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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 TRIAL BRIEF RESPONDING TO OBOT, OGRE, AND CCIG PROPOSED STATEMENT OF DECISION

Action Filed: December 4, 2018
Trial Date: July 10, 2023

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INTRODUCTION

In 2016, the City of Oakland and OBOT entered into a contract, the West Gateway Ground Lease, that established a path through what was otherwise going to be an intractable dispute over the City's authority to apply legislation banning the storage and handling of coal to the proposed project at the West Gateway. At the time, the City had commenced legislative hearings to consider the regulation of coal for health and safety reasons, and OBOT had expressed the view that the City did not have the authority to apply such regulations to this project.

The parties included in the Ground Lease provisions that addressed the disputed issue and at the same time permitted the project to move forward: the City agreed to grant OBOT the land and the right to pursue the development of the proposed terminal *notwithstanding* any challenged legislation (by agreeing not to hold OBOT in default for failure to comply with any such challenged law, Ex. 68-28 §5.1). And OBOT recognized the City's right to enact legislation (*id*.), as well as its own right to challenge the application of such legislation to the West Gateway project (Ex. 68-29-30 §5.2). Consistent with these provisions, the parties did *not*, however, include *any* term relieving OBOT of its contract obligations, or tolling of the contract deadlines to complete those obligations, for delays in the contract deadlines related to the anticipated legislation or litigation. Ex. 68-85 §17.2, 68-31-32 §6.1. Instead, the parties agreed to let that dispute play out elsewhere, while OBOT took responsibility for the cost of construction, for obtaining all regulatory approvals, and for commencing construction by specific deadlines. *E.g*., Ex. 68-38 §6.2.9; *id*. 28-30 §5.1-5.2; *id.* 31-32 §6.1.

Each side bore risk: OBOT, the risk that it would lose any challenge to the City's legislative acts and not be permitted to handle coal at the terminal; and the City, the risk that its law barring the handling of coal would be struck down and OBOT would move forward with plans to ship coal through the terminal. Either way, however, the project was to be built: OBOT was required to move forward and meet the deadline to commence construction of a multi-commodity terminal and at least one rail improvement by no later than August 14, 2018.

Notwithstanding OBOT's execution of the Ground Lease in order to obtain the land, and notwithstanding the language of this agreement, OBOT suspended its efforts to design, seek

permits, or commence construction of the terminal. And it did not resume those efforts until September 2018, after the construction deadline at issue here.

OBOT now contends that the City's actions caused it to stop performing as early as March 2016, less than a month into the contract, but those arguments have two significant and fatal flaws (among the host of other legal and evidentiary problems set forth further below in this brief).

First, OBOT invokes issues that it was admittedly aware of at the time it signed the Ground Lease. OBOT acknowledges, as it must, that at the time it signed the Ground Lease it knew the City was planning to legislate with respect to coal. Plaintiffs' proposed Statement of Decision ("OBOT SOD") 13 ("OBOT was aware that the City maintained its right to regulate the transport of coal").[1] But OBOT negotiated no tolling, and no contingency. In addition, before the City signed the Ground Lease, OBOT was aware of all of the following: that the City was taking a different legal position from OBOT's on the applicability of CEQA to future proposed specific project plans and whether discretionary permits would be required for future project proposals (*see* City's letters to OBOT on December 8, 2015, Ex. 555, and February 11, 2016, Ex. 66); that the City had not given substantive "feedback" on the TLS design plans (the "Basis of Design" ("BOD") provided to the City as part of the health and safety hearings in September 2015); that the City had not yet provided OBOT with a compilation of regulations applicable to the project (the DA "binder"); that the City and the Port had not yet entered into the Rail Access Agreement ("RAA") for the City's access to the Port's rail terminal; that some public improvements within the leased property were ongoing; that the City had requested but not received certain Alameda County Transportation Commission ("ACTC") third-party funds to be used for public wharf improvements; and the list goes on. *Infra* at 28-51, 55-58. Yet again, fully aware of these issues, OBOT entered an agreement to commence construction of the terminal by no later than August 14, 2018, and negotiated no provision making construction contingent or otherwise tolling the construction deadlines for any of these issues either.

[1] The City refers to OBOT, OGRE, and CCIG as "OBOT" for convenience throughout unless otherwise noted.

Second, there is no dispute that *after* the contract deadline, OBOT resumed its efforts to move the project forward by proposing a design plan for a new sublessee (ITS) for the City's approval on September 28, 2018. Yet by OBOT's own account, *nothing had changed* with respect to the City actions and inactions that it contends interfered with its ability to perform: OBOT maintained (notwithstanding the binder provided in June 2016) that the City had not provided a correct binder of regulations; or given "feedback" on the original TLS BOD; or provided OBOT with a list of "approved commodities"; or explained the allegedly new "commodity-by-commodity" CEQA or discretionary permit process OBOT contended was created on March 9, 2016; or rescinded the "Cappio memo"; or obtained third-party wharf funding from ACTC; or entered into the RAA; or allegedly finished public improvements OBOT contends prevented access; or issued a fence permit to OGRE; or withdrawn the City's June 2018 STB filing. *Infra* at 19. Nonetheless, shortly after OBOT finally signed a sublease with ITS on September 24, 2018, it submitted the project for approval. That fact alone—that OBOT was able to resume its efforts independent of and notwithstanding all of the City action and inaction it now contends stopped it from moving forward—proves that OBOT could have moved forward all along. It thus establishes that it was not the City's actions, but OBOT's own choices, that caused OBOT to miss the Initial Milestone deadline.

OBOT now recognizes this is a "single-issue" trial over whether the City's termination of the Ground Lease based on OBOT's failure to comply with the contract deadline was a breach, or whether OBOT's deadline was extended by events of force majeure. OBOT SOD 3-4, 19, 38. But California law is clear regarding the implications of using the words "force majeure" in a contract: force majeure events cannot include anticipated events, and OBOT must prove, among other requirements, that the alleged event *caused* the delay in performance, which the record establishes OBOT cannot do. OBOT's arguments asking this Court to apply a different standard invite error.

So what did the evidence show were the actual reasons OBOT did not perform, if not the City's alleged actions and inactions? OBOT chose to wait on a sublessee to put forward the money and assume OBOT's responsibilities under the Ground Lease, and that sublessee did not

come through until September 2018. Even before the Ground Lease was signed, OBOT had an exclusive and very lucrative arrangement with a potential sublessee (John Siegel, and his rotating cast of companies that Phil Tagami deemed "the Siegel Shuffle")—through which OBOT was paid many millions of dollars for option agreements and rights to the sublease (money that went into OBOT's pocket, not into design or construction costs). OBOT planned to turn over all responsibility to pay for and construct the terminal to that sublessee, which happened to be owned by a coal company (Bowie Resource Partners); that sublessee did not want to sign the sublease until after the resolution of the federal litigation challenging the City's regulation of coal; and by the time the litigation concluded, that sublessee had run out of money. Even after the federal decision, OBOT chose to spend the summer of 2018 negotiating over money it would be paid for selling the *right* to the sublease rather than initiating design and construction; and by the time OBOT started to perform, the Initial Milestone deadline had come and gone. OBOT's proposed Statement does not address, let alone contest, any of these facts, because the evidence was conclusive.

The Ground Lease did not require OBOT to perform through a sublease, and OBOT did not negotiate any contingency that allowed it to wait to perform until such a sublease was in place. OBOT's internal communications with Mr. Siegel revealed that it recognized this fact: during the entire performance window, OBOT pushed Mr. Siegel to agree to move the project forward by the binding Ground Lease milestone deadlines (and knew that there were ways it could perform)—but Mr. Siegel declined, and OBOT did not pursue those other options. And as Phil Tagami candidly admitted, OBOT also could have paid for and constructed the entire Minimum Project itself, but declined to do so. California law is clear that a party that has performance options remaining cannot establish an event of force majeure, even if events interfere with or even render impossible one of its options for performance.

The truth revealed by the trial record is that OBOT made the deal with the City to acquire the land rights notwithstanding the dispute over coal, then suspended any efforts to perform from the minute Phil Tagami walked out of the March 9, 2016 pre-application meeting and never came back until September 28, 2018. The City did not "block" this project, for political reasons or

otherwise. OBOT chose to wait, when it did not have to. Both sides knew the deal that they were entering in February 2016, and both assumed the risk that they would lose the challenge to the City's coal legislation and have to live with it. OBOT simply did not follow through on its end of the bargain, and has invented a narrative to blame the City for what were its own choices to delay performance that was required by the unambiguous terms of the Ground Lease.

Because OBOT cannot invoke force majeure to extend binding contract deadlines for things that it knew about or anticipated at the time of contact, or to extend contract deadlines when it was able to move forward notwithstanding the events it claims are "force majeure," and for a host of other legal and evidentiary reasons set forth further below, OBOT, not the City, breached this contract. The City was well within its contractual rights in 2018 to decide that Phil Tagami and his business partners had not and were not going to deliver the project they had promised, to call OBOT on its default, and to terminate this contract.

FACTUAL MISREPRESENTATIONS

OBOT's proposed Statement of Decision invites error by asking the Court to find a multitude of facts that are either unsupported by any record evidence at all (revealed by the lack of any citation or mis-citations) or contrary to all record evidence, including Plaintiffs' witnesses' own admissions and other uncontroverted witness testimony and documents. The following is a non-exhaustive list of examples that demonstrate the extent of the misrepresentation of the record reflected in OBOT's proposed Statement:

OBOT SOD "Fact" and Evidence:	**Actual Record Evidence:**
OBOT SOD 50:27-28: **"The regulations were not … signed[.]"** **"The regulations were not provided in hard copy[.]"** Citing: "RT 695:7-13" [Tagami]	The regulations transmitted to OBOT in June 2016 by the City were **signed** by Mr. Ranelletti. Ex. 84-2. Mr. Tagami *admitted* they were signed: **"I will agree the city signed – sent a transmittal that was signed."** Trial Tr. 694:6-10, 695:10-13. Mr. Tagami admitted that he *told* the City that "**either electronic or hard copy**" would be acceptable. Trial Tr. 689:8-694:5; Ex. 688 (Tagami confirming either format acceptable); Ex.

	84-1 (describing communications from Mr. Tagami regarding format).
OBOT SOD 17:15-17: "**In recognition that OBOT was diligently pursuing such design and construction at all times prior to February 15, 2018, the City granted OBOT the full two years of rent tolling**." Citing: "See e.g., Ex. 169."	No evidence supports the statement that the City "recognize[d]" that OBOT was "diligently pursuing" the required design and construction of the wharf and rail improvements required by section 1.7.2 (Ex. 68-17 §1.7.2). The cited document, Exhibit 169, is the City's July 24, 2018 Notice of Past Due Rent to OBOT which specifically states: "Among other rights, **while for purposes of this Notice, City is defining the Rent Commencement Date to be February 15, 2018, City does not intend to waive and is hereby reserving any and all rights it may have under the Ground Lease entitling it to define the Rent Commencement Date as an earlier date**." Ex. 169-2. OBOT omits the undisputed testimony that the City granted tolling even though OBOT *failed* to comply with the tolling conditions. Tr. 3235:6-20 (Lake).
OBOT SOD 51:24-26: "Ms. Cappio also admitted that **even after OBOT provided notice that it considered the City's failure [to provide the binder] to be an act of Force Majeure delay, the City elected to not substantively follow up with OBOT on its claim**." Citing: "RT 2562:22-2564:4."	The City **responded** to OBOT's force majeure letter on **March 22, 2016** with a detailed response. Ex. 81; *see also* Trial Tr. 684:22-686:8 (Tagami). Plaintiffs omit that Ms. Cappio *corrected her testimony when shown the City's March 22 response.* Trial Tr. 2566:11-24.
OBOT SOD 17:6-8: "**Plaintiffs and their subtenants spent approximately $25 million to develop and advance the Terminal**. Citing: "RT 1089:07-11; Ex. 194."	No evidence supports this statement. The cited document (Ex. 194) and testimony refers to an accounting of millions of dollars in payments made by Mr. Siegel and his entities to CCIG and OBOT, for things like option extensions and other payments, and millions Mr. Siegel spent on buying out equity in his former employer. Other record evidence not cited by OBOT also demonstrates the millions paid to CCIG and OBOT that were not spent on design or construction. *E.g.*, Ex. 653; Ex. 638-9 (totaling payments due in the amount of $19 million); *see also* Trial Tr. 1260:16-1261:6 (Tagami admitting payments totaling $19 million due for sublease

	take down). Witnesses admitted the money paid to CCIG/OBOT from 2016-2018 was not being spent on the Terminal (either for design, which was paid for by Siegel, or construction, which was never paid for). Trial Tr. 1982:12-14, 1996:19-1997:3 (Morodomi); Ex. 957 at 123:2-124:16, 173:10-18, 186:8-13 (Rosen); *see also* Trial Tr. 1966:4-25; Ex. 638-9. To be clear, while the project did not progress at all, OBOT was paid millions trading in future rights to the land, while spending nothing of its own money on the Terminal.
OBOT SOD 65:12-14: "**OBOT and its principals made multiple requests for preapplication meetings to clarify zoning and other requirements**" Citing: "RT 1602:10-20"	OBOT's witnesses admitted that Mr. Tagami ended the March 9, 2016 pre-application meeting by walking out. *E.g.*, Trial Tr. 1969:17-1970:3 (Morodomi). After March 9, 2016 there is no documentary support for any request for any preapplication meeting in 2016, 2017, or 2018 prior to the Initial Milestone. OBOT omits internal OBOT documents acknowledging that OBOT needed to request such a meeting. Exs. 601-3, 661. The first reference to setting up any post-March 9, 2016 meeting was for *September 2018*. Ex. 661 (Tagami to Siegel in 2018: "I would like to reserve the earliest date available in September with the City staff for you to initiate the ITS/IES permit submittal process with the City[.]"). The only record evidence of an actual request was once Millcreek was hired, in October 2018. Ex. 249.
OBOT SOD 61:24-26: **"Despite knowing the Cappio Memo would drastically affect Plaintiffs' ability to complete the Project**, Ms. Cappio admitted that she never provided a copy to Mr. Tagami or anyone at CCIG, OBOT, or OGRE." Citing: "RT 2264:17-2266:6."	The testimony cited provides no support for the assertion that Ms. Cappio "kn[ew] the Cappio Memo would drastically affect Plaintiffs' ability to complete the Project." Nor is there any testimonial or documentary evidence anywhere in the record to support that statement. The record does not even contain a single piece of documentary evidence that *OBOT* thought, at any point prior to the Initial Milestone, that the Cappio Memo was affecting the project in any way, despite learning about the memo no later than April 2016. Trial Tr. 2962:11-25 (Sanders).

OBOT SOD 53:15-20: **"In July 2015**, TLS and Plaintiffs submitted to the City the Basis of Design. (Ex. 750.) … **It is undisputed that the City did not provide an approval, a denial, or a notice of incomplete documents as the Ground Lease requires**." Citing: "RT 2240:16-2241:16." .	OBOT states elsewhere the BOD was provided in September, not July. OBOT SOD 12:10 ("Plaintiffs first submitted the BOD in September 2015"); *see* Ex. 51-1 (Sept. 2015: "[W]e are providing a copy of our basis of design package for inclusion in your city staff report for the upcoming hearing."). There is no record evidence of any July submission. Mr. Tagami *admitted* that OBOT did *not* submit the BOD for landlord approval in 2015—because the Ground Lease was not even signed yet. Trial Tr. 699:14-700:3. OBOT's witnesses admitted that no version of the BOD was submitted for landlord approval until September 28, 2018, after ITS took down its sublease. Ex. 239; Trial Tr. 699:24-700:9 (Tagami); Trial Tr. 1966:4-25 (Morodomi). OBOT omits evidence that OBOT told the City in May 2016 *not to review the TLS BOD because more detailed design documents would be submitted in the future.* Exs. 589-1-2, 598-1-2. OBOT did not do that until September 2018. The City promptly responded to the ITS submission in 2018 within the timeframes required by the Ground Lease prior to termination. Ex. 247; Ex. 68-35 §6.2.1.
OBOT SOD 55:4-6: "Ms**. Cappio testified that she understood that … further details would be provided in future iterations based on the City's feedback**" Citing: "RT 2552:13-19"	The cited testimony does not mention feedback from the City. Trial Tr. 2552:13-19. Ms. Cappio *never* testified that the City's feedback was necessary for OBOT or TLS to provide further details on the Terminal's design. All testimony was to the contrary that the City was waiting for *OBOT* to submit its design proposal (particularly after OBOT told the City it was being revised, Exs. 589, 598). Trial Tr. 2272:5-9, 2493:23-2494:9 (Cappio); Trial Tr. 3720:25-3722:13 (Lake).
OBOT SOD 65:28-66:2: "**Witnesses on both sides testified** that finalizing the Terminal's design depended on the City's approval of commodities." Citing: "RT 1076:6-12, 2274:7-2275:10, 2275:7-10; Ex. 854, p. 8."	No City witness testified that the Terminal's design depended on the City's approval of commodities. Ms. Cappio's cited testimony confirms that she understood that the "commodities to go through the terminal" would have "a bearing" on the Terminal's design, but she understood that process required *OBOT* to first "come in with more detailed plans that we could review and begin to give feedback about what would be necessary on a construction set of drawings." Trial Tr. 2274:7-2275:10. Nor did Mr.

	Cole's cited testimony say anything about the City's approval of commodities. Ex. 854, p. 8. Rather, OBOT repeatedly told the City in 2016 *not* to analyze particular commodities, and that the City should wait for *OBOT* to "confirm[] a particular operator for the Terminal and commit[] to a commodity to be shipped." Ex. 589-2; Ex. 598.
OBOT SOD 15:9-11: "**The City was aware** of OBOT's request and **that OBOT needed commodities identified to further design the Terminal**." Citing: "Ex. 64; RT 220:4-18, 292:8-17, 2276:3-8."	None of OBOT's citations (or any other record evidence) supports the assertion that the City was aware OBOT needed the City to identify commodities in order for OBOT to further design the Terminal.
OBOT SOD 10:8-10: "The City was aware of TLS's role in the Terminal and **its connection to Bowie** before it entered the Ground Lease with OBOT. Citing: "See, e.g., Ex. 51 (**TLS letter to the City almost 2.5 years before the Ground Lease**)." .	Ex. 51 contains letters dated **July and September 2015**, which is not "2.5 years before the Ground Lease" was signed in February 2016. Neither the July nor the September 2015 letter from TLS says *anything* about Bowie (and instead refer to "*our* City," furthering the misrepresentation of TLS as a locally owned business). Ex. 51-1, 51-2. OBOT omits witness admissions that OBOT did not tell the City about Bowie prior to the Ground Lease. Trial Tr. 3485:5-20 (McClure); *accord* Trial Tr. 2404:20-2405:12 (Cappio).
OBOT SOD 59:28-60:2: "**At no time** after the execution of the Ground Lease **did the City apply for third-party funding** consistent with Section 6.3.2 of the Ground Lease, **including reapplying to ACTC**." Citing: "Ex. 854, pp. 17-19 (78:25-82:3)"	No evidence supports this statement. OBOT omits record evidence of the City **applying** for ACTC funds in 2015 (Ex. 42, July 2015 City letter to ACTC); and **re-applying** for ACTC funds in 2016, including OBOT communications recognizing the City reapplied for funds. *See* Ex. 716 (City communication to OBOT about renewed City application for wharf improvement funding in September 2016); Ex. 711 (Ms. Morodomi's acknowledgement of the City's renewed application for wharf improvement funding in October 2016). OBOT's only citation, to testimony of Doug Cole, *confirms* that ACTC **asked** the City to "**reapply… which we did the following year**." Ex. 854 at 79:22-24.

OBOT SOD 79:5-6: "Plaintiffs also presented evidence that the **City acted to keep OGRE out of the RAA process**." Citing: No citation to record.	OBOT omits all record evidence that OGRE and its counsel were actively involved in the process of exchanging and commenting on RAA discussion drafts and negotiations from 2016-2018. Exs. 727, 720, 719, 728, 734. Mark McClure *admitted* OGRE and its counsel were involved in negotiations and that the City took positions on OGRE's behalf during negotiations. Trial Tr. 3453:11-3454:23.

In addition to the above statements that are unsupported by and contrary to the record, OBOT and its witnesses made a number of factual assertions at trial that are notably absent from, and thereby abandoned in, OBOT's proposed Statement, in light of the direct evidence contradicting those assertions, including:

- OBOT allegedly provided the City with a "red letter" version of the DA "binder" of regulations responding to the City's June 16, 2016 compilation of the applicable regulations. *Compare* Trial Tr. 325:11-326:5 (Tagami) *with* OBOT SOD 50-51 (omitting any such contention).

- OBOT allegedly provided the December 2016 version of the OGRE sublease to the City prior to 2018. *Compare* Trial Tr. Trial Tr. 2981:11-22; Trial Tr. 3045:24-3056:1 (Sanders) *with* OBOT SOD 87 (omitting any such contention); *see also* Opening Slides (claiming "OBOT/OGRE Sublease submitted to City Dec. 15, 2016")

- The City allegedly "refused to grant" and "failed to process" OBOT's permit applications. *Compare* OBOT Opening Slides ("Refused to Issue Permits") *with* OBOT SOD 60-68 (omitting any such contention). *See also* FAC ¶6 (alleging "refusal to process permit applications"""). OBOT's witnesses instead admitted OBOT never submitted any permit applications. Trial Tr. 3561:18-22 (McClure); Trial Tr. 1997:4-10, 1999:13-19 (Morodomi).

- Betsy Lake allegedly "lifted" the Cappio memo then re-instated it in 2018. *Compare* Trial Tr. 590:13-19, 1434:8-11 (Tagami) *with* OBOT SOD 17-18 (omitting any such contention).

- OBOT and OGRE allegedly could not build *any* track because they lacked access. *Compare* Trial Tr. 1655:15-25, 1714:24-1715:9, 1715:10-1716:3, 1716:11-22, 1718:18–1719:18 (McClure) (testifying on direct that OBOT could not build any track because of lack of access to the land) *with* OBOT SOD 84-87 (contending OBOT and OGRE *did have access and did build track*). As discussed further below, OBOT now attempts to argue the *facts regarding access* in the alternative (by continuing to argue they could not build track at the same time it argues that they did build track), when the evidence was conclusive that OBOT and OGRE had access and the ability to build, started to build, and then *stopped*. *Infra* at 11-16.

DISCUSSION

I. Construction of the Terminal and Rail Were Each Independent and Necessary Minimum Project Requirements and OBOT Defaulted on Both

As OBOT now concedes, the plain language of the Gound Lease required OBOT to Commence Construction of both the Bulk and Oversized Terminal "*and*" at least one of the five Minimum Project Rail Improvements to meet the Initial Milestone deadline. Ex. 68-32-33 §6.1.1.1 (emphasis added); OBOT SOD 48, 84. Because both components were required, the failure to Commence Construction of either of these elements was a default. OBOT asks the Court to hold that it was excused by events of force majeure from timely performing with respect to both the terminal and rail requirements (OBOT SOD 25-27), *or* in the (factual) alternative that it did construct some of rail, and therefore, it contends, met both requirements because rail was part of the terminal (OBOT SOD 84-87).

However, there are no alternative *facts.* OBOT cannot contend both that it lacked the access necessary to build the Minimum Project Rail Improvements and therefore did not commence construction, *and then admit* that it did have access and commenced construction. But that is exactly what OBOT's proposed Statement asks this Court to find (without acknowledging the factual inconsistency). *Compare* OBOT SOD 68-76 *with* OBOT SOD 84-87.

The record evidence conclusively established that OBOT did *not* satisfy the Initial Milestone requirement for commencing construction of the Minimum Project Rail Improvements, despite having access to the land and starting then stopping work on track, because the contract unambiguously required "*active and on-going construction.*" Ex. 68-129 (Art. 40, Def. "Commence Construction": "with respect to any and all improvements on all or any portion of the Premises, that a Building Permit has been obtained for such Improvements, where applicable a foundation (slab or other type) has been installed and *such Improvements are subject to active and on-going construction*.") (emphasis added).

First, the evidence demonstrated that OBOT started to build track in the areas of at least two of the five Minimum Project Rail Improvements (in the BNSF Easement, but on the wrong Lead track; and in the Claw), thus proving it had *access and the ability to build track on that land*.

Exs. 796, 833, 837; for further discussion of access and construction of track, *see infra* at 43-46. This was confirmed by the City's uncontroverted witness testimony and documents, which showed that the City's public improvements on the rail right of way areas for West Gateway Lead Tracks No. 1 and 2 were complete by 2017. Exs. 777-2, 847; Trial Tr. 4112:23-4113:4 (Lake); for further discussion of the completion of the public improvements, *see infra* at 43-46.[2]

Second, the evidence was *undisputed* that OGRE President Mark McClure ordered his subcontractor Chris Stotka (the President of IRC) to *stop building track* in May 2018. Trial Tr. 1862:10-13, 3714:15-16 (McClure); Trial Tr. 737:7-19, 759:1-6 (Stotka).[3]

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[2] The only record evidence submitted regarding the dates the public construction work was done in the rail right of way was provided by the City, not OBOT. The City introduced an e-mail from CCIG in 2018 attaching the City's general contractor schedule for the public improvements which showed the grading and drainage work on West Gateway Lead Tracks 1 and 2) completed in 2015 and 2017. Ex. 777-2. Mr. McClure initially refused to admit the accuracy of this document, but eventually conceded it was likely the schedule was accurate. Trial Tr. 3346:3-8, 3346:17-23, 3347:6-9, 3349:1-4. Mr. McClure testified that this work needed to be complete before OGRE commenced constructing track, and admitted that it was complete in the areas for which OGRE began constructing track. Trial Tr. 3314:25-3315:11, 3355:15-3356:1, 3337:13-25. The City staff confirmed in May 2018 the public improvements on the rail right of way were complete. Ex. 847; Trial Tr. 4049:24-4050:15, 4107:18-4108:1 (Lake). In contrast, while Mr. McClure and Mr. Tagami both made repeated *general* assertions in their testimony that the City's ongoing public improvements prevented access, both noticeably failed to specify dates during which the public improvement work was ongoing (or the specific locations of such work), even though CCIG *managed* those improvements for five years, through the end of 2017. Trial Tr. 2724:22-2725:1, 1711:1-13 (McClure); Trial Tr. 1166:10-18 (Tagami). Nor did Plaintiffs introduce any documentary evidence regarding the timing of the actual improvement work to controvert the City's evidence. Ex. 777-2; Ex. 847. The testimony on the subject of access to the rail land and the timing of the completion of the public improvements is just one of many notable examples of Mr. McClure's sustained evasiveness, testimony directly contradicted by documentary evidence, which along with the established pattern of public misrepresentations of fact, should severely damage his credibility before this Court. *See also* Trial Tr. 2605:4-8, 2606:4-16, 2607:3-8, 2608:13-20 (refusing to answer questions about his own notes); Trial Tr. 3692:10–3693:13 (maintaining that OGRE never received "discussion" drafts of the RAA); Trial Tr. 3537:13-3538:13, 3539:2-24, 3541:4-11 (insisting that his March 2016 op-ed stating "we have had nothing to do with that" meant CCIG had nothing to do with Utah funds in a "contractual" sense).

[3] Again, Mr. McClure initially repeatedly testified to the Court that OGRE was unable to build *any* track because it lacked access to any of the land in the rail right of way. Trial Tr. 1655:15-25, 1714:24-1715:9, 1715:10-1716:3, 1716:11-22, 1718:18–1719:18. Confronted with contrary evidence, Mr. McClure then admitted that OGRE did start to build some track. Trial Tr. 3328:17-23, 3351:13-3352:6, 2772:21–2773:2. And when confronted with a May 2018 email to Mr. Stotka, Mr. McClure admitted that he ordered Mr. Stotka to *stop building track* in May 2018. Trial Tr. 3714:12-16, 1863:17-24. He then admitted that he explained to Mr. Stotka that OGRE would not resume rail construction until a number of conditions were met, including a "[r]ail access agreement, rail operating agreement, STB approval, UPRR ITA, [and] resolution with the City on our OBOT lease." Trial Tr. 1863:2-1865:29. Mr. Stotka also confirmed that Mr.

Third, Mr. McClure admitted that between May 2018 and August 14, 2018, OGRE did not construct further track per his instructions, which was confirmed by the City evidence. Trial Tr. 3714:12-20 (McClure); *see also* Trial Tr. 3942:6-17 (Lake).

Fourth, Mr. McClure unambiguously and without qualification admitted that as of August 14, 2018, OGRE was not engaged in *active and ongoing construction*, again, confirmed by the City's evidence. Trial Tr. 3715:23-3716:5 (McClure); Trial Tr. 3942:6-17 (Lake); *see also* Ex. 162-7 (June 2018 OBOT-OGRE Sublease substantially delaying OGRE's assumption of rail obligations).

OBOT's Statement thus invites this Court to err by entirely ignoring the "active and on-going construction" element of the definition of Commence Construction, or any of these admissions with respect to OGRE's access, the completion of the specific public improvements required to build track, and undisputed decision by OGRE to *stop constructing track*. OBOT SOD 84-87.[4]

Moreover, OBOT's only contention that it met the Initial Milestone with respect to the construction of the terminal is that it constructed some rail, and the "Terminal includes rail improvements." OBOT SOD 85-86.[5] But separate and apart from the failure to show the active and ongoing construction to meet the Initial Milestone requirement for even the rail, OBOT also ignores the plain language of the Ground Lease that defines "Bulk and Oversized Terminal" and "Railroad Improvements" separately. OBOT SOD 84-85; Ex. 68-239 (Ex. 3.1 Scope of Development, defining Bulk and Oversized Terminal and Railroad Improvements); Ex. 68-128

McClure ordered him to stop building track in May 2018. Trial Tr. 737:15-19, 757:19-758:5, 759:1-6. OBOT did not introduce any evidence to contest these facts, which conclusively disprove their theory that *the City's denial of access* prevented OBOT building track.

[4] The City addresses OBOT's further unsupported contentions that it was prevented from constructing track by the City's actions constituting force majeure, which are directly inconsistent with these contentions that it met the Initial Milestone for rail, *infra* at 43-46.

[5] The City's witnesses confirmed that OBOT did not commence construction of the terminal. Trial Tr. 3741:22-3742:3, 4117:11-16 (Lake). OBOT did not attempt to deny or controvert this evidence other than claiming rail was somehow part of the terminal, notwithstanding the plain language of the contract. None of OBOT's communications with the City in the aftermath of the Initial Milestone ever claimed that they actually began construction of the terminal, because they did not. Ex. 191 (response to 2018 DA annual compliance review correspondence); Ex. 248 (notice of claim); Ex. 856 (response to 2019 DA annual compliance review).

(Art. 40, defining "Bulk and Oversized Terminal" as set forth in Ex. 3-A Scope of Development). OBOT selectively quotes the definition to imply that the rail part of "OBOT Wharf and Rail Improvements" (i.e., the wharf and rail on the West Gateway property that do *not* include the Minimum Project Rail Improvements, *see* §6.1) are included in the definition of Bulk and Oversized Terminal. OBOT SOD 85:20-26. OBOT omits the language stating that the *wharf improvements* included in the OBOT Wharf and Rail Improvements are included in the Bulk and Oversized Terminal, and the *rail improvements* of the OBOT Wharf and Rail Improvements are included in the Railroad Improvements. Ex. 68-239 (Ex. 3.1). There is nothing in the Ground Lease that defines Bulk and Oversized Terminal to include the rail improvements, for purposes of construction or otherwise. Moreover, if the Minimum Project Rail Improvements were intended to be part of the Bulk and Oversized Terminal, as OBOT contends, then the Initial Milestone deadline specifically and separately requiring OBOT to commence construction of the Bulk and Oversized Terminal *and at least one of the five* Minimum Project Rail Improvements (Ex. 68-32 (§6.1)) would make no sense at all.[6]

OBOT's proposed Statement likewise fails to mention that its witnesses *admitted* that the construction of the terminal did not include construction of the Minimum Project Rail Improvement pieces of connector track. Trial Tr. 1839:23-1840:6; 1840 8-12 (McClure). OBOT can cite no document to support its argument, because there is no record evidence showing that CCIG, OBOT, or OGRE ever stated, internally or externally, that construction of the rail was included in the plans for the Bulk and Oversized Terminal. Indeed, when OBOT finally submitted the ITS BOD for landlord approval of the schematic drawings for the terminal on September 28, 2018, *it did not include the rail. See* Exs. 238, 240 (submitting 2018 ITS Basis of Design as Schematic Drawings for the Bulk and Oversized Terminal *without* plans for rail); Ex.

[6] There was no dispute that the parties planned for this ultimately to operate as a rail-served terminal, but that misses the point of whether *construction* of the rail was necessary for or included in *construction* of the terminal. It was not, per the plain language of the Ground Lease, as explained above. OBOT tries to argue that "terminal" is a term that should be given a special technical meaning to include rail (relying on Mr. McClure's experience as *a real estate developer*, which is unrelated to rail). Trial Tr. 1519:7-12. This too ignores the plain language of the contract. The parties' language and intent, not OBOT's hindsight arguments, control. Civil Code §§1636, 1638, 1639.

247 (City letter deeming drawings for the Ground Lease "Initial Improvements" incomplete without, *inter alia*, rail drawings); Ex. 252-3 (responding to City's notice of incomplete construction drawings not by submitting rail drawings but explaining rail was to be completed separately); Ex. 765 (submitting the rail improvements for approval for the first time in 2019, post-termination).

At the end of the day, the evidence at trial showed that notwithstanding its contractual promise to build, rather than spend the time and money to move the project forward, OBOT did nothing for the two-and-a-half year performance window other than collect profit from trading in the future rights to the land. *See* Ex. 638-9 (OBOT collected millions in payments from Siegel entities by 2018, largely for option extensions and sublease "take-down" payments); Ex. 194; Ex. 653; Trial Tr. 1260:16-1261:3, 1336:3-1338:18 (Tagami) (admitting payments from TLS/IES/ITS were profit to OBOT); Trial Tr. 957 at 186:8-11, 186:13 (Rosen) (confirming payments to OBOT for option rights not spent on construction or design prior to ITS sublease).[7] The evidence was uncontroverted that OBOT made a *business decision* that it was going to rely on another entity to pay for and construct the terminal rather than pay for and build the terminal itself (as it promised to do, Ex. 68-38 §6.2.9, 68-72 §12.1.14), and then it chose again and again to wait for that sublease rather than taking the steps needed to meet the Initial Milestone deadline. *Infra* at 51-55.

Thus, the evidence at trial was conclusive that OBOT had not Commenced Construction of either the Bulk and Oversized Terminal or any of the Minimum Project Rail Improvements, per the plain terms of the contract. And, as OBOT's proposed Statement now confirms, OBOT's sole contention at trial for excuse of performance is that events of Force Majeure extended that deadline and thereby provided that excuse. OBOT SOD 3-4, 19, 38. As the next sections

[7] OBOT asks the Court to conclude without any support at all that OBOT and its sublessee spent over $25 million on this project, based only on a document that shows an accounting, provided by Mr. Siegel that includes the millions Mr. Siegel spent paying CCIG and OBOT for option and exclusivity and sublease payments, and buying out equity in his employer. OBOT SOD 17:7-8 (citing Ex. 194). OBOT did not spend the money it earned trading in the rights to the land on design or construction of the terminal; rather, these payments were pure profit to OBOT. OBOT SOD 17; Ex. 194; *supra* at 6-7. The record contains no evidence of any amount spent by CCIG or OBOT on the terminal project, because, as they candidly admitted, the plan was always to have their sublessee pay for those costs. Trial Tr. 1982:12-14, 1996:19-1997:3 (Morodomi).

demonstrate, notwithstanding its attempts to rewrite the contract standards for force majeure, to rely on events that OBOT was aware of or could foresee at the time of contract, to base their claims on contentions disproven or otherwise utterly unsupported by the evidentiary record, and to ignore the conclusive evidence that OBOT's own business decisions caused the delay both before and after OBOT waited out the results of the federal litigation, OBOT has failed to carry its heavy burden.

II. OBOT's Force Majeure Contentions Defy the Contract Terms, Law, and Fact

A. The City and OBOT Did Not Agree to Automatic and Indefinite Force Majeure Extensions Upon *Unilateral* Notice

OBOT's threshold excuse by way of force majeure contention is that the Ground Lease construction deadline was "automatically" extended when it provided the City with notices claiming force majeure. OBOT SOD 2:4-9 ("the Initial Milestone Date was automatically extended by OBOT's multiple notices of Force Majeure…").[8] OBOT again overreaches. This "automatic extension" theory has no basis in the language of the contract and would swallow all of OBOT's contractual obligations notwithstanding the parties' agreement to their importance. This Court should reject OBOT's absurd reading of the contract language as granting OBOT the power to unilaterally and indefinitely delay its own performance, simply by providing notice.

Section 16.1 permits an extension of the time for a party's contract obligations where an event of Force Majeure has caused a failure of timely performance, and plainly requires the triggering event to *qualify* as an "event of Force Majeure." Ex. 68-84-85 §16.1, 132 (Art. 40, Def. "Force Majeure"). OBOT bears the burden of proof to establish that such an event existed and caused OBOT's delay in performance, subject to the standards discussed further below, under longstanding California law. *E.g.*, *Butler v. Nepple* (1960) 54 Cal.2d 589, 598-99; *San Mateo*

[8] *See also* OBOT SOD 2 at 3:6-7, 26 ("automatically extended"); *id*. at 33:2-3 ("Force Majeure letters that extended the Initial Milestone Date in proportion to each delay"); *id.* at 33:5 ("extension rights"); *id*. at 33:15-16 ("right to an extension"); *id*. at 35:27-28 ("Plaintiffs had every reason to believe that the Initial Milestone Date had been extended under the express provision of Section 16.1"); *id*. at 36:1-2 ("the fact that nothing in the Force Majeure provision of the Lease states that either party can reject a Force Majeure delay notice"); *id*. at 39:13 ("automatically extended"); *id*. at 49:16-17 ("the extension is automatic and not subject to the other party's approval or rejection").

Cmty. Coll. Dist. v. Half Moon Bay Ltd. P'ship (1998) 65 Cal.App.4th 401, 414; for further discussion, *see infra* at 23-38. No language in this provision purports to alter that burden.

Because the provision does not say the extension is automatic, OBOT's argument relies solely on the absence of language expressly setting forth a procedure for a party to reject a force majeure claim. OBOT SOD at 36:1-2 ("[N]othing in the Force Majeure provision of the Lease states that either party can reject a Force Majeure delay notice. . ."). But this is typical of force majeure provisions, and OBOT cites no case law supporting such an extreme interpretation (OBOT SOD 39, 49), because none exists. *See., e.g*., *Hong Kong Islands Line Am. S.A. v. Distribution Servs*. *Ltd.* (C.D. Cal. 1991) 795 F. Supp. 983, 987, *aff'd*, (9th Cir. 1992) 963 F.2d 378 (assessing merits of force majeure claim notwithstanding provision requiring notice); *Fitness International, LLC v. KB Salt Lake III, LLC* (Cal. Ct. App., Sept. 26, 2023, No. B320562) 2023 WL 6230746, at *3 (same).

OBOT's proposed interpretation also violates the canon of interpretation that "[t]he whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." Civil Code §1641. OBOT and the City agreed to a host of contract provisions that reflect the parties' intent to move this project forward expeditiously, which would be rendered meaningless if OBOT could unilaterally extend its own deadlines: the specific and unambiguous construction deadlines set forth in Section 6.1 (Ex. 68-31: "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 the Permitted Uses) (the "Minimum Project") are constructed within a specified period of time"); that time for performance was of the essence (Ex. 68-36 §6.2.5); provisions stating that OBOT "shall develop" the land and *must* continuously use the land for the stated purposes (Ex. 68-23, 68-25 §§3.1.1, 3.4 ("Premises Must Be Used")); early termination provisions for failure to meet the Minimum Project requirements (Ex. 68-33 §6.1.2); provisions allowing OBOT to move construction drawings forward through the approval process if the City fails to respond (Ex. 68-35 §6.2.1); and the lack of any OBOT "self-help" remedy requiring performance even if OBOT believes the City

to be in default (Ex. 68-91-92 §22.1), among others.

Interpreting the contract to grant OBOT a *unilateral* right to extend deadlines simply upon notice would conflict with the parties' clear intent as reflected in the above provisions, *contra* Civil Code §§1636, 1641, 1650, and further, would be an absurd reading, *contra* Civil Code §1638. Such an interpretation would also render OBOT's promise to perform by specific deadlines and the City's remedies for failure to meet them illusory, by putting the power entirely in one party's hands to determine the schedule on which to comply, over the course of 66 years—effectively rendering those deadlines unenforceable nullities. *Contra* Civil Code §1641.

B. OBOT's Actions to Move the Project Forward in September 2018 Prove that Alleged Prior "Events of Force Majeure" Did Not Prevent OBOT from Moving Forward.

OBOT now concedes that that the plain language of the Ground Lease requires it to prove that each claimed Force Majeure event *caused* its delayed performance. Ex. 68-84 §16.1; Ex. 68-132 Art. 40 (def. "Force Majeure"); OBOT SOD 45:19-21 ("Plaintiffs must demonstrate that each alleged Force Majeure event caused delay of OBOT's ability to meet the Initial Milestone Date."); *Hong Kong Islands Line*, 795 F. Supp. at 989 ("It is well-established that in order to constitute a force majeure, an event must be the proximate cause of nonperformance of the contract."). But the actions of OBOT and its sublessee ITS in September of 2018 directly disprove OBOT's contention that it could not move forward with the project between February 16, 2016 and the performance deadline of August 14, 2018 *because* of the City's actions.[9]

OBOT's primary argument is that a host of City actions and inactions entirely prevented it from moving forward with the design planning needed to submit the project for initial approval, beginning at the very outset of the contract. OBOT SOD 19-20; 48-84. Thus, OBOT contends that it could not take even the first step of submitting Schematic Drawings for City review pursuant to Section 6.2.1, or move forward with any further work on terminal design, in light of

[9] This section applies to all of OBOT's asserted force majeure claims other than the Ordinance, which is also not an event of Force Majeure, for the reasons discussed *infra* at 55-58. To the extent that OBOT does argue that the City's position with respect to the 2016 Ordinance and Resolution had not changed as of August 14, 2018 in light of the City's appeal, that claim of Force Majeure would also fail for lack of causation as well as all the other reasons discussed below. OBOT SOD 17-18.

the City's actions. *Id*.[10] But then, incongruously, OBOT claims that by submitting the ITS BOD plans to the City for approval on September 28, 2018, it commenced the cure of its default on the Initial Milestone deadline by moving the project forward, notwithstanding that, according to OBOT, *nothing* about the City's alleged actions and inactions had changed. OBOT SOD 17-18.

According to OBOT, even taking its allegations at face value, as of September 28, 2018, the City still had not done any of the following: provided a correct "binder" of regulations; provided "feedback" on the BOD; provided a list of "approved commodities"; explained the allegedly new "commodity-by-commodity" CEQA or discretionary permit process; rescinded the "Cappio memo"; obtained third-party wharf funding from ACTC; entered into the RAA; finished public improvements allegedly preventing access; issued a fence permit; or withdrawn its STB filing.[11] But the evidence was undisputed that immediately after OBOT and ITS signed the ITS sublease (on September 24, 2018, Exs. 237, 801), OBOT and ITS submitted the ITS BOD for landlord approval pursuant to Section 6.2.1 (Ex. 239), submitted a formal Pre-Application proposal (the "Basic Application for Development Review") (Ex. 249), requested a new pre-application meeting with the Planning and Building Department (*id*.), and made other accompanying requests to the City. Exs. 236, 238; *see also* Exs. 660, 661 (Tagami to Siegel: "I would like to reserve the earliest date available in September with the City staff for you *to initiate*

[10] OBOT's primary argument is that it could not meet the Initial Milestone deadline to Commence Construction because the City's many acts of Force Majeure prevented it from moving the project through all of the requisite preconstruction steps. *Id.* Those steps include: submitting the first level of Construction Drawings (called "Schematic Drawings") for landlord approval, followed by Preliminary Construction Documents and then Final Construction Documents, as well as obtaining all required regulatory approvals (from the City and other regulatory agencies) and entering into Construction Contracts. Ex. 68-35-36 (§6.2.1, 6.2.4, 6.2.6). OBOT conceded and the evidence was conclusive that it took none of these steps between February 16, 2016 and August 14, 2018. Trial Tr. 1966:4-25, 2001:13-20 (Morodomi); Trial Tr. 699:21-700:9 (Tagami); Ex. 239 (taking the first step—submitting Schematic Drawings for Landlord approval—in September 2018).

[11] OBOT specifically contends that for each of its claimed force majeure actions or inactions, other than the Ordinance, by August 14, 2018 nothing in the City's position had changed. *See* OBOT SOD at 17:22 (failure to rescind Cappio Memo), 17:23 (failure to "comment" on BOD), 17:24-25 (failure to "approve a commodity or articulate the process that OBOT was required to follow for commodity or permit approval"), 18:1-8 (failure to "cooperate" generally because of political opposition to coal), 18:16-19 (failure to provide "access" or "possession" of Railroad R/O/W), 18:25-27 (failure to enter a Rail Access Agreement), 51:1-2 (failure to provide binder), 59:28-60:2 (failure to apply for ACTC funds), 65:13-15 (failure to "clarify zoning"), 68:8-12 (failure to issue fence permit), 83:10-13 (failure to "cooperate" at STB).

the ITS/IES permit submittal process with the City[.]") (emphasis added); Trial Tr. 1358:16-1359:4.[12] Moreover, the 2018 ITS BOD that OBOT and ITS submitted to the City for approval contained exactly the same HDR drawings from the 2015 TLS BOD. Trial Tr. 3748:14-22 (Lake); Trial Tr. 1954:11-1955:1 (Morodomi); *compare* Ex. 750-522-556 (2015 BOD) *with* Ex. 240-459-493 (2018 BOD). If OBOT was able to move forward with the project in 2018, including by submitting the 2015 drawings, notwithstanding the continuation of these alleged actions of the City, these alleged events could not have prevented OBOT from moving forward at any point in time earlier.

Thus, none of the City's acts that OBOT claims were events of Force Majeure prevented OBOT from taking these actions in September 2018. For example, OBOT contends that the City's position regarding discretionary permits and the possibility of further CEQA review "upended the process for approving Terminal design and plans without replacing that process with a new one for OBOT to follow," OBOT SOD 60:19-61:5, preventing OBOT from moving forward, OBOT SOD 60-67. But that contention is rendered plainly false by OBOT's 2018 actions, which show that OBOT knew *exactly* what "process" to follow: the process for landlord approval outlined in the Ground Lease and the regulatory approval process that was well-understood through OBOT's decades of development experience, *i.e.* submit Schematic Drawings for Landlord approval, Ex. 68-35 §6.2.1, and submit documents and requests to begin the pre-application process for regulatory approval, *see* Trial Tr. 1602:4-18 (McClure); Trial Tr. 3118:12-3120:14 (Ranelletti) (describing standard pre-application process); Trial Tr. 2438:9-17 (Cappio).

[12] OBOT and ITS's request to schedule a new pre-application meeting was the first such communication from OBOT since March 2016, and ITS "sought to provide enough information about the proposed project to initiate a discussion about the required City interdepartmental approvals and process to achieve a building permit." Ex. 249; *see also* Ex. 252-2 (OBOT and ITS "set up an intake meeting" with Planning Director Gilchrist "[i]n order to better understand the City's process for permit approval, and to discuss the potential for an accelerated construction start."); Trial Tr. 2057:24-2058:3 (Ms. Morodomi reached out to Mr. Gilchrist for a meeting in Fall 2018). ITS's new engineering consultant Millcreek also submitted, for the very first time, a "Basic Application for Development Review," including an application for a "Design Review Exemption (DRX) and Project Zoning Clearance." Ex. 249-1. Further, OBOT and ITS for the first time "formally request[ed] meetings with Landlord consistent with Section 6.2.2 of the OBOT Ground Lease." Ex. 252-3. OBOT and ITS did all of this notwithstanding that all of the issues now claimed by OBOT to have prevented performance allegedly remained outstanding.

Likewise, for example, OBOT claims that the "Cappio Memo" delayed the project, OBOT SOD 66:22, but OBOT also says the Cappio Memo was still in place in Fall 2018, OBOT SOD 63:11-13, and that did not prevent OBOT and ITS from submitting their "Schematic Drawings" for landlord approval, or the Basic Application for Development Review to finally restart the permit process, Exs. 249-1, 252-2.

The bottom line for these and OBOT's other claims listed above (including relating to "feedback" on the BOD, the binder of regulations, the public improvements, the RAA, the STB, the fence permit, and ACTC) is that as of September 28, 2018, *nothing had changed* from OBOT's perspective, and yet OBOT finally took the first step forward anyway, as soon as the ITS sublease was signed.

The record was also conclusive that, far from being prevented by the City, OBOT *chose* to wait for its sublessee to pursue design development of the project. *See infra* at 51-55. Nothing in the Ground Lease *required* OBOT to wait for a subtenant; to the contrary, OBOT assumed the performance obligations to pay for, construct, and operate the terminal (Ex. 68-23-25 Art. 3, Ex. 68-38 §6.2.9) and OBOT expressly agreed that "its personal business skills and philosophy were an important inducement to Landlord for entering into this Lease" (Ex. 68-72 §12.1.14; *see also* Ex. 75-5 (identifying OBOT as responsible party for obtaining permits and regulatory approvals); Trial Tr. 2502:20-2504:4 (Cappio). The evidence established that notwithstanding OBOT's contractual commitment to the City, OBOT made the *choice* to wait for a sublease, and made the decision, again and again, that it would not perform these obligations itself, because it preferred to hand them off to another entity. *See* Trial Tr. 1266:12-1268:3, 1268:19-1269:16, 1360:6-19 (Mr. Tagami asserting that "OBOT doesn't really have a role with respect to this process until [its] sublessee is ready to submit something"). Thus, OBOT and its lawyers told the City in 2016 in no uncertain terms that it would return to the City with a project proposal (including revised design documents and a proposed "permitting approach") once a sublease was signed. Ex. 589-2,

598-2.[13] OBOT waited, and never returned to the City with a project proposal as promised, through the years when TLS failed to ever sign a sublease, Trial Tr. 2728:13-15, Ex. 957-21 at 67:4-13, as the IES sublease was declared null and void for failure to pay Mr. Siegel's debts, Ex. 152-1, Trial Tr. 2971:23-2972:23, and as OBOT and Mr. Siegel negotiated what eventually became the ITS sublease, Exs. 158, 173, 201. In fact, the record was conclusive that even after the federal court's decision in May 2018, OBOT did not immediately commence any design and construction work, or enter into a sublease, or submit a new BOD for review, but instead spent the summer of 2018 negotiating for ever greater payments to OBOT for the right to that sublease while the design work remained on hold. Exs. 158, 173, 201; Ex. 957 at 185:12-187:6 (design, pre-construction, and construction work was all delayed until ITS sublease was taken down). Accordingly, for 2016, 2017, and most of 2018, as OBOT waited until it had a sublease in place, neither OBOT nor its sublessee presented any further project design or restarted the permitting pre-application process with the City, as Ms. Morodomi admitted. Trial Tr. 1966:4-25.

Given these facts, OBOT cannot prove that any of the City's alleged actions and inactions that it claimed were events of Force Majeure, but that it contends continued at the time of OBOT's September 2018 submission, actually ***caused*** its prior delay in performance. This failure of causation is determinative of OBOT's claims regardless of whether this Court agrees that the City's interpretation of the force majeure standard is the only one supported by the contract language and the law, as explained in the next section: there is no dispute that OBOT must prove causation, and it has not. And further, besides defeating any claim of causation, the fact that OBOT was able to proceed in September 2018 notwithstanding its own contention that the City's actions had not changed preclude OBOT from meeting even OBOT's proposed more lenient standard requiring it to show only an event that "hindered" performance, let alone the correct standard requiring it to show timely performance was rendered impossible.

[13] OBOT and its lawyers also told the City that the *sublessee* would choose the commodities, and design would proceed once the *sublessee* made that decision. Ex. 589-2-3, Ex. 598-1-3. The record evidence was undisputed that Mr. Tagami and Mr. Siegel put pencils down on design in July 2015 and did not pick them up again until the ITS sublease was signed. Exs. 82-1, 539; Ex. 957 at 174:18-181:17, 185:12-186:13 (Rosen); Trial Tr. 1944:4-15 (Morodomi); Trial Tr. 1102:6-9, 1103:18-21 (Wolff).

C. OBOT Cannot Read the Words Force Majeure, and the California Law Interpreting that Term, Out of the Ground Lease

OBOT invites error in asking the Court to endorse an interpretation of Section 16.1 ("Delay Due to Force Majeure") that ignores the well-accepted meaning of the words "force majeure" and the long history of California law interpreting force majeure contract terms. In fact, OBOT's interpretation is so extreme that it would read the words "force majeure" out of the contract entirely. This Court should reject OBOT's conclusory assertion that the supposedly "unique" language used in this provision shows that the parties silently and implicitly decided to deviate from decades of California law governing the meaning of force majeure provisions, in particular the requirement that force majeure events cannot be anticipated at the time of contract.

OBOT's proposed Statement makes clear that it is asking this Court to interpret the Force Majeure provision to excuse and extend its performance deadlines in the event of *any* act of the City that delayed, hindered, or even affected its performance, regardless of whether the event was known or anticipated. OBOT SOD 38:22-24 (arguing the Force Majeure provision "provides for reasonable extensions of time to perform when 'acts of the other party' delay, hinder or affect a party's ability to perform"). However, this provision does not say that *any* act of the other party that hinders, delays, or affects performance extends the contract deadlines (regardless of whether the event was foreseeable or not, regardless of whether the party exercised diligence or not, and regardless of whether it actually prevented any option for timely performance). And it did not *replace* the words "force majeure" with "hinder," "delay" or "affect."

Rather, the provision says that a party whose performance "is hindered or affected *by events of Force Majeure*" cannot be in default "to the extent of any delay resulting *from Force Majeure*." Ex. 68-84 §16.1 (emphasis added). OBOT skips right over the words "by events of Force Majeure" to argue that the provision applies to *any* event that delays, hinders, or affects performance. OBOT thereby asks this Court to reject the long-standing meaning of the term "force majeure" and to read the contract's Force Majeure provision as if it did not even contain those words at all. *Contr*a Civil Code §§1638, 1641.

There can be no real dispute that "force majeure," which is a legal term with no lay meaning, has long been understood to include only unanticipated or unforeseen events. The definition of "force majeure" is "[a]n event or effect *that can be neither anticipated nor controlled*; esp., an *unexpected event* that prevents someone from doing or completing something that he or she had agreed or officially planned to do." Black's Law Dictionary (11th Ed. 2019) (emphasis added).[14] California law thus construes provisions that use the term "force majeure" to incorporate that requirement. *See* City's SOD at 74 & n.55 (citing case authority). OBOT asserts that the City is trying to read a foreseeability requirement into this provision, OBOT SOD 42:1-2, when, by virtue of the words OBOT and the City used, that requirement is already present.

The City and OBOT did not adopt a tolling provision that was triggered by any action of the City with any alleged impact on OBOT's ability to perform regardless of foreseeability; the City and OBOT agreed to a *force majeure* provision. And, if the City and OBOT had wanted to negotiate a more specific provision extending deadlines that altered the standard meaning of force majeure for specific anticipated events, they could have done so (but did not), such as the specific "Litigation Force Majeure" provision negotiated by CCIG and the City in the original LDDA, *see* Ex. 378-62 §10.1.2; *cf. San Mateo Cmty. Coll. Dist.* (1998) 65 Cal.App.4th at 413 ("While [the] lease may include a provision that if performance is temporarily suspended or excused, the time period of the suspension will not count against the primary lease term, the lease here contains no such provision.").

OBOT suggests no alternative meaning for the words "force majeure." OBOT SOD 38-39. OBOT also cites no California case law that supports its argument that "force majeure" can include anticipated events (OBOT SOD 41), because there is none. OBOT invites this Court to err. OBOT simply asserts that this contract provision is "unique" (ignoring the use of the words "force majeure") without explaining *why* the language used is uncommon or how it alters the

[14] *See also* 30 WILLISTON ON CONTRACTS § 77:31 (4th ed. 2020) (Force majeure). Likewise, a "force majeure clause" means "[a] contractual provision allocating the risk of loss if performance becomes impossible or impracticable, [especially] *as a result of an event or effect that the parties could not have anticipated or controlled*." Black's Law Dictionary (11th Ed. 2019) (emphasis added).

usual meaning. OBOT is also just wrong: it would be error to conclude that the force majeure provision in the Ground Lease is "unique" and not subject to the plain meaning of force majeure simply by virtue of the use of words like "hinder" (*see SVAP III Poway Crossings, LLC v. Fitness International, LLC* (2023) 87 Cal.App.5th 882, 892), "delay" (*West Pueblo Partners, LLC v. Stone Brewing Co., LLC* (2023) 90 Cal.App.5th 1179, 1188), "acts of the other Party" (*Decker Coal Co. v. Commonwealth Edison Co.* (9th Cir. 1986) 805 F.2d 834, 837), or "acts of the government" (countless cases, including *West Pueblo Partners,* 90 Cal.App.5th at 1188).

In particular, the inclusion of "acts of the other party" in the laundry list of exemplar categories does not eliminate the requirement that a force majeure event be unforeseeable. Force majeure clauses often "specify which qualifying events will trigger [their] application," but that does not alter the force majeure standard that applies in the same way to all of the exemplar categories. *West Pueblo Partners*, 90 Cal.App.5th at 1188.[15] In fact, if anything, the inclusion of acts of the other party in this list cuts the other way. To the extent that a party is concerned about a foreseeable act of the other party, it is well within that party's control to raise that concern and negotiate with the other party in the context of working out the specific contract terms.[16] Including that term does not *silently* alter decades of California law.

OBOT also ignores the words used in the Force Majeure definition requiring qualifying events to be "due to causes beyond such Party's control," and the meaning ascribed to those words under California law, which requires that the party claiming force majeure prove that notwithstanding acting with skill and diligence to perform, timely performance was impossible or

[15] The contrast between this "unique" provision and what OBOT contends are "boilerplate" provisions is a false one. Most contracts include force majeure provisions tailored in some way to the contract at issue, by for example modifying the list of triggering events, negotiating specific language that the parties agree is not force majeure, or creating different notice periods or language regarding the resulting extensions. *West Pueblo Partners*, 90 Cal.App.5th at 1188; *Watson Laboratories, Inc.*, 178 F.Supp.2d at 1110; *Butler* 54 Cal.2d at 598–99. The variation in the framing has never precluded California courts from interpreting the plain meaning of force majeure. The question is whether the parties used language that altered the standard meaning, and here, the parties did not.

[16] In fact, many of the actions of the City alleged by OBOT to be events of force majeure implicate contract provisions that the parties negotiated. *See infra* at 28-51; City SOD at 78-81. As Mr. Tagami candidly admitted, he did not negotiate any contractual contingency or tolling for those issues. Trial Tr. 683:23-684:2. It would be error to read the general force majeure provision to swallow the provisions that more specifically address the issues OBOT now raises.

unreasonably expensive. *Oosten*, 45 Cal.2d at 788–89; *Butler v. Nepple* (1960) 54 Cal.2d 589, 599; *West Pueblo Partners, LLC*, 90 Cal.App.5th at 1187–88. As with the term "force majeure," OBOT suggests no alternative meaning for the words "causes beyond such Party's control," but simply reads them out of the provision. In doing so, OBOT identifies no case authority that reads the diligence requirement out of a force majeure clause, because there is none.[17] To the extent OBOT claims courts discuss this only as an "analytical" matter rather than a factual performance requirement, that is just wrong too: *see, e.g.*, *Jin Rui Grp., Inc. v. Societe Kamel Bekdache & Fils S.A.L.* (9th Cir. 2015) 621 F. App'x 511 (rejecting force majeure claim under *Oosten* and *Butler* standard where "Jin Rui failed to take reasonable steps to ensure that it could meet its contractual obligations to SKB.").

Finally, OBOT asks this Court to hold, contrary to *West Pueblo Partners*, that unless parties use the word "impossible" in a force majeure provision, the long-standing *Oosten* and *Butler* standards do not apply. *West Pueblo Partners* rejected that precise argument (that the common meaning of the term "delay," for example, meant that the *Oosten* impossibility standard did not apply), 90 Cal.App.5th at 1188, to which OBOT has no real response. OBOT SOD 44-45.[18]

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[17] In *United States v. Brooks-Callaway Co*., the Supreme Court rejected an argument similar to OBOT's: that the inclusion of a list of triggering events in a force majeure provision means that the parties intended for *any act* on that list to qualify as force majeure. The Court explained why this overbroad approach is inconsistent with the requirement the acts be beyond the claiming party's "control":

> A logical application of the decision below would even excuse delays from the causes listed although they were within the control, or caused by the fault of the contractor, and this despite the proviso's requirement that the events be 'beyond the control and without the fault or negligence of the contractor'. If fire is always an excuse, a contractor is free to use inflammable materials in a tinder-box factory and escape any damages for delay due to a resulting fire. Any contractor could shut his eyes to the extremest probability that any of the listed events might occur, submit a low bid, and then take his own good time to finish the work free of the compulsion of mounting damages, thus making the time fixed for completion practically meaningless and depriving the Government of all recompense for the delay.

United States v. Brooks-Callaway Co. (1943) 318 U.S. 120, 123–24. Diligence by the party claiming force majeure has *always* been a requirement, for the good reasons explained by the Supreme Court.

[18] OBOT's only argument to attempt to distinguish *West Pueblo Partners* is to claim it is limited to provisions regarding rent. OBOT SOD 45. But that is not what the case says. The

Ignoring the background law on impossibility and impracticability that informs force majeure, OBOT prefers a lesser standard that would excuse its contractual obligations if any of its options for performance have been somehow affected or made more difficult.[19] But contract law has always been clear that even if OBOT could prove that *one* of its options for performance was rendered impossible or impracticable by the City's acts, that would not excuse OBOT from performing:

> What is the consequence of failure because of impossibility of one of two alternative performance provisions in a contract? The cases hold that where a contract requires a promisor to do a certain thing or to do something else the impossibility of one mode of performance does not discharge him from his obligation to render the alternative performance which has not become impossible.

Ashland Oil & Ref. Co. v. Cities Serv. Gas Co. (10th Cir. 1972) 462 F.2d 204, 211–12 (internal quotation omitted); *accord Rosenthal v. Perkins* (1898) 123 Cal. 240, 243 ("Why should defendants not perform the other alternative which remains possible?"); *Guilbert Tex., Inc. v. United States Fed. Grp. Consortium Syndicate* (C.D. Cal. Apr. 22, 2022) 2022 WL 1599867, *8 ("Where a party's duty is to render an alternative performance, 'the fact that one or more of the alternatives has become impracticable will not discharge the party's duty to perform if at least one of them remains practicable.'" (quoting Restatement (Second) of Contracts § 261)). As the Restatement (Second) of Contracts explains:

> A contract may permit a party to choose to perform in one of several different ways, any of which will discharge his duty. Where the duty is to render such an alternative performance, the fact that one or more of the alternatives has become impracticable will not discharge the party's duty to perform if at least one of them remains practicable.

§261, comment f (1981).[20]

Court of Appeal held that under a force majeure contract provision, "the qualifying event must have still caused *a party's timely performance* under the contract to 'become impossible or unreasonably expensive,'" notwithstanding that provision's use of the term 'delay' rather than impossibility. *West Pueblo Partners*, 90 Cal.App.5th at 1188 (emphasis added).

[19] This is particularly so in light of Mr. Tagami's admissions that OBOT could have performed, including by self-funding the entire Minimum Project. Trial Tr. 1267:22-25, 1268:19-21, 1269:11-16.

[20] OBOT leans hard into its interpretation of the underlying contracts as vesting its right *to ship coal*, as opposed to the right to pursue the development of a terminal consistent with then

As the Court of Appeal recognized in *West Pueblo Partners*, the law of impossibility and impracticability informs the meaning of force majeure. 90 Cal.App.5th at 1188. OBOT cannot establish that timely performance was impossible just because one option out of many has allegedly been impacted. Thus, even if OBOT could establish that notwithstanding its diligent efforts to perform, an unforeseeable City act made one option for performance of its obligations to construct a bulk terminal more difficult or even impossible (for example, a facility specifically built to ship coal and only coal), the contract *does not extend* OBOT's performance deadlines if other options still remain (such as building the truly multi-commodity terminal OBOT described to the City, or building a smaller terminal for other lighter commodities while the fight over coal played out).[21] *Nothing* in the plain language of the Ground Lease authorized OBOT to sit back and wait because it believed its preferred option for performing was impacted by the City's actions (whether or not OBOT was right). Contract law holds OBOT to the bargain it made in 2016, unless and until OBOT can prove that something truly unanticipated later actually prevented it from meeting those binding performance obligations. OBOT has not even come close in this case to doing so.

D. OBOT's Force Majeure Claims Are Otherwise Contrary to the Factual Record Including the Applicable Terms of the Contracts

OBOT has also failed to meet its burden of establishing any unanticipated event of Force Majeure that prevented its timely performance for a host of reasons, in addition to the failure of

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applicable laws, to dismiss its other available options for performing. To be very clear: the contracts are silent with respect to commodities and do not grant OBOT the right to do business involving any particular commodity, which is a right the City could not legally give, given the potential that any number of regulatory entities (federal, state, and indeed local, if they met the right standards) could regulate in a manner that impacted the market for bulk commodities, including coal. Thus the Ground Lease requires OBOT to build a "Bulk and Oversized Terminal which is … capable of servicing one or more lines of export products" (Ex. 68-32 §6.1(a)), without *limiting* that to a purpose-built terminal designed *only* to ship coal. It is only by portraying the contract as defining its performance obligation in such a singular way (its preferred way to perform, but *only one of many*) that OBOT can try and get around the impossibility and impracticability law incorporating into the concept of force majeure. It cannot.

[21] The evidence at trial did not establish that it would have been impossible or unreasonably expensive for OBOT to submit a design to the City for review at any time between 2016 and 2018 even for a terminal designed *only* for coal, including because the City *agreed* in the plain language of the contract that OBOT could move forward with its plans without fear of being called in default for failure to comply with the challenged Ordinance. Ex. 68-28 §5.1 (contract language the OBOT proposed Statement does not mention, at all).

causation discussed *supra* at 18-22. Together and individually, the evidence utterly fails to establish that there was any nefarious scheme by the City to block this project; this rhetoric is unsupported fiction. Thus, OBOT largely relies on selective and inaccurate descriptions of the evidence including the conclusory and self-serving testimony of its own witnesses, while ignoring the extensive documentary record, those same and other witnesses' admissions, and the specific contract provisions that govern the parties' obligations on specific topics. The Court should reject OBOT's attempt to resort to omissions and misrepresentations of the record evidence and the contract terms to overcome its failure of proof.

1. The Binder of Regulations Provided to OBOT in 2016.

OBOT claims that "the City failed to deliver a binder of regulations that applied to the Project," which "delayed or hindered OBOT's performance." OBOT SOD 50:3-5. But OBOT ignores that its request for the binder of regulations was well known to OBOT prior to February 16, 2016, and so cannot be an event of force majeure under the Ground Lease. Ex. 65-1 (Jan. 2016 email); Trial Tr. 683:11-14 (Tagami was aware "well before" Ground Lease). Mr. Tagami acknowledged he could have sought a contingency in the contract for this issue *but did not*. Trial Tr. 683:19-684:2. OBOT also significantly misrepresents the facts:

OBOT asks the Court to find that the City "never certified a set of regulations that complied with Section 3.4.3." OBOT SOD 51:1-2. That is false: the City did so on June 15, 2016. Ex. 84; Trial Tr. 687:4-6 (Tagami); Trial Tr. 2351:23-2352:1 (Cappio); Trial Tr. 3156:13-16 (Ranelletti).

OBOT asks the Court to find that "[t]he regulations were not…signed," OBOT SOD 50:27, even though they were. Ex. 84-2 (signed letter transmitting regulations); *see* Trial Tr. 694:6-10, 695:10-13 (Tagami).

OBOT asks the Court to find that "the regulations were not provided in hard copy," OBOD SOD 50:27, ignoring that Mr. Tagami himself told the City that "either electronic or hard copy" was acceptable to OBOT. Ex. 688; *see* Ex. 84-1-2; Trial Tr. 689:8-690:14, 692:7-694:10 (Tagami).

OBOT asks the Court to find there were errors in the binder the City provided, OBOT SOD 50:28-51:1, but there is *no documentary evidence* to support that claim, and OBOT's witnesses could not identify even a single error in the City's binder, Trial Tr. 697:4-7 (Tagami), or any such error ever communicated to the City, Trial Tr. 1899:25-1900:3 (Morodomi).[22]

Finally, OBOT offers only argument and no evidence at all that the timing or content of the June 2016 binder had any effect on OBOT's ability to move the project forward. OBOT SOD 51:11-14. OBOT's decision to "stop" its design work had nothing to do with the binder: OBOT and TLS put their "pencils down" on any further terminal design work in July 2015, long before the Ground Lease. Ex. 539-1; Trial Tr. 1944:4-15. The evidence showed that OBOT also already understood the regulations that applied to the project: in July 2015, it had produced the TLS Basis of Design, which OBOT stated "*includes all laws, regulations, and protocols with which any proposed facility must comply and from which it must begin*." Ex. 589-4 (emphasis added); Ex. 750-201-02 (7/21/2015 TLS BOD, Vol. 1, Section 7: "Permitting and Fees," including "TLS program elements and the permitting required for each," listing specific permits by agency). OBOT also compiled its *own version* of the binder, and identified the 76 permits that would be required for the project. Ex. 565-2, 565-16; Ex. 750-7; Trial Tr. 325:15-17, 384:15-385:13, 1449:15-22 (Tagami); Trial Tr. 1896:16-22, 1959:11-19 (Morodomi). And OBOT did not introduce any evidence linking its failure to move forward for the more than two years *subsequent* to receipt of the binder and prior to the Initial Milestone to anything in the binder that was provided to it in June 2016. *See* Trial Tr. 2514:1-5 (after June 16, 2016, Ms. Cappio did not understand the binder to be an open issue); Trial Tr. 1966:4-25 (Morodomi); Trial Tr. 1103:18-21 (Wolff); Ex. 239.

[22] While OBOT's witnesses spent time at trial claiming there was a "red letter" version provided to the City in response, OBOT has apparently abandoned that allegation now given that no documentary evidence supports it, OBOT's own witnesses could not confirm its truth, and the City's witnesses credibly denied it, explaining that if OBOT had ever provided corrections they would have reviewed and considered them. Trial Tr. 694:14-18 (Tagami); Trial Tr. 1899:25-1900:3 (Morodomi); Trial Tr. 2352:2-16, 2513:1-2514:5 (Cappio); Trial Tr. 3156:25-3157:5 (Ranelletti); Trial Tr. 3729:22-25 (Lake).

2. "Feedback" on the TLS Basis of Design That OBOT Told the City Not to Review

OBOT invites this Court to hold that "the City's failure to review and substantively comment on the Basis of Design was a Force Majeure event that breached the Ground Lease and extended the Initial Milestone Date." OBOT SOD 53:7-9. OBOT makes this statement, remarkably, without ever mentioning in its proposed Statement the written communications in which it told the City in 2016 *not* to review the TLS BOD because it was going to revise and resubmit design documents once TLS signed a sublease (Exs. 589-2, 598-2), or the fact that the first written record evidence of a request to review the "Schematic Drawings" in the BOD was on September 28, 2018, after the relevant performance deadline had passed (Ex. 239).

First, to the extent OBOT wanted "feedback" on the 2015 TLS BOD, there is no dispute that it knew about that issue prior to the Ground Lease (having provided the BOD to the City in September 2015, and allegedly having received no feedback, OBOT SOD 12:10-16, 53:15-20). Such an anticipated issue cannot be force majeure, especially when the parties *specifically contracted* regarding the process for review of design documents. Ex. 68-35 §6.2.1.

Again, OBOT misleads with respect to the facts:

There is no dispute that the 2015 TLS BOD was initially provided to the City not pursuant to a Ground Lease that had not yet been signed, but as part of the 2015 health and safety investigation. Ex. 51; Trial Tr. 699:14-700:9. There is also no record evidence of any request by OBOT for the City to ever review this 2015 TLS BOD as Schematic Drawings pursuant to Section 6.2.1, either before or after the signing of the Ground Lease. *See* Trial Tr. 3720:12-17 (Lake). In fact, as OBOT's witnesses admitted, there was no "submission" of any drawings by OBOT or any of its sublessees for landlord approval pursuant to the Ground Lease until September 28, 2018, after the ITS sublease was signed. Ex. 239; Trial Tr. 699:14-700:9 (Tagami); Trial Tr. 1966:4-25 (Morodomi); Trial Tr. 3213:14-17 (Ranelletti).

OBOT further ignores the evidence regarding what happened with respect to the TLS BOD in 2016: there is no dispute that *OBOT* walked out of the March 9, 2016 pre-application meeting at which the BOD was to be discussed, and prior to the "Next Steps" part of the agenda which was to include "[i]dentification of major questions and concerns, requests for information

and further detail[.]" Ex. 567-2; Trial Tr. 2484:1-12, 2485:2-10 (Cappio). OBOT's unsupported claim that "OBOT actually needed the City's feedback in order to move forward, and the City knew that," OBOT SOD 55:1-2, defies belief, given what happened next: in May 2016, OBOT specifically told the City *not* to review the TLS Basis of Design because it would be revised and submitted once OBOT signed a sublease. Exs. 589, 598. And despite OBOT's proclivity for documents (maintained in a room full of project binders), there is not a single piece of documentary evidence that OBOT *ever* asked for feedback on the Basis of Design after the March 9, 2016 meeting.[23]

OBOT also cannot rewrite the contract. Inviting legal error, OBOT admits that its argument ignores the contract language. OBOT SOD 54:28-55:1 ("The express requirements of Section 6.2.1 are only part of the story."). The Ground Lease agreed to by OBOT does not require the City to give "feedback" or "comments" on any design work. Ex. 68-35 §6.2.1. The parties agreed that if the City does not approve or disapprove properly submitted schematic drawings, that inaction "shall not constitute an Event of Default under this Lease on the part of Landlord, but such [drawings] shall be deemed approved by the Landlord in its proprietary capacity, provided that Tenant first provides Landlord with at least ten (10) days prior written notice[.]" *Id.* It was undisputed that OBOT never invoked the contract provision deeming any drawings approved. *See* Trial Tr. 3720:12-17 (Lake).

[23] There is much more evidence that OBOT ignores or miscites. For instance, OBOT ignores Ms. Cappio's testimony that the City *did* give feedback on the BOD prior to Mr. Tagami's adjournment of the process. Trial Tr. 2240:16-20, 2272:5; *see also* Trial Tr. 1604:3-17 (McClure). OBOT mischaracterizes the evidence regarding the City's review of the 2015 Basis of Design by alleging that City's review was "inadequate" because "Ms. Cappio spent one hour reviewing the 1,500-page document[.]" OBOT SOD 54:14-16. In fact, Ms. Cappio testified that she reviewed the entire BOD, noted that it "contained a lot of information we already had" including fee schedules of City agencies and the Development Agreement, but nonetheless assigned a planner to "go through it in detail," and then had meetings about it. Trial Tr. 2279:7-2280:12, 2338:22-2339:3; *see also* Trial Tr. 3211:9-19 (Mr. Ranelletti confirming review of BOD); Trial Tr. 2439:6-16 (Ms. Cappio made sure the various departments were "familiar with what was contained in the basis of design" prior to the March 9, 2016 meeting). Ms. Cappio also credibly explained that it was "way too early" to hire an outside expert to review the "[e]xtremely sketchy" BOD. Trial Tr. 2278:24-2279:6, 2459:2-10; *see also* Trial Tr. 1027:23 (Mr. Tagami admitting BOD was "skeletal").

3. The Demand for "Approved Commodities" Found Nowhere in Contract or Law

OBOT claims that it was prevented from moving forward with the project because "the City never identified a single commodity that would be approved." OBOT SOD 66:11-12. To the extent that OBOT believed City pre-approval of commodities was an issue, OBOT was aware of this issue prior to entering into the Ground Lease, barring any claim of force majeure. Trial Tr. 2905:1-20 (Mr. Sanders believed the City, prior to the Ground Lease, to be contemplating reviewing the impact of particular commodities in the regulatory review process). And rather than negotiate a provision authorizing OBOT to delay its deadlines until regulatory uncertainty was resolved, OBOT actually negotiated exactly the opposite: a provision ensuring that OBOT could proceed with the project pending any challenge to the applicability of a regulation to the project. Ex. 68-28 §5.1 ("Tenant shall not be in default hereunder for failure to comply with any Laws … if Tenant is contesting the applicability of such Laws (including Regulatory Approvals) to Tenant or this Lease[.]"). OBOT's proposed Statement ignores this provision, arguing instead that OBOT could not proceed with its planned terminal, and that "OBOT could not build a Terminal that handled other commodities until the City approved those commodities." OBOT SOD at 66 & n.16. OBOT cannot invent a new requirement—that OBOT need not perform until the City "approves" individual commodities—that is contrary to the plain language of this contract, and then fault the City for failing to comply.

With respect to the other evidence, OBOT again tells an incomplete and misleading story. First, OBOT omits its witness admissions that any such request to the City has no basis in either the Ground Lease, or any regulation or law. Trial Tr. 2675:10-18 (McClure). Indeed, OBOT did not negotiate any requirement in the Ground Lease that the City provide such a list of approved commodities to move the project forward. Ex. 68-34-41 §6.2. A demand for a *pre-approved* list would also turn the regulatory review process on its head, as the City's witnesses explained. Trial Tr. 3109:13-18, 3112:2-7, 3117:12-18, 3118:18-3121:10, 3123:8-22, 3124:16-3125:8 (Ranelletti); Trial Tr. 2274:20-2275:6, 2479:24-2480:11, 2480:18-2481:2, 2498:11-15 (Cappio). The City had obligations under CEQA (including to compare any project as actually proposed with the project description reviewed and approved at the last stage in the 2012 addendum), and that state law

would likely have *forbidden* the City to "approve" commodities outside the context of an actual permit application or project proposal from OBOT. For instance, with respect to OBOT's request for what it calls a "simple letter indicating approval of soda ash," OBOT SOD 66:14-15, which the Oakland City Attorney determined could not be issued, Ms. Cappio explained that such a letter was not "part of the standard CEQA review process" and that the City had already been sued under CEQA related to the project. Trial Tr. 2498:11-22; *see also* Cal. Code Regs., tit. 14, §15162, discussed *infra* at 36-38.

OBOT mischaracterizes Ms. Cappio as having admitted that OBOT *needed* feedback from the City regarding commodities in order to move forward with the design of the Terminal, OBOT SOD 65:26-66:21, but Ms. Cappio never said that. To the contrary, she confirmed that the City could not analyze "commodities" in the abstract, but needed to assess *OBOT's plans* for *handling* those commodities with respect to safety, storage, dust control, air pollution, and other issues. Trial Tr. 2479:24-2480:11, 2480:18-2481:2. The City planned to "do an analysis and make sure that the types of systems and operations were concurrently appropriate for the handling of that material as part of the plan check process." Trial. Tr. 2480:18-2481:2. Ms. Cappio had hoped for "a multi-department review" by the fire, environmental services, planning, and building departments because "any commodity would have affected those departments." Trial Tr. 2281:21-2282:1. But in Ms. Cappio's words, "we never got that far" because OBOT never submitted any detailed plans or proposal for the Terminal, as OBOT has admitted. Trial Tr. 2274:20-2275:3 (Cappio); Trial Tr. 1966:4-25 (Morodomi).

OBOT also ignores its representations on this subject during the contract period. OBOT repeatedly told the City *not to analyze particular commodities* because such analysis would be "premature," since OBOT had not yet signed a sublease and the future subtenant had not yet confirmed any commodities:

> [T]here are no confirmed "OBOT Activities" to be "characterized" for *any* commodity, let alone coal … The project simply is not yet at that stage. … At this time, no commodity has been confirmed. Further, as a prerequisite to a confirmed commodity, there must be a confirmed operator of the facility. To date, the legal operator of the facility remains unconfirmed.

Ex. 589-2; *accord* Ex. 598-2 ("We have shared with the City that our expectation previously was for dry bulk commodities, but even that is not a certainty at this point."). OBOT urged the City to wait to conduct any analysis until "the time OBOT submits the full design of the Terminal as specifically proposed to handle a committed commodity[.]" Ex. 589-2.

Consistent with OBOT's repeated representations that it was waiting for its sublessee (rather than waiting for the City), there is not a single piece of documentary evidence that OBOT or its business partners *ever* told the City it could not move forward without a list of approved commodities. Trial Tr. 2082:3-8, 2083:7-15 (Cappio); Trial Tr. 2682:14-21 (Mr. McClure admitting OBOT never told the City in writing that it could not move forward without an approved list of commodities).

In contrast, OBOT's written communications with the City repeatedly represented that the terminal it planned to design needed to be flexible to handle any legal commodity as determined by the market over time as markets shifted. *E.g.*, Ex. 24-1, Ex. 28 (Mr. Tagami: "Given … the need to stay viable for the full term of the 66 year lease, we intentionally sought from the City an industry-standard facility, a multi-commodity bulk marine terminal."). OBOT also told the City prior to entering the Ground Lease that it would be possible to move forward with a smaller multi-commodity terminal project that would handle fewer products but still meet the minimum project requirements. Exs. 64, 562-3; Trial Tr. 464:16-22 (Tagami); Trial Tr. 2435:16-2436:10, 2456:2-11 (Cappio); *see also* Ex. 557. Finally, as discussed *supra* at 19, when OBOT did move forward with its proposed terminal design in September 2018, it did so without ever having been informed which commodities were approved or not. *See* Trial Tr. 1103:18-1104:1 (Mr. Wolff admitting that ITS picked the design pencil back up in 2018 without having received "direction from the city at that point in time as to which specific commodities would be acceptable").

Thus, OBOT's claims that it was *undisputed* that OBOT needed to know from the City "what commodities would be approved" because the "Terminal's design depended on the City's approval of commodities," OBOT SOD 65-66, could not be further from the language of the contract or the other record evidence. The evidence actually established that OBOT agreed to move forward, told the City it would move forward, and could have moved forward with a project

design. Nothing about OBOT's entirely invented commodity approval requirement is an event of force majeure.

4. "Reopening" CEQA

OBOT claims that the City's legal position regarding the potential for further CEQA review of the project, explained at the March 9, 2016 pre-application meeting, somehow "delayed and hindered OBOT's ability to design and build the Terminal[.]" OBOT SOD 63:15-16. OBOT's argument is difficult to discern, but appears to be that "CEQA review was complete," and that therefore any suggestion by the City that further CEQA review could be required was an event of force majeure. OBOS SOD 64:12.[24] That argument is meritless, for several reasons.

First, the evidence was conclusive that OBOT was informed and aware of the City's legal position regarding the potential for future environmental review of OBOT's proposals *prior* to entering into the Ground Lease, barring any claim of force majeure. Exs. 66 (Feb. 11, 2016 letter), 555 (December 8, 2015 letter). OBOT's repetition of the claim that witnesses were "surprised" (OBOT SOD at 67) omits their testimony admitting the City's position was not new—because the City's position here is simply a true statement of the law. Trial Tr. 676:18-677:5, 1435:15-1436:17 (Tagami); Trial Tr. 2620:19-24 (McClure); Trial Tr. 2905:1-20 (Sanders); Trial Tr. 2942:15-22 (Mr. Sanders admitting that CEQA can require further analysis); *see also* Trial Tr. 2371:16-25 (City would have been vulnerable to litigation if it had simply declared that "CEQA was closed"); Trial Tr. 3124:4-3125:19 (Ranelletti explaining CEQA process); Trial Tr. 2423:11-2425:3, 2429:2-13 (Cappio explaining CEQA process). That the issue of further CEQA review was anticipated is further established by its inclusion in both the DA, Ex. 7-25-26 §3.5.1 ("Subsequent CEQA Review"), and the Ground Lease, Ex. 68-29 §5.2.1.

Second, the evidence clearly established that the City's position, consistent with the plain language of the contracts between the parties and the law, was that CEQA would potentially require additional environmental analysis, depending on the project as presented (as was true for

[24] OBOT's ever-shifting arguments repeatedly conflate the separate issues of the application of CEQA to any project proposals, the regulatory requirements for the various types of permitting, and supposed "commodity-by-commodity review." The City addresses each of OBOT's arguments separately.

any of the projects at the Oakland Army Base). OBOT seriously misstates the record by claiming (without citation) that the City "announce[d] at the March 2016 kickoff meeting that it *would require additional discretionary approvals under CEQA on a commodity-by-commodity basis*[.]*"* OBOT SOD at 60:19-21. Even OBOT's witnesses did not say that, admitting that the City talked about the *possibility* of future CEQA review. Trial Tr. 1892:14-17 (Morodomi) (City "mentioned that CEQA *may* need to be reevaluated on a commodity-by-commodity basis") (emphasis added); Trial Tr. 474:21-475:5 (Tagami) (Ms. Cappio said "the city was *considering* a commodity-by-commodity review and *looking at the applicability of reopening CEQA* as a part of that") (emphasis added), 1432:23-25; Trial Tr. 1590:25-1591:8 (McClure) (City stated that "we were… *potentially* having a CEQA process for each commodity") (emphasis added) *see also* Trial Tr. 3152:19-3153:11 (Ranelletti) (the City "mentioned that there is a possibility of CEQA review applying the project as it moves forward during the development review process…We were explaining that the 2012 addendum was finalized. And the project going forward, if there are future actions subject to CEQA based on the development review process and the required permits, that CEQA could apply in some fashion. And the developer believed that CEQA was essentially closed."). And in fact, the City never conducted any further CEQA review of the project. Trial Tr. 2075:2-8, 2284:25-2285:9 (Cappio).[25]

Third, OBOT's claims regarding CEQA being "closed" are predicated on an equally incorrect claim that the 2002 CEQA EIR and 2012 Addendum documents "covered all possible bulk commodities, including coal," OBOT SOD 6:20-22, 64:16, even though that is simply false: in 2002 there was not even a bulk commodity terminal contemplated, and in 2012 the addendum considered two alternatives (Variant A, a working waterfront and Variant B, a research and

[25] OBOT's arguments regarding CEQA are a truly uninterrupted series of misstatements of law and fact. In addition to the above, OBOT claims that the City "contradicted the established rule under the initial environmental study that no further CEQA review was required and breached the City's obligation to rely on the existing EIR." OBOT SOD 64:17-20. This makes no sense. There is no "established rule" that "no further CEQA review was required" when CEQA specifically requires analysis of changed circumstances (OBOT cites no law; the law says otherwise); the "initial environmental study" was obviously complete only *as of that time*, Ex. 1-15-16; and the City could not possibly have breached its obligation to rely on the existing EIR because the City *never conducted any further CEQA analysis*, which in any event was required to rely on the existing EIR *only* to the "extent permissible by CEQA," Ex. 7-25-26 §§3.5.1, 3.5.2.

development park), only one of which included a bulk terminal, and, significantly, conducted no analysis of *any* bulk commodities at all, and did not even mention coal. Ex. 1-18-19, 1-44, 1-58; Trial Tr. 240:18-21 (Tagami); Trial Tr. 2071:12-15 (Cappio).

Fourth, OBOT does not cite any *law* in support of these contentions regarding CEQA being "closed," because that argument is specious. *See* Cal. Code Regs., tit. 14, §15162. OBOT cites the Development Agreement ostensibly as supporting its position, OBOT SOD 63:19-64:11, even though the very provisions OBOT cites specifically contemplate that "Subsequent CEQA Review" is possible. Ex. 7-25-26 §3.5; *see also* Ex. 68-29 §5.2.1 ("Tenant acknowledges…. 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."). OBOT also ignores the uncontroverted evidence that in its internal documents and discussions with the Port from 2016 and 2017 it discussed the possibility of additional CEQA review for the project, directly undermining its claims here that the City was changing anything OBOT did not already know and understand regarding the regulatory regime. Ex. 564-2; Trial Tr. 2629:2-2632:23, 2666:23-2667:16, 2668:14–21 (McClure).

5. Other Permitting Issues for Non-Existent Permit Applications: Discretionary Review per the Oakland Planning Code

Like the CEQA allegations, OBOT asks this Court to endorse allegations regarding "discretionary approvals" that defy the evidentiary record and the law, ignore OBOT's own witness admissions, and cannot possibly be an event of force majeure. OBOT claims that it could not move forward based on the "the City's announcement" at the March 2016 pre-application meeting "that the City *would approve permits only on a discretionary and commodity-by-commodity basis*." OBOT SOD 60:19-22 (emphasis added).

First, OBOT ignores the undisputed documentary evidence and its own witnesses' admissions that it understood the City's position regarding potential discretionary permits for the project prior to signing the Ground Lease. Exs. 66, 555; Trial Tr. 400:18-22, 676:18-25, 1195:11-1197:11 (Tagami); Trial Tr. 1435:15-1436:10 (Tagami confirming that City's position in prior letters was the same issue Ms. Cappio raised at the March 9 meeting); Trial Tr. 2620:19-24

(McClure); Trial Tr. 2836:4-14, 2905:1-20 (Sanders). OBOT also ignores that the DA specifically addresses the required Subsequent Approvals, including a long list of examples that include discretionary permits. Ex. 7-16-17, Ex. 7-25-26 §3.5; Trial Tr. 3114:10-18, 3116:17-3117:11 (Ranelletti). OBOT also ignores that the Ground Lease also addressed this issue, including mechanisms for OBOT to challenge any regulatory approvals. *See* Ex. 68-28 §5.1, 68-29-30 §5.2.1, 68-34 §6.1.3; City SOD 79; Trial Tr. 1197:4-11 (Tagami).

Second, OBOT's witnesses were inconsistent in their description of what the City allegedly said at the meeting, at times appearing to make the stronger assertion that the City claimed "all" permits would be discretionary, and at other times admitting the City said that there were possible discretionary permits that might be required. *Compare, e.g.* Trial Tr. 481:6-11 (Tagami: "[T]he permits were all going to be viewed as discretionary") *with* Trial Tr. 2901:25-2902:6 (Sanders: "[T]he city was exploring other discretionary approvals it could take"); *see* Trial Tr. 2300:1-7 (Cappio: "I remember indicating to CCIG that there may be call for or demand for discretionary reviews, and we would be determining that as we got more detail on the plans."), 2485:14-19 (denying that she said discretionary permits would be required). The City's witnesses credibly explained the contract language in the DA and the law, including the Oakland Planning Code, under which some of the required permits that may be required for the project were designated, by law, as discretionary. Trial Tr. 2367:5-2369:4, 2467:10-22 (Cappio); Trial Tr. 3114:10-18, 3115:20-3118:10 (Ranelletti).[26]

Third, OBOT fails to mention that OBOT conceded the correctness of the City's position that discretionary permits might be required for the project. For example, OBOT's witnesses

[26] Nothing about the DA changed this Oakland law. OBOT's argument that the parties agreed that permits would be ministerial (OBOT SOD 64) misconstrues the language of the DA and ignores the express discussion of additional, subsequent, *discretionary* approvals. Ex. 7-16-17, 7-25-26 §5.3. OBOT states that the DA "make[s] certain decisions ministerial," OBOT SOD 64:5, an assertion which is unsupported and contrary to Mr. Ranelletti's credible testimony regarding permitting. Trial Tr. 3116:14-16 (explaining that most permits "are categorized by ministerial or discretionary in the Oakland Planning Code," not by the DA); Ex. 7-24 §3.4.4 (City has the "*right*" to apply the Construction Codes and Standards to the project "as a ministerial act"). OBOT writes that "[o]ther decisions, including most permit approvals, are ministerial as a matter of City practice and policy even if not under the parties' contracts." OBOT SOD 64:8-10 (citing testimony). The City has never disputed that many permit approvals are ministerial, but it is notable that not a single one of OBOT's seven citations supports its assertion.

admitted that the terminal project would likely require a grading or excavation permit, and that such permits are discretionary. *See* Trial Tr. 2640:1-2642:15 (McClure admitting that a grading or excavation permit would be necessary to construct massive 100 ft. x. 25 ft. x 12 ft. dump pits touching San Francisco Bay), 2645:10-22 (McClure admitting that grading and excavation permits are discretionary under the Oakland Planning Code); *see also* Ex. 7-16-17 (DA contemplates that the project may require subsequent grading permits); Trial Tr. 2368:5-2369:4 (Cappio explaining that grading permits are discretionary, and City anticipated that grading permits would be required); Trial Tr. 3114:10-18, 3116:24-3117:7 (Ranelletti explaining that Subsequent Approvals under the DA, including discretionary permits such as grading, are administered by his Department). These concessions are decisive: it cannot possibly have been force majeure for the City merely to articulate the accurate requirement under Oakland law that some discretionary permits might be required by OBOT's project proposals.[27]

OBOT also makes unsupported arguments regarding zoning. OBOT SOD 15:3, 15:27 (the project's zoning was "disrupted" and OBOT "couldn't rely on the zoning"), 20:2-3 (the City "deci[ded] to…upend zoning"), 60:21 (the "zoning in place for the terminal no longer applied"), 65:10-13 ("the City undermined the…zoning…framework for the Terminal" and failed to "clarify zoning"), 67:12 ("the City wanted to change zoning"). But this is empty rhetoric. There is *no*

[27] OBOT also interprets Ms. Cappio's testimony as having "confirmed that Mayor Schaaf and other political leaders were looking for ways to impose discretionary reviews as a mechanism to preclude handling coal at the terminal," OBOT SOD 63:5-7, and as having failed to deny that "the City would never let the Project be completed so long as coal was a potential commodity," OBOT SOD 63:7-10. But OBOT ignores that Ms. Cappio *immediately* clarified her testimony in responding to OBOT's counsel's leading questions, confirming that the Mayor did *not* say anything about discretionary approvals and merely expressed concern about the project, Trial Tr. 2533:22-2534:14. Ms. Cappio confirmed that "the city was going to accept the fact that, regardless of what happened to the coal lawsuit, that this was an important project for the city and pursued that during my tenure." Trial Tr. 2565:9-12, *accord* Trial Tr. 2507:11-18. Ms. Cappio confirmed that she had no knowledge of whether "[a]s long as coal was a potential commodity to be shipped through the terminal, the political leadership in the city would not let this project be completed." Trial Tr. 2565:14-20. Others confirmed that political leadership had *no role* in the administration or decisions pertaining to the project, evidence which OBOT also omits. Trial Tr. 3257:24-3258:3 (Landreth); 3230:18-23 (Lake); 3168:19-25, 3201:21-3202:3 (Ranelletti). OBOT also mentions an email discussion between City employees regarding discretionary approvals from *May 2015*, *see* OBOT SOD 61:3-18, Ex. 27, and describes that email as "unbeknownst" to OBOT, when OBOT was forwarded that email that very day (long before the Ground Lease). OBOT submitted *no* evidence (because none exists) that this 2015 email resulted in any City actions of any kind, either before or during the contract performance window.

dispute that, as OBOT puts it, "Zoning was … in place." OBOT SOD 64:21. The City's witnesses made this exceedingly clear, in testimony OBOT ignores. Trial Tr. 2254:23-25, 2486:16-19, 2487:3-7 (Cappio); Trial Tr. 3101:17-24, 3154:5-10 (Ranelletti). The contention that by telling OBOT its project may need further CEQA review or discretionary permits consistent with applicable law, the City was changing "zoning" is specious. Moreover, none of OBOT's exhaustive force majeure letters even *mention* zoning, and there is no documentary evidence that it was ever at issue. Zoning appears to be an issue OBOT's witnesses conjured up to explain their failure to act, but the record evidence established that the City's statements regarding potential CEQA and discretionary approvals for OBOT's project proposals had nothing to do with zoning.

Finally, as with CEQA, for purposes of establishing an event of force majeure that rendered actual performance impossible, OBOT has no claim that the City wrongly treated some permit as discretionary or abused its discretion in handling a permit. That is because, again, *OBOT never applied* for a single permit for this project, whether ministerial or discretionary. Trial Tr. 1997:4-19, 1999:13-19 (Morodomi); Trial Tr. 3561:18-22, 3564:9-15 (McClure); Trial Tr. 3148:1-9 (Ranelletti); Ex. 188-1-2.

6. Other Permitting Issues for Non-Existent Permit Applications: the Cappio Memo

OBOT asserts that "[t]he Cappio Memo…delayed the Project[.]" OBOT SOD 66:22. OBOT did not submit any evidence establishing a connection between that memo and any actions impacting the project.

The November 2015 "Cappio Memo" was an internal City memorandum to the Planning and Building Department regarding the process the City would take when processing future OBOT permits, once the Ground Lease was signed. Ex. 61.[28] OBOT undisputedly never applied for any permits. Trial Tr. 1997:4-20, 1999:13-19 (Morodomi); Trial Tr. 3561:18-22, 3564:9-15 (McClure); Trial Tr. 3148:1-9 (Ranelletti); Ex. 188-1-2. As a result, the process envisioned by the Cappio Memo for OBOT's permits never took place. Trial Tr. 2511:15-21 (Ms. Cappio never received the notification contemplated by the memo). There is therefore no conceivable way the

[28] To be crystal clear, the Cappio Memo *contemplated granting OBOT permits*, and nowhere suggested that permits should or would be denied. Ex. 61-2-3.

Cappio Memo could have "delayed" the Project (much less rendered OBOT's performance impossible).

OBOT's litany of assertions regarding the Cappio Memo have no record support. OBOT claims that Mayor Schaaf "confirmed that the initial purpose of the Cappio Memo was delay," OBOT SOD 16:3, but she said no such thing, Trial Tr. 1798:8-23, 1818:15-20, and in any event there is no evidence any "delay" occurred.[29] OBOT states that "the City focused its resources on coal…internally through the Cappio Memo and related strategies….to delay and hinder development of the Terminal," OBOT SOD 57:18-22, but cites no evidence to support that statement, which is false. OBOT similarly asserts, without an ounce of supporting evidence or explanation, that Ms. Cappio "kn[ew] the Cappio Memo would drastically affect Plaintiffs' ability to complete the Project." OBOT SOD 61:24-26. Finally, OBOT cites Mr. Tagami's conclusory and unsupported statement that in his view, the Cappio Memo "without question" delayed and hindered the project. OBOT SOD 66:22 (citing Trial Tr. 432:16-19). That is not credible evidence of City action with any impact on this project.

It bears emphasis that at a high level, OBOT's claims regarding the Cappio Memo make no sense. If the City wanted to "delay and hinder development of the Terminal" through the November 2015 Cappio Memo, OBOT SOD 57:19-22, why did it shortly thereafter *sign a Ground Lease with OBOT to move the project forward and give OBOT the land for the next 66 years*, when it was under no present obligation to do so? Trial Tr. 2437:23-2438:2 (Cappio); Trial Tr. 1040:2-8 (Tagami); *see also* Ex. 553-4. If the City wanted to "delay and hinder development of the Terminal," why did the City grant OBOT two years of tolling and free rent to which OBOT was not entitled? Trial Tr. 3235:6-20. Conversely, if OBOT truly felt that the Cappio Memo was

[29] Mayor Schaaf recalled that the memo was written at some point after an incident where the City Council had not been kept informed regarding permitting for a crematorium. Trial Tr. 1798:13-23. She said nothing about delay, much less about a desire to delay or deny OBOT permits. *Id.* OBOT's unsupported assertion about delay is also contrary to the plain text and to the credible testimony of every witness directly involved with the Planning Department regarding the purpose of the Cappio Memo, which was notification and coordination among staff and City officials on a high-profile project. Trial Tr. 2253:13-16, 2257:3-7 (Cappio); Trial Tr. 3141:18-3143:6, 3145:16-24 (Ranelletti); Trial Tr. 3257:13-3258:11 (Landreth); Trial Tr. 3732:1-11, 3732:12-25 (Lake).

hindering the project, why did OBOT never raise this issue in a *single* piece of correspondence, whether in a force majeure letter or otherwise, at any time after OBOT learned of it in *April 2016*, until after the Initial Milestone had passed? Trial Tr. 2962:18-25. Finally, if OBOT truly felt the Cappio Memo was hindering the project, why did it continue to push its proposed sublessee to fund the project and meet the binding contractual deadlines throughout 2016, well after knowing about this memo? Exs. 604-3, 604-5, 645-14, 770; *see also* Exs. 579, 581, 605. OBOT's story, again, falls apart when confronted with the record evidence.

7. OBOT's Access to City and Port Property to Construct Rail.

OBOT claims that the City failed to "turn over" access to the Rail Right-of-Way property, which constituted an event of Force Majeure. *See* OBOT SOD 68-70, 73-74. As discussed above, OBOT's proposed Statement is factually inconsistent, in that OBOT later contends OGRE had access to the property needed to construct track. *Supra* at 11-16.

First, Plaintiffs *admit* in part VI.E of their proposed Statement that they had access to Railroad R/O/W. OBOT SOD 84-87. In an (erroneous) attempt to prove that they Commenced Construction under the Ground Lease, Plaintiffs write that "[t]he evidence demonstrates that OGRE Commenced Construction of improvements to Lead Tracks No. 1 and No. 2," that "it is uncontested that the work occurred before August 14, 2018," and that "[i]t is also uncontested that the work was in the Outer Claw and included some improvement to Leads 1 and 2, and West of the Wake crossing." OBOT SOD 85:27-86:7. That is correct insofar as OBOT now admits it had the access necessary to start work (and is not correct insofar as OBOT contends it met the minimum project when it *stopped* working far before the deadline, *supra* at 12-13).

The Court could stop its analysis with Plaintiffs' admissions, which defeat this force majeure claim. If it does not, however, the record points to the same conclusion.

To begin with, OBOT *agreed* to take the land subject to ongoing public improvements, thus anticipating that the improvements would be ongoing. Ex. 68-11 §1.1.1. It negotiated no deadline for the completion, and instead negotiated a sole exclusive remedy for the failure to complete—termination—which it indisputably never invoked. Ex. 68-117 §37.9.2(b).

Next, for the reasons explained above, the evidence, including Plaintiffs' admissions, was conclusive that construction of the rail had nothing to do with construction of the terminal. Even if OBOT were right that the City's actions impacted their ability to construct rail, this cannot be a force majeure event with respect to the independently required contract obligation to construct the terminal, for all the reasons explained *supra* at 11-16.

OBOT ignores the only record evidence on the actual timing of the public improvements on the rail right of way, which established that those public improvements necessary to construct track were *done* before 2018. Notwithstanding its direct access to this information, OBOT never provided the Court with any actual evidence of the timing of the completion of the grading and drainage work on the rail right-of-way by the City's contractor (which worked directly for OBOT for five years). The only record evidence, which was uncontroverted, was provided by the City, and showed that the public improvements work on the West Gateway Lead Tracks No. 1 and 2 were done by *2017*. Ex. 777-2. Mr. McClure admitted that schedule was likely accurate. Trial Tr. 3348:21-3349:4.[30] There is not a single document in the record reflecting any concern from Plaintiffs about *access* to the land on which they were to construct track prior to the Initial Milestone deadline.[31]

OBOT's argument also ignores that it did have access to build track and decided to stop. As discussed above, the record reflects that Plaintiffs had access to the Rail R/O/W and were able to construct track on two of the areas designated for Minimum Project Rail Improvements—the

[30] The statements in OBOT's proposed Statement regarding the "survey" needed to confirm the boundaries of the leased land, and access to the BNSF easement likewise do not withstand scrutiny. The survey requirement in section 1.1.1 of the Ground Lease relates to certifying completion of the public improvements, and expressly states that OBOT's obligations under the Ground Lease continue unabated pending completion. Ex. 68-11. OBOT falsely claims that it lacked access to the land in the BNSF easement because of a pre-Ground Lease Memorandum of Agreement (*approved* by OBOT). However, in the very next sentence, OBOT explains (correctly) that "the City owned the land, the City granted BNSF the exclusive right to use the track, and the track was to be constructed by OGRE." *Compare* OBOT SOD 69:22-27 *with* OBOT SOD 70:2-3. This is also what Ground Lease says, *in the same place where OBOT agreed to construct that track*. Ex. 68-32 §6.1(b)(1). None of these factors was a barrier to Plaintiffs' ability to construct at least one of the Minimum Project Rail Improvements by the Initial Milestone.

[31] The first time Plaintiffs raised the issue of rail access was August 21, 2018, one day after the City notified OBOT it had not met the Initial Milestone. Ex. 189-4-5; Trial Tr. 3377:10-3378:14 (McClure).

BNSF easement, and the Outer Claw—before Mr. McClure ordered IRC to stop building track. Trial Tr. 756:17-757:16, 758:11-17, 758:11-759:6 (Stotka); Trial Tr. 3714:12-16 (admitting he told Mr. Stotka to stop building track); Ex. 837; Ex. 783 (Tagami to Cappio in 2016: "private rail work has been underway for the last few months"); Trial Tr. 3351:18-3352:6 (McClure admitting work referred to by Mr. Tagami on Port property paid for by OGRE); Trial Tr. 3976:11-3977:13 (Lake); *supra* at 12-13. Likewise, as discussed above, Plaintiffs fail to account for or explain their own agreement in the June 2018 OGRE Sublease to put off any of OGRE's responsibility with respect to the rail until many conditions were met, including a successful application to the STB for common carrier status, which could take years. Ex. 162-7 §2.2(a); *supra* at 13.

With respect to the Port's land, OBOT also ignores important record evidence. OBOT's objection that they were never provided with their own *special* easement to construct track on the Port property ignores the evidence that (1) the plain terms of the temporary construction easement granted access to the City *and its agents*, including "tenants," to construct track, Ex. 780-1; (2) OGRE was directly involved in the negotiations that led to the granting of the easements, Trial Tr. 2762:21-24, 2763:2-9 (McClure); and (3) neither OBOT nor OGRE ever requested access to the land pursuant to the easement. Trial Tr. 2777:19-2778:3; 2779:8-11 (McClure). OBOT also ignores the City and Port testimony that OBOT/OGRE had access through these construction easements. Trial Tr. 3938:14-17 (Lake); Trial Tr. 3784:1-18, 3785:9-12, 3785:20-3786:20 (Wan).

Finally, Plaintiffs seriously misrepresent a key 2018 e-mail from City staff to Ms. Lake, responding to her inquiry regarding what work had been performed by OBOT/OGRE leading up to the Initial Milestone deadline, which was then approaching. OBOT appears to believe that email states that OBOT/OGRE met the Minimum Project Rail Improvements when *it states exactly the opposite*. Ms. Lake asked her staff whether OBOT had constructed any of the five Minimum Project Rail Improvements (because she was trying to understand, reasonably, what had been done vis-à-vis the upcoming deadline). Mr. Monetta responded that OBOT had built some track on Lead Track *No. 2* in the West of Wake area. Ex. 847-1. Then, because Lead Track *No. 2* in the BNSF Easement in that area is *not a Minimum Project Rail Improvement*, Mr. Monetta explained *that track is not reflected on the drawing in Ex. 6.1-B* (which is the location of

the Minimum Project Rail Improvements). Mr. Kennedy confirmed that Mr. Monetta was correct, and confirmed that the City's public improvement work out there was complete (as of May 2018) except for the Industrial Drill Track. *Id.* This e-mail exchange thus confirms that public improvements were complete; that OBOT had access; and that the track that OBOT/OGRE built did not qualify as one of the five Minimum Project Rail Improvements for the Initial Milestone, as Ms. Lake's testimony likewise confirmed. Trial Tr. 3926:25-3927:9, 3942:1-5, 4102:13-4107:17 (Lake).[32]

8. The Rail Access Agreement Had Nothing to Do With Construction

OBOT's eighth force majeure claim, that the City failed to use commercially reasonable efforts to enter into the RAA with the Port, is also a red herring. OBOT argues that the inability to finalize the RAA by the Initial Milestone "delayed and hindered" its ability to perform because it prevented OBOT/OGRE from accessing Port property and because the RAA was essential to *construction*. OBOT SOD 80.

First, OBOT entered into the Ground Lease fully aware that the City and Port had not completed negotiations. If Plaintiffs were concerned that the absence of the RAA would derail the project entirely, they were free at the time to negotiate a contingency for construction, or to even negotiate a deadline by which the RAA would be complete. Instead, they did not, and negotiated only the right to exercise their sole and exclusive remedy: the right to terminate the contract (which OBOT never invoked). Ex. 68-31 §5.2.3(a).

The absence of the RAA had no impact on Plaintiffs' ability to construct track. The plain language of the Ground Lease describing the RAA does not mention construction at all; instead, it states that the RAA will provide definitive agreement regarding use rights, service provisions, and rates for service. Ex. 68-31 §5.2.3(a). Mr. McClure admitted that the Ground Lease says nothing

[32] As discussed further below, this mistaken interpretation of this e-mail factors heavily into OBOT's contentions that the City acted in "bad faith" by calling OBOT in default because the City supposedly *knew* OBOT had met part of the Minimum Project for Rail. *Infra* at 63-68. But this ignores the language of the email, the language of the contract describing the location of these improvements, and Ms. Lake's testimony entirely. Ex. 847; Ex. 68-32 §6.1(b)(i); Trial Tr. 3926:25-3927:9, 3942:1-5, 4102:13-4107:17 (Lake). There is no support, at all, for the contention that the City "knew" that OBOT had constructed part of the Minium Project Rail Improvements, because it had not, notwithstanding having access and every opportunity to do so.

about construction. Trial Tr. 3385:20-3386:2. The CSA between the City and the Port likewise establishes parameters for the RAA, Ex. 3-17-18 §11.0, separately and apart from the section in which the City and Port agreed to temporary construction easements on each other's property. Ex. 3-13-14 §6.07(a). The CSA parameters for the RAA relate to the City's access to the *Port's* rail terminal, and again do not reference access for construction purposes. Ex. 3-17-18 §11.0. Mr. McClure also agreed with that interpretation of the CSA. Trial Tr. 3386:3-3387:23. In short, by the plain language of all of these agreements, and by Mr. McClure's admissions, the RAA was not necessary for Plaintiffs to construct the Minimum Project Rail Improvements. And, as already demonstrated, *supra* at 43-46, Plaintiffs had access to the Port's property and were able to construct track on that property regardless of the RAA.

Plaintiffs' witness testimony established, at best, that the RAA would be needed for the eventual *operation* of the project. *See, e.g.*, OBOT SOD 80:21-23 ("[U]nlike the City's temporary construction easements, the RAA was to include long-term use easements to ensure that the rail, once constructed, could actually be used"); OBOT SOD 81:9-11 ("[T]imely completion of the RAA was necessary so that OGRE could accurately quote rail rates and prepare for service"). OBOT provided no actual link between the purposes of this agreement, as intended by the City and Port, and construction because as its witnesses admitted, these operational access issues had no bearing on Plaintiffs' ability to construct the track they agreed to build.

Plaintiffs also seriously misrepresent the record evidence regarding the complexity of the RAA negotiations and the City's ongoing and sustained efforts to reach an agreement, including by ignoring their own and their counsel's participation at the invitation of the City. *Contrary* to their representations, OGRE participated in the RAA negotiations, was well aware of the complexity inherent in negotiating the RAA, and was aligned with the City on several issues related to the agreement. *See* Exs. 727, 720, 719, 728 (discussion drafts of the RAA exchanged with Plaintiffs); Ex. 734 (Marc Stice summarizing outstanding issues preventing finalizing the RAA in March 2018); Trial Tr. 3453:11-3454:23 (Mark McClure, after repeatedly refusing to answer, admitting that "on some of these items [in Ex. 734] the City and OGRE were aligned, and some of them were just more complicated and required further discussion."). The record also

reflects that the issues pertaining to a second agreement involving OGRE (the Rail Operating Agreement, or "ROA") became intertwined with the RAA and complicated by issues raised by OGRE, which OBOT ignores. Trial Tr. 3810:10-3811:15 (Wan). And the record further reflected significant delays on OGRE's part in moving the ROA and RAA negotiations forward, which OBOT also ignores. *See* Ex. 109 (email from Skyler Sanders to Port apologizing for delay in responding to ROA draft); Ex. 160 (June 20, 2018 email from Skyler Sanders requesting an RAA meeting "for the end of August").

9. 2018 Third Party Permits/Approvals (BCDC Fence Permit and STB Rail)

OBOT's attempt to blame the City for delays in their ability to obtain third-party approvals and permits, from both BCDC and the STB, again fails to address the pertinent record evidence. That evidence establishes that the City fully cooperated with OBOT and OGRE in OGRE's efforts to obtain a BCDC fence permit, and that OGRE chose to delay its (unnecessary) STB filing for years without justification independent of any action by the City. Moreover, neither of these issues had anything to do with OBOT's actual ability to construct either the terminal or the rail.

A. *BCDC fence permit*. OBOT did not need the OGRE fence permit to construct either the terminal or the rail, Trial Tr. 1998:16-1999:7 (Morodomi), so this cannot be a force majeure event delaying compliance with the Initial Milestone.

In addition, Plaintiffs attempt to cast their ultimate failure to obtain a fence permit from BCDC as reflective of the City's purported interference by ignoring relevant testimony and the documentary record. OBOT SOD 67-68. The truth is that OBOT's own delay prevented the Burma Road fence from being built. OBOT was aware as early as 2014 that the property would need to be fenced, and knew as early as June 2017 that it would be responsible for obtaining permits and building the fence. Trial Tr. 1933:17-1934:8 (Morodomi). Nonetheless, OBOT/OGRE did not even *start* the process of obtaining the required fence permits until July of

2018.[33] Trial Tr. 1935:19-21 (Morodomi); Ex. 458. When approximately one month before the Initial Milestone OGRE did finally start the fence permit process, the undisputed record showed that the City fully cooperated. OBOT ignores this record entirely.

Specifically, the City promptly informed OGRE of the outstanding items and next steps that were needed to obtain the permit. Ex. 459. The City then *approved* OGRE's fence permit plans for submission to BCDC the same day OGRE provided those materials, Exs. 460, 462, and confirmed that the plans complied with zoning requirements a week later, Ex. 463. The City then *approved* OGRE's building permit application, pending submission of a Waste Reduction and Recycling Plan. Ex. 667. OGRE failed to obtain approval of that plan until January 2019. Ex. 271. Ultimately, the first time OGRE attempted to pull the finalized fence permit was January 2019, well after the contract had been terminated. Trial Tr. 2012:9-20 (Morodomi). The record was conclusive that Plaintiffs' delays in starting the application process and obtaining all the required pieces of the application, not the City's actions, are what interfered with BCDC approval.

b. *STB filings*. Plaintiffs once again disregard their own delays while mischaracterizing the record. OBOT acknowledges that OGRE sought STB approval in 2015, OBOT SOD 82, but fails to mention OGRE's almost three-year delay in returning to the STB after it previously withdrew its 2014 and 2015 notices of exemption. *See* Ex. 52 (withdrawal of 2015 Notice of Exemption), Ex. 155 (2018 Petition for Declaratory Order). This three-year delay cannot be blamed on the City, so Plaintiffs simply ignore it.

Plaintiffs *argue* that "OBOT and OGRE could not proceed until it had all approvals in place." OBOT SOD 83. But there is no evidence supporting that statement—nothing in the Ground Lease required STB approval, OGRE could have operated like its affiliate WOPR without any common carrier status, Trial Tr. 786:21-788:9 (Stotka), and OGRE told the Port that it was

[33] Plaintiffs argue that the reason they waited until the summer of 2018 to apply for the fence permit is because the public improvements were still ongoing. OBOT SOD 67. Nothing but self-serving testimony supports that assertion, and Ms. Morodomi admitted that the permit could have been obtained even if public improvements were still underway in the West Gateway Right-of-Way parcel of land. Trial Tr. 1935:3-6.

petitioning for common carrier status to increase its leverage in the federal litigation. Trial Tr. 3373:12-3374:11 (McClure). OGRE built private track previously in 2016 without any STB authorization, as Mr. Tagami explained to Ms. Cappio. Ex. 783. Further, Mr. Stotka was laying track for OGRE in 2018 when Mark McClure told him to stop construction until STB approval was obtained, clearly demonstrating that track could be built without STB approval. Trial Tr. 1863:20-1864:16, 1864:22-24 (McClure).

All the record shows is that OGRE made the decision, for business reasons, to seek STB authorization, and OGRE's decisions for business reasons to pursue STB approval are not evidence that such approval was actually needed. The only contract that required STB approval prior to building track was the OGRE Sublease between OBOT and OGRE, which delayed OGRE's responsibility to build track until OGRE obtained common carrier status. Ex. 162-7. That was a choice made by Plaintiffs, not a requirement imposed by the City.

When OGRE did finally return to the STB, in late May 2018, the Initial Milestone was already fast approaching. Ex. 155. OGRE had changed its position before the STB, which raised serious questions at the agency about OGRE's plans and intentions and delayed the agency's decision regarding OGRE's petition. Ex. 752. None of this supports Plaintiffs overblown contention that the City's actions somehow delayed the STB proceeding, which never would have resulted in a ruling for OGRE prior to the deadline given OGRE's delays in filing.

10. Third Party Funding for the *Public* Wharf Improvements (ACTC)

OBOT claims that "the City's failure to cooperate with OBOT to secure third-party funding for the Project," referring to ACTC funding, is yet another force majeure event. OBOT SOD 59:3-5. OBOT again encourages the Court to simply ignore the actual record evidence.

First and foremost, OBOT's argument centers on supposed actions taken by City Councilmember Rebecca Kaplan and Mayor Schaaf regarding ACTC funding in *July 2015*, which cannot be force majeure under the much later-signed Ground Lease. OBOT SOD 59. Indeed, OBOT *knew* that no ACTC funding had yet been obtained, and *waived that condition* to the Ground Lease. Ex. 561-25 §5.3.1(b); Ex. 68-10 (Recital D); Trial Tr. 1173:10-1177:11.

Further, on the merits, there is no dispute that the ACTC funds were for *public* wharf improvements, Trial Tr. 3477:21-23, 3478:17-25 (McClure), Trial Tr. 1174:12-21 (Tagami), and there is no evidence at all linking those funds with construction of the *private* improvements for the terminal or the rail.

Regardless, OBOT's contention that the City "withdrew" its request for funding is fiction. Trial Tr. 1801:6-8 (Mayor never asked ACTC to withhold any funds); Ex. 854 at 79:06 (Cole: the funds "just…didn't get approved"). The record shows that in July 2015, notwithstanding its concerns about coal at the West Gateway, the City applied for public funds for the project from ACTC, including $22 million in funds for the public wharf improvements on the West Gateway. Ex. 42; *see also* Ex. 561-20 §5.1.2 (making clear that the $22 million was for "Public Wharf Improvements"); Trial Tr. 3477:21-3478:25. ACTC allocated more than $40 million to the project, but declined to allocate the $22 million for public wharf improvements for reasons that are not in the record. Ex. 854-26 at 80:20-24, 104:21-22 (Cole designations).

It is undisputed that the City then *re-applied for the $22 million* in 2016. Exs. 711, 716; *see* Trial Tr. 1801:6-8 (Schaaf); Trial Tr. 2514:14-25 (Cappio); Trial Tr. 3481:23-3484:6 (McClure). There is no evidence the City did anything other than diligently seek ACTC funding, and there is also no evidence that the lack of ACTC funding interfered in any way with OBOT's ability to commence construction. Ex. 854 at 80:12 (Cole: City made its best efforts to secure ACTC funds).[34]

E. OBOT's Uncontroverted Actions, Particularly in the Summer of 2018, Demonstrate a Lack of Diligence that is Fatal to Any Claim of Force Majeure Post-Federal Decision

There is no dispute, and indeed, OBOT concedes, *see supra* at 19, that it did not take steps required of it by the Ground Lease (submitting Construction Documents for review, obtaining

[34] Tellingly, virtually the entire "evidentiary" basis cited for OBOT's force majeure claim is citations to OBOT's own force majeure letter rather than any credible evidence. OBOT SOD 59-60 (repeatedly citing Ex. 191).[34] Although that letter was admitted as a business record, the Court made clear on the record with respect to similar letters that the Court would consider them only as notice, not as support for their factual allegations. Trial Tr. 4092:19-21, 4093:9-13, 4094:1-6. The only trial testimony cited supports the City. Trial Tr. 1775:2-9 (Mayor Schaaf confirming she told ACTC that the City's concerns about coal did "not affect the city's request for ACTC grant funding for the public infrastructure improvements at the army base").

permits and regulatory approvals, see Ex. 68-34-41 §6.2) to move the terminal project review process forward prior to the federal decision. That lack of diligence for over two years is fatal, *see supra* at 25-26. Even after the federal decision, OBOT still failed to exercise the diligence required to claim an extension on its performance via force majeure. The City conclusively proved that, instead of moving the project forward in the summer of 2018, OBOT kept dancing along with the Siegel Shuffle to put more money in Mr. Tagami's pocket. There is no dispute that while the land lay idle and the pencils remained down, Mr. Tagami and his fellow CCIG owners insisted on collecting millions in payments to themselves, none of which was spent on design or construction, before agreeing to move forward.

Indeed, Plaintiffs' account of events that it asks this Court to endorse completely overlooks—and seeks to erase—any mention of the financial choices they made during the contract performance period that led to the termination of the Ground Lease. OBOT SOD 16-17, 19-21. Although John Siegel was OBOT's only proposed or actual sublessee/terminal operator from 2014 through the termination of the Ground Lease, he is conspicuously absent from (other than a single mention) OBOT's proposed Statement. OBOT SOD 10:1-3. Similarly, IES, Mr. Siegel's second entity created for the project and OBOT's second proposed sublessee, is not mentioned at all, despite the significance of the proposed, then nullified, IES sublease to the events in 2018.

The relevant facts are undisputed and entirely ignored by OBOT: Mr. Siegel took TLS through *ten option extensions* without ever signing a sublease. Exs. 514, 517, 549, 574, 590, 618, 620, 630, 632, 637, 638; Trial Tr. 1265:12-15, 1266:10-17 (Tagami). Mr. Tagami canceled the CCIG-TLS development management agreement in 2017 because Mr. Siegel owed too much money, but continued to extend Mr. Siegel's option. Ex. 117 (DMA Suspension Agreement); Ex. 957-27-28 at 83:5-9, 83:11, 83:13-15, 83:18-24 (Rosen); Trial Tr. 1245:12-1247:8 (Tagami). Mr. Tagami and his partners extensively debated whether to walk away and investigated other options, but always came back to Mr. Siegel. Exs. 570, 605, 607, 608, 609, 151, 639, 652; *see also* Ex. 151 (Tagami to Siegel: "Others are knocking."). Mr. Tagami explained, early on, that he knew they were trading their reputation for the "TLS revenue stream" (Ex. 580), and he never let

go of that hope. Mr. Siegel, for his part, also came back every time, for years after the City passed the coal Ordinance. Exs. 604, 618, 620, 630, 632, 635, 637, 638; *see also* Ex. 610-2 (Siegel to Tagami: "I want what is best for you and will support whatever direction you guys ultimately choose. That said, I know that I am uniquely situated and experienced to greatly assist you[.]") Mr. Tagami and his partners gave Mr. Siegel yet another chance in 2018 with the IES sublease (Ex. 137), under which Mr. Siegel assumed OBOT's responsibilities for the terminal (Ex. 645), only to have OBOT later declare it "null and void" in light of Mr. Siegel's failure to pay. Ex 152.[35]

As of 2018, Mr. Siegel was still eager to proceed. Ex. 648, 652. But even after the federal decision, Mr. Tagami did not agree to a new sublease with Mr. Siegel. Trial Tr. 1284:2-6, 1308:8-1310:23. That was because Mr. Siegel still owed Mr. Tagami millions of dollars, and Mr. Tagami was determined to receive those payments and more before moving forward. Ex. 957-14 at 51:25-52:8 (Rosen); Trial Tr. 1312:24-1314:16; 1328:17-20 (Tagami). Thus, he spent the summer of 2018 negotiating payments he was to receive from Mr. Siegel, including additional millions of dollars in exclusivity payments (which he did receive) and a $5,000-$10,000 daily late fee for delays in closing a sublease. Exs. 158, 173, 201. Then, when Mr. Siegel did not have the funds himself to purchase the sublease at the price Mr. Tagami demanded, OBOT spent the remainder of the summer and into the fall helping Mr. Siegel secure third-party financing to pay Mr. Tagami the "take down" payment. Exs. 158, 173, 201; Ex. 957-65 at 185:12-22, 186:8-11, 186:13 (Rosen); Trial Tr. 1320:2-23 (Tagami).

None of the work on the project would resume until the sublease was signed, which required Mr. Tagami to be paid by Mr. Siegel. Ex. 957-65 at 185:12-22, 186:8-11, 186:13. During the time period that OBOT should have been working on project design and construction, Mr. Tagami delayed the sublease until he was paid. Ex. 957-37 at 107:7-9, 107:11-14.

[35] Notwithstanding the City's requests for information regarding IES, Exs. 145, 654, none of this was shared with the City, including Mr. Tagami's declaration that the IES sublease was null and void, until months later. Ex. 152 (internal email declaring sublease null and void in May 2018); Ex. 237-2 (September 28, 2018 letter to City telling it to consider IES sublease "null and void"). Understandably, the City explained that none of this gave it any confidence in Mr. Tagami or Mr. Siegel's ability to carry this project through. Trial Tr. 3742:16-22 (Lake).

Throughout this time *no work was being done on the project*. Ex. 145, Ex. 654; Ex. 957-65 at 186:15-24 (Rosen); Trial Tr. 1995:9-1997:3 (Morodomi).

Moreover, at no point during all of these negotiations with Mr. Siegel or his funders did Mr. Tagami ever say that OBOT could not move this project forward because of actions by the City.[36] And, Mr. Tagami repeatedly told Mr. Rosen, the individual managing the potential investments, the City *wanted* the project to move forward, it just did not want coal to be shipped (an admission *directly* contrary to Mr. Tagami's testimony that the City blocked the entire project in light of its opposition to coal). Ex. 957-66-67 at 200:11-16, 200:25-201:11, 203:8-19 (Rosen).

Thus, Mr. Tagami's pattern of prioritizing personal financial gain over advancing the project continued after the federal ruling. OBOT claims now that, after the federal court decision, the City's "campaign to prevent OBOT from applying for a permit continued." OBOT SOD 17. This is fiction. There is no evidence of any action or communication by the City preventing OBOT from applying for any permit, during this time period or any other. *Supra* at 41-43. City witnesses testified that nothing prevented OBOT from submitting plans for landlord approval, and that they expected and repeatedly asked Mr. Tagami to do so. Trial Tr. 3722:14-19 (Lake); *see also* Trial Tr. 2272:5-9, 2494:3-9 (Cappio). And multiple City witnesses testified that the responsibility to propose the project for approval fell entirely to OBOT (under the Ground Lease and regulatory process), and in the absence of a formal submittal under the Ground Lease from OBOT, there was nothing they could do to move the project forward Trial Tr. 2272:5-9, 2494:3-9 (Cappio); Trial Tr. 3151:6-15, 3155:6-20 (Ranelletti).

Moreover, Mr. Tagami was fully aware of the approaching Initial Milestone deadline, and aware that Mr. Siegel's financial precarity placed any potential deal in jeopardy. Trial Tr. 1318:23-25, 1314:11-16 (Tagami); Ex. 206. But the project remained on hold until Mr. Tagami got paid, and until the sublease was finally signed and submitted to the City—well after August

[36] And, when one of the potential funders for Mr. Siegel's obligations under the proposed sublease suggested that they just reach out and discuss the status of the project with the City directly, Mr. Tagami categorically refused and Mr. Siegel suggested the funder be fired. Ex. 204. Mr. Tagami subsequently concealed the City's September 21, 2018 Notice of Unmatured Event of Default from another lender (Autumn Wind) to secure the $6 million take down payment. Exs. 668, 231, 233; Ex. 957-55-56 at 158:17-20, 157:19-22, 957-58-59 at 164:4-16, 165:4-12 (Rosen).

14, 2018 had passed and the City had notified OBOT that it needed to cure its failure to Commence Construction of the Initial Milestone**.** Ex. 217.

Thus, the delay in advancing the project from May to September 2018 was entirely OBOT's fault. None of these facts are refuted, explained, or even acknowledged in Plaintiffs' proposed Statement. While OBOT might want to overlook them, OBOT's failure to exercise diligence is fatal to any force majeure claim.

F. The Ordinance and OBOT's Litigation Were Anticipated Events, Even After Which OBOT was Able to Perform, and Cannot Be Force Majeure

The above sections reveal the total lack of any evidentiary support for OBOT's allegations regarding the City's supposed scheme to block this project from 2016 through 2018.

All that remains to discuss is the coal Ordinance and Resolution. Force majeure claims based on that law are foreclosed by res judicata, as set forth *infra* at 58-62. But even setting aside that fundamental flaw, the City's legislative act was not an event of force majeure because it was entirely anticipated by the parties, accounted for in the very language of the contract at issue, and in no way prevented OBOT's performance.

OBOT's proposed Statement asks this Court to rewrite the terms of the Ground Lease to grant OBOT an extension pending the federal litigation that OBOT did not and could not negotiate into the Ground Lease. There is no dispute that the parties anticipated, at the time of contract, that the City would enact legislation regulating coal. OBOT SOD 13:1-3 ("OBOT was aware that the City maintained its right to regulate the transport of coal"). Indeed, they planned for the prospect that such legislation would be enacted, and then challenged by OBOT, in the language of the Ground Lease itself, Ex. 68-28 §5.1, and acknowledged their respective positions in the Third Amendment to the LDDA signed the very same day. Ex. 561-40-41 §13. With this shared knowledge in mind, the parties negotiated the specific timeframes for the Initial Milestone and tolling, Ex. 68-17 §1.7.2, 68-33 §6.1.1.1, giving OBOT two-and-one-half years to perform, as well as all the other provisions of this contract that reflected the parties' desire to move this project forward. *Supra* at 17-18.

Knowing full well that regulation of coal and ensuing litigation over its applicability to the project under Section 3.4.3 of the DA was on the horizon, if OBOT had wanted its unambiguous performance obligations and deadlines to be delayed in the event of these anticipated events, it knew how to negotiate such a clause in the Ground Lease. But it did not.[37] OBOT did not negotiate a provision that tolled deadlines during the time that litigation was pending. OBOT did not negotiate a provision that excused its performance if the City went forward with legislation that a court subsequently held could not be applied to the project. It did not negotiate any such extension of the contract deadlines because the entire point of the parties' decision to move forward with the Ground Lease in early 2016 was to agree to build the terminal notwithstanding the coming dispute over the City's authority to enact legislation and apply it to the project. The Ordinance and Resolution, anticipated at the time of contract, cannot be events of force majeure under the plain meaning of that term as used by the parties in the Ground Lease.

Thus, regardless of which party won the eventual federal case, the parties anticipated these events. The City has previously explained that section 5.1.1.2 of the Ground Lease precludes OBOT from claiming excuse based on "any present or future Law, whether foreseen or unforeseen, and however extraordinary," which necessarily includes the coal Ordinance and Resolution. Ex. 68-29 §5.1.1.2; *see* City's SOD 93-94. But even if this Court were to disagree, the Force Majeure provision cannot be read to include events the parties plainly anticipated, including the challenge to the applicability of the law to the project (which necessarily presupposes the understanding that one party or the other would win). And there is no dispute that it *was* anticipated that the City would pass a coal ordinance *and* that OBOT would dispute its applicability under section 3.4.3 of the DA. That is conclusive for purposes of force majeure, under longstanding precedent.

OBOT invites this Court to revise the deal it reached in 2016 in order to grant it a delay that it never would have been able to negotiate: to wait out the litigation challenging the

[37] *See, e.g.,* LDDA "Litigation Force Majeure" provision, Ex. 378-62 §10.1.3; *see also* Ex. 645-22 (IES sublease extract, drafted by CCIG, acknowledging that "Litigation is not a Force Majeure event" in force majeure provision that contract required to be the same as the Ground Lease).

ordinance before moving forward. OBOT resorts to grounding its plea to rewrite this contract in arguments regarding fairness, but the parties assessed the fairness of their respective positions in 2016 and chose their path forward. The plain language of the contract makes clear that both sides agreed to assume the risk that the other would win, and that the terminal would be built in the wake of that decision: If OBOT prevailed, the City's law prohibiting the handling of coal could not be enforced at the West Gateway; and if the City prevailed, it could. Either way, the terminal would be built. OBOT simply did not comply with that deal.

In fact, the City even granted OBOT the express right *not* to comply with the challenged law during the pendency of any challenge (Ex. 68-28 §5.1), which forecloses any argument that OBOT could not have moved forward, even with a facility designed to ship coal. OBOT had the contractual right to put the City to the test, but it had to take the steps required by the contract, which it did not do.

In addressing the reasons why the Ordinance is an event of force majeure, OBOT's proposed Statement largely focuses on litigation *resources*. OBOT SOD 56-58. But OBOT did not even attempt to show (or even to argue) that money spent on the litigation impacted its ability to perform. It concedes that money was not the issue. OBOT SOD 17 n.6. Otherwise, OBOT's only substantive explanation as to why the Ordinance and Resolution impacted its ability to perform during the time it was in effect (July 2016-May 2018) was the following:

> **As the City has acknowledged, OBOT needed to know the commodities that would be approved for the Terminal before it could complete design.** (RT 220:4-18, 292:8-17, 1076:6-12, 1602:21-1603:2, 2336:10-17.) **That issue could not be resolved until after OBOT I.**

OBOT SOD 58:11-13. This language reveals that OBOT has abandoned several arguments that it maintained throughout this litigation, namely: the argument that the Ordinance itself prevented construction; the argument that the Ordinance cast an "overburden" that prevented funding that was necessary for construction; the argument that the Ordinance interfered with its ability to sign a sublease; and the argument that the Ordinance interfered with its only financially viable long-term business prospects for the terminal (shipping coal). All of these arguments are waived.

Thus, OBOT argues *only* that the uncertainty caused by the litigation over the Ordinance as to commodities that "would be approved" meant that OBOT could not "complete design." OBOT SOD 58:11-13. But what OBOT means is that it *should* not have had to move forward with design in light of the City's actions affecting the eventual market for commodities—not that it *could* not do so. In fact, OBOT *already had a design*, the 2015 BOD, that it contends contained schematic drawings for a multi-commodity terminal. How does the Court know that OBOT believed the BOD contained such drawings? It submitted that very design for landlord approval in 2018, after the performance deadline. Exs. 238, 239, 240. OBOT also admitted it had the funds to self-fund the entire Minimum Project (including design). Trial Tr. 1267:22-25, 1268:19-21, 1269:11-16 (Tagami). *No uncertainty* prevented OBOT from actually submitting designs to the City to start the process of review at any time between February 16, 2016 and August 14, 2018.

OBOT fatally ignores the language of the contract it negotiated. OBOT had the right and the means to put the City to the test: submit the project, move it forward, and make the City follow the laws applying to regulatory review. But it chose to wait until a specific prospective sublessee was willing to front the money for the project (after paying OBOT many millions for option and sublease rights), and that sublessee was never willing or able to do so prior to the performance deadline. OBOT cannot blame the City, or its attempt to enact health and safety legislation, for that choice.

III. Res Judicata Bars OBOT's Claims for Delay Based on Events Prior to June 2017 including the Ordinance and Resolution

OBOT's proposed Statement confirms that its breach of contract claims are now limited to the assertion that the 2018 contract termination breached the Ground Lease (OBOT SOD 48-84), and led to related *subsequent* breaches with respect to the requested NDAs and estoppel certificates (OBOT SOD 87). OBOT has therefore abandoned any other breach claims asserted in this litigation based on pre-termination acts by the City, eliminating the need for the Court to address any res judicata implications for those breach claims.

The res judicata question that remains for the Court to resolve is whether OBOT's force majeure excuse arguments, seeking contract remedies for actions of the City arising prior to and during the federal litigation, are foreclosed under California law. For the reasons explained below, OBOT cannot now seek relief from this Court for alleged "delays" in performance arising from events prior to June 2017, including but not limited to the City's Ordinance and Resolution.

OBOT concedes, as it must, that in deciding whether two causes of action are the same so that res judicata applies, California courts ask whether the same primary right is at issue in both cases. OBOT SOD 31-32. And OBOT acknowledges that a primary right is the "'right to be free from a particular injury, regardless of the legal theory on which liability for the injury is based.'" OBOT SOD 32:1-3. Despite that concession, in asking this Court to hold that the federal case did not involve the same primary right as this case, OBOT invites error by relying exclusively on differences in the *legal theories* asserted, arguing that "*OBOT I* was … a narrow case, limited primarily to review of an administrative record for sufficiency of evidence" and based solely on a provision of the DA. OBOT SOD 35:19-23.[38] But what matters here is that OBOT sued based on *the injury inflicted when the City enacted the Ordinance and Resolution*, and it was obligated to assert all claims challenging that act and related acts, and to seek all relief available for that injury, in the federal lawsuit—not to leave some of its legal claims and remedies for a subsequent state court action.[39]

To avoid res judicata, OBOT protests that it could not have sought relief in the federal case for the effect that the Ordinance and Resolution had on its ability to meet its contractual obligations, because it did not yet know that the City would hold OBOT to its contractual deadline and so any such claim or relief would have been "unripe." OBOT SOD 37. But OBOT makes no showing that such a claim or request for relief would have been unripe. OBOT *did*

[38] This is not even true. OBOT asserted a variety of legal theories, not just breach of the DA. Fed. Dkt. 74 (June 14, 2017) at 31-40. Nor would it matter if it had not; res judicata asks whether claims *could have* been asserted, not whether they were. *See Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 904 ("Even where there are multiple theories upon which recovery might be predicated, one injury gives rise to only one claim for relief.") (quotations omitted).

[39] Indeed, OBOT appears to confuse claim preclusion with issue preclusion when framing what was at issue in the federal case based solely on which legal claims the federal court actually reached and decided. OBOT SOD 35.

initially seek declaratory and injunctive relief from their performance deadlines, and they *did* initially reserve their right to seek damages for the delays to and interference with their ability to move forward with the West Gateway project. The federal court did not dismiss that request as unripe; OBOT itself decided to abandon it.[40]

Having done so, OBOT may not re-raise that request for declaratory and injunctive relief extending its performance deadlines, or seek damages for the delay in its ability to perform. *Mycogen* instructs that a plaintiff must seek all relief for an injury to her primary right in her first lawsuit, even if the need for some forms of relief is only "speculative" and "prospective" at that time. *Mycogen*, 28 Cal.4th at 907; *see also id.* (rule applies "even though the plaintiff was not aware of the particular elements of damage therein sought to be recovered at the time of the pendency of the prior action") (quotations omitted); *Abbott v. 76 Land & Water Co.* (1911) 161 Cal. 42, 48 ("[I]t is no warrant for a second action that the party may not be able to actually prove in the first action all the items of the demand, or that all the damage may not then have been actually suffered."). OBOT is not entitled to rely on assertions that it was unsure that the City would hold OBOT to its unambiguous contract deadlines to excuse its decision to drop this requested relief.

OBOT also urges the Court to incorrectly rest its res judicata ruling on the language of the contract, stating that the Ground Lease allowed OBOT to *wait* to assert a force majeure claim. OBOT SOD 33. Setting aside the question whether that accurately describes the Ground Lease notice provision, the timing of the notice provision is not relevant to whether *res judicata doctrine* allowed OBOT to reserve this claim or relief. Moreover, if anything, the fact that the Ground Lease specifically authorized OBOT to assert a force majeure claim within 30 days of its knowledge of a Force Majeure event—and did not *require* OBOT to wait for a performance deadline or demand—demonstrates that nothing would have prevented OBOT from seeking in the federal case declaratory or injunctive relief finding that the Ordinance and Resolution, or related

[40] Thus, *Ass'n of Irritated Residents v. Dep't of Conserv.* (2017) 11 Cal.App.5th 1202, 1219-20, which held that dismissal on ripeness grounds is not a final judgment on the merits, is inapposite. The federal court did not dismiss OBOT's requested relief as unripe; the case proceeded to final judgment on the merits.

actions of the City in the federal case, extended OBOT's contractual performance deadlines. *See* Ex. 68-84-85 §16.1. Indeed, OBOT's contention that its claim would be unripe is belied by the fact that it asserted a March 2016 force majeure claim based on the binders, well before its performance was due. Likewise, this contract prohibited OBOT from engaging in "self-help," which means that if OBOT believed the City's actions to be interfering with its contractual rights, it *was* obligated to see relief *prior to its performance deadline*, which also defeats OBOT's "ripeness" assertions. Ex. 68-92 §22.1.

OBOT further asks the Court to conclude that a request for such relief would have been unripe because "[t]he federal court had not yet concluded that the resolution applying the no-coal ordinance to OBOT was invalid." OBOT SOD 37:11-12. But this is patently wrong: a plaintiff *never* knows whether it will prevail on the merits when it decides what to include in a prayer for relief; res judicata does not allow a plaintiff to wait to see if it will prevail in the first lawsuit and then seek relief for that victory in a second one. *See Mycogen*, 28 Cal.4th at 897 ("Under [res judicata] doctrine, all claims based on the same cause of action must be decided in a single suit; if not brought initially, they may not be raised at a later date.").

In concluding that this case is based on a different primary right than the federal one, moreover, OBOT invokes only authority involving a second lawsuit that was based on wholly different conduct than the first, not cases arising from the same or related actions. OBOT SOD 34.[41] And contrary to Plaintiffs' characterization, *Mycogen* did not base its res judicata conclusion on the fact that the defendant had fully repudiated the contract, but the fact that the second suit was based on the same wrongful act as the first. 28 Cal.4th at 895-98.

[41] *See Allied Fire Protection v. Diede Constr., Inc.* (2005) 127 Cal.App.4th 150, 155 (holding res judicata did not preclude subsequent fraud claim based on later-discovered facts showing fraud); *Brenelli Amedeo, SPA v. Bakara Furniture, Inc.* (1994) 29 Cal.App.4th 1828, 1837 ("the right to have contractual obligations performed is distinct from the right to be free from tortious behavior preventing collection of a judgment"); *Sawyer v. First City Fin. Corp.* (1981) 124 Cal.App.3d 390, 402-03 ("breach of contract by failing to pay a note violates a 'primary right' which is separate from the 'primary right' not to have the note stolen"); *Abbott*, 161 Cal. at 48 (rule allowing suits based on later contract breaches "has no application to actions for additional damages on account of some particular breach involved in a former action").

Finally, OBOT demonstrates confusion when it asks this Court to conclude that "a remedy, particularly like the one pleaded here, is not a cause of action under the primary rights approach." OBOT SOD 37:3-4. No one argues that a remedy is a cause of action. Res judicata requires OBOT to seek all potential remedies for an injury in their first case—so here, OBOT had to seek all relief for the Ordinance and Resolution, and related acts of the City, in the federal case, which it did not do. That forecloses OBOT from seeking such relief now via its invocation of force majeure, and so OBOT's force majeure claims cannot be based on events before June 14, 2017.[42]

IV. Plaintiffs' Alternative Claims Also Fail

A. Anticipatory Breach

For the first time, OBOT's proposed Statement limits its anticipatory breach claim to the City's express termination of the Ground Lease as the alleged act of repudiation. OBOT SOD 88. Previously, OBOT had alleged (without support) that the City's actions *prior* to OBOT's performance deadline constituted repudiation; this is now abandoned. This new approach makes OBOT's anticipatory breach claim entirely duplicative of its express breach claim.

Anticipatory breach is a doctrine that allows a plaintiff to sue for breach of contract when its counterparty makes clear that it will not perform without waiting for the counterparty's actual breach. CACI No. 324. That doctrine is completely inapplicable here, where OBOT contends that the City actually breached by terminating the contract: OBOT did not sue prior to the time for the City's performance but rather after, it contends, the City breached.

In any event, like express breach, anticipatory breach requires a plaintiff to establish that "but for the defendant's breach, the plaintiff would have had the ability to perform." *Ersa Grae Corp. v. Fluor Corp.* (1991) 1 Cal.App.4th 613, 625 (cited in CACI No. 324, Sources and Authority). OBOT's failure to establish performance or excuse dooms this claim as well.

[42] As noted *supra* at 58, OBOT has abandoned its breach theories based on acts of the City before the federal litigation. OBOT SOD 3-4, 19, 38. If it had not, the relevant date for OBOT's affirmative breach claims would be May 18, 2018, under estoppel principles previously briefed, when OBOT was still asserting those claims. City of Oakland's Trial Brief on Prior Federal Litigation (Aug. 7, 2023) at 10-11.

B. Breach of the Implied Covenant

Like any other breach of contract claim, OBOT's claim for breach of the implied covenant requires it to prove that it performed or that its performance was excused. *See* CACI No. 325 (second element). Because OBOT has failed to do so, for all the reasons previously set forth, this Court need not go any further. (And if OBOT prevails in showing that its performance is excused, it succeeds on its express breach claim and this claim is moot).

Even if this Court were to address the claim, OBOT again fails to support its assertions with record evidence. OBOT's proposed Statement for the first time focuses the claim on two acts of the City after May 2018.[43] First, OBOT contends that the City's declaration that OBOT was in default for failure to meet the August 14, 2018 Initial Milestone deadline "was not objectively reasonable or valid," and was in "bad faith." OBOT SOD 91. The only basis OBOT gives for its conclusion that the City's determination that OBOT was in default violates the implied covenant is that the City was aware "that Plaintiffs had performed and the City had failed to perform." OBOT SOD 91.[44] This is directly contrary to the record evidence, for all the reasons explained *supra* at 11-16. In particular, to the extent OBOT relies on a City staff email to Ms. Lake addressing OBOT's efforts with respect to rail, as explained *supra* at 45-46, that email

[43] Prior to trial, and before submitting their proposed Statement of Decision, Plaintiffs had not previously identified the basis for their claim for breach of the implied covenant. When the Court asked Plaintiffs to submit an explanation of the City's breaches, they did not include any claimed breaches of the implied covenant. *See* Plfs' July 11, 2023 list.

[44] To the extent that OBOT's claim focuses on the deferral of a substantive response rather than the declaration of default, that in no way could establish a breach of the implied covenant. OBOT identifies no evidence that the short deferral between OBOT's assertion of new force majeure claims on July 30, August 3, and August 28, 2023 and the City's rejection of those claims on September 21, 2018 in order to carefully consider those claims was in "bad faith." First, the City had in fact substantively responded to the only force majeure claim that OBOT had submitted before July 30, 2018—the 2016 letter based on the DA binders—within two weeks of OBOT's notice on March 22, 2016. Ex. 81. The only additional force majeure claim that OBOT had asserted was in July 30 and August 3, 2018 letters purporting to "reiterat[e]" a force majeure claim based on the Ordinance and Resolution (events from two years prior), with no explanation at all for OBOT's delay. Exs. 174, 176. Then, after the City notified OBOT it missed the Initial Milestone deadline, OBOT asserted a litany of additional claims on August 28, 2018. The City responded within a month, on September 21, 2018, having very carefully considered the claims. Ex. 217. Finally, OBOT does not identify any contractual benefit that the City's decision not to respond to that force majeure claims deprived it of, nor could it—since OBOT was not going to meet the Initial Milestone regardless, OBOT was entitled to no response, and the City would have and did reject those claims as non-meritorious in any event.

explains why OBOT did *not* meet the milestone. OBOT entirely misunderstands that evidence.

In any event, this theory plainly duplicates OBOT's express breach claim. "[W]here," as here, "breach of an actual term is alleged, a separate implied covenant claim, based on the same breach, is superfluous." *Guz v. Bechtel Nat'l, Inc.* (2000) 24 Cal.4th 317, 327.[45] OBOT's breach of implied covenant claim based on the City's rejection of OBOT's force majeure claims and declaration of default is "simply duplicative [of her breach of contract cause of action], and thus may be disregarded." *Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1392 (cited in CACI No. 325, Directions for Use).

Second, OBOT now contends that the City's rejections of OBOT's "good faith efforts to cure"—primarily, submitting the 2018 BOD—were also "in bad faith." OBOT SOD 92.[46] But OBOT has offered no evidence at all establishing that in determining that OBOT's actions in September and October 2018 failed to cure its default the City acted in subjective "bad faith." All evidence is to the contrary—that the City's decision was reasonably grounded in OBOT's failure to demonstrate efforts supporting a cure within any reasonable amount of time.

Specifically, the evidence was undisputed that as of September 28, 2018, when OBOT submitted the *same* design plans created by a prior potential subtenant in 2015, couched as a brand-new BOD, OBOT was no further along in developing and delivering the terminal than they had been three years before. Trial Tr. 2026:13-2042:24 (discussing Exs. 672 and 750) (Morodomi). OBOT asks this Court to find that OBOT submitted "updated and revised Schematic Drawings" in September 2018 in response to the City's notice of default (the 2018 BOD). OBOT SOD 20. This is not true. The 2018 ITS BOD contains exactly the same drawings created by HDR that were included in the 2015 TLS BOD, without update or revision. *Compare* Ex. 240-459-493 (2018 ITS BOD, Vols. 1 and 2, Section 15 "Conceptual Drawings) *with* Ex.

[45] OBOT's SOD quotes *Guz*'s statement that "[a] breach of the contract may also constitute a breach of the implied covenant of good faith and fair dealing," OBOT SOD 93, but the sentence that immediately follows clarifies that "insofar as the [defendant]'s acts are directly actionable as a breach of an implied-in-fact contract term, a claim that merely realleges that breach as a violation of the covenant is superfluous." 24 Cal.4th at 352.

[46] OBOT's SOD makes no argument that the City otherwise breached the Ground Lease by terminating in light of OBOT's efforts during the cure window, and has waived any such argument. OBOT SOD 48-84.

750-522-556 (2015 TLS BOD Vols. 1 and 2, Section 16, "Conceptual Drawings); Trial Tr. 1340:8-1342:14 (Tagami). As Ms. Morodomi explained, OBOT was required to ask HDR's permission to resubmit this 2015 work in 2018. Trial Tr. 1954:11-20. As Ms. Lake put it, the 2018 BOD "was a virtual carbon copy" of the 2015 Basis of Design." Trial Tr. 3748:6-9.[47]

The City did not reject the submission "out of hand," an assertion for which OBOT cites no evidence. OBOT SOD 21. The record evidence was uncontroverted that the City reviewed the submission and provided OBOT with a response within the required contract timeframes that explained exactly why the City was rejecting the Schematic Drawings as incomplete. Ex. 247. OBOT's response, which was not sent to the City until *after* the cure period expired, attempted to address the identified deficiencies and did not state that the City's determination was insufficiently detailed. Ex. 252.

Moreover, the Ground Lease provides that OBOT could cure its default only if it could "prosecute such cure with diligence and dispatch *to completion within a reasonable time thereafter*." Ex. 68-86-87 §18.1.7 (emphasis added). The 2018 BOD contained "conceptual" project schedules that indicated OBOT had not done any work on the design of key parts of the project, and did not anticipate finishing that design for many years, and construction for even longer, which is not a "reasonable amount of time." *Compare* Ex. 750-562 *with* Ex. 240-498 (storage building design); Trial Tr. 3749:2-3751:11. In 2015, it was contemplated that the terminal project would be completed a little more than three years after signing the Ground Lease, by April 17, 2019. Trial Tr. 2029:2-14 (discussing Ex. 750) (Morodomi). But the 2018 conceptual schedule showed an anticipated completion date of February 2025—nine years after

[47] OBOT also asks this Court to find that "Millcreek Engineering (the architect and engineer)" attempted to schedule a meeting with the City." OBOT SOD 21. But the evidence cited by OBOT (*see* OBOT SOD 21 (citing Ex. 239)) is a letter submitting the ITS BOD which states that "HDR and Architectural Dimensions" prepared the plans. Ex. 239-1. The record was undisputed that Millcreek was hired later by ITS, not OBOT, and did not request any meeting until October 2018. Ex. 249; Trial Tr. 1355:8-1357:16, 1476:16-1478:4; *see also* Trial Tr. 1479:1-20. OBOT also ignores the uncontroverted testimony that Mr. William Gilchrist, the Director of Planning and Building with whom they requested to meet, needed to attend an unexpected funeral. Trial Tr. 3923:10-23. No record evidence supports OBOT's statement that "the City cancelled the meeting and would not respond to Milcreek's, ITS's or OBOT's requests to reschedule"; OBOT cites nothing other than the submission letter. OBOT SOD 21.

signing the Ground Lease, and more than six years into the future. Trial Tr. 2031:7-12 (discussing Ex. 672) (Morodomi). These self-identified, lengthy delays did the opposite of curing OBOT's failure to perform. Instead, they proved to the City that 1) OBOT had done nothing to move the project forward since 2015, and 2) OBOT did not believe it could advance the project in a timely manner as of 2018.

OBOT's view that the City was nonetheless required to accept its "cure" would provide an indefinite extension that simply does not exist, and cannot be read into this provision of the contract, without doing violence to the parties' intent expressed in the myriad other terms requiring the developers to move the project forward expeditiously. *Supra* at 17-18. The City's rejection of OBOT's proposed cure, which would have tripled the construction timeline, cannot be deemed in bad faith.

Finally, OBOT does not address, and has no response to, the City's explanation that OBOT's history of promising a TLS sublease and never coming through, submitting the IES sublease, failing to provide basic financial information, and then submitting an ITS sublease supported only by an organizational chart identifying John Siegel's spouse as the owner and nothing else, along with OBOT's failure to move the project forward for two-and-one-half years, left the City with no confidence in OBOT's or its new proposed entity's demonstrated ability to perform. Trial Tr. 3742:16-22 (Lake). Likewise, as Ms. Lake explained, when the City agreed to hear ITS's presentation, Mr. Tagami walked out yet again after introducing Mr. Siegel, leaving the City with the distinct impression that he no longer stood behind this project. Trial Tr. 3945:25-3946:6 (Lake).

Unable to establish any act that breached the implied covenant, OBOT resorts to a general argument that the City acted in "bad faith" because its termination of the Ground Lease was motivated by opposition to coal. OBOT SOD 92-93. But the City was authorized by the Ground Lease to terminate the contract when OBOT failed to meet the Initial Milestone deadline. Ex. 68-32-33 §§6.1.1, 6.1.1.1; Ex. 68-33 §6.1.2; City SOD 56-59. If the City is correct, it wins; if OBOT is correct and this was not authorized, the City breached. The implied covenant cannot add to or subtract from these express requirements, and with respect to the express breach claims, the

City's motive for doing so is completely irrelevant. *See Carma Developers (Cal.), Inc. v. Marathon Development Cal., Inc.* (1992) 2 Cal.4th 342, 374 (implied covenant cannot "prohibit a party from doing that which is expressly permitted by [the] agreement"); *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 Servs., 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.").

In any event, OBOT's lacks any evidence of actual bad faith, connected to any actual action by the City. Then-Mayor Libby Schaaf's statement after the May 2018 federal district court decision that the City would continue to fight against coal, OBOT SOD 92, demonstrates no intent to interfere with Plaintiffs' contractual rights, given that the federal decision allowed the City to collect additional health and safety evidence and that the City had the right to appeal. Similarly, then-City Administrator Sabrina Landreth's vague recollection that the City was planning to appeal and was "in the same place" with respect to its views about coal after the federal district court decision issued, Trial Tr. 3296:5-18, is in no way equivalent to (as Plaintiffs assert) saying that "the City would not permit the Terminal to go forward so long as coal was on the table," OBOT SOD 92.[48] Both witnesses testified that they wanted the terminal project to go forward and took actions to facilitate it. Trial Tr. 3246:25-3248:10, 3250:25-3251:5, 1806:15-1807:1. And more important, no evidence shows that either official took or directed any action that OBOT alleges interfered with its ability to perform. *See* Trial Tr. 3257:24-3258:3 (Mayor and City Council had no role in permitting); Trial Tr. 3258:12-17 (Ms. Landreth did not instruct anyone not to issue permits). Even if it could support these allegations, the implied covenant "protect[s] the express covenants or promises of the contract," and OBOT cannot show its violation by simply establishing that City officials opposed coal. *Carma Developers*, 2 Cal.4th at

[48] While Ms. Landreth did not "have … as we sit here today specific recollection of everything I reviewed," she was clear that she "looked at everything that [she] needed in order to make an informed decision," including "a whole host of correspondence." Trial Tr. 3281:25-3282:3, 3284:7-13. Nor is there any reason that Ms. Landreth could not rely on her staff or her counsel. *See also* Trial Tr. 3293:5-23 (rejection of force majeure claims was subject of privileged communications).

3734. OBOT's subjective belief in its opposing party's "bad faith" has never been sufficient to prove such a claim, and it is not sufficient here.

C. OGRE is Not an Intended Third-Party Beneficiary[49]

OGRE's claims fail for all of the reasons discussed above. In addition, OGRE is not an intended third-party beneficiary under the Ground Lease. OBOT's proposed Statement acknowledges what is the clearest expression of the parties' intent: their agreement that the Lease has no third-party beneficiaries. Ex. 68-120 §38.4. In quoting that provision, OBOT omits crucial words; that provision reads (with words that Plaintiffs omitted italicized), "This Lease is for the exclusive benefit *of the Parties* hereto and not for the benefit of any other Person and shall not be deemed to have conferred any rights, express or implied, upon any other Person …." *See id.*; OBOT SOD 23.

OBOT offers no explanation as to why this express contract term does not foreclose OGRE's claims. Instead, OBOT invites this Court to err by ignoring this plain contract language, relying on cases holding that when a lessor "has expressly agreed to a sublease" courts will conclude that the sublessor has third-party-beneficiary status. OBOT SOD 23. But OBOT's own authority makes clear that this is an implied doctrine, which rests on an interpretation of the parties' intent, *absent express language*. *See Marchese v. Standard Realty & Dev. Co.* (1977) 74 Cal.App.3d 142, 147. An implied contract term cannot overcome an express term. *See Carma Developers*, 2 Cal.4th at 374 ("[A]s a general matter, implied terms should never be read to vary express terms") (citing 3 Corbin, Contracts, §564, p. 298 (1960) ("[I]n interpreting a contract 'an implication … should not be made when the contrary is indicated in clear and express words.'"). Nor does OBOT's authority hold otherwise, as there was *no third-party-beneficiary clause in the contract* at issue in *Marchese.* In fact, Plaintiffs do not cite a single case holding that a sublessor had third-party-beneficiary rights *notwithstanding* an express no-third-party-beneficiary clause.

[49] This is also an issue on which Plaintiffs bear the burden of proof. *The H.N. & Frances C. Berger Foundation v. Perez* (2013) 218 Cal.App.4th 37, 43.

Accordingly, the Ground Lease's explicit statement that there are no third-party beneficiaries prevails over an implication that the parties intended OGRE to be one.[50]

Nothing in the Ground Lease expressly grants OGRE third-party rights sufficient to overcome an express no third-party beneficiary contract term. Here, the only mention of OGRE is in passing, and it is *contingent.* It does not say that the parties agreed that OGRE *will* be a sublessee. The provision provides conditions *if* OGRE becomes one, and makes very clear that the parties contemplate circumstances in which an entity that is *not an affiliate of CCIG or OBOT* would play that role. Ex. 68-114 §37.8.1. Contrast this with the language of the same provision of the Ground Lease in which OBOT and the City expressly discuss making OBOT the third-party beneficiary of other City contracts. *Id.*

Alternatively, Plaintiffs argue that they meet the strict standard for implied third-party-beneficiary status set forth in *Goonewardene v. ADP, LLC* (2019) 6 Cal.5th 817. But even setting aside the other two requirements of that three-part test, Plaintiffs cannot establish that benefiting OGRE was a "motivating purpose" of the parties. OBOT SOD 24-25. The facts that OGRE was formed to build the rail network and that the City would benefit from the rail network (including in relation to state grants) may show an intent that OGRE's sublease benefit *the City*, but it does not show that a "motivating purpose" of the City was to benefit *OGRE*. *Cf. Goonewardene*, 6 Cal.5th at 835 (concluding that *employer*, not *employees*, was intended beneficiary of contract with payroll company). Plaintiffs argue that "[t]he City was aware of OGRE's role," OBOT SOD 25, but "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." *Goonewardene*, 6 Cal.5th at 830.[51]

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[50] The evidence at trial established that OGRE was not even a valid sublessee until at least June 27, 2018, when OBOT submitted an OGRE sublease to the City for the first time. Ex. 162. OBOT again invites this Court to error by citing to a 2016 document (which was invalid as inconsistent with the Ground Lease and for violating the requirement that any sublease be provided to the City within five days of signing). OBOT SOD 23, 24 (citing Ex. 104); *see* Exs 145, 654. There was no record evidence of any submission of that document to the City until 2018. Ex. 137. Further, that 2018 sublease *delayed OGRE's assumption of the lease and responsibilities for years.* Ex. 162-7; Trial Tr. 1869:11-1872:9.

[51] OBOT also cites only its own witnesses' testimony as evidence of the City's knowledge, but Mr. McClure was not competent to testify about the City's intent. OBOT SOD 25.

Finally, it is not true that "[t]he Court has already resolved this issue in OGRE's favor." OBOT SOD 23. The Court simply held that the "City has not met its burden to show that OBOT [sic] cannot claim breach of the Lease." Summary Judgment Order (1/6/2022) at 23.

V. Remedy Issues, Including the Requests for Specific Performance, Declaratory Relief, and/or Damages, Are for the Remedy Phase

Directly defying this Court's order focusing this phase of trial on issues of breach and holding any arguments regarding remedy for another phase, OBOT's proposed Statement seeks extensive and detailed "declaratory relief" that in effect grants OBOT specific performance of contract terms and other forms of injunctive remedies. OBOT seeks "declarations," for example, that the Ground Lease remains in effect, that OBOT commenced a cure, that contractual deadlines must be extended by at least two years, that certain permits are not required, that the City must "turnover possession of any property that Plaintiffs have a right and obligation to improve," that the City must enter an RAA with the Port, that the rail network contemplated by the RAA is limited to a specified area, that the City must issue NDA and estoppel certificates in the form OBOT requests, that the Ground Lease does not restrict any commodity, and numerous other vague statements of "the parties' rights and obligations under the Ground Lease." OBOT SOD 94-97.

This Court decided to bifurcate the trial, and "to deal with the issue of liability first" while leaving remedies for the next phase. Pretrial Tr. (7/6/2023) at 26; *see also id.* at 43. Declaratory relief (particularly of the nature OBOT proposes here, which goes far beyond a simple declaration as to which party breached the contract) is a remedy, not a determination of liability. *See Columbia Pictures Corp. v. De Toth* (1945) 26 Cal.2d 753, 761; Code Civ. P. §§1060, 1062. It also goes without saying that a party cannot achieve by way of declaratory relief in a contract case something it did not and could not negotiate in the terms of the contract itself. But setting aside the lack of merit in Plaintiffs' underlying claims, and the lack of any basis for many of these extraordinary requests that go *far beyond the terms of the Ground Lease itself*, any request for declaratory relief by either party should be evaluated and resolved, if at all, at the appropriate time after resolution of this liability phase.

CONCLUSION

For all the foregoing reasons, and the reasons set forth in the City of Oakland's proposed Statement of Decision submitted September 25, 2023, the City respectfully requests the Court adopt the City's proposed Statement, including holding that OBOT breached the West Gateway Ground Lease, and therefore rule in favor of the City on liability on all claims, and proceed to resolve the question of the City's contract remedies.

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