MANATT, PHELPS & PHILLIPS, LLP
BARRY W. LEE (Bar No. 088685)
E-mail: BWLee@manatt.com
CHRISTOPHER L. WANGER (Bar No. 164751)
E-mail: cwanger@manatt.com
One Embarcadero Center, 30th Floor
San Francisco, California 94111
Telephone: (415) 291-7400
Facsimile: (415) 291-7474

Attorneys for
OAKLAND BULK AND OVERSIZED TERMINAL, LLC; OAKLAND GLOBAL RAIL ENTERPRISE, LLC and CALIFORNIA CAPITAL & INVESTMENT GROUP, INC.

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 AND RELATED COUNTERCLAIM	Consolidated Case Nos. RG18930929 / RG20062473 Unlimited Civil Case / Assigned to Judge Noël Wise, Dept. 514 **TRIAL BRIEF OF OAKLAND BULK AND OVERSIZED TERMINAL, LLC; OAKLAND GLOBAL RAIL ENTERPRISE, LLC AND CALIFORNIA CAPITAL & INVESTMENT GROUP, INC.** Trial Date: July 10, 2023

I. INTRODUCTION

Plaintiffs, Oakland Bulk and Oversized Terminal, LLC ("OBOT"), Oakland Global Rail Enterprise, LLC ("OGRE") and their affiliate, Counter-Defendant California Capital & Investment Group, Inc. ("CCIG") (collectively, "Plaintiffs") submit this Trial Brief pursuant to the Court's December 13, 2022 Order Rescheduling Jury Trial.

This is an action by Plaintiffs to recover for Defendant City of Oakland's numerous and long-running breaches of agreements pursuant to which Plaintiffs are building a multi-million-dollar rail-to-ship bulk commodity terminal (the "Terminal") on a portion of the former Oakland Army Base known as the West Gateway (the "Project"). The Project will enhance the community, provide a strong economic base for West Oakland and reduce truck trips in and around the City. The City entered the contracts[1] with Plaintiffs under a prior administration that authorized Plaintiffs to build the Terminal and ship through the Project a wide variety of commodities, without limitation. The City's subsequent administrations, however, opposed the decision to ship coal and considered the Project politically toxic. As a result, the City has engaged in a years-long campaign to thwart the development and deprive Plaintiffs of the benefits of their contracts.

The City first attempted to rewrite the parties' contracts in 2016 by adopting a resolution and ordinance prohibiting the transportation, handling and storage of coal and petcoke through the City and illegally applying the ordinance, by resolution, to the Project. OBOT was forced to sue the City and obtained a federal judgment holding that the City breached the parties' Development Agreement by applying the resolution to the Project. Following the ruling (issued by N.D. Cal. Judge Vince Chhabria), the then-mayor, Libby Schaaf, and City Council members went on record declaring that, notwithstanding the City's contracts with Plaintiffs, they would continue to do everything in their power to stop the Project from moving forward. Mayor Schaaf declared: "We will continue to fight this battle on all fronts; not just today, but every day." Following an appeal by the City, the Ninth Circuit affirmed the judgment against the City.

[1] The contracts included, among others, (1) a Development Agreement dated July 16, 2013 pursuant to which OBOT (and/or its subtenant) is to construct and operate the Terminal and make certain railroad improvements to the property necessary to serve the Terminal (the "Development Agreement"); and (2) a Lease dated February 16, 2016 whereby OBOT leased the West Gateway property and existing rail right-of-way from the City (the "Lease").

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 rights to develop the Terminal. In addition to the aforementioned breach of the Development Agreement, the City failed to perform material obligations under the Lease, and further prevented OBOT's performance under the same by, among other things, failing and refusing to (1) turn over possession of the West Gateway property to the Plaintiffs; (2) use commercially reasonable efforts to obtain third-party ministerial permits necessary to develop the terminal; (3) review and comment on OBOT's schematic drawings; or (4) engage in numerous other acts required under the Lease. The Assistant City Administrator, Claudia Cappio, instituted a policy directing City staff not to issue any permits to Plaintiffs (even routine, ministerial permits), but instead required all staff to obtain authorization from senior level City employees before issuing a permit (the "Cappio Memo"). No other project in the City has been subject to a similar requirement or restriction, and the Cappio Memo is still in effect today.

By this action, Plaintiffs seek (1) a judicial declaration that their contracts remain valid and binding; (2) an Order requiring the City to specifically perform its contractual obligations so that Plaintiffs may move forward with and complete construction of the Terminal; and (3) an award of damages for harm caused by the City's breaches and resulting delays of the Project.

II. PROCEDURAL BACKGROUND

OBOT and OGRE filed this action in December 2018, and allege claims for breach of contract, anticipatory repudiation of contract and breach of the implied covenant of good faith and fair dealing. In response, the City initially filed and then dismissed days later an unlawful detainer complaint seeking a declaration that Plaintiffs had forfeited their rights under the Lease. The City then filed an unsuccessful anti-SLAPP motion challenging Plaintiffs' complaint and pursued a related appeal that delayed this action for approximately 18 months. In the interim, the City inexplicably filed a new action against Plaintiffs and asserted claims for alleged breach of the Development Agreement and Lease and for declaratory relief that the Lease was terminated.[2] The

[2] The City's claims were compulsory counterclaims and should have been filed, if at all, in Plaintiffs' pending action rather than a new action.

City's later-filed action was subsequently consolidated with this action on March 18, 2021.

After substantial discovery, the City moved for summary judgment of Plaintiffs' claims, which the Court (Hon. Delbert Gee) denied in its entirety on January 6, 2022, two months prior to the originally scheduled March 4, 2022 trial date. The City subsequently persuaded the Court to vacate the initial trial date by entering into a Settlement Term Sheet with Plaintiffs on January 31, 2022 setting forth the material terms on which it was purportedly willing to resolve the matter. The proposed settlement was merely a ruse as the City reneged on the Term Sheet and refused to complete the settlement, eventually declaring that the "economics don't work." As a result, the City obtained another significant delay – until July 10, 2023 – of the trial of Plaintiffs' claims.

III. DISCUSSION

A. The City has Breached Its Obligations to Plaintiffs Under the Development Agreement and Lease.

Because the politics of coal swayed the City against the agreements it entered, the City has done everything it could to thwart Plaintiffs' development efforts and evade its obligations. Unfortunately for the City, nothing in the parties' agreements limits the types of commodities that may be exported through the Terminal, and the City cannot avoid its contractual obligations. To prevail in this action, Plaintiffs need only show (1) a contract between the parties existed; (2) Plaintiffs performed or were excused for nonperformance; (3) the City breached; and (4) the breach resulted in damages to Plaintiffs. *Durell v. Sharp Healthcare* (2010) 183 Cal.App.4th 1350, 1367. "[H]indrance of the other party's performance operates to excuse that party's nonperformance." *Erich v. Granoff* (1980) 109 Cal.App.3d 920, 930.

The City has repeatedly breached the Development Agreement and Lease[3] by, among other things:

[3] Like most agreements involving major developments on municipal land, the Development Agreement and the Lease contemplate a joint effort by the parties and impose strict requirements of cooperation and good faith to ensure the developer can meet the contractual deadlines. The agreements also contain unambiguous and broad "force majeure" provisions that mandate the tolling and extension of deadlines that cannot be met because of delays caused by any acts of the City that hinder OBOT's performance. These provisions were critical to OBOT. Having committed to spend millions of dollars to develop the Terminal, OBOT could not be at the mercy of changing political regimes and priorities.

- Refusing to consider and provide comment on OBOT's Basis of Design for the Project;
- Announcing that it would reopen CEQA and conduct a new review, and approve future permits on a commodity-by-commodity basis and generally failing to process Plaintiffs' permit applications in good faith;
- Requiring additional discretionary approvals, such as subjecting the Project to the Creek Protection Permit, in contravention to the EIR (and thus the Development Agreement);
- Failing to provide the existing City regulations binders;
- Failing to cooperate with OBOT's efforts to obtain regulatory approvals, such as the BCDC fence permit and the Surface Transportation Board approval (going so far as to affirmatively obstruct Plaintiffs' efforts to obtain the same);
- Failing to turn over possession of critical portions of the Property;
- Failing to issue non-disturbance agreements to two subtenants;
- Failing to issue estoppel certificate to two subtenants;
- Failing to honor the *force majeure* provision of the Lease[4];
- Failing to use commercially reasonable efforts to pursue the Rail Access Agreement with the Port; and
- Failing to cooperate with Plaintiffs to secure funding, such as the ACTC funding.

These breaches were inexcusable and all part of the City's coordinated campaign to destroy the Project. To date, Plaintiffs have spent more than $31 million on the Project, and have been denied the opportunity to develop the billion-dollar project.

For its part, the City alleges that Plaintiffs (successful developers with a proven track record of public projects) failed to meet the development requirements by failing to commence construction of the Terminal and railroad improvements by the Initial Milestone Date, failing to have completed construction by the Second Milestone Date, and failing to satisfy the Minimum Project. But OBOT had submitted the Basis of Design (to which the City failed to respond), OGRE had submitted and received approval from the City for the permanent fence as part of the Fence Project, and had completed a portion of the railroad improvements (including expending more than

[4] Under the Lease, "Force Majeure" events are "events which result in delays in a Party's performance of its obligations hereunder due to causes beyond such Party's control, including . . . acts of government [or] acts of the other party . . .." Once a party provides notice of the Force Majeure event, it is entitled to a reasonable extension of time to satisfy its obligations.

$1.6 million on materials and labor while awaiting the City's grant of the right-of-way for installation), which satisfied the Initial Milestone Date. Plaintiffs have repeatedly provided notice to the City that its actions and inactions were Force Majeure events under the parties' contracts, which notices tolled and extended the milestone deadlines. The Lease expressly states that "a Party whose performance of its obligations is hindered or affected" by acts of the other party or government shall be entitled to reasonable extensions of time to comply.[5] Thus, the express terms of the Lease entitle Plaintiffs to years-long extensions of the milestone deadlines. And even if the deadlines were not extended by the express operation of the Force Majeure provision (and they were), Plaintiffs are excused from compliance with the deadlines as a result of the City's material contract breaches and other actions in breach of the covenant of good faith and fair dealing implied in the parties' contracts. There is simply no factual support for the City's contention that Plaintiffs breached either the Development Agreement or the Lease.

Plaintiffs seek in this action the damages that naturally and foreseeably resulted from the City's breaches. Plaintiffs estimate that these damages exceed $20 million as of the time of trial. In addition to the direct damages, the Lease contains an attorneys' fees provisions entitling the prevailing party in this dispute to recover its reasonable attorneys' fees. Plaintiffs also seek their reasonable attorneys' fees in this matter.

The City has suggested that Plaintiffs' damages are consequential damages that are barred by a provision of the Lease. Not true. The damages Plaintiffs suffered and seek in this case are the natural and necessary result of the City's breaches and are therefore general damages and not consequential damages. *Tradeshift, Inc. v. BuyerQuest, Inc.*, No. 20-cv-01294-RS, 2021 WL

[5] The City has erroneously and repeatedly suggested that in order for Plaintiffs to be entitled to an extension of the milestone deadlines under the Force Majeure provision of the Lease for acts of the City that resulted in delays, the City's acts must have rendered Plaintiffs' performance "impossible". That argument ignores and attempts to rewrite the clear and unambiguous terms of the Lease. Section 40 of the Lease defines "Force Majeure" events as "acts of the other Party" "which result in delays in a Party's performance of its obligations hereunder due to causes beyond such Party's control." Section 16.1 in turn states that a Party whose performance of its obligations hereunder is *hindered or affected* by effects of Force Majeure shall not be considered in breach of or in default of its obligations hereunder to the extent of any delay resulting from Force Majeure…" (emphasis added.) Section 16.1 thus makes clear that the City's acts need not render satisfaction of a deadline impossible. Instead, Plaintiffs are entitled to an extension as long as the City's acts hindered Plaintiffs' performance, which is precisely what happened.

4306011, at *8 (N.D. Cal. Sept. 22, 2021) ("While lost profits more often are special damages, they can be general damages if they qualify under the standard test for general damages: they must 'naturally and necessarily result' from the breach.") (*quoting Lewis Jorge Constr. Mgmt. v. Pomona Unified Sch. Dist.*, 34 Cal. 4th 960, 975 (2004)).) In *James v. Herbert*, the Court found lost profits to be general damages, holding: "Where the prospective profits are the natural and direct consequences of the breach of the contract they may be recovered. Profits are part and parcel of the contract itself, entering into and constituting a portion of its very element; something stipulated for, the right to the enjoyment of which is just as clear and plain as to the fulfillment of any other stipulation. They are presumed to have been taken into consideration and deliberated upon before the contract was made, and formed, perhaps, the only inducement to the arrangement." *James v. Herbert* (1957)149 Cal.App.2d 741, 749; *see also Mission Beverage Co. v. Pabst Brewing Co.*, LLC (2017) 15 Cal.App.5th 686, 710 ("'[G]eneral damages,' which are damages that 'flow directly and necessarily from a breach of contract' . . . include lost profits . . .")

B. Evidentiary Issues.

Pursuant to this Court's Pre-Trial Order Plaintiffs filed three motions *in limine;* the City filed ten. Plaintiffs continue to meet and confer with the City to attempt to reduce their evidentiary disputes. Apart from those evidentiary issues, Plaintiffs are not presently aware of other evidentiary issues.

C. Trial Estimate.

Plaintiffs estimate that their activities at trial (opening statement, direct and cross exam and closing argument) will take approximately ten (11) days.

D. Interpreter.

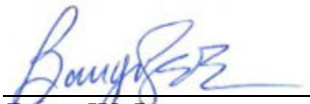
No trial witnesses will require an interpreter.

E. Other Trial Readiness Issues.

Plaintiffs will be ready to proceed to trial on July 10, 2023 and are not presently aware of any trial readiness issues.

Dated: June 21, 2023

MANATT, PHELPS & PHILLIPS, LLP

By: 

Barry W. Lee
Attorneys for Plaintiffs
CALIFORNIA CAPITAL & INVESTMENT GROUP, INC., OAKLAND BULK AND OVERSIZED TERMINAL, LLC and OAKLAND GLOBAL RAIL ENTERPRISE, LLC