

14 FSM R. 305, 307 n.1 (App. 2006).

Accordingly, we have carefully reviewed PII's petition for rehearing and we determine that we have neither overlooked nor misapprehended a material point of law or fact. The petition is denied.

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FSM SUPREME COURT TRIAL DIVISION

FSM TELECOMMUNICATIONS CABLE CORPORATION (the Open Access Entity),)	CIVIL ACTION NO. 2021-010
)	
Plaintiff-Counter-Defendant,)	
)	
vs.)	
)	
FSM TELECOMMUNICATIONS CORPORATION,)	
)	
Defendant-Counterclaimant.)	
_____)	

ORDER GRANTING PARTIAL SUMMARY JUDGMENT

Larry Wentworth
Associate Justice

Hearing: May 12, 2022
Decided: October 25, 2022

APPEARANCES:

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HEADNOTES

Telecommunications

A public law removed FSM Telecommunications Corporation's monopoly status when its power to operate as the sole provider of all telecommunications services, except radio and television broadcasting, within the FSM and between points in the FSM and points outside thereof was changed to the power to operate as a provider of all telecommunications services within the FSM and between points in the FSM and points outside thereof. FSM Telecomm. Cable Corp. v. FSM Telecomm. Corp., 23 FSM R. 667, 674 & n.2 (Pon. 2022).

Telecommunications

The Open Access Entity may only provide international and domestic connectivity for the transmission of data for communications services as a wholesaler but not at retail, and such connectivity must be provided on non-discriminatory and cost-based terms. FSM Telecomm. Cable Corp. v. FSM Telecomm. Corp., 23 FSM R. 667, 675 n.5 (Pon. 2022).

Civil Procedure – Motions; Civil Procedure – Summary Judgment – Procedure

Rule 43(e) permits the taking of oral testimony to decide motions although this is rarely done or needed for summary judgment motions. FSM Telecomm. Cable Corp. v. FSM Telecomm. Corp., 23 FSM R. 667, 677 (Pon. 2022).

Telecommunications

By statute, the FSM Telecommunications Corporation is required to operate as a provider of all telecommunications services within the FSM and between points in the FSM and points outside thereof; to expand telecommunications services to areas and communities in the FSM that are presently unserved or poorly served and to improve the quality, reliability, and variety of services available to all users; and to invest all its surplus revenues in the expansion and improvement of telecommunications facilities and services. FSM Telecomm. Cable Corp. v. FSM Telecomm. Corp., 23 FSM R. 667, 677 n.6 (Pon. 2022).

Insurance – Coverage

Marine maintenance coverage is a type of insurance whereby the policyholder is guaranteed that a repair ship will be available to fix a broken or disabled submarine cable. It does not cover the cost of the repair. FSM Telecomm. Cable Corp. v. FSM Telecomm. Corp., 23 FSM R. 667, 680 n.7 (Pon. 2022).

Civil Procedure – Summary Judgment – Grounds

Summary judgment is proper when, viewing the facts in the light most favorable to the party against whom judgment is sought, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. FSM Telecomm. Cable Corp. v. FSM Telecomm. Corp., 23 FSM R. 667, 682 (Pon. 2022).

Civil Procedure – Summary Judgment – Procedure

A movant plaintiff, when seeking summary judgment, must not only show that there are no material facts genuinely in dispute and that it is entitled to judgment as a matter of law, but must also overcome all of the adverse party's affirmative defenses and counterclaims. FSM Telecomm. Cable Corp. v. FSM Telecomm. Corp., 23 FSM R. 667, 682 (Pon. 2022).

Civil Rights – Acts Violating; Contracts – Breach

As a general proposition, a governmental entity's breach of a contract does not constitute a civil rights violation. FSM Telecomm. Cable Corp. v. FSM Telecomm. Corp., 23 FSM R. 667, 683 (Pon. 2022).

Constitutional Law – Taking of Property; Contracts – Breach

Generally, when the government itself breaches a contract, a party must seek compensation from the government in contract rather than under a takings claim. A takings claim is inappropriate where it duplicates a breach of contract claim and a breach of contract remedy is available. FSM Telecomm. Cable Corp. v. FSM Telecomm. Corp., 23 FSM R. 667, 683 (Pon. 2022).

Constitutional Law – Taking of Property

A taking occurs whenever a public entity substantially deprives a private party of the beneficial use of its property for a public purpose. FSM Telecomm. Cable Corp. v. FSM Telecomm. Corp., 23 FSM R. 667, 683 (Pon. 2022).

Constitutional Law – Taking of Property

An unconstitutional taking has not occurred when a corporation wholly owned by the national

government, transferred property to another corporation, also wholly owned by the national government because it remained at all times public property used for a public purpose. FSM Telecomm. Cable Corp. v. FSM Telecomm. Corp., 23 FSM R. 667, 683 (Pon. 2022).

Contracts – Interpretation

Interpretation of contracts and their provisions is a matter of law to be determined by the court. FSM Telecomm. Cable Corp. v. FSM Telecomm. Corp., 23 FSM R. 667, 683 (Pon. 2022).

Civil Procedure – Pleadings – Affirmative Defenses; Civil Procedure – Pleadings – With Particularity; Torts – Fraud

Fraud, unlike most other affirmative defenses, is an affirmative defense that must be pled with particularity, and this particularity requirement applies not only to a plaintiff pleading a fraud claim in its complaint, but also to a defendant pleading fraud as an affirmative defense in its answer. FSM Telecomm. Cable Corp. v. FSM Telecomm. Corp., 23 FSM R. 667, 684 (Pon. 2022).

Civil Procedure – Pleadings – With Particularity; Torts – Fraud

When pleading fraud, the pleader must state the time, place, and content of the false misrepresentation, the fact misrepresented and what was obtained as a consequence of the fraud. FSM Telecomm. Cable Corp. v. FSM Telecomm. Corp., 23 FSM R. 667, 684 (Pon. 2022).

Civil Procedure – Summary Judgment – Procedure

When the affirmative defense of fraud is not pled with particularity, the defense fails. FSM Telecomm. Cable Corp. v. FSM Telecomm. Corp., 23 FSM R. 667, 684 (Pon. 2022).

Contracts – Consideration

Consideration was not “illusory” when the party claiming failure of consideration received, at cost, non-discriminatory access to undersea fiber optic cables between Yap and Guam, between Chuuk and Pohnpei, and the future prospect of similar access to a cable between Pohnpei and Kosrae (with onward connection to Nauru and Kiribati), all without capital expenditure or indebtedness on Telecom’s part. FSM Telecomm. Cable Corp. v. FSM Telecomm. Corp., 23 FSM R. 667, 684 (Pon. 2022).

Contracts – Consideration

Courts generally do not inquire into the sufficiency of consideration – parties to an agreement are free to attach value to whatever is exchanged, and, as long as each side gained something, consideration was exchanged. FSM Telecomm. Cable Corp. v. FSM Telecomm. Corp., 23 FSM R. 667, 684 (Pon. 2022).

Civil Procedure – Dismissal – Before Responsive Pleading

When the plaintiff has stated enough of a claim so as to obtain preliminary injunctions in its favor, it has overcome this defense early on. But just because a plaintiff has stated a claim, it does not automatically follow that the plaintiff will prevail on its claim. FSM Telecomm. Cable Corp. v. FSM Telecomm. Corp., 23 FSM R. 667, 684 (Pon. 2022).

Civil Procedure – Pleadings – Affirmative Defenses; Contracts – Damages – Mitigation of

The failure to mitigate damages affirmative defense is a defense only to the amount of damages, not to the liability for damages. FSM Telecomm. Cable Corp. v. FSM Telecomm. Corp., 23 FSM R. 667, 684 (Pon. 2022).

Contracts – Breach; Torts – Breach of Implied Covenant of Good Faith

The doctrine of tortious bad faith breach of contract is closely related to the covenant of good faith and fair dealing. FSM Telecomm. Cable Corp. v. FSM Telecomm. Corp., 23 FSM R. 667, 684 n.8 (Pon. 2022).

Contracts – Duress

Since freedom of will is essential to a contract's validity, an agreement obtained by duress, coercion, or intimidation is invalid. Duress takes two forms – physical and economic, and physical duress negates assent to a contract *ab initio*. FSM Telecomm. Cable Corp. v. FSM Telecomm. Corp., 23 FSM R. 667, 685 (Pon. 2022).

Contracts – Duress

Economic duress makes a formed contract voidable. A contract is voidable for economic duress if: 1) a party's manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative; or 2) a party's manifestation of assent is induced by one who is not a party to the transaction, unless the other party to the transaction in good faith and without reason to know of the duress either gives value or relies materially on the transaction. FSM Telecomm. Cable Corp. v. FSM Telecomm. Corp., 23 FSM R. 667, 685 (Pon. 2022).

Contracts – Duress

The requirements for a showing of duress by threat can be grouped under four headings. First, there must be a threat. Second, the threat must be improper. Third, the threat must induce the victim's manifestation of assent. Fourth, it must be sufficiently grave to justify the victim's assent. FSM Telecomm. Cable Corp. v. FSM Telecomm. Corp., 23 FSM R. 667, 685 (Pon. 2022).

Contracts – Duress

Wrongful acts or threats may be categorized into four principal classes. 1. Violence or threats of violence [not economic duress]. 2. Imprisonment or threats of imprisonment [also not economic duress]. 3. Wrongful seizing or withholding, or threats to wrongfully seize or withhold, goods or lands. 4. Other wrongful acts. But, absent a wrongful threat, the driving of a hard bargain is not duress. This is true even if one party benefits from the financial distress of the other. FSM Telecomm. Cable Corp. v. FSM Telecomm. Corp., 23 FSM R. 667, 685 (Pon. 2022).

Contracts – Duress

To be wrongful or improper the act or threat does not have to be unlawful, and, if a party's assent has been induced by the duress of a third person, rather than that of the other party to the contract, the contract is nonetheless voidable by the victim. FSM Telecomm. Cable Corp. v. FSM Telecomm. Corp., 23 FSM R. 667, 685 (Pon. 2022).

Common Law

Although FSM courts are not bound to adopt common-law doctrines, they may, by statute, use the Restatements of the Law as the rules of decision to determine and apply the common law in the absence of written law, while keeping in mind the suitability of any given common law principle for the FSM. FSM Telecomm. Cable Corp. v. FSM Telecomm. Corp., 23 FSM R. 667, 685 n.9 (Pon. 2022).

Contracts – Duress

The pressure put on a corporation by the corporation's owner to negotiate and agree to a contract with certain provisions (unless those provisions are illegal) does not constitute a wrongful or improper act giving rise to a duress defense and a contract voidable by the coerced party. FSM Telecomm. Cable Corp. v. FSM Telecomm. Corp., 23 FSM R. 667, 686 (Pon. 2022).

Civil Procedure – Pleadings – Affirmative Defenses; Civil Procedure – Summary Judgment – Procedure

Generally, an affirmative defense must have been pled in the answer in order for the court to be able to consider it when the plaintiff has sought summary judgment. FSM Telecomm. Cable Corp. v. FSM Telecomm. Corp., 23 FSM R. 667, 686 n.10 (Pon. 2022).

Contracts – Illegality

The general rule is that a change of law does not validate a contract that was originally illegal and

FSM Telecomm. Cable Corp. v. FSM Telecomm. Corp.
23 FSM R. 667 (Pon. 2022)

unenforceable. However, the contract may be ratified. Moreover, there are exceptions when the repealing statute expressly so states or where this is implied. FSM Telecomm. Cable Corp. v. FSM Telecomm. Corp., 23 FSM R. 667, 686 (Pon. 2022).

Contracts – Illegality; Statutes – Repeal

When the repealing statute expressly states that the reasons for the repeal were that the parties had negotiated an agreement and that the repealed statutes were no longer necessary and may create inconsistency problems with the negotiated agreement, even if the agreement had illegal provisions or was an illegal contract and even if the party's performance did not ratify the agreement, the when-the-repealing-statute-expressly-so-states exception applies and the illegal contract defense fails. FSM Telecomm. Cable Corp. v. FSM Telecomm. Corp., 23 FSM R. 667, 686 (Pon. 2022).

Contracts – Unconscionable

The traditional test for unconscionability is that a contract is unconscionable if it is such as no man in his senses and not under delusion would make on the one hand, and as no honest or fair man would accept, on the other. The unconscionability test involves the question of whether the provision amounts to the taking of an unfair advantage by one party over the other. To be unconscionable, the contract term must be so one-sided as to be oppressive. FSM Telecomm. Cable Corp. v. FSM Telecomm. Corp., 23 FSM R. 667, 687 (Pon. 2022).

Civil Procedure – Pleadings – Affirmative Defenses; Contracts – Unconscionable

Generally, the party who asserts the defense of unconscionability must plead and prove it. FSM Telecomm. Cable Corp. v. FSM Telecomm. Corp., 23 FSM R. 667, 687 (Pon. 2022).

Contracts – Unconscionable

A court may refuse to enforce the entire contract or it may refuse to enforce or limit the application of an unconscionable clause. Courts have usually contented themselves with refusing to enforce or limiting the application of an unconscionable clause. Particular terms may be unconscionable whether or not the contract as a whole is unconscionable. Terms may be unconscionable in some contexts but not in others. Overall imbalance and weakness in the bargaining process are then important. FSM Telecomm. Cable Corp. v. FSM Telecomm. Corp., 23 FSM R. 667, 687 (Pon. 2022).

Contracts – Unconscionable

Unconscionability has generally been recognized to include the absence of a meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party. FSM Telecomm. Cable Corp. v. FSM Telecomm. Corp., 23 FSM R. 667, 687 (Pon. 2022).

Contracts – Unconscionable

Courts continue to focus on both “unreasonably favorable” terms and “an absence of meaningful choice.” It has become fashionable to designate the former as “substantive,” and the latter as “procedural” unconscionability. Procedural unconscionability is broadly conceived to encompass not only the employment of sharp practices and the use of fine print and convoluted language, but also a lack of understanding and an inequality of bargaining power. Most cases involve a combination of the two types of unconscionability; and it is generally agreed that if more of one is present, the less of the other is required. It is unclear whether substantive unconscionability alone is enough. FSM Telecomm. Cable Corp. v. FSM Telecomm. Corp., 23 FSM R. 667, 687 (Pon. 2022).

Separation of Powers

Policy adoption is the other government branches' responsibility, not the court's. FSM Telecomm. Cable Corp. v. FSM Telecomm. Corp., 23 FSM R. 667, 687 (Pon. 2022).

Contracts – Unconscionable; Statutes

The government may chose any policy not constitutionally prohibited, or implement a policy by any

means not constitutionally or statutorily prohibited, no matter how ill-advised the policy or the means of implementation. Ill-advised governmental policy choices imbedded in a contract do not make that contract unconscionable. FSM Telecomm. Cable Corp. v. FSM Telecomm. Corp., 23 FSM R. 667, 687 (Pon. 2022).

Contracts – Unconscionable

The critical juncture for determining whether a contract is unconscionable is the moment when it is entered into by both parties – not whether it is unconscionable in light of subsequent events. FSM Telecomm. Cable Corp. v. FSM Telecomm. Corp., 23 FSM R. 667, 688 (Pon. 2022).

Contracts – Unconscionable

A contract is not unconscionable because at some future time some contract provisions may become commercially impracticable to perform or that the contract's purpose may be frustrated. A party may plead and raise those defenses to excuse or discharge its performance or to avoid liability only if and when supervening circumstances give it an actual factual basis to do so. FSM Telecomm. Cable Corp. v. FSM Telecomm. Corp., 23 FSM R. 667, 688 (Pon. 2022).

Contracts – Unconscionable

A non-compete clause is not unconscionable when one party is restricted to, and has a monopoly over, the wholesale business of telecommunications transmission by undersea fiber optic cable on a non-discriminatory basis at cost, and the other party is restricted from competing with the wholesale business, but still has an undersea cable and 50% of its spectrum for its own use. This is a reasonable restraint on trade if the wholesaler is to operate on a non-discriminatory and non-profit basis, open for use by all telecommunications retail providers. Otherwise, not only would the wholesaler not be financially viable, but the other party, with its greater resources, would also be able to threaten the wholesaler's existence. FSM Telecomm. Cable Corp. v. FSM Telecomm. Corp., 23 FSM R. 667, 688 (Pon. 2022).

Contracts – Unconscionable

A party cannot show much by the way of procedural unconscionability in a contract's formation when there were no sharp practices, no use of fine print and convoluted language in the contract, and certainly not a lack of understanding or a great inequality in bargaining power. FSM Telecomm. Cable Corp. v. FSM Telecomm. Corp., 23 FSM R. 667, 688 (Pon. 2022).

Contracts – Unconscionable

In any contract negotiation, the parties' bargaining power will usually be unequal. FSM Telecomm. Cable Corp. v. FSM Telecomm. Corp., 23 FSM R. 667, 688 (Pon. 2022).

Contracts – Unconscionable

Courts have generally been chary about using the doctrine of unconscionability to protect merchants and similar professionals and have declined to apply it in favor of sophisticated corporations. The FSM Supreme Court is also chary of applying the unconscionability doctrine in favor of a sophisticated corporation, and a further reason for being chary is that both parties are public corporations owned by the national government. FSM Telecomm. Cable Corp. v. FSM Telecomm. Corp., 23 FSM R. 667, 688 (Pon. 2022).

Civil Procedure – Summary Judgment – Procedure; Contracts – Unconscionable

When a party has pled unconscionability and produced enough evidence that certain clauses might be unconscionable, the court cannot conclude on summary judgment that these clauses are definitely not unconscionable. FSM Telecomm. Cable Corp. v. FSM Telecomm. Corp., 23 FSM R. 667, 688 (Pon. 2022).

Civil Procedure – Summary Judgment – Procedure; Contracts – Unconscionable

Because courts usually content themselves with refusing to enforce or limiting the application of an unconscionable clause rather than considering the whole contract to be unconscionable, the court, on summary judgment, deny summary judgment on just those clauses, and conclude that, other than those

clauses, the movant is entitled to a judgment that as a matter of law that the contract is otherwise legally valid and enforceable. FSM Telecomm. Cable Corp. v. FSM Telecomm. Corp., 23 FSM R. 667, 688-89 (Pon. 2022).

Civil Procedure – Summary Judgment – Procedure; Contracts – Unconscionable

When the court has ruled that the movant is entitled to a judgment that as a matter of law the contract is legally valid and enforceable but cannot set a dollar amount for the non-movant's liability on the contract because the factual amounts are not genuinely undisputed, partial summary judgment will be granted. FSM Telecomm. Cable Corp. v. FSM Telecomm. Corp., 23 FSM R. 667, 689 (Pon. 2022).

Setoff

The term “offset” is used quite commonly as a synonym of “set-off.” FSM Telecomm. Cable Corp. v. FSM Telecomm. Corp., 23 FSM R. 667, 689 n.11 (Pon. 2022).

Setoff

The setoff of debts to a recoverable net balance is a salutary principle. Under the setoff doctrine when parties dealing together become mutually indebted, ordinarily only the balance is recoverable. FSM Telecomm. Cable Corp. v. FSM Telecomm. Corp., 23 FSM R. 667, 689 (Pon. 2022).

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COURT'S OPINION

LARRY WENTWORTH, Associate Justice:

On May 12, 2022, the court heard argument on the Plaintiff's Motion for Summary Judgment, filed September 29, 2021; Opposition to Motion for Summary Judgment, filed October 11, 2021; Plaintiff's Reply to Defendant's Opposition to Motion for Summary Judgment, filed November 9, 2021; Supplement to Opposition to Motion for Summary Judgment, filed April 20, 2022; Plaintiff's Supplemental Brief in Support of Plaintiff's Motion for Summary Judgment, filed May 2, 2022; Plaintiff's Fourth Amended List of Exhibits for Injunctive Relief, Declaratory Relief and Summary Judgment, filed May 4, 2022; Second Supplement to Opposition to Motion for Summary Judgment, filed May 6, 2022; Plaintiff's Notice of Plaintiff's Supplemental Exhibit X, filed May 11, 2022; and Third Supplement to Opposition to Motion for Summary Judgment, filed May 11, 2022.

The court also had before it the FSM Department of Justice's FSM National Government Amicus Curiae Brief Re: Indefeasible Rights of Use Between FSMTC & OAE, filed August 27, 2021; FSM National Government Supplemental Amicus Curiae Brief Re: Indefeasible Rights of Use Between FSMTC & OAE, filed May 11, 2022; Amendment to FSM National Government Supplemental Amicus Curiae Brief Re: Indefeasible Rights of Use Between FSMTC & OAE, filed May 11, 2022; Notice of Errata to FSM National Government Supplemental Amicus Curiae Brief Re: Indefeasible Rights of Use Between FSMTC & OAE, filed May 11, 2022; and the defendant's Response to FSM National Government Supplemental Amicus Curiae Brief Re: Indefeasible Rights of Use Between FSMTC & OAE, filed May 12, 2022. And afterwards, the defendant filed on June 10, 2022, its Fourth Supplement to Opposition to Motion for Summary Judgment.

For the reasons given below, the court grants the plaintiff partial summary judgment.

I. BACKGROUND

A. *National Policy*

In 2007, the FSM was not connected to the outside world through undersea cables. The FSM Telecommunications Corporation (“Telecom”), a public corporation of the FSM government, 21 F.S.M.C.

202, borrowed money from the Rural Utilities Service (“RUS”), a United States federal government agency, to finance the construction of a cable spur to connect Pohnpei with the Hantru-1 fiber optic undersea cable between the Marshall Islands and Guam and obtain spectrum rights through to Guam. This spur connection was finished and opened for use by Telecom and its customers in 2009. In 2011, the national government adopted an explicit policy goal of providing fiber optic undersea cable connections to all four FSM states. The FSM was unable to obtain U.S. funding for this. The World Bank was willing to fund this if the FSM took certain steps to foster a more competitive telecommunications market.

After much debate, Congress enacted the FSM Telecommunications Act of 2014. FSM Pub. L. No. 18-52, §§ 5-94, 18th Cong., 3d Spec. Sess. (2014) (to be codified at 21 F.S.M.C. 301-391). The President signed it into law on April 3, 2014. This Act created a regulatory framework for the telecommunications sector and a regulatory body called the Office of the Telecommunication Regulation Authority (“TRA”). *Id.* §§ 8-9 (to be codified at 21 F.S.M.C. 304-305). This Act also created the plaintiff, the FSM Telecommunications Cable Corporation, which the statute consistently calls the Open Access Entity (“the OAE”).¹ *Id.* §§ 91-92 (to be codified at 21 F.S.M.C. 389-390). The OAE was established as a not-for-profit, *id.* § 91(2) (to be codified at 21 F.S.M.C. 389(2)), “shareholding corporation” with the FSM Secretary of Finance and Secretary of Transportation, Communication and Infrastructure (“TC&I”) as the only shareholders, who hold “the shares for and on behalf of the government,” *id.* § 92(1) (to be codified at 21 F.S.M.C. 390(1)). Another part of Public Law No. 18-52 removed Telecom’s monopoly status. *Id.* § 1(1) (to be codified at 21 F.S.M.C. 203(1)).²

Financing was arranged, and the FSM Department of TC&I became the implementing agency. The FSM partnered with Palau (saving significant costs) to connect Yap on a spur off the Palau to Guam undersea cable. And an undersea cable was laid from Chuuk to Pohnpei where it connected to the Hantru-1 spur.

B. *Deed Granting the OAE Indefeasible Rights of Use*

A financing agreement condition required Telecom to provide access to the Hantru cable system free of charge in order for the World Bank to disburse any funds. Telecom would not agree to this. Legislation was enacted to require Telecom to give the OAE access to its Hantru cable rights free of charge, FSM Pub. L. No. 20-13, § 1(10), 20th Cong., 1st Reg. Sess. (2017) (to have been codified at 21 F.S.M.C. 201(10)), and to give Telecom the same access to the OAE’s Chuuk undersea cable to Pohnpei and Guam, FSM Pub. L. No. 20-20, § 1(2), 20th Cong., 1st Reg. Sess. (2017) (to have been codified at 21 F.S.M.C. 389(2)).

Telecom lobbied against this legislation. It instead negotiated and eventually and reluctantly agreed to a Deed Granting Indefeasible Rights of Use (“IRU Deed”) to which the World Bank issued its non-objection conditioned on the FSM Department of Justice deeming the IRU Deed to be binding and legally enforceable. On February 1, 2018, the Telecom and the OAE boards of directors both approved the IRU Deed, subject to RUS’s approval since RUS held a lien on Telecom’s Hantru Pohnpei spur cable ownership. The IRU Deed

¹ How the plaintiff came to be somewhat confusingly called the FSM Telecommunications Cable Corporation is unexplained. The statutes name it the “Open Access Entity.” To avoid any confusion the parties’ similar names (and very similar abbreviations) might cause, the court will only refer to the plaintiff as the Open Access Entity or the OAE, and to the defendant as Telecom.

² The statute previously gave Telecom the power “to operate as the sole provider of all telecommunications services, except radio and television broadcasting, within the Federated States of Micronesia and between points in the Federated States of Micronesia and points outside thereof.” 21 F.S.M.C. 203(1). Public Law No. 18-52 amended this statute. Now, Telecom only has the power “to operate as a provider of all telecommunications services within the Federated States of Micronesia and between points in the Federated States of Micronesia and points outside thereof.” FSM Pub. L. No. 18-52, § 1(1), 18th Cong., 3d Spec. Sess. (2014) (to be codified at 21 F.S.M.C. 203(1)).

was executed the next day. On February 28, 2018, RUS notified Telecom that it consented to the IRU Deed, and on March 22, 2018, the FSM Department of Justice issued a legal opinion that the IRU Deed was a valid binding agreement.³ On July 20, 2018, Public Laws No. 20-13 and No. 20-20 were repealed in their entirety and the previous statutory language reinstated. FSM Pub. L. No. 20-101, 20th Cong., 4th Spec. Sess. (2018).

Under the IRU Deed, Telecom granted the OAE a "25-year infeasible exclusive rights of use of 50% of the total available capacity on one fiber pair in the main HANTRU-1 cable . . ." IRU Deed § D.(1). The IRU Deed also provided that the FSM government had assigned or would assign to the OAE 1) the submarine cable assets connecting Yap to Guam including the wholly owned Yap spur cable and a "25-year infeasible exclusive rights of use in optical wavelength bands in the SEA-US cable system"; 2) a wholly owned cable system connecting Chuuk to Pohnpei; and 3) its interests in a planned East Micronesia Cable system ("EMC") connecting Kosrae to Pohnpei, Nauru, and Kiribati. IRU Deed § C.

The Yap and the Chuuk submarine cable systems have been built and are being operated by the OAE. A construction contract for the EMC project has not yet been executed. One bidding process was invalidated, maybe due to security concerns since the EMC project would connect on Pohnpei to the Hantru cable which also carries sensitive military traffic between Guam and U.S. installations at Kwajalein, Marshall Islands.

Under the IRU Deed, the "OAE will supply [Telecom], and [Telecom] will purchase from OAE, all of [Telecom]'s primary international and interstate connectivity services requirements to the extent of OAE's rights and available capacity . . ." IRU Deed § 6.2. Telecom cannot use satellite systems to compete with or avoid using the OAE submarine cable system, *id.* § 6.4, but must, if it has (and only if) satellite services contracted, supply the OAE with backup interstate and international satellite service at cost if and when there is any submarine service outage or downtime, *id.* § 6.5. Since there is currently no undersea cable to Kosrae, Telecom uses satellites to serve Kosrae.

C. Financial Obligations

The IRU Deed obligates the OAE to pay 50% of all future RUS loan principal and interest payments for the RUS loan⁴ Telecom used to acquire its Hantru cable rights and 50% of all reasonable and necessary costs Telecom paid to unrelated third parties for operation, maintenance, and restoration of its Hantru cable rights. IRU Deed § 5.1(a). Telecom is to invoice the OAE on a monthly basis for all sums the OAE owes Telecom and the OAE is to remit those sums within 30 days. *Id.* § 5.3. The OAE is allowed to charge its wholesale customers⁵ its total expenses (including its payments to Telecom under IRU Deed section 5, and depreciation, amortization, and interest expenses) plus up to a 5% reserve, but could not charge for its sunk costs in its submarine fiber optic cable capital assets. *Id.* § 7.1.

While Telecom remains the OAE's sole customer, the OAE will charge Telecom on a monthly basis all sums it is entitled to charge its wholesale customers. *Id.* § 7.2. If and when the OAE has more wholesale

³ This Department of Justice legal opinion was amended on March 29, 2019, to cover two IRU Deed amendments for minor agreed changes to the technical specifications to reflect final configurations.

⁴ Telecom billed the OAE a total of \$975,369.02 for its share of the Hantru loan repayments after the IRU Deed took effect. RUS later waived or forgave the remaining \$8,209,255 loan balance. Telecom continues to make payments on an earlier, unrelated RUS infrastructure loan.

⁵ The OAE may only "provide international and domestic connectivity for the transmission of data for communications services as a wholesaler but not at retail. Such connectivity shall be provided on non-discriminatory and cost-based terms." FSM Pub. L. No. 18-52, § 91(2), 18th Cong., 3d Spec. Sess. (2014) (to be codified at 21 F.S.M.C. 389(2)).

customers than just Telecom, the OAE charges will be “fairly and equitably allocated among its wholesale customers.” *Id.* § 7.3. The OAE and Telecom agreed to a schedule of estimated yearly costs from 2018 through 2041, subject to adjustment based on actual costs. *Id.* § 7.5 & Annex G. The OAE invoices Telecom monthly and Telecom is to pay those sums within 30 days or less. *Id.* § 7.6. The sums the OAE owes Telecom and the sums Telecom owes the OAE must be netted so that there will be only a single monthly payment from Telecom to the OAE. *Id.* § 7.7. At some point, Telecom stopped invoicing the OAE under IRU Deed sections 5.1 and 5.3 because the OAE just charged all of those costs back to Telecom.

Telecom met its financial obligations under the IRU Deed and made its monthly payments up through March 2020, after which Telecom stopped paying. Telecom’s ostensible reason for stopping was that it anticipated substantial lost revenue due to the covid-19 pandemic that necessitated the emergency closure of the FSM’s borders since Telecom would not then receive any “roaming charges” from overseas visitors’ use of their mobile phones while here. Those charges were a significant part of Telecom’s overall revenue stream. Although the “roaming charges” revenue, as expected, evaporated, Telecom’s overall revenue from other sources unexpectedly increased substantially.

Then, on March 24, 2020, Telecom informed the FSM President that it was repudiating the IRU Deed and ceasing all payments under it to the OAE as well as ceasing payments to the TRA. Telecom asserted that its payments to those inter-government agencies cost it over \$1 million without any direct benefit to it or to its services to the public. Telecom also objected to the OAE’s alleged involvement in Yap with the installation of terrestrial fiber optic cables to homes and businesses as competition with its retail business.

The OAE continues to invoice Telecom monthly (without the 5% reserve as Telecom is OAE’s only customer). Telecom has not paid these invoices, but instead has “booked” the amounts on its balance sheet and retained those funds separately.

D. *Litigation*

1. *Pleadings*

The OAE then filed this suit alleging that Telecom had willfully breached its contractual obligations under the IRU Deed by not paying the OAE’s monthly invoices. The OAE also alleged that Telecom had breached the IRU Deed contract by attempting to communicate directly with and pay the OAE’s creditors; by denying the OAE access to its cable landing stations on Yap, Chuuk, and particularly Pohnpei; and by contracting to upgrade its Hantru system spectrum without collaborating with the OAE. The OAE seeks a money judgment for its unpaid invoices as damages for breach of contract; an order that Telecom specifically perform its IRU Deed obligations; a finding that Telecom has breached its implied covenant of good faith and fair dealing; and a finding that Telecom breached the IRU Deed by not consulting with the OAE before contracting to upgrade its Hantru spectrum; by engaging in anti-competitive practices. The OAE further seeks a declaratory judgment that the IRU Deed is legally valid and enforceable since such a declaration is needed to maintain the FSM’s international standing with its EMC partners. The OAE also seeks injunctive relief to prevent Telecom from interfering with its operations and with its rights under the IRU Deed.

Telecom pleads affirmative defenses of 1) failure to state a claim; 2) failure of consideration; 3) breach of contract; 4) failure to mitigate damages; 5) offset and waiver; 6) bad faith; 7) that the IRU Deed is unconscionable and entered into under duress; 8) unconstitutional taking of property without just compensation; 9) fraud, misrepresentation, and detrimental reliance; and 10) intentional or negligent interference with business opportunities, and pleads counterclaims for 1) declaratory relief to set aside the IRU Deed and to halt any OAE involvement in fiber-to-the-home projects; 2) unconstitutional taking of property without just compensation; 3) intentional and negligent interference with a contract; 4) intentional or negligent interference with business opportunities; 5) breach of contract and of the covenants of good faith and fair dealing; and 6) anti-competitive conduct.

2. *Motions*

After ten days of evidentiary hearings, the court issued preliminary injunctions: 1) granting the OAE access to its cable landing stations, Order Granting Injunctive Relief for Access to FSM Telecommunications Cable Landing Station at 2 (May 26, 2021); 2) ordering the parties to cooperate on the technical aspects of the upgrades of their respective Hantru spectrums, Order Granting Injunctive Relief for Hantru-1 Cable FSM Telecommunications Upgrade at 3-4 (June 4, 2021); and 3) that Telecom “continue to ‘book’ its monthly payments, as set by the [IRU Deed], and keep those funds in its retained reserves (or retained earnings) so that those funds, or whatever part of them the court orders, are readily available for payment to the OAE, upon the resolution of this case,” FSM Telecomm. Cable Corp. v. FSM Telecomm. Corp., 23 FSM R. 360, 363 (Pon. 2021).

The OAE responded to Telecom’s counterclaims by moving to dismiss them. On October 19, 2021, the court dismissed all of Telecom’s counterclaims except for the OAE’s alleged unconstitutional taking of property without just compensation, insofar as that counterclaim did not assert the rights of the individual FSM states; and the OAE’s alleged breach of contract and the breach of the covenants of good faith and fair dealing. FSM Telecomm. Cable Corp. v. FSM Telecomm. Corp., 23 FSM R. 437, 440-41 (Pon. 2021). Since most of the dismissed counterclaims involved fiber-to-the-home allegations, those counterclaims were dismissed without prejudice to allow the TRA to address and resolve them administratively. *Id.* at 440.

The OAE also moved for summary judgment, based partly on the facts undisputedly established by the ten days of evidentiary hearings, and in depositions and admissible exhibits. The parties both relied on this hearing evidence without objection. (Also, Rule 43(e) permits the taking of oral testimony to decide motions although this is rarely done or needed for summary judgment motions.) After extensive briefing, the summary judgment motion was heard on May 12, 2022.

II. PARTIES’ POSITIONS

A. *The OAE’s Summary Judgment Motion*

The OAE moves for a summary judgment confirming the validity of its IRU Deed with Telecom, and the amounts due it under the IRU Deed. The OAE contends that there is no genuine issue of material fact whether the IRU Deed is a valid contract supported by ample consideration. The OAE states that Telecom met its IRU Deed financial obligations up to March 2020, after which Telecom unilaterally ceased payment, even though payment to the OAE remained obligatory. The OAE contends that Telecom’s affirmative defenses do not create a genuine issue of material fact about the IRU Deed’s legal validity and that there is no genuine issue about the amount of the unpaid balances (\$847,964) on OAE’s invoices to Telecom, and that the OAE is entitled to judgment as a matter of law.

B. *Telecom’s October 11, 2021 Opposition*

Telecom’s initial opposition to OAE’s summary judgment motion relies on the contract defenses of duress and unconscionability; the withdrawal of World Bank funding for the EMC project; alleged contract breaches by the OAE; bad faith; and factual questions on damages amount. It contends that the IRU Deed as a whole is unconscionable and contravenes Telecom’s 21 F.S.M.C. 203 mandate,⁶ or, alternatively, that

⁶ This statutory mandate requires Telecom “to operate as a provider of all telecommunications services within the Federated States of Micronesia and between points in the Federated States of Micronesia and points outside thereof,” 21 F.S.M.C. 203(1) (as amended); “to expand telecommunications services to areas and communities in the Federated States of Micronesia that are presently unserved or poorly served and to improve the quality, reliability, and variety of services available to all users,” 21 F.S.M.C. 203(4); and “to invest all surplus revenues of the Corporation in the expansion and improvement of telecommunications facilities and services,” 21 F.S.M.C. 203(7).

enough IRU Deed provisions are unconscionable that the IRU Deed as a whole should be set aside. Telecom also asserts that the consideration for the IRU Deed was “illusory” because, while Telecom conveyed a half interest in the Hantru cable spectrum (from Pohnpei to Guam) to the OAE, making the OAE liable for half the remaining principal and interest capital costs for the Hantru spur RUS loan, the OAE then charged all those capital costs right back to Telecom. Telecom also contends that there is a sufficient factual dispute over whether Telecom made a showing of duress that precludes summary judgment. Telecom asserts that not only was the IRU Deed agreed to under duress but that its terms are unconscionable either in its entirety or in its relevant parts and therefore the whole IRU Deed should be voided.

Telecom also contends that the IRU Deed provision that Telecom not use satellites or other means to compete with OAE’s submarine cables to provide interstate or international connectivity services is unconscionable because, given Telecom’s mandate to provide universal service throughout the FSM, it is a restraint of trade, and because it must use satellites to serve Kosrae since there likely will not be an undersea cable to Kosrae soon. Telecom also contends that the IRU Deed requirement that it purchase all its primary international and interstate connectivity services from Yap and Chuuk (and from Kosrae if the EMC System is built) onward as far as Guam from OAE is an unconscionable restraint of trade. Telecom argues that the telecommunications sector was restructured without any planning or research on the restructuring’s potential effects or viability, and that the IRU Deed’s provisions undermine Telecom’s viability and condemn it to a slow death.

Telecom further contends that there are genuine factual questions about the amounts it would owe to OAE based on the OAE invoices because Telecom has potential offsets against those amounts. Telecom argues that the overhead amounts based on OAE officers’ compensation should be reduced by the time they spent on projects not covered by the IRU Deed. Telecom further contends that any amounts due under a costs-plus contract, such as the IRU Deed, should also be reviewed for unconscionability.

C. The OAE’s November 9, 2021 Reply

The OAE replied that Telecom’s claim that it was presented with the IRU Deed as a take-it-or-leave-it proposition was merely a conclusory allegation and recounted a detailed history of the political events and the negotiations between Telecom and the OAE that led up to the IRU Deed. The OAE stresses that it is a national government instrumentality, as is Telecom, tasked with implementing national policy. The OAE contends that the bargain that was struck was that Telecom, and all future retail telecommunications providers, would have access to no-capital-cost, new infrastructure and the Hantru spur was existing infrastructure, which would thus bear costs, and that Telecom would be unable to extract monopoly profits from any new operators that entered the FSM market.

The OAE contends that it may pass through all of its costs to the retail telecommunications providers including the capital cost of its one-half responsibility for the repayment of the RUS loan for the Hantru submarine cable, which the OAE agreed to assume when half of the Hantru spectrum was transferred to it. All other OAE capital costs were to be paid for through World Bank grants, and therefore are not pass-through costs for the OAE to charge to its retail providers. The OAE asserts that Telecom did not demand, seek, or negotiate for compensation for the Hantru cable when the IRU Deed was negotiated.

The OAE further argues that restraints of trade are commonplace in business contracts and are generally assessed under a reasonableness standard and that the IRU Deed’s requirement that Telecom use the OAE’s submarine cables and spectrum, where available, rather than use satellites was entirely reasonable because otherwise fiber optic cable service would not be financially viable. Supporting the government’s market liberalization policy, the OAE argues that the public interest favors ensuring that Telecom uses a high-quality, no-capital-cost service (where available) instead of lower quality satellite services.

The OAE further contends that Telecom should be estopped from claiming that there are contractual

defects in the IRU Deed. The OAE concludes that the court has enough evidence before it to grant the OAE's summary judgment motion and to determine whether the contract formation was unconscionable and therefore more Civil Procedure Rule 56(f) discovery was not needed.

D. Telecom's April 20, 2022 Surreply

Telecom contends that the IRU Deed was an illegal contract and thus unenforceable because its provisions concerning or restricting the monthly payments to only those (netted) payments due to the OAE were contrary to the provisions concerning monthly payments in Public Laws No. 20-13 and No. 20-20, which were in effect when the IRU Deed was negotiated, approved, and executed.

Telecom further contends that the OAE has a history of mismanagement and a singular lack of accomplishments during its existence. It points in particular to the lack of progress on the EMC project; to the unfinished upgrade for the OAE's half of the Hantru spectrum; to the OAE's lack of retail provider customers other than Telecom; and an allegation that the OAE has misused a Congressional appropriation to materially assist iBoom, a retail provider on Yap, and thereby contravene the IRU Deed's non-compete clause.

E. The OAE's May 2, 2022 Rejoinder

The OAE responds by emphasizing all the events that lead to the February 2, 2018 execution of the IRU Deed, starting with proposed legislation to restructure Telecom and liberalizing the telecommunications market. The OAE's chronology indicates that the IRU Deed, as adopted, varied significantly from the original proposal because Telecom suggested and agreed to some changes, but that the IRU Deed certainly did not match Telecom's original preferred position which was the status quo without an OAE. Nor did it match the original proposal involving Telecom restructuring and total transfer of the Hantru spectrum to the OAE.

The OAE notes that the World Bank financing agreement requiring Hantru access was not directly binding on Telecom since Telecom was not a party to it. The OAE also notes that that financing agreement predated the OAE's existence its provisions cannot be traced to the OAE's door. The OAE argues that Telecom's real main objection was that Telecom was not selected to operate all the undersea cables, which are "bottleneck" facilities through which all retail providers' data transmissions flow. The OAE also argues that, when faced with Telecom's possible restructuring by Congress, Telecom's management and board of directors chose to negotiate for a more favorable result, especially since Telecom's primary concern was favorable pricing for cable usage. The OAE notes that the FSM intervened with payments to contractors to keep the Yap and Chuuk cable projects going forward while the IRU Deed negotiations were going on.

The OAE also asserts that Telecom wanted to finalize the IRU Deed before the OAE had even hired a chief executive officer, but that the IRU Deed's final terms were negotiated after one had been hired and by the chief executive officers of both the OAE and Telecom. The OAE notes that Telecom had further concerns about the redundant costs of its legacy satellite contracts, but that, in the end, these were used to provide service to FSM areas that the undersea cables did not serve. The OAE further argues that, although Telecom did not receive compensation for the Hantru cable assets transferred to the OAE, Telecom could have sought an FSM government subsidy for that, since Telecom, as a government corporation, has commonly received FSM government subsidies, but Telecom instead sought and received subsidies for other projects and to fulfill its statutory mandate.

The OAE also notes that since the IRU Deed went into effect and the Yap and Chuuk cables became operational (meaning Telecom had to use them), Telecom's internet revenues have increased while its internet access costs have decreased. The OAE argues that therefore the IRU Deed has benefitted Telecom's bottom line and that since Telecom has been "booking" the amounts it would have paid the OAE, this shows that Telecom can operate successfully within the current statutory and IRU Deed framework.

The OAE also argues that the IRU Deed's payment provisions are fair and that if another retail provider had entered the market before RUS forgave the remaining loan balance, that provider would have paid a share of the repayment costs in accordance with IRU Deed section 7.1. The OAE also complains that Telecom has not been paying for marine maintenance coverage⁷ for the Hantru cable as required by IRU deed section 8.3. Instead, the OAE has paid that.

The OAE also notes that Telecom's unpaid invoice balance had, as of May 1, 2022, reached \$1,630,700.

F. *Telecom's May 6 and 11, 2022 Surrejoinders*

Telecom points to a letter from the TRA to the OAE chief executive, questioning an equivocal statement of that executive and reminding him that the OAE, by statute, is required to provide international and interstate connectivity to all licensed FSM telecommunications operators. Telecom cites this as an example of the OAE's bad faith conduct. Telecom also points to that executive's response, which, now that it seems Telecom will no longer be the OAE's sole customer, Telecom claims shows that the OAE is not preparing service agreements with other FSM-licensed retail providers and taking steps towards the apportionment of costs.

G. *Amicus Curiae*

In its brief(s), the amicus curiae, the Federated States of Micronesia, wishes to make the court aware that both Telecom and the OAE are FSM national government instrumentalities and that the IRU Deed was a product of a collective arrangement or negotiation of the national government and the parties and that the IRU Deed's overarching purpose was to implement the national government's telecommunications policies and laws. The FSM argues that, since both the OAE and Telecom are national government instrumentalities, "[a]ny claim of coercion by the FSM does not sit well with the notion that they are each responsible for and have a duty to carry out [the] FSM's policies and laws." FSM Nat'l Gov't Amicus Curiae Br. at 8 (Aug. 27, 2021).

The FSM also wishes to direct the court's attention to the Indefeasible Rights Use agreement that the OAE has signed with its Nauru and Kiribati counterparts ("EMC IRU"). The FSM further notes that grant funding for the EMC project has now become available from sources other than the World Bank and that the EMC IRU is dependent on the IRU Deed because the EMC project will connect Kosrae, Nauru, and Kiribati to the outside world through the Hantru cable system. The FSM notes that the IRU Deed is a foundational document for the FSM's international commitments to the neighboring countries of Nauru and Kiribati.

H. *May 12, 2022 Hearing*

1. *The OAE*

The OAE notes that at first, this is a collection action – the OAE is trying to collect from Telecom the sums Telecom owes it. The OAE asserts that the IRU Deed is more than just a contract between two public corporations and not just an agreement for access rights because the IRU Deed was instituted to implement national policy. The OAE asserts that Telecom's real position is not that the OAE has breached the IRU Deed, but instead is a general disagreement with the policy that the national government has adopted.

The OAE notes that its accomplishments include providing access to capital-free infrastructure (its submarine cables) and that the EMC project is again moving forward. The OAE argues that this is an improvement over when Telecom had monopoly power and, although Telecom was able to get financing for

⁷ Marine maintenance coverage is a type of insurance whereby the policyholder is guaranteed that a repair ship will be available to fix a broken or disabled submarine cable. It does not cover the cost of the repair.

the Hantru connection to Pohnpei, it was unable to do the same for the other states. The OAE states FSM then negotiated with the World Bank for funding which was a game-changer when it was willing to provide the capital costs as a grant, conditioned on there being free access to the Hantru cable system. The OAE points out that Congress's preferred solution to Hantru access problem was to transfer its ownership from Telecom to the OAE and that it passed two public laws to effect that (Nos. 20-13 and 2020), but, since Telecom negotiated a different result (the IRU Deed), those laws were never implemented and were later repealed. The OAE also argued that the IRU Deed was modified to accommodate Telecom's desires about the cable landing station on Chuuk (placing it within the Telecom property on Weno island rather than a rental location next door) and about redundant satellite costs. The OAE argues that it has been reasonable and, since Telecom was its only customer, gave Telecom discounts and did not charge for consultants or the 5% reserve it was allowed to charge, but that, nevertheless, Telecom stopped paying after March 2020, even though its financials improved after that, and therefore its actions do not show bad faith. In contrast, the OAE implies that Telecom's actions, stopping payments to the OAE, trying to pay the OAE's vendors directly, do show bad faith, and further implies that Telecom may have signed the IRU Deed hoping or expecting it to be unenforceable.

The OAE points out that it has no profits or cash reserves so that the legacy debt service for the RUS Hantru loan must be part of its overhead that it must, under IRU Deed section 7.5, apportion among its customers. The OAE also answers that its officer's letter to the TRA does not show bad faith since that letter explicitly expressed the OAE's willingness to follow whatever guidance the TRA might give about how to apportion costs among its customers now that Telecom will not be its only customer (two new customers to come on line).

The OAE argues that Telecom's real objection is not the cost allocation itself, but that it has to pay the OAE at all. The OAE notes that if specific costs are objected to, that there is an IRU Deed mechanism to address those concerns. The OAE further states that the EMC project has not been decommissioned and is again, with new grant funding sources, going forward. The OAE also argues that there was actual consideration for the IRU Deed even though Telecom did not receive any direct compensation, it retained ownership of the Hantru cable and the OAE agreed to pay half of the remaining debt on it and to provide access to the Yap and Chuuk cables (and the EMC cable in the future) without any legacy debt to bear. The OAE further states that Telecom cannot show economic duress because for there to be economic duress there must be an unlawful threat, but that the possibility that Congress had enough support to restructure Telecom against Telecom's wishes was not an unlawful threat and Telecom would likely not have agreed to the IRU Deed without that possibility. The OAE notes that whether an act was unlawful is a matter of law for the court to decide since the facts are not disputed. Lastly, the OAE noted that the regulator had only recently opened the FSM telecommunications market and that it takes years to determine if a market opening is working.

The OAE asks the court to declare the IRU Deed valid and enforceable and to award money damages based on its back invoices, and that any decision about apportionment of costs to other service providers is an open issue left to the TRA to decide in the first instance.

2. *Telecom*

Telecom argues that the IRU Deed is so bad that it must be unconscionable. It contends that the OAE just adds an unnecessary layer of cost without any benefit. Telecom notes that while the OAE was created by the FSM national government, Telecom has stakeholders in the four FSM states. Telecom argues that it is still the only retail provider who is paying the OAE because the other providers first need to execute service agreements before they pay and none have yet been prepared.

Telecom further doubts whether the EMC project will be brought to fruition, and if it is, whether that will be by May 2026. It calls the EMC project a travesty and notes that a previous bid by a Chinese company to build it was rejected by the U.S. government. Telecom notes that it did not jeopardize the EMC project.

Telecom suggests that the EMC project may have been “decommissioned,” and, if so, then IRU Deed section 1.1 would relieve it of having to provide the OAE access rights to the cable landing station on Pohnpei and certain other facilities.

Telecom asserts that the IRU Deed was so one-sided it was unconscionable; makes no commercial sense; was a take-it-or-leave-it proposition; and that no potential international competitor will ever come to the FSM. Furthermore, it argues that the IRU Deed was illegal because Public Laws No. 20-13 and No. 20-20 were in effect when the IRU Deed was signed.

Telecom argues that this matter should go to trial because the IRU Deed was illegal when signed and therefore void; because the IRU Deed charges all costs back to Telecom as the sole retail provider; because Telecom did not negotiate the IRU Deed – it was done by others; and because Telecom further questions why the OAE should own half the Hantru spur spectrum if its whole purpose is to provide connectivity at no capital cost since that asset had a capital cost (half the RUS loan) which the OAE never paid. Telecom suggests that the OAE (or someone) should have purchased the Hantru asset from it. Telecom asserts that it is unfair that it must provide the OAE with half its Hantru spectrum without compensation and must pay all of the OAE’s costs while it cannot compete with the OAE with its satellite service or through Starlink.

I. *Telecom’s June 10, 2022 Further Surrejoinder*

Telecom notes that the OAE now has another customer, iBoom in Yap, but that the OAE refuses to adjust its invoice amounts to Telecom ostensibly because Telecom has not been paying its invoices and cites this as an example of the OAE’s bad faith conduct. Telecom notes that the OAE informed the TRA that its Hantru spectrum was currently off-line because its upgrade was in progress. And Telecom argues that the OAE seems to be contemplating an apportionment of its monthly charges based on the retail providers’ revenues when the proper apportionment is on a cost basis.

III. ANALYSIS

A. *Summary Judgment Requirements*

Summary judgment is proper when, viewing the facts in the light most favorable to the party against whom judgment is sought, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *E.g.*, Mailo v. Chuuk Health Care Plan, 20 FSM R. 18, 22 (App. 2015); Nahnken of Nett v. United States, 7 FSM R. 581, 586 (App. 1996). But a movant plaintiff, when seeking summary judgment, must not only show that there are no material facts genuinely in dispute and that it is entitled to judgment as a matter of law, but must also overcome all of the adverse party’s affirmative defenses and counterclaims. Andrew v. Heirs of Seymour, 19 FSM R. 331, 340 (App. 2014); FSM Dev. Bank v. Salomon, 22 FSM R. 468, 477 (Pon. 2020) (must show that the affirmative defenses are insufficient as a matter of law and overcome all of the adverse parties’ counterclaims); FSM Dev. Bank v. Gilmete, 21 FSM R. 159, 169 (Pon. 2017) (summary judgment movant must also overcome all the adverse parties’ counterclaims); Isamu Nakasone Store v. David, 20 FSM R. 53, 57 (Pon. 2015) (must show that the affirmative defenses are insufficient as a matter of law).

B. *Telecom’s Counterclaims*

1. *Generally*

The court notes that it has already dismissed most of Telecom’s counterclaims except for the OAE’s alleged unconstitutional taking of property without just compensation, (the takings counterclaim that asserted the rights of the FSM states was dismissed); and the OAE’s alleged breach of contract and of the covenants of good faith and fair dealing. FSM Telecomm. Cable Corp., 23 FSM R. at 440-41. Both these counterclaims were also raised as affirmative defenses. The counterclaim alleging that the OAE breached

the IRU Deed contract and breached of the covenants of good faith and fair dealing will be addressed below under affirmative defenses. See *infra* part III.C.4.

2. Takings Counterclaim

This leaves the OAE's alleged unconstitutional taking of property without just compensation as an actual counterclaim. The court concludes that it should have also dismissed this counterclaim. The court has previously held that as a general proposition, a governmental entity's breach of a contract does not constitute a civil rights violation. Stephen v. Chuuk, 18 FSM R. 22, 25 (Chk. 2011); FSM v. GMP Hawaii, Inc., 16 FSM R. 479, 484 (Pon. 2009); Island Dev. Co. v. Yap, 9 FSM R. 18, 20 (Yap 1999). Generally, "when the government itself breaches a contract, a party must seek compensation from the government in contract rather than under a takings claim." Piszel v. United States, 833 F.3d 1366, 1376 (Fed. Cir. 2016). "A takings claim is inappropriate where it duplicates a breach of contract claim and a breach of contract remedy is available . . ." Rain & Hail Ins. Serv., Inc. v. Federal Crop Ins. Corp., 229 F. Supp. 2d 710, 713 (S.D. Tex. 2002). Telecom therefore does not, based on its IRU Deed contract counterclaim, have a takings claim against the OAE since it may maintain and resort to various contract remedies.

Furthermore, a taking occurs whenever a public entity substantially deprives a private party of the beneficial use of its property for a public purpose. Ladore v. Panuel, 17 FSM R. 271, 275 (Pon. 2010). Telecom is not a private party. The Hantru spectrum was not private property when the OAE acquired half of it. It was already public (governmental) property, and it was already being used for a public purpose – providing universal telecommunications service. In this case, 50% of the Hantru spectrum was transferred from one national government instrumentality (Telecom) to another national government instrumentality (OAE). Thus, no private property was involved, and no unconstitutional taking occurred. Telecom, wholly owned by the national government, transferred 50% of the Hantru spectrum to the OAE, also wholly owned by the national government. It remained at all times public property used for a public purpose.

Accordingly, Telecom's takings counterclaim is dismissed.

C. Affirmative Defenses

Telecom asserts affirmative defenses 1) failure to state a claim; 2) failure of consideration; 3) breach of contract; 4) failure to mitigate damages; 5) offset and waiver; 6) bad faith; 7) that the IRU Deed is unconscionable and entered into under duress; 8) unconstitutional taking of property without just compensation; 9) fraud, misrepresentation, and detrimental reliance; and 10) intentional or negligent interference with business opportunities. These are generally contract defenses. Interpretation of contracts and their provisions is a matter of law to be determined by the court. Smith v. Nimea, 19 FSM R. 163, 169 (App. 2013).

1. Affirmative Defenses Already Overcome

As noted when discussing and dismissing the unconstitutional taking of property counterclaim above, *supra* part III.B.1., some of Telecom's affirmative defenses duplicate its counterclaims, and those counterclaims have been dismissed. Accordingly, the court must consider those affirmative defenses of breach of contract, unconstitutional taking of property without just compensation, and intentional or negligent interference with a contract or with business opportunities to have already been overcome.

2. Fraud and Misrepresentation

For its fraud and misrepresentation defense, Telecom alleges that fraud and misrepresentation by the OAE and third parties about the IRU Deed's impact occurred and that promises were made that the law would be changed.

The court must disregard Telecom's fraud affirmative defense. Telecom did not plead it with particularity. Fraud, unlike most other affirmative defenses, is an affirmative defense that must be pled with particularity, Pacific Islands Dev. Bank v. Sigrah, 22 FSM R. 600, 605 (Pon. 2020), because, in all averments of fraud, the circumstances constituting fraud must be stated with particularity, and this particularity requirement applies not only to a plaintiff pleading a fraud claim in its complaint, but also to a defendant pleading fraud as an affirmative defense in its answer. Macayon v. FSM, 22 FSM R. 544, 555 (Chk. 2020). When pleading fraud, the pleader must state the time, place, and content of the false misrepresentation, the fact misrepresented and what was obtained as a consequence of the fraud. Pacific Agri-Products, Inc. v. Kolonia Consumer Coop. Ass'n, 7 FSM R. 291, 293 (Pon. 1995). Telecom did not do this. This defense fails.

3. *Failure of Consideration or "Illusory" Consideration*

Telecom claims that the IRU Deed is void because there was no consideration since the consideration was "illusory." Telecom's consideration was not illusory or non-existent. Telecom received, at cost, non-discriminatory access to undersea fiber optic cables between Yap and Guam, between Chuuk and Pohnpei, and the future prospect of similar access to a cable between Pohnpei and Kosrae (with onward connection to Nauru and Kiribati), all without capital expenditure or indebtedness on Telecom's part. Courts generally do not inquire into the sufficiency of consideration – parties to an agreement are free to attach value to whatever is exchanged, and, as long as each side gained something, consideration was exchanged. Goyo Corp. v. Christian, 12 FSM R. 140, 148-49 (Pon. 2003). This affirmative defense fails.

4. *Other Affirmative Defenses*

Telecom also pleads the failure to state a claim, failure to mitigate damages, offset and waiver, and bad faith as affirmative defenses. But, if the OAE prevails on any of its claims, it has stated a claim. Since the OAE stated enough of a claim so as to obtain preliminary injunctions in its favor, it has overcome this defense early on. But just because a plaintiff has stated a claim, it does not automatically follow that the plaintiff will prevail on its claim. But since the court, with this order, grants the OAE partial summary judgment, the OAE has stated a claim.

Since the only damages the OAE claims are amounts allegedly due from Telecom under the IRU Deed, the failure to mitigate damages affirmative defense is a little puzzling. To the extent that it refers to whether the OAE should have reduced its costs and thus the amounts the OAE charges Telecom it is a defense only to the amount of damages, not to the liability for damages. The same is true for the offset and waiver defense. Telecom seems to have argued both of these defenses in its summary judgment oppositions in this manner. Both of these defenses will therefore be considered only if Telecom's liability is found.

Telecom's bad faith defense is just a generalized statement the OAE has dealt with Telecom in bad faith on all issues. Many of those issues, which Telecom gave as evidence of bad faith, involve the counterclaims that were dismissed, and therefore are no longer before the court. Of the remaining instances of bad faith, they all seem to be subsumed in Telecom's duress and unconscionability defense. This is also true of any part of the counterclaim of breach of the covenant of good faith and fair dealing that may have escaped the earlier dismissal of counterclaims. It also is subsumed in Telecom's duress and unconscionability defense.⁸

⁸ Closely related to the covenant of good faith and fair dealing is the doctrine of tortious bad faith breach of contract. See Silberg v. California Life Ins. Co., 521 P.2d 1103, 1108-09 (Cal. 1974). In this case, they so overlap as to be the same.

5. *Duress and Unconscionability*

Telecom contends that the IRU Deed is unconscionable and that Telecom entered into it only under duress.

a. *Duress*

Telecom contends that it would not have ever agreed to the IRU Deed if it had not been for the duress it suffered. Since freedom of will is essential to a contract's validity, "an agreement obtained by duress, coercion, or intimidation is invalid." Nahnken of Nett v. United States, 7 FSM R. 581, 588 (App. 1996) (citing 17A AM. JUR. 2D *Contracts* § 234, at 237 (1991)). Duress takes two forms – physical and economic, and physical duress negates assent to a contract *ab initio*. Smith v. Nimea, 18 FSM R. 36, 41 (Pon. 2011) (citing RESTATEMENT (SECOND) OF CONTRACTS intro. topic prec. § 174, at 473 (1981)).

(i). *Economic Duress*

Telecom asserts that it only agreed to what it considers an unconscionable IRU Deed because of economic duress.

Economic duress makes a formed contract voidable. A contract is voidable for economic duress if: (1) a party's manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative; or (2) a party's manifestation of assent is induced by one who is not a party to the transaction, unless the other party to the transaction in good faith and without reason to know of the duress either gives value or relies materially on the transaction.

Smith, 18 FSM R. at 41-42. "The requirements for a showing of duress by threat can be grouped under four headings. First, there must be a threat. Second, the threat must be improper. Third, the threat must induce the victim's manifestation of assent. Fourth, it must be sufficiently grave to justify the victim's assent." E. ALLAN FARNSWORTH, *CONTRACTS* § 4.16, at 257 (1982).

Wrongful acts or threats "may be categorized into four principal classes. 1. Violence or threats of violence [not economic duress]. 2. Imprisonment or threats of imprisonment [also not economic duress]. 3. Wrongful seizing or withholding, or threats to wrongfully seize or withhold, goods or lands. 4. Other wrongful acts." JOSEPH M. PERILLO, *CALAMARI AND PERILLO ON CONTRACTS* § 9.3, at 318-19 (5th ed. 2003) (footnote omitted). But, "absent a *wrongful* threat, the driving of a hard bargain is not duress. This is true even if one party benefits from the financial distress of the other." *Id.* at 320 (emphasis in original). To be wrongful or improper the act or threat does not have to be unlawful. *Id.* at 319; FARNSWORTH, *supra*, § 4.17, at 259. And, "[i]f a party's assent has been induced by the duress of a third person, rather than that of the other party to the contract, the contract is nonetheless voidable by the victim." RESTATEMENT (SECOND) OF CONTRACTS § 175 cmt. e (1981) (but exception if other party gives value in good faith and without reason to know of duress).⁹

(ii). *Alleged Improper Threat or Wrongful Act*

Telecom asserts that it was subjected to economic duress when Congress, before enacting Public Law No. 18-52, threatened to restructure Telecom if it was unwilling to acquiesce to liberalization of the telecommunications sector. Telecom contends that it was subjected to further duress when Congress

⁹ Although FSM courts are not bound to adopt common-law doctrines, they may, by statute, 1 F.S.M.C. 203, use the Restatements of the Law as the rules of decision to determine and apply the common law in the absence of written law, while keeping in mind the suitability of any given common law principle for the FSM. Iriarte v. Individual Assurance Co., 18 FSM R. 340, 365 (App. 2012).

enacted Public Laws No. 20-13 and No. 20-20, transferring the Hantru spur to the OAE. The OAE agrees that Telecom only negotiated and reluctantly consented to the IRU Deed because Congress had indicated (threatened) that if it did not, Congress would restructure Telecom and would (and did by the temporary enactment of Public Laws No. 20-13 and No. 20-20) transfer ownership and control of Telecom's Hantru cable ownership rights.

In this case, the question of duress turns on whether these threats or acts were wrongful or improper. If Congress were an actual third party to the IRU Deed transaction, the court would agree with Telecom that it had made a sufficient factual showing that the duress issue would need to go to trial. But here Congress (usually the national government's policy-making branch), and by extension the national government as a whole, owns Telecom. And the national government also owns the OAE. The court cannot say that the pressure put on a corporation by the corporation's owner to negotiate and agree to a contract with certain provisions (unless those provisions are illegal) constitutes a wrongful or improper act giving rise to a duress defense and a contract voidable by the coerced party.

(iii). *Purported Illegality of Contract Provisions*

As another part of its duress argument, Telecom argues that the IRU Deed is voidable because its payment provisions were illegal¹⁰ because these provisions were contrary to statutes in effect when the IRU Deed was executed – Public Laws No. 20-13 and No. 20-20 – and that the subsequent repeal of those statutes by Public Law No. 20-101 should have no effect. The court must reject this argument.

"The general rule is that a change of law does not validate a contract that was originally illegal and unenforceable. However, the contract may be ratified. Moreover, there are exceptions when the repealing statute expressly so states or where this is implied . . ." PERILLO, *supra*, § 22.9, at 860 (footnotes omitted). Here, Telecom likely ratified the IRU Deed by performing under it for almost two years after Public Law No. 20-101 repealed the statutes that may have made certain IRU Deed provisions illegal.

But more importantly, even if Telecom did not ratify the IRU Deed after repeal, the repealing statute expressly states that the reasons for the repeal were that the OAE and Telecom had negotiated an agreement (the IRU Deed) and that the "public laws are therefore no longer necessary and may create inconsistency problems with the negotiated agreement." FSM Pub. L. No. 20-101, § 1, 20th Cong., 4th Spec. Sess. (2018). In other words, if, because of Public Laws No. 20-13 and No. 20-20, the IRU Deed was illegal when it was drafted and agreed to, Public Law No. 20-101's repeal of those statutes specifically intended to make the IRU Deed legal. Thus, even if the IRU Deed had illegal provisions or was an illegal contract and even if Telecom's performance did not ratify the IRU Deed, the when-the-repealing-statute-expressly-so-states exception applies. This defense fails.

b. *Unconscionability*

Telecom further contends that the IRU Deed is unconscionable and that therefore the court should refuse to enforce it.

(i). *Unconscionability Test and Extent of Remedy*

The traditional test for unconscionability is that "a contract is unconscionable if it is such as no man

¹⁰ Telecom did not plead the IRU Deed's purported illegality as a separate affirmative defense. It probably should have. Generally, an affirmative defense must have been pled in the answer in order for the court to be able to consider it when the plaintiff has sought summary judgment. *Carroll v. Paramount Pictures, Inc.*, 3 F.R.D. 47, 48 (S.D.N.Y. 1943). The court only considers it here because Telecom was able to make it factually a part of its duress affirmative defense by arguing that the public laws that made the IRU Deed provisions illegal were part of the pressure – duress – that induced it to consent to the IRU Deed.

in his senses and not under delusion would make on the one hand, and as no honest or fair man would accept, on the other.” *FSM Dev. Bank v. Gilmete*, 21 FSM R. 159, 180 (Pon. 2017) (internal quotation omitted). “[T]he unconscionability test involves the question of whether the provision amounts to the taking of an unfair advantage by one party over the other.” *Id.* “To be unconscionable, the contract term must be so one-sided as to be oppressive.” *Id.* (internal quotation omitted).

Generally, “[t]he party who asserts the defense of unconscionability must plead and prove it.” FARNSWORTH, *supra*, § 4.28, at 309. “[A] court may refuse to enforce the entire contract or it may refuse to enforce or limit the application of an unconscionable clause. Courts have usually contented themselves with refusing to enforce or limiting the application of an unconscionable clause” *Id.* (footnote omitted). “Particular terms may be unconscionable whether or not the contract as a whole is unconscionable. . . . [T]erms may be unconscionable in some contexts but not in others. Overall imbalance and weakness in the bargaining process are then important.” RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. e (1981).

“Unconscionability has generally been recognized to include the absence of a meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.” *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449, 18 A.L.R.3d 1297, 1301-02 (D.C. Cir. 1965) (unsophisticated consumer presented with adhesion contract by merchant).

Courts continue to focus on both “unreasonably favorable” terms and “an absence of meaningful choice.” It has become fashionable to designate the former as “substantive,” and the latter as “procedural” unconscionability. Procedural unconscionability is broadly conceived to encompass not only the employment of sharp practices and the use of fine print and convoluted language, but [also] a lack of understanding and an inequality of bargaining power. Most cases involve a combination of the two types of unconscionability; and it is generally agreed that if more of one is present, the less of the other is required. It is unclear whether substantive unconscionability alone is enough

FARNSWORTH, *supra*, § 4.28, at 314-15 (footnotes omitted).

(ii). *Alleged Ill-Advised Policy*

Telecom contends that the IRU Deed is unconscionable because it is the product of the FSM’s adoption of ill-advised and thus unworkable policies. Telecom avers that it can show that there are better ways to lower telecommunications costs and foster competition than that mandated by Public Law No. 18-52 and establishment of the OAE. However, even if the IRU Deed is the result of ill-advised policies, that concern is outside the court’s purview. Policy adoption is the other government branches’ responsibility, not the court’s.

The government may chose any policy not constitutionally prohibited, or implement a policy by any means not constitutionally or statutorily prohibited, no matter how ill-advised the policy or the means of implementation. Ill-advised governmental policy choices imbedded in a contract do not make that contract unconscionable. If there is a better method to implement the national policy goals of reducing telecommunications costs while increasing quality and connectivity other than the OAE connecting all four states with fiber optic cable, Telecom may endeavor to persuade the government’s policy-making branches of that, not the court.

This argument must therefore be rejected

(iii). *Future Satellite (Starlink) Service*

Telecom further contends that being required to use the OAE’s submarine cables to provide its primary interstate and international telecommunications services is unconscionable because in the not-too-

distant future those fiber optic cables will be obsolescent and uncompetitive due to the Starlink satellite system that Starlink's proprietor is now deploying. This conjecture is too speculative. It has no bearing on whether the IRU Deed was unconscionable when executed. "The critical juncture for determining whether a contract is unconscionable is the moment when it is entered into by both parties—not whether it is unconscionable in light of subsequent events." *American Software, Inc. v. Ali*, 54 Cal. Rptr. 477, 480 (Cal. Ct. App. 1996); see also FARNSWORTH, *supra*, § 4.28, at 315-16 ("any unfairness in the terms is to be judged at the time the contract is made and not at some later time").

Telecom's conjecture is only a guess (perhaps an educated guess) that at some future time some IRU Deed provisions may become commercially impracticable to perform or that the contract's purpose may be frustrated. See RESTATEMENT (SECOND) OF CONTRACTS § 261 (discharge by supervening impracticability of performance); and § 265 (discharge by supervening frustration of purpose) (1981). Telecom may plead and raise those defenses to excuse or discharge its performance or to avoid liability only if and when supervening circumstances give it an actual factual basis to do so. Currently, it is just speculation.

(iv). *One Provision Possibly Unconscionable*

The court has carefully considered the IRU Deed's terms in light of the parties' arguments and concludes, that as a whole, the IRU Deed is not unconscionable. In particular, the court concludes that the non-compete clause is not unconscionable. Thus, the OAE is restricted to, and has a monopoly over, the wholesale business of telecommunications transmission by undersea fiber optic cable on a non-discriminatory basis at cost, FSM Pub. L. No. 18-52, § 91(2), 18th Cong., 3d Spec. Sess. (2014) (to be codified at 21 F.S.M.C. 389(2)), and Telecom is restricted from competing with the OAE's wholesale business, IRU Deed § 6.4, although Telecom still has the Hantru spur and 50% of its spectrum for its own use. This seems a reasonable restraint on Telecom's trade if the OAE is to operate on a non-discriminatory and non-profit basis, open for use by all telecommunications retail providers. Otherwise, not only would the OAE not be financially viable, but Telecom, with its greater resources, would also be able to threaten the OAE's existence.

Furthermore, Telecom cannot show much by the way of procedural unconscionability in the IRU Deed's formation. There were no sharp practices, no use of fine print and convoluted language in the IRU Deed, and certainly not a lack of understanding or a great inequality in bargaining power. Telecom was represented by able counsel throughout the IRU Deed negotiations, as was the OAE. In any contract negotiation, the parties' bargaining power will usually be unequal. FARNSWORTH, *supra*, § 4.28, at 316 ("their bargaining power will rarely be equal"). Both Telecom and the OAE are sophisticated corporations, with Telecom perhaps the more sophisticated since it had greater experience in lobbying Congress and the OAE had recently come into existence. "Courts have generally been chary about using the doctrine of unconscionability to protect merchants and similar professionals and have declined to apply it in favor of sophisticated corporations." *Id.* § 4.28, at 313-14. This court is also chary of applying the unconscionability doctrine in favor of a sophisticated corporation. And a further reason for being chary is that both IRU Deed parties are public corporations owned by the national government.

The court, however, cannot say that the clauses whereby the OAE assumes liability for 50% of the Hantru loan repayments after obtaining 50% of the Hantru spectrum from Telecom, but then charges all of those repayments back to Telecom are clearly not unconscionable. The OAE received a property interest with a lien on it held by RUS but had no responsibility to see that the mortgage was paid off and the lien removed. Since Telecom has pled unconscionability and produced enough evidence that these particular clauses might be unconscionable, the court cannot conclude on summary judgment that these clauses are definitely not unconscionable.

(v). *Summary Judgment on Legal Validity of Rest of IRU Deed*

Because courts usually content themselves with refusing to enforce or limiting the application of an

unconscionable clause rather than considering the whole contract to be unconscionable, the court's denial of summary judgment is limited to just these clauses. The court therefore concludes that, other than these clauses, the OAE is entitled to a judgment that as a matter of law the IRU Deed is legally valid and enforceable.

The effect of separating these possibly unconscionable clauses from the rest of the IRU Deed contract is limited because, at most, it only concerns liability for 50% of the Hantru loan repayments between February 2, 2018, and when RUS forgave the remaining loan balance. It has no continuing effect on future events. The court will therefore grant the OAE summary judgment that the IRU Deed is a legally valid and enforceable contract other than the clauses which the court must now leave for future adjudication about whether they are an unconscionable and unenforceable part of an otherwise legally valid and enforceable contract or whether they may also be enforced.

6. *Offset or Setoff and Damages*

Telecom asserts that there are genuine factual disputes about damages because it may, for various reasons, be entitled to offsets¹¹ against the OAE invoice amounts. It is also possible, but not yet determined, that the OAE may have some liability for 50% of the Hantru loan repayment after February 2, 2018, that conceivably could be offset against the sums that the OAE invoiced Telecom.

The setoff of debts to a recoverable net balance is a salutary principle. See, e.g., Ertag v. Haines, 104 A.2d 81, 86 (N.J. Super. 1954) ("from the earliest times the courts held that the practice of set-off is wise, salutary and to be favored"). Under the setoff doctrine "where parties dealing together become mutually indebted, ordinarily only the balance is recoverable." 80 C.J.S. *Set-off and Counterclaim* § 3, at 8 (1953). That is what the IRU Deed provides for – only the net balance is recoverable (by the OAE).

Telecom alleges, and the OAE chief executive officer, in his testimony agrees, that the time that OAE officers spend on the EMC project is not properly part of OAE overhead to be charged its retail provider customers but is part of the EMC project capital cost, and as such should not be included in (or should be deducted from) the OAE invoices to retail providers. It is unclear whether this has been done. Telecom also claims that the time that OAE officers spend on other projects not covered by the IRU Deed should be deducted from the officers' compensation that is charged as overhead in the OAE invoices to retail providers. Telecom has produced some evidence that there are such projects.

For these reasons, the court cannot set a dollar amount right now for Telecom's liability on the IRU Deed. The factual amounts are not genuinely undisputed. Summary judgment on this claim is therefore denied.

IV. CONCLUSION

Since the OAE has not overcome Telecom's affirmative defense that the terms involving repayment of 50% of the RUS Hantru loan were unconscionable, the court, following the usual court practice concerning unconscionability, severs that particular IRU Deed provision so as to later determine whether it may be unconscionable. The court grants the OAE summary judgment that the rest of the IRU Deed is a legally valid and enforceable contract and that the OAE has an indefeasible right to use 50% of the Hantru cable spectrum from Pohnpei to Guam and indefeasible rights to use the submarine cables between Guam and Yap and between Pohnpei and Chuuk and the EMC cable once that project is built. The court denies summary judgment on the exact amounts Telecom owes the OAE.

* * * *

¹¹ "The term 'offset' is used quite commonly as a synonym of 'set-off.'" 80 C.J.S. *Set-off and Counterclaim* § 3, at 8 (1953).