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

13 SUPERIOR COURT OF CALIFORNIA

14 IN AND FOR THE COUNTY OF ALAMEDA

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

19 Plaintiffs,

20 v.

21 CITY OF OAKLAND, a California municipal
corporation,

22 Defendant.

23 CITY OF OAKLAND,

24 Counter-Plaintiff,

25 v.

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

28 Counter-Defendants.

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Consolidated Case Nos. RG18930929 /
RG20062473

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

**PLAINTIFFS' TRIAL BRIEF
(REMEDIES PHASE)**

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

1 **I. INTRODUCTION**

2 Exactly five years ago today, Defendant/Counter-Plaintiff City of Oakland (“the City”)
3 unlawfully terminated its Ground Lease with Plaintiff/Counter-Defendant Oakland Bulk and
4 Oversized Terminal LLC (“OBOT”) and failed to recognize OBOT’s rights to an extension of time
5 to perform based on the City’s multiple acts of Force Majeure. The City also, in violation of its
6 contractual duties the duty of good faith and fair dealing, engaged in multiple acts that substantially
7 and materially interfered with Plaintiffs’ ability to conduct their permitted uses on the Premises,
8 including their right to develop the Terminal. It is now settled that the City’s termination breached
9 the Ground Lease; and thus OBOT and its subtenant, Plaintiff Oakland Global Rail Enterprise, LLC
10 (“OGRE”) (collectively, “Plaintiffs”), are entitled to a remedy. Plaintiffs respectfully request the
11 following remedies in the alternative.

12 Scenario 1 would include: (1) a declaratory judgment that OBOT is not in default of the
13 Development Agreement (“DA”) or the Ground Lease and that both contracts remain in full force
14 and effect; (2) an award of specific performance under which the City is required to comply with
15 all of its obligations under the Ground Lease, OBOT’s performance deadlines, as well as related
16 deadlines and obligations, are extended by at least two years and five months; and (3) an award of
17 actual damages of approximately \$20 million, consisting of amounts incurred by Plaintiffs as a
18 direct result of the City’s default during the period of time it took OBOT to obtain specific
19 performance.

20 Scenario 2 would include the same declaratory judgment and past damages but not specific
21 performance. Instead, the Court would award actual damages of approximately \$150 million
22 (inclusive of Plaintiffs’ past damages) incurred by Plaintiffs over the life of the Ground Lease that
23 the City improperly terminated.¹

24
25 ¹ Both damages awards were the subject of expert reports produced by Plaintiffs, and the City’s
26 contention that these amounts are newly claimed is baseless. Plaintiffs also expressly prayed for
27 damages in their First Amended Complaint. Finally, in accordance with the Court’s November 21,
28 2023 Order, by close of business on November 27, 2023, Plaintiffs will file a final summary of
damages they seek in conjunction with specific performance and a final Summary of legal damages
they seek as an alternative remedy.

1 The Court has already determined that Plaintiffs are entitled to a declaration that OBOT is
2 not in default under the Development Agreement or the Ground Lease. It follows that both contracts
3 remain in full force and effect. This phase raises three remaining questions:

- 4 1. Under Scenario 1, what is the nature and scope of the extension of time and related
5 relief that Plaintiffs are entitled to as part of the specific performance remedy?
- 6 2. Under both scenarios, what are Plaintiffs' compensable past actual damages?
- 7 3. Under Scenario 2, what are Plaintiffs' compensable future actual damages?²

8 This brief focuses on the first question. Based on this Court's November 21, 2023 Order on
9 election of remedies and the scope of damages, Plaintiffs will answer the second and third questions
10 in the briefs and tables due on November 27, 2023.

11 **II. WITNESSES**

12 Plaintiffs anticipate calling three fact witnesses during the remedies phase: Phil Tagami,
13 Mark McClure, and James Wolff. All three witnesses will testify about the rail-to-ship Terminal
14 project, various aspects of the damages Plaintiffs seek, and the extension of time Plaintiffs seek.

15 Plaintiffs also anticipate calling an expert witness, Peter Brown. Mr. Brown is an expert
16 forensic accountant with significant experience quantifying damages in commercial litigation,
17 including performing valuations and lost profit analyses. He will testify about the actual damages
18 Plaintiffs seek—both past and future. Mr. Brown's deposition was taken by Defendant prior to the
19 commencement of trial.

20 **III. DECLARATORY RELIEF (SCENARIOS 1 AND 2)**

21 Plaintiffs are entitled to a declaration that the Ground Lease remains in full force and effect.
22 (*See* First Amended Complaint ¶ 136(b).)³ The Court has already determined that Plaintiffs are

24 ² Under either scenario, consistent with Ground Lease Section 38.13 and California Civil Code
25 Section 1717, OBOT will file a post-trial prevailing party motion to recover the millions of dollars
26 in attorneys' fees and costs it was forced to incur in this action, which amounts are not included in
27 Plaintiffs' damages calculations.

28 ³ In their First Amended Complaint, Plaintiffs sought both a declaration that Plaintiffs are not in
29 default under the DA or the Ground Lease and a declaration that those contracts remain in full force
30 and effect. (First Amended Complaint ¶¶ 136(a)-(b).) The Court included the former in its PSOD
31 but not the latter.

1 entitled to a declaration that OBOT is not in default under the DA or the Ground Lease, ((Proposed)
2 Statement of Decision (“PSOD”) at 94:4-9), and that the City’s termination of the Ground Lease
3 breached that contract (*id.* at 2:18-21). It follows that the City’s termination of the Ground Lease
4 was ineffective and that both contracts remain in full force and effect. Plaintiffs require such a
5 declaration to correct the false claim the City has made to the world—including key regulatory
6 agencies, lenders, and other third parties with whom Plaintiffs must deal to complete the Project—
7 that Plaintiffs’ Ground Lease was terminated.

8 **IV. SPECIFIC PERFORMANCE (SCENARIO 1 ONLY)**

9 The parties agree that Plaintiffs are entitled to specific performance. (*See* Reporter’s
10 Transcript of Proceedings (“RT”) at 4275:10-13, 4276:13-15, 4281:4-13, 4286:4-8, 4293:4-8.) That
11 makes sense. The Ground Lease expressly permits OBOT to seek an order of specific performance
12 for the City’s default, as well as other equitable relief appropriate to the circumstances of the
13 default. (Ex. 68-89, GL § 20.2.)⁴

14 The parties disagree on the scope of specific performance that the Court should award.
15 Plaintiffs seek a judgment awarding specific performance and related relief that provides the
16 following:

- 17 1. The Initial Milestone Date in Section 6.1.1 of the Ground Lease is extended by at
18 least two years and five months, beginning on the date of final judgment.
- 19 2. The parties’ obligation under Section 6.3.1 of the Ground Lease to cooperate in the
20 identification and pursuit of third party funds necessary to complete certain
21 improvements is extended by at least 2 years and five months, beginning on the date
22 of final judgment.

23
24
25 ⁴ Ground Lease Section 20.2 provides in full: “Tenant’s Equitable Relief. Except as otherwise
26 provided in this Lease, Tenant shall be entitled at any time after a default or threatened default by
27 Landlord to seek injunctive relief or an order for specific performance, where appropriate to the
28 circumstances of such default. In addition, after the occurrence of an Event of Default, Tenant shall
be entitled to any other equitable relief (excepting termination of this Lease) that may be appropriate
to the circumstances of such Event of Default.” (Ex. 68-89.)

1 **1. Plaintiffs are entitled to an extension of the Initial Milestone Date of at least 2.5**
2 **years.**

3 Determining the length of OBOT’s extension of time to Commence Construction of the
4 Minimum Project—i.e., the Initial Milestone Date—involves a two-step inquiry. The plain
5 language of the Ground Lease entitles OBOT to an extension of time equal to (1) the delay caused,
6 *plus* (2) additional time reasonably required to perform. Section 16.1 of the Ground Lease—the
7 Delay Due to Force Majeure provision—provides that “a Party whose performance of its
8 obligations hereunder is hindered or affected by events of Force Majeure shall not be considered in
9 breach of or in default in its obligations hereunder *to the extent of any delay resulting from Force*
10 *Majeure ...*” (Ex. 68-84 (emphasis added).) The definition of Force Majeure in Article 40 of the
11 Ground Lease confirms that “[t]he delay caused by Force Majeure includes ... *the period of time*
12 *during which performance of an act is hindered ...*” (Ex. 68-132 (emphasis added).) The definition
13 also includes “*such additional time thereafter as may reasonably be required to complete*
14 *performance of the hindered act.*” (*Id.* (emphasis added).) Under the plain terms of these provisions,
15 taken together, the extension of time that Plaintiffs have to perform the hindered act (i.e.,
16 commencement of construction of the Minimum Project) is equal to the period of time during which
17 performance was hindered plus additional time reasonably needed to perform. *See* Cal. Civ.
18 Code §§ 1638 (“The language of a contract is to govern its interpretation, if the language is clear
19 and explicit, and does not involve an absurdity.”), 1639 (“the intention of the parties is to be
20 ascertained from the writing alone, if possible”), 1641 (“The whole of a contract is to be taken
21 together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret
22 the other.”), 1643 (contract must receive interpretation that will make it operative and capable of
23 being carried into effect).

24 On the first step of the inquiry—the length of delay—the evidence presented during the
25 liability phase demonstrates that the City caused delays that prevented commencement of
26 construction by at least two years and five months (if counting only from the first act of Force
27 Majeure until contract termination) and as much as seven years and four months (if counting from
28 the first act of Force Majeure until the filing of this brief). In its PSOD, the Court identifies six City

1 acts that each constitute a separate act of Force Majeure, including the City’s: (1) breach of the DA
2 by enacting a resolution in June 2016 to apply a no-coal ordinance to OBOT without substantial
3 evidence; (2) breach of the covenant of good faith and fair dealing after the May 2018 Federal
4 Decision; (3) failure to disclose commodities that it considered permissible and the basis of its
5 position; (4) failure to provide substantive, written feedback on the Basis of Design; (5) failure to
6 use commercially reasonable efforts to enter into the Rail Access Agreement with the Port of
7 Oakland; and (6) failure to complete the Public Improvements and the related survey of the rail
8 corridor, and turn over the property to OBOT to complete the private improvements. (PSOD at
9 89:3-90:15.) The Court characterizes each act, other than the DA breach, as occurring after May
10 15, 2018. (*Id.* at 90:14-15.)

11 The DA breach, based on the date of enactment of Resolution No. 86234, occurred on June
12 27, 2016. (Ex. 499-9.) The period of delay, based on the Court’s Force Majeure findings, thus
13 started on June 27, 2016—878 days (2 years, 4 months, 26 days) before the City terminated the
14 Ground Lease on November 22, 2018. At minimum, Plaintiffs are entitled to an extension of the
15 Initial Milestone Date equal to that delay. The period of delay as characterized above, ends at
16 termination because the City’s unlawful termination effectively tolled the Ground Lease term and
17 OBOT’s obligations to perform. *Cf. Cent. Valley Gen. Hosp. v. Smith*, 162 Cal. App. 4th 501, 521
18 (2008) (“one party’s repudiation discharges any remaining duties of performance of the other party
19 with respect to the expected exchange” (citations omitted)). For that reason, the extension of time
20 should not commence until the Court enters judgment and awards specific performance.⁵

21 On the second step—additional time reasonably needed to perform—Plaintiffs will present
22 evidence that the circumstances today are fundamentally different than they were in 2016 when the
23 parties executed the Ground Lease; plainly, the amount of time required has increased considerably
24

25 ⁵ If the Court disagrees that the City’s termination tolled the Ground Lease, the delay caused by the
26 City’s acts continued to accrue after termination and is ongoing, consisting of 2,704 days (7 years,
27 4 months, 6 days) since the City enacted the resolution to apply its no-coal ordinance to OBOT.
28 That delay will continue to until at least entry of judgment. If the City fails to cure the Force
Majeure events identified in the PSOD at that time, the period of delay would continue to accrue.
Plaintiffs’ proposed period of two years and five months is reasonable and easier to manage.

1 due to market and regulatory changes over the last seven years. The evidence will demonstrate
2 multiple factors that reasonably extend the time Plaintiffs will need to meet the Initial Milestone.

3 These factors include, without limitation:

- 4 • Project remobilization will take time on both sides after more than seven years of
5 delay, five years of “termination,” and years of litigation in federal and state court.
- 6 • Remobilization will involve new hiring, ensuring compliance with applicable
7 regulations, taking inventory of onsite materials and assessing which materials can
8 be used, adjusting for new requirements such as changed standards for ballast rock,
9 and other steps.
- 10 • Key City staff with the institutional knowledge needed to support the Project no
11 longer work for the City, including Douglas Cole, Sabrina Landreth, Claudia
12 Cappio, and Patrick Cashman. City remobilization will require identification and
13 education of the City’s new Project team, including consultants to review the Basis
14 of Design, staff to negotiate the Rail Access Agreement to execution, and team
15 members to perform the City’s additional contract obligations.
- 16 • Infrastructural and regulatory barriers must also be taken into account. For instance,
17 the Project is required to satisfy multiple mitigation standards, including through air
18 monitoring. The expensive air-monitoring system—including one air monitor on the
19 West Gateway and two at other Project locations—have all been removed or
20 destroyed. In addition, the regulatory agencies that will need to issue approvals are
21 all currently under the impression that the Ground Lease has been terminated.
- 22 • The permit approval process is impacted, including because the City is experiencing
23 high vacancy rates for the permitting functions across multiple departments. (*See*
24 *Ex. 1002-34.*⁶)
- 25 • Plaintiffs must secure new construction financing, which is contingent on the City
26 cooperating by providing an estoppel and non-disturbance agreement.

27
28 ⁶ Not in evidence.

- The market for commodities has changed. For instance, Solvay, a global leader in the soda ash market, and Vancouver Bulk Terminal recently announced a partnership to develop a terminal in Washington State, which could impact the viability of soda ash as a commodity for the terminal in Oakland. (See Ex. 1004.⁷)
- Supply chain delays have impacted nearly every industry since the pandemic and even common construction materials have become more difficult to find and require more lead time than before the pandemic. Similarly, construction cost inflation has been significant during for the time period in question.
- The same delays that existed prior to termination still exist, including the City’s failure to turn over the Railroad R/O/W Property and complete and deliver the survey of the rail corridor.

The evidence presented at trial will demonstrate that the above and other factors require additional reasonable time for Plaintiffs to complete the Initial Milestone.

2. Plaintiffs are entitled to an extension of the parties’ obligations to identify and pursue third-party funding under Section 6.3.1.

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.” (Ex. 68-41, GL § 6.3.1.) Under Section 6.3.1, the parties’ obligation to identify and pursue third-party funds sunsets on the earlier of the date that Unfunded Improvements become fully funded or April 16, 2019. The evidence will show that the Unfunded Improvements had not been fully funded as of November 22, 2018, meaning the parties’ obligation to pursue funding would have continued to exist but for the City’s unlawful termination of the contract. The parties’ obligation could not have expired on April 16, 2019 because that date occurred after the City terminated the contract.

In addition, the funding that Section 6.3.1 contemplates, including for wharf improvements, is necessary for OBOT to meet its construction obligations. Extending the parties’ obligations under

⁷ Not in evidence.

1 that section is thus a necessary part of extending the Initial Milestone Date. The Ground Lease
2 expressly permits the Court to award specific performance and “any other equitable relief ... that
3 may be appropriate to the circumstances of [the City’s] Event of Default.” (Ex. 68-89.) The law
4 authorizes the same. *See Hutton v. Gliksberg*, 128 Cal. App. 3d 240, 249 (1982) (“In granting
5 specific performance, a trial court may award in its decree such additional or incidental relief as
6 necessary to adequately sort out the equities of the parties” (citation omitted)).⁸

7 Finally, Section 6.3.1 expressly provides for an extension of time due to events of Force
8 Majeure. Although Section 6.3.1 uniquely limits such events to those that occurred after February
9 16, 2016, this Court has already found that all six Force Majeure events occurred after that date.
10 The sunset date in Section 6.3.1 should thus be extended by the same duration as the Initial
11 Milestone Date.

12 **V. PAST ACTUAL DAMAGES (SCENARIOS 1 AND 2)**

13 Plaintiffs seek past actual damages for their costs and losses incurred during the period prior
14 to obtaining judgment. It is undisputed that these damages are available under Scenario 2 because
15 a successful plaintiff is entitled to all damages stemming from the breach. As detailed in Plaintiffs’
16 Trial Brief Regarding Recovery of Damages filed on November 20, 2023, and their forthcoming
17 supplemental brief on the same topic, these damages, including lost profits during the period before
18 judgment, are also available in conjunction with specific performance. *See Rogers*, 28 Cal. App.
19 4th at 1220-22. The specific items of damage will be presented in the tables that the Court has
20 ordered Plaintiffs to file by November 27, 2023 and the subject of testimony at trial.

21 **VI. FUTURE ACTUAL DAMAGES (SCENARIO 2 ONLY)**

22 Plaintiffs seek actual damages of approximately \$150 million (inclusive of the past damages
23 discussed above and future actual damages). As detailed in Plaintiffs’ Trial Brief Regarding
24 Recovery of Damages filed and their forthcoming supplemental brief on the same topic, these

25 _____
26 ⁸ *See also Rogers v. Davis*, 28 Cal. App. 4th 1215, 1221-22 (1994) (“[A] ‘decree [of specific
27 performance] need not be absolute in form, and the performance that it requires need not be
28 identical with that promised in the contract; it may be so drawn as best to effectuate the purposes
for which the contract was made, and it may be granted on such terms and conditions as justice
requires.’” (quoting Restatement (First) of Contracts § 359(2))).

1 damages are available for breach of contract and do not fall under the Ground Lease's consequential
2 damages provision. The specific items of damage will be presented in the tables that the Court has
3 ordered Plaintiffs to file by November 27, 2023 and the subject of testimony at trial.

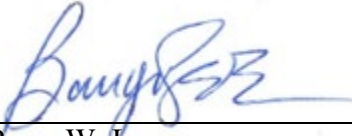
4 **VII. CONCLUSION**

5 As detailed above, and in Plaintiffs' first two pretrial briefs and forthcoming supplemental
6 briefs, Plaintiffs are entitled to the remedies they seek. With respect to specific performance,
7 Plaintiffs are entitled to an extension of time to meet the Initial Milestone of, at minimum, two
8 years and five months from the date of final judgment.

9 Date: November 22, 2023

MANATT, PHELPS & PHILLIPS, LLP

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