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OAKLAND BULK AND OVERSIZED TERMINAL and
OAKLAND GLOBAL RAIL ENTERPRISE

SUPERIOR COURT OF THE STATE OF CALIFORNIA

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 and

Plaintiffs,

v.

CITY OF OAKLAND, a California municipal corporation,

Defendant.

Civil Case No.

COMPLAINT FOR:

(1) BREACH OF CONTRACT;
(2) ANTICIPATORY BREACH;
(3) BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING;
(4) FRAUDULENT INDUCEMENT/ FALSE PROMISE;
(5) INTENTIONAL INTERFERENCE WITH CONTRACT (TLS);
(6) INTENTIONAL INTERFERENCE WITH PROSPECTIVE ECONOMIC RELATIONS (TLS AND ITS);
(7) NEGLIGENT INTERFERENCE WITH PROSPECTIVE ECONOMIC RELATIONS (TLS AND ITS);
(8) INTENTIONAL INTERFERENCE WITH CONTRACT (OGRE);
(9) INTENTIONAL INTERFERENCE WITH PROSPECTIVE ECONOMIC RELATIONS (OGRE);
(10) NEGLIGENT INTERFERENCE WITH PROSPECTIVE ECONOMIC RELATIONS (OGRE);
(11) DECLARATORY RELIEF; AND
(12) SPECIFIC PERFORMANCE

Plaintiffs Oakland Bulk and Oversized Terminal, LLC ("OBOT") and Oakland Global Rail Enterprise, LLC ("OGRE") (collectively, "Plaintiffs") hereby complain against Defendant City of Oakland ("Defendant" or "City") and allege as follows:

SUMMARY OF ACTION

1. Plaintiffs bring this action to compel the City to fulfill its promises and honor its legal obligations to Plaintiffs, who are the developers of a rail-to-ship bulk commodity terminal ("Terminal") located at a portion of the former Oakland Army Base known as the West Gateway. Over the last several years, the City has engaged in an uninterrupted pattern of delay and interference, all with the objective of preventing OBOT from completing this project. Indeed, the City's latest tactic—falsely asserting that its Lease with OBOT has automatically terminated as the result of a claimed default that did not occur—speaks volumes about the City's misguided attempts to eliminate this project in violation of its long-standing contractual commitments.

2. The former Oakland Army Base is uniquely situated with its immediate proximity to both a deep-water port and existing rail capacity, which allows for significant international goods movement through a bulk goods shipping terminal that can receive, store, handle, and ship goods that are typically transported in large quantities. Absent these characteristics, such goods would have to be transported via diesel trucks with significantly higher ambient air emissions, including particulate matter, in and around the already impacted community of West Oakland.

3. Beginning in 2010, Plaintiffs, or their predecessors-in-interest, and the City entered into a series of contracts with respect to the former Oakland Army Base in general and the "West Gateway" portion of the former base in particular, including the following:

a. that certain Exclusive Negotiation Agreement, dated January 22, 2010 (as amended, the "ENA");

b. that certain Army Base Gateway Redevelopment Project Lease Disposition and

Development Agreement, effective December 4, 2012 (as amended, the "LDDA");

c. that certain Development Agreement by and between the City of Oakland and Prologis CCIG Oakland Global, LLC Regarding the Property and Project Known as "Gateway Development/Oakland Global" dated July 16, 2013 (the "DA"); and

d. that certain Army Base Gateway Development Project Ground Lease for West Gateway, dated February 16, 2016 (as amended, the "Lease"), whereby OBOT ground leased (i) the West Gateway property; and (ii) the existing rail right-of-way ("Railroad R/O/W Property" and together with West Gateway property, the "Property").

4. Pursuant to their rights and obligations under such agreements, the developers set out to redevelop a significant portion of the former Oakland Army Base, which included reestablishing certain rail improvements (the "Shortline Rail") and developing the Terminal. The Shortline Rail and the Terminal are collectively referred to herein as the "Project".

5. In order to reach this vision, it was understood that OBOT would sublease portions of the Property to a terminal subtenant who would design, construct and operate the Terminal and a rail subtenant who would design, construct and operate the Shortline Rail.

6. Once realized, the Project is positioned to streamline customer logistics supply chains, create more service options for shippers from the United States seeking greater access to and from foreign markets, solidify Oakland's reputation as a major west coast trade center for American resources, and carry on the proud history of Oakland's working waterfront through the creation of long-term job opportunities for Oakland residents.

7. Currently, the DA and the Lease define the City's and OBOT's rights and obligations with respect to the Project.

8. In one egregious omission or act after another, the City has failed to perform its material obligations under the Lease and DA, and has aggressively taken steps to prevent

OBOT's performance under the Lease and receipt of its benefit of the bargain thereunder. The City's omissions and actions constitute breaches of its contractual obligations and thwart completion of the Project. Such breaches include enforcement of an illegal and politically-driven ordinance and resolution banning any transfer of coal through the West Gateway Terminal; threat of inappropriate and unwarranted additional layers of legal review that may subject Plaintiffs to litigation exposure; unfounded accusations against Plaintiffs of contractual default; refusal to address essential prerequisites for permit submittals; failure and refusal to turnover possession of the very premises that Plaintiffs have a right and obligation to occupy and improve; and interference with Plaintiffs' funding and permitting efforts with outside regulatory agencies.

9. The City's breach of the Lease has caused harm to Plaintiffs, continues to cause harm to Plaintiffs, and excuses any non-performance by Plaintiffs under the Lease and/or the DA.

10. Plaintiffs seek to hold the City accountable for its legal obligations in pursuing this action.

11. Section 38.13 of the Lease states that if a party to the Lease is required to bring an action against the other party for a failure to perform thereunder, or if any other dispute arises between the parties, the prevailing party is entitled to recover all costs and expenses incurred, including attorneys' fees.

PARTIES

12. Plaintiff OBOT is a California limited liability company with its principal place of business in Oakland, California. Pursuant to the DA and the Lease, OBOT is the developer of the Project.

13. Plaintiff OGRE is a California limited liability company with its principal place of business in Oakland, California. OGRE is an affiliate of OBOT and entered into a sublease agreement with OBOT with respect to the Shortline Rail portion of the Project. OGRE seeks to

rehabilitate the rail network and become a Class III common carrier, providing rail switching services (including on behalf of Class I common carriers) on the Oakland Army Base rail network.

14. Defendant City is a municipal corporation and a chartered city organized and existing under the laws of the State of California.

JURISDICTION AND VENUE

15. Jurisdiction in this Court is proper because the amount in controversy exceeds $25,000.

16. Venue is proper in this Court pursuant to Code of Civil Procedure section 394 because Plaintiffs' claims are asserted against Oakland, which is located in Alameda County. This Court is also a proper venue because a substantial part of the events giving rise to the claim occurred in Oakland, California.

17. The contract at issue in this case contains the following provision at Section 38.9:

> This Lease is entered into in the City of Oakland, State of California, and shall be governed by, and interpreted in accordance with, the laws of the State of California . . . all action or proceedings arising directly or indirectly under this Lease may, at the sole option of Landlord, be litigated in courts have situs within the City of Oakland . . .

GENERAL ALLEGATIONS

I. Reuse Plan for Oakland Army Base.

18. In 1999, the U.S. Department of Defense closed the U.S. Army facility known as the "Oakland Army Base" for military use. Following its closure, 370 acres of the former Oakland Army Base property were transferred to the City, with approximately 200 acres of the waterfront area allocated by the City to the Port of Oakland, acting by and through its Board of Port Commissioners ("Port") operation area,[1] while the remaining 170 acres known as the

[1] The Port is a political subdivision of the City of Oakland. The Charter of the City of Oakland (as amended through November 2016), Section 700. The seven members of the Board of Port Commissioners are nominated by the Mayor

"Gateway Development Area" remained for redevelopment by the City.

19. Facing the loss of local jobs and other economic benefits from the closure of the Oakland Army Base, the City adopted a "Redevelopment Plan for the Oakland Army Base Development Project" to facilitate the "redevelopment, rehabilitation, and revitalization" of the Gateway Development Area (as amended, the "Redevelopment Plan"). Its "major goals" included, among other things, the "strengthening of the economic base of the community by the construction and installation of infrastructure" to "stimulate new development, employment, and social and economic growth." To achieve its goals the Redevelopment Plan did not present "specific proposals," but instead "present[ed] a process and a basic framework" within which the City could "fashion, develop, and proceed with . . . specific plans, projects and solutions." The Redevelopment Plan granted the City authority to sell or lease real property in the Gateway Development Area for "redevelopment of [the] land by private enterprise."

20. In 2008, after numerous other proposed projects for redevelopment of the Oakland Army Base failed, the City issued a Request for Qualifications seeking plans from private developers to "transform the [Gateway Development Area] into a mixed use commercial and/or industrial development."

21. Thirteen developers submitted proposals, including California Capital & Investment Group, Inc. ("CCIG") and AMB Property, L.P. ("AMB"). CCIG is the sole member of OBOT. CCIG and AMB were jointly selected as the developers for the West Gateway, Central

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of the City of Oakland and appointed by the City Council. Section 1204 of the Charter expressly states "[a]ll real property acquired by the City shall be held in the name of 'The City of Oakland.'" See also the Charter of the City of Oakland (as amended through November 2016), Section 706(15) (providing that the powers of the Port include the ability "[t]o acquire ***in the name of the City*** by purchase, condemnation, gift, lease, or otherwise take over and hold all lands, property, property rights, leases, or easements, and personal property of every kind, necessary or convenient for the development and operation of the port, or for the carrying out of the powers herein granted to the Board. Whenever the Board determines that any lands owned by the City within its jurisdiction have become unnecessary for port purposes or harbor development, it may in its discretion transfer such lands to the control of the Council, free from all restrictions, or it may sell or exchange such lands, by ordinance subject to the referendum provisions of this Charter.") (***emphasis added***).

Gateway and East Gateway of the former Oakland Army Base.

22. At all times, the developers clearly communicated to the City, including in project documentation, their plan to develop the Terminal at the West Gateway.

23. The City was aware that coal was a potential bulk commodity to be transported through the Terminal. For example: (i) in 2011 a potential subtenant of the Terminal, Kinder Morgan, gave a presentation to City officials that identified coal as 34% of the "Bulk Tonnage Breakout" Kinder Morgan shipped; (ii) on or about April 19, 2012, the City commissioned and received a report from the Tioga Group, Inc. that identified coal as a likely bulk commodity that could be handled at the Terminal ("Tioga Report"); (iii) in May 2012, Port staff exchanged emails that expressly referenced coal as a potential commodity to be shipped through the Terminal; (iv) in June 2012, CCIG provided to City officials a video of a comparable facility in Long Beach that depicted coal; (v) a May 2013 study commissioned by the Port expressly included coal on its list of suggested commodities; (vi) a September 12, 2013 Report on Compliance prepared by the City's outside counsel, Holland & Knight, and adopted by the City through resolution, included the "Long Range Property Management Plan" for the Oakland Army Base that cited examples of typical bulk commodities to be handled by the Terminal: "**(e.g. lumber, coal, sulfur)**"; and (vii) September 2013 emails between staff members at San Francisco Bay Conservation and Development Commission ("BCDC") and Earthjustice noted that coal had been expressly included in discussions regarding potential commodities at the Terminal.

24. Informed in large measure by the Tioga Report, the City was aware that the ultimate success and viability of the Project largely hinged on the ability to identify and secure the commitment of a commodity provider with long-term needs for the processing and handling capacity the Terminal would provide over its 66-year useful life.

25. The use of rail to transport bulk commodities to and from shipping vessels is the

keystone component of the Project. The City, the Port, OBOT, and OGRE all have repeatedly acknowledged the importance of rail to the Project, including through the City's adoption of the master plan. But now, not only is the City objecting to the rail work moving forward, but it has allowed the other major developer at the Oakland Army Base, Prologis, Inc. ("Prologis"), to develop non-rail served buildings contrary to the master plan and what was represented to OBOT and OGRE as part of the business case for the Project; to be fair, Prologis originally attempted to locate rail served tenants, but because the Rail Access Agreement was not in place and the City's actions prevented the completion of the rail work, no rail rate could be quoted, so there was no serious interest by a rail tenant.

II. Contracts Entered into by Plaintiffs and City.

26. As stated above, the material contracts related to the redevelopment of the former Oakland Army Base include the ENA, the LDDA[2], the DA and the Lease.

27. Under the ENA, the developers (i) funded the development of the redevelopment concept and the City's environmental review of such redevelopment concept; (ii) spearheaded the City's ability to secure in excess of $250,000,000 in grant funds from the federal government and the State of California transportation commission; and (iii) negotiated the terms of the LDDA.

28. Under the LDDA, the City and the developers agreed, among other matters, (i) to work together on the design, funding and construction of certain street, utility, grading, wharf, rail and other improvements that were necessary for the developers' redevelopment of the subject portions of the former Oakland Army Base (the "Public Improvements"); and (ii) to the form of the leases for the subject property (including the Lease).[3]

[2] Certain terms of the Third Amendment to the LDDA were subsumed in the Lease and lapsed automatically upon execution of the Lease.

[3] The LDDA was originally entered into by the City, the Oakland Redevelopment Successor Agency ("ORSA") and Prologis CCIG Oakland Global, LLC (a joint venture entity formed by a CCIG affiliate and a Prologis affiliate, "Prologis/CCIG"). On or about August 30, 2013, ORSA assigned its rights and obligations under the LDDA to the City. On or about June 13, 2014, Prologis/CCIG assigned its rights and obligations under the LDDA with respect to

29. The DA was entered into to, among other matters, vest the developer's rights to develop the redevelopment project for the subject portions of the former Oakland Army Base.[4]

30. Under the Lease, (i) the City agreed (among other obligations) to continue to cooperate with OBOT in the identification and pursuit of additional funds for the Public Improvements and construct the funded Public Improvements, and OBOT agreed to (among other obligations) to pay the required rent and develop the Minimum Project (which included certain rail and terminal improvements).

31. Neither the DA nor the Lease impose any restrictions preventing the transport of coal or petcoke through the Terminal. Neither agreement limits or otherwise differentiates the type(s) of bulk commodities that could be exported from the Terminal. There is no existing zoning that prohibits or disallows any legal commodity (e.g. coal).

32. In particular, Section 3.4 of the DA specified that only "Existing City Regulations" as of the adoption of the DA would "govern the development of the Project and all Subsequent Approvals with respect to the development of the Project on the Project Site." The only exception to this express contractual promise is Section 3.4.2 of the DA: the City could apply health and safety regulations adopted after July 16, 2013, to the Terminal only if (a) the application of any such health and safety regulation is "otherwise permissible pursuant to Laws"— "Laws" being defined to include the "Constitution of the United States, and any codes, statutes, regulations, or executive mandates thereunder"; and (b) the "City determines based on substantial evidence and after a public hearing that a failure to do so would place existing or future occupants or users of the Project, adjacent neighbors, or any portion thereof, or all of them,

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the Property pursuant to that certain Partial Assignment and Assumption (West Gateway) of the Lease Disposition and Development Agreement (the "WGW Partial Assignment").

[4] The DA was originally entered into between the City and Prologis/CCIG. Pursuant to Section 10.1 of the DA, Prologis/CCIG's rights and obligations under the DA with respect to the West Gateway were automatically assigned to OBOT upon the execution of the WGW Partial Assignment by the City, Prologis/CCIG and OBOT confirming OBOT as a permitted assignee under the LDDA with respect to the West Gateway.

in a condition substantially dangerous to their health or safety."[5]

33. In order to induce developers to pursue their respective projects at the Army Base, the City represented that it had entered into a Cooperation Agreement dated December 20, 2012, with local community groups in West Oakland, as well as various labor organizations to make sure the neighbors and labor groups supported the Project in exchange for community benefit concessions. Although OBOT was not a party to the Cooperation Agreement, the City mandated that the related cost and obligations be borne by OBOT and the other developers.

34. OBOT came to realize that the community groups and labor refused to honor their obligation to support the Project, and instead were quick to interfere with the Project despite having received the benefit of the bargain. Community groups breached the Cooperation Agreement prior to the City's execution of the Lease. The City failed to enforce compliance with the Cooperation Agreement, which delayed Project completion and caused monetary damage to Plaintiffs.

35. Moreover, on information and belief, the $541,440.00 payment OBOT made to the City for the West Oakland Community Fund ("WOCF") has never been distributed to said fund but has been retained by the City.

36. Following the execution of the DA and the Lease, Plaintiffs invested years of effort and millions of dollars in planning the development of the Project. To date, OBOT and its affiliates have invested well in excess of $30 million on these development efforts. And Plaintiffs will suffer damages in excess of $100 million if the City's conduct prevents completion of the Project.

37. In 2013, CCIG stated that its immediate commodity focus was on iron ore and copper concentrate, which was accurate at the time. However, CCIG refused to make a pledge to

[5] Certain other narrow exceptions exist that allow the City to apply new regulations to the project, but none of those exceptions apply here.

the City to take coal and all fossil fuels off of the table as potential commodities to be handled at the Terminal. CCIG explained that ***to be viable in the competitive marketplace, the Project must be responsive to the demands of the market over the 66-year life of the Lease***.

38. Further, as part of its development process and in furtherance of its obligations under the foregoing contracts, OBOT began to search for a company to construct and operate the Terminal. In the spring of 2014, OBOT entered negotiations with Terminal Logistics Solutions, LLC ("TLS").

39. The negotiations eventually resulted in a November 2014 Exclusive Negotiation Agreement and Sublease Option between OBOT and TLS (the "Sublease Option"). The Sublease Option granted TLS an exclusive option to sublease and operate the Terminal for a sixty-six (66) year period.

40. Consistent with the City-approved DA and industry practice for such facilities, the Sublease Option did not restrict the shipment of coal or any other commodity to and through the Terminal.

III. The City's Obligations to Cooperate with OBOT to Secure Funding and Permits and Construct the Funded Public Improvements.

41. In each of the LDDA and Lease, the City agreed to cooperate with OBOT to obtain third party permits or approvals necessary to construct the Public Improvements and to cooperate to identify and to pursue funds for the Public Improvements.

42. However, the City has not cooperated with Plaintiffs to obtain funds or permits, and in several instances the City has affirmatively obstructed such matters.

43. For example, the City and the Port established a Joint Environmental Remediation Fund ("JERF") to fund remediation for the entirety of the former Oakland Army Base reuse plan. Remediation of areas essential to the core operations of the Project were and remain an essential prerequisite to being able to construct and operate the Project on formerly contaminated lands.

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The Public Improvements budget expressly excluded environmental remediation costs, however, the City used an undisclosed amount of Public Improvements funds, as opposed to JERF funds, for remediation work, thereby depleting funds for non-Project-allocated work. All funds in the JERF have long-since been exhausted for unknown purposes.

44. On or about April 24, 2014, Fred Blackwell, the then City Administrator, identified various categories of funding deficiencies in City accounts relative to the original agreements for the Public Improvements (directly impacting the Project), and asked OBOT to work "collaboratively with the City to solve the funding shortfall."

45. On June 5, 2014, the City obtained an amendment to a permit issued by BCDC for a portion of the Public Improvements (the "BCDC Amendment"). The BCDC Amendment included, at the City's direction: (a) the installation of the re-aligned W. Burma Road that will provide primary vehicular access to the West Gateway; and (b) certain driveway, parking and public access improvements located to the west of the West Gateway (the "Public Access Improvements"). The BCDC Amendment characterized the Public Access Improvements as both part of the permitted improvements and the required mitigation.

46. On July 8, 2014, as the City's project manager for the public infrastructure work, CCIG responded to the City's request for cooperation by noting that previous iterations of the budget identified sources sufficient to meet the City's required contribution. CCIG asked for clarification of the City's funding sources and requested accounting documentation for various funding discrepancies and irregularities including: (i) the Tidelands Trust Burma Road Fund that the City had allocated inconsistently from time to time; (ii) the City's failure to separately account for funds to be distinguished between disparate segments of the overall Project; and (iii) allocation of third-party legal expenses.

47. On November 4, 2014, the City provided a funding update for the Project termed

the Mid-Project Budget Revise, which re-sequenced completion of the Public Improvement components and set out the sources and uses that form the basis for the final budget. In summary, under the Mid-Project Budget Revise, OBOT assumed far greater obligations and costs in exchange for the City's assurances that the Lease would become effective more quickly and construction and completion of the Terminal accelerated. OBOT lived up to its side of the bargain, the City receiving the benefit thereof, but the City has repeatedly failed to honor its promises, and indeed, has endeavored to prevent completion of the Project.

48. The most material example of the City's failure to meet its obligations under the Lease relates to its refusal to accept $22 million Measure BB bond funds from the Alameda County Transportation Commission ("ACTC") for the design and construction of certain Public Improvements that were originally the City's obligations under the LDDA and Lease and were assumed by OBOT pursuant to the Third Amendment to the LDDA.

49. On November 4, 2014, Alameda County voters approved Measure BB, authorizing an extension and augmentation of the existing transportation sales tax (Measure BB). Measure BB is projected to generate approximately $8 billion in revenues from April 2015 to March 2045 for transportation improvements for Alameda County. ACTC is responsible for disbursing funds generated by Measure BB.

50. The City asked OBOT to support Measure BB during its campaign, which OBOT did with the expectation that certain funds generated by Measure BB could potentially be allocated to the Project (specifically, the original Public Improvements that were assumed by OBOT).

51. Measure BB was adopted, and ACTC identified approximately $22 million as available to the Project as part of its goal of recognizing the economic importance of port/marine terminal facilities and providing connections between goods and markets with minimal impacts to

residential neighborhoods. In addition, ACTC allocated funds to the City to perform public improvements in and around the Property.

52. Yet the City has interfered with requested disbursements of funds on behalf of the Project causing ACTC to not disburse any funds to aid in development of the Project to date.

53. For example, on June 13, 2015, the City's representative on the ACTC Commission introduced a resolution at an ACTC Commission meeting to prevent the ACTC funds from being released for the City Funded Wharf Improvements absent a promise to not ship coal or petcoke.

54. Additionally, on July 31, 2015, Mayor Libby Schaaf and Councilmember Lynette Gibson McElhaney co-signed a letter to the Executive Director of ACTC in which they requested disbursement of Measure BB funds. Despite their obligation under the Lease to cooperate with OBOT to secure third party funds, the City requested ACTC disburse funds to construct "public" versus "private" improvements at the former Oakland Army Base. They expressly highlighted that "the potential for the export of coal and related product is an extremely controversial issue" related to the "private improvements." Distinguishing their request for funding for the public improvements from that allocated for the private improvements, the letter states: "Please be advised, however, that our efforts to appropriately address the coal export issue related to the developers [sic] **private improvements** do not affect the City's request for ACTC grant funding for the **public infrastructure improvements** at the Army Base." (Emphasis in original.)

55. Consequently, the City requested and received ACTC funds for public improvement costs that were used to pay back the funds that were inappropriately used for remediation work rather than JERF funds.

56. On October 31, 2016, the City applied for $27.46 million in ACTC funding for Wharf Improvements at Wharf 7 on the Property—improvements that would need to be made no

matter the type of bulk commodity handled by the Project. However, in yet another act of bad faith, on information and belief, a City representative used her influence as an ACTC Commissioner to block the funding of the $27.46 million over the coal and petcoke issue.

57. Thereafter, and despite OBOT's continued requests, the City has failed to make any effort to pursue the ACTC funds or to locate any other source of funding, instead electing to engage in a campaign of obstruction.

58. The City has neglected its obligation to cooperate with OBOT to pursue third party funds, and instead, it has affirmatively interfered with OBOT's ability to obtain any funds from ACTC, as part of its on-going effort to oppose the Project absent a promise by OBOT to not ship coal or petcoke.

59. Moreover, the Lease requires OBOT's and the other developers' approvals before making adjustments to the budget. On information and belief, the City has reallocated money from what is contemplated by the budget without first obtaining OBOT's and the other developers' consent.

IV. The City Caved to Political Opposition to the Project.

60. Soon after OBOT started negotiations with TLS, word began to spread about one of the potential commodities TLS intended to handle at the Terminal, coal, which generated significant public concern in Oakland. Even though the City was previously aware that coal, petcoke and other fossil fuels could be handled at the Terminal, special interest groups began focusing on the matter in 2014. Facing political pressure from environmental and special interest groups, the Oakland City Council adopted a resolution expressing the City's general opposition to transporting fossil fuels through the City on June 17, 2014 ("2014 Resolution") despite the fact that coal was regularly transported through the City by rail at that time. The City did not conduct any study or hold a public hearing before passing the 2014 Resolution. The City and OBOT

executed the DA on July 16, 2013, therefore the 2014 Resolution was not binding on OBOT or the Project.

61. Despite executing the Lease, the City continued to yield to political pressure to the Project's detriment. While the City Council contracted with Environmental Science Associates ("ESA") to perform a health and safety review (without going through a competitive bid process), the marketplace safely transported over 1 billion metric tons of seaborne coal annually and transported many million tons of coal domestically by interstate rail. On July 27, 2016, the City enacted a politically-motivated illegal ordinance prohibiting the storage and handling of coal at bulk goods facilities in Oakland ("Ordinance"), and adopted a resolution that would apply the Ordinance to OBOT on the alleged grounds that it would be "necessary to prevent conditions substantially dangerous to the health and/or safety of existing and/or future occupants or users of the Project and Adjacent Neighbors" ("Resolution").

62. On May 15, 2018, the United States District Court for the Northern District of California ("District Court")[6] found that the City breached the DA, which gave OBOT vested rights to develop and to operate a bulk-commodity terminal, by adopting the Ordinance and Resolution without any "substantial evidence" that transporting coal through the terminal would present a "substantial danger" to people in Oakland.

63. The District Court found: "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. As a practical matter, this renders the coal ordinance a nullity, because the only reason the City adopted it was to restrict OBOT's operations, and OBOT is the only facility in Oakland to which it could conceivably apply." ("District Court

[6] *Oakland Bulk & Oversized Terminal, LLC v. City of Oakland*, Case No. 3:16-cv-07014-VC (N.D. Cal, May 15, 2018).

Ruling").

64. The City breached its obligations under the Lease and DA by adopting the Ordinance and Resolution. Further, the City's illegal regulatory actions are the basis for a Force Majeure claim under the Lease,[7] which includes delays caused by "acts of the government."

65. Prior to adopting the Ordinance and Resolution, the City was aware of the effect the new regulations would have on Plaintiffs' ability to survive as a business. OBOT openly shared with the City its need to finalize an option agreement and sublease for the Project with a bulk commodity provider willing to make a substantial investment in the Project including tens of millions of dollars and a decades-long commitment.

66. The City had actual knowledge that the Ordinance and Resolution would interfere with Plaintiffs' ability to receive the benefits of the Lease and the DA. The City's adoption of the Ordinance and Resolution as well as its defense against OBOT's lawsuit with no substantial evidence to support the City's position delayed OBOT's performance under the Lease. Rather than resolving OBOT's claims, the City defended its erroneous position and delayed the Project.

67. On or about June 13, 2018, the City filed a Notice of Appeal of the District Court Ruling. The City continues to prosecute its appeal of the District Court Ruling, and continues to interfere with OBOT's ability to perform timely under the Lease.

V. No New Discretionary Decisions or Creek Protection Permit Are Required.

68. The City prepared an Environmental Impact Review ("EIR") for the entire Army Base in 2002. The City adopted the Addendum EIR on June 21, 2012 ("2012 Addendum"). The

[7] Force Majeure is defined by the Lease as: "events which result in delays in 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 cause 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." (Emphasis added.)

2012 Addendum included the imposition of an extensive suite of mandatory mitigation measures and conditions of approval.

69. Per the terms of the DA, the certified EIR already addressed the environmental impacts of the Project:

> 3.5.1 Reliance on Project EIR. 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. 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 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.

70. The City has relied on the certified EIR on multiple occasions after special interest groups started expressing opposition to coal and petcoke.

71. There are no present circumstances that would justify supplemental environmental review of the Project. No further permits are required to develop and construct the Project that require discretionary review by the City.

72. In addition, the 2012 Addendum (prepared for and adopted by the City as lead agency) expressly states that the Project does not require a Creek Protection Permit: "In conclusion, waters in the project area are not defined as a creek by the Creek Protection Ordinance. This finding is consistent with the 2002 EIR findings that there are no creeks in or near the project area, and conditions do not exist that could cause a conflict with the City's Creek Protection Ordinance."

73. There is no legitimate reason for the City to require OBOT to obtain any further discretionary permits to construct the Project, and if the City subjects the Project to further unnecessary discretionary review it will do so in bad faith.

VI. Cappio Memo.

74. On November 6, 2015, Assistant Oakland City Administrator Claudia Cappio sent an internal memorandum to the Oakland Planning and Building Department regarding Permitting for the Facilities ("Cappio Memo"). The Cappio Memo represents a transparent effort by the City to slow down or halt construction of the Project, contrary to the intent and obligations of the parties set forth in the DA, Lease and Mid-Project Budget Revise. The Cappio Memo provides that, "[d]ue to the high-profile nature of the project it is important for the City Administrator's Office to provide updates to the City Council on the status of OBOT implementation," and Cappio intends to notify the City Council whenever an application for a building or construction related permit is submitted by OBOT. These directions are highly unusual and atypical.

75. Cappio instructed the Planning and Building Department to notify City staff "upon receipt of any building or construction-related permit application for OBOT (including, without limitation, building permit, p-job permit, grading permit, ***creek protection permit***, etc.)" (emphasis added) and further instructed that the Planning and Building Department that it may not "deem the application complete or issue the permit until after consultation with" Cappio, Rachel Flynn, the Director of Planning and Building, and Darin Ranelletti, the Deputy Director of Planning and Building, all of whom answer to the City Administrator, who, in turn, answers to the Mayor.

76. On information and belief, no other development project at the Oakland Army Base or in the City at large has ever had a similar restriction placed upon it, particularly one that modifies the regulatory scheme in place in violation of the DA and Lease.

77. On information and belief, the Cappio Memo has never been formally withdrawn by the City. Moreover, all of the individuals identified in the Cappio Memo as needing to approve any permit have since left their respective positions with the City, causing additional

confusion and delay for the permitting of the Project.

VII. Permit Application Pre-Meeting.

78. During a pre-application meeting on March 9, 2016 at which OBOT expected to discuss with City department heads the necessary components to complete an application for a building permit for the Project, OBOT presented the Basis of Design to relevant City department heads and permit decision-makers. OBOT previously submitted the Basis of Design to the City and has consistently requested feedback and direction from the City regarding specific permit requirements.

79. In the March 9, 2016 meeting, the City stated that OBOT's Project permit applications are subject to additional discretionary approvals, notwithstanding Section 3.4.4 of the DA which provides that the City "shall have the right to apply to the Project at any time, ***as a ministerial act***, the Construction Code and Standards in effect at the time of the approval of any City Approval or Subsequent Approval thereunder." OBOT questioned the City's continued and repeated references to the review being "discretionary," as discretionary decisions by the City, in some instances, potentially reopen analysis under CEQA, and the CEQA analysis of the Project had long-since been completed. Given the DA's express provision that review of the Project for permitting would be "ministerial," OBOT informed the City that designation of such review as "discretionary" in order to trigger new CEQA review, would violate the DA.[8]

80. In response to these questions, the City stated that the Project would require a creek bed alteration permit, which was discretionary. As noted above, however, the 2012 Addendum expressly concludes that no creek bed permit is required.

81. It is clear that by subjecting each permit application to increased scrutiny and discretionary review, the City is attempting to reopen CEQA review improperly for the purpose

[8] There are legal principles that would justify re-opening of CEQA (e.g., a significant change in the Project proposed by OBOT), but none of those principles were or are present in this instance.

of interfering with Plaintiffs' completion of the Project. Moreover, the City stated at the March 9, 2016 meeting that it would conduct a commodity-by-commodity review under CEQA for any commodity handled by the Terminal; Assistant City Attorney, Mark Wald, also stated the same in an email to OBOT's outside counsel.

82. Additionally, the City stated at the March 9, 2016 meeting that it was unsure of whether the current Construction Codes and Standards were sufficient to address the issues that may be raised by the construction and operation of a bulk terminal facility and that it was going to implement a process to review the current codes and standards and determine if they need to be supplemented for the Project. To OBOT's knowledge, the City has never identified the Construction Codes and Standards that would be applicable to the Project, hence the continued and pressing need to meet with the City Building and Planning Department.

83. Under Section 3.4.3 of the DA, the City has an obligation to compile a record of all "existing City regulations" applicable to the Project. Despite repeated requests, the City consistently refused to provide the record of applicable regulations. Instead, the City ultimately requested that OBOT compile the noted record, a City obligation, which OBOT did and transmitted to the City. The City, however, failed to certify the compilation as the binding record of regulations applicable to the Project.

84. The purpose and intent of the DA is to establish the existing regulations and permit requirements and shield OBOT from future changes in regulation with limited exceptions.

85. On March 11, 2016, OBOT provided a notice of the Force Majeure Delay as defined in the Lease that was caused by the City's inability to inform OBOT of the Construction Codes and Standards and applicable City regulations that apply to the Premises and Project Improvements, as those terms are defined in the governing documents. Because the City admitted that it was unable to provide the foundational information set forth in the applicable

Construction Codes and Standards and applicable City regulations as required under Section 3.4.4 of the DA, OBOT was prevented from continuing work on the design of the Project Improvements beyond the Basis of Design.

86. Due to the City's act of Force Majeure, OBOT is entitled to an extension of at least two years of the Commencement Date, as defined in the Lease, with a further continuing extension for so long as the City fails in its obligations to identify the applicable Construction Codes and Standards and applicable City regulations to which design and construction of the Terminal must comply, process permit applications, as well as compliance with all of its numerous obligations under the DA and Lease.

VIII. The City's Interference with Essential Rail Improvements.

87. The City also obstructed the Project's progress in areas other than the illegal Ordinance and Resolution. The Project requires Plaintiffs to construct the Shortline Rail, to connect the existing rail line to the Port Rail Terminal and allow the Terminal to link rail to vessel break bulk shipping operations. For over six years the City has intentionally blocked and interfered with OBOT's efforts to acquire rights for, to access properties for, and to rehabilitate these essential Rail Improvements.

88. The City's refusal to advance and interference with the Shortline Rail not only blocks Project progress, it interferes with Plaintiffs' ability to secure potential customers and jeopardizes Plaintiffs' ability to collect payments from such customers.

89. The rail-related delays caused by the City and the Port have caused Plaintiffs to lose valuable service contracts and incur monetary losses and delays.

A. Rail Access Agreement.

90. On information and belief, the Port Rail Terminal (defined in the Lease) is located on City property controlled by the Port. At this time, there is no permanent rail operator at the

Port Rail Terminal.

91. The City granted to OBOT (and OGRE) the City's "rights to access and use the Port Rail Terminal" under Section 1.5.1 the Lease.

92. However, the Port has previously represented to OGRE that it is unwilling to enter into a Rail Operating Agreement for rail service at the Port Rail Terminal until the Rail Access Agreement is executed between the City and the Port.

93. Despite the City and Port agreeing upon fundamental terms in 2012, not to mention that all of the land in question is owned by the City, the Port and the City have failed for over six years to process, to secure and to provide a written Rail Access Agreement as required by Section 5.2.3 of the Lease.

94. Despite OBOT's written demands, including its July 20, 2018 letter, the City has failed to use and refuses to use commercially reasonable efforts to pursue a Rail Access Agreement as required by the Lease.

95. After four years of stagnation, Cappio committed in October 2016 for the City and Port to meet and discuss the draft Rail Access Agreement by early November 2017.

96. To OBOT's knowledge, such a meeting did not take place until August 29, 2018, nearly a year after the date originally promised.

97. And while the City, Port, and OGRE met on three occasions during August-September 2018, on information and belief, the City and Port were attempting to collude to expand the operational rights of the Port beyond what had previously been agreed to by the parties, depicted in all drawings, and represented to the State and Federal governments, while continuing to thwart OGRE's efforts by refusing to employ commercially reasonable efforts to negotiate in good faith the Rail Access Agreement for the benefit of OGRE and OBOT.

98. On September 26, 2018, the City elected to discontinue any regularly scheduled

Rail Access Agreement meetings. To OBOT and OGRE's knowledge, no further meetings to discuss the Rail Access Agreement have been held. The City's and the Port's collusive refusal to reach closure on a Rail Access Agreement prevented OBOT and OGRE from performing their obligations under the DA and the Lease.

B. Rail Right of Way.

99. In addition, the City has an obligation under the Lease to provide a Rail Right of Way ("R/O/W") on the West Gateway property to OBOT/OGRE to allow rail construction and operations.

100. OBOT and OGRE have diligently and in good faith attempted to pursue the physical work necessary for rail access to the Project and the rehabilitation of pre-existing rail on the Project site, including: (i) hiring a contractor to perform the rail work; (ii) working to obtain an industrial track agreement with Union Pacific Railroad; and (iii) expending over $1.6 million on rail materials and labor, with the materials currently stockpiled on-site waiting for installation. Yet, the City has still not turned over the Rail R/O/W to OBOT on the required schedule, nor has it confirmed the Rail R/O/W conforms with engineered drawings.

101. On July 24, 2018, the City demanded that OBOT pay rent for the West Gateway, including the Rail R/O/W to which the City continued and continues to deny OBOT/OGRE access, going back to February 16, 2018, under the threat of default under the Lease. OBOT paid and continues to pay rent to the City for the West Gateway (including the Rail R/O/W) under protest.

102. On October 9, 2018, the City confirmed that it was not prepared to turn over the rail corridor to OGRE, citing an uncompleted survey of the facilities.

103. As recently as October 18, 2018, the City stated that the Rail R/O/W had not been turned over. And as of the time of the filing of this Complaint, the City has continued its failure

to grant OBOT/OGRE access to the Rail R/O/W. Again, the City's failure to do so, prevented OBOT/OGRE's performance, resulting in delay and monetary damage.

C. The City's Failure To Cooperate and Affirmative Interference At The Surface Transportation Board.

104. The City and Port are actively interfering with OGRE's efforts to obtain approvals from the Surface Transportation Board ("STB") to facilitate track rehabilitation and operation of the rail.

105. Since 2015, the City or the Port, or both, have objected to each petition that OGRE filed with the STB.

106. In May 2018, OGRE filed a petition with the STB seeking confirmation that no additional STB approval was required to rehabilitate the Rail R/O/W consistent with the City's own construction drawings and the City and Port master redevelopment plan, primarily those rail improvements the City obligated OBOT/OGRE to make under Section 6.1 of the Lease; OGRE is statutorily obligated to obtain STB authorization prior to the construction of rail where the STB has jurisdiction. OGRE expressly noted in its petition for a declaratory order that it would be seeking operation exemption from the STB under a separate application. Beginning on June 29, 2018, the City and the Port have repeatedly opposed OGRE's May petition.

107. Under Section 5.2.2.2 of the Lease, the City is obligated to "cooperate in good faith regarding Tenant's efforts to obtain Regulatory Approvals for the Project from any regulatory agency other than City," which it failed to do.

108. As a result of the City's breach of its obligation to cooperate, OGRE has been forced to spend tens of thousands of dollars in legal fees to defend against the City's objection to the STB, and, more importantly, the rehabilitation of the Rail R/O/W has been delayed indefinitely.

D. The City's Failure to Provide Property Rights to OBOT.

109. To induce OBOT to enter into the Lease, the City represented that it had easements with the Port that would allow OBOT and its subtenants the right to enter upon Port property to construct and use the relevant segment of track, as set forth in Sections 1.1.1, 1.1.2, 1.5.1, and 1.5.2 of the Lease.

110. The Port has represented to the STB that OGRE has not yet obtained the property rights that it needs from the Port to build any track on "Port property."

111. To the extent OBOT/OGRE do not have the right to enter upon Port property to make the Rail Improvements, the City has materially misrepresented the property rights granted to OBOT under the Lease.

IX. The City's Illegitimate Claim of an Unmatured Event of Default.

112. Because of the City's action, TLS did not exercise its Sublease Option. After the issuance of the District Court Ruling, where now the parties thought the City would cease its pattern of interference, OBOT entered into a sublease agreement with Insight Terminal Solutions, LLC ("ITS"), whereby ITS will develop and operate the Terminal.

113. Rather than cooperating with Plaintiffs to proceed with the Project, the City has renewed its efforts to kill the Project by falsely asserting that OBOT is in default under the Lease and continuing its pattern of obstructionist conduct.[9]

114. On August 20, 2018, the City sent a letter to OBOT claiming that OBOT failed to commence construction of the Minimum Project by the Initial Milestone Date set forth in the Lease. The City alleged OBOT had committed an Unmatured Event of Default and demanded that OBOT cure the "Default."

[9] Elected officials, including Mayor Schaaf repeatedly made clear to the public and press her adamant opposition to coal being transported at and through the Project and her intention to do anything necessary to prohibit it. She personally told a principal of OBOT that she would do anything in her power to make sure that no coal would come through Oakland, "even if it meant killing the entire project to do so."

115. OBOT vehemently denied it committed an Unmatured Event of Default and reiterated its prior claim that the City has caused Force Majeure under the Lease tolling any performance deadline of OBOT commensurate on an ongoing basis with the City's own actions thwarting and impeding OBOT's ability to perform.

116. The City has an obligation to issue a Non-Disturbance Agreement for the Subtenant ("NDA") who will operate the Project under Section 12.5 of the Lease.

> 12.5.1 Conditions for Non-Disturbance Agreements. From time to time upon the request of Tenant, Landlord shall enter into agreements with Subtenants providing generally, with regard to a given Sublease, 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 ("Non-Disturbance Agreements"). . . (v) if Tenant is then in default of any of its obligations under this Lease, Landlord may condition its agreement to provide a Non Disturbance Agreement on the cure of such defaults as Landlord may specify either in a notice of default given under Section 18.1 or in a notice conditionally approving Tenant's request for such Non Disturbance Agreement (and if an Event of Default or Unmatured Event of Default on the part of Tenant then exists, then Landlord may withhold or condition the giving of a Non Disturbance Agreement) . . .

117. An NDA is key to a subtenant's ability to obtain financing for the construction of its sublease improvements, as any potential lender will want to know that the sublandlord's breach of the master lease will not affect the subtenant's rights under the sublease.

118. Plaintiffs submitted a form of NDA to the City four times beginning in April 2018. After the third submission, on August 24, 2018, the City responded for the first time and made redline interlineation changes to the form Plaintiffs previously submitted. Plaintiffs executed the revised NDA and submitted it to the City; however, at the conclusion of a meeting with the City on August 29, 2018, the City indicated that before signing it needed to make additional changes to the NDA, stating that it would do so later that same day.

119. After a week and a half of following up with the City to no avail, in a letter to the

City dated September 7, 2018, OBOT and OGRE rescinded their respective signatures and, consistent with Section 12.5.2 of the Lease, included a copy of the form of NDA showing requested interlineations or deletions to the form of NDA previously circulated by the City, a copy of which is attached hereto as **Exhibit 1**.

120. Section 12.5.2 of the Lease requires the City to approve or specifically disprove the requested interlineations or deletions within twenty (20) days. That Section also provides: "Failure by Landlord to approve or disapprove of specific interlineations, deletions or other modifications requested by a Subtenant within such twenty (20) day period shall be deemed to be approval of the requested changes . . . ."

121. On September 27, 2018, the City refused to issue a NDA with respect to the proposed sublease between OBOT and OGRE, notwithstanding the City's contractual obligation to do so. As a pretext, the City predicated its refusal on Section 12.5.1 of the Lease and the City's incorrect claim that it is entitled to withhold or condition the grant of a NDA to a Subtenant because OBOT has committed an Unmatured Event of Default related to the Initial Milestone Date. The City argued that OBOT may renew its request for an NDA for the OGRE Sublease following "resolution of the Unmatured Event of Default."

122. The City's obligation under Section 12.5.2 of the Lease to comment upon requested changes to a form of NDA is not conditioned upon the absence of an Event of Default under the Lease. On October 3, 2018, OBOT and OGRE notified the City that they deemed the City's non-response as approval of the requested changes to the form of NDA. In an October 17, 2018 letter, the City rejected this assertion, claiming that the City's refusal to issue an NDA somehow relieves it of its obligations under Section 12.5.2.

123. On September 28, 2018, concurrent with the execution of the ITS sublease, OBOT submitted a request to the City for an NDA in favor of ITS. The City refuses to provide the

requested NDA. On October 3, 2018, the City was provided notice that its refusal to issue the NDA has and will continue to cause substantial damage to OBOT and OGRE, and it is interfering with their business and contractual relationships with third-parties.

124. Also on September 28, 2018, OBOT submitted a request to the City for estoppel certificates pursuant to Section 26.1 of the Lease for both ITS and OGRE. As permitted under item (d) of Section 26.1 of the Lease, for the OGRE estoppel, OBOT asked for a list of matters affecting the status of the Rail R/O/W, including, without limitation, the date when City will turn over the Rail R/O/W to OBOT, as well as OBOT's ability to enter onto lands the Port claims it owns to perform the Rail Improvements.

125. On October 18, 2018, the City provided an estoppel certificate for OGRE, which erroneously references the Unmatured Event of Default; however, the City refused to estop the property rights granted to OBOT under the Lease saying that the request was unreasonable—this, while the Port, a department of the City, was arguing OBOT had no rights to access a majority of the Rail R/O/W, including the necessary rail interface with the Union Pacific mainline.

126. Also on October 18, 2018, the City refused to provide an estoppel certificate for ITS. Despite acknowledging that the Lease is in full force and effect and that OBOT has been paying rent, the City claimed that ITS may not rely on the estoppel because, the City erroneously claims, OBOT's sublease with ITS is invalid and that an Unmatured Event of Default was pending.

127. On October 23, 2018, the City claimed that OBOT failed to cure the alleged Unmatured Event of Default during the cure period and alleged that OBOT defaulted under the Lease. The City alleged that OBOT is required to pay liquidated damages within thirty (30) days after the Notice of Default and alleged the Lease "automatically terminates" with respect to the Unimproved Premises, as defined by the Lease. The City demanded that OBOT pay liquidated

damages on or before November 22, 2018.

128. OBOT disputes that it defaulted under the Lease. And because it is not in default of the Lease, OBOT did not pay liquidated damages to the City on or before November 22, 2018.

X. The City's Refusal to Cooperate with OBOT Continues to Present Date.

129. As a part of the master plan, the City was to provide perimeter fencing at the Oakland Army Base, including at the Property.

130. Once again, due to budgetary issues, the City requested that the developers (including OBOT) take on the obligation to construct perimeter fencing at their respective lease areas but sold the idea by representing that the construction could take place under the City's existing building permit for the public infrastructure project. On information and belief, Prologis constructed its perimeter fencing under the City's existing permit, and the City ended up paying for and constructing the fence for the other developer. However, the City has made OBOT and OGRE obtain a new building permit causing additional costs and delay, which has also lead to security issues at the Property.

131. Moreover, in the course of evaluating the permit application for the fence, the City departed from the previously agreed upon plan for the placement of the fence in the public right of way and instead insisted that the fence be constructed on OBOT/OGRE's private leased lands.

132. Additionally, the City insisted on a new review of the proposed fence, including revised plans and design drawings, even though the parties previously agreed upon the design of the fence. Plaintiffs acquiesced; however, the permit has still not been issued due to the City's ongoing issues with BCDC.

133. The City objects to the previously agreed upon Public Access Improvements that were included in the June 5, 2014 BCDC Amendment.

134. BCDC has stated that it will not permit the use of the W. Burma Road

improvements that are required to provide access to the West Gateway and that it will not process the additional BCDC permits that are required for the development and operation of the Project until the City constructs the Public Access Improvements required under the existing BCDC Amendment. The City's refusal to do so constitutes active interference with OBOT's ability to obtain the BCDC permits necessary to continue with the Project.

135. The City has represented to OBOT that it considers any mitigation measures required by BCDC to be allocated to the Community Facilities District ("CFD") established for the Project. However, the parties previously negotiated which public improvements are designated as OBOT obligations under the CFD, and the parties agreed that, among other things, the City would pay for mitigation measures for W. Burma Road.

136. Additionally, even though the master plan contemplated the Port be included in the CFD as a financial contributor thereto, and the Port is receiving beneficial use of the public infrastructure within the CFD's jurisdiction, the City has not yet added the Port to the CFD, all the while availing itself of the CFD's benefits.

137. The City is now refusing to honor its prior commitments with regard to the funding of mitigation measure improvements as set forth in the master plan and the DA.

XI. The City's Improper Rejection of OBOT's DA Compliance.

138. Each year since executing the DA, OBOT has provided a summary of its efforts to substantially comply with the terms of the DA. For the first time, after certifying OBOT's compliance each and every year before, on August 27, 2018, the City claimed that OBOT has not met its obligations under Section 3.3 of the DA, to "develop the Private Improvements for each Phase of the Project in accordance with the 'Minimum Project' description, scope, schedule and sequencing set forth in the Ground Lease for each Phase." The City claimed that OBOT failed to submit schematic drawings or a building permit application to the City for review prior to the

Initial Milestone Date.

139. The City's actions have prevented OBOT's ability to progress with construction of the Project. Furthermore, the City's assertion that OBOT failed to comply with the Initial Milestone Date was premature because the DA expressly provides that the annual review is meant to be a retrospective review of compliance over the prior year (i.e. July 31, 2017 to July 31, 2018) and it should not include a review of the current year's compliance.

140. Pursuant to Section 6.3 of the DA, if the City does not agree with OBOT's response, it must commence a meet and confer/mediation process. Despite OBOT's repeated requests to meet and confer, the City refuses to do so without explanation, constituting another breach of the DA.

XII. The City's Improper Rejection of the Basis of Design.

141. Because the City has not, in recent history, processed any construction work like that contemplated by the Project, it asked OBOT and, at the time, TLS, to submit a "Basis of Design" setting forth the conceptual design of the Project so that the parties could meet and discuss what would be necessary for the City to issue a building permit. As such, a Basis of Design was submitted to the City on July 21, 2015, and again on September 8, 2015–it is this Basis of Design that formed the basis of the discussion at the March 9, 2016 meeting.

142. In order to move the development of the Terminal forward, and having no response from the City to the prior submission, OBOT, on behalf of ITS, re-submitted the Basis of Design to the City on September 28, 2018, requested the City's comments thereon relative to preparing a more comprehensive permit application for the Terminal, and requested the City's cooperation to obtain the necessary building permits.

143. To that end, October 4, 2018, representatives from OBOT and ITS met with representatives from the City (Elizabeth Lake and Bijal Patel) to discuss the Project and request

the City's help in setting up preliminary intake meetings with the Building and Planning Department. On that same day, representatives from OBOT and ITS reached out to William Gilchrist, Director of the City's Building and Planning Department to request a meeting to discuss the development and the steps that would be taken by the parties for ITS to get a building permit from the City to construct the Terminal. A meeting was scheduled for October 14, 2018.

144. On October 13, 2018, Mr. Gilchrist sent an email saying that he was cancelling the meeting. Despite multiple attempts by OBOT and ITS to reschedule the meeting, the City and Mr. Gilchrist refuse to meet.

145. The City acknowledged receipt of the Basis of Design and other materials on October 18, 2018. However, the City stated that it was recognizing only "conceptual drawings," merely a portion of the full context of the Basis of Design, and is apparently disregarding the rest. The City then went on to contend that the submittal is "incomplete," largely without specifying how or why the submittal is incomplete or the material required to render it complete; where the City did specify items it deemed to be missing, nearly all of that information was already in the Basis of Design. The City also asserted that "[t]he City's response to this submittal shall in no way be construed as a substantive response or acceptance of a cure or commencement of cure of the Unmatured Event of Default described in the letter from the City Attorney dated September 21, 2018."

146. In yet another attempt to meet with the City, on October 19, 2018, ITS and its contractor completed and delivered to the City a Development Review Application, formally requesting a meeting with the City. The City has not responded to the Development Review Application. Moreover, on October 25, 2018, OBOT sent a letter to the City addressing the City's statements in its October 18, 2018 response to the Basis of Design, pointing out to the City where the City had overlooked information or otherwise providing responses to the City's

questions, and again requesting a meeting with the City. The City has not responded to the October 25 letter.

147. The City repeatedly and consistently insists that it will not take any action to move the Project forward unless and until OBOT agrees to construct a "ban compliant" terminal. However, the District Court Ruling found the City's application of the Ordinance and Resolution to the Project is invalid, constitutes a breach of the DA, and the City may not rely on the illegal coal ban to restrict operations at the Project.

148. After losing its legal battle against the Project, the City has resolved to engage in a bureaucratic attack on the Project with the hope of causing its demise. Those actions by the City necessitated the filing of this action.

149. Given the City's conduct as described above, on October 19, 2018, Plaintiffs presented a timely claim for damages and injunctive relief to the City in compliance with Government Code § 900 *et seq*. ("Notice of Claim"). Plaintiffs identified the facts giving rise to the City's liability as described herein and provided notice of each claim set forth below.

150. Rather than respond to Plaintiffs' Notice of Claim, the City published statements to the press on November 10, 2018, incorrectly claiming that the City terminated the Lease. On November 13, 2018, Plaintiffs asked the City to clarify whether the November 10, 2018 statement to the press constituted a rejection of Plaintiffs' Notice of Claim.

151. On November 20, 2018, the City published false statements to the press that the Lease terminated automatically "this week."

152. On December 3, 2018, the City served a Three-Day Notice to Quit or Cure alleging that OBOT violated the Lease and demanding that OBOT "cure" the breach or vacate the Property within three (3) days. Plaintiffs dispute the validity of that Notice.

153. The City failed to act on Plaintiffs' Notice of Claim within forty-five (45) days

after the City received the claim, therefore Plaintiffs' claim application was deemed denied on December 3, 2018.

FIRST CAUSE OF ACTION

Breach of Written Contract (Lease)

(Against Defendant)

154. Plaintiffs reallege and incorporate by reference the allegations of paragraphs 1 through 153 as set forth above.

155. OBOT has performed each of the obligations to be performed by it under the Lease, except for those excused or otherwise discharged by reason of the City's conduct, including but not limited to payment of rent, taxes, and operating expenses under the Lease.

156. The City breached the Lease and the DA by, among other things: (i) enactment of the illegal Ordinance and Resolution banning any transfer of coal through the Project; (ii) assertion of a defense of the illegal Ordinance and Resolution in the trial court and prosecution of appeal; (iii) allegation that OBOT committed an Unmatured Event of Default and Event of Default; (iv) refusal to address essential prerequisites for permit submittals for the Project; (v) refusal to issue permits for the Project; (vi) failure and refusal to turnover possession of the Property that Plaintiffs have a right and obligation to improve, including but not limited to the Rail R/O/W; (vii) interference with Plaintiffs' funding and permitting efforts with outside regulatory agencies; (viii) failure to cooperate to identify and pursue third party funds for the Project, including, but not limited to, funds generated by Measure BB; (ix) interference with ACTC's disbursement of funds to the Project; (x) failure to execute a Rail Access Agreement with the Port so that the Port will permit OGRE to construct the Rail Improvements; (xi) interference in Plaintiffs' proceedings before the STB; (xii) refusal to issue an NDA and estoppel for OBOT's subtenants; (xiii) improper rejection of OBOT's invocation of the Force Majeure

Lease provision and refusal to extend completion dates as required by the Lease; and (xiv) rejection of Plaintiffs' Basis of Design and refusal to meet and confer as required by the Lease.

157. Had the City not engaged in these breaches: (i) Plaintiffs would have proceeded with development of the Project in a timely manner; (ii) Plaintiffs and their subtenant would not have been forced to expend substantial sums of money on legal fees, increased construction and lending costs, and delays; and (iii) Plaintiffs would have received expected funds from third-parties to fund the Project. As a result of the City's breaches, Plaintiffs have incurred damages. Plaintiffs will suffer irreparable harm to the extent Plaintiffs lose the unique opportunity complete the Project in an ever-changing marketplace.

158. Plaintiffs' damages are a foreseeable and proximate result of the City's breaches of the Lease and DA. The City had actual knowledge that, among other things, enforcement of the illegal Ordinance and Resolution would interfere with Plaintiffs' ability to receive the bargained-for benefits of the Lease and DA.

159. Plaintiffs have been damaged in amount subject to proof at trial in excess of $100 million. Plaintiffs will continue to be damaged unless the City is compelled to perform under the Lease and the DA.

SECOND CAUSE OF ACTION

Anticipatory Breach (Lease)

(Against Defendant)

160. Plaintiffs reallege and incorporate by reference the allegations of paragraphs 1 through 159 as set forth above.

161. OBOT has performed each of the obligations to be performed by it under the Lease, except for those excused or otherwise discharged by reason of the City's conduct, including but not limited to payment of rent, taxes, and operating expenses under the Lease.

162. The City gave Plaintiffs notice that it would not perform its obligations under the

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Lease and DA by, among other things, (i) private and public statements by elected officials opposing the Project and threatening to "kill" the Project; (ii) alleging that OBOT committed an Unmatured Event of Default and Event of Default; (iii) requiring inappropriate additional layers of environmental and discretionary review that may subject Plaintiffs to litigation exposure; (iv) refusal to compile a record of all "existing City regulations" applicable to the Project; and (v) requiring Plaintiffs to pay for improvements and mitigation measures that the City committed to pay.

163. At the time Plaintiffs received the City's repudiation, Plaintiffs had performed each of the obligations to be performed by it under the Lease, except for those excused or otherwise discharged by reason of the City's conduct, and Plaintiffs were ready, able, and willing to complete performance on their part.

164. As a result of the City's anticipatory breach of the Lease and DA, Plaintiffs have been damaged in an amount to be proven at trial. Plaintiffs will continue to be damaged unless the City is compelled to perform under the Lease and DA.

THIRD CAUSE OF ACTION

Breach of the Implied Covenant of Good Faith and Fair Dealing (Lease)

(Against Defendant)

165. Plaintiffs reallege and incorporate by reference the allegations of paragraphs 1 through 164 as set forth above.

166. OBOT has performed each of the obligations to be performed by it under the Lease, except for those excused or otherwise discharged by reason of the City's conduct, including but not limited to payment of rent, taxes, and operating expenses under the Lease.

167. Expressly stated in the Lease and the DA and implied as a matter of law is a covenant of good faith and fair dealing that requires, among other things, that the City would not

do anything to unfairly interfere with the right of Plaintiffs to receive the benefits of the Lease and DA.

168. OBOT has acted in good faith in its interactions with the City throughout the Project process. In contrast, the City unfairly and in bad faith interfered with Plaintiffs' right to receive the benefits of the Lease and the DA, and otherwise breached the implied covenant of good faith and fair dealing, by among other things: (i) enactment of the illegal Ordinance and Resolution banning any transfer of coal through the Project; (ii) assertion of a defense of the illegal Ordinance and Resolution in the trial court and prosecution of appeal; (iii) allegation that OBOT committed an Unmatured Event of Default and Event of Default; (iv) refusal to address essential prerequisites for permit submittals for the Project; (v) refusal to issue permits for the Project; (vi) failure and refusal to turnover possession of the Property that Plaintiffs have a right and obligation to improve, including but not limited to the Rail R/O/W; (vii) interference with Plaintiffs' funding and permitting efforts with outside regulatory agencies; (viii) failure to use commercially reasonable efforts to identify and pursue third party funds for the Project, including but not limited to funds generated by Measure BB; (ix) interference with ACTC's disbursement of funds to the Project; (x) failure to execute a Rail Access Agreement with the Port so that the Port will permit OGRE to construct the Rail Improvements; (xi) interference in Plaintiffs' proceedings before the STB; (xii) refusal to issue an NDA and estoppel for OBOT's subtenants; (xiii) rejection of Plaintiffs' Basis of Design and refusal to meet and confer as required by the Lease; (xiv) private and public statements by elected officials opposing the Project and threatening to "kill" the Project; (xv) requiring inappropriate additional layers of environmental and discretionary review that may subject Plaintiffs to litigation exposure; (xvi) refusal to compile a record of all "existing City regulations" applicable to the Project; (xvii) rejecting Plaintiffs' Force Majeure claim; and (xviii) requiring Plaintiffs to pay for improvements and mitigation

measures that the City committed to pay.

169. Had the City not engaged in these breaches of the implied covenant of good faith and fair dealing: (i) Plaintiffs would have proceeded with development of the Project in a timely manner; (ii) Plaintiffs and their subtenant would not have been forced to expend substantial sums of money on legal fees, increased construction and lending costs, and delays; and (iii) Plaintiffs would have received expected funds from third-parties to fund the Project. As a result of the City's breaches, Plaintiffs have incurred damages. Plaintiffs will suffer irreparable harm to the extent Plaintiffs lose the unique opportunity complete the Project in an ever-changing marketplace.

170. Plaintiffs' damages are a foreseeable and proximate result of the City's breaches of the implied covenant of good faith and fair dealing.

171. Plaintiffs have been damaged in amount subject to proof at trial of not less than $100 million. Plaintiffs will continue to be damaged unless the City is compelled to perform under the Lease and DA.

FOURTH CAUSE OF ACTION

Fraudulent Inducement/False Promise

(Against Defendant)

172. Plaintiffs reallege and incorporate by reference the allegations of paragraphs 1 through 171 as set forth above.

173. The City made a series of promises to OBOT to induce OBOT to enter the Lease and DA, including among others, (i) a promise to perform under the Lease; (ii) a promise to cooperate in the completion of the Project; (iii) a promise that certain funds generated by Measure BB would be allocated and disbursed to OBOT to build Wharf Improvements; and (iv) a promise that the City would cooperate with Plaintiffs in obtain permits and funding from third-parties.

174. The City did not intend to perform its promises at the time it entered into the Lease to the extent Plaintiffs subleased the Terminal to a bulk commodity provider that shipped coal.

175. Specifically, on November 4, 2014, City Administrator Blackwell provided OBOT the Mid-Project Budget Revise, which purported to re-sequence completion of the Public Improvement components and set out the sources and uses that form the basis for the final budget.

176. OBOT relied on Blackwell's assurances that the Lease would become effective more quickly and construction and completion of the Terminal accelerated if OBOT agreed to assume more funding obligations under the Mid-Project Budget Revise.

177. The City intended that Plaintiffs rely on its promises that the City would cooperate in the development of the Project.

178. Plaintiffs invested years of effort and millions of dollars, in an amount to be proven at trial, to develop the Project based on their reasonable reliance on the City's promise to perform under the Lease and the DA.

179. The City has not performed its promised acts as described above, and as a result Plaintiffs have been harmed.

180. Plaintiffs' reliance on the City's promises was a substantial factor in causing its harm.

FIFTH CAUSE OF ACTION

Intentional Interference with Contractual Relations (TLS)

(Against Defendant)

181. Plaintiffs reallege and incorporate by reference the allegations of paragraphs 1 through 180 as set forth above.

182. OBOT entered into the Sublease Option with TLS in November 2014, which granted TLS an exclusive option to sublease and operate the Terminal. The Sublease Option did

not restrict the type of bulk commodity to be transported through the Terminal.

183. The City knew of the proposed sublease between OBOT and TLS.

184. The City knew that the success of the Project hinged on OBOT's ability to secure the commitment of a commodity provider with long-term needs for the useful life of the Terminal.

185. The City's conduct prevented performance of the sublease between OBOT and TLS by making it harder to timely complete the Project. Consequently TLS has abandoned the sublease.

186. By engaging in this conduct, the City intended to disrupt the performance of the sublease between OBOT and TLS. Alternatively, the City knew that disruption of performance was certain or substantially certain to occur.

187. As a direct result of the City's conduct, Plaintiffs were harmed in an amount to be proven at trial. Plaintiffs will continue to be damaged unless the City is compelled to perform under the Lease and DA.

SIXTH CAUSE OF ACTION

Intentional Interference with Prospective Economic Relations (TLS and ITS)

(Against Defendant)

188. Plaintiffs reallege and incorporate by reference the allegations of paragraphs 1 through 187 as set forth above.

189. Since 2012, the City has intentionally interfered with Plaintiffs' prospective economic relationships with two potential subtenants, TLS and ITS, by engaging in a series of disruptive acts as described above. The sublease with TLS would have resulted in a future economic benefit to OBOT; and the sublease with ITS will result in a future economic benefit to OBOT.

190. The City knew of the proposed sublease between OBOT and TLS, and the subsequent sublease between OBOT and ITS, because OBOT had informed the City of the terms of the subleases and requested that the City issue an NDA to the subtenants.

191. The City knew that the success of the Project hinged on OBOT's ability to secure the commitment of a commodity provider with long-term needs for the useful life of the Terminal.

192. The prospective economic relationship between OBOT and TLS has been disrupted because of the City's wrongful conduct. Specifically, TLS abandoned its proposed sublease with OBOT and OBOT was required to seek out a new subtenant to develop the Project.

193. The prospective economic relationship between OBOT and ITS has been disrupted because of the City's wrongful conduct. Specifically, the City refuses to issue an NDA and estoppel for the sublease agreement between ITS and OBOT which threatens OBOT's ability to perform under the sublease agreement.

194. As a proximate result of the City's wrongful conduct, Plaintiffs have been damaged in an amount to be proven at trial. Plaintiffs will continue to be damaged unless the City is compelled to perform under the Lease and DA.

SEVENTH CAUSE OF ACTION

Negligent Interference with Prospective Economic Relations (TLS and ITS)

(Against Defendant)

195. Plaintiffs reallege and incorporate by reference the allegations of paragraphs 1 through 194 as set forth above.

196. The City has negligently interfered with Plaintiffs' prospective economic relationships.

197. The sublease with TLS would have resulted in a future economic benefit to

Plaintiffs; and the sublease with ITS will result in a future economic benefit to Plaintiffs.

198. The City knew of the proposed sublease between OBOT and TLS, and the subsequent sublease between OBOT and ITS, because OBOT had informed the City of the terms of the subleases and requested that the City issue an NDA and estoppel to the subtenants.

199. The City knew or should have known that its wrongful conduct, as described above, and failure to act with reasonable care would disrupt Plaintiffs' economic relationship with TLS and ITS.

200. The City breached its duty to Plaintiffs by failing to act with reasonable care including but not limited to: (i) refusing to issue an NDA, (ii) failing to issue an estoppel without a false claim that OBOT committed an Unmatured Event of Default; and (iii) breaching the Lease and DA as described above.

201. OBOT's economic relationships with TLS and ITS have been disrupted.

202. The City negligently failed and continues to fail, to cure its negligence by failing to perform under the Lease and DA.

203. As a proximate result of the City's negligence, Plaintiffs have been damaged in an amount to be proven at trial. Plaintiffs will continue to be damaged unless the City is compelled to perform under the Lease and DA.

EIGHTH CAUSE OF ACTION

Intentional Interference with Contractual Relations (OGRE)

(Against Defendant)

204. Plaintiffs reallege and incorporate by reference the allegations of paragraphs 1 through 203 as set forth above.

205. OGRE entered into a sublease agreement with OBOT ("OGRE Sublease") that granted OGRE an exclusive right to rehabilitate the rail network and become a Class III common

carrier, providing rail switching services (including on behalf of Class I common carriers) on the Oakland Army Base rail network.

206. The City knew of the OGRE Sublease.

207. OGRE incurred costs in reliance on its ability to perform and receive the benefits of the OGRE Sublease, including but not limited to: (i) costs to purchase materials to construct the rail; (ii) payment of rent under the OGRE Sublease; and (iii) costs to purchase a locomotive to provide rail services.

208. The City knew that the success of the Project hinged on OBOT's ability to secure a subtenant to rehabilitate the rail network and provide rail switching services.

209. The City's conduct has prevented and is preventing performance of the sublease between OGRE and OBOT by making it harder to timely complete the Project.

210. By engaging in this conduct, the City intended to disrupt the performance of the sublease between OGRE and OBOT. Alternatively, the City knew that disruption of performance was certain or substantially certain to occur.

211. As a direct result of the City's conduct, Plaintiffs were harmed in an amount to be proven at trial. Plaintiffs will continue to be damaged unless the City is compelled to perform under the Lease and DA.

NINTH CAUSE OF ACTION

Intentional Interference with Prospective Economic Relations (OGRE)

(Against Defendant)

212. Plaintiffs reallege and incorporate by reference the allegations of paragraphs 1 through 211 as set forth above.

213. The City has intentionally interfered with OGRE's prospective economic relationships with potential customers of its rail switching services, by engaging in a series of

disruptive acts as described above. OGRE is unable to secure customers for its rail operation because of the City's omissions and actions. OGRE's prospective economic relationships would have resulted in a future economic benefit to Plaintiffs.

214. The City knew of the OGRE Sublease, because Plaintiffs had informed the City of the terms of the OGRE Sublease and requested that the City issue an NDA to the OGRE as a subtenant.

215. The City knew that the success of the Project hinged on OBOT's ability to secure a subtenant to rehabilitate the rail network and provide rail switching services.

216. The prospective economic relationship between OGRE and its potential rail customers has been disrupted because of the City's wrongful conduct.

217. As a proximate result of the City's wrongful conduct, Plaintiffs have been damaged in an amount to be proven at trial. Plaintiffs will continue to be damaged unless the City is compelled to perform under the Lease and DA.

TENTH CAUSE OF ACTION

Negligent Interference with Prospective Economic Relations (OGRE)

(Against Defendant)

218. Plaintiffs reallege and incorporate by reference the allegations of paragraphs 1 through 217 as set forth above.

219. The City has negligently interfered with OGRE's prospective economic relationships with potential customers.

220. OGRE's ability to obtain customers for rail services as provided for under the OGRE Sublease would have resulted in a future economic benefit to OGRE.

221. The City knew of the OGRE Sublease, because Plaintiffs had informed the City of the terms of the OGRE Subleases and requested that the City issue an NDA to the OGRE as a

subtenant.

222. The City knew or should have known that its wrongful conduct, as described above, and failure to act with reasonable care would disrupt OGRE's economic relationship with its potential customers.

223. The City breached its duty to Plaintiffs by failing to act with reasonable care including but not limited to: (i) refusing to turn over the Rail R/O/W to OBOT; (ii) refusing to issue an NDA to OGRE, (iii) failing to issue an estoppel without a false claim that OBOT committed an Unmatured Event of Default; and (iv) breaching the Lease and DA as described above.

224. OGRE's economic relationships with its potential customers have been disrupted.

225. The City negligently failed and continues to fail, to cure its negligence by failing to perform under the Lease and DA.

226. As a proximate result of the City's negligence, Plaintiffs have been damaged in an amount to be proven at trial. Plaintiffs will continue to be damaged unless the City is compelled to perform under the Lease and DA.

ELEVENTH CAUSE OF ACTION

Declaratory Relief

(Against Defendant)

227. Plaintiffs reallege and incorporate by reference the allegations of paragraphs 1 through 226 as set forth above.

228. An actual, ripe, justiciable, and substantial controversy has arisen and now exists between Plaintiffs and the City with respect to several issues. Plaintiffs contend that the City has breached and/or repudiated its obligations under the Lease and DA. It is clear from the City's responses to Plaintiffs' correspondences that the City disagrees. The City contends that OBOT

has committed an Event of Default under the Lease, and Plaintiffs dispute the City's contention.

229. Under Code of Civil Procedure Section 1060 *et seq*., Plaintiffs seek a judicial declaration, including but not limited to the following:

(i) OBOT and OGRE are not in default under the DA or the Lease;

(ii) neither the Lease nor the DA has been terminated, either automatically or otherwise and both remain in full force and effect;

(iii) ALTERNATIVELY, if the Court determines OBOT has committed an unmatured event of default or event of default, OBOT has commenced cure that vitiates any grounds for termination of the Lease or DA by the City;

(iv) On March 11, 2016 OBOT properly invoked the Force Majeure Delay Lease provisions and is entitled to an extension of at least two years of the Commencement Date, as defined in the Lease, with a further continuing extension for so long as the City fails in its obligations to identify the applicable Construction Codes and Standards and applicable City regulations to which design and construction of the Terminal must comply or otherwise fails to meet its obligations under the DA or Lease;

(v) the process is to be open so that permits requested by OBOT or OGRE will be issued by the City as a ministerial act (without delay) and are not subject to discretionary review;

(vi) a creek protection permit is not required for the Project;

(vii) the City is required to turnover possession of the Property that Plaintiffs have a right and obligation to improve, including but not limited to the Rail R/O/W;

(viii) the City is required to identify and to pursue third party funds for the Project, including but not limited to funds generated by Measure BB;

(ix) the City is required to request and to process ACTC's disbursement of funds to the Project;

(x) the City is required to execute a Rail Access Agreement with the Port pursuant to the agreed upon terms between the City and Port as set forth in that certain Amended and Restated Cost Sharing Agreement;

(xi) the rail network contemplated by the Rail Access Agreement is limited to the track east of Wake Avenue;

(xii) there is no such thing as "Port property" and OBOT/OGRE have all the rights to access the rail areas set forth in the Lease;

(xiii) the City and Port are obligated to support and not to interfere with Plaintiffs' proceedings before the STB;

(xiv) 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;

(xv) the form of NDA has been approved by the City and is attached hereto as **Exhibit 1**.

(xvi) the City is obligated to accept Plaintiffs' Basis of Design and to meet and confer as required by the Lease;

(xvii) OBOT and its subtenant may have beneficial use of the West Gateway, and use the West Gateway for open storage consistent with the Lease;

(xviii) the City is obligated to construct the Public Access Improvements consistent with its BCDC permit without seeking contribution from OBOT; and

(xviv) the City had knowledge prior to execution of the LDDA, DA, and Lease, that coal was a potential commodity to be handled by the Terminal.

230. A judicial declaration is necessary and appropriate at this time under the circumstances in order that Plaintiffs may ascertain their rights and interests with respect to the contracts between Plaintiffs and the City.

TWELFTH CAUSE OF ACTION

Specific Performance of Contract

(Against Defendant)

231. Plaintiffs reallege and incorporate by reference the allegations of paragraphs 1 through 230 as set forth above.

232. The Lease and DA are sufficiently certain in their terms to be specifically enforced.

233. OBOT has substantially performed each of the obligations to be performed by it under the Lease, except for those excused or otherwise discharged by reason of the City's conduct, including but not limited to payment of rent under the Lease.

234. The City has breached the Lease and DA as described above.

235. The City has received adequate consideration for the Lease and DA, including but not limited to payment of rent under the Lease.

236. The Lease and DA are just and reasonable as to the City, and its assent was not obtained by misrepresentation, concealment, circumvention, or unfair practices of Plaintiffs. At all relevant times, the City was aware that Plaintiffs intended to build a bulk commodity terminal that could be used to transport all legally permitted commodities, including, without limitation, coal.

237. Plaintiffs have no adequate remedy at law for the City's wrongful conduct. Plaintiffs will suffer irreparable harm to the extent Plaintiffs lose the unique opportunity complete the Project in an ever-changing marketplace.

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PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for judgment as follows:

1. Compensatory damages in an amount to be proven at trial;

2. Declaratory relief as set forth above;

3. Specific performance of all of Defendant's contractual obligations set forth in the DA and Lease;

4. A preliminary and permanent injunction enjoining and forbidding the City from interfering or attempting to interfere with the completion of the Project by Plaintiffs;

5. For attorneys' fees and costs of suit incurred herein; and

6. For such other further relief as the Court may deem just and proper.

DEMAND FOR JURY TRIAL

Pursuant to California Code of Civil Procedure section 631, Plaintiffs hereby demand a trial by jury.

Dated: December 4, 2018

MANATT, PHELPS & PHILLIPS, LLP

By: _____
Barry W. Lee
Andrew Bassak
Ana G. Guardado
Attorneys for Plaintiffs
OAKLAND BULK AND OVERSIZED TERMINAL and OAKLAND GLOBAL RAIL ENTERPRISE

EXHIBIT 1

NON-DISTURBANCE AND ATTORNMENT AGREEMENT

THIS NON-DISTURBANCE AND ATTORNMENT AGREEMENT ("**Agreement**"), dated as of _____ ____, 2018 (the "**Effective Date**"), is entered into by and among the City of Oakland, a municipal corporation, (hereinafter called "**Master Landlord**"), Oakland Bulk and Oversized Terminal, LLC, a California limited liability company (hereinafter called "**Tenant**"), and Oakland Global Rail Enterprise, LLC, a California limited liability company (hereinafter called "**Subtenant**").

WITNESSETH:

WHEREAS, Master Landlord and Tenant entered into that certain Army Base Redevelopment Project Ground Lease, dated as of February 16, 2016 (the "**Master Lease**"), which Master Lease is attached hereto as **Exhibit 1** and includes certain rights and obligations with respect to the property described in the Master Lease as the Premises (the "**Premises**");

WHEREAS, Tenant and Subtenant have entered into that certain Sublease Agreement (WGW Rail), dated as of June 26, 2018 (the "**Sublease**"), which Sublease is attached hereto as **Exhibit 2** and includes certain rights and obligations with respect to a portion the Premises further described in the Sublease (the "**Sublease Premises**");

WHEREAS, Subtenant desires to be assured of continued occupancy of the Sublease Premises under the terms of the Sublease; and

WHEREAS, this Agreement is entered into pursuant to Section 12.5 of the Master Lease.

AGREEMENT

NOW, THEREFORE, in consideration of the mutual promises, covenants and agreements herein contained, the receipt and sufficiency of which are hereby acknowledged, the parties hereto, intending to be legally bound hereby, agree as follows:

1. Non-Disturbance; New Lease. In the event the Master Lease expires, terminates or is canceled or of the surrender thereof by Tenant, whether voluntary, involuntary, or by operation of law, and Master Landlord retakes possession of the Premises during the term of the Sublease, including but not limited to, due to a default by Tenant under the Master Lease (individually and collectively, the "**Master Lease Termination**"), subject to the terms of this Agreement:

(a) The Sublease shall not terminate as a result of the Master Lease Termination;

(b) So long as Subtenant is not then in default, after applicable notice and cure periods under any of the terms, covenants, or conditions of the Sublease, Master Landlord hereby agrees not to materially affect or materially disturb Subtenant's right to possession of the Sublease Premises and any of Subtenant's other rights under the Sublease in the exercise of Master Landlord's rights under the Master Lease;

(c) Master Landlord and Subtenant hereby agree that following the Master Lease Termination, the Sublease shall thereafter be deemed a direct lease between Master Landlord and Subtenant; and

(d) Within ~~(__)~~ thirty (30) days of the Master Lease Termination, Master Landlord and Subtenant agree to prepare and execute a new direct lease, ~~commercially reasonable terms acceptable to Mater Landlord and Tenant~~based on the same or substantially similar terms as the Sublease, for the remainder of the Sublease term (the "**New Lease**"), at which point the Sublease shall automatically terminate.

2. Limitation on Landlord's Liability under Sublease or New Lease. In the event of a Master Lease Termination, Master Landlord shall not:

(a) Be liable to Subtenant for any act, omission or breach of the Sublease by Tenant, except with respect to (i) continuing material defaults that first arose prior to the Master Lease Termination, but only to the extent continuing after the Master Lease Termination and (ii) matters that first arise after the Master Lease Termination to the extent provided for in the Master Lease;

(b) Be subject to any offsets or defenses which Subtenant might have against Tenant; provided, however, the foregoing shall not prevent any offsets or defenses under the Sublease or New Lease that (i) arise after the Master Lease Termination to the extent provided for in the Sublease or New Lease, whichever is then in force, and (ii) are expressly permitted under the terms of the Master Lease (provided that offsets and defenses against Master Landlord for continuing material defaults that first arose prior to the Master Lease Termination shall be limited to the extent continuing after the Master Lease Termination); or

(c) Be liable to Subtenant for any security deposit or prepaid rent or other fees or sums previously paid by Subtenant to Tenant unless such deposits are actually transferred to Master Landlord,.

2. Attornment. Subject to the provisions of Sections 1 and 2, above, Subtenant hereby agrees to attorn to Master Landlord.

3. Subtenant Estoppel. Subtenant hereby agrees and represents:

3.1 That a true and accurate copy of the Sublease, including all exhibits and amendments, is attached hereto as Exhibit 2 and is unmodified, except for such attached and fully executed amendments, and to Subtenant's actual or constructive

knowledge is in full force and effect, as so amended;

3.2 Concurrently herewith, Subtenant has paid the following amounts to Tenant as "Rent" under the Sublease: None.

3.3 To Subtenant's actual or constructive knowledge, Subtenant is not aware of any defaults by any party under the Sublease which have not been cured, except as follows: (if none, insert "None"): None.

4. Continued Effect of Master Lease. As between Master Landlord and~~,~~ Tenant, ~~and Subtenant,~~ the Sublease shall not alter, amend or otherwise modify any provisions of the Master Lease. This Agreement shall not release or discharge Tenant of any of its obligations under the Master Lease or release, discharge or alter the primary liability of Tenant to pay rent and all other sums due under the Master Lease and to perform and comply with all other obligations of Tenant under the Master Lease. Subtenant shall not violate any of the terms and conditions of the Master Lease to the extent applicable to the use and occupancy of the Sublease Premises. Subject to the terms of Sections 1 and 2, above, any breach of the Master Lease by Tenant ~~or Subtenant~~ and/or any breach of the Sublease by Subtenant which results in a breach of the Master Lease shall entitle Master Landlord to all the rights and remedies provided in the Master Lease. Nothing in this agreement shall be construed as validation of Tenant's ~~or Subtenant's~~ performance or lack thereof with respect to any of either of their obligations under the Master Lease, assurance that Tenant ~~or Subtenant have or have~~ has or has not defaulted under the Master Lease, or a waiver of Master Landlord's ability to pursue all appropriate remedied against Tenant ~~and/or Subtenant~~ under the Master Lease, and at law and equity for all such default, whether arising~~ariing~~ before or after the date of this Agreement.

5. Term of Master Lease and Sublease. Subtenant acknowledges and agrees that, subject to the provisions of this Agreement including without limitation Section 2 above, the term of the Sublease shall terminate upon the termination of the Master Lease and execution and delivery of the New Lease.

6. Entire Agreement; Successors. This Agreement contains the entire agreement between the parties hereto regarding the matters which are the subject of this Agreement. In the event of an assignment under the Master Lease by Master Landlord or, in the case of Tenant, an assignment permitted by Master Landlord under Section 12.1 of the Master Lease or a Permitted Transfer as defined in Section 12.3 of the Master Lease of Tenant's interest in the Master Lease with respect to all or a portion of the Sublease Premises, then the assignee of either Master Landlord or Tenant, as applicable, shall automatically be deemed the assignee of Master Landlord or Tenant, as applicable, under this Agreement, and such assignee shall automatically assume and be subject to all the terms herein and the obligations of Master Landlord or Tenant, as applicable, under this Agreement. No other assignments of this Agreement shall be permitted, ~~exceptas~~ except as described in the Master Lease. Subject to the foregoing, the terms, covenants and conditions of this Agreement shall apply to and bind the heirs, successors, the

executors and administrators and permitted assigns of all the parties hereto. To the extent applicable, this Agreement shall insure to the benefit of Subtenant's Mortgagee and its successors and assigns. The parties acknowledge and agree that no rule or construction, to the effect that any ambiguities are to be resolved against the drafting party, shall be employed in the interpretation of this Agreement. If any provision of this Agreement is determined to be illegal or unenforceable, such determination shall not affect any other provisions of this Agreement, and all such other provisions shall remain in full force and effect.

7. Counterparts. This Agreement may be executed in any number of counterparts, provided each of the parties hereto executes at least one counterpart; each such counterpart hereof shall be deemed to be an original instrument, but all such counterparts together shall constitute but one agreement.

8. Brokerage Commissions. Tenant and Subtenant covenant and agree that under no circumstances shall Master Landlord be liable for any brokerage commission or other charge or expense in connection with the Sublease or this Agreement and Tenant and Subtenant agree to protect, defend, indemnify and hold Master Landlord harmless from the same and from any cost or expense (including but not limited to attorneys' fees) incurred by Landlord in resisting any claim for any such brokerage commission.

9. Attorneys' Fees. In the event of any litigation between the parties hereunder to enforce or interpret this Agreement, the prevailing party (whether after trial or appeal) shall be entitled to recover from the party not prevailing its reasonable attorneys' fees and costs, in addition to all other proper relief.

10. Governing Law. This Agreement and the rights and obligations of the parties hereto are governed by the laws of the State of California.

[Rest of Page Left Blank]

IN WITNESS WHEREOF, the undersigned have caused this Agreement to be executed as of the Effective Date.

MASTER LANDLORD:

City of Oakland,
a municipal corporation

By: _____

Name: _____

Its:
_____

Approved as to form and legality this _____ day of _____, 2018

_____
City Attorney

TENANT:

OAKLAND BULK AND OVERSIZED TERMINAL, LLC, a California limited liability company

By:_____
Phil Tagami
Authorized Signatory

SUBTENANT:

OAKLAND GLOBAL RAIL ENTERPRISE, LLC, a California limited liability company

By:_____
Mark McClure
Manager

EXHIBIT 1
MASTER LEASE

[Attached]

EXHIBIT 2
SUBLEASE

[Attached]

EXHIBIT 3

MEMORANDUM OF AGREEMENT

[Attached]

RECORDING REQUESTED BY
AND WHEN RECORDED MAIL TO:

The City of Oakland
250 Frank H. Ogawa Plaza, 3rd Floor
Oakland, CA 94612
Reference: Oakland Army Base

With a copy to:

Oakland Bulk & Oversized Terminal, LLC
300 Frank H. Ogawa Plaza, Ste. 340
Oakland, CA 94612

(Space Above This Line For Recorder's Use Only)

MEMORANDUM OF
NON-DISTURBANCE AND ATTORNMENT AGREEMENT

This Memorandum of Non-Disturbance and Attornment Agreement (this "Memorandum"), dated as of _____ ___, 2018, is entered into by and between the CITY OF OAKLAND, a municipal corporation ("Master Landlord"), Oakland Bulk and Oversized Terminal, LLC, a California limited liability company ("Tenant"), and Oakland Global Rail Enterprise, LLC, a California limited liability company ("Subtenant").

Master Landlord and Tenant have entered into that certain Army Base Gateway Redevelopment Project Ground Lease for West Gateway between Master Landlord and Tenant, dated February 16, 2016 (the "Master Lease"), whereby Master Landlord leased to Tenant, and Tenant leased from Master Landlord, that certain real property located in the City of Oakland as more particularly described in the Master Lease. A Memorandum of the Master Lease has been recorded in the Official Records of Alameda County as Document No. 2016-038036.

Tenant and Subtenant have entered into that certain Sublease Agreement (WGW Rail), dated December 15, 2016 (the "Sublease"), whereby Tenant subleased to Subtenant, and Subtenant leased from Tenant, that certain portion of the Master Lease premises located in the City of Oakland as more particularly described in Exhibit A attached hereto. A Memorandum of the Sublease has been recorded in the Official Records of Alameda County as Document No. _____.

Master Landlord, Tenant and Subtenant have entered into that certain Non-Disturbance and Attornment Agreement dated _____ ____, 2018, with respect to the Master Lease and the Sublease (the "NDA"). All terms in this Memorandum that are not defined herein shall have the same meanings as set forth in the NDA.

This Memorandum incorporates herein in full, by this reference, all provisions of

the NDA. This Memorandum is solely for recording and notice purposes and in no way alters, amends, modifies or supplements the provisions of the Master Lease, Sublease or NDA. In the event of any conflict between any provision of the NDA and any provision of this Memorandum, the NDA shall control.

This Memorandum shall extend to and be binding upon the parties hereto and their legal representatives, heirs, successors, and assigns.

This Memorandum may be executed in counterparts, each of which is deemed to be an original, and all such counterparts constitute one and the same instrument.

IN WITNESS WHEREOF, Master Landlord, Tenant and Subtenant have executed this Memorandum as of the date first written above.

MASTER LANDLORD:

City of Oakland,
a municipal corporation

By: _____

Name: _____

Its:
_____

Approved as to form and legality this _____ day of _____, 2018

_____
City Attorney

TENANT:

OAKLAND BULK AND OVERSIZED TERMINAL, LLC, a California limited liability company

By:_____
Phil Tagami
Authorized Signatory

SUBTENANT:

OAKLAND GLOBAL RAIL ENTERPRISE, LLC, a California limited liability company

By:_____
Mark McClure
Manager

EXHIBIT A
TO
MEMORANDUM

LEGAL DESCRIPTION OF REAL PROPERTY

[See attached]