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SUPERIOR COURT OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

OAKLAND BULK AND OVERSIZED TERMINAL, LLC, a California limited liability company and OAKLAND GLOBAL 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, INC.

Counter-Defendants.

Consolidated Case Nos. RG18930929 / RG20062473

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

PLAINTIFFS' [PROPOSED] STATEMENT OF DECISION

Trial Date: July 10, 2023

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I. INTRODUCTION

Oakland Bulk and Oversized Terminal, LLC ("OBOT"), Oakland Global Rail Enterprise, LLC. ("OGRE"), and the City of Oakland ("the City") are parties to several contracts with a common aim: to develop the Gateway Industrial District of the former Oakland Army Base ("OAB") into railroad-served warehouses and a seaport, including the ship-to-rail Bulk and Oversized Terminal ("Terminal") intended to handle multiple commodities at the area of the OAB known as the West Gateway (collectively, "the Project"). The Project, including the Terminal, was intended to boost Oakland's economy, create jobs, and serve the City's industrial needs while reducing truck traffic and emissions. (*See* Reporter's Transcript of Proceedings ("RT") 166:9-167:8, 167:13-168:4, 171:16-20, 173:7-15, 203:12-20, 253:9-14, 321:10-322:12, 1787:12-20, 3250:12-17, 3254:7-17; *see generally*, Exs. 1, 3, and 8.)

This case concerns two contracts central to the Project: first and primarily, the Army Base Gateway Redevelopment Project Ground Lease for West Gateway dated February 16, 2016 ("Ground Lease" or "GL") (Ex. 68);[1] and second, the Development Agreement Regarding the Property and Project Known as "Gateway Development/Oakland Global" dated July 16, 2013 ("Development Agreement" or "DA") (Ex. 7). The City and OBOT are parties to both contracts.[2] OGRE is a Ground Lease subtenant under its Sublease Agreement with OBOT. (Ex. 162.)

On September 21, 2018, the City initiated termination procedures under the Ground Lease's termination provisions. (Ex. 217.) The City contends that it lawfully terminated the Ground Lease, effective November 22, 2018, because OBOT had not Commenced Construction

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[1] Where the Court uses initial capitalization for a term that it has not defined in this statement of decision, that term is defined in the Ground Lease.

[2] In 2008, the City conducted a national solicitation for qualifications for master developers for the Project and selected the joint venture between Prologis and CCIG, Prologis CCIG Oakland Global LLC ("Oakland Global"). (Ex. 1, p. 87.) As to the Premises under the Ground Lease, Oakland Global later assigned its rights, including rights and obligations under the 2012 Lease Disposition and Development Agreement and 2013 Development Agreement to OBOT. (*See* Ex. 561 (Third Am. to Lease Disposition and Development Agreement), Recital D.) Prologis, CCIG, and Oakland Global are sometimes referred to as "OBOT" in light of OBOT's succession to their interests in the Project and Terminal.

of the Minimum Project (a contractually defined portion of the Terminal) by the Initial Milestone Date (the deadline to Commence Construction on the Minimum Project), which the City contends was August 14, 2018.

OBOT, OGRE, and CCIG (OBOT and OGRE together, "Plaintiffs"; OBOT and CCIG together "Counter-Defendants" or "OBOT") contend that the City intentionally hindered and delayed development of the Terminal for political reasons, the Initial Milestone Date was automatically extended by OBOT's multiple notices of Force Majeure, and that notwithstanding the City's actions and inactions, Plaintiffs Commenced Construction of the Minimum Project before August 14, 2018. Moreover, Plaintiffs argue that the parties contracted for a market rate multicommodity Terminal but the City later faced strong political opposition to the transfer of coal through the Terminal. In response, the City enacted an ordinance that banned coal operations at bulk material facilities in Oakland (Ex. 87), followed by a resolution that expressly applied the ordinance to the Terminal (Ex. 499).

In earlier litigation between OBOT and the City—*Oakland Bulk & Oversized Terminal, LLC v. City of Oakland*, 321 F. Supp. 3d 986 (N.D. Cal. 2018), *aff'd*, 960 F.3d 603 (9th Cir. 2020) ("*OBOT I*")—the U.S. District Court for the Northern District of California determined that OBOT had a vested contractual right to develop and operate a Terminal through which any commodity, including coal, could be transferred in accordance with the City's regulations that existed when the Development Agreement was signed in 2013, and enjoined the City from applying the coal ban to OBOT. *OBOT I*, 321 F. Supp. 3d at 1010 ("The resolution applying the coal ordinance to the OBOT facility is invalid, because it is a breach of the development agreement. The City is therefore enjoined from relying on the resolution either to apply the ordinance to OBOT or to restrict future coal operations at the facility."); *Oakland Bulk & Oversized Terminal, LLC v. City of Oakland*, No. 16-cv-07014-VC, 2017 WL 11528287, at *1 (N.D. Cal. 2017) ("[OBOT] has a contractual right to *pursue* development of a coal terminal to the extent allowed under the municipal code as it existed when the Development Agreement was signed." (emphasis in original)).

Unable to lawfully keep coal out of the Terminal through regulatory action but facing the same political climate as before the federal litigation, the City in its Landlord capacity delayed and obstructed development of the Terminal. It wanted a Terminal without coal (*i.e.*, a "ban-compliant Terminal") or no Terminal at all. According to Plaintiffs and CCIG, the City's actions and omissions delayed and hindered their ability to develop the Terminal, and they sent multiple notices of Force Majeure claims under Section 16.1 of the Ground Lease that automatically extended OBOT's deadline to Commence Construction, making the City's attempted termination unlawful, ineffective, and a breach of the Ground Lease.

This case concerns several causes of action and defenses. OBOT and OGRE are Plaintiffs and allege causes of action against the City as Defendant for: (1) breach of the Ground Lease and the Development Agreement on behalf of OBOT; (2) breach of the Ground Lease on behalf of OGRE; (3) anticipatory repudiation; (4) breach of the implied covenant of good faith and fair dealing in both the Ground Lease and Development Agreement; (5) declaratory relief; and (6) specific performance. The City has also filed a counter-complaint. As Counter-Plaintiff, the City has alleged causes of action against OBOT and CCIG as Counter-Defendants for: (1) breach of the Ground Lease; and (2) declaratory relief. Notwithstanding the multiple causes of action alleged, at its heart, this is a single-issue contract case in which both sides focus on the same event: the City's purported termination of the Ground Lease. The parties seek this Court's determination of whether that termination was ineffective and a breach of the Ground Lease because Plaintiffs were entitled to extensions of the Initial Milestone Date under the Ground Lease's Delay Due to Force Majeure provision (GL § 16.1, Art. 40), or Plaintiffs Commenced Construction of the Minimum Project before August 14, 2018 or, conversely whether the termination was effective because OBOT breached the Ground Lease by not Commencing Construction by August 14, 2018. As explained below, Plaintiffs' various breach theories, including those under the Development Agreement, were each presented at trial as reasons that the Initial Milestone Date was met or automatically extended, and consequently, that the City's attempted termination was ineffective and breached the Ground Lease.

A bench trial in this matter was held on July 10-14, 17, 24-26, 28, 31, August 1-3, 7-11, 16-18, 21-22, 24-25, 28-29, 31, 2023 in Department 514, the Honorable Noël Wise presiding. This statement of decision is based on the facts presented at trial.

For the reasons detailed below, the Court finds and holds that the City's purported termination of the Ground Lease was improper and without legal basis. The undisputed evidence at trial confirmed that the City did not want Plaintiffs to develop a terminal through which coal could be shipped and took various actions that hindered and delayed Plaintiffs' development of the Terminal in order to accomplish that goal. Those actions, which began at the inception of the Lease, included but were not limited to (1) failing to identify the regulations that would apply to the development of the Terminal; (2) passing the coal ban ordinance in breach of the Development Agreement and applying it to the Terminal; (3) refusing to engage or provide feedback on Plaintiffs' Terminal plans and designs; and (4) failing to turn over or provide Plaintiffs with access to the property necessary to complete construction of the rail improvements and numerous other events designed to hinder Plaintiffs' performance. Because these events had their intended effect and adversely affected, hindered, and delayed Plaintiffs' ability to timely complete the Terminal design and otherwise perform, Plaintiffs were entitled to extensions of their performance obligations under Section 16.1 of the Ground Lease, including the Initial Milestone Deadline to well beyond August 14, 2018. The City failed unjustifiably to honor Plaintiffs' contractual extension rights and instead terminated the Ground Lease at the earliest opportunity to achieve its goal of a ban-compliant terminal. Accordingly, by purporting to terminate the Ground Lease, the City breached the Ground Lease, entitling Plaintiffs to seek remedial relief in the damages phase of this trial.

II. THE PARTIES

OBOT is a wholly owned subsidiary of CCIG. (RT 200:1-6.) CCIG is a development firm (previously headquartered in Oakland) with a history of public/private developments, including Oakland's Fox Theater and the Rotunda Building. (RT 132:12-134:4.) OGRE is also a wholly owned subsidiary of CCIG, and was formed to develop and operate the rail portions of the Project. (RT 200:17-24, 205:3-5.) Phil Tagami and Mark McClure are principals of CCIG,

OBOT, and OGRE. Both are long-time real estate developers, and Mr. Tagami is a former commissioner and president of the Port of Oakland; Mr. McClure also served as Port Commissioner. (RT 131:14-132:8, 1519:7-12, 1519:21-24.) The City believed that, based on their experience and expertise, CCIG, OBOT, OGRE, and their principals were uniquely qualified to handle the Project. (RT 1788:21-1789:10; 2395:11-2396:1.)

The City is a municipal corporation and a chartered city organized and existing under the laws of the State of California. (May 27, 2020 Complaint ¶ 10.)

III. FACTUAL BACKGROUND

A. The Project and Terminal

After the Oakland Army Base was closed in 1999, the City approved a Redevelopment Plan for the area, including a waterfront portion of the City's land called the "West Gateway". (Ex. 1, pp. 33, 58.) The plan was intended, among other things, to provide new state-of-the-art facilities to support the movement of goods through the development of a rail-served bulk commodity terminal at the West Gateway. (Ex. 1, pp. 33, 35, 43.) A bulk goods shipping terminal is a facility that can receive, store, handle, and ship goods that are typically transported in large quantities, such as cement, iron ore, coal, and petroleum coke." *OBOT I*, 321 F. Supp. 3d at 989.

The Terminal presented a unique opportunity to improve logistics for commodity suppliers in the West United States. (RT 1059:9-17, 1060:2-1061:4.) It would be one of few locations on the West Coast with single-line rail service by both the Union Pacific Railroad ("UP") and the Burlington Northern Santa Fe Railroad ("BNSF"), the two mainline or long-haul railroads with a duopoly on all transcontinental freight rail lines in the West. (RT 1061:5-11.) In addition, there would be single-line access for many mining commodities in the West directly to the Terminal, which had near-immediate access to open water, making it preferable to inland California ports like Stockton and Richmond. (RT 1061:12-16.)

The Terminal also presented the potential for substantial economic benefits for both the developers and the City. Under the contracts between the parties, the City was entitled to participation rent equal to 10% of the tariff revenue that the Terminal generated. (*See* GL § 2.3 (Ex. 68, pp. 19-22).) The City stood to make in excess of $50 million annually from the

completed Terminal. (RT 1063:13-1064:12.) The City's own economic analysis estimated that for each dollar invested, the Project would generate $2.16 in value for the public in the form of lower cost goods, air quality, traffic, and highway safety benefits. (Ex. 955, p. 7.)

The plan to redevelop the OAB included both public (horizontal) infrastructure improvements and private (vertical) development to be completed in two phases: first, the public improvements would be completed with public funding to prepare the land for private development (RT 175:21-176:7, 314:4-318:1, 459:22-25), followed by the private improvements. The public improvement work included environmental remediation, utilities, grading, and roads. (RT 174:17-175:1.) The private improvement work included rail throughout the Project and the rail-to-ship Terminal. (RT 175:21-176:7, 459:22-25.)

B. California Environmental Quality Act Review and Zoning

In 2002, the City prepared an Environmental Impact Report ("EIR") (Ex. 1) under the California Environmental Quality Act, California Public Resources Code, section 21000, *et seq.* ("CEQA"). The EIR evaluated the environmental impacts of the redevelopment plan and was certified by the City Planning Commission. (Ex. 1, p. 15.) The 2002 EIR identified all potentially significant development impacts of the plan. (Ex. 1, p. 17.) In 2012, the City prepared an addendum to the 2002 EIR ("2012 Addendum"), that concluded no subsequent or supplemental EIR was needed. (Ex. 1, p. 15; Ex. 839, p. 2.) The 2012 Addendum acknowledged that the Terminal would operate on a 24-hour per day basis and handle up to three 6,400-foot long "unit trains" of 100 cars each per day. (Ex. 1, p. 44.) The 2002 EIR and 2012 Addendum also covered all possible bulk commodities, including coal. (*See e.g.*, Ex. 1, p. 44; *see also* RT 3994:14-22, 3995:5-13.) The City and OBOT agreed that the 2002 and 2012 Addendum "fully analyzed all potentially significant environmental effects in compliance with the CEQA and the CEQA Guidelines …" (Ex. 378, p. 5, ¶¶ AA.)

The City also established zoning for the Project, which is located in the City's Gateway Industrial Zone under Section 17.101F.010 of the Oakland Planning Code. The Planning Code lists permitted and conditionally permitted uses in each zone, including for the Terminal in the Gateway Industrial Zone. Under the Planning Code, permitted uses include "Regional Freight

Transportation Industrial Activities" such as freight handling and shipping services by water and rail, as well as the transportation of all types of goods without limitation. (Section 17.10.584.) The Planning Code did not expressly or impliedly limit the handling or shipping of any bulk commodities (including coal) in the Gateway Industrial Zone.

C. The Trade Corridor Improvement Fund Grant

In 2012, the City awarded CCIG a five-year contract to manage the Project's public infrastructure improvements. (RT 176:8-20.) The public/private nature of the Project required significant coordination between the parties. Mayor Dellums' administration branded the Project as "One Vision, One Project, One Team." (RT 149:12-18.)

The City applied for and received a grant for the public improvements of approximately $240 million from the State of California's Trade Corridor Improvement Fund ("TCIF"). Those funds were reserved for projects that improved trade corridor mobility and reduced emissions of diesel particulate and other pollutant emissions. (RT 251:15-23.) The Project was eligible for and received TCIF grant funds because it was a rail-focused project, and its rail components would reduce the volume of commodities transported by truck and the number of associated truck trips, improving transportation efficiency and reducing pollution in the area. (RT 150:22-151:12, 203:12-204:2, 251:15-252:8, 3840:15-3846:5, 1755:10-25; Ex. 453.)

D. The 2012 Lease Disposition and Development Agreement and the 2013 Development Agreement

In 2012, the City, Oakland Global, and the Oakland Redevelopment Successor Agency entered into the Lease Disposition and Development Agreement ("LDDA"). (Ex. 378.) The City and Oakland Global entered the Development Agreement the following year. (Ex. 7; RT 190:1-9.) As noted above, after a competitive process, the City selected Oakland Global to develop the Project, and Oakland Global later assigned its rights to OBOT, including those under the LDDA and DA that pertain to the Terminal. (*See* n.2, *supra*.)

The LDDA sequenced the private development of particular parcels of land and set out the conditions precedent to the execution of ground leases, including one from the City to OBOT for property where the Terminal would be located. (RT 289:10-12, 313:2-17.) Due to funding issues,

many of the West Gateway public improvements were contractually changed to private improvement—in what was to be called the Mid-Project Budget Revise—in exchange for an earlier takedown of the Ground Lease. (RT 284:16-285:16, 293:12-15, 329:13-20; 335:11-336:18; Ex. 15.)

The Development Agreement froze in place the regulations that existed on July 13, 2013 so that OBOT would understand the rules that applied to the Project before designing and building the Terminal, including rail.

As the federal court explained in *OBOT I*,

> As a general matter, development agreements are contracts between local governments and developers that freeze existing zoning and land use regulations into place. These agreements are intended to provide developers with a measure of certainty that new and unexpected government regulations will not stymie their projects, particularly when the projects require years of investment, government approvals, and construction. Consistent with this general approach, the agreement between the City and OBOT includes a provision that prevents the City from imposing new regulations on the terminal project after the date on which the City signed and adopted the agreement.

OBOT I, 321 F. Supp. 3d at 992.

The Development Agreement also required the City to certify the regulations that existed at the time and would apply to the Project by delivering a signed binder of all Existing City Regulations to OBOT within 90 days of the contract's execution. (DA § 3.4.3.) The City provided the regulations—albeit in a different form than required under the Development Agreement—more than 2.5 years after the deadline. (RT 2171:6-14, 2277:21-24, 2283:19-23; Ex. 84.)

The Development Agreement thus vested in OBOT the right to develop and operate the Terminal subject to the laws at the time the Development Agreement was approved, with limited exceptions. (RT 319:12-23; DA §§ 3.2, 3.4; Ex. 839, p. 3, n.1.) The sole relevant exception was for later enacted regulations that, if not applied to the Project, would pose a significant risk to the health and safety of the People of Oakland. (DA § 3.4.2.) Under Section 3.4.2, the City could apply a later enacted regulation to the Project only if it was permissible under federal and other laws, and the City had determined based on "substantial evidence" that a failure to enact the

regulation would place occupants, users or neighbors of the Project in a condition substantially dangerous to their health and safety. (*Id.*; Ex. 839, p. 3, n.1.)

The Development Agreement contained no restriction on the types of commodities to be shipped through the Terminal and conferred on OBOT a contractual right to ship the full range of commodities, including coal. *See OBOT I, LLC*, 2017 WL 11528287, at *1 (denying the City's motion to dismiss and finding that OBOT "has a contractual right to *pursue* development of a coal terminal to the extent allowed under the municipal code as it existed when the Development Agreement was signed"; "If the City wanted to restrict the developer to an approved list of commodities—or to foreclose the handling of a particular commodity such as coal—it should have included language to that effect in the Development Agreement"). This right was key to developing the Terminal because only a limited number of commodities with the long-term supply and demand needed to support the life of the Terminal exist.[3] Even fewer high-value commodities with the supply, demand, and market price to support Terminal operations exist. (*See, e.g.*, Ex. 51, p. 2 (September 8, 2015 letter from Terminal Logistics Solutions informing the City that "[t]o be economically viable, we must be able to transload raw materials such as corn, soy, beans, borax, iron ore, pot ash, soda ash, and yes, coal"); RT 1773:16-1774:7; *see also*, Ex. 8, p. 44.)

This economic reality was reinforced by the two long-haul rail carriers—UP and BNSF—that controlled the selection of commodities to be transported on their tracks. Without approval from the mainline carriers, no commodity could realistically be transported through the Terminal. (RT 208:9-19, 268:2-8, 390:6-13.)

E. Terminal Logistics Solutions

In 2014, OBOT entered into an Exclusive Negotiation Agreement (Ex. 514)—*i.e.*, an option agreement—with Terminal Logistics Solutions, Inc. ("TLS") granting TLS the option to enter into a sublease to construct and operate the Terminal. (Ex. 514; RT 1066:9-19.) TLS was a wholly owned subsidiary of Bowie Resource Partners ("Bowie"), an energy company with coal

[3] Under the Ground Lease, OBOT has a right to operate the Terminal on City property for the maximum term of 66 years. (GL § 1.2.)

mines in Utah and Colorado. (RT 1065:10-20; 1057:25-1058:2.) Bowie was owned by John Siegel and Trafigura—a multinational commodity trading company that moves more than one hundred million tons of commodities through terminals that it operates globally. (RT 1057:21-1058:11.) Jim Wolff, Bowie's former CFO, worked with TLS and had prior experience overseeing the development of commodity terminals. (RT 1057:4-10, 1065:10-12, 1134:8-10.) Mr. Wolff eventually became the Executive Vice President of TLS's successor, Insight Terminal Solutions ("ITS"), which entered into a sublease for the Terminal in 2018. (Ex. 801; RT 1080:2-20.) The City was aware of TLS's role in the Terminal and its connection to Bowie before it entered the Ground Lease with OBOT. (*See, e.g.*, Ex. 51 (TLS letter to the City almost 2.5 years before the Ground Lease).)

Prior to entering the option with OBOT, TLS confirmed that OBOT had the right to ship coal through the Terminal under its contracts with the City, and the City knew that coal was a potential commodity. (RT 1062:25-1063:12, 1066:20-1067:15; Ex. 8, pp. 37-44.) TLS subsequently hired consultants, including engineers and architects, to develop an operating plan for the Terminal. (RT 1068:14-22.) TLS understood that the Project was to "feed, clean, and power the world"—for instance, that soda ash and borax could be used to clean, grains could be used to feed, and coal could be used to power. (Ex. 646, p. 22; RT 1076:24-1077-04.)

F. Political Response to Coal

The City understood that coal was a potential commodity for the Terminal. In 2013, the City prepared a Long-Range Management Plan ("LRMP") (Ex. 8) for the OAB that addresses the use of the West Gateway for a bulk commodity terminal. (Ex. 8, pp. 37-44.) The LRMP expressly references coal as one of three main commodities shipped through California bulk commodity terminals. (Ex. 8, p. 44.) It also notes that because the West Gateway Terminal would be rail-served, it would have operating efficiencies over bulk commodity terminals that were truck-served or located at smaller ports like Stockton, which handles and ships coal. (*Id.*)

In mid-2014, after executing the Development Agreement and preparing the LRMP, and in response to broader concerns about potential climate change and the environment, the City

adopted Resolution No. 85054 to express opposition to transporting fossil fuels through the City. (Ex. 13, pp. 3-5.)

The following year, Libby Schaaf became the City's Mayor, a position she held through 2022. (RT 1749:21-23.) Mayor Schaaf was aware that coal was a possible commodity to be handled at the Terminal early in her tenure as Mayor. (RT 1772:9-12, 1779:16-22.) She opposed fossil fuels and attempted to exert her personal influence over Phil Tagami and Mark McClure (whom she had known since high school) to achieve her political objective of preventing coal from being transported through the City. For example, on May 11, 2015 (nine months before execution of the Ground Lease), in an email with the subject line "stop all mention of coal now," Mayor Schaaf told Mr. Tagami that she was "extremely disappointed" to hear about "the possibility of shipping coal into Oakland." (Ex. 29, p. 3.) Because there was no coal restriction in the Development Agreement or the City's regulations in place at that time, Mr. Tagami understood the Mayor to be asking OBOT to voluntarily agree not to handle coal as a commodity at the Terminal or face a "public battle." (RT 1766:13-16; Ex. 29; *see also* RT 278:2-18; Ex. 28.) At trial, Mayor Schaaf confirmed Mr. Tagami's understanding. (RT 1766:13-16.)

On October 22, 2015, the Mayor called Mr. McClure to express her views on coal; Mr. McClure memorialized the call in a note he created immediately after. (Ex. 59A; RT 1820:3-5.) According to Mr. McClure's notes, Mayor Schaaf stated that "she was willing to put the entire project in jeopardy to stop the potential shipment of coal," and that "she would do everything in her power to make sure no coal would come through Oakland even if it meant killing the entire project to do so." (Ex. 59A.) Although Mayor Schaaf disagreed with some of the note's contents, she generally confirmed the note's accuracy. (*See* RT 1802:7-11, 1803:4-8, 1804:9-11.)

G. The Basis of Design

With the help of retained experts, in 2015 TLS prepared an operating plan (Ex. 32) and an initial Basis of Design ("BOD") for the Terminal. (Ex. 750.) The BOD was a voluminous document (approximately 1,500 pages) that, among other things, described the operation of the Terminal, contained detailed schematic drawings of Terminal components, their location on the West Gateway property, and other information about Terminal design and operations. (RT

1072:09-18; Ex. 750, pp. 521-557 (BOD Vol. I).) It reflected the basic framework for the Project. (RT 396:7-17; 438:19-439:3; 704:5-10.) The BOD was intended to be a preliminary document for OBOT and TLS to discuss with the City in order to prepare additional versions that would ultimately lead to a final design document. (RT 2228:15-2229:2; *see also* RT 1948:19-1949:3.) The Terminal's final design would depend on the commodities to be handled, stored and transported. Because the Terminal was a purpose-built facility, it was critical to know which commodities would be shipped through the Terminal in order to complete its design. (RT 220:4-18, 220:4-18, 292:8-17, 1076:6-12.) Ms. Cappio confirmed that completion of the design required identification of the commodities to be handled. (RT 2336:10-17, 2275:7-10; Ex. 598.)

Plaintiffs first submitted the BOD in September 2015. (Ex. 750; Ex. 51; Ex. 72; RT 557:22-558:9.) Plaintiffs presented testimony that the BOD took "significant time, energy, and money," and Plaintiffs needed the City to review the BOD and substantively comment on it to proceed. (RT 583:9-12.) Mr. Tagami described the BOD as a "dartboard" on which the City could provide feedback for the design. (RT 396:7-17, 438:19-439:3, 704:5-10.) As discussed below, OBOT contends that the City never engaged in the iterative process of providing the necessary feedback which, in turn, hindered, delayed and ultimately prevented Plaintiffs from exercising their contractual right to build a Terminal. Although Claudia Cappio testified that she had specific comments on where the BOD needed to be improved (RT 2241:9-16), she admitted at trial that, with one minor exception, she did not share those comments with OBOT. (RT 2340:19-2341:2, 2341:6-2342:4, 2343:22-2344:9, 2344:10-2345:1, 2345:2-11, 2345:16-23, 2554:5-13, 2554:14-25, 2555:1-11, 2555:12-21, 2345:24-2346:18, 2241:9-16.)

H. The Ground Lease.

On February 16, 2016, the parties entered the Ground Lease, which governs, among other things, the turnover of the leased Premises, the required cooperation between the parties, and the construction of the Minimum Project Improvements. (RT 539:4-544:22.) At the time, the City was aware that OBOT maintained that it had the right under the Development Agreement and the Ground Lease to ship coal through the Terminal. (Ex. 24; Ex. 51, p. 2; RT 271:25-272:3.) In a February 16, 2016 press release (the effective date of the Ground Lease) Mayor Schaaf stated

expressed her strong opposition to coal. (Ex. 69.) For its part, OBOT was aware that the City maintained its right to regulate the transport of coal consistent with the strict restrictions in the Development Agreement.

The City neither expressly nor impliedly limited in the Ground Lease the commodities that could be transported through the Terminal. (RT 381:3-6.) When negotiating the Ground Lease, the City proposed a provision that referenced its right to regulate the transportation and handling of coal at the Terminal. OBOT rejected that provision, and the City accepted and signed a version of the Ground Lease with no reference to coal or any other commodity. (*Compare* Ex. 803 § 5.2.1(a) (redlined version), *with* Ex. 68 § 5.2 (executed version); *see also* RT 378:2-18, 380:1-15, 381:3-6.)

I. The Third Amendment to the LDDA.

On the same day that the parties signed the Ground Lease, the parties also signed the Third Amendment to the LDDA.[4] (Ex. 561.) The City has attributed great significance to the Third Amendment to the LDDA but that agreement had no effect on those provisions of the Development or the Ground Lease that determine the outcome of this case.[5] The City points specifically to Section 13 of the Third Amendment to the LDDA. But in that section, entitled "No Waiver of Rights or Obligations", the parties merely acknowledged that OBOT and the City maintained their respective rights and obligations under the Development Agreement. That section did not grant the City any new rights or impose any new obligations on OBOT. Thus, at the time the parties entered into the Lease, (1) the City was still prohibited from applying any new regulations to the Terminal that it could not establish were necessary for health and safety; and (2) OBOT still had the right to develop Terminal through which coal could be shipped.

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[4] The Third Amendment to the LDDA was executed before the Ground Lease. (*See* reference in recital C of Ground Lease to prior execution of Third Amendment to LDDA (Ex. 68, p. 10.))

[5] In section 1.4 of the subsequently executed Ground Lease, the parties agreed that with limited exceptions, the Ground Lease and not the LDDA or its amendments, establishes the right and obligations of OBOT and the City with respect to the lease of the Premises. (Ex. 68-15.) The City also agreed in a Fourth Amendment to the LDDA entered in June 2017 that OBOT was no longer a party to the LDDA further undermining any purported significance of the Third Amendment to the LDDA to this action. (*See* Recital C to the Fourth Amendment to the LDDA Ex. 819-1.)

J. The March 9, 2016 Kickoff Meeting and the Cappio Memo

One month after the execution of the Ground Lease, OBOT requested a kickoff meeting to discuss the Terminal and get feedback from the City on the Basis of Design. (RT 433:2-435:17, 436:1-5, 456:7-25; Ex. 72; Ex. 750.) OBOT suggested certain agenda items for discussion, and the City agreed to the agenda. (Ex. 72.) The kickoff meeting took place on March 9, 2016. (RT 2295:6-9; Ex. 76.)

Deputy Assistant Administrator Claudio Cappio came to the kickoff meeting with a different agenda. According to OBOT, and although CEQA was closed and zoning was in place, "Ms. Cappio . . . wanted to argue that the city could engage in a commodity-by-commodity review; that the permits would no longer be ministerial, they would become discretionary; and that the building codes and standards that we were to rely upon from the adoption of the development agreement were still up in the air and the city may be adopting new rules." (RT 287:22-288:4, 474:6-20, 474:21-475:13.) Mr. Tagami testified that "[w]e were blindsided" by the City's approach. (RT 474:8.)

As detailed more fully below, Ms. Cappio's announcement regarding commodity-specific reviews and making permit issuance discretionary was the tip of the iceberg. Almost a year before the kickoff meeting, unbeknownst to Plaintiffs, the City had already been looking for a way to use discretionary CEQA review as a mechanism to block coal after seeing states other than California successfully use the same strategy. (Ex. 27, RT 1595:22-1596:2, 2264:17-2266:6, 3169:18-3172:10.) In May 2015, Mr. Tagami advised Mayor Schaaf that CEQA was closed. (Ex. 28.) On November 9, 2015, the City internally circulated a memorandum from Ms. Cappio (dated November 6, 2015) regarding "Permitting for Oakland Bulk and Oversized Terminal at Army Base" (the "Cappio Memo"). (Ex. 61.) Consistent with Ms. Cappio's announcement four months later at the kickoff meeting that OBOT permits would become discretionary, the Cappio Memo instructed the Planning and Building Department to notify three senior City officials (Ms. Cappio; Darren Ranelletti, the Deputy Director of Planning and Building; and Rachel Flynn, the Director of Planning and Building) upon receipt of any permit application from OBOT, and not to deem the application complete or issue a permit until after consulting with them. (Ex. 61, pp. 2-3.) It is

undisputed that the Memo applied only to OBOT, and the City could not provide an example of any other project that was subject to such limitations. (RT 2252:5-7.)

With the ordinary permitting and zoning process disrupted in favor of a novel commodity-by-commodity approach, Plaintiffs repeatedly requested that the City clarify the process to have a commodity approved and permits issued. (RT 287:22-288:4, 383:25-384:8, 390:24-391:16, 417:5-418:5, 419:2-420:1, 477:2-478:9, 541:18-543:14, 2080:4-11, 2081:1-16.) That clarification never came. (RT 3178:3-22.) OBOT (and TLS) also requested that the City identify commodities that it would be willing to approve so that they could move forward with the design. (RT 1075:17-21, 1135:22-1136:08.) The City was aware of OBOT's request and that OBOT needed commodities identified to further design the Terminal. (Ex. 64; RT 220:4-18, 292:8-17, 2276:3-8.) And yet the City never identified a single commodity it was willing to approve. (RT 1076:2-5.) The City's refusal to approve any commodity delayed and hindered Terminal construction because without knowing which commodities could be transferred, Plaintiffs and TLS could not complete the BOD. (RT 1076:6-12; 2336:10-17.)

The parties dispute whether they ever discussed the BOD at the kickoff meeting or otherwise. Mr. Tagami testified that he requested to discuss the BOD at the kickoff meeting but the discussion did not occur. (RT 438:14-439:7, 473:6-14; Ex. 72.) As Mr. Tagami described: "So think of it as tennis. We hit the ball over the net. No one returned the serve. So we sat there and waited for the ball to come back over the net. There was no one to talk to." (RT 328:22-329:6.)

For her part, Ms. Cappio suggested that the parties did discuss the BOD at the kickoff meeting. But Ms. Cappio testified that she spent only one hour reviewing the 1,500-page document prior to the meeting before determining that it was insufficiently detailed. (RT 2338:19-25.) Ms. Cappio also testified that the parties discussed agenda item 1A (which included the BOD) but admitted that the entire meeting lasted fewer than 45 minutes. (RT 2482:9-2483:7.) Ms. Cappio could not recall any specific discussion of the BOD at the meeting. (RT 2293: 12-14.)

The end result of the kickoff meeting was that Plaintiffs were again "at a point where [they] didn't know what the process would be. [They] couldn't rely on the zoning or the DA. [And they] couldn't get a response back from the city on specifics." (RT 417:17-418:5.)

K. The City's No-Coal Ordinance, the Resolution Applying the Ordinance to the Terminal, and *OBOT I*

At trial, Mayor Schaaf confirmed that the initial purpose of the Cappio Memo was delay; specifically, to give Oakland's City Council the opportunity to pass legislation before any permits for the Project were issued. (RT 1798:8-23; 1818:15-20.) The City proceeded to hold health and safety hearings on coal in May and June 2016 (Ex. 87, p. 1; Ex. 499, p. 6) to develop a record on coal. OBOT participated in the process, including by cooperating with the City's consultant for the hearings, Environmental Science Associates ("ESA"), by providing it with information about the Terminal, its design, and the handling of coal. (RT 2240:16-22, 2241:2-16.) Once the hearings concluded in Summer 2016, the City enacted Ordinance No. 13385 to amend its Municipal Code to prohibit the storage and handling of coal and petroleum coke at bulk material facilities and terminals in Oakland (Ex. 87), and Resolution No. 86234 (Ex. 499) to expressly apply the no-coal ordinance to the Terminal.

In response, OBOT filed a complaint in the U.S. District Court for the Northern District of California, seeking to enjoin the City from applying its ban to the Terminal on the basis that it violated the Commerce Clause of the U.S. Constitution, was preempted by federal law, and breached the Development Agreement. *OBOT I*, 321 F. Supp. 3d at 991. The federal court held that the City's application of a new regulation to the Terminal breached the Development Agreement because the record before the City Council after the health and safety hearings "does not contain substantial evidence that OBOT's proposed operations would pose a substantial danger to the health or safety of people in Oakland." *Id.* at 992. The district court also determined that the resolution was invalid and enjoined the City "from relying on [it] either to apply the ordinance to OBOT or to restrict future coal operations at the facility." *Id.* at 1010. The court did not reach the constitutional or preemption claims. *Id.* at 1011.

L. Plaintiffs' Attempts to Advance Terminal Development in the Face of the No-Coal Ordinance.

In the face of the uncertainty created by the No-Coal Ordinance and the City's refusal to identify any approved commodities, Plaintiffs continued to perform and move the Terminal

forward. (RT 1090:12-15.) Among other things, Plaintiffs prepared for and obtained the City's approval on the construction drawings for the rail improvements, purchased the track, crossings and other materials needed to meet the rail obligations in the Ground Lease and acquired the necessary locomotives to commence providing service. (RT 1674:2-19, 1659:6-18, 1676:24-1677:21, 1693:25-1694:15, 1720:2-7, 2731:16-2732:14, 2745:4-10, 2746:18-2747:6.) In connection with their performance under the parties' agreements, Plaintiffs and their subtenants spent approximately $25 million to develop and advance the Terminal.[6] (RT 1089:07-11; Ex. 194.)

Between 2016 and August 2018, the City acknowledged in multiple ways that Plaintiffs were performing under the parties' agreements. The City sent OBOT letters that confirmed that OBOT was in compliance with the Development Agreement at all times between February 2016 and July 2017. (Ex. 94; Ex. 122.) Additionally, under Sections 1.7.2 and 1.7.2.1 of the Ground Lease, OBOT was entitled to a two-year tolling of its obligation to pay rent to the City (from February 16, 2016 to February 15, 2018) on the condition that OBOT "diligently pursues to Completion the design and construction of the OBOT Wharf and Rail Improvements." In recognition that OBOT was diligently pursuing such design and construction at all times prior to February 15, 2018, the City granted OBOT the full two years of rent tolling. (*See e.g.*, Ex. 169.)

M. The City's Post-*OBOT I* Conduct

Plaintiffs believed that OBOT's federal lawsuit challenging the coal ban would provide clarity and propel the Project forward. (RT 1079:21-1080:01.) But the City's campaign to prevent OBOT from applying for a permit continued even though the City's resolution was now invalid and the ordinance could not be applied to OBOT. The Cappio Memo remained in place. (RT 2261:9-15, 3302:15-23.) The City still had not commented on the BOD. (RT 1893:10-1894:3.) And it still refused to approve a commodity or articulate the process that OBOT was required to follow for commodity or permit approval. (RT 3295:18-3296:18.) Construction and operation

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[6] The City has suggested that the Plaintiffs lacked the funding necessary to advance the Terminal development. But it was the City's position on coal and not a lack of funding that hindered the development. (RT 1089:12-25.)

1 remained stalled because the City continued to refuse to cooperate with the development of the
2 Terminal. (RT 1080:21-1081:09.)
3 In other words, the City's opposition to coal continued and it decided to pursue a "ban-
4 compliant Terminal" even though the district court had ruled that there was no ban. Sabrina
5 Landreth was the City Administrator at the time. (RT 3243:18-3244:9.) Ms. Landreth testified
6 that the City maintained its anti-coal position as to the Terminal after *OBOT I* and through the
7 City's appeal of the district court's decision. (RT 3295:18-3296:18; *see also* RT 3278:9-14 (Ms.
8 Landreth's admission that the City maintained its same position during the entire Project).) The
9 Ninth Circuit Court of Appeals decided the City's appeal on May 26, 2020—eighteen months
10 after the City contends the Ground Lease was terminated—and upheld the district court's ruling.
11 *See OBOT I*, 960 F.3d 603 (9th Cir. 2020).
12 After *OBOT I*, the City also continued to delay and hinder Plaintiffs' ability to develop the
13 Terminal and other rail portions of the Project in other ways. For instance, the Ground Lease
14 requires that the City give OBOT (and through its sublease, OGRE) possession of the Railroad
15 R/O/W Property and other portions of the rail corridor throughout the OAB. (GL §§ 1.1.1, 1.1.2,
16 1.5.1, 1.5.2.) Notwithstanding Plaintiffs' repeated requests for access (RT 2774:5-24, 2777:4-17,
17 3378:15-23, 3662:15-3663:11; Ex. 189; Ex. 227, p. 5; Ex. 306; Ex. 455; Ex. 477), the City had
18 not turned possession of any portion of the Railroad R/O/W Property to OBOT or OGRE as of
19 November 22, 2018. (RT 1529:24-1530:6; 4030:21-4031:1.) This made it impossible for
20 Plaintiffs to build the majority of the Project rail improvements. As a matter of common sense, a
21 developer cannot build something on land that they are not allowed to access.
22 The City's delay in granting Plaintiffs possession of and access to the Premises involves
23 multiple factors, including the City taking longer than it anticipated to complete horizontal
24 development, the City's JV retaining possession, the City's lag in accepting the JV's public
25 improvement work as complete, the City's failure to re-survey of the property, and the City's
26 failure to enter a Rail Access Agreement (also referred to as "RAA") with the Port of Oakland so
27 that Plaintiffs could access portions of the OAB that are Port owned or controlled. These delays
28 and hinderances, as well as other facts are discussed in more detail below.

N. The City's Force Majeure Delay and Purported Termination of the Ground Lease

The Ground Lease requires OBOT to have Commenced Construction of the Minimum Project (including the Terminal and one of five Rail Improvements) by the Initial Milestone Date. (GL § 6.1.1.) The Initial Milestone Date is 180 days after the Ground Lease's Commencement Date. (GL § 6.1.1.1.) The Commencement Date is the date written on the first page of the Ground Lease (GL § 1.2), which is February 16, 2016. OBOT and the City previously agreed to toll the Commencement Date for two years, setting a potential Initial Milestone Date 180 days later on August 14, 2018.

The Ground Lease also includes a Force Majeure provision that entitles OBOT to extensions of time to perform its contractual obligations based on acts of the City or government that delay, hinder or affect OBOT's ability to perform. (GL § 16.1.) The provision requires OBOT to provide notice to the City of its Force Majeure claim within a reasonable time after obtaining actual knowledge of the scope and magnitude of the Force Majeure event or promptly after the City demands performance. (*Id.*)

Plaintiffs contend that the City acts described above and other City acts constitute Force Majeure events that upon proper and timely notice, automatically extended their deadlines, including the Initial Milestone Date. OBOT presented the City with Force Majeure notices on at least March 11, 2016 (Ex. 76), April 10, 2018 (Ex. 148), July 30, 2018 (Ex. 174), August 3, 2018 (Ex. 176), August 28, 2018 (Ex. 191; Ex. 193), September 24, 2018 (Ex. 222), September 28, 2018 (Ex. 670), October 4, 2018 (Ex. 243), October 19, 2018 (Ex. 248), March 19, 2019 (Ex. 276), and September 27, 2019 (Ex. 856). In these notices, OBOT claimed that the following City acts were Force Majeure events that delayed or hindered development of the Terminal and extended its deadlines: (1) the City's failure to confirm the regulations that would apply to development of the Terminal (Ex. 76; Ex. 148; Ex. 174; Ex. 176; Ex. 248; Ex. 856); (2) the City's refusal to meaningfully engage with OBOT on the Basis of Design (Ex. 191; Ex. 248; Ex. 856); (3) the City's holding of health and safety hearings and enactment of its no-coal ordinance and resolution, resulting in the federal litigation (Ex. 174; Ex. 176; Ex. 191; Ex. 248; Ex. 856); (4) the

City's failure to cooperate with OBOT to secure third-party funding for the Project (Ex. 191; Ex. 856); (5) the City's decision to approve permits on a discretionary and commodity-by-commodity basis, potentially reopen CEQA, upend zoning, and adopt the protocol in the Cappio Memo (Ex. 191; Ex. 248; Ex. 856); (6) the City's refusal to turn over possession of the Railroad R/O/W Property, including by failing to complete a survey of the property after public improvements were complete (Ex. 191; Ex. 248; Ex. 856); (7) the City's failure to enter the Rail Access Agreement with the Port (Ex. 191; Ex. 248; Ex. 856); and (8) the City's interference and failure to cooperate with regulatory approvals (Ex. 191; Ex. 248; Ex. 856). Plaintiffs reiterated these Force Majeure claims and other City misconduct to the City through additional correspondence. (*See, e.g.*, Ex. 193; Ex. 222; Ex. 243; Ex. 248; Ex. 670.)

Notwithstanding Plaintiffs' Force Majeure delay claims, Sabrina Landreth decided to terminate the Ground Lease at the earliest possible opportunity (RT 3261:6-13, 3261:22-3262:3, 3281:5-8). Ms. Landreth testified that she cannot recall reviewing any of Plaintiffs' Force Majeure claims or the Force Majeure provision in the Ground Lease prior to making that decision. (RT 3266:21-3267:24, 3281:15-3282:16, 3283:3-3284:19.)

On August 20, 2018, Ms. Landreth sent a letter to Mr. Tagami reciting the Minimum Project requirements, contending that OBOT had not Commenced Construction by the Initial Milestone Date, but deferring a "substantive response" to OBOT's March 11, 2016 Force Majeure letter. (Ex. 185.) On September 21, 2018, Oakland City Attorney Barbara Parker sent Mr. Tagami a Notice of Cure with Respect to an Unmatured Event of Default ("cure notice" or "notice to cure"), contending that OBOT had not Commenced Construction of the Minimum Project, and purporting to reject OBOT's prior Force Majeure claims. (Ex. 217.)

Although OBOT disagreed with the City's position, it also responded to the cure notice by commencing a cure. For example, on September 28, 2018, OBOT submitted its updated and revised Schematic Drawings. (Ex. 238; Ex. 240; RT 617:24-618:20.) Comment on the Schematic Drawings was also needed from the City in its regulatory capacity to refine the Terminal design. (GL § 6.2.1 ("Landlord shall approve or disapprove Construction Documents submitted to it for approval within thirty (30) days after submission. Any disapproval shall state in writing the

reasons for disapproval.").) Millcreek Engineering (the architect and engineer) also scheduled a meeting with the City to discuss the permitting process, but the City cancelled the meeting and would not respond to Millcreek's, ITS's or OBOT's requests to reschedule. (Ex. 239, p. 1.)

Rather than provide meaningful review of the Schematic Drawings, the City rejected the drawings out of hand. On October 18, 2018, the City stated that it would only recognize the "conceptual drawings" portion of the submission – a small portion of the multi-volume Schematic Drawings – and disregard the rest of the submittal. (Ex. 247.) The City claimed that the Schematic Drawings were "incomplete," largely without specifying how or why, nor did the City identify what the City required to render it complete, as required by the Lease. (*Id.*; *see* GL, § 6.2.1 ("If Landlord deems the Construction Documents incomplete, Landlord shall notify Tenant of such fact within twenty-one (21) days after submission and shall indicate which portions of the Construction Documents it deems to be incomplete.").) The City also ignored the Ground Lease's provision that a cure effort must only be commenced and reasonably pursued with diligence if it could not be completed with the 30-day cure period. (GL § 18.1.7.)

Several of OBOT's Force Majeure notices identified above were in direct response to the City's cure notice, which demanded performance. (*See* Ex. 191; Ex. 193; Ex. 222; Ex. 243; Ex. 248; Ex. 670.) OBOT had learned from the City in 2016, when it purported to reject OBOT's first Force Majeure claim, that it would consider any Force Majeure claim premature until the City had declared a default. (*See* Ex. 81, p. 2.) And the Ground Lease does not require the party whose time to perform is extended to notice a Force Majeure claim until after a performance demand from the other party. (GL § 16.1.)

Notwithstanding all the evidence that OBOT tried to Commence Construction, that the City had prevented all progress, and that the Plaintiffs commenced and made diligent efforts toward curing the alleged default once notice was provided, on October 23, 2018, the City issued a Notice of Event of Default, claiming that the 30-day cure period had ended and the Ground Lease would automatically terminate. (Ex. 250.) The Ground Lease was purportedly terminated on November 22, 2018. (*Id.*)

IV. PROCEDURAL BACKGROUND

Plaintiffs filed their original complaint on December 4, 2018. In response, on January 14, 2019, the City concurrently filed a demurrer and motion to strike. The City's demurrer sought dismissal of the contract claims based on res judicata, as well as dismissal of Plaintiffs' prior tort claims based on the Government Claims Act, statute of limitations, and other arguments. Similarly, the City's motion to strike was based on res judicata and the statute of limitations.

On May 16, 2019, the Court (Hon. Jo-Lynne Q. Lee) granted the motions in part and denied them in part, sustaining the City's objections to the tort claims (Order Re Demurrer (May 16, 2019)), and ordering that five paragraphs be stricken from the complaint to the extent they "include allegations that the enactment of the invalidated Ordinance and Resolution for a basis for claims of breach of contract or other damage" (Order Re Motion to Strike, p. 2 (May 16, 2019)).

On December 11, 2020, following denial of the City's anti-SLAPP motion and the City's unsuccessful appeal of that order, Plaintiffs filed the operative First Amended Complaint ("State FAC").[7]

Following extensive discovery, on October 1, 2021, the City moved for summary judgment, primarily arguing that Plaintiffs had not Commenced Construction of the Minimum Project by the Initial Milestone Date and no act of Force Majeure had occurred. On January 6, 2022, this Court (Hon. Delbert C. Gee) denied the motion.

On March 17, 2023, the City moved to bifurcate the trial into liability and damages phases. On July 6, 2023, the Court granted the motion. A trial on liability was held, beginning July 10, 2023 and lasting 29 court days.

V. OGRE'S STANDING AS THIRD-PARTY BENEFICIARY AND SUBTENANT

OGRE is a party to Plaintiffs' second cause of action for breach of contract, fourth cause of action for breach of the implied covenant of good faith and fair dealing, and fifth cause of action for declaratory relief—all of which relate to the Ground Lease. The City argues in its

[7] On December 11, 2018 the City filed an unlawful detainer action but dismissed the action on December 14, 2018. On May 27, 2020, the City filed a second complaint, for breach of contract and declaratory relief, that mirrors Plaintiffs' action. The cases were consolidated on March 18, 2021.

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fifteenth affirmative defense that OBOT should be the only plaintiff in this case because OGRE lacks standing to sue under the Ground Lease based on a no-third party beneficiaries clause. (GL § 38.4.) That clause states that the "Lease is for the exclusive benefit hereto and not for the benefit of any other Person and shall not be deemed to have conferred any rights, express or implied, upon any other Person, except as provided in Article 34 with regard to Mortgages." (*Id.*) OGRE does not contend that the mortgage exception applies. Instead, it argues that it has standing as an expressly intended beneficiary and named subtenant of the Ground Lease.

The Court has already resolved this issue in OGRE's favor. The City made the same argument in its October 1, 2021, motion for summary judgment. The Court denied that motion and determined that OGRE has standing to sue the City under the Ground Lease as an express subtenant. (January 6, 2022 Order Denying City's Motion for Summary Judgment.) The Court's order applies here. The Court also makes the following findings:

First, OGRE is an express subtenant under the Ground Lease. (GL § 37.81(c), Art. 40.) "[A] contract, made expressly for the benefit of a third person, may be enforced by him." Cal. Civ. Code § 1559. Under the Ground Lease's express terms, OGRE is an exception to the no third party beneficiaries clause. The Lease specifically contemplates that OGRE would benefit as OBOT's sublessee and assignee. Article 40 includes "OGRE" as a defined term. And Section 37.8.1(c) permits OBOT to transfer and assign Lease rights to OGRE without the City's consent,[8] which occurred when OBOT entered into the Sublease Agreement with OGRE. (Ex. 104; Ex. 162.) And because OGRE is not an ordinary third-party beneficiary, but a subtenant, it has the right to sue for breach of the covenant of quiet enjoyment, which is the premise of Plaintiffs' claim that the City's termination of the Ground Lease breached the contract. *Marchese v. Standard Realty & Dev. Co.*, 74 Cal. App. 3d 142, 147 (1977) ("[I]f a lessor has expressly agreed to a sublease, the sublessee is a third-party beneficiary to the implied covenant of quiet enjoyment

[8] Section 37.8.1(c) of the Ground Lease requires the City's prior written consent for all "Transfers" with respect to the Railroad R/O/W Property but "excluding any such Sublease to OGRE." Section 12.1.1 defines "Transfers" to include assignments and subleases of OBOT's interests in the Lease. In other words, the Lease specifically contemplated that OBOT would sublease and assign rights to OGRE without requiring any further approval from the City.

in the original lease and has the right to go directly against the lessor for its breach. . . . When, as in the instant case, the lease itself contains a provision that the property may be sublet to a named party . . . it follows that [the named party] is the beneficiary of lessor's promise to allow [it] to occupy the property.").

Second, OGRE would be an express beneficiary even if not named in the Lease. A third-party need not be specifically named in the contract, *Kalmanovitz v. Bitting*, 43 Cal. App. 4th 311, 314 (1996), and it may enforce the contract unless it benefits only incidentally. *Shurpin v. Elmhirst*, 148 Cal. App. 3d 94, 103 (1983). *See also Kaiser Eng'rs, Inc. v. Grinnell Fire Prot. Sys. Co.*, 173 Cal. App. 3d 1050, 1055 (1985) ("[T]he term 'expressly' in Civil Code section 1559 has come to mean merely the negative of 'incidentally.'"). The key considerations to determine third-party beneficiary status are: (1) "whether the third party would in fact benefit from the contract"; (2) "whether a motivating purpose" (not the sole purpose) of the contracting parties was to benefit the third party; and (3) "whether permitting a third party to bring its own breach of contract action against a contracting party is consistent with the objectives of the contract and the reasonable expectations of the contracting parties." *Goonewardene v. ADP, LLC*, 6 Cal. 5th 817, 829-30 (2019). In assessing these considerations, the Court must consider "all of the relevant circumstances under which the contract was agreed to." *Id.*; *Jones v. Aetna Cas. & Surety Co.*, 26 Cal. App. 4th 1717, 1725 (1996). All three *Goonewardene* considerations demonstrate OGRE's standing.

On the first factor—whether OGRE would benefit from the Ground Lease—OGRE would benefit from the planned development of the rail Terminal contemplated in the Lease. OGRE's purpose was to develop rail infrastructure and service to the Terminal, which was essential to the Project. (Ex. 104 (Sublease); Ex. 162.)

On the second factor—whether a motivating purpose of the parties was to benefit OGRE—the evidence demonstrates that the parties intended to benefit OGRE. OGRE was specifically formed to build the rail network to connect the entire development of the Project. (RT 1522:15-1523:6.) The Project was funded through a grant from the State of California that required the City to establish a rail network; and OGRE was formed to meet that requirement.

(*Id*.) The City was aware of OGRE's role—and intended OGRE to be its rail operator—from the Project's inception, including when the Development Agreement was signed in 2013 and later, when the Ground Lease was executed in 2016. (RT 1583:5-15, 3388:20-23.)

The third factor—whether permitting OGRE to bring its own breach action is consistent with the parties' intentions—also cuts in favor of OGRE for the same reasons discussed above. The Lease names OGRE as a subtenant, which is sufficient to infer that the parties anticipated that OGRE could sue for breach of the Lease. *See Real Prop. Servs. Corp. v. City of Pasadena*, 25 Cal. App. 4th 375, 383 (1994); *Marchese*, 74 Cal. App. 3d at 147.

The Court again finds that OGRE has standing to sue for breach of the Ground Lease. It also has standing to sue for breach of the implied covenant of quiet enjoyment and fair dealing and declaratory relief because both claims concern the City's conduct under the Ground Lease, including to interfere with OGRE's right to enjoy the benefits of the Ground Lease as a subtenant.

Having determined that OGRE has standing to sue under the Ground Lease, the Court turns to the Parties' claims.

VI. PLAINTIFFS' FIRST CAUSE OF ACTION AND SECOND CAUSE OF ACTION FOR BREACH OF CONTRACT[9]

A. Summary of Plaintiffs' Breach of Contract Claim

As noted above, the parties raise the same core question as to the Ground Lease: did the City breach the Ground Lease by terminating it for OBOT's alleged failure to Commence Construction of the Minimum Project by August 14, 2018—the date the City contends was the Initial Milestone Date; or did OBOT breach the Ground Lease by failing to Commence Construction of the Minimum Project by that date? Plaintiffs contend that terminating the contract breached the Ground Lease's quiet enjoyment provision (GL § 29.1) and its Delay Due to Force

[9] Plaintiffs' First Cause of Action is by OBOT for breach of the Ground Lease and Development Agreement. Plaintiffs' Second Cause of Action is by OGRE for breach of the Ground Lease. This section addresses both together because OBOT presented its claims under the Development Agreement as reasons that the Initial Milestone Date in the Ground Lease was extended. In other words, if OBOT prevails on its Development Agreement theories, the City's termination of the Ground Lease based on an August 14, 2018, Initial Milestone Date was ineffective and a breach of the Ground Lease.

Majeure clause (GL § 16.1) because the termination was on the basis of missing the Initial Milestone Date, which Plaintiffs argue was extended beyond August 14, 2018, by Force Majeure events, and, in any event, Plaintiffs had Commenced Construction of the Minimum Project on or before that date.

Throughout the litigation and at trial, Plaintiffs articulated other breach theories but nearly all of them overlap with claims of City-caused delay that Plaintiffs included in their Force Majeure letters to the City prior to November 22, 2018. (*See* Ex. 76; Ex. 148; Ex. 174; Ex. 176; Ex. 191; Ex. 248; Ex. 856.) Plaintiffs presented their additional breach theories less as independent claims, and more as support for their primary claim: that the Initial Milestone Date was extended or Plaintiffs had Commenced Construction of the Minimum Project on or before that date, making the City's purported termination of the Ground Lease based on that date both ineffective and a breach of the Ground Lease.

The additional Force Majeure/breach of Ground Lease theories that Plaintiffs argue extended the Initial Milestone date are based on the City's alleged failure to (1) consider and comment on the Basis of Design as required by Section 6.2.1; (2) cooperate with OBOT to secure third-party funding for the Project as required by Section 6.3.1; (3) turn over possession of portions of the Premises such as the Railroad R/O/W Property in violation of Sections 1.1.1, 1.1.2, 1.5.1, and 1.5.2; (4) re-survey the Premises as required by Section 1.1.1; (5) use commercially reasonable efforts to enter the Rail Access Agreement with the Port as required by Section 5.2.3; and (6) cooperate with OBOT's efforts to obtain regulatory approvals as required by Section 5.2.2.2.

Plaintiffs have also alleged two breach of Ground Lease theories that do not coincide with their Force Majeure delay letters: breach of Section 12.5.1 of the Ground Lease for failure to issue Non-Disturbance Agreements ("NDAs"); and breach of Section 26.1 for failure to issue estoppel certificates. The evidence presented at trial demonstrates, as discussed below, that the City's rejection of OBOT's requests for NDAs and estoppel certificates was based on the City's then-pending termination of the Ground Lease. (Ex. 485 (NDAs); Ex. 676 (estoppel certificates).) These last two breaches are thus also tied up in the City's termination of the Ground Lease.

In addition to Plaintiffs' claim that the City breached the Ground Lease by terminating it (including Plaintiffs' various supporting theories under the Ground Lease), Plaintiffs have alleged three breaches of the Development Agreement. Like the breaches Plaintiffs allege under the Ground Lease, each alleged Development Agreement breach overlaps with a claim of City-caused delay that Plaintiffs included in their Force Majeure letters to the City before November 22, 2018. (*See* Ex. 76; Ex. 148; Ex. 174; Ex. 176; Ex. 191; Ex. 248.) These include the City's alleged failure to (1) timely certify a list of regulations that existed when the Development Agreement was signed and that would apply to the Project as required by Section 3.4.3; (2) rely on the existing EIR to the fullest extent permissible as required by Section 3.5.1 and apply the then-existing Construction Code as a ministerial act as required by Section 3.4.4; and (3) meet and confer with OBOT about the first two breaches as required by Section 8.4. Although these delay claims are made based on the City's obligations under the Development Agreement, Plaintiffs have presented them as additional City acts that delayed performance of their Ground Lease obligations, and that upon proper notice, automatically extended the Initial Milestone Date under Ground Lease, section 16.1. If Plaintiffs are correct, then the City breached the Ground Lease by prematurely terminating it.

In sum, Plaintiffs allege thirteen breaches—ten under the Ground Lease and three under the Development Agreement. These breaches have a common thread and coalesce into one primary breach claim: Plaintiffs' contention that the City deployed a multipronged attack on the Terminal's development in order to prevent commencement of construction by August 14, 2018, then terminate the Ground Lease.

B. Threshold Legal Issues

Prior to reaching the merits of Plaintiffs' breach of contract claim, the Court addresses two threshold legal issues that the City raised during trial: (1) whether *OBOT I* is res judicata as to any part of Plaintiffs' breach claim; and (2) whether Plaintiffs are required to satisfy certain common law requirements for force majeure even though the City and OBOT negotiated a non-boilerplate Delay Due to Force Majeure Clause (GL § 16.1).

1. Res Judicata

The City argues under its fifth affirmative defense for res judicata that Plaintiffs cannot (1) rely on events prior to May 15, 2018 (the date of the *OBOT I* judgment) as the basis for their breach claim; or (2) rely on events prior to June 14, 2017 (the date OBOT filed its First Amended Complaint in *OBOT I* ("Federal FAC") (Ex. 120[10]) to support OBOT's contractual Force Majeure rights or excuse defenses because this case involves the same cause of action as *OBOT I*.[11]

In order to prevail on its defense, the City bears the burden of meeting three elements. "Res judicata applies [to bar a claim] only when a second suit involves (1) the same cause of action (2) between the same parties or their privies (3) after a final judgment on the merits in the first suit." *Samara v. Matar*, 5 Cal. 5th 322, 327 (2018) (citations and marks omitted). The City has not met its burden.

a. The Operative Date for Application of Res Judicata

The City asks the Court to apply one date for Plaintiffs' affirmative claims and another for certain defenses. It is black letter law that the date the operative complaint was filed in the earlier case is the key date for res judicata purposes. *See Yager v. Yager*, 7 Cal. 2d 213, 217 (1936) ("It is a general rule that a party cannot put in issue rights acquired pendente lite unless a supplemental pleading is filed, and, if such a pleading is not filed, he is not foreclosed from asserting such rights in a subsequent action."); *Allied Fire Prot. v. Diede Constr., Inc.*, 127 Cal. App. 4th 150, 155 (2005) ("Res judicata is not a bar to claims that arise after the initial complaint is filed. These rights may be asserted in a supplemental pleading, but if such a pleading is not filed a plaintiff is not foreclosed from asserting the rights in a subsequent action."). OBOT filed the Federal FAC on

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[10] The Court takes judicial notice of OBOT's First Amended Complaint, docket 74, filed June 14, 2017, in *OBOT I*, and marked at this trial as Exhibit 120. *See Arce v. Kaiser Found. Health Plan, Inc.*, 181 Cal. App. 4th 471, 482-83 (2010) (taking judicial notice of pleadings).

[11] The City also argues that a breach of the Development Agreement does not establish a breach of the Ground Lease. Plaintiffs agree, and do not contend that the holding in *OBOT I* that the City breached the Development Agreement establishes a breach of the Ground Lease in this case. (*See* Plaintiffs' Response to City of Oakland's Trial Brief on Prior Federal Litigation at 4:2-19 (Aug. 17, 2023).) Based on Plaintiffs' description of their breach claims, this Court does not reach the merits of the City's argument.

June 14, 2017. (Ex. 120.) Thus, under ordinary circumstance, OBOT could raise any claim that accrued after that date in a subsequent action. The City appears to agree that June 14, 2017, is the correct date for res judicata purposes. (RT 4157:15-25.)

The City argues that the Court should nevertheless apply a different date for Plaintiffs' breach claims under estoppel principles because Plaintiffs represented in their opposition to the City's demurrer to the original complaint that all facts prior to May 15, 2018 were background; the Court relied on that representation when it overruled the demurrer; and Plaintiffs amended their complaint to allege only breaches after May 15, 2018. The Court disagrees.

Estoppel is codified in California Evidence Code section 623, which states: "Whenever a party has, by his own statement or conduct, intentionally and deliberately led another to believe a particular thing true and to act upon such belief, he is not, in any litigation arising out of such statement or conduct, permitted to contradict it." Cal. Evid. Code § 623. In addition, the doctrines of judicial estoppel and equitable estoppel may be relied on by a party in litigation. "A party may invoke equitable estoppel to prevent his opponent from changing positions if (1) he was an adverse party in the prior proceeding; (2) he detrimentally relied upon his opponent's prior position; and (3) he would now be prejudiced if a court permitted his opponent to change positions. Equitable estoppel focuses on the relationship between the parties, and is designed to protect litigants from injury caused by less than scrupulous opponents. By contrast, judicial estoppel focuses on 'the relationship between the litigant and the judicial system, and is designed 'to protect the integrity of the judicial process. By definition, equitable estoppel requires privity, reliance, and prejudice because the doctrine concentrates on the relationship between the parties to a specific case. Conversely, . . . the gravamen of judicial estoppel is not privity, reliance, or prejudice[, but r]ather, it is the intentional assertion of an inconsistent position that perverts the judicial machinery." *Jackson v. Cnty. of Los Angeles*, 60 Cal. App. 4th 171, 183 (1997) (quotations and citations omitted). Accordingly, the doctrine of judicial estoppel applies "when: (1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally

inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake." *Id*. Neither of these doctrines is applicable in the instant case.

First, Plaintiffs' opposition to the City's demurrer to the original complaint makes clear that the operative date for res judicata is the commencement of the action. (*See* Plaintiffs' Opposition to Defendant's Demurrer to Complaint (Apr. 4, 2019) at 1:15-17 ("But the City ignores that Plaintiff's claims are based on the City's breaches and misconduct occurring ***after*** the filing of the federal litigation …" (emphasis original)), 4:6-7 ("For example, Plaintiffs allege the following wrongful acts occurred ***after the filing of the Federal Litigation*** …" (emphasis original)), 6:20 ("A cause of action is framed by the facts in existence when the complaint is filed …"), 7:18 ("Plaintiffs here have a right to enforce their contractual Lease rights where the City committed new breaches after the Federal Litigation was filed and separate from the conduct at issue in this case.").) Plaintiffs did not state that the operative date for res judicata is May 15, 2018, or that all facts alleged before that date were pleaded merely as background.

Second, the Court's prior orders did not rely on Plaintiffs' purported representations. The Court stated the correct law that res judicata is a bar to later claims, if at all, only if they accrued prior to filing of the operative complaint. In granting the City's motion to strike, "the Court [found] that the only portions that should be stricken are those that on their face arose *before the commencement of the federal action* and are asserted as the basis for Plaintiffs' causes of action, and not pled as background facts." (Order Re Motion to Strike, p. 2 (May 16, 2019) (emphasis added).) The only allegations that fell under that description were those that alleged that enactment of the ordinance and resolution were breaches. (*Id.*) The Court used similar language when it overruled the City's demurrer. (*See* Order Re Demurrer, p. 4 (May 16, 2019) ("As a cause of action is framed by the facts *in existence when the underlying complaint is filed*, res judicata is not a bar to claims that arise after the initial complaint is filed." (internal marks omitted)).)

Third, the State FAC does not limit Plaintiffs' breach claims as narrowly as the City suggests. The City is correct that Plaintiffs use the date May 15, 2018, in the State FAC. (*See* State FAC ¶ 6.) But that usage appears to be in support of the narrative in the State FAC that the City lost in *OBOT I* on May 15, 2018, then continued to breach its contractual obligations,

including obligations that were not at issue in the earlier case. In the same paragraphs of the State FAC that refer to the City's post-*OBOT I* conduct, Plaintiffs also allege breaches that involve earlier facts—*e.g.*, the City's alleged failure to use commercially reasonable means to enter the Rail Access Agreement with the Port, transfer possession of the Railroad R/O/W Property to OBOT and OGRE, and cooperate with OBOT to obtain third-party funding for the Project.

In addition, the State FAC preserves the issue of Force Majeure delay based on pre-*OBOT 1* conduct. For instance, Plaintiffs incorporate their Force Majeure letters by reference into the State FAC. (*See* State FAC ¶ 46 (incorporating Plaintiffs letters dated March 11, 2016 (Ex. 76), April 10, 2018 (Ex. 148), and October 19, 2018 (Ex. 248), and identifying the City's failure to identify the regulations applicable to the Project as an event of Force Majeure).) Plaintiffs' October 19, 2018, letter lists several alleged Force Majeure events and identifies the City's health and safety hearings and adoption of the no-coal ordinance and resolution at the top of the list. (Ex. 248, p. 14.)

Finally, estoppel requires a showing of prejudice. *DRG/Beverly Hills, Ltd. v. Chopstix Dim Sum Cafe & Takeout III, Ltd.*, 30 Cal. App. 4th 54, 59 (1994). There is none here. Both sides presented voluminous evidence at trial on events prior to May 15, 2018. From its opening statement and through trial, the City focused on evidence of whether the parties knew coal was a potential commodity as early as 2014 and 2015, the potential financing of the Terminal in 2016 and 2017, and several other events that predate the federal litigation. The City has not made a showing of detrimental reliance or prejudice.

As explained below, the Court finds that res judicata does not preclude any part of Plaintiffs' claims or defenses in this case. In the event that res judicata did apply, June 14, 2017—the date OBOT filed the Federal FAC—would be the operative date to determine whether the causes of action in this case had accrued early enough to be precluded if the City could also satisfy each element of res judicata.

b. The Cases Concern Different Causes of Action.

California courts apply the primary rights theory to assess whether two proceedings involve identical causes of action. *Mycogen Corp. v. Monsanto Co.*, 28 Cal. 4th 888, 904 (2002);

Hong Sang Mkt., Inc. v. Peng, 20 Cal. App. 5th 474, 490 (2018). "The plaintiff's primary right is the right to be free from a particular injury, regardless of the legal theory on which liability for the injury is based. The scope of the primary right therefore depends on how the injury is defined. A cause of action comprises the plaintiff's primary right, the defendant's corresponding primary duty, and the defendant's wrongful act in breach of that duty." *Fed'n of Hillside & Canyon Ass'ns. v. City of Los Angeles*, 126 Cal. App. 4th 1180, 1202 (2004).

(1) OBOT's Claim Accrued After *OBOT I* When the City Terminated the Ground Lease.

Two cases do not involve the same primary right, and an earlier action does not preclude a later one if a party obtains new rights during the pendency of or after the first action. *Allied Fire Protection*, 127 Cal. App. 4th at 155 ("The general rule that a judgment is conclusive as to matters that could have been litigated does not apply to new rights acquired pending the action which might have been, but which were not, required to be litigated." (internal quotation marks omitted)). In contract cases like this one, a party may bring a later lawsuit for any subsequent breach—that is, any breach that accrues during or after the first action. Cal. Code Civ. Proc. § 1047 ("Successive actions may be maintained upon the same contract or transaction, whenever, after the former action, a new cause of action arises therefrom"); *Karlsson Grp., Inc. v. Langley Farm Investments, LLC*, No. CV–07–0457–PHX–PGR, 2008 WL 4183025, at *5 (D. Ariz. Sept. 8, 2008) (subsequent actions are permissible on the same contract when new facts arise during the pendency of the first action); *Zingheim v. Marshall*, 249 Cal. App. 2d 736, 744-45 (1967) (seriatim lawsuits permissible for each missed payment due under an installment contract).

This case is about the City's termination of the Ground Lease based on the alleged expiration of the Initial Milestone Date, which the City contends was August 14, 2018. As detailed above in the Court's summary of Plaintiffs' breach claim, every breach Plaintiffs allege—whether under the Ground Lease or the Development Agreement—centers on the City's termination, which the City contends was effective on November 22, 2018—more than a year after OBOT filed the Federal FAC and months after judgment in the federal litigation.

In addition, nearly every breach alleged overlaps with a claim of Force Majeure delay that Plaintiffs identified in their Force Majeure letters to the City that extended the Initial Milestone Date in proportion to each delay. (*See* Ex. 76; Ex. 148; Ex. 174; Ex. 176; Ex. 191; Ex. 248; Ex. 856.) Under the express terms of the Ground Lease, OBOT was entitled to refrain from exercising its extension rights until after the City demanded performance of the obligation delayed by the event of Force Majeure. (GL § 16.1.) The City acknowledged that requirement when it purportedly rejected OBOT's first Force Majeure claim in 2016 on that very basis. (Ex. 81, p. 2 (City's March 22, 2016, response to OBOT's first Force Majeure letter, stating that the claim was premature because "Landlord has not provided any notification to Tenant that Tenant is in breach of or default in its obligations under the WGW Lease . . . .").) The City did not demand performance of OBOT until August 20, 2018. (Ex. 185 (the City's August 20, 2018, noting passage of the Initial Milestone Date and deferring a substantive response to Plaintiffs' Force Majeure claims); Ex. 217 (City's September 21, 2018, notice to cure, rejecting Plaintiffs Force Majeure claims); Ex. 250 (City's October 23, 2018, notice of default stating that the Ground Lease would terminate on November 22, 2018).) And the City did not violate OBOT's right to an extension until it rejected the Force Majeure claims and declared default based on the Initial Milestone Date that OBOT's Force Majeure claims extended. Plaintiffs' breach claim, including each alleged Force Majeure claim, could not have accrued until (1) October 23, 2018, when the City declared default, or (2) November 22, 2018, when the City alleges the termination became effective. Plaintiffs could not have litigated their breach claim, including each supporting claim, during *OBOT I* even if the same primary right was theoretically implicated.

That leaves only Plaintiffs' alleged breaches for the City's failure to issue NDAs and estoppel certificates for OBOT's subtenants. The evidence presented at trial indicates that the process of issuing NDAs was iterative, involving information gathering, potentially the City's approval of each sublease, and negotiating NDA language. (RT 2023:1-13, 2889:7-12, 3010:16-24.) The parties were engaging in that process when the City terminated the Ground lease. (RT 3012:18-3013:9.) On October 18, 2018, the City sent a letter to Mr. Tagami, citing OBOT's alleged default as a basis for denying OBOT's NDA requests. (Ex. 485.) Similarly, on October

18, 2018, the City sent Mr. Tagami a letter citing its notice to cure and the pending termination as the first condition to issuing estoppel certificates. (Ex. 676.) The termination stopped the process of issuing NDAs and estoppel certificates. It follows that if the City's termination was in breach, so was its decision not to issue NDAs or estoppel certificates on the basis of the termination. These alleged breaches accrued either on October 17 and 18, 2018 when the City used the termination as a basis to not issue the documents or later when the City terminated the Ground Lease.

The City cites no law for the proposition that a party cannot base a breach of contract claim that accrued during or after an earlier case on some facts that existed during that case. Res judicata concerns when a party acquires the right to litigate—that is, when a claim accrues—not when each supporting fact comes into existence. *See Allied Fire Prot.*, 127 Cal. App. 4th at 155 (res judicata does not apply to new rights acquired during the earlier action); *Brenelli Amedeo, S.P.A. v. Bakara Furniture, Inc.*, 29 Cal. App. 4th 1828, 1836-39 (1994) (subsequent lawsuit with same factual basis permissible where cases involved distinct primary rights); *Sawyer v. First City Fin. Corp.*, 124 Cal. App. 3d 390, 402-03 (1981) (same). Here, Plaintiffs' breach claim—whether viewed as one claim that the termination breached the Ground Lease with multiple supporting claims or as several independent claims—accrued after *OBOT I* when the City purported to terminate the Ground Lease.

Relatedly, a party has a right to sue for an ongoing breach of a continuing duty in successive actions until the contract is repudiated, at which time there is only a single breach and a single cause of action. *Abbott v. 76 Land & Water Co.*, 161 Cal. 42, 48-49 (1911); *Legg v. United Benefit Life Ins. Co. of Omaha*, 182 Cal. App. 2d 573, 580 (1960) ("Although it is true that section 1047 recognizes the right to maintain a new action for a continuing breach of a continuing obligation, it is also well established that the continuing breach necessarily implies a continuing duty." (citations omitted)); *Mycogen Corp. v. Monsanto Co.*, 28 Cal. 4th 888, 895-98, 905 (2002) (rejecting the argument of a continuing duty because the breach that gave rise to *Mycogen I* was full contract repudiation). In this case, Plaintiffs allege several continuing duties that the City breached after *OBOT I*. These include the City's continuing duties to cooperate with

OBOT to secure third-party funding for the Project (GL § 6.3.1), transfer possession of the Premises, including the Railroad R/O/W Property, to OBOT (GL §§ 1.1.1, 1.1.2, 1.5.1, 1.5.2); use commercially reasonable efforts to enter the Rail Access Agreement with the Port (GL § 5.2.3); cooperate with OBOT's efforts to obtain regulatory approvals (GL § 5.2.2.2); re-survey the Premises as (GL § 1.1.1); and rely on the existing EIR to the fullest extent permissible and ministerially apply the Construction Code (DA §§ 3.44, 3.51). The key question for the breach of a continuing duty is not when the breach allegedly began, but whether it continues after the earlier action. In this case, and as detailed below in the Court's discussion of each Force Majeure claim, the City's conduct was ongoing.

(2) The Two Cases Involve Different Primary Rights.

Even if Plaintiffs' claim had accrued earlier, it involves a different primary right than the one at issue in *OBOT I.* Indeed, this Court reached that same conclusion the first time the City made this same res judicata argument. (Order Re Demurrer, p. 4 (May 16, 2023).) The Court reaches the same conclusion here.

OBOT I was about OBOT's right to build the Terminal based on the regulations that existed when the Development Agreement was executed subject only to a narrow exception that permitted the City to apply a new law to the Project on a showing that, based on substantial evidence, not applying that law would pose a risk to the health and safety of the people of Oakland. *OBOT I*, 321 F. Supp 3d at 990-91. *OBOT I* was thus a narrow case, limited primarily to review of an administrative record for sufficiency of evidence. *See OBOT I*, 321 F. Supp 3d at 988 (defining the issue as "whether the record before the City Council when it made this decision [to apply a coal ban to OBOT] contained substantial evidence that the proposed coal operations would pose a substantial health or safety danger").

This case is about the City's termination and OBOT's performance extension rights under the Ground Lease. *OBOT I* neither addressed nor adjudicated those rights. As discussed, the City's performance demands and subsequent contract termination in 2018 caused Plaintiffs' breach claims to accrue. Plaintiffs had every reason to believe that the Initial Milestone Date had been extended under the express provision of Section 16.1 based on the City's prior acts that

hindered and delayed Plaintiffs' performance, and the fact that nothing in the Force Majeure provision of the Lease states that either party can reject a Force Majeure delay notice/claim. The City committed a new act of breach that caused a new injury and gave rise to a new remedy when, in 2018, it terminated the Ground Lease without recognizing OBOT's right to an extension of the Initial Milestone Date based on the City's prior and ongoing conduct.

c. OBOT's Prayer for Relief in the Federal FAC Does Not Change the Result.

In an attempt to overcome this Court's prior ruling, and despite having raised the res judicata effect in its second motion in limine before trial, the City raised a new res judicata argument mid-trial. The City now argues that the Federal FAC includes the Ground Lease in the final sentence of OBOT's prayer for relief, which sought "relief prohibiting the City from asserting that OBOT has breached [the Ground Lease and other contracts] by any failure to perform resulting from the City's own misconduct." (Federal FAC, Prayer ¶ D.) The City attempts to recast the primary right at issue in *OBOT I* as a request to extend OBOT's performance deadlines based on its inclusion of this language in the final sentence of the Federal FAC. But the Federal FAC makes no other mention of the Ground Lease; and it does not discuss or make allegations about the Minimum Project, the Initial Milestone Date, any extension of time or Force Majeure event, or delay in OBOT's ability to perform its Ground Lease obligations. Instead, nearly every paragraph of the Federal FAC is dedicated to allegations regarding the sufficiency of evidence before the City when it banned coal. (*See* Federal FAC ¶¶ 38-121.) In *OBOT I*, OBOT alleged three claims. The first challenged the constitutionality of the City's no-coal ordinance and resolution; the second argued federal preemption; and the third alleged that the City breached the Development Agreement's provisions that froze the then-exiting regulations in place because its determination that coal posed a health and safety threat was not based on substantial evidence. (*See generally id.*; *see also OBOT I*, 321 F. Supp 3d at 988.) None of those claims involve delay, let alone delay related to the Minimum Project or the Initial Milestone Date, and none are at issue in this case.

The City contends that OBOT's inclusion of "Ground Lease" in the prayer—although limited to a single sentence, never litigated, and divorced from the causes of action actually pleaded—is sufficient for res judicata. But a remedy, particularly like the one pleaded here, is not a cause of action under the primary rights approach. *Torrey Pines Bank v. Superior Court*, 216 Cal. App. 3d 813, 824 (1999) ("It is the title, right or obligation sought to be established or enforced, not the remedy or relief sought, which determines the nature and substance of the cause of action.").

Further, OBOT's requested remedy was likely unripe and without merit. The requested relief involved only a hypothetical scenario where the City could allege a hypothetical breach of one of three contracts (the LDDA, the Development Agreement, and the Ground Lease) based on the City's own misconduct. The federal court had not yet concluded that the resolution applying the no-coal ordinance to OBOT was invalid; nor does the sentence the City relies on even mention the ordinance. At most, OBOT was asking the federal court for an advisory opinion on a potential, future controversy. *See Stonehouse Homes LLC v. City of Sierra Madre*, 167 Cal. App. 4th 531, 542 (2008) ("Courts may not render advisory opinions on disputes which the parties anticipate might arise but which do not presently exist." (citing *Teachers' Ret. Bd. v. Genest*, 154 Cal. App. 4th 1012, 1043-44 (2007))). Unripe claims in an earlier action do not preclude claims in a later action. *Cf. Ass'n of Irritated Residents v. Dep't of Conserv.*, 11 Cal. App. 5th 1202, 1219-20 (2017); *see, e.g.*, *Boeken v. Philip Morris USA, Inc.*, 48 Cal. 4th 788, 799-802 (2010) (analyzing, in part, the res judicata effect of an earlier case based on the actual availability of the remedy sought).

d. The Effect of *OBOT I*

Although *OBOT I* does not require res judicata effect as to any of OBOT's, OGRE's, and CCIG's respective claims and defenses, it did resolve certain issues that inform this statement of decision.

First, the health and safety of coal and petcoke are not at issue here. The parties acknowledge that *OBOT I* determined that the City's initial health and safety findings were not

supported by substantial evidence, and that the City has not conducted additional hearings on the health and safety of coal or petcoke since *OBOT I*. (RT 1809:16-1810:12.)

Second, *OBOT I* determined that the City breached the Development Agreement by passing the resolution applying its no-coal ordinance to OBOT. *OBOT I*, 321 F. Supp. 3d at 1010 ("The resolution applying the coal ordinance to the OBOT facility is invalid, because it is a breach of the development agreement."). As to that breach, this Court will determine only if it also qualifies as an event of Force Majeure under Section 16.1 of the Ground Lease that entitles OBOT to extensions of the Initial Milestone Date.

Third, to the extent the Ground Lease and Development Agreement remain in effect (which the Court addresses below), OBOT has a contractual right to handle any bulk commodities at the Terminal, including coal. *See OBOT I*, 321 F. Supp. 3d at 988-89; *see also Oakland Bulk & Oversized Terminal, LLC v. City of Oakland*, No. 16-cv-07014-VC, 2017 WL 11528287, at *1 (N.D. Cal. June 6, 2017) ("If the City wanted to restrict the developer to an approved list of commodities – or to foreclose the handling of a particular commodity such as coal – it should have included language to that effect in the Development Agreement."). The City also remains under an injunction that prohibits it from applying the no-coal Ordinance to OBOT. *OBOT I*, 321 F. Supp. 3d at 1010 ("The City is . . . enjoined from relying on the [health and safety] resolution either to apply the [no-coal] ordinance to OBOT or to restrict future coal operations at the facility.").

2. Force Majeure

a. The Delay Due to Force Majeure Provision

The parties bargained for and agreed to a straightforward, unambiguous, and unique provision that provides for reasonable extensions of time to perform when "acts of the other party" delay, hinder, or affect a party's ability to perform its obligations under the Ground Lease. Section 16.1 of the Ground Lease is entitled "Delay Due to Force Majeure," and states in full:

> For all purposes of this Lease, a Party whose performance of its obligations hereunder is hindered or affected by events of Force Majeure shall not be considered in breach of or in default in its obligations hereunder to the extent of any delay resulting from Force

1 Majeure, provided, however, that the provisions of this Section 16.1 shall not apply to Tenant's obligation to pay Rent, including Additional Rent. A Party seeking an extension of time pursuant to the provisions of this Section 16.1 shall give notice to the other Party describing with reasonable particularity (to the extent known) the facts and circumstances constituting Force Majeure within (a) a reasonable time (but not more than thirty (30) days unless the other Party's rights are not prejudiced by such delinquent notice) after the date that the claiming party has actual knowledge of the scope and magnitude of the applicable Force Majeure event or (b) promptly after the other Party's demand for performance.

8 (GL § 16.1 (Ex. 68, pp. 84-85).)

9 Section 16.1 gives each party a right to an extension of time to perform its obligation under the Ground Lease when an event of Force Majeure hinders or affects its ability to perform those obligations. It also provides a notice procedure to obtain an extension of time. It provides no procedure for rejecting a Force Majeure claim. If an event of Force Majeure occurs, the impacted party gives notice and its time to perform is automatically extended.

14 Article 40 of the Ground Lease defines "Force Majeure" as:

15 events which result in delays in a Party's performance of its obligations hereunder due to causes beyond such Party's control, including, but not restricted to, acts of God or of the public enemy, acts of the government, acts of the other Party, fires, floods, earthquakes, tidal waves, terrorist acts, strikes, freight embargoes, delays of subcontractors and unusually severe weather and, in the case of Tenant, any delay resulting from a defect in Landlord's title to the Premises other than a Permitted Exception. Force Majeure does not include failure to obtain financing or have adequate funds. The delay caused by Force Majeure includes not only the period of time during which performance of an act is hindered, but also such additional time thereafter as may reasonably be required to complete performance of the hindered act.

23 (Ex. 68, p. 132.)

24 **b. The City's Common Law Arguments**

25 The City argues that, irrespective of the express terms of the provision in question, California common law reads three requirements into every contractual force majeure provision: (1) the event must be unforeseeable at the time of contract; (2) the party advancing the event as force majeure must demonstrate that it performed with skill, diligence, and good faith; and (3) the

event must make performance either impossible or unreasonably expensive. The City is correct that California courts have imposed these or similar requirements on some parties seeking to enforce force majeure provisions in contracts *based on the language in those contracts and the specific circumstances at issue*. *See, e.g.*, *W. Pueblo Partners, LLC v. Stone Brewing Co., LLC*, 90 Cal. App. 5th 1179, 1187 (2023) ("We begin our analysis with the language of the force majeure provision itself."). Like those courts, this Court begins with the language of the contract. *See* Cal. Civ. Code § 1638; *Watson Labs., Inc. v. Rhone-Poulenc Rorer, Inc.*, 178 F. Supp. 2d 1099, 1110 (C.D. Cal. 2001) (express terms of a contractual force majeure provision can supersede common law).

The Ground Lease Force Majeure provision and definition (GL § 16.1 and Art. 40 (Ex. 68, p. 132), respectively) are highly unique. They make clear – unlike any case cited by the City – that an event of Force Majeure includes "acts of the other Party" that cause delay in performance. (*Id.*) It is axiomatic that a party cannot benefit from its own breach. *Unruh v. Smith*, 123 Cal. App. 2d 431, 437 (Cal. App. 1954). Reading the City's proposed requirements would not only contradict the unique and bargained for contractual language but would result in an injustice – it would allow the City's delays and own failure to perform to result in Plaintiffs' breach, and that result is untenable.

(1) Foreseeability

The City argues that the language "due to causes beyond such Party's control" in Section 16.1 is universally interpreted by courts to mean that the event must be unforeseeable at the time of contract. (City Reply at 4:9-5:15.) The City cites multiple cases for that principle but only two actually interpret force majeure provisions: *Free Range Content, Inc. v. Google Inc.*, No. 14-cv-02329-BLF, 2016 WL 2902332 (N.D. Cal. May 13, 2016) and *Watson Labs., Inc.*, 178 F. Supp. 2d at 1099. Both federal cases, which are not binding on this Court, consider boilerplate force majeure provisions. *See Free Range Content, Inc.*, 2016 WL 2902332, at *2; *Watson Labs., Inc.*, 178 F. Supp. 2d at 1113. They also acknowledge that a foreseeable event can be an act of force majeure when the parties contract for it. *Free Range Content, Inc.*, 2016 WL 2902332, at *6; *see also E. Air Lines, Inc. v. McDonnell Douglas Corp.*, 532 F.2d 957, 992 (5th Cir. 1976) ("[W]hen

the promisor has anticipated a particular event by specifically providing for it in a contract, [they] should be relieved of liability for the occurrence of [that] event regardless of whether it was foreseeable.").

Here, the Ground Lease's definition of "Force Majeure" is also unique. Although it includes the usual parade of unpredictable horribles (*e.g.*, "fires, floods, earthquakes, tidal waves, terrorist attacks"), it also includes "acts of the government" (*e.g*., the City as regulator) and "acts of the other Party" (*i.e.*, the City as Landlord under the Ground Lease). (Ex. 68, p. 132.) Section 16.1 then limits those acts that qualify as events of Force Majeure to those that hinder, affect, or delay a party's ability to perform its obligations under the Ground Lease. (Ex. 68, p. 84.) The provision further limits the remedy for a Force Majeure event (an extension of time to perform) "to the extent of any delay resulting from Force Majeure" (*id.*) plus "such additional time thereafter as may reasonably be required to complete performance of the hindered act" (Ex. 68, p. 132).

Taken together, Section 16.1 and Article 40 create a unique Force Majeure framework not present in boilerplate force majeure provisions. Under that framework, acts of the other party that hinder or affect a party's ability to perform a Ground Lease obligation insulate that party from breach claims, but only to the extent of the delay, and they entitle that party to an extension of time to perform equal to the delay plus reasonable additional time. The specificity of the provision overcomes any presumption that an event must be unforeseeable at the time of contracting to qualify as a Force Majeure event.

The Court also interprets Section 16.1 and Article 40 based on the whole of the Ground Lease and its other clauses. Cal. Civ. Code § 1641. It also interprets those provisions against the backdrop of the Development Agreement. *Id.* § 1642 ("Several contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together."). Both contracts include multiple provisions that require cooperation and good faith to ensure that the developer can meet contractual deadlines. (GL §§ 5.2.2.2, 6.2.1, 6.3.1; DA §§ 8.4, 14.8, 14.10.)

The Court thus declines to read the City's requested foreseeability requirement into the Ground Lease's Delay Due to Force Majeure provision.

(2) Skill, Diligence, and Good Faith

The City also argues that the language "due to causes beyond such Party's control" is interpreted to require a showing that the party acted with skill, diligence, and good faith. In the context of this case, the Court disagrees for the same reasons discussed above. The parties agreed to a unique Force Majeure provision that must be given effect.[12]

The City relies on several cases, but none read a "skill, diligence, and good faith" requirement into a force majeure provision like the one in the Ground Lease—*i.e.*, a narrow clause that provides only for an extension of time to perform proportionate to the delay caused by the other party. *Oosten v. Hay Haulers Dairy Emps. & Helpers Union*, 45 Cal. 2d 784 (1955) is not a force majeure case at all. It is a contract dispute between a dairy farmer and a creamery regarding the creamery's failure to purchase milk, and a narrow contract provision that protected the parties from liability if a labor dispute made performance "impossible." *Id.* at 786. The court evaluated the creamery's contract defense as an impossibility defense because that was the contract's language. *Id.* at 788-89. The language regarding skill and diligence that the City relies on is dictum from a treatise—not part of the Court's interpretation of the contract at issue, let alone of a clause like Section 16.1 of the Ground Lease. *Id.* at 789.

Butler v. Nepple, 54 Cal. 2d 589 (1960) involves a force majeure defense by a lessee in an action by the lessor to recover rent due under an oil and gas lease. *Id.* at 592, 593. The court noted the force majeure defense but made clear that its affirmance of the lower court judgment was made on other grounds. *Id.* at 593-94. The section that the City cites is silent on "skill, diligence, and good faith." *See id.* at 599.

[12] In fact, the parties negotiated many force majeure provisions—each with different language and different effect. (*See, e.g.*, Ex. 3, p. 53 (Cost Sharing Agreement); Ex. 7, p. 35 (Development Agreement); Ex. 68, p. 84 (Ground Lease § 16.1 Force Majeure provision); Ex. 68, p. 132 (Ground Lease definition of "Force Majeure"); Ex. 378, p. 61 (Lease Disposition and Development Agreement).)

Horsemen's Benevolent & Protective Ass'n v. Valley Racing Ass'n, 4 Cal. App. 4th 1538 (1992) involves a party seeking a complete excuse from performance. *Id.* at 1564. The remedy for force majeure in the contract at issue in that case was contract termination. *Id.* Here, the remedy is an extension of time to perform measured by the delay caused by the other party plus additional reasonable.

Requiring OBOT to demonstrate diligence also makes little sense because each of OBOT's Force Majeure claims is tied to a specific contract obligation of the City, not OBOT. For instance, it is the City (not OBOT) that is prevented under the Development Agreement from applying new regulations to the Terminal (Ex. 7 § 3.4.1); and the City (not OBOT) has a duty to use commercially reasonable efforts to enter the Rail Access Agreement with the Port (Ex. 68 § 5.2.3). The contracts set forth the parties' duties and thus which party must demonstrate diligence.

The Court thus declines to apply the common law requirement, to the extent one exists, on skill, diligence, and good faith to the Ground Lease's Delay Due to Force Majeure provision.[13] Even if the Court were to impose a skill, diligence, and good faith requirement, Plaintiffs presented sufficient evidence at trial to satisfy the standard.

On a general level, the skill and qualification of OBOT, OGRE, and their principals, Mr. Tagami and Mr. McClure are uncontested. Mr. Tagami has a long track record of holding prominent positions in the Oakland, most relevantly as a former commissioner and president of the Port of Oakland (where he oversaw the entitlement, financing, design, and development of Terminal 2 at the Oakland International Airport), as well as being responsible for the successful development of some of the City's most notable construction projects, including the Rotunda Building and the Fox Theater. (RT 131:14-132:8, 133:17-134:12, 134:21-135:5, 137:2-7, 138:11-

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[13] The City also appears to overstate the law. Based on the City's cited cases, there is no rule that in order to demonstrate an event was beyond a party's control, that party must first demonstrate that it acted with skill, diligence, or good faith. The test appears analytical, asking whether the event of force majeure could "have been prevented by the exercise of prudence, diligence and care." *Pac. Vegetable Oil Corp. v. C.S.T., Ltd.*, 29 Cal. 2d 228, 238 (1946); *accord Horsemen's Benevolent & Protective Ass'n*, 4 Cal. App. 4th at 1564 ("[T]he test is whether under the particular circumstances there was such an insuperable interference occurring without the parties' intervention as could not have been prevented by prudence, diligence and care.").

18.) Mayor Schaaf testified that she believed Messrs. Tagami and McClure were uniquely qualified to complete the complex Terminal project, and she had seen Mr. Tagami "take on very difficult and complicated development projects and succeed." (RT 1788:21-1789:10.) Their diligence as to the specific events in this litigation are addressed where relevant below.

(3) Impossibility and Unreasonable Expense

Section 16.1 expressly grants OBOT an extension time for OBOT to meet contract deadlines for acts of the City that delay, hinder, or affect OBOT's performance toward such deadlines. Nothing in the contract expressly or impliedly limits OBOT's extension rights under this provision to *events that make performance impossible or unreasonably expensive*. (Ex. 68, p. 84.) The City's arguments to the contrary attempt to ascribe to the provision an interpretation to which it is not reasonably susceptible in violation of basic contract interpretation tenets. *See* Cal. Civ. Code §§ 1638, 1639, 1641; *Wolf v. Super. Court (Walt Disney Pictures and Television)*, 114 Cal. App. 4th 1343, 1351 (2004), *as modified on denial of reh'g* (Feb. 19, 2004).

The provision appears to presume that performance *will be possible*, providing only for an extension of time to perform after a Force Majeure event, not a full excuse of performance. Section 16.1 provides in relevant part that "[f]or all purposes of this Lease, a Party whose performance of its obligations hereunder *is hindered or affected* by events of Force Majeure shall not be considered in breach of or in default in its obligations hereunder *to the extent of any delay* resulting from Force Majeure[.]" (*Id*. (emphasis added).) The provision does not excuse performance based on impossibility or unreasonable expense; instead it caps the benefit (an extension of time to perform) to the party claiming Force Majeure "to the extent of any [resulting] delay." (*Id.*) An extension of time to accomplish an impossible performance milestone would be unnecessary and meaningless. The Force Majeure provision of the Ground Lease, by seeking to extend deadlines as opposed to excuse performance, does not require Plaintiffs to demonstrate impossibility or unreasonable expense.

The City points to two recent cases decided on unique facts during the COVID-19 pandemic: *SVAP III Poway Crossings, LLC v. Fitness Int'l, LLC*, 87 Cal. App. 5th 882 (2023) and *West Pueblo Partners, LLC v. Stone Brewing Co., LLC*, 90 Cal. App. 5th 1179 (2023). Both

cases address whether a force majeure event (the pandemic) excused a tenant's duty to timely pay rent where the lessor had fulfilled its contractual duties and the tenant had the ability to pay. *See W. Pueblo Partners, LLC*, 90 Cal. App. 5th at 1188; *SVAP III Poway Crossings, LLC*, 87 Cal. App. 5th at 892-93. Payment of rent is a unique, straightforward issue, and the Ground Lease's Force Majeure provision expressly does not apply to rent.

Both cases also appear to stand for the principle that courts require a showing of causation, not that a force majeure event rendered performance altogether impossible or unreasonably expensive. While both courts use language of impossibility from common law, their analysis sounds in causation. In *SVAP III*, the force majeure provision provided that "[i]f either party is delayed or hindered in or prevented from the performance of any act" by a force majeure event, performance would be excused for the duration of that event. *Id.* at 892. The court then performed a simple analysis: did government gym closure laws during the pandemic actually delay, hinder, or prevent the defendant from performing? *See id.* at 892-93.[14] *West Pueblo*—which also analyzed a force majeure provision that accounted for "delays"—conducted a similar analysis. *See W. Pueblo Partners, LLC*, 90 Cal. App. 5th at 1188 ("The plain meaning of the *force majeure* provision does not support an interpretation that ties a party's obligation to pay rent to its profitability or revenue stream instead of a delay or interruption *caused by the force majeure event itself.*" (emphasis added)). Plaintiffs do not contest that they need to demonstrate that each Force Majeure event actually hindered or delayed performance. This Court agrees. Plaintiffs must demonstrate that each alleged Force Majeure event caused delay of OBOT's ability to meet the Initial Milestone Date. They are not required to demonstrate that it was impossible or unreasonable expensive to meet the Initial Milestone Date.

But even if the Court were to accept the City's argument that impossibility or unreasonable expense should be written into the Force Majeure provisions, Plaintiffs presented sufficient evidence to support the conclusion that the City's actions rendered full performance

[14] The Court also notes that *SVAP III* separately evaluated a force majeure defense and impossibility and impracticability defenses, and the portions of the case that the City relies on are part of that court's analysis of impossibility and impracticability, not force majeure. *See SVAP III Poway Crossings, LLC*, 87 Cal. App. 5th at 892-94.

"impossible" and "unreasonably expensive." In particular, the City failed to turn over the Rail Right of Way and permanent easements prior to August 14, 2018 (RT 4030:21-4031:1, 1529:24-1530:6), which precluded construction of the rail lines. Ms. Cappio agreed, testifying that without a RAA, private development at the Project may become infeasible. (2095:12-16.) The Oakland City Council came to the same conclusion when it passed Ordinance 85325. (Ex. 18, p. 2.) As Mr. McClure testified, rail improvements would never be constructed in the absence of an easement or other use agreement that ensured the tracks could be used over the 66-year lease term. (RT 1700:1-17, 3398:12-3399:19, 1657:10-13, 1674:20-1675:5, 2759:24-2760:8, 2760:15-2761:13, 2765:5-8, 3441:24-3442:8, 3600:1-6, 3600:23-3601:3, 3602:16-3603:6 (establishing all easements had an expiration date, none specifically granted OGRE access, and none established a right to construct and operate rail over the 66-year term of the Ground Lease).)

In addition, portions of the public infrastructure work had to be completed and resurveyed before the rail could be installed. (RT 1700:18-22, 1708:14-1709:14, 3654:10-3655:15; Ex. 477; Ex. 478.) Ms. Lake agreed, testifying that rail improvements could not be constructed if the rail corridors were not turned over. (RT 4029:20-4030:6.) The evidence was undisputed that the rail corridors had not been turned over to OGRE by September. 21, 2018, the date of the City' notice of unmatured event of default. (RT 4030:21-4031:1; Ex. 217.) Moreover, the City did not accept the public improvements until Summer 2019, well after August 14, 2018. (RT 4018:14-4019:6, 4026:9-22, 4039:18-23.) And, without rail, it would be "impossible" to operate the bulk commodity Terminal because bulk commodities are transported by rail. (RT 1651:19-1652:5.) The rail-to-ship Terminal would become "infeasible" without a fully functioning rail network that was necessary for operations. (RT 214:13-215:11, 217:22-218:11, 1437:22, 1651:2-18.)

Substantial evidence also demonstrated that finalizing the design of the Terminal depended in part on identifying the commodities that would be acceptable to the City. (RT 2275:7-10.) Without certainty as to what commodities would be handled at the Terminal, the design for the purpose-built facility could not be completed. (RT 2336:10-17; Ex. 598.) And, as Ms. Cappio testified, the City never identified the commodities that could or could not be handled. (RT 2082:19-22, 2272:10-14, 2550:3-12, 2556:3-12.) In short, to achieve its policy of a

coal-free Oakland, the City made it very clear to Plaintiffs that it was not possible for them to build a Terminal through which coal could be shipped. And the City admitted the Terminal was delayed due to these "local policy decisions." (Ex. 453.)

C. Summary of Relevant Law and Elements of Proof

The essential elements of a breach of contract cause of action are (1) the existence of the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to the plaintiff. *Oasis W. Realty, LLC v. Goldman*, 51 Cal. 4th 811, 821 (2011). The first element is not in dispute. The parties agree that they entered the Ground Lease and that it was in effect until at least November 22, 2018.

The fourth element (damages) is also not in dispute. It is uncontested that the City's termination of the Ground Lease denies Plaintiffs the benefits of that contract—an agreement with a potential 66-year term that would have benefitted all parties and the people of Oakland. (GL § 1.2.) Damages are also not at issue during this phase. If Plaintiffs demonstrate that the City breached the Ground Lease, the available remedy—whether damages, specific performance, or both—and the scope of that remedy will be determined in the second phase.

The second element (OBOT's performance or excuse for nonperformance) and the third element (the City's breach) are at issue, but under the unique circumstances of this case, the two elements are effectively merged into a single element. The City has stipulated that (1) it terminated the Ground Lease based on OBOT's failure to Commence Construction by the Initial Milestone Date; and (2) if OBOT had not breached the contract on that date, then the City's termination is a breach. (RT 60:3-9, 180:15-23.) OBOT argues that it did not breach the Ground Lease because its time to perform (the Initial Milestone Date) was extended by events of Force Majeure or otherwise excused. If OBOT is correct, the City breached the Ground Lease. Plaintiffs can also prevail by demonstrating that OBOT did Commence Construction by August 14, 2018. At trial, Plaintiffs presented sufficient evidence to establish both grounds to demonstrate that the City's termination was improper and constituted a breach of the lease.

D. The City's Termination Breached the Ground Lease Because OBOT Was Not Required to Commence Construction by August 14, 2018.

1. Summary of the Minimum Project, the Initial Milestone Date, and Contractual Force Majeure Requirements

Both sides' breach claims center on the Minimum Project and the Initial Milestone Date. Section 6.1 of the Ground Lease defines the Minimum Project as the Bulk and Oversized Terminal and five Minimum Project Rail Improvements:

> (i) The portion of the WGW Lead Track No. 1 to be constructed within the BNSF Rail Easement and transferred to BNSF pursuant to the BNSF Rail Easement (the "BNSF Rail Improvements");
>
> (ii) The portion of the WGW Lead Track No. 2 that is located within the Port Rail Easement (the "East of Wake Rail Improvements");
>
> (iii) The portion of WGW Lead Track No. 2 to be constructed on the Port property located east of the Railroad R/O/W Property and north of the Port Rail Terminal and commonly referred to as the "Outer Claw" property;
>
> (iv) If the Port and/or the City enters into an Industrial Track Agreement with BNSF which permits the nonexclusive use of the BNSF Rail Improvements to provide rail service into the Port Rail Terminal and to the West Gateway, MH-1 Lease Area and the New Central Gateway Lease Area which is reasonably satisfactory to the City and Tenant, the portion of WGW Lead Track No. 1 to be constructed on the Port property located east of the Railroad R/O/W Property and north of the Port Rail Terminal and commonly referred to as the "Outer Claw" property; and
>
> (v) The rail Improvements designated as Industry Drill Track No. 1.

(GL § 6.1.)

Section 6.1.1 requires OBOT to have Commenced Construction by the Initial Milestone Date but expressly makes "all dates and time periods" in Section 6.1.1 expressly subject to extension for Delay Due to Force Majeure. (GL § 6.1.1.) The Initial Milestone Date is defined in the Ground Lease as the date by which OBOT was to have "Commenced Construction of the Bulk and Oversized Terminal and at least one of the components of the Minimum Project Rail Improvements listed in Section 6.1(b) above prior to the date that is 180 days after the Commencement Date[.]" (GL § 6.1.1.1.) The City contends that the Initial Milestone Date was August 14, 2018.

Plaintiffs' primary argument is that the Initial Milestone Date was extended by City acts that constitute events of Force Majeure under Section 16.1 and Article 40 of the Ground Lease. In addition to the language in those provisions quoted above, Section 16.1 includes a notice requirement. The party whose performance was delayed or hindered by a Force Majeure event must "give notice to the other Party describing with reasonable particularity (to the extent known) the facts and circumstances constituting Force Majeure[.]" (GL § 16.1.) The notice must also be timely. To meet the timeliness requirement, a party must give notice within "(a) a reasonable time (but not more than thirty (30) days unless the other Party's rights are not prejudiced by such delinquent notice) after the date that the claiming party has actual knowledge of the scope and magnitude of the applicable Force Majeure event or (b) promptly after the other Party's demand for performance." (*Id*.)

Section 16.1 and Article 40 do not include any process to reject a Force Majeure claim; they do not state that claims are subject to the other party's approval; nor do they provide any exception to a Force Majeure claim. (*See* GL § 16.1, Art. 40.) Based on the plain language of the contract (Cal. Civ. Code § 1638), if a Force Majeure event delays or hinders a party's performance, and that party gives the notice Section 16.1 requires, the extension is automatic and not subject to the other party's approval or rejection. Put another way, upon proper notice, the claimant (here, OBOT) has every reason to believe that their deadlines have been extended.

In sum, the City's termination was improper and a breach of the Ground Lease if the evidence demonstrates (1) an act of government (the City as regulator) or an act of the other party (the City as Landlord), (2) hindered or delayed OBOT's ability to meet the Initial Milestone Date, and (3) was identified by Plaintiffs in a proper and timely notice of Force Majeure delay to the City. Once those elements are established, the extension is automatic.

Plaintiffs' Force Majeure notices and claims are summarized above in Section III.N. The Court addresses each below.

2. The City's Failure to Confirm the Regulations Applicable to the Terminal.

Plaintiffs contend that the City failed to deliver a binder of regulations that applied to the Project, and that its failure breached the Development Agreement and constitutes an act of the City that delayed or hindered OBOT's performance. The Court agrees.

The binder that the City owed OBOT was no ordinary binder. It was the City's assurance that OBOT could move forward and that its work would not need to be undone or deemed unlawful based on a regulation that did not exist when the Development Agreement established the Project's regulatory framework. *See OBOT I*, 321 F. Supp. 3d at 992. The Development Agreement froze in place the regulations that existed when the contract was entered so that OBOT would have certainty on the law that applied to the Project during its entire duration. (DA § 3.41.) It also required the City to compile two binders of all Existing City Regulations, sign both copies, and deliver one to OBOT within 90 days—effectively certifying the regulations that would be in effect over the course of the Project. (DA § 3.43.)

The Development Agreement was executed on July 13, 2013 (Ex. 7), making the regulations due on October 11, 2013. The City does not dispute that it did not timely provide the required, signed binder to OBOT. (RT 2171:6-14, 2277:21-24, 2283:19-23.) For their part, Plaintiffs were diligent. Megan Morodomi was actively involved with the Project on the OBOT side, oversaw construction, and worked hand-in-hand with the City's project manager, Douglas Cole. (RT 1887:18-1888:15, 1889:8-16, 1889:21-1890:9.) Mr. Tagami and Ms. Morodomi testified that Plaintiffs requested the regulations from the City on numerous occasions, then collected the regulations they believed applied, and provided those to the City for review. (RT 325:11-17, 437:11-25, 1185:19-25, 1202:5-8, 1896:10-1897:24; *see also* Ex. 75.) The City later delivered a different, digital version of the regulations on June 15, 2016—more than 2.5 years after the deadline and four months after the City signed Lease. (Ex. 84; RT 325:18-25, 395:16-25, 463:16-23, 1897:10-1898:4, 2294:8-13; *see also* Ex. 65.) The City's version also failed to comply with the Development Agreement. The regulations were not provided in hard copy or signed (RT 695:7-13), and the City included post-DA regulations that were not applicable to the Project (RT

325:18-326:11, 1897:20-24). The City never addressed these issues and never certified a set of regulations that complied with Section 3.4.3. (RT 397:5-13, 1900:19-1901:11.)

a. The City's Acts Delayed and Hindered Plaintiffs' Performance.

The City's conduct delayed and hindered development of the Terminal. The purpose of freezing the then-existing regulations in place was to ensure that a later change in law would not disrupt the development; and that OBOT would not design, then build something later deemed unlawful. That's why identifying and understanding the applicable regulations is "one of the first exercises of any kind of project." (RT 326:21-25.) As Mr. Tagami explained to the City on March 7, 2016: "[w]e do not want our design team, consultants proceeding with design work, nor our prospective tenants making operational and timing representations that are not consistent with the rules[.]" (Ex. 75, p. 1.) Without knowing the rules that applied to the Terminal, OBOT "could only take the design development of the project so far into the basis of design, then [it] needed to stop until [it] understood what those rules were." (RT 327:16-23; *see also* RT 327:4-5; 329:7-20, 397:1-13, 560:6-21.)

Mr. McClure testified that the City's identification of the regulations that applied to the Terminal became even more important after the City unilaterally introduced new procedures that did not exist when the Development Agreement was executed, including through the Cappio Memo and at the kickoff meeting when the City announced that it was considering additional discretionary approvals on a commodity-by-commodity basis. (*See* RT 2678:12-2679:1, 2679:15-25.) Ms. Cappio admitted that Plaintiffs' accurate knowledge of the regulations was an important step to preparing detailed construction drawings. (RT 2293:15-20.) Yet, the City delayed providing that knowledge for more than 2.5 years, stifling OBOT's ability to prepare a more detailed Basis of Design, which is a necessary prerequisite to advancing the Minimum Project. Ms. Cappio also admitted that even after OBOT provided notice that it considered the City's failure to be an act of Force Majeure delay, the City elected to not substantively follow up with OBOT on its claim. (RT 2562:22-2564:4.)

b. Plaintiffs Provided Proper and Timely Notice of the Claim.

Plaintiffs provided notice of their Force Majeure claim on March 11, 2016 (Ex. 76), April 10, 2018 (Ex. 148), July 30, 2018 (Ex. 174), August 3, 2018 (Ex. 176), October 19, 2018 (Ex. 248), and September 27, 2019 (Ex. 856). These notices described the Force Majeure claim regarding Section 3.4.3 with reasonable particularity. "Reasonable particularity" is a flexible concept that depends on what is being described; but it generally means a reasonable description under the circumstances that allows the other side to ascertain the claim. *See, e.g.*, *People v. Robinson*, 47 Cal. 4th 1104, 1133 (2010) (in the criminal procedure and search and seizure context); *Advanced Modular Sputtering, Inc. v. Super. Ct.*, 132 Cal. App. 4th 826, 835-36 (2005) (in the trade secret context). Here, Plaintiffs' Force Majeure letters are detailed. OBOT's March 11, 2016, letter, for instance, expressly states that its purpose is to provide notice of Force Majeure delay, identifies the City's contractual obligations, details the City's conduct, states the automatic extension that OBOT believed it was contractually entitled to, and requests the City's performance. (Ex. 76; *see also* Ex. 148, p. 2; Ex. 174; Ex. 248, p. 23.)

The notices were also timely. OBOT provided notice before the City's September 21, 2018 notice to cure (Ex. 217), in fact, multiple times (Ex. 148; Ex. 174; Ex. 176). The City purported to reject the original claim twice, once in 2016 (Ex. 81), and again in its notice to cure (Ex. 217). But between those purported rejections, the City "acknowledge[d] receipt of OBOT's claims for Force Majeure in its request, through letter dated March 11, 2016 … to toll the Initial Milestone Date" but "elect[ed] to continue a deferral of its substantive response[.]" (Ex. 185, p. 2 (August 20, 2018, letter from Sabrina Landreth to Phil Tagami); *see also* Ex. 492, p. 2 (August 20, 2018, letter from Bijal Patel to Skyler Sanders stating the same); RT 3959:8-18 (Elizabeth Lake's testimony that the City deferred response).)

The City demanded performance with respect to the Minimum Project in its September 21, 2018, notice to cure. (Ex. 217.) OBOT then again provided notice of its Force Majeure claim on October 19, 2018 (Ex. 248), fewer than thirty days after the performance demand, which the Court finds was prompt.

Plaintiffs have shown that they satisfied the requirements of Section 16.1. The City's failure to confirm the regulations applicable to the Project for more than 2.5 years was a Force Majeure event that delayed development of the Terminal and, upon notice, entitled OBOT an automatic extension of the Initial Milestone Date. The City has not demonstrated that its conduct did not delay or hinder development of the Terminal.

3. The City's Failure to Review the Basis of Design.

Plaintiffs argue that the City's failure to review and substantively comment on the Basis of Design was a Force Majeure event that breached the Ground Lease and extended the Initial Milestone Date. The Court agrees.

The Ground Lease provides a process for the approval of Construction Documents, which is defined to include Schematic Drawings, Preliminary Construction Documents, and Final Constructions Documents. (GL § 6.2.1.) Once Construction Documents are submitted, the City has thirty days to approve or disapprove them. (*Id.*) If the City finds that Construction Documents are incomplete, it has only 21 days to inform the developer. (*Id.*)

In July 2015, TLS and Plaintiffs submitted to the City the Basis of Design. (Ex. 750.) The BOD was a large volume of information approximately 1,500 pages in length (RT 2222:19-2223:2, 2279:17-20), and constitutes a Schematic Drawing and thus a Construction Document under Section 6.2.1 (*see* RT 2292:22-2293:7, 2463:2-4, 2552:23-2553:2). It is undisputed that the City did not provide an approval, a denial, or a notice of incomplete documents as the Ground Lease requires. (RT 2240:16-2241:16.)

The City also never substantively responded to the BOD or provided any feedback or comments on the document. (RT 1604:6-17.) And although Ms. Cappio testified that the BOD was incomplete or needed work, she admitted that she never communicated her criticism to the OBOT. (*E.g.*, RT 2241:9-16.) Ms. Cappio also testified that the City wanted OBOT to move forward with the Terminal design (RT 2488:24-2489:6) but the City presented no evidence to support that claim. If, in fact, the City wanted OBOT to move forward with the Terminal design, the City could and should have identified deficiencies and provided comments to OBOT's initial

design in order to advance the Project. But the City presented no evidence that it provided those comments.

To the contrary, Ms. Cappio testified that specific sections of the BOD were insufficient but admitted that she never asked OBOT for more specificity. These sections include, for example, the sections on rail car dumpers (RT 2340:19-2341:2); conveyors (RT 2341:6-2342:4); identified commodities (RT 2343:22-2344:9); the containerized bulk handling process (RT 2344:10-2345:1); equipment containers (RT 2345:2-11); materials (RT 2345:16-23); surfacing (RT 2554:5-13); soils (RT 2554:14-25); safety and access (RT 2555:1-11); and storage containers (RT 2555:12-21). The City asked OBOT about just one topic—covered rail cars—and the Developers provided the requested information, then received no further feedback. (RT 2345:24-2346:19; *see also* RT 2046:20-25.) Ms. Cappio claimed there was further information that she wanted while working on the Project but admitted that she never identified it for OBOT. (RT 2241:9-16.)

There is also evidence that the City's review of the BOD was inadequate. Ms. Cappio spent one hour reviewing the 1,500-page document before purportedly determining that it was insufficiently detailed. (RT 2338:19-2339:3.) And at the time, the City admitted that it did not have any staff with experience related to bulk commodity and oversized rail-to-ship terminals (RT 2350:23-2351:3); nor did the City hire an outside consultant to review the BOD for purposes of meeting its Ground Lease obligations even though the City knew that OBOT would have paid for the review (RT 2279:3-6, 2561:14-2562:4). Although the City's consultant for the health and safety hearings (ESA) leading to the City's no-coal ordinance and resolution reviewed the BOD, it had only two follow-up questions about the document, which the OBOT promptly answered. (RT 2240:16-2241:16.) On these facts, the City did not cooperate with OBOT to move the BOD forward.

a. The City's Acts Delayed and Hindered Plaintiffs' Performance.

The City's failure to provide contractually required feedback on the Basis of Design delayed and hindered Plaintiffs' ability to move the Project forward, including the Minimum Project by the Initial Milestone Date. The express requirements of Section 6.2.1 are only part of

the story. OBOT actually needed the City's feedback in order to move forward, and the City knew that. The BOD was the beginning of a collaborative and iterative process that required back and forth between OBOT and the City to move forward. (RT 2294:14-19.) Although she viewed the BOD as incomplete, Ms. Cappio testified that she understood that the process was iterative (RT 2294:14-19), the submission was preliminary, and further details would be provided in future iterations based on the City's feedback (RT 2552:13-19). Yet, she never provided that feedback.

Mr. Tagami testified that creating the BOD took "significant time, energy, and money" and Plaintiffs' needed the City's review and comment on it to proceed. (RT 583:9-12; *see also* RT 396:7-17, 438:19-439:3, 704:5-10.) OBOT requested that the parties discuss the City's review of the BOD at the March 9, 2016 kickoff meeting and brought copies of the three-volume design to provide to the City at the meeting but that discussion did not occur. (RT 438:14-439:7, 473:6-14, 1891:23-1892:4; 1892:22-25; *see also* Ex. 72.) The City never provided any comment on the BOD, and Plaintiffs were unable to proceed with further refining it and moving toward final construction documents without the City's input. (RT 697:8-21.)

Ms. Morodomi also attended the kickoff meeting with the OBOT team and testified that no one from the City reached out to her to address the BOD between the time of that meeting and the end of 2018. (RT 1893:10-1894:3.)

Ms. Cappio also effectively admitted that the City prevented OBOT from preparing a Basis of Design with greater specificity. Ms. Cappio, Mr. McClure, and other witnesses agreed that the Terminal is a purpose-built facility and that identifying the primary commodity types to be transported through the Terminal was critical to the design process. (*E.g.*, RT 2336:10-17, 1602:21-1603:2, 1604:24-1605:5; Ex. 598; Ex. 854 (Cole Depo. Testimony), pp. 8, 12, 13.) The City's decision to issue permits and approvals on a commodity-by-commodity and discretionary basis, as discussed in detail below in Section VI.D.6, left OBOT without any certainty as to what commodities would be permitted, and, therefore, what equipment would ultimately be required for the Terminal. (RT 1076:6-12.) OBOT presented evidence that it needed direction from the City regarding commodities acceptable to the City to advance Terminal design. (RT 2275:7-10,

2336:10-17; Ex. 598.) But the City never provided that information to OBOT. (RT 1894:22-1895:12, 3178:3-22, 1076:2-5, 2082:19-22, 2272:10-14, 2556:3-12.)

Further, and as discussed above, OBOT's accurate knowledge of the regulations was an important step to preparing detailed construction drawings—a fact Ms. Cappio confirmed. (RT 2293:15-20.)

b. Plaintiffs Provided Proper and Timely Notice of the Claim.

In addition to prior notices to the City, Plaintiffs provided notice of their Force Majeure claim on August 28, 2018 (Ex. 191) and October 19, 2018 (Ex. 248). Both notices describe the Force Majeure claim with reasonable particularity. (*See* Ex. 191, p. 2 (describing OBOT's good faith efforts as to the BOD), 191, p. 3 (identifying the BOD and other delays under the heading "City's Force Majeure Actions" and "articulating the length of the BOD-related delay and other City conduct that precipitated it); Ex. 248, p. 13 (expressly making claims of delay under Section 16.1), Ex. 248, p. 22 (identifying the City's failure to comment on the BOD as a Force Majeure event; explaining that "[t]he core foundation on which any terminal will be constructed and operate is the Basis of Design"; and noting that OBOT still had not received feedback).)

The notices were timely for the same reasons discussed above. They promptly followed performance demands. Plaintiffs' August 28, 2018, Force Majeure letter is dated only eight days after the City's August 20, 2018, letter (Ex. 185), noting passage of the Initial Milestone Date and deferring a substantive response to Plaintiffs' earlier Force Majeure claims. And as noted above, Plaintiffs' October 28, 2018, Force Majeure letter was sent less than thirty days after the City's September 21, 2018, notice to cure (Ex. 217), and only five days after the City's October 23, 2018, notice of default (Ex. 250).

4. The City's Health and Safety Hearings, No-Coal Ordinance, and Resolution Applying the Ordinance to OBOT

It is undisputed that the resolution that applied the no-coal ordinance to OBOT breached the Development Agreement and OBOT's vested right to develop a multicommodity Terminal through which coal could be transported because the City's determination that coal threatened the health and safety of Oaklanders was not supported by substantial evidence. *OBOT I*, 321 F. Supp.

3d at 1010-11. Plaintiffs do not seek to relitigate *OBOT I*. Instead, they ask whether the same conduct that breached the Development Agreement, as determined in *OBOT I*, also constitutes an act of Force Majeure that extended the Initial Milestone Date. It does.

The City devoted significant resources and time to banning coal at the Terminal even though it also entered the Development Agreement prohibiting the application of new City laws to the Terminal. The City's Rules & Regulations Committee met on July 16, 2015 to schedule a public hearing on the health and safety impacts of coal. (Ex. 797.) The City held that hearing on September 21, 2015 (*see* Ex. 54; Ex. 87), and a second hearing on May 9, 2016 (*see* Ex. 87). *See also OBOT I*, 321 F. Supp. 3d at 990 (describing the September 2015 and May 2016 hearings). The City Council held related meetings on June 27, 2016 (Ex. 499), and July 19, 2016 (Ex. 87). At these meetings, the City enacted its no-coal ordinance (Ex. 87), and the resolution that applied the ordinance to the Terminal (Ex. 499), which had a chilling effect on the Terminal. (RT 1075:03-13.)

The City's hearings and related work occurred between Summer 2015 and Summer 2016, not including the lengthy litigation that followed. During that same time period, and as discussed above, OBOT was still pushing the City to identity the regulations that applied to the Project; and OBOT and TLS submitted their first Basis of Design (September 2015) and requested City review that never occurred. Instead, the City focused its resources on coal—both on the public front through hearings and a ban, and internally through the Cappio Memo and related strategies launched during and around the same time as the hearings to delay and hinder development of the Terminal until the City could find a way to ban coal, or short of an enforceable ban, to ensure a coal-free Terminal.

The hearings also consumed OBOT's resources. The City needed OBOT to participate in the process, including by cooperating with the City's consultant, ESA, by providing it with information about the Terminal, its design, and the handling of coal. (RT 2240:16-22, 2241:2-16 Ex. 54; Ex. 57, pp. 1-5 and 10-11.) OBOT cooperated, including by answering follow-up questions from ESA. (*Id.*)

Although OBOT initiated the federal litigation, the City defended the ordinance and resolution even though no substantial evidence supported its position. The lack of substantial evidence is a settled fact. *OBOT I*, 321 F. Supp. 3d at 992. Political decisions delayed and hindered the Terminal. (*See* Ex. 854, p. 7.) Elizabeth Lake admitted that she represented to the State of California that the Project had been "delayed due to litigation related to local policy decisions." (Ex. 453; RT 4004:20-4006:3.) Douglas Cole made similar statements to the State in his role. (Ex. 181, p. 1; *see also* RT 4057:6-25.)

Not including the appeal, the litigation to invalidate the resolution took place from December 7, 2016 when OBOT filed the federal action until May 15, 2018 when the district court issued its findings of fact and conclusions of law, and entered judgment for OBOT. (Ex. 191, p. 5.) As the City has acknowledged, OBOT needed to know the commodities that would be approved for the Terminal before it could complete design. (RT 220:4-18, 292:8-17, 1076:6-12, 1602:21-1603:2, 2336:10-17.) That issue could not be resolved until after *OBOT I*. But even short of the litigation, the City still had not reviewed the BOD (RT 2338:19-2339:3, 2350:23-2351:3, 2279:3-6, 2561:14-2562:4, 2240:16-2241:16), articulated a process for approval of any commodity (RT 1604:24-1605:5), identified any commodity it would approve (RT 1076:02-05), or corrected or rescinded the Cappio Memo (RT 2261:9-15, 3302:15-23), so that OBOT could finalize design, apply for permits, and build the Terminal.

Plaintiffs provided notice of their Force Majeure claim on August 3, 2018 (Ex. 176), August 28, 2018 (Ex. 191), and October 19, 2018 (Ex. 248). These notices described the Force Majeure claim with reasonable particularity. (*See* Ex. 176, p. 1 (identifying the ordinance and resolution as events of Force Majeure); Ex. 191, p. 5 (same; also identifying time period as between June 2016 and May 2018); Ex. 248, pp. 14-20 (providing seven pages of description of the claim).) Notice was also timely for the same reasons discussed above as to the same Force Majeure letters.

5. The City's Failure to Cooperate with OBOT to Secure Third-Party Funding for the Project

Plaintiffs contend that the City's failure to cooperate with OBOT to secure third-party funding for the Project is a Force Majeure event that delayed their performance and extended the Initial Milestone Date. The Court agrees.

The Ground Lease requires the City and OBOT to "cooperate in the identification and pursuit of third-party funds necessary to [c]omplete" certain improvements, including "City Funded Wharf Improvements." (GL § 6.3.1.) The City and OBOT identified and secured approximately $22 million in funding from the Alameda County Transportation Commission (ACTC) to be used towards the wharf improvements, which was in addition to approximately $43 million that CCIG and the City had obtained from ACTC for horizontal infrastructure improvements. (Ex. 191, p. 7.) Although the funds were not contingent on the type of commodity handled by the Terminal, on or around July 13, 2015, City Council Member Rebecca Kaplan introduced a resolution at an ACTC Board meeting to prevent the ACTC Funds from being released for the City Funded Wharf Improvements. (Ex. 191, p. 7.) On July 31, 2015, Mayor Schaaf wrote to ACTC to reiterate that "the potential for the export of coal and related product is an extremely controversial issue for many residents, businesses, organizations, the Mayor and City Council" and advised that her office and City Council would "appropriately address coal export issues." (Ex. 42; RT 1775:2-9.) Former City project manager Douglas Cole confirmed that the City's position with ACTC and the withdrawal of funding was directly related to the City's political opposition to coal. (Ex. 854, pp. 7-10.)

After Ms. Kaplan introduced the resolution to prevent the release of funds, Plaintiffs, through their counsel at the time (Marc Stice) contacted City Attorney Barbara Parker to discuss the City's actions. (Ex. 191, p. 7.) Ms. Parker did not substantively respond. (*Id.*) Instead, Mayor Schaaf and City Council President McElhaney submitted a July 31, 2015, letter to ACTC justifying Ms. Kaplan's actions, and ACTC withdrew the funds. (Ex. 191, p. 7; *see also* Ex. 854, p. 18.) Not only did the City not fully cooperate to obtain the ACTC fundings, it took affirmative actions to have the funds rescinded. (Ex. 191, p. 7.) At no time after the execution of the Ground

Lease did the City apply for third-party funding consistent with Section 6.3.2 of the Ground Lease, including reapplying to ACTC. (Ex. 854, pp. 17-19 (78:25-82:3).) The City's conduct exemplifies its willingness to undermine Project development in pursuit of its no-coal agenda.

Plaintiffs provided notice of their Force Majeure claim on August 28, 2018 (Ex. 191) and October 19, 2018 (Ex. 248, pp. 31-33.) These notices describe the Force Majeure claim with reasonable particularity. (*See* Ex. 191, p. 7 (identifying section 6.3.1, the City's obligations, and the key facts giving rise to the claim, including the amount of funding blocked by the City); Ex. 248, pp. 31-33 (same).) As discussed above, both the August 28, 2018, and the October 19, 2018 notices were timely.

6. The City's Acts Regarding Discretionary Approvals, CEQA, and Permits.

OBOT I confirmed that the Development Agreement gave OBOT the vested right to build a multicommodity Terminal that could handle coal. *OBOT I*, 321 F. Supp. 3d at 989. Neither the Development Agreement nor the Ground Lease limit the types of commodities that can be transported through the Terminal. (Exs. 7, 68; RT 381:3-6, 2233:21-2234:7, 3995:5-13.) Plaintiffs presented evidence of multiple City acts they argue were part of a concerted effort by the City to delay and hinder Terminal development as an end run around *OBOT I*, the Development Agreement, and the Ground Lease. The Court agrees.

These acts include the City's announcement at the March 2016 kickoff meeting that it would require additional discretionary approvals under CEQA on a commodity-by-commodity basis; that the zoning in place for the Terminal no longer applied; and that the City would approve permits only on a discretionary and commodity-by-commodity basis. The City acts that OBOT alleges delayed and hindered its ability to build the Terminal also include the Cappio Memo and the City's related steps to obstruct OBOT permit applications. While some of the City's conduct occurred before or during *OBOT I*, the City never changed course. As of November 22, 2018, the City had not rescinded the Cappio Memo (RT 2261:9-15, 3302:15-23), clarified the process that OBOT was required to follow to obtain approval of commodities or permit application (RT

1 2080:4-11, 2081:1-16), or even identified a single commodity that it would allow to go through
2 the Terminal (2082:19-22).
3 Against that backdrop, the City's plan unfolded through a series of internal actions over
4 several years and upended the process for approving Terminal design and plans without replacing
5 that process with a new one for OBOT to follow. On May 8, 2015, Zac Wald (Councilmember
6 McElhaney's Chief of Staff) sent an email to Mark Wald (Deputy City Attorney) to suggest that
7 the City use discretionary approvals and the CEQA and EIR process to block coal at the
8 Terminal. (RT 1585:17-1586:16; Ex. 27, p. 2.) Darin Ranelletti, the Deputy Director of Planning
9 and Building at the time, received a copy of the email and understood that Zac Wald "was asking
10 about approvals and attempts to block coal in other states" and "discretionary approvals that
11 could be used as leverage for calling for a supplemental environmental document per what is in
12 the email." (RT 3169:18-3172:10.) Mark Wald had forwarded the email to Mr. Ranelletti, Mr.
13 Cole, and Mr. Monetta, asking whether any discretionary actions or approvals were coming up,
14 including "amending the LDDA and/or agreements with CCIG." (Ex. 27.) Mr. Cole informed
15 them that "[t]he only upcoming discretionary actions/approvals that are scheduled" were to the
16 benefit of the City. (*Id.*; *see also* RT 1587:6-11.) Although Mr. Ranelletti testified that he
17 disagreed with Mr. Cole's assessment, he could not recall writing to correct Mr. Cole's answer.
18 (RT 3171:25-3173:1.)
19 On November 6, 2015—six months after the Wald email—the City internally circulated
20 the Cappio Memo at the direction of City Administrator Sabrina Landreth. (Ex. 61; RT 2251:14-
21 17, 2257:3-5.) Copies were provided to the Planning and Building Department, Mayor Schaaf,
22 and City Council. (Ex. 61, p. 2; RT 2251:18-2252:4.) Plaintiffs did not learn about the Memo
23 until the following year when it was produced during discovery in different litigation. (RT 426:4-
24 18, 1595:22-1596:2.) Despite knowing the Cappio Memo would drastically affect Plaintiffs'
25 ability to complete the Project, Ms. Cappio admitted that she never provided a copy to Mr.
26 Tagami or anyone at CCIG, OBOT, or OGRE. (RT 2264:17-2266:6.)
27 The Cappio Memo instructed the Planning and Building Department to notify three senior
28 City officials (Ms. Cappio, Mr. Ranelletti, and Rachel Flynn, the Director of Planning and

Building)[15] upon receipt of any permit application from OBOT, and not to deem a permit application complete or issue a permit until after consultation with those three officials. (Ex. 61, pp. 2-3.) These requirements relate only to OBOT's development of the Terminal (RT 2252:5-7), and do not apply to the public improvements portion of the Project, private improvements by other developers, or any project outside of the Oakland Army Base. (2252:8-21, 2258:2-13, 2361:10-19.) Witnesses on both sides agreed that the Cappio Memo was unique. (RT 431:1-7, 2253:17-23, 2256:13-17, 2260:8-13, 3208:15-3210:11, 3301:13-17, 3302:8-13; Ex. 854, p. 37.)

On November 9, 2015, Mr. Ranelletti sent an email to planning staff instructing them to remind all zoning staff of the Memo at the next zoning meeting and to post a copy of the Memo at the zoning counter. (Ex. 61, p. 1.) The zoning counter is the first step in the permitting process. (RT 1596:11-17, 1607:20-1608:16.) Thus, City planning staff were required to follow the Cappio Memo from the first step of the permitting process, but only for OBOT applications (RT 1599:20-1600:1, 3300:17-22); and even though clearing the zoning counter usually involves only a planner determining if a requested use or activity is consistent with the zoning (RT 1600:8-1601:10; *see also* RT 1607:20-1608:16, 1610:6-1611:1).

These actions appear to have come from the top. Just two weeks before the City internally circulated the Cappio Memo, Mayor Schaaf called Mr. McClure to discuss the Terminal, express her opposition to coal, and according to Mr. McClure, threaten to kill the entire Project if OBOT did not agree to a ban-compliant Terminal. (Ex. 59A; RT 1540:7-11, 1544:22-1545:5, 1546:21-1547:5, 1549:19-1550:6, 1556:17-24.) Ms. Cappio confirmed that she periodically met with the

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[15] The Planning and Building Department is divided into two bureaus: (1) Planning; and (2) Building. (RT 3096:18-3097:7.) The Planning Bureau prepares plans and regulations to guide the physical development of the City, and then it applies those regulations to the review and approval of proposed development projects; the Building Bureau applies the codes and regulations related to health and safety to proposed development projects, issues construction-related permits, and inspects buildings under construction. (*Id.*) The Building Bureau also administers the Oakland Planning Code (which contains the zoning regulations) and implements CEQA. (RT 3097:8-22.) The Planning and Building Department functions as the environmental review agency for the City. (RT 3097:25-3098:7) As Deputy Director of Planning and Building, Darin Ranelletti was the environmental review officer charged with ensuring compliance with CEQA on behalf of the City. (*Id.*) The instructions in the Cappio Memo to Planning and Building and the involvement of Mr. Ranelletti (and Ms. Flynn, the Director of Planning and Building) support Plaintiffs' view that the City was using CEQA, discretionary approvals, and the permit process, including zoning to slow down or stop development of the Terminal.

Mayor "about the coal issue" (RT 2211:2-6), she understood that the City's political leaders, including Mayor Schaaf, were concerned about coal because of Oakland's "large environmental community" and potential voter unrest (RT 2397:1-11), and because of the potential political fallout with a large voting bloc, the project was subjected to a heightened "level of scrutiny" (RT 2431:13-19). Ms. Cappio also confirmed that Mayor Schaaf and other political leaders were looking for ways to impose discretionary reviews as a mechanism to preclude handling coal at the terminal. (RT 2532:18-2533:2.) It is undisputed that "Mayor Schaaf expressed strong feelings about her concerns for coal"; and Ms. Cappio did not deny that the City would never let the Project be completed so long as coal was a potential commodity to be shipped through the Terminal. (RT 2565:9-24.)

There is no evidence that the Cappio Memo was ever modified or rescinded, let alone by the Initial Milestone Date or November 22, 2018, when the City contends the Ground Lease terminated. (RT 2261:9-15, 3302:15-23.)

a. The City's Acts Delayed and Hindered the Terminal.

The City's conduct delayed and hindered OBOT's ability to design and build the Terminal for several reasons. First, and most obviously, it upended provisions of the Development Agreement, the 2002 EIR and 2012 Addendum, zoning, permit approval procedures, and the framework that OBOT needed to move the Terminal forward.

As to the Development Agreement, section 3.4.4 states that "[t]he City shall have the right to apply to the Project at any time, *as a ministerial act*, the Construction Codes and Standards in effect at the time of the approval of any City Approval or Subsequent Approval thereunder." (DA § 3.4.4 (emphasis added).)

Section 3.5.1 states:

> The EIR, which has been certified by City as being in compliance with CEQA, addresses the potential environmental impacts of the entire Project as it is described in the Project Approvals. *Nothing in this Development Agreement shall be construed to require CEQA review of Ministerial Approvals*. It is agreed that, in acting on any discretionary Subsequent Approvals for the Project, City will rely on the EIR to satisfy the requirements of CEQA *to the fullest extent permissible* by CEQA and City will not require a new initial study, negative declaration or subsequent or supplemental EIR unless

1 required by CEQA, as determined by City in its capacity as the Lead Agency, and will not impose on the Project any mitigation measures or other conditions of approval other than those specifically imposed by the City Approvals, specifically required by the Existing City Regulations or by subsequent CEQA review.

(DA § 3.5.1 (emphasis added); *see also* RT 2903:13-2904:1.)

Together, these provisions make certain decisions ministerial, and expressly do not require CEQA review of those decisions. The Development Agreement also requires the City to rely on the existing EIR to the fullest extent permissible—even if a discretionary subsequent approval is required. Other decisions, including most permit approvals, are ministerial as a matter of City practice and policy even if not under the parties' contracts. (RT 1596:11-17, 1607:20-1608:16, 1599:20-1600:1, 3300:17-22, 1600:8-1601:10, 1607:20-1608:16, 1610:6-1611:1.) The City's conduct ignored and breached these provisions.

Similarly, CEQA review was complete. The 2002 EIR and 2012 Addendum "fully analyzed all potentially significant environmental effects in compliance with the CEQA and the CEQA Guidelines . . ." and were approved by the City. (Ex. 378, p. 5, ¶¶ AA; *see also* Ex. 1, p. 15; RT 2073:5-16.) The EIR applied to the Terminal (RT 2626:10-21), including rail (RT 2630:15-24); and it covered all commodities without limitation (RT 1587:25-1588:6, 2633:24-2634:13). This fact made the City's decisions surprising and unforeseeable because they contradicted the established rule under the initial environmental study that no further CEQA review was required and breached the City's obligation to rely on the existing EIR. (RT 239:1-10, 287:22-289:4, 331:19-332:3, 475:7-13; *see also* Ex. 1, p. 15.)

Zoning was also in place. The West Gateway and former Oakland Army Base are within the Gateway Industrial District. (RT 1560:4-8, 1571:13-16, 1578:21-1579:4, 1579:12-25.) That zone is a special district that had been rezoned for the Project; it applies only to the OAB, including the West Gateway. (RT 3101:5-24.) The City's regulations for that zone from execution of the Development Agreement in 2013 through termination of the Ground Lease in 2018 (like the current regulations) permitted "seaport" and "rail yard" activities without condition. (Oakland Planning Code, 17.101F.030; RT 1576:2-10, 1579:12-1580:7, 1583:24-1584:2.) According to Mr. McClure, who is a past member of the Planning Commission of the City of Oakland (RT 1571:6-

12), these activities include all activity that would be required to run a bulk marine terminal in the West Gateway (RT 1578:6-16, 1578:21-1579:4, 1579:12-25). Mr. Ranelletti confirmed Mr. McClure's description of the West Gateway's zoning. (RT 3108:13-3109:12, 3111:10-17, 3174:19-3175:1.) And Ms. Cappio agreed that the intended uses of the Terminal fell within the permitted uses under the zoning provisions of Chapter 17.10.584 of the City of Oakland Municipal Code. (RT 2075:15-24, 2078:4-7, 2318:20-2319:8.)

In sum, and as Mark McClure testified, the City's conduct undermined years of work to establish the Gateway Industrial District, the Master Plan, the design criteria for the district, and the EIR. (RT 1593:18-1594:9.)

The City's actions also delayed OBOT's ability to design and build the Terminal because even though the City undermined the contractual, zoning, and CEQA framework for the Terminal, it never clarified its new requirements or procedures. OBOT and its principals made multiple requests for preapplication meetings to clarify zoning and other requirements (RT 1602:10-20), and warned Mayor Schaaf that reopening CEQA would put the entire Project at risk and create a multi-year delay (RT 1554:25-1555:19). The City never clarified zoning, a procedure for OBOT to follow to obtain permits, or a plan for approving commodities (RT 287:22-288:4, 383:25-384:8, 390:24-391:16, 417:5-418:5, 419:2-420:1, 477:2-478:9, 541:18-543:15, 2080:4-11, 2081:1-16.) Mr. Ranelletti confirmed that the City failed to adopt or communicate to Plaintiffs any official procedure to conduct a commodity-by-commodity review. (RT 3178:3-22.) To proceed, OBOT needed to understand what the City wanted in order to process a permit. (RT 384:3-8.) OBOT could not present anything to the zoning counter, delaying Terminal development until the City established a process (RT 1604:18-23; Ex. 854, p. 54; *see also* RT 1078:13-18), which did not occur (RT 417:1-418:5, 391:11-16, 456:7-13; Ex. 72). Construction and operation stalled because the City continued to refuse to cooperate with the development of the Terminal. (RT 1080:21-1081:09, 1090:16-24.)

The City's conduct also delayed the Terminal because OBOT could not finalize the Terminal design—even if the City provided feedback on the BOD—without assurance on the commodities that could be handled. Witnesses on both sides testified that finalizing the

Terminal's design depended on the City's approval of commodities. (RT 1076:6-12, 2274:7-2275:10, 2275:7-10; Ex. 854, p. 8.) OBOT could not conform its schematics to "hypothetical commodity-by-commodity review or a new CEQA process." (RT 1602:21-1603:2, 1604:24-1605:5.) The City's position on coal also raised the concern that other commodities could be deemed unacceptable, further setting back Terminal design and construction. As Mr. Tagami testified, coal was not the only commodity that was politically risky and nothing prevented the City from unilaterally declaring other commodities prohibited. (RT 277:6-278:1, 389:7-19.)

OBOT repeatedly requested to know what commodities would be approved. (RT 1075:17-1076:05, 1135:22-1136:08,, 2084:8-11.) The City knew that OBOT requested to know what commodities would be acceptable so that it could further design the Terminal. (Ex. 64; RT 220:4-18, 292:8-17, 2276:3-8.) Yet the City never identified a single commodity that would be approved. (RT 1076:02-05, RT 2082:19-22, 2272:10-14, 2556:3-12.)[16]

The City's refusal to approve any commodities despite instituting a commodity-by-commodity approval requirement is highlighted by Ms. Cappio's failure to sign a simple letter indicating approval of soda ash. (Ex. 91.) Mr. Tagami requested this assurance in a letter, and the City's investigation of soda ash found that any concerns about handling soda ash could be resolved through appropriate mitigation. (RT 2084:8-14, 2085:13-19; *see also* 1135:22-1136:08 (TLS requests for approval of soda ash).) Ms. Cappio's draft letter even stated that "soda ash will not trigger further review under [CEQA]." (Ex. 91, p. 2.) Ultimately, Mark Wald in the City Attorneys' office intervened and prohibited Ms. Cappio from issuing the final letter. (RT 2086:19-21, 2089:7-10, 2122:5-16.)

The Cappio Memo also delayed the Project (RT 385:14-386:20, 432:16-19), and demonstrates that the City internally deviated from its normal permitting process (Ex. 61; RT 424:13-22, 426:19-427:6, 589:23-590:12), even though it failed to provide any guidelines to

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[16] The City has argued that OBOT could have simply moved forward and built a coal-free Terminal and pursue other commodities. OBOT has a vested right to develop a Terminal that handles coal to the extent permissible under the laws that existed in July 2013. But even if that were not the case, OBOT could not build a Terminal that handled other commodities until the City approved those commodities, which the City refused to do.

1 OBOT. Mayor Schaaf confirmed that the purpose of the Cappio Memo was to give City Council
2 the opportunity to pass emergency legislation before any permits for the Project were issued (RT
3 1798:8-23; 1818:15-20)—in a word, delay.

4 All of this surprised Plaintiffs. (*See* RT 474:8, 1593:18-1594:9.) Plaintiffs had no reason
5 to suspect that the City would upend the settled zoning, EIR, and permit process. As Ms. Cappio
6 acknowledged, the completed EIR and addendum did not require a commodity-by-commodity
7 review. (RT 2071:12-15.) She also confirmed that the City did not give notice of its commodity-
8 by-commodity position to OBOT before signing the Ground Lease. (RT 2080:15-22, 2079:23-
9 2080:3.) Even before working for the City, when Ms. Cappio was CCIG's EIR consultant in
10 connection with the 2012 EIR Addendum (Ex. 1), she never advised Mr. Tagami or CCIG that
11 there was a possibility of a future commodity-by-commodity review. (RT 2071:16-2072:9.)
12 Consequently, Plaintiffs were surprised that the City wanted to change zoning and apply the
13 potential for subsequent CEQA analysis on a commodity-by-commodity basis. (RT 2623:20-
14 2624:8, 2673:7-15, 3615:3-22.)

15 **b. The Burma Road Fence**

16 The City's deviations from its ordinary permitting processes when OBOT was involved is
17 demonstrated by OBOT's application for the Burma Road fence. Ms. Morodomi testified that
18 permitting is a multi-step process that begins with planning and zoning clearance, followed by
19 submitting the permit application to the City. (RT 1906:2-15.) Once these requirements are met
20 and fees are paid, a building permit is typically issued. (*Id.*)

21 In 2018, OBOT needed to build the fence on Burma Road to prevent trespass, illegal
22 dumping, and vandalism. (RT 2044:12-2045:17.) The need existed earlier, but public
23 improvements had to be completed first. (RT 1934:9-1935:2.) In fact, the City had reviewed and
24 approved schematics for the fence years earlier in 2014. (RT 1902:7-1903:8) When Ms.
25 Morodomi submitted project information, including structural calculations and product
26 specification at the planning counter, the clerk told her that there was a different intake process
27 for projects at the former Oakland Army Base, and referred her to Pete Vollman. (RT 1902:22-
28 1903:8; Ex. 178.)

Mr. Vollman informed Ms. Morodomi that OBOT was required to submit a "design review exemption" or DRX that would serve as the equivalent of typical zoning approval. (RT 1905:23-1906:15; *see also* Ex. 460.) These requirements meant that OBOT needed "landowner approval" even though the City had approved the fence in 2014, and the fence was originally a City construction obligation. (RT 1908:16-19; Ex. 178).

Plaintiffs were also required to obtain a BCDC permit for the fence but both entities—the City and BCDC—wanted a permit from the other first. (RT 1908:20-1909:15, 1913:5-14; Ex. 459.) After delays resulting from the City's demand that the fence be removed from the public infrastructure improvements and included in the private development and the City's lack of cooperation, Ms. Morodomi eventually submitted all documentation and fees required for a City construction permit; by then the City had placed a lock on its system to prevent issuance of permits to OBOT, so the permit was never issued. (RT 1921:13-1922:12.)

c. Plaintiffs Provided Proper and Timely Notice of the Claim.

Plaintiffs provided notice of their Force Majeure claim on August 28, 2018 (Ex. 191) and October 19, 2018 (Ex. 248). These notices described the Force Majeure claim with reasonable particularity. (*See* Ex. 191, pp. 4-5 (describing in detail the Cappio Memo and events at the kickoff meeting as events of Force Majeure); Ex. 248, pp. 20-24 (Cappio Memo); *id.*, pp. 24-26 (CEQA and related issues).) The notices were timely for the same reasons discussed above as to the same Force Majeure letters.

7. The City's Refusal to Turn Over Possession of the Premises, Including the Railroad R/O/W Property

The Ground Lease requires the City as Landlord to turn over possession of the premises to OBOT, including the Railroad R/O/W Property (also referred to as "rail corridor" (*see* RT 1835:16-22)), and other portions of the Premises where rail was to be constructed (GL §§ 1.1.1, 1.1.2, 1.5.1, 1.5.2), and because of the Sublease Agreement (Ex. 104; Ex. 162, pp. 4-64), to OGRE. Notwithstanding Plaintiffs' repeated requests for access (RT 2774:5-24, 2777:4-17, 3378:15-23, 3662:15-3663:11; Ex. 189; Ex. 227, p. 5), the City had not turned possession of any portion of the Railroad R/O/W Property or other portions of the rail corridor to OBOT or OGRE

as of November 22, 2018. (RT 1529:24-1530:6.) Plaintiffs contend that the City's conduct constitutes an event of Force Majeure under Section 16.1 that extended the Initial Milestone Date and breached the Ground Lease. The Court agrees.

a. The City's Acts Delayed and Hindered Plaintiffs' Performance.

OGRE was prepared to build rail by the end of August 2017, drawings had been submitted to and approved by the City, and no further permits were required for OGRE to commence work. (RT 734:6-23, 1659:6-18, 1720:2-7, 2731:16-2732:14, 2745:4-10, 2746:18-2747:6.) But it was impossible for OGRE to build rail if it was not permitted to access the areas where the rail was to be built. OGRE could not have its contractors begin construction until the City granted access to the Railroad R/O/W Property and other parts of the rail corridor. (RT 1637:20-1639:13.) Nor would it make sense to build the rail network in the absence of easements or other use agreements to operate the system for the 66-year lease term. (RT 1646:21-1647:9, 3355:4-3356:1, 3446:8-14, 1657:10-13, 1674:20-1675:5, 1700:23-1701:14, 1706:6-1707:15.)

As discussed above, there are five Minimum Project Rail Improvements under the Ground Lease. Other than in one limited instance when it suited the City's interests, OGRE had access to none.

The first is the BNSF Rail Improvements—the portion of Lead Track No. 1 to be constructed within the BNSF Rail Easement. (GL § 6.1(b)(i).) This land is owned by the City (RT 3925:10-3926:4), subject to the BNSF Rail Easement (RT 3926:12-16). On February 27, 2015—a year before OBOT and the City entered the Ground Lease—the City sent OBOT a copy of the City's memorandum of agreement ("MOA") with BNSF regarding relocation of the BNSF Rail Easement. (Ex. 951.) But the City's agreement with BNSF did not give OBOT the right to access the easement area. As Elizabeth Lake acknowledged in her testimony, the Ground Lease was not in place at the time (RT 3960:8-13, 3961:17-3962:14, 3963:5-8), Plaintiffs were not parties to the MOA (RT 3960:14-24), the MOA was not signed and Plaintiffs were not provided with a signed copy (RT 3960:25-3961:3, 3961:10-12), BNSF reserved the sole right to control operation of the track, which included the exclusive right to construct track. (RT 3965:22-3966:8, 3966:23-3967:1), and BNSF would be the sole grantee of the easement to operate a railroad on the parcel

(RT 3967:24-3968:18) even though OBOT would pay for the private improvements (RT 3966:15-22). In short, the City owned the land, the City granted BNSF the exclusive right to use the track, and the track was to be constructed by OGRE. (RT 4127:1-10.) As of November 22, 2018, the City had failed to turn over that portion of the corridor to OBOT or OGRE to construct the BNSF Rail Improvements. (RT 1715:5-9.)

The second Minimum Project Rail Improvement is the East of Wake Rail Improvements—the portion of Lead Track No. 2 located within the Port Rail Easement. (GL § 6.1(b)(i).) The Port's position was that OGRE needed a permanent easement before it could construct the segment. (RT 3838:7-3839:14; Ex. 214, p. 7.) As of November 22, 2018, this portion of the corridor had not been turned over to OBOT or OGRE. (RT 1715:23-1716:3.)

The third Minimum Project Rail Improvement is a portion of Lead Track No. 2 on what is commonly referred to as the "Outer Claw" property. (GL § 6.1(b)(iii).) The Outer Claw portion of the rail corridor is Port-owned. (RT 1655:15-25.) Access rights were never granted to OGRE. (RT 1716:14-22.) Although IRC was able to install some track in the Outer Claw (including Lead Track No. 2) through a contract with the City that OGRE paid for (RT 1737:8-16, 1858:24-1859:17, 3324:17-3425:7, 3325:13-22), that construction had to stop because OGRE did not receive further access to the property to move forward. (RT 1861:16-24, 3595:13-23; *see also* 3904:17-3905:9; Ex. 799, p. 8.)

The fourth Minimum Project Rail Improvement is a portion of Lead Track No. 1 also located in the Outer Claw. (GL § 6.1(b)(iv).) The improvement includes a condition precedent—entry into an Industrial Track Agreement with BNSF. (*Id.*) Putting that aside, OGRE would not have been able to build this improvement because it was never granted access to the property. (RT 1718:9-17.)

The final Minimum Project Rail Improvement is Industry Drill Track No. 1. (GL § 6.1(b)(v).) Completing improvements on Industrial Drill Track No. 1 required access through an easement from the Port. OGRE was never granted the access needed to commence the improvements. (RT 1719:11-18.)

Multiple City acts intersected to keep OGRE out of the rail corridor and unable to build the rail network, thus delaying the Project. At the time (between execution and termination of the Ground Lease), public improvements, including grading, underdrain construction, and other site preparation, needed to be complete before OGRE could begin the private rail work. (RT 1700:18-22, 1708:14-1709:14.) Consequently, the rail corridor was in possession of the City's joint venture contractor working on the public infrastructure portion of the Project. (RT 1700:1-17.) The rail corridor also needed to be resurveyed because Plaintiffs paid rent on a square footage basis and there was a dispute about the boundaries of the Railroad R/O/W Property after a BNSF easement was moved to the south to accommodate East Bay MUD's expansion of Engineers Road—a private road to the northern rail corridor. (RT 1700:23-1701:14, 1706:6-1707:15; Ex. 478.) And, as noted above, even after resolution of these factors, OGRE needed easements to access portions of the rail corridor that were under Port jurisdiction, as well as that portion controlled by BNSF. (RT 1700:1-17, 3398:12-3399:19.)

(a) Public Improvements

The City was required to complete certain public improvements before OGRE could take possession of the rail corridor and perform its work. (GL § 1.1.1.) Ms. Lake acknowledged that requirement in her testimony. (RT 4018:9-23.)

The City's internal correspondence also reflects its understanding that OGRE could not take possession of the corridor until public improvements were complete and the City had accepted them. In an email on September 26, 2018, Ms. Lake asked Isabel Brown and Frank Kennedy why the City was "not turning over the rail corridor at the same time [it was] accepting the public improvements" (Ex. 227, p. 4.)—effectively acknowledging both the requirement to give possession to OBOT and OGRE, and that the public improvements were nearing completion during the cure period (between the City's September 21, 2018 notice to cure and its October 23, 2018 notice of default). One day later, Ms. Lake emailed the same group, stating that the Ground Lease permitted the City to "turn over the site improvements on the lease area on Monday at the same time [it] accept[s] the public improvements." (Ex. 227, p. 1.)

As Ms. Lake's emails reflect, the public infrastructure work in the corridor was completed sometime in Fall 2018 (RT 1711:1-13, 3594:15-24), after the August 14, 2018 deadline the City imposed on Plaintiffs. Even then, the City did not turn over the rail corridor, delaying OGRE's ability to construct rail. (RT 1711:15-17, 2724:19-2725:9.) Instead, the City waited to accept the improvements as complete until Summer 2019, the following year (RT 4018:21-4019:6)—long after the City's alleged Initial Milestone Date had passed.

In the meantime, Plaintiffs continued to ask the City when they could expect access to the Corridor. Ms. Lake's email exchange with Ms. Brown and Mr. Kennedy was initiated by an email from Mr. McClure asking for a date when the corridor would be turned over. (Ex. 227, p. 5.) Yet, Mr. McClure was not copied on any of Ms. Lake's responsive emails; nor was any of the information in those emails ever shared with him. (RT 1707:16-1708:9, 3670:1-8.)

On August 21, 2018, Mr. Tagami also asked the City when they could expect the property to be turned over based on his understanding that the completion process would start on August 31, 2018 (Ex. 189, p. 3.) One week later, Mr. Monetta responded that the City "d[id] not have dates or estimated timing to share[.]" (Ex. 189, p. 2; RT 4022:4-23.) That information was not shared with OBOT prior to November 22, 2018. (RT 1707:16-1708:9, 3670:1-8, 1932:11-15.)

As detailed more fully below, OGRE had purchased the materials it needed to build the private improvements, and was ready to perform as soon as the City deemed the public improvements complete. (RT 759:17-760:2; 760:9-761:17; 763:11-18; 765:17-19; 769:10-12; 789:19-25.)

(b) The City's Joint Venture Contractor

Relatedly, OGRE subcontracted with IRC to construct the rail components of the Project, including the Bulk and Oversized Terminal and the Minimum Project Rail Improvements as defined in the Ground Lease. (RT 755:1-8, 775:2-776:24.) But the City and its joint venture contractor ("JV") for the public infrastructure work remained in possession of the rail corridor until after the City initiated termination procedures. (RT 834:2-10, 1637:20-1639:13, 4030:21-4031:1.) Chris Stotka, IRC's principal, testified that IRC could not begin work until the City's JV completed its work on behalf of the City, such as completing the subgrade and drainage, and the

1 City turned over the property to OBOT and OGRE. (RT 738:14-21, 761:10-17, 761:21-762:9,
2 833:22-834:10.) Two contractors (the JV and OGRE) could not occupy the same property at the
3 same time and perform their respective construction obligations. (RT 1709:3-14.) Mr. Stotka
4 estimated that once IRC was released to do the work, it would take approximately one year to
5 complete. (RT 834:10-835:10.) Yet, the City's contractor never demobilized so that OBOT and
6 OGRE could take possession of the Railroad R/O/W Property. (RT 834:2-10, 1850:12-18,
7 1861:4-15.) The JV did not complete its work on the rail improvements (for example, the "East of
8 Wake Improvements" (*see* RT 761:18-762:9)) until late 2018, which did not give OGRE the time
9 necessary to complete its work prior to November 22, 2018 (RT 834:15-835:10), let alone by the
10 City's alleged Initial Milestone date, which had already passed.

11 **(c) The Survey**[17]

12 Section 1.1.1 of the Ground Lease requires a re-survey of the Premises within 60 days of
13 completion of the public improvements. (GL §1.1.1.) On September 26, 2018, Mr. McClure
14 attended an OAC meeting where the City confirmed that it would move forward with the survey
15 to validate the boundaries of the Railroad R/O/W Property. (Ex. 227, p. 4 to 227-5; RT 1710:19-
16 25.) On October 17, 2018, Frank Kennedy reiterated the need for a survey to IRC. (Ex. 478; RT
17 1713:18-1714:8.) The survey was never completed. (RT 3670:9-24.)

18 **(d) Easements**

19 As noted, the City does not own or control the entire rail corridor, and thus requires right-
20 of-way and other easements to access those areas and do construction. For instance, Easement P-
21 18 (Ex. 780) granted the City a right of way through portions of the Inner Claw of the rail
22 corridor that the Port owned. (RT 1656:23-1657:7.) While P-18 granted the City a non-assignable
23 and temporary construction easement in the area, Elizabeth Lake acknowledged that P-18 was

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25 [17] Plaintiffs alleged the City's failure to re-survey the Premises as a separate breach of the Ground Lease. (*See, e.g.*, State FAC ¶ 6.) The Court has included it within its analysis of the City's
26 alleged failure to give possession of the Premises, specifically the rail corridor, to OBOT and OGRE because the two claims are inherently linked. The City could not transfer possession of the
27 Railroad R/O/W Property to OBOT and OGRE until the survey was complete. The survey is also discussed in Plaintiffs' Force Majeure letters as part of Plaintiffs' claim that the City failed to
28 deliver possession of the Railroad R/O/W Property. (*See* Ex. 248, p. 42.)

executed in 2014 (long before the Ground Lease) (RT 3972:7-12), expired on December 31, 2016, and was in effect for only a matter of months after the Ground Lease was executed (RT 3972:13-21), followed by a gap in coverage and an amendment effective from only June to December 2017 (Ex. 775; RT 3975:2-11.) At trial, the Port's former General Counsel, Danny Wan confirmed that Port never entered a permanent easement with the City for infrastructure and rail improvements (RT 3897:1-25), and testified that he was unaware of the Port granting any of the permanent construction easements that the Port was contemplating granting to the City in 2013 (RT 3905:17-3906:7; Ex. 799, pp. 11-12). Plaintiffs (like any other entity seeking to work in these areas) also require easements. OBOT and OGRE were never provided with an easement similar to P-18. (RT 1657:4-1658:2.) Consequently, OGRE could not construct track in the area. (RT 1657:10-13.)

Similarly, Industrial Drill Track No. 1 (the fifth Minimum Project Rail Improvement) is on Port property; and OGRE was never given access. (RT 1654:6-13, 1655:2-13.) The Port granted the City a temporary construction easement for this area as well. (RT 1657:14-22.) That easement was not continued for the benefit of OGRE. (RT 1657:23-1658:2.)

Easements were also needed for West Gateway Lead Tracks 1 and 2. (RT 1674:20-1675:5.)

The City has argued that its temporary construction easements permitted OGRE to build rail. But each easement had expiration dates; none specifically granted OGRE access; and none established a right to construct and operate rail over the 66-year term of the Ground Lease. (RT 2759:24-2760:8, 2760:15-2761:13, 2765:5-8, 3441:24-3442:8, 3600:1-6, 3600:23-3601:3, 3602:16-3603:6.) In addition, these easements could not be transferred to OGRE. (RT 3598:15-3599:2; Ex. 780.)

(e) OGRE's Readiness

It is undisputed that had the rail corridor been handed over, OGRE was prepared to do the work. On August 28, 2017, OGRE submitted construction drawings for the railroad plans to the City, which included specifications for the track, crossings, and other rail improvements. (RT

1659:6-18, 1720:2-7, 2731:16-2732:14.) The City received and approved the drawings. (RT 2745:4-10, 2746:18-2747:6.)

OGRE also ordered and purchased materials needed to meet the rail obligations in the Ground Lease and its sublease with OBOT. (RT 1659:6-18, 1676:24-1677:21; Ex. 854, p. 16; Ex. 854, p. 60.) It had acquired all of the necessary track and ties to complete the connection to all anticipated development areas once the City had completed site preparation and acquired the necessary locomotives to commence providing service. (RT 1674:2-19, 1693:25-1694:15.) As of November 22, 2018, these materials remained in the West Gateway ready to be deployed. (RT 1734:3-10, 1734:20-1735:19, 3604:23-3606:1.) OGRE was ready to go as soon as the City turned over the Railroad R/O/W Property to OGRE. (RT 759:17-760:2, 760:9-761:17, 763:11-18, 765:17-19, 769:10-12, 789:19-25.)

OGRE also engaged in the necessary contractual relationships to do the work. As noted, OGRE subcontracted IRC to construct the rail components of the Project, including the Terminal and Minimum Project Rail Improvements. (RT 755:1-8, 775:2-776:24.) OGRE also contracted with David Buccolo to provide switching services, conducting safety training, performing regulatory response work, and consulting on business and contract development, including with potential industrial freight customers. (Ex. 821, p. 3.) And it started negotiation of an industry track agreement with Union Pacific. (RT 1659:6-18.)

Lastly, OGRE did as much work as it could without having access to the land. Mr. Stotka testified that, in regard to the work IRC did for Plaintiffs, all of OGRE's work was completed prior to November 2018 to the extent it was possible without being granted access by the City. (RT 737:7-19, 756:17-757:1, 758:18-759:12, 761:21-762:9, 762:22-25, 764:3-765:19, 766:8-22, 767:1-10, 777:4-16.) For example, the rail between the Burma and Wake crossings was constructed (and paid for by OGRE) so that the City could close out its CPUC permit. (RT 833:2-19.)

(f) The City's Argument Regarding CCIG as Project Manager

The City argues that OGRE had access to the rail corridor because CCIG served as the City's project manager with respect to the public improvements for a time. Mark McClure testified that there is a distinction between being physically able to walk on the land and being able to mobilize contractors when the City's joint contractor was performing its own work on the Premises and remained in control of the entire area. (RT 1856:14-1857:11.) The Court agrees. The City conflates CCIG's obligations to manage the public improvements until the end of 2017 with OGRE's ability to access the property to begin the private rail improvements needed to satisfy OBOT's Minimum Project obligations.

The City has not presented evidence that it turned possession of the Railroad R/O/W Property or other portions of the rail corridor to OBOT as the Ground Lease requires. Ms. Lake confirmed that the rail corridor had not been turned over to OGRE by September 21, 2018, the date of the City's notice of unmatured event of default. (RT 4030:21-4031:1; Ex. 250.) Instead, it has pointed to outlier scenarios where the City gave OGRE access for particular purposes.[18]

b. Plaintiffs Provided Proper and Timely Notice of the Claim.

Plaintiffs provided notice of their Force Majeure claim on August 28, 2018 (Ex. 191) and October 19, 2018 (Ex. 248). The notice described the Force Majeure claim with reasonable particularity. (*See* Ex. 191, pp. 3-7; Ex. 248.)

The notice was also timely for the same reasons discussed above as to the same Force Majeure letter.

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[18] The City permitted OGRE to access some areas when it served purposes other than building rail required for the Minimum Project; for instance, to construct a rail crossing at Wake Avenue that permitted that road to open. (RT 1630:25-1631:11.) OGRE also built track west of the Wake crossing so that the City could test the crossing equipment as part of its permit requirements (RT 1634:13-16), and stored ties, ballast rock, and other materials east of Wake in preparation to build additional track once the property was turned over to OGRE, which never occurred (RT 1634:2-12).

8. The City's Failure to Use Commercially Reasonable Efforts to Enter the Rail Access Agreement with the Port

The Ground Lease requires the City to use commercially reasonable efforts to enter the Rail Access Agreement with the Port of Oakland. (GL § 5.2.3; RT 1662:16-1663:3.) It also grants rail access rights to OBOT subject to the RAA. (GL § 1.5.1.) It is undisputed that the City and Port did not enter an RAA as of November 22, 2018. (RT 215:23-216:13, 217:2-5, 2126:20-2127:2.) Plaintiffs contend that the City's failure to enter the RAA is a Force Majeure event that breached the Ground Lease and extended their time to perform. The Court agrees.

"Commercially reasonable" is not defined in the Ground Lease. (*See* GL, Art. 40.) When the term is not defined, whether a party acted in a commercially reasonable manner is a question of fact that turns on whether the conduct was reasonable under all the circumstances. *Gifford v. J & A Holdings*, 54 Cal. App. 4th 996, 1006 (1997); *Sempra Energy Res. V. Cal. Dep't. Water Res.,* No. D043397, 2005 WL 1459950, at *9 (Cal. Ct. App. June 21, 2005*)*. The length of time it takes a party to perform is itself evidence of reasonableness or a failure to act reasonably. *See, e.g.*, *Gen. Elec. Credit Corp. v. Bo-Mar Constr. Co.*, 72 Cal. App. 3d 887, 893 (1977) (delay between the repossession and sale of a machine reduced the sale price, which "alert[ed] the court to the possibility of commercially unreasonable practices").

Here, the City had not entered the RAA with the Port by November 22, 2018, even though the City and Port agreed to the primary terms of the RAA more than seven years earlier. On June 19, 2012, the City and the Port executed an Amended Cost Sharing Agreement ("CSA") that provided for the City and the Port to enter the RAA and a Rail Operating Agreement ("ROA"). (Ex. 3; 1649:15-18.) City representatives, including John Monetta and Douglas Cole, agree that the RAA and ROA were close to completion when the City and the Port had executed the CSA in 2012. (RT 1664:13-20, 1647:10-25; Ex. 47-2-3; Ex. 854, p. 15; *see also* RT 2125:5-10.) Mr. Cole's and Mr. Monetta's representations make sense because the CSA set forth the City's and Port's obligation to negotiate the RAA and the high-level terms of the RAA. (*See* Ex. 3 ¶¶ 10-11; RT 3845:7-3848:15.)

On December 9, 2014—before Mayor Schaaf took office but while she was on City Council—the City passed Resolution No. 85325 authorizing the City Administrator, *without returning to City Council*, "to negotiate and execute, without returning to City Council, a Rail Access Agreement and any related agreement with the Port of Oakland for a term up to 66-years to enable rail access to the City-owned Central, East, North and West Gateways Areas at the Base." (Ex. 18; *see also* RT 1650:6-1651:1, 1758:3-12.) This streamlined the process by empowering the City Administrator to get the job done without returning to City Council for authority. (Ex. 18; RT 211:10-22.) The resolution also set forth certain RAA terms, including an obligation to enter the RAA for at least a 20-year term. (Ex. 18.) The City Council also acknowledged that "without this rail access, portions of the contemplated development of the City-owned portions of the Base by private developers may become infeasible …" (*Id.*)

In April 2015, Mr. McClure worked with the City and Port on an RAA term sheet that they completed. (RT 1675:10-15.) OGRE's role in the process was to provide operational context needed to inform the agreement. (RT 1675:16-24.) According to Douglas Cole, a full agreement was drafted in 2015. (Ex. 854, pp. 39-40; *see also* Ex. 47, p. 3.) Danny Wan, the Port's current Executive Director was the Port's General Counsel at the time. (RT 3762:10-20, 3827:4-22.) He confirmed that the Port and City had negotiated detailed RAA terms in 2015. (RT 3869:6-3873:22; Ex. 22, pp. 5-6.) John Monetta also represented that the RAA was "close to completion" in August 2015 (Ex. 47, p. 3); Mr. Wan confirmed the accuracy of that statement as well. (RT 3877:2-25.) Yet, the City still did not enter the RAA with the Port.

During its delay, the City continued to assure Plaintiffs that the agreement was close to completion during that entire seven-year period. For instance, on October 13, 2016, Ms. Cappio sent Mr. McClure and Mr. Tagami a letter regarding the status and sequence for the Port, City, and OBOT rail agreements. (Ex. 95.) Ms. Cappio promised to continue to work on the RAA and related agreements. (RT 1680:3-1681:10.) She also represented that a discussion draft of the RAA had been prepared and would be discussed by the City and the Port 13 months later in November 2017. (Ex. 95-3; RT 1685:20-1686:10.) Mr. McClure explained that while it was commercially reasonable for the City to provide a schedule to complete the rail agreement work, it was not

commercially reasonable to wait 13 months just to discuss a draft that existed in 2016. (RT 1686:11-1687:10; *see also* RT 3471:17-3472:1.) The Court agrees with Mr. McClure's testimony. The amount of time it took the City to enter the RAA with the Port is itself a failure that delayed and hindered OBOT's ability to build rail.

Plaintiffs also presented evidence that the City acted to keep OGRE out of the RAA process. On July 10, 2017, in response to OGRE's request to participate in RAA meetings between the City and the Port, Ms. Cappio appeared to agree but said that first, she wanted "to get the remaining, outstanding issues more fully framed with options, pros and cons. (Ex. 121, p. 2; RT 1692:2-11.) Mr. McClure testified that he did not understand the delay, and that Ms. Cappio never explained to him what she meant by needing to more fully frame outstanding issues. (RT 1692:23-1693:11.) Mr. McClure continued to believe that an RAA could be achieved within a very short timeframe. (RT 1695:14-18.)

Relatedly, on July 20, 2018, Mr. Tagami sent a letter to the City asking, among other things, why after six years and detailed terms set forth in the CSA, the City still had not entered the RAA with the Port. (Ex. 166-2; RT 1695:23-1696:3, 1696:21-1697:16.) The City never substantively answered Mr. Tagami's questions. (RT 1697:17-21.)

On August 16, 2018, Douglas Cole wrote in an email to Pat Cashman, Betsy Lake, and Bijal Patel that "at some point real soon the City and Port are probably going to have to answer to why the RAA has not advanced and how this has impacted the fundamental basis for the grants to both the City and Port." (Ex. 181; Ex. 854, p. 31.) In Cole's words: "the Rail Access Agreement was one of the very first deliverables that the city and port were supposed to deliver to the developer." (Ex. 854, p. 31.) On October 25, 2018, Cole sent another email to Ms. Lake, Ms. Patel, and several other senior City staff, writing: "I would like to impress upon the City and Port to advance the Rail Access Agreement (RAA) which is directly linked to performance." (Ex. 251; *see also* Ex. 854, pp. 44-45.) Ms. Lake's only response to Mr. Cole was to thank him for his work, saying nothing about the RAA. (RT 4070:11-22.) In her trial testimony, Ms. Lake referred to the City's and Port's work on the RAA as "sort of decent progress over time." (RT 3952:20-25.) Ms. Lake's description is at odds with the Ground Lease's requirement to use commercially

reasonable efforts. *See generally*, *Gifford v. J & A Holdings*, 54 Cal. App. 4th 996, 1006 (1997); *Sempra Energy Res. v. Cal. Dep't. Water Res.*, No. D043397, 2005 WL 1459950, at *9 (Cal. Ct. App. June 21, 2005*)*.

Finally, by August 29, 2018, the City had started to insist on a new RAA term contrary to the Ground Lease: to have all of the Railroad R/O/W Property be non-exclusive. (RT 3460:8-13, 3461:4-12.) In other words, not only did the City not use commercially reasonable efforts to enter the RAA as required by the Ground Lease and spelled out in the CSA, but the City also affirmatively undermined negotiations by insisting on terms not contemplated by the earlier, binding contracts. The City failed to cooperate with OBOT on the RAA. (RT 541:7-10, 543:21-544:1.)

a. The City's Acts Delayed and Hindered Plaintiffs' Performance.

The City's failure to enter the RAA delayed and hindered Plaintiffs' ability to construct the Minimum Project by the Initial Milestone Date. The primary and obvious reason for delay, which is also discussed above with respect to the rail corridor, is that it is impossible to build something on property without access to that property. As to the Port-controlled portions of the Minimum Project—the East of Wake Rail Improvements (GL § 6.1(b)(i)), the portion of Lead Track No. 2 on the Outer Claw (*id.* § 6.1(b)(iii)), and Industry Drill Track No. 1 (*id.* § 6.1(b)(v))—access required the RAA. (RT 1437:22-1437:10, 1674:20-1675:5, 3405:12-25.) The RAA was to include the easements that OGRE needed to access Port-owned or controlled portions of the rail corridor and build the rail network, including portions of the Minimum Project. (GL § 5.2.3(a).) And unlike the City's temporary construction easements, the RAA was to include long-term use easements to ensure that the rail, once constructed, could actually be used. (RT 3445:20-3446:7.)

The City's failure as to the RAA impacted the entire Project. Douglas Cole referred to the RAA as the most critical agreement to delivering all of the obligations for the project." (Ex. 854, p. 14; *see also* Ex. 854, p. 15 ("without the Rail Access Agreement, you're basically—you can't do anything").) It is undisputed that the Terminal is a rail-to-ship project, and that rail access is key to the entire Oakland Army Base Project. (RT 2090:21-23, 2094:2-3, 2095:12-16.) The

Project's state funding through the $242 million TCIF Grant was directly linked to rail access. (Ex. 187, p. 3; Ex. 854, pp. 31-32; RT 150:22-151:13, 203:12-204:2, 251:15-252:8, 1755:10-25.) And without rail access, private development of the West Gateway would be infeasible. (RT 214:13-215:11, 2095:12-16.) Mr. Tagami described the rail-served Terminal as a "supply chain" because the Terminal could not be served unless every piece of the Project, including all the rail infrastructure, was completed. (RT 214:13-215:11, 268:2-8.) In short, the Project is first and foremost a rail project. (RT 148:9-21, 209:12-22.)

There were also specific provisions to be included in the RAA setting rates the Port would charge. (RT 1725:13-24; Ex. 3, pp. 17-18.) Witnesses from both sides testified that timely completion of the RAA was necessary so that OGRE could accurately quote rail rates and prepare for service; without that ability, negotiations with Union Pacific and others was difficult, if not impossible. (*See* RT 2163:22-2164:2, 2165:8-18, 3474:1-11, 3671:22-3672:4, 3672:23-3673:8.)

The City blames the Port for its decade-long failure to enter the RAA. Mr. McClure testified that the Port communicated no opposition to the RAA to him. (RT 1669:4-13.) To the contrary, the Port expressed support for the RAA in 2017. (RT 1690:16-1691:1; Ex. 121.) Ms. Cappio confirmed that the Port wanted to get the RAA executed. (RT 2147:10-16.) It never got done.

In contrast to the City's delay, Plaintiffs acted diligently and in good faith. Plaintiffs continuously pushed the City to enter the RAA, asked to participate in the process, and requested to know when the agreement would be complete. (RT 1664:21-1665:8, 1675:10-1676:8, 1678:17-1679:18, 1691:2-19, 1696:21-1697:21, 3426:14-22; Ex. 166, p. 2.) Plaintiffs early and continuously reiterated the importance of the RAA to the City, including to Ms. Cappio, because the RAA was necessary to secure rail access and tenants. (RT 1670:10-1671:4, 3472:2-10.) And they continued to push the City to meet its contractual obligations. (RT 1675:10-1676:8, 3447:6-25.) But the City never acted with urgency.

On March 2, 2016, Mr. McClure wrote to Ms. Cappio that he was "concerned that we have lost the necessary momentum required to finish the RAA" (Ex. 74), and Ms. Cappio admitted that she never responded to him (RT 2129:15-20). Then, on March 13, 2016, Mr.

Tagami wrote Ms. Cappio and Mr. Cole, requesting that, because the drafting of the RAA had lingered since February 2013 (three years at that point), the City provide a timetable for completion. (Ex. 306, p. 3.) Ms. Cappio agreed that this request was appropriate. (RT 2141:25-2142:2.) Mr. Tagami went on to say that the City's failure to obtain the RAA "affects the project, all of the prospective tenants, project financing, and the ability to meet the objectives of the state grant," to which Ms. Cappio again agreed. (Ex. 306, p. 3; RT 2142:23-2143:14.) Despite this clear request for a timetable and need for some level of urgency, Ms. Cappio testified that she could not recall any further written communications regarding the RAA from the time of Mr. Tagami's March 13, 2016 email until October 13, 2016 (Ex. 95; RT 2148:20-25), when, as noted above, Ms. Cappio told Messrs. Tagami and McClure that a "[d]iscussion draft has been prepared and will be discussed by the City and Port by early November, 2017," a full year later. (Ex. 95; RT 2158:10-14.)

b. Plaintiffs Provided Proper and Timely Notice of the Claim.

Plaintiffs provided notice of their Force Majeure claim on August 28, 2018 (Ex. 191) and October 19, 2018 (Ex. 248). The notices described the Force Majeure claim with reasonable particularity. (Ex. 191, pp. 3-7.) The notices were timely for the same reasons discussed above as to the same Force Majeure letter.

The Court finds that the City failed to use commercially reasonable efforts to enter the RAA as required by Section 5.2.3 of the Ground Lease. The City's conduct delayed and hindered OBOT's ability to meet the Initial Milestone Date giving rise to a Force Majeure claim. When OBOT timely noticed that claim, the Initial Milestone Date was automatically extended.

9. The City's Interference and Failure to Cooperate with Regulatory Approvals

OGRE's engagement with the Surface Transportation Board ("STB") for the rehabilitation and operation of the rail goes back to 2015. (Ex. 47; RT 1644:23-10.) Each time OGRE has attempted to move the rail forward with the STB, the City, the Port, or both have objected. (RT 1657:10-13, 1660:24-1661:16.) Most recently, the City opposed the application that OGRE submitted to STB in May 2018. (RT 1659:19-21; Ex. 821, pp. 8-9.) Plaintiffs contend that the

City's opposition to OGRE's STB application caused Force Majeure delay, entitling Plaintiffs to an extension of the Initial Milestone Date upon proper notice. The Court agrees.

Section 5.2.2.2 of the Ground Lease states:

> Without limiting the requirements set forth in Section 5.2.2.1, the Parties agree to communicate regularly and to cooperate in good faith regarding Tenant's efforts to obtain Regulatory Approvals for the Project from any regulatory agency other than City. The Parties' obligation to cooperate in good faith shall include, but not be limited to, meeting and conferring as necessary, joint invitations to and attendance at meetings, copies of correspondence, and execution of mutually acceptable applications as owner and applicant where necessary and appropriate to implement the Project and this Lease; provided, however, that Landlord shall have no obligation to make any expenditures or incur any expenses in connection therewith other than reasonable administrative expenses.

(GL § 5.2.2.2; *see also* RT 1640:11-16.) Mr. McClure testified that the City cooperated with OBOT for a period, but after its May 15, 2018, loss in federal court, that cooperation ended. (RT 1640:17-25.)

Most notably, the City actively opposed OGRE's application to the Surface Transportation Board. OGRE needed regulatory approval from the STB because it has jurisdiction over the track that OGRE needed to rehabilitate in the Project area. (RT 1641:21-1642:6.) On May 23, 2018—just eight days after the *OBOT I* decision—OGRE applied to the STB, seeking confirmation from the STB that no additional STB approval was required for OGRE to construct the Project's rail improvements, including the Minimum Project Rail Improvements identified in Section 6.1 of the Ground Lease. (Ex. 155; RT 1652:6-21), which the City opposed (RT 1659:19-21; Ex. 821, pp. 8-9). That opposition delayed the Project for the obvious reason that OBOT and OGRE could not proceed until it had all approvals in place. (RT 1659:19-21, 1660:21-1661:16, 2683:19-2684:9.) OGRE could not proceed without approval.

Plaintiffs provided notice of their Force Majeure claim on August 28, 2018 and October 19, 2018 (*See* Ex. 191, p. 2 (describing OBOT's good faith efforts as to the BOD), 191, p. 3 (identifying the BOD and other delays under the heading "City's Force Majeure Actions" and "articulating the length of the BOD-related delay and other City conduct that precipitated it); Ex. 248, p. 13 (expressly making claims of delay under Section 16.1), Ex. 248, p. 22 (identifying the

City's failure to comment on the BOD as a Force Majeure event; explaining that "[t]he core foundation on which any terminal will be constructed and operate is the Basis of Design"; and noting that OBOT still had not received feedback).). OBOT's letter described the Force Majeure claim with reasonable particularity. As discussed above, OBOT's August 28, 2018, and October 19, 2018 Force Majeure letters were also timely.

10. Summary of Findings on Plaintiffs' Claim that the City Breached the Ground Lease by Terminating it Prematurely.

Plaintiffs have demonstrated by a preponderance of the evidence that the City breached the Ground Lease's quiet enjoyment provision (GL § 29.1) by terminating it because August 14, 2018, was not the Initial Milestone Date. As detailed above, the City's conduct in multiple instances hindered and delayed Plaintiffs ability to construct the Minimum Project. These events persisted from the inception of the Lease in February 2016 until its purported termination in November 2018 – a period of more than 31 months. Upon proper notice of OBOT's Force Majeure claims, which OBOT provided, its time to perform under the Ground Lease was extended. The length of the extensions should be no less than the period of delay, which the Court finds to be a minimum of 31 months. The City's purported termination also breached the Delay Due to Force Majeure provision (GL § 16.1, Art. 40) by enforcing an invalid Initial Milestone Date when it attempted to terminate the Ground Lease.

E. The City's Termination Breached the Ground Lease Because OBOT Commenced Construction by August 14, 2018.

As detailed above, the Ground Lease requires OBOT to have Commenced Construction of the Minimum Project, including the Bulk and Oversized Terminal and at least one Rail Improvement, by the Initial Milestone Date. (GL §§ 6.1(b), 6.1.1.1.) The City interprets "Bulk and Oversized Terminal" as a simple structure separate from rail. That interpretation is contrary to the plain language of the Ground Lease, the law of contract interpretation, and the meaning of the term in the industry.

The Court begins with the plain language of the Ground Lease. *See* Cal. Civ. Code §§ 1635 (contracts with public entities are interpreted by the same rules as private contracts), 1636

(interpretation must meet mutual intention of the parties), 1638-1639 (the language governs to determine intention so long as intention can be ascertained by the writing alone). The Ground Lease defines "Bulk and Oversized Terminal" as "[a] ship-to-rail terminal designed for the export of noncontainerized bulk goods and import of oversized or overweight cargo consistent with the Master Plan, *which includes, without limitation*, the City Funded Wharf Improvements and the wharf repairs and Improvements included in the OBOT Wharf and Rail Improvements ('Bulk and Oversized Terminal')" (GL, Ex. 3.1 (emphasis added).) The plain language of the Ground Lease's definition of "Bulk and Oversized Terminal" includes more than a single structure; it provides a non-exhaustive list of what is included in the Terminal, making clear that the list is "without limitation." (*Id.*)

Consistent with the definition in the Ground Lease, Mr. McClure testified that "the terminal is an amalgamation of both equipment, rail, and other things that help you unload a railcar, store it in a pile, load it onto a conveyor belt and out to a ship . . . it's many components, and the terminal is a location where those components come together." (RT 1559:1-13.) Mr. McClure's testimony about the technical meaning of "terminal"—based on 25 years of industry experience—is consistent with the plain language of the Ground Lease and is entitled to considerable weight given the technical nature of the Terminal. *See* Cal. Civ. Code § 1645 ("Technical words are to be interpreted as usually understood by persons in the profession or business to which they relate, unless clearly used in a different sense.").

The Terminal includes rail improvements. (RT 3578:24-3579:2.) "Railroad Improvements" as defined in Exhibit 3.1 to the Ground Lease include improvements to Lead Tracks No. 1 and No. 2 consistent with the Master Plan. (GL, Ex. 3.1; RT 3579:12-3580:2.) Relatedly, the definition of "Bulk and Oversized Terminal" also incorporates "OBOT Wharf and Rail Improvements" which include the rail improvements listed in Exhibit 3.1—*e.g.*, Lead Tracks No. 1 and No. 2. (RT 3581:19-3582:8.) Therefore, if Plaintiffs Commenced Construction on either Lead 1 or Lead 2, it Commenced Construction of the Terminal.

The evidence demonstrates that OGRE Commenced Construction of improvements to Lead Tracks No. 1 and No. 2. In fact, the City spent significant time examining Mr. McClure

about work that Chris Stotka and Industrial Railways Company performed in the Outer Claw in an effort to show that OGRE had at least *some* access to the Railroad R/O/W Property. Mr. McClure explained that this work was performed by IRC, but that OGRE paid for it. (RT 3342:16-3343:7; *see also* RT 3592:10-13.) And it is uncontested that the work occurred before August 14, 2018. (RT 3608:2-7.) It is also uncontested that the work was in the Outer Claw and included some improvement to Leads 1 and 2, and West of the Wake crossing. (*See* Ex. 833; Ex. 837; RT 3582:15-25, 3590:2-18, 3591:10-3592:7, 3608:24-3609:6, 3609:14-3610:3.) In addition, OGRE also paid for the installation of track west of the Burma Road crossing that was intended to enter the MH-1 parcel. (Ex. 829; RT 3588:16-3589:20, 832:14-833:1.)

OGRE (and OBOT through its subtenant) thus performed some construction of the Terminal. This same work also falls under Minimum Project Rail Improvement 3, which expressly includes the portion of Lead Track No. 2 to be constructed on the Outer Claw. (GL § 6.1(b)(iii); Ex. 833.) Therefore, if the work performed satisfies the definition of "Commenced Construction," Plaintiffs will have Commenced Construction of both the Terminal and at least one Minimum Project Rail Improvement.

The work meets the criteria for commencing construction under the Ground Lease—issuance of a permit where applicable; installation of a foundation, slab, or other type; and active and ongoing construction. (GL, Art. 40 (Ex. 68, p. 129); RT 3612:8-20.) No permit was required for improvement because the City approved the plans, and permits are not required for the installation of rail. (RT 3612:8-3613:3.) OGRE's installation of light weight concrete and ballast rock satisfies the foundation requirement. (RT 3613:4-13, 3613:22-3614:15.) And the only reason the work did not continue is that the City refused to turn possession of the area over to OGRE. (RT 3606:2-22.)

City staff working on the Project confirmed that OBOT had Commenced Construction. On May 22, 2018, five days after the *OBOT I* decision, Ms. Lake asked her team what Plaintiffs had done to satisfy the Initial Milestone Date. (Ex. 847, p. 2.) She did not ask Plaintiffs this question (RT 4047:17-25), and she had never asked it prior to the federal ruling. (RT 4125:25-4126:15). Mr. Monetta confirmed to Ms. Lake that "OBOT ha[d] constructed rail improvements

within its leased premises" (Ex. 847, p. 1; RT 4048:7-12), and Mr. Kennedy informed Ms. Lake that he agreed with Mr. Monetta's assessment, noting that the City had not completed its public improvements related to Industrial Drill Track No. 1. (Ex. 847, p. 1; RT 4049:2-23, 4050:18-4051:1).

Ms. Lake testified that she visited the West Gateway in the Spring of 2018 and personally observed that track construction had commenced, with particular reference to the BNSF Rail Easement Area—the first Minimum Project Rail Improvement. (RT 3940:23-3941:16, 3942:1-5; Ex. 837.) She admitted that the rail had been constructed by OGRE. (RT 3976:11-3977:13; *see also* 4064:11-19 ("[I]n the spring of 2018, it was clear that the developer had started to put down track and materials on at least a portion of the rail right-of-way.").)

F. The City Used Its Unlawful Termination to Justify Additional Breaches.

Plaintiffs also allege that the City breached the Ground Lease by refusing to issue estoppel certificates with respect to OBOT's subleases with OGRE and TLS (*see* Ex. 675; Ex. 676), and to issue a non-disturbance agreement for the OBOT's sublease with OGRE (*see* Ex. 226; Ex. 236; Ex. 485; Ex. 492 (approving OGRE sublease)). The Court agrees for the reasons below.

Section 12.5.1 of the Ground Lease requires the City, at OBOT's request, to enter Non-Disturbance Agreements with OBOT's subtenants "that in the event of any termination of this Lease, Landlord will not terminate or otherwise disturb the rights of the Subtenant under such Sublease, but will instead honor such Sublease as if such agreement had been entered into directly between Landlord and such Subtenant." (GL § 12.5.1.) Here, the City did the opposite. On October 17, 2018, before the cure period had expired, the City sent Mr. Tagami a letter rejecting OBOT's request for a Non-Disturbance Agreement, citing as its first basis, the City's prior notice to cure and the pending termination. (Ex. 485.)

Section 26.1 of the Ground Lease requires the City to issue estoppel certificates, at OBOT's request, stating that the Ground Lease is in full force and effect, identifying any known defaults, and providing other information, including responses to any of OBOT's reasonable request. (GL § 26.1.) Here, like with OBOT's requests for Non-Disturbance Agreements, the City

failed to issue an accurate certificate for OBOT's sublease with OGRE, citing its cure notice and the pending termination as a reason. (Ex. 676.)

In short, the City used its termination of the Ground Lease as a reason for non-performance. It follows that if the City's termination was unlawful, then the City's non-performance based on the unlawful termination was also a breach of the Ground Lease. The Court has already determined that City wrongfully terminated the Ground Lease. It also finds that the City's refusal to issue Non-Disturbance Agreements and estoppel certificates also breached the Ground Lease.

VII. OBOT'S THIRD CAUSE OF ACTION FOR ANTICIPATORY REPUDIATION

OBOT also alleges that the City's conduct constitutes anticipatory repudiation of the Ground Lease. The law on anticipatory breach is straightforward. It occurs "when one of the parties to a bilateral contract repudiates the contract." *Taylor v. Johnston*, 15 Cal. 3d 130, 137 (1975). "A party can breach, or break, a contract before performance is required by clearly and positively indicating, by words or conduct, that the party will not or cannot meet the requirements of the contract." CACI 324. The repudiation may be either express or implied. "An express repudiation is a clear, positive, unequivocal refusal to perform"; "an implied repudiation results from conduct where the promisor puts it out of his power to perform so as to make substantial performance of his promise impossible." *Taylor*, 15 Cal. 3d at 137. The repudiation must be without justification. *Gold Mining & Water Co. v. Swinerton*, 23 Cal.2d 19, 29 (1943). In this case, City's repudiation was express. It declared default and purported to terminate the Ground Lease.

For the reasons detailed above, the City repudiated the contract based on a performance deadline that had not passed. Despite Plaintiffs' diligent efforts to perform, on October 23, 2018, the City wrongfully claimed that Plaintiffs were in default and purported to terminate the Ground Lease, effective November 22, 2018. (Ex. 250.) At that time, the City was still required to perform, its statement definitively declared that it would no longer do so, and it did not perform. Thus, the City's notice was a clear, positive, and unequivocal refusal to perform and a repudiation of the Ground Lease.

VIII. PLAINTIFFS' FOURTH CAUSE OF ACTION FOR BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

Even if Plaintiffs had not prevailed on their breach of contract claim or complied with Section 16.1 of the Ground Lease to trigger automatic extensions of OBOT's deadlines, the City's conduct detailed above also demonstrates that the City breached the covenant of good faith and fair dealing implied in the contract. The evidence demonstrates that the City engaged in a long-term strategy with multiple approaches to deny OBOT and OGRE the benefits of the Ground Lease and OBOT the benefits of the Development Agreement. Even had the Court determined that some of those approaches did not breach an express contract term, the evidence would still demonstrate that the City's conduct was in bad faith and intended to obstruct OBOT's ability to perform its contractual obligations.

When viewed as a whole, the record is particularly troubling for the City. The City was so opposed to coal that it took every opportunity to prevent it from entering Oakland, even if that meant killing the Project. Indeed, the City's opposition to coal and the political pressures that gave rise to that opposition are not in dispute. As admirable as some may find that objective, the health, safety, and environmental impact of coal are not on trial. Those issues were settled in the federal litigation. *OBOT I*, 321 F.Supp.3d at 1010-11. So was OBOT's right to develop a Terminal through which multiple commodities, including coal could be transported. It is also undisputed that neither contract at issue in this case prohibits coal. (RT 2326:11-15, 2328:18-22, 2328:23-2329:5.) Consequently, the City's vigilant pursuit of a ban-compliant Terminal targeted OBOT's vested rights, was intended to deprive OBOT and OGRE of contractual benefits, and breached the implied covenant.

A. The Implied Covenant of Good Faith and Fair Dealing

Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement "to prevent one contracting party from unfairly frustrating the other party's right to receive the benefits of the agreement actually made." *Guz v. Bechtel Nat'l Inc.*, 24 Cal. 4th 317, 349 (2000); *Comunale v. Traders & General Ins. Co.*, 50 Cal. 2d 654, 658 (1958) (citing *Brown v. Superior Court*, 34 Cal. 2d 559, 564 (1949)). "'This covenant [of good

1 faith and fair dealing] not only imposes upon each contracting party the duty to refrain from
2 doing anything which would render performance of the contract impossible by any act of his own,
3 but also the duty to do everything that the contract presupposes that he will do to accomplish its
4 purpose.'" *Pasadena Live v. City of Pasadena*, 114 Cal. App. 4th 1089, 1093 (2004) (quoting
5 *Harm v. Frasher*, 181 Cal. App. 2d 405, 417 (1960)). The covenant is particularly important "in
6 situations where one party is invested with a discretionary power affecting the rights of another.
7 Such power must be exercised in good faith." *Carma Developers (Cal.), Inc. v. Marathon Dev.*
8 *Cal., Inc.*, 2 Cal. 4th 342, 372 (1992); *see also Cal. Lettuce Growers v. Union Sugar Co.*, 45 Cal.
9 2d 474, 484 (1955).

10 To prove a breach of the implied duty, a plaintiff must establish (1) the parties entered into
11 a contract; (2) the plaintiff did all, or substantially all of the significant things that the contract
12 required it to do or that it was excused from having to do those things; (3) all conditions required
13 for defendant's performance had occurred or were excused; (4) the defendant prevented the
14 plaintiff from receiving the benefits under the contract; (5) by doing so, the defendant did not act
15 fairly and in good faith; and (6) the plaintiff was harmed by the defendant's conduct. CACI 325;
16 *Seaman's Direct Buying Serv., Inc. v. Standard Oil Co.*, 36 Cal.3d 752, 768 (1984).

17 At its heart, "[a] party violates the covenant if it subjectively lacks belief in the validity of
18 its act …" *Carma Developers, Inc. v. Marathon Dev. Cal., Inc.*, 2 Cal. 4th 342, 372 (1992). "The
19 essence of the good faith covenant is objectively reasonable conduct." *Lazar v. Hertz Corp*. 143
20 Cal. App. 3d 128, 141 (1983)

21 **B. The City Did Not Act in Good Faith.**

22 The City's bad faith reached its apex after *OBOT I*, when it effectively ignored the ruling
23 (that coal was once again permitted) to achieve a coal-free terminal, at the risk of having no
24 terminal at all. *OBOT I* was decided on May 15, 2018. The decision came after, as the City's
25 witnesses testified, the parties had put the coal issue "aside" in order to execute the Ground
26 Lease, allowing the City to proceed with the health and safety hearings, with Plaintiffs free to
27 challenge that process in court. (RT 3229:5-15) The City conducted its hearings and enacted the
28

ordinance and resolution, OBOT challenged them in court, and Judge Chhabria's ruling resolved the "coal issue" in Plaintiffs' favor.

Rather than accept the ruling, however, the City continued its prior conduct and sought new ways to achieve its goal of a ban-compliant terminal. The City's conduct that breached the implied covenant is detailed at length above. The Court reiterates a few instances below.

On May 22, 2018, just days after the decision in *OBOT I*, Ms. Lake asked her team what Plaintiffs had done to satisfy the initial project rail milestone deadline. (Ex. 847) This was the first time she asked her team about OBOT's progress toward the Initial Milestone Date. (RT 4125:25- 4126:15). And she didn't ask Plaintiffs the question. (RT 4047:17-25.) Ms. Lake was informed that Plaintiffs had Commenced Construction, but the City had not fulfilled its obligations with respect to the public improvements, a precursor to turning over the rail corridor for private improvements. (Ex. 847; RT 4048:7-12, 4049:2-23, 4050:18-4051:1.) Thus, after the federal decision, Ms. Lake knew the City had not turned over the rail corridor to Plaintiffs and that Plaintiffs could not continue work on the Minimum Project Improvements.

Although Ms. Lake inquired about the possibility that OBOT would not meet the Initial Milestone Date immediately after *OBOT I* (and was informed the Plaintiffs had in fact Commenced Construction), and the City had failed to give OBOT and OGRE possession of or access to the rail corridor, the City sent letters to OBOT on August 20, 2018, stating that it had missed the Initial Milestone Date. (Ex. 185; Ex. 492). Both letters acknowledged Plaintiffs' Force Majeure claims, including the initial March 11, 2016, claim (Ex. 76), but stated that the City "elects to continue a deferral of its substantive response to, including denial and/or legal challenge of, such claims." (Ex. 185-2; RT 492-2.) Thus, even though City staff informed Ms. Lake that OBOT had Commenced Construction, and the City knew that it had not accepted completion of its public improvements or handed over the rail corridor to OBOT, the City still ignored OBOT's Force Majeure claims in order to impose an invalid, earlier deadline and declare Plaintiffs to be in default. (*See* Ex. 217). Because the City knew that Plaintiffs had performed and the City had failed to perform, ignoring the Force Majeure claims and declaring default was not objectively reasonable or valid; the City acted in bad faith.

Thereafter, Plaintiffs made good faith efforts to cure the claimed deficiency but the City rejected those efforts out of hand, including by stating that it would only recognize the "conceptual drawings" portion of the revised and resubmitted multi-volume Basis of Design – and disregard the rest of the submittal. (Ex. 247.) The City then claimed that the Basis of Design were "incomplete," largely without specifying how or why, nor did the City identify what the City required to render it complete, as required by the Lease. (*Id.*; *see* GL, § 6.2.1.) The City also ignored the Ground Lease's provision that a cure effort must only be commenced and reasonably pursued with diligence if it could not be completed with the 30-day cure period. (GL § 18.1.7.) This was all done in bad faith. *See Mad River Lumber Sales, Inc. v. Willburn*, 205 Cal. App. 2d 321, 325 (Cal. App. 1962) (holding that a contracting party cannot unreasonably prevent the other party from attempting to cure its deficiencies where the contract allows for a cure period).

And discussed above, the City's conduct permeated the highest levels of City government. In response to *OBOT I*, Mayor Schaaf said: "This is a fight for environmental justice and equity. Oakland's most vulnerable communities have unfairly suffered the burden of pollutants and foul air for too long. We will continue to fight this battle on all fronts." (RT 1777:6- 1779:15.) Mayor Schaaf acknowledged that the federal ruling indicated that one front the City could continue to fight was redoing the environmental study and gathering sufficient evidence of the health and safety risks, but it never did so. (RT 1809:16-1810:12.)

Instead, the City attempted termination. Ms. Landreth, who reported directly to Mayor Schaaf (RT 3245:4-12) admitted that the City's position with respect to the no-coal ordinance did not change after the May 15, 2018 decision in the federal case (RT 3295:18-3296:18). In other words, the City would not permit the Terminal to go forward so long as coal was on the table. Ms. Landreth testified that she made the decision to terminate the Ground Lease, but had no recollection of reviewing any of OBOT's Force Majeure claims. (RT 3261:6-3262:3, 3281:15-20) Purporting to terminate the Ground Lease without reviewing the claims that put the Initial Milestone Date at issue is not objectively reasonable. In light of all the evidence, the only reasonable conclusion is that the City's notice of default was just one more step towards its objective of achieving a ban-complaint terminal.

Each of the City's other acts discussed above also evidence the City's bad faith, including the City's decision that the existing zoning, permit process, and EIR would not apply without ever identifying any new process for permit or commodity approval; its failure to participate in the iterative Basis of Design process; its opposition to third-party funding that it had a contractual obligation to support; and its opposition to OGRE's application to the STB.

The City's twelfth affirmative defense argues that Plaintiffs' claim for breach of the implied covenant of good faith and fair dealing is barred in its entirety because it is based on the same facts as Plaintiffs' breach of contract claim. The Court disagrees.

First, the same evidence that can support a breach of contract can also support a breach of the implied covenant claim. "A breach of the contract may also constitute a breach of the implied covenant of good faith and fair dealing." *Guz v. Bechtel Nat'l Inc.*, 24 Cal. 4th 317, 352 (2000); *see also* S*hade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.*, 78 Cal. App. 4th 847, 881 (2000) (collecting cases).

Second, even if that were not the law, parties are permitted to present claims (and evidence) in the alternative. *Sundance v. Municipal Court*, 192 Cal. App. 3d 268, 274 (1987) ("Litigants in good faith may raise alternative legal grounds for a desired outcome"). In some instances, conduct that a party initially alleges as a breach of contract may not breach an express contract term, but can still breach the implied covenant of good faith and fair dealing. *Careau & Co. v. Sec. Pac. Bus. Credit, Inc.*, 222 Cal. App. 3d 1371, 1395 (1990). It is the purview of the Court to evaluate the evidence and determine the extent to which that evidence supports each claim or both claims.

Third, and as shown above, Plaintiffs presented substantial evidence at trial that the City intentionally interfered with Plaintiffs' ability to perform their contractual obligations and enjoy the benefits of their contracts. That is the heart of the implied covenant.

IX. PLAINTIFFS' FIFTH CAUSE OF ACTION FOR DECLARATORY RELIEF

Plaintiffs' fifth cause of action seeks 14 declarations—each related to the status of the parties' contracts and their rights and obligations under those contracts.[19] (State FAC ¶ 136.) To qualify for declaratory relief, Plaintiffs are required to show a proper subject for declaratory relief and an actual controversy. Cal. Code. Civ. Proc. § 1060; *Lee v. Silveira,* 6 Cal. App. 5th 527, 546 (2016). "It is elementary that questions relating to the formation of a contract, its validity, its construction and effect, excuses for nonperformance, and termination are proper subjects for declaratory relief." *Fowler v. Ross*, 142 Cal. App. 3d 472, 478 (1983). Plaintiffs' requested declarations are addressed below.

1. Plaintiffs' Requested Declarations Regarding Contract Default and Status

Plaintiffs seek a declaration that they are not in default under the Ground Lease or Development Agreement. They also request a declaration that neither contract has been terminated and both remain in full force and effect. For the same reasons the Court finds that the City breached the Ground Lease (discussed above), the Court also finds that Plaintiffs are entitled to a declaration that they are not in default and the contracts remain in effect.

2. Plaintiffs' Requested Declaration Regarding Commenced Cure

Plaintiffs seek a declaration that OBOT commenced a cure that vitiates any grounds for termination of the Ground Lease of Development Agreement. As discussed above, OBOT responded to the City's September 21, 2018 cure notice by commencing a cure. Under Section 18.1.7 of the Ground Lease, OBOT was not required to cure the alleged default within thirty days because construction of the Minimum Project could not reasonably be completed within thirty days. (*See* GL § 18.1.7.) Commencing the cure and diligently prosecuting it was sufficient. (*Id.*) Thus, even had August 14, 2018 been the Initial Milestone Date, the City's October 23, 2018 notice of default would have been premature. OBOT is thus entitled to the declaration it seeks.

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[19] Plaintiffs also pleaded a request for declaratory relief that under Section 12.5.2 of the Ground Lease, the City shall approve the revisions to the form NDA. The Court has already determined that the Ground Lease remains in force because the City's termination was ineffective. Thus, the Ground Lease's provisions regarding NDAs also remain in effect.

3. Plaintiffs' Requested Declaration Regarding Force Majeure

Plaintiffs also seek a declaration that OBOT properly invoked the Force Majeure provision under the Ground Lease and is entitled to an extension of at least two years of the Commencement Date, as defined in the Ground Lease, with a further continuing extension for so long as the City fails to meet its obligations under either contract. The Court already determined above that OBOT properly invoked the Force Majeure provision under the Ground Lease.

Plaintiffs are also correct that the Ground Lease provides for an extension of time to perform equal to at least the period performance is delayed. (*See* GL, Art. 40.) In fact, OBOT is also entitled to "such additional time thereafter as may reasonably be required to complete performance of the hindered act." (*Id.*) Here, the facts demonstrate that the City's acts to hinder the development of the Terminal persisted from the inception of the Lease in February 2016 through the purported termination of the Lease in November 2018. Thus OBOT is entitled to at least a 31-month extension. For instance, the City identified the regulations that apply to the Project more than 2.5 years late; although it had the Basis of Design since 2015, the City had not substantively responded to it as of November 22, 2018; and the City's health and safety hearings, ordinance, and resolution delayed the Terminal from at least Summer 2016 when the City passed its coal ban through May 15, 2018 when it was invalidated.

4. Plaintiffs' Requested Declaration Regarding Creek Protection Permit

Plaintiffs request a declaration that a creek protection permit is not required. The 2012 EIR Addendum makes clear that no permit is required. (Ex. 1, pp. 196-97.)

5. Plaintiffs' Requested Declaration Regarding the Railroad R/O/W Property

Plaintiffs seek a declaration that the City is required to turnover possession of any property that Plaintiffs have a right and obligation to improve, including but not limited to the Railroad R/O/W Property. To the extent the Ground Lease includes an obligation for the City to give possession or access to OBOT or OGRE to any property, the Court has already determined that the Ground Lease remains in effect.

As to the Railroad R/O/W Property specifically, the evidence demonstrates that the preconditions for turning over the rail corridor have been met. For instance, Ms. Lake's testimony and internal City correspondence shows that the City accepted the public improvements as complete in Summer 2019 and that the improvements had in fact been completed much earlier. (Ex. 227; RT 1711:1-13, 3594:15-24, 4018:21-4019:6.) Plaintiffs are entitled to the declaration they seek. To the extent the City has additional obligations to perform in connection with turning the rail corridor over to OBOT, such as completing the survey required by Ground Lease, section 1.1.1, the City must perform those obligations in the manner and time required by the Ground Lease.

6. Plaintiffs' Requested Declaration Regarding the Rail Access Agreement

Plaintiffs seek a declaration that the City is required to enter a Rail Access Agreement with the Port under the terms the City and Port agreed to as set forth in the Amended and Restated Cost Sharing Agreement. The Court has already determined that the City failed to use commercially reasonable efforts to enter the RAA as the Ground Lease requires. (GL § 5.2.3.) That failure includes the City's attempts to include terms in the RAA that are inconsistent with the Ground Lease, which with respect to the RAA, corresponds to the CSA. (*See* CSA ¶¶ 10-11 (Ex. 3).) Plaintiffs are thus entitled to a declaration that the City is required to enter the RAA under terms consistent with the CSA.

7. Plaintiffs' Requested Declaration Regarding Location of the Rail Network

Plaintiffs seek a declaration that the rail network contemplated by the Rail Access Agreement is limited to the track east of Wake Avenue.

8. Plaintiffs' Requested Declaration Regarding NDA and Estoppel Certificates.

Plaintiffs seek a declaration that the City is obligated to issue an NDA and estoppel for OBOT's subtenants without reference to any unmatured event of default or event of default. The Ground Lease requires the City to issue NDA's and estoppel certificates at OBOT's request if

certain conditions are met. (GL §§ 12.5.1, 26.1.) In October 2018, the City responded to OBOT's pending requests for NDAs and estoppel certificates for its subtenants, OGRE and ITS. (*E.g.*, Ex. 485; Ex. 676.) The City's responses referenced the City's then-pending notice to cure. The City withheld granting NDAs pending expiration of the cure period. (*E.g.*, Ex. 485.) The City appeared willing to issue estoppel certificates, but only on condition that the Ground Lease remained in full force and effect, referencing the cure notice in the responses. (*E.g.*, Ex. 676.) In other words, the certificate the City issued on October 18, 2018 (Ex. 676) had no value because the City declared default only five days later. Plaintiffs are entitled to the declaration they seek.

9. Plaintiffs' Requested Declarations Regarding Additional Rights and Obligations Under the Ground Lease

Plaintiffs seek several additional declarations that restate the parties' rights and obligations under the Ground Lease. These include declarations that OBOT and OGRE have the right to access the rail areas set forth in the Ground Lease (*see* GL §§ 1.1.1, 1.1.2, 1.5.1, 1.5.2); that the City is obligated to cooperate with Plaintiffs' proceedings before the STB (*see* GL § 5.2.2.2); that OBOT and its subtenant may have beneficial use of the West Gateway (*see* GL § 29.1 (quiet enjoyment)); and that the City is obligated to construct all improvements as required under the Lease (*e.g.*, GL § 37.9.2(b)). These declarations all restate the parties' rights and obligations under the Ground Lease that have been discussed above. Because the Court finds that the City's termination of the Ground Lease was ineffective, it also determines the parties' rights and obligations under the Ground Lease remain in effect.

10. Plaintiffs' Requested Declaratory Relief Regarding Coal

As explained throughout this Statement of Decision, neither the Ground Lease nor the Development Agreement restrict any particular commodity. That issue was resolved with respect to the Development Agreement in *OBOT I*, and this Court resolves it with respect to the Ground Lease. Plaintiffs are entitled to the declaration they seek.

X. PLAINTIFFS' SIXTH CAUSE OF ACTION FOR SPECIFIC PERFORMANCE

Plaintiffs' sixth cause of action is a request for a particular remedy, specific performance, for the City's breach of the Ground Lease and Development Agreement. The availability of

particular remedies and the scope of those remedies has been reserved for the second phase of trial. In this phase, the Court addresses only liability.

As discussed above, the Court has found that the City breached the Ground Lease by terminating it. The Court has also found additional breaches that support Plaintiffs' improper termination claim, including breaches of the Development Agreement. Whether specific performance is the appropriate remedy for those breaches will be decided at the next phase of trial. Relatedly, the Court defers a determination on the City's fourteenth affirmative defense regarding the availability of specific performance until the second phase of trial.[20]

XI. THE CITY'S FIRST CAUSE OF ACTION FOR BREACH OF CONTRACT

The City contends that OBOT breached the Initial Milestone Date set forth in Ground Lease (GL § 6.1.1.1), by failing to Commence Construction of the Bulk and Oversized Terminal by August 14, 2018, triggering the contract provision for early termination (GL § 6.1.2).

The City's breach claim is the mirror image of Plaintiffs' claim—either the termination was proper or it was a breach. For the reasons discussed at length above, the Court finds that

[20] For the same reason, the Court does not reach the City's sixteenth affirmative defense for unjust enrichment, eighteenth affirmative defense for failure to mitigate, nineteenth affirmative defense regarding causation of damages, twentieth affirmative defense that damages are barred by contract terms, and twenty-third affirmative defense regarding attorneys' fees. These all relate to the availability and scope of various remedies, which will be determined during the second phase of trial. The City has alleged several affirmative defenses that the Court has not addressed. These include the City's first through fourth, sixth, thirteenth, seventeenth, twenty-first, and twenty-second affirmative defenses. None of these are affirmative defenses. The City's first defense is for failure to state a claim, which the Court addressed at the pleading stage. Its second affirmative defense is that its performance was excused by Plaintiffs' breaches of the Ground Lease by failing to comply with deadlines. This is just another way of stating the parties' competing breach claims, which the Court has addressed. The third defense is indistinguishable from the second. The City's fourth affirmative defense is that its performance was excused by termination of the Ground Lease. But this case is all about whether that termination was valid. Again, the City merely restates the affirmative breach claims as a defense. The City's sixth affirmative defense is simply that it performed its contractual obligations. The City's performance is another way of saying the City did not breach—it goes directly to an element of the claim and is not a defense. Similarly, the City's thirteenth affirmative defense states only that the declaratory relief claim seeks more than what is available under law; it's seventeenth defense is only that Plaintiffs suffered no harm; and it's twenty-first affirmative defense is that the City's conduct was lawful or reasonable. All of these defenses simply restate elements of the parties' claims. None are true affirmative defenses.

OBOT prevails on the City's claim for breach of contract. The City's termination was ineffective and a breach of the Ground Lease.

XII. THE CITY'S SECOND CAUSE OF ACTION FOR DECLARATORY RELIEF

The City seeks a declaration that (1) OBOT breached the Ground Lease by failing to comply with Minimum Project Requirements for the Bulk and Oversized Terminal and Railroad Improves; (2) as a result of the breach, the Ground Lease and Development Agreement have terminated; and (3) the City is entitled to certain remedies for OBOT's breach.

The City's declaratory relief claim fails because it expressly hinges on its breach claim. The Court has already determined that OBOT did not breach the Ground Lease.[21]

Date: September 25, 2023

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[21] Because the Court has determined that the City has not established either of its Counterclaims and is not entitled to any relief on its Counterclaims, the Court does not need to address Plaintiffs' affirmative defenses to the Counterclaims.