LP as the result of Mr. Wilson's multiple roles. Finally, as stated above, the Arbitrator finds that Mr. Wilson's multiple roles in the Royal Phoenix transaction were disclosed to Profimex via Profimex's counsel prior to closing of the transaction and statements by Profimex alleging non-disclosure of that circumstance are false.

105. The Arbitrator finds that Statements 2-1, 2-2 and 2-6 were made with malice, that is, with a reckless disregard as to it's truth, with ill will, spite and a wanton, reckless and willful disregard of the rights of OAD or the injurious effect of the statements upon OAD and are therefore not protected by the Common Interest Privilege.

106. The Arbitrator finds that Statements 2-4 and 2-5, made to representatives of Prager Metis, are defamatory *per se*. Specifically, the Arbitrator finds that the statements, which indirectly or directly accuse OAD of a crime arising from the alleged non-disclosure of Mr. Wilson's roles in the Royal Phoenix transaction, would tend and were made with an intent to injure OAD in its business and profession.

107. Counsel for Profimex identified no criminal statute that would even remotely make OAD's failure to disclose Mr. Wilson's role in the Royal Phoenix transaction, had such a failure actually occurred, either "criminal" or cause for OAD "to be in jail" as asserted by Profimex.

108. The Arbitrator finds that Statements 2-4 and 2-5 were made with malice, that is, with a reckless disregard as to the truth, with ill will, spite and a wanton, reckless and willful disregard of the rights of OAD or the injurious effect of the statements upon OAD and are therefore not protected by the Common Interest Privilege.

109. The Arbitrator finds that Statement 3-1, made to investors in the Royal Phoenix project solicited by Profimex, is defamatory *per se*. Specifically, the Arbitrator finds that the statement, which accuses OAD of concealing "critical information" from limited partners in Royal Phoenix, both would tend and was made with an intent to injure OAD in its business and profession.

110. Bank of America ("BOA")was an existing tenant at the Royal Phoenix complex when it was acquired by Royal Phoenix Partners, LP. BOA did not maintain a retail banking branch at the location but instead housed an IRS payment processing center under a contract with that government agency. The Arbitrator finds that BOA made the internal decision not to renew its lease at Royal Phoenix as part of a consolidation of similar facilities, at least a year before the expiration of the least term. The Arbitrator finds that BOA was not required to give notice of non-renewal and, in fact did not give OAD notice of non-renewal, until shortly before the expiration of the lease term. The Arbitrator finds that OAD did not have actual knowledge of the BOA decision

or conceal that knowledge from "investors and Profimex" for "many months" before the tenant's departure.

111. The submission of evidence relating to Statement 3-1 deserves further comment. Profimex's extensive testimony relating to the BOA departure from Royal Phoenix, that was unquestionably a negative event but one that could have been at least predicted as a possibility from a due diligence review of leases at the property prior to acquisition, varied from the allegation in Statement 3-1 (that OAD had actual knowledge which it concealed) to an allegation of negligence (OAD should have known). On the issue of concealment, Mr. Rosenheim (in response to questions from the Arbitrator) ultimately stated that the basis for his statement in that regard was the failure of OAD to remove BOA as a representative tenant at the Royal Phoenix project on an OAD promotional web site for a few weeks after BOA departed from the property. Profimex also offered testimony, unrelated to the truth or falsity of Statement 3-1, that OAD should have done something to prevent or reverse the BOA decision. That testimony resulted in counter-testimony from OAD representatives of steps taken by OAD (including contacting the offices of the two Georgia United States Senators who might have influence over the IRS client of BOA) once the non-renewal was announced to have the lease renewed. There was absolutely no evidence that OAD could have influenced the decision of corporate giant BOA regarding a routine consolidation of facilities. The deposition of Todd LaTour, a relocation agent for BOA, taken and tendered by Profimex, only supported the forgoing finding. The Arbitrator notes that the considerable discovery, hearing time and post hearing evidence related to the BOA non-renewal issue is an example of the unreasonable expansion of the proceedings in this arbitration by Profimex.

112. The Arbitrator finds that Statement 3-1 was made with malice, that is, with a reckless disregard as to the truth, with ill will, spite and a wanton, reckless and willful disregard of the rights of OAD or the injurious effect of the statement upon OAD and is therefore not protected by the Common Interest Privilege.

113. The Arbitrator finds that Statements 4-1, 4-2, 4-3 and 4-4, made to investors in the Royal Phoenix project solicited by Profimex, are defamatory *per se*. Specifically, the Arbitrator finds that the statements, which accuse OAD of various bad acts based on OAD's ownership in an entity that owned office buildings near those owned by Royal Phoenix Partners, LP, both would tend and were made with an intent to injure OAD in its business and profession.

114. The Arbitrator finds that OAD did not conceal it's interest in rental office property in the same sub-market as the Royal Phoenix project. The parties submitted considerable testimony from their respective principals and several deposition witnesses on the question of whether OAD's nearby project was or was not competitive with the Royal Phoenix project. The Arbitrator finds, as was not disputed in that testimony, that the two projects were designed for different potential users. Royal Phoenix is a property offering office finished front space with warehouse finish/loading dock accessible capacity in the rear of the leaseholds. OAD's project offered traditional two story office space accessible from a common lobby with elevator service to the upper floor. The Arbitrator finds that, notwithstanding considerable discovery effort, Profimex failed to identify a single tenant that made a decision to lease space at the OAD project instead of the Royal Phoenix Partners, LP property.

115. As with allegations regarding the BOA lease renewal, much or most of the evidence relating to whether the two properties were competitive did not address the issue of the truth or falsity of Profimex's specific accusations in Statements 4-1, 4-2, 4-3 and 4-4 because the Royal Phoenix Partners, LP limited partnership agreement specifically permits the direct competitive ownership that Profimex claims was "illegal" or that OAD "lied" about. Specifically, paragraph 9.6 of that document provides, in part:

> The General Partner and its Affiliates may act as general or managing partners for other companies or managers of other limited liability companies engaged in businesses similar to those conducted hereunder, even if competitive with the business of the Partnership. Nothing herein shall limits the General Partner, or its Affiliates from engaging in any other business activities, and the General Partner and its Affiliates shall not incur any obligation, fiduciary or otherwise, to disclose, grant or offer any interest in such activities to any party hereto.

Thus, the "conflict of interest" which Profimex did not prove to have arisen with regard to any specific prospective tenant, was in any event permitted under the Royal Phoenix Partners, LP limited partnership agreement. Under no circumstance was OAD's operation of a potentially competitive property in the same submarket as Royal Phoenix "illegal" or the basis of any allegation that OAD "lied".

116. The Arbitrator finds that Statements 4-1, 4-2, 4-3 and 4-4 were made with malice, that is, with a reckless disregard as to the truth, with ill will, spite and a wanton, reckless and willful disregard of the rights of OAD or the injurious effect of the statements upon OAD and are therefore not protected by the Common Interest Privilege.

117. The Arbitrator finds that Statements 5(b)-2 and 5(b)-3 are defamatory *per se*. Specifically, the Arbitrator finds that the statements, which relate to the Pleasant Grove project and accuse OAD of issuing "fraudulent reports" that made them

"dangerous" and of being "conmen", both would tend and were made with an intent to injure OAD in its business and profession.

118. The evidence was undisputed that individuals associated with OAD owned unimproved real property contiguous to the Pleasant Grove project. The Arbitrator finds that the evidence did not establish any fraud on the part of OAD with regard to their management of the Pleasant Grove project or that OAD conducted a "con" scheme with regard to that project.

119. The Arbitrator finds that Statements 5(b)-2 and 5(b)-3 were made with malice, that is, with a reckless disregard as to the truth, with ill will, spite and a wanton, reckless and willful disregard of the rights of OAD or the injurious effect of the statements upon OAD and are therefore not protected by the Common Interest Privilege.

120. In summary, the Arbitrator finds that Statements 5(b)-2 and 5(b)-3 are defamatory *per se* and that these statements both would tend and were made with malice as defined both under the constitution and New York common law.

121. The Arbitrator finds that Statements 1-1, 1-3, 1-4, 1-10, 1-11, 1-14, 1-15, 1-16, 1-19, 1-20, 1-21, 1-22, 1-23, 1-25, 1-26, 1-27, 1-28, 1-29, 1-35, 1-37, 1–38, 1-43, 1-44, 1-47, 1-49, 1-51, 2-3, 5(a)-1, 5(a)-2, 5-(a)-3, 5(a)-4, 5(a)-5, 5(a)-6and 5(b)-1 to be not defamatory for reasons stated herein. In making this finding, the Arbitrator notes that the Tribunal did not find that OAD acted negligently in its management of any of the Project Entities. On this issue, Profimex offered the deposition and affidavit testimony of Thomas Ellis as an expert on the standard of care applicable to a property manager responsible for leasing commercial office space. The Arbitrator found Mr. Ellis's affidavit testimony to be a mere restatement of criticisms expressed by Profimex (some

almost word for word) and not credible. The Arbitrator found Mr. Ellis's deposition testimony credible but not persuasive and notes that his primary criticisms were directed to the efforts and activities of the very reputable real estate brokers hired by OAD to lease the properties that Mr. Ellis testified about. The Arbitrator found credible the testimony of Nathan Pramik, the broker representative actually involved in leasing efforts at Royal Phoenix who attributed the difficulties in leasing Royal Phoenix to both a difficult and slow to recover economy and the "very challenging" airport market area. The Arbitrator also notes OAD's testimony regarding its participation, if not leadership, in the creation of a special tax zone to fund improvements in the Royal Phoenix sub-market which would economic activity in that sub-market.

122. Further, although the evidence demonstrated that OAD did not timely provide specific reports required under the organizational documents of various Project Entities, the Arbitrator finds that, at least for the first several years of the dealings between OAD and Profimex, Profimex agreed to and engaged in an alternate process of reporting matters relating to the Project Entities. The Arbitrator finds that when Profimex later demanded strict compliance with reporting requirements, it did so in an atmosphere that was accompanied by Profimex's increasingly vehement and, as found herein, often defamatory, criticisms of OAD that discouraged professional or effective communication between the parties.

5. Damages

(a) Finding Of Injury To OAD

123. Under New York law, when proof of injury is proved to have been sustained as the result of a statement otherwise found to be non-privileged and

defamatory *per se*, special damages need not be proved and an award of general damages may be made. As several courts have noted in authority cited by both Parties, proof of exact causation resulting from defamatory statements is almost always problematic which is why general damages are available when statements have been presumed to cause injury. See, for example, *Israel Travel Advisory Serv., Inc. v. Israel Identity Tours, Inc.*, 61 F.3d 1250, 1256 (7th Cir. 1995) ([H]ow does [Plaintiff] prove a counterfactual proposition about the behavior of persons who bought [Defendant's] services? [Plaintiff] was able to prove that lies had been told, but the extent of their effect was bound to be problematic. That's why general damages are available in the law of defamation. See *Prosser & Keeton on* *1256 *Torts* 791 & n. 80, 843 (5th ed. 1984); 61 F.3d 1250, 1255-56); *Metro. Opera Ass'n. v. Local 100*, 00CIV3613LAP, 2005 WL 1712241(S.D.N.Y. July 19, 2005) (The proposition that a plaintiff need not "assign an actual dollar value to the injury" is completely at odds with Defendants' assertion that Plaintiff must show particular evidence of pecuniary loss. *Id.*[3] This is further supported by a series of cases both inside and outside of the Second Circuit. *See,e.g.,Dalbec v. Gentleman's Companion, Inc.*, 828 F.2d 921, 925 (2d Cir.1987)(plaintiff met her burden by, among other things, submitting evidence that defamatory statements had negatively changed the opinion of community residents about her); *Brown v. Petrolite Corp.*, 965 F.2d 38, 45-46 (5th Cir.1992)(burden met through testimony as to the cost of advertising that would be required to combat the defamation); *Israel Travel Advisory Serv., Inc. v. Israel Identity Tours, Inc.*, 61 F.3d 1250 (7th Cir.1995)(award of actual damages where witnesses testified that they were almost fooled by the defamatory statements); *Rombom v. Weberman*, 2002 WL 1461890 (Sup.Ct. Kings Co. June 13, 2002), *aff'd*,766 N.Y.S.2d 88

(2d Dept.2003)(burden met where plaintiff's testimony was that defamatory statements were specifically designed to discourage potential clients from hiring him).[4] The applicable case law quite simply does not require that a defamation plaintiff produce particular evidence of pecuniary loss to establish actual harm and recover damages.).

124. The Arbitrator finds that OAD has proved injury to its reputation, both in the United States and in Israel, as the result of statements found to be defamatory *per se* herein.

125. For example, OAD offered evidence that Real Estate Capital Partners, a United States based real estate investor that also partnered with Profimex, refused to consider an investment proposed by OAD when contacted by a third party soliciting participation in the transaction.

126. OAD also offered the testimony of Itay Goren, the former employee of Profimex who is currently a capital aggregator in Israel that Profimex had completely "poisoned the well" in the Israeli investment community and that he would therefore not even attempt to solicit Israeli investors for future OAD projects. The Arbitrator notes that Profimex objected to and attempted to exclude the testimony of Mr. Goren based on his refusal to answer certain questions of Profimex counsel during his deposition. The Arbitrator carefully reviewed Mr. Goren's testimony and found his refusal to answer questions that would specifically identify his current clients or details about his current business activities understandable in light of the fact that Mr. Goren has already successfully sued Profimex for defamation in Israel and has claim for severance compensation still pending on appeal. The Arbitrator further finds that Mr. Goren's testimony regarding the market effect of the Profimex statements made to Israeli

investors to be consistent with what would be a reasonably foreseeable consequence of statements of the type found to be defamatory and therefore credible.

127. OAD also offered evidence that, after Profimex began making statements that are found herein to be defamatory to Israeli investors, its attempt to respond to Profimex's criticism through direct communications with those investors resulted in confrontational "shouting matches" on the part of those investors.

128. The Arbitrator further finds that the statements found to be defamatory herein have damaged OAD in exactly the manner intended by Profimex as stated by Profimex to Mr. Gluckman at Prager Metis when Mr. Rosenhiem initiated the "forensic audit" of the Royal Phoenix and Northwoods projects. It was undisputed that in 2015, during the pendency of this arbitration, Profimex successfully persuaded some of the limited partner investors in the Royal Phoenix project to commence an ICC Arbitration in Israel seeking to remove OAD as the general partner in Royal Phoenix Partners, LP. The Request For Arbitration filed in that matter (Exhibit 603, admitted into evidence without objection), is troubling because it makes inaccurate reference to this arbitration between Profimex and OAD stating that this arbitration "has nothing to do with the [Royal Phoenix] Partnership". That statement that is at best misleading in light of the fact that most of the Profimex statements found to be defamatory herein, and therefore false, not only relate to the Royal Phoenix project but also relate the very same subjects that are the basis of claims in the new proceeding. For purposes of this arbitration, the recently commenced arbitration provides undisputable evidence that Profimex's defamatory statements have caused injury to OAD's reputation among the Israeli investors who have

now taken action adverse to OAD based on those statements. As Mr. Goren testified, those investors are extremely unlikely to invest in future OAD projects.

(b) Special Damages

129. OAD introduced the testimony of Karen Fortune as an expert on the issue of special damages. The Arbitrator found Ms. Fortune's general economic analysis, and methodology to be credible and persuasive. On the other hand, Ms. Fortune's ultimate opinion on the issue of special damages suffered by OAD were based on her opinion that OAD's loss of a specific $32,000,000.00 potential transaction, referred to by the Parties and Ms. Fortune as the "Pfeiffer Deal", was proximately caused by Profimex's defamatory statements. The Arbitrator finds that, under New York law, the issue proximate cause is to be decided by the finder of fact and law and, at least in this case, not a matter appropriate for expert opinion. See, *Palsgraff v Long Island Railroad Co.*, 248 N.Y. 339, 162 N.E. 99 (1928) and cases citing.

130. The Arbitrator finds that OAD did not prove by a preponderance of the evidence that the failure to secure and close the Pfeiffer Deal was proximately caused by Profimex's defamatory statements. The evidence demonstrated that other contributing causes, including the receipt by the seller in that transaction of a substantially better offer from a competing purchaser, contributed to the lost opportunity related to that transaction. In making this finding the Arbitrator also notes that the Pfeiffer Deal was considerably larger than prior OAD transactions and therefore not directly comparable to transactions funded in part by Israeli investors who were the primary targets of Profimex's defamatory statements.

(c) General Damages

131. The Arbitrator did find Ms. Fortunes analysis and collected data to be helpful in considering an award of general damages. For example, the Arbitrator notes her findings that OAD raised $19,867,000.00 in capital from Israeli investors solicited by Profimex and her analysis of potential acquisition and property management fees under the OAD transaction model.

132. Based upon the forgoing, and a review of the entire record in this arbitration, the Arbitrator finds that an award of general damages in favor of OAD and against Profimex in the amount of $500,000.00 is appropriate and proper in this matter. To the extent necessary, the Arbitrator allocates that damage award *pro rata* among the non-privileged statements found to be defamatory *per se* herein. See generally *Israel Travel Advisory Serv., Inc. v. Israel Identity Tours, Inc.*, 61 F.3d 1250, 1256 (7th Cir. 1995) cited by OAD in its briefing.

133. In making this finding, the Arbitrator notes evidence that OAD has continued to successfully solicit capital for new transactions from sources other than the Israeli investors that were previously the source of approximately $20,000,000.00 in investment funds. As discussed by Ms. Fortune and other witnesses, and as a matter of general knowledge, capital is the core building block of a real estate investment business and the Arbitrator finds that one important source of capital has been lost to OAD as the result of Profimex's defamatory statements. The fact that OAD has not failed as a business does not speak to the success it might have enjoyed had additional capital been available.

(d) Punitive Damages

134. Punitive damages are awardable for defamation under New York law if the defamatory statements are found to have been made with common law malice. *Israel Travel Advisory Serv., Inc. v. Israel Identity Tours, Inc.*, 61 F.3d 1250, 1256 (7th Cir. 1995). That finding has been made herein.

135. Based upon the forgoing, and a review of the entire record in this arbitration, the Arbitrator finds that an award of punitive damages in favor of OAD and against Profimex in the amount of $200,000.00 is appropriate and proper in this matter. To the extent necessary, the Arbitrator allocates that damage award *pro rata* among the statements found to be defamatory *per se* herein and to have been made with common law malice.

(e) Attorney's Fees

136. Attorney's fees and expenses are awardable for defamation under New York law if the defamatory statements are found to have been made with common law malice. Attorney's fees and costs of the arbitration are also allocable pursuant to ICC Article 37.

137. OAD has submitted evidence that it incurred attorney's fees in the amount of $742,206.01 and expenses related to this arbitration in the amount of $15,562.51.

138. The amount of an award of attorney's fees is in the discretion of the Sole Arbitrator. Based upon a review of the billing statements submitted by OAD, the amount of the damage award for defamation herein, the stipulation by OAD that it would not seek a damage award in excess of $1,000,000, and the entire record in this arbitration, the Arbitrator finds that an award of attorney's fees in favor of OAD and against Profimex in the amount of $250,000.00 is appropriate and proper in this matter. To the extent

necessary, the Arbitrator allocates that damage award *pro rata* among the statements found to be defamatory *per se* herein and to have been made with common law malice.

5. Summary

139. The Tribunal enters awards for OAD and against Profimex in the amount of $500,000.00 in general damages, $200,000.00 in punitive damages and $250,000.00 in attorney's fees for a total award in the amount of $950,000.00.

VII. Costs

140. At its session of 19 November 2015, the Court fixed the sole arbitrator's fees and the administrative expenses which, together with the sole arbitrator's expenses, amount to US $95,000.00, such amount having been paid by the parties in equal shares.

141. Each of the Parties has requested that the Tribunal make an allocation of expense and costs of the arbitration in its favor pursuant to ICC Article 37. In light of the findings and awards herein, the respective awards of attorneys fees and costs made herein, and a review of the entire record in this matter, the Sole Arbitrator finds that the costs and expenses of arbitration allocable pursuant to ICC Article 37 shall be borne equally by the Parties.

VIII. Dispositive Section

142. It is hereby ordered that the following awards are entered by the Tribunal:

(a) In favor of Profimex, acting on behalf of Bamberger Rosenheim, Ltd., and against OAD in the amount of US$496,176.07;

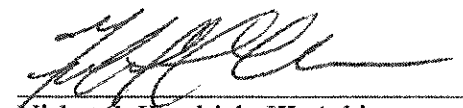
(b) In favor of OAD and against Profimex, acting on behalf of Bamberger Rosenheim, Ltd. in the amount of US$950,000.00.

143. The Tribunal applies set off to the awards made herein. Profimex, acting on behalf of Bamberger Rosenheim, Ltd., is ordered to pay to OAD the sum of US$453,823.93.

144. All claims of the parties as to which no award is made herein are rejected and dismissed. No claims of either party are reserved for future decision.

Place of Arbitration: Atlanta, Georgia (U.S.A.)

Date: 30 November 2015

Signature: 

Nisbet S. Kendrick, III, Arbitrator