BARBARA J. PARKER, City Attorney - SBN 069722
MARIA BEE, Chief Assistant City Attorney - SBN 167716
JAMILAH A. JEFFERSON, Supervising Deputy City Attorney - SBN 219027
One Frank H. Ogawa Plaza, 6th Floor
Oakland, California 94612
Telephone: (510) 238-7686
Facsimile: (510) 238-6500
jjefferson@oaklandcityattorney.org

STACEY M. LEYTON - SBN 203827
DANIELLE LEONARD - SBN 218201
JONATHAN ROSENTHAL - SBN 329638
ALTSHULER BERZON LLP
177 Post Street, Suite 300
San Francisco, CA 94108
Telephone: (415) 421-7151
Facsimile: (415) 362-8064
sleyton@altber.com
dleonard@altber.com
jrosenthal@altber.com

DARALYN DURIE - SBN 169825
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, CA 94105
Telephone: (415) 268-7000
Facsimile: (415) 268-7522
ddurie@mofo.com

Attorneys for CITY OF OAKLAND

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA

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

Plaintiffs,

v.

CITY OF OAKLAND, a California municipal corporation,

Defendant.

CITY OF OAKLAND

Counter-Plaintiff,

v.

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

Counter-Defendants.

Consolidated Case Nos. RG18930929 / RG20062473

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

CITY OF OAKLAND'S BRIEF IN ADVANCE OF BENCH TRIAL REGARDING IMPORTANT LEGAL ISSUES

Action Filed: December 4, 2018
Trial Date: July 10, 2022

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

I. INTRODUCTION

On February 16, 2016, the City and OBOT entered into a 66-year lease of valuable City-owned land within the old Oakland Army Base called the West Gateway, in exchange for OBOT's promise to build and operate a bulk commodity shipping terminal. The Ground Lease set forth tight timeframes and authorized early termination for failure to meet the deadline to commence construction of the project, called the milestone construction deadline.

At the time the City and OBOT entered into the lease, all parties were aware that the City was in the midst of a legislative process in which the City Council was considering whether to regulate the commodities coal and petcoke (commodities that OBOT wanted to ship through the terminal) and whether to apply those regulations to the West Gateway project. OBOT and its business partners were disputing whether the City had the legislative authority to do so. With eyes wide open, the City and OBOT agreed to set aside that dispute and let it play out in another arena, and to move the terminal project forward. That agreement to move forward is the fundamental agreement reflected in this Ground Lease; without it, the City would not have given OBOT this land, at this time.

Thus, in the Ground Lease, in exchange for the land, OBOT agreed to *build the terminal anyway*, notwithstanding any separate attempt by the Oakland City Council to regulate coal. That agreement is reflected in the express terms of the contract. The City gave OBOT two-and-one-half years to start construction, provided for early termination if that deadline were missed, and threw in two years of free rent to allow OBOT to get started. OBOT agreed to these deadlines, agreed to assume complete responsibility for the cost and progress of development, and agreed that legislative and regulatory acts *would not excuse its performance under this contract*. The City turned over the West Gateway on February 16, 2016, and expected OBOT to move forward.

Two-and-one-half years later, as of August 14, 2018, OBOT had not moved the project forward, and failed to meet the construction deadline. That default terminated the lease by its express terms. OBOT claimed force majeure, refused to cede possession of the land, and sued.

The Developers now claim that the City's force majeure acts excused their performance and extended the contract deadlines, and therefore the City's notice of default and termination

breached the contract. Their complaints center around the City's 2016 Ordinance and Resolution regulating the storage and handling of coal, over which OBOT already sued in federal court. But that contention is foreclosed by the contract terms. It also involves an issue clearly anticipated by the parties at the time of the entry into the contract. Moreover, that legislative act in no way prevented the Developers from constructing the multi-commodity bulk terminal they unambiguously promised the City they would build. The entire deal was predicated on the promise to build this terminal *anyway*. Nor did any of the other laundry list of actions the Developers invoke prevent OBOT from moving this project forward.

Under unanimous governing law interpreting force majeure contract provisions discussed below, the Developers must prove all of the following to establish an event of force majeure: (1) the event was *unanticipated*; (2) the Developers diligently did everything within their own power to perform; and (3) notwithstanding those efforts, the event made performance *impossible or unreasonably expensive.* But there is no dispute that the Developers were aware of the City Council's legislative process regarding coal at the time they entered the contract. And the truth is that the Developers have *admitted* they could have moved the project forward and met the early milestone deadline, consistent with the deal with the City they struck in February 2016, notwithstanding any regulation of coal. But instead, having already made a deal with a business partner backed by the coal industry, they decided to stick with that partner, not to explore other options, and to wait and see the result of the fight over coal. Whatever the reasons the Developers decided to wait (waiting for their business partner to arrange financing; fear that their partner would sue them; or the desire not to spend their own money on the project), that *choice to wait* was not an option permitted by this contract.

The evidence in this trial will reveal that Developers' largely hindsight arguments claiming the City blocked the terminal project because of its political opposition to coal lack evidentiary support. These contentions also ignore the plain language of the contract and governing contract law, which the City will outline in this brief. This case will be determined by the language of that contract, not by the myriad collateral extra-contractual issues that the Developers invoke, for lack of anything relevant on which they can rely.

II. IMPORTANT CONTRACT PROVISIONS

Earlier Contracts (LDDA and DA). The Developers' relationship with the City began when the City selected California Capital Investment Group ("CCIG") as one of the developers for the City's portion of the Army Base land, including the West Gateway and other Gateway parcels. In 2012, the City and CCIG entered into a Lease Disposition and Development Agreement ("LDDA"), which provides a framework that is extinguished upon entry of any Ground Lease for a particular parcel and generally addresses the parties' respective agreements to conditions precedent and schedule for the ordering of those Ground Leases.[1]

In 2013 the City and CCIG then entered into a Development Agreement ("DA"), which is a contract that is also a legislative act and addresses the City's regulatory and legislative power with respect to the project.[2] The DA expressly states that the provisions of any subsequent Ground Lease control with respect to that parcel. PTX 007 (DA) §14.27.

Notwithstanding the Developers' consistent refrain, the LDDA and DA do not give the Developers the "right" to ship whatever commodities they want. The LDDA and DA grant development rights and obligations, and generally require the Developers to proceed in a manner that complies with all of the applicable *federal*, *state*, and *local* laws that would apply to answer the question of how and what they can ship. PTX 007 (DA) §§2.4, 7.2. These contracts contain no provision authorizing the shipment of any commodities; they are subject, like all development projects, to applicable laws; and in this context, those applicable federal, state, and local laws are particularly complex. The Developers' overly myopic and static view of the regulatory context in which these contracts are situated appears to be one of the fundamental misconceptions upon

[1] Contracts between the parties will be among the parties' exhibits for trial, including the February 16, 2016 West Gateway Ground Lease (PTX 068), the LDDA (PTX 378), the DA (PTX 007), and the Third Amendment to the LDDA (also signed on February 16, 2016) (DTX 561). For the Court's convenience, the City has with this brief provided the Court with a copy of the West Gateway Ground Lease here at issue, in its own binder.

[2] Generally, a DA is understood to lock in the then-current City regulations with certain police power exceptions. As the Court is aware, one of those exceptions (for health and safety threats) was at issue in the federal litigation over the coal and petcoke Ordinance and Resolution. *OBOT v. Oakland* (N.D. Cal. 2018) 321 F.Supp.3d 986, *aff'd*, 96 F.3d 603 (2020). The First District Court of Appeal very recently reiterated that the California Constitution does not allow the City of Oakland to contractually waive its police power authority. *Discovery Builders v. City of Oakland* (June 22, 2023) __ Cal.Rptr.3d __, 2023 WL 4115074, *1, 6-9.

which their entire case is based.

On February 16, 2016, the same day the parties signed the West Gateway Ground Lease, they also signed the Third Amendment to the LDDA, by which, in order to allow the West Gateway to move forward, OBOT waived certain conditions precedent to entering the Ground Lease (including issues they now raise, discussed further below, such as the execution of the Rail Access Agreement and completion of the public improvements on the Rail Right-of-Way land). Notably, the parties also included language expressly acknowledging the "City's rights, notwithstanding any vested development rights of the Developer Parties, to fully consider and when applicable adopt and apply to the Project future City regulations pursuant to applicable provisions of the Development Agreement, including but not limited to regulations pertaining to the transportation, transloading, handling and/or export of coal or petroleum coke." DTX 561 2/16/2016 Third Amendment to LDDA, at 38 ¶38.

West Gateway Ground Lease. OBOT and the City signed the Ground Lease on February 16, 2016 against the backdrop of the City's consideration of the future City regulations governing coal discussed above. Oakland Global Rail Enterprise ("OGRE") is not a party. The relevant provisions of the contract, which was highly negotiated, detailed, and lengthy (136 pages, 594 with exhibits), are set forth in Appendix 1 to this brief, along with a list of key abbreviations and terms, in Appendix 2.

III. IMPORTANT LEGAL ISSUES

The City and the Developers sue each other for breach of the West Gateway Ground Lease. The elements are parallel and familiar: existence of the contract; performance or excuse of performance; breach; and harm. CACI 303. The Developers contend they are also suing for breach of the DA, anticipatory breach of contract, breach of the implied covenant, and third-party breach of contract for OGRE, but as explained below, those claims are all foreclosed. The City provides an outline of the following significant legal issues raised by the parties' claims and defenses to assist the Court in considering the evidence at trial.

A. OBOT Failed to Perform by Failing to Construct the Terminal Alone.

The contract terms required OBOT to commence construction of the terminal, along with

one of the five enumerated rail improvements required by the Lease, by a specific date. PTX 068 §6.1.2. Per their initial trial brief (filed 6/21/2023, prior to the stipulation to proceed by bench trial), the Developers intend to focus at trial on the required *rail* improvements (and the City's alleged interference with those improvements). There is no dispute that the plain terms of the contract required OBOT to eventually construct all three types of improvements (terminal, rail, and wharf). But the relevant contract interpretation question at this trial is whether OBOT breached the Initial Milestone deadline by failing to commence construction of the Bulk and Oversized terminal alone. The Minimum Project Initial Milestone deadline was not written to permit OBOT to satisfy the deadline by commencing the rail "or" the terminal; it required construction of the terminal *and* at least one rail improvement. PTX 068 §6.1.2. OBOT's failure to commence construction of the terminal, which is undisputed, was a material breach under the Lease's plain terms.[3] Any argument that the City's actions impacted the five rail improvements misses the point: OBOT defaulted with respect to the terminal, regardless of whether it also failed to construct the one rail improvement the Initial Milestone required, and regardless of whether the rail portion of the project was delayed and by whom.

B. Res Judicata Bars OBOT's Breach Claims Based on Pre-May 2018 Events.

This Court has already imposed a significant substantive guardrail around the Developers' attempt to sue the City a second time for breach of contract, by correctly holding that claims that were or could have been raised in the federal case are barred by res judicata. Demurrer Order (5/16/2019); Motion to Strike Order (5/16/2019). In response to this Court's res judicata ruling, the Developers filed their operative amended complaint setting forth claims that arise *only after May 15, 2018*, the date of the federal decision. First Amended Complaint (12/11/2020). The Developers may not for purposes of trial now revert and attempt to raise claims, particularly with respect to the DA, that predate May 15, 2018.[4]

[3] OBOT concedes, as they must, that they did not Commence Construction of the terminal as required by the Minimum Project as set forth in the Ground Lease. *See*, *e.g.,* Plaintiffs' Motion in Limine to Preclude Evidence and Argument re: Health and Safety Risks (6/16/2023) at 3:1 (admitting that "OBOT has not begun the terminal's construction…").

[4] Plaintiffs' recent Trial Brief is *replete* with reliance on alleged pre-May 15, 2018 breaches. *See, e.g.*, Plfs' Trial Brief (6/21/2023) at 1-2 ("This is an action by Plaintiffs to recover for

This Court's prior res judicata rulings and the Developers' related concessions are conclusive. In opposing the City's pleadings motions, the Developers conceded that res judicata would apply to claims based on "facts in existence" at the time of the earlier federal litigation, and argued that the City's pre-May 2018 actions were included in their complaint only for "background" purposes. Plfs' Opp. to Demurrer (4/4/2019) at 6-7. This Court held that res judicata prevented the Developers from basing their claims on events that predated the federal litigation (including the 2016 Ordinance and Resolution), and permitted claims to proceed to the extent that "there are [sic] post-federal action conduct that exist as a valid basis for the claims." Demurrer Order (5/16/2019) at 3-4; Motion to Strike Order (5/16/2019). Accordingly, the Developers filed their amended complaint alleging claims based only on post-May 15, 2018 events. *See, e.g*., First Amended Complaint (12/11/2020) ¶¶6 ("Since the issuance of the federal ruling in May 2018 …"), 7 ("after the issuance of the Federal Ruling"), 41, 50, 56, 60, 69, 76, 80, 83, 95; *see also id*. ¶1 ("The above allegations regarding the federal lawsuit and subsequent appeal are not the basis of Plaintiffs' claims here, but rather are included to explain the historical context of this lawsuit."). The City has therefore conducted discovery and prepared for trial based on the Court's ruling and Plaintiffs' allegations.

Plaintiffs cannot now resurrect old claims, contrary to the Court's ruling, their own concessions, and governing law. Res judicata clearly prevents the Developers from relying on any pre-May 2018 acts of the City, including but not limited to the 2016 Ordinance, as a basis for their breach claims, because they could have sought relief for those acts in their federal case. *See Villacres v. ABM Indus. Inc*. (2010) 189 Cal.App.4th 562, 569; *Owens v. Kaiser Found. Health Plan, Inc.* (9th Cir. 2001) 244 F.3d 708, 713. The recent reversion is also entirely barred by estoppel. *See MW Erectors, Inc. v. Niederhauser Ornamental & Metal Works Co., Inc.* (2005) 36

Defendant City of Oakland's numerous and long-running breaches of agreements…"); ("The City first attempted to rewrite the parties' contracts in 2016 by adopting a resolution and ordinance…"); ("*During* and after the City's failed legislative attempts to stop the Project, the City resorted to self-help and effectively refused to allow Plaintiffs to exercise their contractual right to develop the Terminal."); *id.* at 2 (referring to a "policy" allegedly created in *2015*); *id*. at 3-4 (listing alleged "breaches" of the Ground Lease and DA that include events beginning in 2015 and 2016) (emphasis added).

Cal.4th 412, 422 (judicial estoppel); *Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 183 (equitable estoppel).

C. Breach and Excuse Must Be Evaluated in Light of the Express Contract Terms

OBOT's breach and excuse of performance arguments ignore the express contract terms in two significant ways: first, by ignoring the terms that expressly authorize the City conduct about which they complain; and second, by ignoring the terms under which OBOT expressly assumed risk. Two important points of law will govern those allegations:

1. City conduct expressly authorized by the contract cannot constitute a breach (of either express terms, or the implied covenant) and therefore cannot excuse performance. *See, e.g., Carma Devs. Inc. v. Marathon Dev. California, Inc*. (1992) 2 Cal.4th 342, 376.

2. Where OBOT expressly assumed the risk for certain acts, even unforeseen, contract law holds OBOT to the bargain it made. *See, e.g*., *Glenn R. Sewell Sheet Metal, Inc. v. Loverde* (1969) 70 Cal.2d 666, 676–78 (J. Traynor) (holding that party who has expressly assumed risk of some event in contract, including risk of "undertaking for himself the duty to comply with all laws and orders respecting the premises," cannot claim excuse of performance).

D. To Prove Excuse of Performance by Force Majeure, OBOT Must Prove Impossibility, Unforeseeability, and Diligent Efforts to Perform

In order for the Developers to establish that the City's termination of the contract in 2018 (or any other post-May 15, 2018 act of the City) breached the Ground Lease, they must first prove that OBOT's performance by the Initial Milestone deadline was excused. The Developers have the burden of proof to establish that their performance was excused (required both as a defense to the City's claim and to establish the second element, performance or excuse, of their own claim). *See Butler v. Nepple* (1960) 54 Cal.2d 589, 598-99; *San Mateo Cmty. Coll. Dist. v. Half Moon Bay Ltd. P'ship* (1998) 65 Cal.App.4th 401, 414.

To prove excuse of performance, the Developers contend that "acts of the other party" (the City), included in the Ground Lease's definition of Force Majeure event, extended the contract deadlines. PTX 068 §16.1, Art. 40. But governing law interpreting force majeure contract provisions such as this one establishes several important rules. As an initial matter, consistent

with decades of precedent, the First District Court of Appeal recently reaffirmed that the language of a force majeure contract provision is interpreted not in isolation, but against the backdrop of the common law impossibility doctrine from whence the concept of force majeure arose. *West Puebelo Partners, LLC v. Stone Brewing Co., LLC* (2023) 90 Cal.App.5th 1179, 1182; *see also Butler*, 54 Cal.2d at 593–99; *Oosten v. Hay Haulers Dairy Emp. & Helpers Union* (1955) 45 Cal.2d 784, 787–88.

Under the plain language of this contract, interpreted in light of governing law, in order to establish an event of Force Majeure, OBOT must prove all of the following:

1. The force majeure event cannot have been *anticipated or foreseeable* by the contracting parties at the time they entered the contract. *See Free Range Content, Inc. v. Google Inc*. (N.D. Cal., May 13, 2016, No. 14-CV-02329-BLF) 2016 WL 2902332, at *6 ("Under California law, unless a contract explicitly identifies an event as a force majeure, the event must be unforeseeable at the time of contracting to qualify as such. *Watson Laboratories Inc. v. Rhone-Poulenc Rorer, Inc*., 178 F.Supp.2d 1099, 1111 (C.D. Cal. 2001)."); *see also London Guarantee & Accident Co. v. Industrial Accident Comm'n of Cal.* (1927) 202 Cal. 239, 242 ("force majeure" events are those "which human vigilance and industry can neither foresee nor prevent"); *accord Aristocrat Hwy. Displays v. Stricklen* (1945) 68 Cal.App.2d 788, 790 (citing *Mitchell v. Ceazan Tires* (1944) 25 Cal.2d 45, 47); *Conlin v. Coyne* (1937) 19 Cal.App.2d 78, 86-87; *OWBR LLC v. Clear Channel Commc'ns, Inc.* (D. Haw. 2003) 266 F.Supp.2d 1214, 1222-24 (force majeure clauses "define[] the scope of unforeseeable events that might excuse nonperformance by a party"); Black's Law Dictionary 657 (7th ed.1999) (defining Force Majeure Clause as "[a] contractual provision allocating the risk if performance becomes impossible or impracticable as a result of an event or effect that the parties could not have anticipated or controlled"). Therefore, any City acts that OBOT was aware of at the time of the contract (and therefore had the ability to *negotiate* terms to address) cannot constitute force majeure. The evidence will show that the following issues were known or foreseeable at the time of contract, and so cannot be force majeure: the alleged "binder" of regulations owed under the DA; the alleged failure to "comment" on the 2015 Basis of Design; and, most significantly, the City

Council's legislative acts with respect to coal.

2. Consistent with the Force Majeure clause's plain language, which requires a triggering event to be "due to causes beyond such Party's control," California law has long interpreted these clauses to require a showing that the party acted with "skill, diligence and good faith" to meet its performance requirements. *Oosten*, 45 Cal.2d at 789; *see also Butler*, 54 Cal.2d at 599; *Horsemen's Benevolent & Protective Ass'n v. Valley Racing Ass'n* (1992) 4 Cal.App.4th 1538, 1564, *opinion modified*. The evidence will show that OBOT failed to move forward on the project at all during the performance period, and so *all* force majeure claims are foreclosed.

3. The party must show that notwithstanding their own diligent efforts to perform, an unforeseen event rendered timely performance "impossible or unreasonably expensive.'" *West Pueblo Partners,* 90 Cal.App.5th at 1182; *see also Butler,*54 Cal.2d at 593–99; *Oosten,* 45 Cal.2d at 787–88; *Watson Laboratories, Inc. v. Rhone-Poulenc Rorer, Inc.* (C.D. Cal. 2001) 178 F.Supp.2d 1099, 1109–10. "[A]cts that merely make performance *unprofitable* or more difficult or expensive do not suffice to excuse a contractual obligation." *SVAP III Poway Crossings, LLC v. Fitness International, LLC* (2023) 87 Cal.App.5th 882, 895 (emphasis added). As the First District recently explained:

> As our high court has held, where a contract contains a force majeure provision, the "mere increase in expense does not excuse the performance unless there exists 'extreme and unreasonable difficulty, expense, injury, or loss involved.' " (*Butler v. Nepple* (1960) 54 Cal.2d 589, 599.) This standard derives from the doctrines of impossibility and impracticability, which are common law defenses to contract performance. (*See Oosten v. Hay Haulers Dairy Employee & Helpers Union* (1955) 45 Cal.2d 784, 788.) Although a force majeure provision is often included in a contract to specify which qualifying events will trigger its application, the qualifying event must have still caused a party's timely performance under the contract to "become impossible or unreasonably expensive." (*Watson Laboratories, Inc. v. Rhone-Poulenc Rorer, Inc*. (C.D. Cal. 2001) 178 F.Supp.2d 1099, 1110, *quoting Oosten*, at p. 789.)

West Pueblo Partners, 90 Cal.App.5th at 1182. This standard applies even when, as here, the force majeure clause uses words like "delay," as in *West Pueblo Partners*, or "hinder," as in *SVAP III Poway Crossings*, 87 Cal.App.5th at 892. Accordingly, only an unforeseen event that OBOT can prove rendered timely performance impossible or unreasonably expensive could excuse it.

4. Finally, the Lease also contains a contract-specific limitation that "Force Majeure does not include failure to obtain financing or have adequate funds." PTX 068 §16.1, Art. 40.

E. OBOT's Excuse and Breach Allegations Conflict with the Contract's Plain Terms

The Developers' trial brief identifies the acts of the City that they contend excused OBOT's performance by way of Force Majeure and/or breached the Ground Lease. The City will respond at trial to the unsupported factual allegations (in particular to establish that none of the cited events remotely rendered performance impossible or unreasonably expensive), but there are significant legal issues as well. To assist the Court, the City begins with the City's 2016 Ordinance and Resolution regarding coal and then organizes the remaining allegations into events prior to, during, and after the contract performance timeframe (February 16, 2016 through August 14, 2018).

1. The City's 2016 Ordinance and Resolution Regarding Coal Did Not Breach the Contract or Excuse OBOT's Performance

Even setting aside their res judicata problem, *see supra* at 11-13, the Developers can base neither their breach claim nor their excuse theory on the 2016 Ordinance, for multiple reasons.[5]

First, the Ground Lease *expressly* provides that the City's actions in its regulatory or legislative capacity cannot breach the Lease and do not excuse OBOT's performance. PTX 068 §5.1.1.2. The parties agreed that OBOT would move forward under the strict timelines set forth in the Ground Lease notwithstanding any legislative or regulatory action by the City, while reserving OBOT's right to challenge such legislation. *Id.* §5.2.1.

Specifically, OBOT expressly agreed that no "present or future Law, whether foreseen or unforeseen, and however extraordinary, shall relieve Tenant of its obligations hereunder, nor give Tenant any right to terminate this Lease in whole or in part or to otherwise seek redress against Landlord." *Id*. §5.1.1.2. OBOT further agreed that "nothing in this Lease shall be deemed to limit or restrict City in the exercise of its governmental regulatory powers and authority with respect to Tenant, the Premises or otherwise, or to render Landlord obligated or liable under this

[5] The Developers do not delineate between breach or excuse, and appear to be claiming that any event that constitutes a breach is excuse, and vice versa. While pre-May 18, 2018 events cannot be relied upon for breach, the City discusses these alleged events to the extent that the Developers are relying on a contention that the alleged prior breach provides an excuse. The City does not concede such a theory is viable following this Court's res judicata ruling, but as discussed, all of these allegations are foreclosed by the contract anyway.

Lease for any acts of omissions of the City in connection with the exercise of its independent governmental regulatory powers and authority." *Id.* §5.2.1. And in return, the City agreed that OBOT would retain its "right to challenge the applicability to the Project of any Laws promulgated by the City during the term." *Id.* §5.2.1. The argument that OBOT's performance was excused by the 2016 Ordinance is contrary to the parties' express agreement to set that dispute aside, and to move this project forward *notwithstanding* that dispute.

In fact, such provisions are required under California law. The Ground Lease must be read consistent with the City's constitutional police power authority to permit legislative actions in furtherance of that power. *See Discovery Builders*, 2023 WL 4115074, *1, 6-9 (California Constitution precludes City from contractually waiving its police powers to enact legislation). Thus, the Ground Lease was explicit that City was entering the Lease in its proprietary (not regulatory) capacity, and that the City's acts in its legislative or regulatory capacity would neither breach the Ground Lease nor excuse OBOT's performance.

Second, as previously discussed, OBOT was well aware the City was considering legislation regarding coal, and so the 2016 Ordinance cannot be characterized as an unanticipated event that justifies OBOT's delay of the project.

Third, to the extent that the Developers wish to rely on the federal court's prior ruling, any breach of the 2013 Development Agreement does not excuse performance under the Ground Lease. The Ground Lease and the DA are separate contracts, with independent performance obligations, and are written such that a breach of the DA does not excuse performance under the Ground Lease. *See Colaco v. Cavotec SA* (2018) 25 Cal.App.5th 1172, 1183 (citing *Fresno Canal & Irr. Co. v. Perrin* (1915) 170 Cal. 411, 416) (breach of independent obligation does not relieve non-breaching party of obligation to perform under other agreement); *cf. Frankel v. Board of Dental Examiners* (1996) 46 Cal.App.4th 534, 550 (dependent covenants "are not favored in the law … and courts shall not construe a term of the contract so as to establish a condition precedent absent plain and unambiguous contract language to that effect"). In fact, the Ground Lease specifies that it supersedes any prior agreement, PTX 068 §38.7, and a party may default under the Lease only by failing to comply with a provision of the Lease, *id.* §22.1. By contrast,

the DA expressly provides that any subsequently entered lease supersedes the DA, and that a breach of such lease is a default under the DA. PTX 07 §§8.1, 14.27.

2. Other Acts Before the Performance Period (Prior to February 16, 2016) Could Not Breach the Contract or Excuse Performance

As discussed *supra* at 11-13, all allegations that the City breached the Ground Lease by way of actions prior to May 15, 2018 are foreclosed by res judicata.

And a party obviously cannot breach a contract or excuse the counterparty's performance by its acts before the contract was signed, where there is no dispute that that counterparty was aware of those acts. If a party wishes for something prior to a contract to be a condition for its agreed upon performance, it must negotiate such a term. *See Guthrie v. Times-Mirror Co*. (1975) 51 Cal.App.3d 879, 885 ("Where parties are aware at the time the contract is entered into that a doubt exists in regard to a certain matter and contract on that assumption, the risk of the existence of the doubtful matter is assumed as an element of the bargain."). And as previously discussed, *supra* at 13-15, force majeure cannot be something anticipated by the parties.

This forecloses the Developers from claiming excuse based on events that predated the Ground Lease of which OBOT was aware, including at least the following: the City Council's consideration of a no coal ordinance; the City's alleged failure to provide OBOT with a binder of applicable regulations in violation of a different agreement (the DA), which regardless the City rectified a few months after the Ground Lease was signed; and the City's alleged failure to "comment" on the TLS Basis of Design OBOT gave the City in July and September 2015 (in connection with the City's regulatory proceedings), *before* entering the Ground Lease. If OBOT had wanted to make these conditions of its performance, it should have negotiated provisions saying so.

3. Other Acts During the Performance Period (February 16, 2016 – August 14, 2018) Did Not Breach the Contract or Excuse Performance

The Developers rely on a laundry list of acts by the City that they say constitute events of Force Majeure excusing their performance, mostly involving the City's alleged failure to act in particular ways. But the Developers largely ignore the express terms of the contract. As discussed *supra* at 13, actions expressly authorized by a contract cannot breach the contract or

excuse nonperformance, because "implied terms should never be read to vary express terms." *Carma Developers*, 2 Cal.4th at 374; *see also* Civil Code §§1636, 1638, 1639, 1641, 1643.

a. Allegations contrary to express terms.

This fundamental principle of contract law applies to the Developers' claims of excuse/force majeure including:

- TLS Basis of Design Review and Approval. The City disputes as a factual matter that the BOD was ever submitted for formal landlord approval as a Schematic Drawing pursuant to Ground Lease §6.2.1. OBOT's argument for why it never applied for any City permits centers on the alleged failure of the City to provide "comments" on the BOD. But the parties negotiated an express term and exclusive remedy: the City's failure to approve or disapprove Construction Documents (including the "Schematic Drawings" alleged to be contained in the BOD) within 15 days is not an "Event of Default," and OBOT's remedy would be to provide notice and deem those documents approved. PTX 068 §6.2.1.
- Any mention of CEQA. The Developers' allegations regarding CEQA are vague, but any claim that discussion of CEQA in any coordination meetings was excuse that justified their choice not to move forward would be directly contrary to the contract. The Ground Lease expressly requires OBOT to comply with all applicable laws, including, expressly, CEQA. PTX 068 §5.2.1.
- Rail Right of Way Land. The Developers allege the City failed to turn over the Rail R/O/W land (a separate parcel on which certain rail improvements were to be constructed, *see* PTX 068 §1.1.1). The parties were aware at the time of the contract that the City had not completed public improvements on this land. And the contract expressly makes the land subject to completion of the public improvements; sets no deadline; and provides a "sole and exclusive" remedy for failure to complete, which the Developers did not invoke. PTX 068 §§1.1.1, 37.92(b).
- Rail Access Agreement. The Developers point to lack of a completed RAA and claim it prevented OBOT from performing. Again, the parties were aware at the time of contract that the RAA was not complete, and the contract expressly addresses this; sets no deadline

for the RAA's completion; and provides another "sole and exclusive remedy" that the Developers did not invoke. PTX 068 §5.2.3.

- Sublease-Related Provisions. All of the sublease-related provisions OBOT invokes (approval of their late-submitted September 28, 2018 ITS sublease; estoppel certificates; NDA) ignore the plain language of these provisions making any City requirements waived or contingent in light of OBOT's default. PTX 068 §§12.5.1, 19.3.4, 26.1.
- STB filings. The parties have a collateral legal dispute, which played out before the federal Surface Transportation Board, regarding the STB's jurisdiction over certain track (which would deprive the City of regulatory authority on its own property). OBOT's contention that the City's legal position regarding the interpretation of federal law is somehow excuse for its performance is directly contrary to Article 5 of this contract.

b. Rail Construction

As previously set forth, *supra* at 10-11, the City will prove that OBOT breached this contract by failing to commence construction of the *terminal*. OBOT's focus on alleged acts (or failure to act) that pertain to rail do not and cannot, under the plain terms of this contract, excuse performance with respect to construction of the terminal (particularly where the parties agreed that the terminal plus only one of the rail improvements would constitute the Initial Milestone). Moreover, their primary arguments (the R/O/W property; the RAA; the STB) contradict express contract terms. *See supra* at 19-20. The obligation that OBOT failed to fulfill—which it now seeks to prove was excused—was the requirement to construct the terminal. Any excuses for its failure to build any of the rail improvements are beside the point.

c. The City's Supposed Scheme to Deny Permits

No evidence will support the Developers' assertion that the City had a secret plan to deny OBOT construction permits or to require OBOT to obtain additional discretionary approvals. Even if it did, that would be irrelevant, because notwithstanding OBOT's complete assumption of responsibility for procuring all permits and approvals, OBOT did not submit a single construction permit application during the performance period—so that any anticipated non-approval could not possibly have affected its ability to perform. *See also* PTX 068 §§6.2.1, 6.2.4, 6.2.6 (OBOT

assumption of complete responsibility for acquiring any permits or regulatory approvals). In fact, OBOT did not even complete the prerequisites to submission of such permit applications.

4. Events After OBOT's Performance Deadline (After August 14, 2018)

The City does not dispute that it terminated the Lease in November 2018 based on OBOT's failure to meet construction deadlines. And it bears little argument that actions of the City *after* the performance deadline cannot excuse OBOT's performance with respect to that deadline. This excludes a very large amount of evidence that OBOT wishes to admit at trial; the City will respond and object accordingly.

The particular allegations include the City's response to requests for an NDA for the September 28, 2018 ITS sublease; estoppel certificates (issued in October 2018); informing BCDC that the Lease was terminated in December 2018; refusing a fence permit to OGRE in January 2019; and any other such actions—all of which are consistent with the City's position that the contract was terminated.

F. "Motive" is not Relevant to Breach of Contract

The Developers stated at the June 28 pretrial conference that they plan to introduce evidence regarding the City's motive or the issue of "pretext." Besides lacking any actual evidentiary support, the City's motive for its actions pursuant to these contracts is not remotely relevant. *See Applied Equipment Corp. v. Litton Saudi Arabia Ltd*. (1994) 7 Cal.4th 503, 516 ("[T]he law generally does not distinguish between good and bad motives for breaching a contract"); *Alki Partners, LP v. DB Fund Services, LLC* (2016) 4 Cal.App.5th 574, 597 ("A party's purported motive to breach a contract is not relevant to the issue of whether there has been a breach."). The question is which party breached the contract, not why.

G. The Developers Will Be Unable to Prevail on Other Claims

1. There Are No Third Party Beneficiaries to the Lease.

OBOT and the City expressly agreed there were no third party beneficiaries to the Ground Lease. PTX 068 §38.4 (No Third Party Beneficiaries). To overcome this express and unambiguous expression of the parties' intent, California law requires unambiguous contract language expressing the parties' intent to benefit a third party. *See The Ratcliff Architects v.*

Vanir Constr. Mgmt., Inc. (2001) 88 Cal.App.4th 595, 603–04 (a no-third-party-beneficiary clause "make[s] the intention of the parties clear; they intended to limit the right sunder the contract to the parties to the contract"); *accord Wexler v. Cal. Fair Plan Ass'n* (2021) 63 Cal.App.5th 55, 65-66. No such language appears in the Ground Lease.

While the Ground Lease does make one passing reference to a possible OGRE sublease (in §37.8.1(c)), it is well-established that "[t]he fact that the third party is only incidentally named in the contract, or that the contract, if carried out according to its terms, would inure to its benefit, is not sufficient to entitle him to enforce it," because it does not establish "an intent to make the obligation inure to the benefit of the third party." *Martin v. Bridgeport Commun. Ass'n* (2009) 173 Cal.App.4th 1024, 1034 (*citing Jones v. Aetna Casualty & Surety Co.* (1994) 26 Cal.App.4th 1717, 1724-25). This provision simply exempts any potential OBOT sublease with OGRE from the requirement of the City's prior approval—which falls far short of demonstrating that the City intended OGRE to benefit from its promises in the Lease notwithstanding the no-third-party-beneficiary clause. *See also Goonewardene v. ADP, LLP* (2019) 6 Cal.5th 817, 830 ("[T]he contracting parties must have a motivating purpose to benefit the third party, and not simply knowledge that a benefit to the third party may follow from the contract").

2. All Remaining Claims Will Be Moot or Foreclosed After Resolution of the Parties' Competing Breach Claims.

OBOT's implied covenant claim requires proof of performance or excuse (*see* CACI 325) and is therefore subject to all of the above. Moreover, the implied convent cannot be read to alter express terms, as the Developers appear to be attempting to do here, by invoking sweeping generalizations of bad faith without regard to the actual contract language. *Carma Developers*, 2 Cal.4th at 374. The Developers should not be permitted to convert this case from a contract dispute into an intentional tort. In any event, the resolution of the competing express breach claims will render this claim moot.

Similarly, anticipatory breach requires a plaintiff to show that it would have been able to fulfill the terms of the contract if the defendant had not repudiated it. CACI 324; *Ersa Grae Corp. v. Fluor Corp*. (1991) 1 Cal.App.4th 613, 625. Therefore, resolution of OBOT's force

majeure defense will be dispositive. Moreover, the plaintiff in an anticipatory breach case must have confirmed the alleged repudiation of the contract, but OBOT has done the opposite, by trying to *extend* the contract. CACI 324; *Central Valley Gen. Hosp. v. Smith* (2008) 162 Cal.App.4th 501, 514; *see also Romano v. Rockwell Internat., Inc*. (1996) 14 Cal.4th 479, 489 (plaintiff electing to sue for anticipatory breach must elect remedies); *Taylor v. Johnston* (1975) 15 Cal.3d 130, 137 (same).

Dated: July 6, 2023

Respectfully submitted,

ALTSHULER BERZON LLP
Stacey M. Leyton
Danielle Leonard
Jonathan Rosenthal

MORRISON & FOERSTER LLP
Daralyn Durie

By: */s/ Danielle Leonard*
Attorneys for CITY OF OAKLAND

APPENDIX 1: West Gateway Ground Lease Key Terms

Premises §1.1.1.	Two pieces of land: The West Gateway Property (approx.. 26 acres) and the Rail Right-of-Way Property (approx.. 8 acres)
Duration §1.2	66 years
Required Use §§3.1.1, 3.4, 6.1., Ex. 3.1.1,	OBOT "shall" use the land to build and operate a Bulk and Oversized Terminal and related rail and wharf improvements. Bulk Oversized Terminal is defined as: "A ship-to-rail terminal designed for the export of non-containerized bulk goods and import of oversized or overweight cargo" (Ex. 3.1.1, Scope of Development)
Minimum Project §6.1	"The parties acknowledge and agree that Landlord has an interest in ensuring that the portion of the Initial Improvements with respect to the Premises comprised of all of the following Improvements (consistent with the Scope of Development and Permitted Uses) (the "Minimum Project") are constructed within a specified period of time: (a) The Bulk and Oversized Terminal which is (i) consistent with the Master Plan and (ii) capable of servicing one or more lines of export products; and (b) [five enumerated Minimum Project Rail Improvements, consisting of pieces of connecting track on various City and Port-owned land.] … "The Parties acknowledge that the OBOT Wharf and Rail Improvements and City Funded Wharf Improvements" are included in the Minimum Project.
Milestone Deadlines §§6.1, 6.1.1.1	"[T]he parties further agree that Tenant shall be required to have Commenced Construction of the Minimum Project and Completed Construction of the Minimum Project pursuant to the schedule set forth in Section 6.1…. 6.1.1.1. Initial Milestone Date. **Commenced Construction of the Bulk and Oversized Terminal and at least one of the components of the Minimum Project Rail Improvements… prior to the date that is 180 days after the Commencement Date**. *See also* Time is of the Essence (§38.1.4)
Tolling of Time Periods §1.7.2	"[O]n condition, that promptly following the execution of this Lease, Tenant commences, and thereafter diligently pursues to Completion, the design and construction of the OBOT Wharf and Rail Improvements… the "Commencement Date"… shall be tolled" until completion of the improvements or February 15, 2018, whichever is earlier] for purposes of: base rent and the Minimum Project deadlines.
Compliance with Laws. Article 5	5.1 "During the Term, Tenant and its use and operation of the Premises shall comply, at no cost to Landlord, (i) with all applicable Laws (including Regulatory Approvals…"; 5.1.1: "Tenant's obligation under this Section 5.1 to comply with *all*

	present or future Laws is a material part of the bargained-for consideration under this Lease." 5.1.1.2: "No occurrence or situation arising during the Term, *nor any present or future Law, whether foreseen or unforeseen, and however extraordinary, shall relieve Tenant of its obligations hereunder*, nor give Tenant any right to terminate this Lease in whole or in part or to otherwise seek redress against Landlord;" 5.2.1: "Tenant acknowledges and agrees that Landlord is entering into this Lease in its proprietary capacity as the holder of fee title to the Property, and not in its capacity as a governmental regulatory agency and that the status, rights and obligations of Landlord, in such proprietary capacity, are separate and independent from the status, functions, powers, rights and obligations of the City in such governmental regulatory capacity, and that *nothing in this Lease shall be deemed to limit or restrict City in the exercise of its governmental regulatory powers and authority with respect to Tenant, the Premises or otherwise, or to render Landlord obligated or liable under this Lease for any acts of omissions of the City in connection with the exercise of its independent governmental regulatory powers and authority."* 5.2.1: "Tenant acknowledges that *the Permitted Uses under Section 3.1 do not limit Tenant's responsibility to obtain all Regulatory Approvals* (and pay all related processing and development fees and satisfy all related conditions of approval) for such uses, including but not limited to, the Master Plan, PUD or Building Permits, nor do such uses limit City's responsibility in the issuance of any such Regulatory Approvals to comply with applicable Laws, including the *California Environmental Quality Act*." 5.2.1: "Nothing in this Lease shall be deemed a waiver by Tenant of its right to challenge the applicability to the Project of any Laws promulgated by the City during the Term."
<u>Other Requirements for Improvements</u> §6.2	"In addition to the requirements in Section 6.1, Tenant shall construct or cause to be constructed the Initial Improvements in accordance with the requirements set forth in this Section 6.2…." • 6.2.1. *Approval of Construction Documents*. This includes procedures and exclusive remedies for Landlord approval of Schematic Drawings, Preliminary Construction Documents and Final Construction Documents. • 6.2.2. *Progress Meetings; Coordination*. "[A]t the request of either Party during the preparation of Construction Documents, Landlord and Tenant shall hold regular progress meetings to coordinate the preparation, review and approval of the Construction Documents." • 6.2.4. *Construction Permits.* "Tenant, at its cost, shall be responsible for applying for and diligently pursuing the issuance of, and thereafter compliance with, all permits and other Regulatory Approvals…" • 6.2.5. *Construction Schedule and Reports*. "All construction with respect to the Project shall be accomplished expeditiously, diligently, and within the timeframes set forth within Section 6.1." • 6.2.6 *Conditions to Commencement of Construction*. "Tenant shall not commence construction of any Initial Improvements until all of the following conditions and requirements have been satisfied by Tenant or

	waived by Landlord": 6.2.6.1 Landlord shall have approved the Final Construction Documents; 6.2.6.2 Tenant shall have obtained all Construction Permits; 6.2.6.3 Tenant shall have entered into the Initial Improvements Construction Contract • 6.2.9 *Costs of Construction*. "Tenant shall bear and pay all costs and expenses of construction of the Initial Improvements and all other Improvements, whether onsite or offsite, …Tenant shall be responsible for performing all site preparation work necessary for construction of the Initial Improvements." • 6.2.13. *BCDC Permits*. "Tenant shall be responsible for obtaining its own regulatory permits (including, without limitation, any required BCDC Permit) for the Improvements to be Completed by Tenant pursuant to this Lease."
Additional Funds §6.3.1	6.3.1 *Pursuit of Additional Funds*. "The Parties shall cooperate in the identification and pursuit of third party funds necessary to Complete the following improvements [not the Private Improvements] … The Parties' obligations with respect to the identification and pursuit of Additional Funds shall terminate upon the earlier of (a) the date that the Unfunded Improvements have been fully funded and (b) April 16, 2019, as such date may be extended pursuant to Force Majeure events, but only to the extent such an event (1) first occurs after February 16, 2016 and (2) only if notice is provided within thirty (30) days of the event triggering the claim of Fore Majeure."
Force Majeure Art. 16 and Art. 40 (Def.)	Force Majeure means events which result in delays in a Party's performance of its obligations hereunder due to causes beyond such Party's control, including, but not restricted to, acts of God or of the public enemy, acts of the government, acts of the other Party, fires, floods, earthquakes, tidal waves, terrorist acts, strikes, freight embargoes, delays of subcontractors and unusually severe weather and, in the case of Tenant, any delay resulting from a defect in Landlord's title to the Premises other than a Permitted Exception. Force Majeure does not include failure to obtain financing or have adequate funds. The delay caused by Force Majeure includes not only the period of time during which performance of an act is hindered, but also such additional time thereafter as may reasonably be required to complete performance of the hindered act." §16.1 Delay Due to Force Majeure. For all purposes of this Lease, a Party whose performance of its obligations hereunder is hindered or affected by events of Force Majeure shall not be considered in breach of or in default in its obligations hereunder to the extent of any delay resulting from Force Majeure, provided, however, that the provisions of this Section 16.1 shall not apply to Tenant's obligation to pay Rent, including Additional Rent. A Party seeking an extension of time pursuant to the provisions of this Section 16.1 shall give notice to the other Party describing with reasonable particularity (to the extent known) the facts and circumstances constituting

	Force Majeure within (a) a reasonable time (but not more than thirty (30) days unless the other Party's rights are not prejudiced by such delinquent notice) after the date that the claiming party has actual knowledge of the scope and magnitude of the applicable Force Majeure event or (b) promptly after the other Party's demand for performance.
Third Party Approvals §§5.2.2.1, 5.2.2.2, 37.9.1	5.2.2.1. "The Parties acknowledge that the Project and Tenant's contemplated uses and activities on the Premises, any subsequent changes in Permitted Uses, and any construction or alterations of Improvements, may require that Regulatory Approvals be obtained from governmental agencies (other than City) with jurisdiction over the Premises or the Project. *Tenant shall be solely responsible for obtaining all such Regulatory Approvals as further provided in this Section*." 5.2.2.2. *"[T]he Parties agree to communicate regularly and to cooperate in good faith regarding Tenant's efforts to obtain Regulatory Approvals for the Project from any regulatory agency other than City*. The Parties' obligation to cooperate in good faith shall include, but not be limited to, meeting and conferring as necessary, joint invitations to and attendance at meetings, copies of correspondence, and execution of *mutually acceptable* applications as owner and applicant where necessary and appropriate to implement the Project and this Lease." 37.9.1 Third Party Approvals. City shall use commercially reasonable efforts to obtain all third party permits or approvals necessary to construct the Public Improvements in accordance with the dates set forth in Exhibit 37.9.1, and *shall cooperate with Tenant in Tenant's pursuit of third party permits and approvals related to the Improvements to be constructed by Tenant under this Lease*. Notwithstanding the preceding provisions of this Section 37.9.1 or Exhibit 37.9.1, the timing of construction of the Public Improvements by City shall be governed exclusively by Section 37.9.2(b).
Other Rail-Related	R/O/W Property-related: • §1.1.1. Premises taken subject to City ongoing public improvements. • §37.9.2(b). No deadline; "sole and exclusive" exclusive remedy for noncompletion of public improvements. RAA-related: • §5.2.3. City agrees to use commercially reasonable efforts to enter into RAA with Port of Oakland; "sole and exclusive" remedy for failure to enter RAA; no deadline.
Other Sublease-Related	• No right to sublet if in default: §19.3.4 • NDA: Landlord's obligation to provide Non-Disturbance Agreement to Subtenant depends on conditions, including, *inter alia,* validity of sublease; and "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." §12.5.1 • Estoppel: Contents of estoppel certificate for Tenant or Subtenant includes "there are then existing any defaults under this Lease (and if so, specifying the same)". §26.1.

Contract Remedy Provisions and Other	• Early Termination Exclusive Remedy for Tenant's Default on Minimum Project (§6.1.2) • Default by Landlord; Tenant's Exclusive Remedies (§22.1; 23.1) • Waiver of Consequential Damages (§24.1) • No Right to Hold Over (§31.1) • No Third Party Beneficiaries (§38.4) • Release of Pre-Contractual Disputes (§1.1.3)

APPENDIX 2: KEY ACROYNMS

Plaintiffs/Counter-Defendants:

- CCIG California Capital & Investment Group
- OBOT Oakland Bulk and Oversized Terminal
- OGRE Oakland Global Rail Enterprise

CCIG/OBOT's Business Partners/Proposed Sublessees:

- TLS Terminal Logistics Solutions
- IES Insight Energy Solutions
- ITS Insight Terminal Solutions
- BRP Bowie Resource Partners

Contracts Between the City and CCIG/OBOT:

- LDDA 2012 City-Prologis/CCIG Lease Disposition and Development Agreement
- DA 2013 City-Prologis/CCIG Development Agreement
- WGW GL 2016 City-OBOT West Gateway Ground Lease
- PMA City-CCIG Project Management Agreement

Contracts Between CCIG/OBOT and other entities:

- ENA Exclusive Negotiating Agreement (between TLS and OBOT; IES and OBOT)
- DMA Development Management Agreement (between CCIG and TLS)
- PMA Project Management Agreement (between CCIG and ITS)

Regulatory Agencies/Other:

- ACTC Alameda County Transportation Commission
- BCDC San Francisco Bay Conservation and Development Commission
- TCIF Trade Corridors Improvement Fund/CalTrans