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County of Alameda

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12 OAKLAND GLOBAL RAIL ENTERPRISE, LLC, and *Counter-*
Defendant CALIFORNIA CAPITAL & INVESTMENT GROUP

13 SUPERIOR COURT OF CALIFORNIA

14 IN AND FOR THE COUNTY OF ALAMEDA

15
16 OAKLAND BULK AND OVERSIZED
TERMINAL, LLC, a California limited liability
17 company and OAKLAND GLOBAL RAIL
ENTERPRISE, LLC, a California limited
18 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
27 CAPITAL INVESTMENT GROUP, INC.

28 Counter-Defendants.

Consolidated Case Nos. RG18930929 /
RG20062473

Unlimited Civil Case / Assigned to
Judge Noël Wise, Dept. 514

**PLAINTIFFS' OPPOSITION TO THE
CITY'S MOTION IN LIMINE TO
EXCLUDE EVIDENCE SUPPORTING
DAMAGES CALCULATIONS
DIFFERING FROM THOSE
DISCLOSED IN DISCOVERY**

Trial Date: July 10, 2023 (Phase 1)
November 28, 2023 (Phase 2)

1 The City’s only motion in limine for this phase of trial attacks a strawman. “The City seeks
2 an order precluding [sic] OBOT from introducing new calculations, amounts, or categories of
3 damages other than what it previously disclosed in [Peter Brown’s expert reports.]” (City 11/22/23
4 MIL at 1:8-11.) The City does not identify any new calculations, amounts, or categories to preclude.
5 To the contrary, the City admits that it filed its motion “in an abundance of caution” because it
6 imagines that Plaintiffs *may* seek to recover damages other than those identified in Mr. Brown’s
7 reports based on Plaintiffs’ updated exhibit list and this Court’s November 21, 2023 Order. (*See*
8 City 11/22/23 MIL at 1:12-18, 5:23-25.) The motion should be denied for three reasons.

9 **First**, the motion is a motion to exclude “surprise” evidence (*see id.* at 4:3-5:8) but there is
10 no surprise to exclude. Plaintiffs seek the same categories of damages now that Mr. Brown
11 identified in his November 15, 2021 report (Ex. 331) and May 3, 2023 supplemental report (Ex.
12 370)¹ and at his depositions on January 12, 2022 and June 7, 2023. To the extent, Mr. Brown has
13 updated a “calculation” or “amount” it is only to bring them current through December 31, 2023 to
14 account for new costs incurred, payments received and the time value of money. The updated
15 numbers are only necessary because of the City’s ongoing delay of the Project. Mr. Brown similarly
16 updated his analysis after the trial date changed in this case from April 2022 to July 2023. (*See* Ex.
17 370-5.) But Mr. Brown’s calculations have always included damages from June 2018 through the
18 end of the Ground Lease’s 66-year term. The amount that Plaintiffs seek to recover for past damages
19 prior to judgment is just a subset of the disclosed calculations. No “new” calculations, amounts, or
20 categories exist. Because the updated damages numbers do not change the categories of damages
21 Plaintiffs seek, there is no basis to exclude them. *See DePalma v. Rodriguez*, 151 Cal. App. 4th
22 159, 165-66 (2007) (excluding expert testimony is improper where the expert’s trial testimony
23 expands conclusions stated in deposition).

24 **Second**, the City has not identified anything specific for Plaintiffs to oppose or for the Court
25 to decide at this juncture. The City argues that Plaintiffs’ exhibits for this phase “appear to be
26 intended to support the amounts of money, not claimed as damages, that OBOT or its sublessees
27

28 ¹ Neither report is in evidence.

1 have invested in this project over the years, including timeframes not included in Mr. Brown’s
2 reports or analyses.” (City 11/22/23 MIL at 3:15-18; *see also id.* at 5:9-22.) But the lion’s share of
3 Plaintiffs’ new exhibits for this phase were also exhibits to Mr. Brown’s reports. More importantly,
4 the City has not identified any specific exhibits (or any new calculations, amounts, or categories of
5 damages), let alone explained why they would be objectionable *if* Plaintiffs seek to admit them.
6 Plaintiffs cannot respond to a motion to exclude hypothetical evidence that the City has not
7 identified. The correct time for the City to object is when Plaintiffs seek to introduce the exhibits it
8 finds objectionable if that occurs. The Court can deny the City’s motion without prejudice to its
9 right to object to specific evidence as it is presented.

10 **Third**, and relatedly, the City hypothesizes that Plaintiffs may now seek new damages based
11 on the Court’s November 21, 2023 Order. Plaintiffs have complied with the Order by filing,
12 concurrently with this brief, the tables of damages that the Court has requested. Those tables
13 confirm that Plaintiffs do not seek new categories of damages.

14 For the above reasons, Plaintiffs respectfully request that the Court deny Plaintiffs’ motion.

15 Date: November 27, 2023

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