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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,

20 v.

21 CITY OF OAKLAND, a California municipal  
corporation,

22 Defendant.

23 CITY OF OAKLAND

24 Counter-Plaintiff,

25 v.

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

27 Counter-Defendants.

Consolidated Case Nos. RG18930929 /  
RG20062473

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

**CITY OF OAKLAND'S MOTION IN LIMINE  
TO EXCLUDE EVIDENCE SUPPORTING  
DAMAGES CALCULATIONS DIFFERING  
FROM THOSE DISCLOSED IN DISCOVERY**

Action Filed: December 4, 2018

Trial Date: July 10, 2023

Cont. Trial Date: Nov. 28, 2023

1 **INTRODUCTION**

2 Defendant and Counter-Plaintiff the City of Oakland hereby moves in limine for an order  
3 limiting Plaintiffs OBOT and OGRE at the upcoming remedy phase of trial to introducing  
4 evidence, including documents and testimony from lay and expert witnesses, supporting the  
5 damages amounts and calculations that were disclosed and confirmed by Plaintiffs in discovery as  
6 the *only* damages sought in this case. OBOT repeatedly confirmed in response to the City’s  
7 discovery requests that the only damages it claimed were those set forth in OBOT’s expert  
8 reports, which calculated certain out-of-pocket costs and lost profits. The City seeks an order  
9 precluding OBOT from introducing new calculations, amounts, or categories of damages other  
10 than what it previously disclosed in those reports, in light of Plaintiffs’ admissions and  
11 representations.

12 The City files this motion for two reasons: (1) the new exhibits served by OBOT on  
13 November 20, 2023 reflect an intent to expand OBOT’s damages claims beyond the amounts,  
14 types, and timeframes contained in OBOT’s expert reports; and (2) this Court’s November 21,  
15 2023 order discusses categories of damages that OBOT has never claimed in this case, risking  
16 OBOT’s consideration of that Order as an invitation to introduce new evidence and damages not  
17 previously disclosed in discovery. The introduction of new evidence, after previously confirming  
18 the scope of OBOT and OGRE’s remedy claims, would be profoundly prejudicial to the City.

19 **BACKGROUND**

20 OBOT did not plead any specific amount of damages. FAC at 18 (¶107), 20 (¶119), 22  
21 (¶131). Accordingly, the City requested OBOT explain its claimed damages and the basis for any  
22 calculations in discovery. The City served multiple sets of interrogatories to OBOT and OGRE  
23 (in both phases of discovery), and took Person Most Knowledgeable depositions of both OBOT  
24 and OGRE (again, in both phases of discovery) to confirm the amount and basis for any damages  
25 claimed by OBOT and OGRE in this litigation. The City used OBOT and OGRE’s claims and  
26 calculations to make choices about discovery, to provide responsive expert reports (again, in both  
27 phases of discovery), and to prepare for this trial.

1 OBOT and OGRE *never varied* in their responses in discovery that the amounts and  
2 calculations of damages are set forth in the reports of their expert Peter Brown, including in the  
3 most recent request by the City to supplement and update OBOT and OGRE’s responses. Most  
4 recently, OBOT confirmed again that:

5 **“Plaintiffs OBOT and OGRE’s method of calculating damages are explained in the**  
6 **expert report of Peter W. Brown of Green Hasson Janks LLP, served November 15,**  
7 **2021 and supplemented on May 4, 2023.”**

8 Leonard Decl. at ¶4 (quoting Plfs’ Supp. Response to Special Interrogatories (Set One), dated  
9 May 5, 2023 at 7:13-15). Likewise, prior to the end of the first phase of discovery in 2021,  
10 OBOT confirmed “Plaintiffs OBOT and OGRE’s method of calculating damages are explained in  
11 the expert report of Peter W. Brown of Green Hasson Janks LLP, served November 15, 2021.”  
12 Leonard Decl. ¶5 (quoting Plfs’ Supp. Response to Special Interrogatories (Set One), dated  
13 November 24, 2021 at 2:26-28).

14 OBOT confirmed, by way of Mr. Tagami’s PMK deposition testimony that it is claiming  
15 *only* those damages calculated by Mr. Brown in his reports in deposition. Leonard Decl. ¶6  
16 (quoting Plfs’ May 11, 2023 Deposition of OBOT (PMK witness: Phil Tagami) at 257:17-20,  
17 258:2-17). OGRE, by way of Mr. McClure’s PMK testimony, confirmed the same. Leonard  
18 Decl. ¶7 (May 17, 2023 Deposition of OGRE (PMK witness: Mark McClure) at 138:11-20. As a  
19 result of these clear statements of position and admissions, the City did not press OBOT or OGRE  
20 for additional information regarding other forms of damage or calculations.

21 Mr. Brown calculated three categories (and three categories *only*) of out-of-pocket  
22 expenses claimed as “economic damages” in this action: federal litigation fees; payroll expenses;  
23 and certain repair and maintenance costs. Mr. Brown was explicit that the claimed damages were  
24 not the amounts OBOT had spent over time on the project: “*Plaintiffs do not claim the entire*  
25 *amount as damages.*” Leonard Decl. ¶8 (11/15/21 Brown Report at 28). Mr. Brown then  
26 explained:  
27  
28

1 Plaintiffs have excluded costs incurred prior to the breach data [*sic*] (May of 2018) as well  
2 as expected costs (*i.e.*, those costs that Plaintiffs would have reasonably incurred had the  
3 Project moved forward as expected). However, in the event that Plaintiffs have incurred  
4 extra costs (*i.e.*, costs that, “but for” the Defendant's alleged actions, Plaintiffs would not  
5 have incurred), then these costs have been included in Plaintiffs' claim for out-of-pocket  
6 costs.  
7 Leonard Decl. ¶8 (11/15/21 Brown Report at 28-29). Mr. Brown confirmed this in his  
8 Supplemental Report prior to trial as well. *See also id.* (Brown 5/3/23 Supp. Report at 3).

9 Next, Mr. Brown calculated lost future profits relying entirely on the amounts that he  
10 concluded OBOT would profit from the ITS and OGRE subleases over the length of the 66-year  
11 Ground Lease. Leonard Decl. ¶9 (Brown 11/15/21 Report at 23-25; Brown Supp. Report at 3-4.).

12 Mr. Brown provided a complete list of the materials he relied on in support of these  
13 calculations. Plaintiff's Exhibits 1092, 1094 (not admitted).<sup>1</sup> The City took responsive discovery,  
14 including two depositions of Mr. Brown, and provided responsive expert reports, based on Mr.  
15 Brown's opinions. Leonard Decl. ¶10. The City did not pursue other discovery in light of OBOT  
16 and OGRE's responses limiting their damages claims to the calculations in Mr. Brown's reports,  
17 particularly at the PMK depositions. Leonard Decl. ¶11.

18 Notwithstanding this clear and unambiguous record of admissions, OBOT has included on  
19 its exhibit lists myriad exhibits that appear to be intended to support the amounts of money, *not*  
20 *claimed as damages*, that OBOT or its sublessees have invested in this project over the years,  
21 including timeframes not included in Mr. Brown's reports or analysis. Leonard Decl. ¶12.

22 On November 21, 2023, this Court issued a pre-trial Order in which it requested OBOT  
23 present to it, in chart form, its incidental damages claims and lost profit claims. In describing the  
24 potential information, the Court referred to timeframes and categories of information that are not  
25 among the calculations performed by Mr. Brown, or the damages claims and evidence to which

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26 <sup>1</sup> On November 20, 2023, OBOT added approximately 100 new exhibits to its exhibit list,  
27 comprised of many of the exhibits to Mr. Brown's report that OBOT obviously had in its  
28 possession at the time of the disclosure of its exhibit lists prior to trial, but did not include on  
those prior lists. *None* of these new exhibits is admissible (for hearsay and other reasons to be  
addressed if and when OBOT seeks to admit them, and for which the City is providing extensive  
objections prior to trial). Among them is the list of materials that Mr. Brown considered in  
forming his opinions.

1 OBOT has unambiguously limited itself in this case.

## 2 DISCUSSION

3 Trial courts can and should exclude “surprise” evidence that prejudices the opposing  
4 party, based on a failure to disclose that information or affirmative representations to the contrary  
5 that “set at rest” claims and issues in discovery. *Campain v. Safeway Stores, Inc.* (1972) 29  
6 Cal.App.3d 362, 366. Among the purposes of discovery is to “expedite the trial of civil matters  
7 by (1) enabling counsel to more quickly and thoroughly obtain evidence and evidentiary leads,  
8 and thus to more quickly and effectively prepare for trial, and (2) enabling counsel to ‘set at rest’  
9 issues that are not genuinely disputed.” *Burke v. Superior Court* (1969) 71 Cal.2d 276, 280–281;  
10 *see also Greyhound Corp. v. Superior Court, Merced County* (1961) 56 Cal.2d 355, 376 (“The  
11 purpose is accomplished by giving greater assistance to the parties in ascertaining the truth and in  
12 checking and preventing perjury, and by providing an effective means of detecting and exposing  
13 false, fraudulent and sham claims and defenses.”). Therefore, “[a] party may be required to  
14 disclose whether or not he will press an issue in the case.” *Campain*, 29 Cal.App.3d at 366 (citing  
15 *Universal Underwriters Ins. Co. v. Superior Court* (1967) 250 Cal.App.2d 722, 728). Thus, in  
16 the *Campain* case, the Court of Appeal held the trial court properly excluded certain damages  
17 after the plaintiff confirmed she was not seeking those damages in her responses to interrogatories  
18 (and at deposition). 29 Cal.App.3d at 366 (“Safeway acted reasonably in relying on pretrial  
19 discovery in the preparation of its case for trial”). So too has the City acted reasonably in relying  
20 on OBOT’s repeated representations as to the scope and extent of its damages in preparing for  
21 this trial, and OBOT should not be permitted to alter course and claim additional or different  
22 damages now.

23 “An important aspect of legitimate discovery from a defendant's point of view is the  
24 ascertainment, in advance of trial, of the specific components of plaintiff's case so that appropriate  
25 preparations can be made to meet them. It is impossible to discover this other than from the  
26 plaintiff. To be useful, such discovery should be conducted as late as possible in the preparation  
27 of the case so that it will reflect plaintiff's final choice of the evidence to be presented.” *Karz v.*  
28

1 *Karl* (1982) 137 Cal.App.3d 637, 650. This is *exactly* what the City did in this case, seeking,  
2 repeatedly, to understand the amount and bases for Plaintiffs' alleged damages, right up through  
3 the end of the second supplemental discovery period, to prepare to respond at trial. And OBOT  
4 and OGRE have not wavered in their reliance on the calculations of their expert, and should not  
5 be permitted to now augment or change those calculations or asserted amounts at trial, thus  
6 requiring the City to expend substantial time and resources addressing claims that it reasonably  
7 understood were not at issue, without any notice in advance of trial regarding what those  
8 calculations, amounts or categories of damages actually are.

9       The City has filed this motion to enforce these basic rules of discovery and trial procedure  
10 for two reasons. First, OBOT has included on its exhibit list multiple exhibits that appear to  
11 address money OBOT alleges it spent on this project over a long period of time, that was not  
12 considered by Mr. Brown and that is not included in the damages amounts or calculations he  
13 performed. OBOT has very clearly admitted it is not seeking damages other than those calculated  
14 in Mr. Brown's reports. Those admissions affirmatively set this issue at rest, and the City is  
15 entitled to rely on those admissions. Whether or not the documents OBOT seeks to admit were  
16 disclosed in discovery, the City's discovery strategy and responsive expert report strategy and  
17 trial preparation, were informed by OBOT's admissions foregoing any damages claims beyond  
18 OBOT's expert reports. OBOT should not be permitted to prejudice the City by inserting new  
19 evidence, and claiming new amounts, at trial. OBOT had *ample* opportunity, over the years of  
20 discovery in this case regarding events long since passed, to explain and include all the amounts  
21 and forms of monetary relief that it could possibly wish to seek. OBOT chose to proceed with its  
22 claims as it has, and those choices should be binding and set the scope of evidence at trial.

23       Next, in an abundance of caution, the City is concerned OBOT will also view this Court's  
24 November 21, 2023 Order as an invitation to now submit evidence regarding calculations and  
25 timeframes it has not disclosed in this case previously. The Court's order included examples  
26 (discussing, for example, expenses prior to the contract or prior to 2018) of damages OBOT has  
27 never claimed here (which of course the Court did not know, because it has not seen the  
28

1 evidence). But, OBOT should not be permitted to now change course and introduce evidence in  
2 support of amounts and calculations that is has never previously disclosed, in the guise of  
3 responding to this Court's Order.

4 Good cause exists, in light of OBOT's exhibit list and this Court's Order, to issue the  
5 requested order, and the City respectfully requests, for the benefit of the Court and the parties,  
6 that the Court issue such an order prior to trial.

7 **CONCLUSION**

8 The City respectfully requests this Court issue an order in limine limiting OBOT to  
9 presenting evidence in support of damages amounts and calculations reflected in the reports of  
10 Mr. Brown, and not in support of any other amounts or types of damages.

11 Dated: November 22, 2023

12  
13 Respectfully submitted,

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21 By: /s/ Danielle Leonard

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