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13 SUPERIOR COURT OF THE STATE OF CALIFORNIA

14 COUNTY OF ALAMEDA

15 OAKLAND BULK AND OVERSIZED
16 TERMINAL, LLC, a California limited
17 liability company, and OAKLAND GLOBAL
18 RAIL ENTERPRISE, LLC, a California
limited liability company

19 Plaintiffs,

v.

20 CITY OF OAKLAND, a California municipal
21 corporation,

22 Defendant.

23 CITY OF OAKLAND

24 Counter-Plaintiff,

v.

25 OAKLAND BULK AND OVERSIZED
26 TERMINAL, LLC, and CALIFORNIA
CAPITAL INVESTMENT GROUP,

27 Counter-Defendants.
28

Consolidated Case Nos. RG18930929 /
RG20062473

Unlimited Civil Case/Assigned to Dept. 514
(Hon. Noël Wise)

**CITY OF OAKLAND'S PRETRIAL BRIEF
NO. 1 REGARDING PROPER SCOPE OF
TRIAL ON ALTERNATIVE REMEDIES**

Action Filed: December 4, 2018

Trial Date: July 10, 2023

Cont. Trial Date: Nov. 28, 2023

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Bancroft v. Woodward (1920)
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Buckmaster v. Bertram (1921)
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Darbun Enterprises, Inc. v. San Fernando Community Hospital (2015)
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Hoopes v. Dolan (2008)
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Moss v. Bluemm (1964)
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12 Cal.App.5th 2522

Reliant Life Shares, LLC v. Cooper (2023)
90 Cal.App.5th 142, 4

Union Oil Co. of California v. Greka Energy Corp. (2008)
165 Cal.App.4th 1292

Wallis v. Superior Ct. (1984)
160 Cal.App.3d 11093

Walton v. Walton (1995)
31 Cal.App.4th 2772

1 Pursuant to the Court’s request at the Case Management Conference held on November 16,
2 2023, the City of Oakland submits this pre-trial brief to address the issue of the authority for
3 Plaintiff Oakland Bulk and Oversized Terminal (“OBOT”)’s demand that the upcoming trial
4 address both of its alternative and mutually exclusive contract remedies notwithstanding the City
5 of Oakland’s stipulation to the availability of specific performance as a remedy for breach of
6 contract in this case.

7 California law is clear that OBOT has no right to require this Court to hold trial on the
8 alternative remedies of specific performance and contract damages. As explained below,
9 California courts have held that in contract cases a plaintiff does not have the right to try
10 inconsistent alternative remedies, and that a court therefore may try equitable remedies first even
11 where the preclusive effect of that trial renders contract damages unavailable. Moreover, there is
12 no case that the City can find that has ever held, contrary to this case law, that a party has the right
13 to proceed to trial on an alternative damages remedy even where the opposing party has stipulated
14 to the availability of specific performance. The general caselaw which OBOT has referenced
15 regarding election of remedies does not address the particular scenario at issue here.

16 This Court can and should proceed with trial on OBOT’s remedies in the most efficient
17 manner, and limit the evidence in the remedy phase to determining the appropriate scope of
18 specific performance.¹

19 DISCUSSION

20 As a remedy for the City’s breach of contract found by this Court, OBOT plainly cannot
21 obtain an order rescinding termination and extending the contract deadlines, *and* an award of
22 contract damages for the full value of the 66-year contract. *See, e.g., Darbun Enterprises, Inc. v.*
23 *San Fernando Community Hospital* (2015) 239 Cal.App.4th 399, 409 (“[a] plaintiff may not
24 receive both” damages and specific performance in a breach of contract claim”); *accord*
25 *Buckmaster v. Bertram* (1921) 186 Cal. 673, 678 (“These remedies are inconsistent and the

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27 ¹ The City addresses OBOT’s new request for equitable monetary remedies incident to specific
28 performance (which it never pleaded, and raised for the first time only after the first phase of
trial), in the accompanying Pretrial Brief No. 2 filed today.

1 [plaintiff] cannot have both, and if one is chosen the other is deemed to be abandoned....”); *Union*
2 *Oil Co. of California v. Greka Energy Corp.* (2008) 165 Cal.App.4th 129, 136. This “double
3 recovery” is impermissible under California law. *Darbun*, 239 Cal.App.4th at 409. As such,
4 there is no question that OBOT must choose between the inconsistent remedies it seeks; the only
5 issue is whether OBOT has the right to proceed to trial now on both in the alternative in light of
6 OBOT’s pursuit of specific performance and the City’s stipulation to the availability of specific
7 performance.

8 California law also is clear that in a breach of contract action seeking both specific
9 performance and contract damages, “[w]here mutually exclusive remedies are pled, *there need*
10 *not be a trial on both remedies.*” *Walton v. Walton* (1995) 31 Cal.App.4th 277, 292 (emphasis
11 added). A plaintiff does *not* have the right to insist on a trial on both alternative remedies, as “the
12 court may decide the equitable issues first, and this decision may result in factual and legal
13 findings that effectively dispose of the legal claims.” *Nwosu v. Uba* (2004) 122 Cal.App.4th
14 1229, 1244; *accord Walton*, 31 Cal.App.4th at 293 (“Where mutually exclusive remedies are
15 pled, there need not be a trial on both the legal and the equitable remedy. Resolution of one
16 renders the other moot.”).

17 This rule stems from the principle of equity first preclusion, under which trial courts in
18 California are bestowed with the discretion to resolve equitable issues before legal ones, and the
19 resolution of those equitable issues is afforded preclusive effect even where the resolution of
20 specific performance renders a claim for damages moot. *Walton*, 31 Cal.App.4th at 293.
21 California courts have “repeatedly held” that resolving equitable issues first violates no right of
22 the plaintiff (which is true even where the plaintiff has not waived the right to a jury trial on
23 damages, as OBOT has here). *See, e.g., Reliant Life Shares, LLC v. Cooper* (2023) 90
24 Cal.App.5th 14, 31; *Orange Cnty. Water Dist. v. Alcoa Glob. Fasteners, Inc.* (2017) 12
25 Cal.App.5th 252, 355; *Hoopes v. Dolan* (2008) 168 Cal.App.4th 146, 156; *Nwosu*, 122
26 Cal.App.4th at 1244; *Walton*, 31 Cal.App.4th at 292–93.

27 Here, it is certain that the resolution of the equitable issues will foreclose any award of
28

1 contract damages, because OBOT seeks a specific performance remedy and the City has
2 conceded the availability of that remedy. It matters not that the availability of that remedy will be
3 resolved in this case by way of stipulation rather than by the Court’s resolution of a disputed issue
4 on the merits: either way, OBOT cannot recover contract damages in this case when the Court
5 grants specific performance. The Court may proceed, under clear California authority cited
6 above, to trial on the issue of that equitable remedy alone, despite OBOT’s request to proceed on
7 alternative remedies. Under this case law, OBOT has no *right* to insist on an advisory decision on
8 its alternative remedy.

9 OBOT has previously invoked general election of remedies case law that include
10 statements such as, “*Ordinarily* a plaintiff need not elect, and cannot be compelled to elect,
11 between inconsistent remedies during the course of trial.” *Wallis v. Superior Ct.* (1984) 160
12 Cal.App.3d 1109, 1114 (emphasis added). In *Wallis*, the issue was whether a plaintiff was
13 required to elect between competing contract and tort claims where *both* remained available to the
14 plaintiff but if remedies for both were granted the recovery could be duplicative. *Id.* *Wallis* did
15 not raise the question now before this Court regarding the impact of the resolution of specific
16 performance on the alternative request for contract damages, and the Court’s authority to manage
17 the proof at the upcoming trial by resolving specific performance first. These general election
18 rules appear to be grounded in the idea that until claims are tried, there remains a risk that one of
19 the remedies may be found to be unavailable, so it would not be appropriate or fair to require a
20 plaintiff to choose between them in advance. *E.g., Bancroft v. Woodward*, 183 Cal.99, 102
21 (1920).² But *Wallis* and the older cases upon which it relies do not purport to address or alter the

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23 ² The Court in *Bancroft* explained:

24 It could hardly be questioned, for example, that under a complaint which, by proper and
25 sufficient averments, set out that the plaintiff had been induced by fraud to enter into a
26 contract and had endeavored to rescind it because of such fraud, and prayed relief upon
27 the basis of such rescission, the plaintiff might be accorded damages in case the fraud
28 were found but under such circumstances that the right of rescission did not exist. To put
the matter in another way, it is wholly inconsistent for a party defrauded to ask for
damages first and a rescission if he cannot have them. But there is nothing inconsistent in

1 substantial California case law holding that resolution of an equitable specific performance
2 remedy can foreclose the availability of contract damages, under which this Court has the clear
3 authority to try equitable issues first and alone. *E.g.*, *Reliant Life Shares*, 90 Cal.App.5th at 32
4 (“any factual findings made following a bench trial on the [plaintiff’s] equitable claims may be
5 binding on its legal claims, and the right is not infringed by its application.”); *Moss v. Bluemm*
6 (1964) 229 Cal.App.2d 70, 73 (“[T]he practical reason for this procedure is that the trial of the
7 equitable issues may dispense with the legal issues and end the case.”); *accord Hoopes*, 168
8 Cal.App.4th at 157. Insofar as the general case law regarding election of remedies is predicated
9 on the plaintiff’s *right* to try both claims, that general authority does not apply to the more
10 specific question raised here of the Court’s authority to proceed to where the resolution of
11 equitable issues will *foreclose* the alternative legal damages without offending any such right
12 (particularly in light of the City’s concession of the availability of specific performance).

13 To be clear: this Court is not forcing OBOT to elect now between competing remedies;
14 OBOT has chosen to pursue specific performance, and *the law* will foreclose the alternative
15 contract damages if and when the Court grants that remedy. It is well within this Court’s
16 authority to determine, in light of the City’s concession of the availability of this remedy, that the
17 trial should not include the evidence regarding damages that the specific performance remedy will
18 render moot.³

19 Finally, there is no California case that the City can find that holds, directly contrary to the
20 authority cited above, the general rules of election of remedies somehow overrule the authority
21 cited above regarding this Court’s authority to proceed to resolve equitable issues first, thereby
22 foreclosing the need to proceed on legal remedies. And there is no California case that the City

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his *asking for rescission first and damages if he cannot have it.*

24 *Id.* (emphasis added).

25 ³ OBOT’s insistence on presenting its remedies in the alternative also ignores OBOT’s conduct
26 since 2018—insisting the contract remains in place, attempting to continue paying rent, refusing
27 to relinquish possession of the West Gateway and remaining in possession of the land—and
28 repeated representations to this Court clearly reflect that specific performance is the remedy it has
elected since 2018.

1 can find that holds that OBOT has the *right* to proceed to trial on both alternative specific
2 performance and contract damages remedies notwithstanding the City’s stipulation to the
3 availability of specific performance. Accordingly, this Court should proceed to trial to resolve the
4 issue of the scope of specific performance in light of the breach found by the Court (and, any
5 other equitable relief permitted by contract and law, as addressed in the accompanying pre-trial
6 brief).

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8 Dated: November 20, 2023

9
10 Respectfully submitted,

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16 By: /s/ Danielle Leonard

17 *Attorneys for CITY OF OAKLAND*