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23 SUPERIOR COURT OF THE STATE OF CALIFORNIA

24 COUNTY OF ALAMEDA

25 OAKLAND BULK AND OVERSIZED
26 TERMINAL, LLC, a California limited
27 liability company, and OAKLAND GLOBAL
28 RAIL ENTERPRISE, LLC, a California
limited liability company

Plaintiffs,

v.

CITY OF OAKLAND, a California municipal
corporation,

Defendant.

CITY OF OAKLAND

Counter-Plaintiff,

v.

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

Counter-Defendants.

ELECTRONICALLY FILED

Superior Court of California,
County of Alameda

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Consolidated Case Nos. RG18930929 /
RG20062473

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

**CITY OF OAKLAND'S PRETRIAL BRIEF
NO. 3 REGARDING THE AVAILABILITY
AND SCOPE OF "INCIDENTAL DAMAGES"
ACCOMPANYING A SPECIFIC
PERFORMANCE ORDER**

Action Filed: December 4, 2018

Trial Date: July 10, 2023

Cont. Trial Date: Nov. 28, 2023

1 Pursuant to the Court’s November 21, 2023 Order, the City of Oakland (the “City”)
2 submits this further brief on OBOT’s claim for damages incident to specific performance.

3 This Court tentatively concluded that incident to specific performance, OBOT can seek
4 monetary relief for “[p]roject costs or expenses incurred by OBOT that have been ‘lost’ and will
5 need to be repaid or replaced in order to complete the development of the Project.” 11/21/23
6 Order at 4. This Order generally comports with the background law on the scope of equitable
7 monetary remedies incident to specific performance in those cases that have awarded them, which
8 requires proof that the but-for cause of the claimed incidental expenses is a delay between the
9 date of promised performance and the order of specific performance. However, this case and
10 OBOT’s claims are not governed only by background law, but the language of the contract to
11 which OBOT agreed, as well as OBOT’s discovery responses in this litigation. And OBOT has
12 now doubly waived any monetary relief for delays incident to an order of specific performance.

13 1. The Ground Lease expressly waives any “incidental” damages. Ex. 68-91-92 (§22.1).
14 That waiver forecloses any award of monetary remedies in this case “incident” to a delay in
15 performance. The damages described by the Court appear to be incidental rather than actual
16 contract damages, and therefore are waived.¹ This Court has no authority in equity to alter an
17 express contract waiver of “incidental damages,” which OBOT made here as part of the
18 consideration for the Ground Lease. *De Anza Enterprises v. Johnson* (2002) 104 Cal.App.4th
19 1307, 1322.

20 2. This Court correctly has recognized in its order that specific performance and actual
21 contract damages are mutually exclusive remedies. There is no dispute that OBOT has always
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23 ¹ The Supreme Court in *Lewis Jorge Construction Management v. Pomona Unified School*
24 *District* explained that actual contract damages, in addition to the usual rule requiring
25 foreseeability for all contract damages, are only those that “necessarily” flow from the terms of
26 the contract itself. (2004) 34 Cal.4th 960, 968. In the context of the Ground Lease, those could
27 include, for example, non-refundable permitting fees paid by OBOT to the City pursuant to the
28 requirements of Section 6.2, if there were such payments to recover (or in the vice versa situation,
lost rent payments owed by OBOT to the City but never paid as a result of a breach, set forth in
Article 2 (Rent)). The Court’s measure of damages appears to describe those that are truly
incident to a delay in performance rather than actual damages arising from a contract breach, and
therefore have been waived.

1 sought specific performance in this case. But it has *never* sought monetary relief incident to
2 specific performance until now. It is far too late to introduce new forms of claimed remedies,
3 now. OBOT has waived this monetary remedy by never claiming equitable monetary relief
4 incident to specific performance in this case.

5 Despite ample opportunity to do so prior, the November 16, 2023 case management
6 conference was the first time OBOT raised an equitable award of damages incidental to specific
7 performance as a potential remedy—it did not plead any equitable monetary relief, *see* 12/11/20
8 FAC at 17-28; it did not identify this remedy in its pre-trial brief, *see* 6/21/23 Plfs. Trial Br. at 5-
9 6; and none of its discovery response suggested that OBOT would be seeking equitable monetary
10 relief, *see, e.g.*, PTX 331 1-2. OBOT may claim that it only seeks to call its damages calculations
11 now by another name, but OBOT’s calculations diverge from what the Court has permitted. The
12 City has had no opportunity to test assertions that expenses need to be replaced. After depriving
13 the City of the opportunity to secure additional discovery and admissions regarding the
14 appropriate calculations and underlying facts, OBOT should be held to its waiver.

15 3. If the Court permits these incidental damages as equitable relief notwithstanding these
16 waivers, it is appropriate to limit relief to the but-for project expenses that are lost because they
17 would need to be repaid or replaced as a result of the delay in performance. In this case, OBOT
18 claims more than what this Court has permitted: it relies on its “expert” calculation of out-of-
19 pocket expenses and lost profits as “delay” damages through trial.²

20 The Court’s decision to exclude, in particular, lost profits from any award of incidental
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22 ² OBOT has repeatedly emphasized in discovery that its damages claims are limited to those
23 encompassed by Mr. Brown’s report. *See* Plfs’ Supp. Response to Special Interrogatories (Set
24 One), dated May 5, 2023 at 7:13-15 (“Plaintiffs OBOT and OGRE’s method of calculating
25 damages are explained in the expert report of Peter W. Brown of Green Hasson Janks LLP,
26 served November 15, 2021 and supplemented on May 4, 2023.”). It would be “grossly unfair and
27 prejudicial” to permit Mr. Brown to testify to a new accounting not disclosed in discovery. *Jones*
28 *v. Moore* (2000) 80 Cal.App.4th 557, 565 (“When an expert deponent testifies as to specific
opinions and affirmatively states those are the only opinions he intends to offer at trial, it would
be grossly unfair and prejudicial to permit the expert to offer additional opinions at trial.”).
Accordingly, the City has moved in limine to limit OBOT to presenting only evidence of the
damages that it previously disclosed in discovery.

1 damages is appropriate, as these are consequential contract damages (subject to specific pleading
2 and other rules generally in contract cases, and waived by contract in this one, *see* Ex. 68-91-92,
3 as discussed in the City’s Pre-Trial Brief No. 2).

4 Moreover, as previously explained, OBOT is claiming its “lost rents” as incidental delay
5 damages based on cases involving property sales that require a complex accounting (from which
6 OBOT cherry-picks only certain factors). City’s Pre-Trial Brief No. 2; *see* Plfs’ 11/20/23 Trial
7 Br. re: Recovery of Damages at 1-2 (citing four land sale cases). But this is not a case involving
8 the sale of property, and the distinction is important where California courts have long recognized
9 that the “rules of damages for a breach of a contract to sell or buy real property are special and
10 unique.” *Greenwich S.F., LLC v. Wong* (2010) 190 Cal.App.4th 739, 751. Indeed, no court has
11 ever granted damages incidental to specific performance in the context of a breached lease
12 agreement. *See* Witkin, Summary of Cal. Law (10th ed. 2005) Equity, § 28 (summarizing the
13 leading cases awarding damages incidental to specific performance, all of which involve a
14 breached contract to sell real property). That makes sense because the complex accounting
15 required assumes a delayed irrevocable transfer of ownership and a party that is ultimately
16 entitled to all the benefits of the property while the other is entitled to all the benefits of the
17 purchase price. If, as is the case here, the transfer of interest is only temporary and the parties
18 will both have mixed and overlapping opportunities to profit from the land (and indeed, where
19 OBOT has been collecting rent from ITS all along), the accounting becomes that much more
20 complex. This remedy is ill-suited to contracts other than sales and the Court should resist the
21 temptation to extend it into this unprecedented territory. It is far too simplistic to quote language
22 stating a monetary award incident to specific performance should include ‘lost rents,;’; this Court
23 is wise to reject OBOT’s invitation to error.

24 Finally, it is also proper for the Court to exclude OBOT’s attempt to claim attorneys’ fees
25 from the *federal* litigation as incidental damages incurred as a result of the breach in this case—a
26 claim made by OBOT here and that makes no sense whatsoever (because those fees were most
27 certainly not *caused* by the breach of the Ground Lease here at issue), in addition to being barred
28 by *res judicata*, *estoppel*, and for myriad other reasons. *See* City’s Pre-Trial Brief. No. 2 at 7.

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Respectfully submitted,

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