Case No. A169585

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION TWO

OAKLAND BULK AND OVERSIZED TERMINAL LLC, *Plaintiff/Counter-Defendant and Respondent*; **OAKLAND GLOBAL RAIL ENTERPRISE, LLC**, *Plaintiff and Respondent*; and **CALIFORNIA CAPITAL INVESTMENT GROUP**, *Counter-Defendant and Respondent,*

v.

CITY OF OAKLAND,
Defendant/Counter-Plaintiff and Appellant.

On Appeal from Judgment of Alameda County Superior Court
Hon. Noël Wise (Depts. 514/21)
Case Nos. RG18930929 / RG20062473

OPENING BRIEF OF DEFENDANT/COUNTER-PLAINTIFF AND APPELLANT CITY OF OAKLAND

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CERTIFICATE OF INTERESTED PARTIES (CRC 8.208)

The following entities or persons have a financial or other interest in the outcome of the proceeding that Appellant and Defendant/Counter-Plaintiff City of Oakland believes the justices should consider pursuant to C.R.C. 8.208(e):

1. There are no other entities or persons with any ownership interest in Appellant and Defendant/Counter-Plaintiff City of Oakland pursuant to Rule 8.208(e)(1).

2. Pursuant to Rule 8.208(e)(2), Defendant/Counter-Plaintiff and Appellant City of Oakland is aware through discovery of an entity that has funded 50% of the fees and costs for Respondent and Plaintiff/Counter-Defendant Oakland Bulk and Oversized Terminal, LLC in this litigation, and that has a business interest in the outcome of this litigation: **Insight Terminal Solutions**, 205 S. Martel Ave., Los Angeles, CA 90036.

Dated: 8/27/2024

Respectfully submitted,

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INTRODUCTION AND SUMMARY OF ARGUMENT

In November 2018, Appellant and Defendant/Counter-Plaintiff City of Oakland ("the City") terminated the contract at issue in this appeal, a 66-year commercial lease of City-owned property in the former Oakland Army Base ("OAB"), after the developer lessee (Respondent and Plaintiff/Counter-Defendant Oakland Bulk and Oversized Terminal, LLC, or "OBOT") failed to meet the central construction deadline in that contract. OBOT agreed to construct a shipping terminal for the import and export of bulk commodities on this land, to do so within specific timeframes, and to continuously operate the terminal for the term of the lease. The performance period ran for two and a half years (from February 16, 2016 to August 14, 2018), which included two full years of tolling of deadlines and free rent granted by the City to help OBOT start the project. However, by the August 14, 2018 contract deadline, OBOT had not met *any* of the pre-construction conditions required by the contract, such as applying for and obtaining required landlord and regulatory approvals, or entering into construction contracts. Nor had OBOT commenced construction of the promised terminal "capable of servicing one or more lines of export products." (*Infra* at 18.) The lease contained an express early termination provision triggered by OBOT's failure to perform by this deadline, and the City invoked it.

After the City terminated the lease, the parties filed the competing breach of contract claims at issue in this appeal. OBOT blamed the City for OBOT's own failure to move the

project forward, claiming that events of Force Majeure caused by the City entitled OBOT to an extension of the deadline, and that the City's subsequent contract termination was a breach of contract and was based on politically-motivated bad faith. After a bench trial, the trial court agreed with the developer.

In ruling for OBOT, the court relied only on a Force Majeure provision and the implied covenant of good faith and fair dealing. As will be explained further below, however, each of the six events of Force Majeure found by the trial court involved issues that were *already addressed* by specific contract terms in which the parties had carefully defined their respective performance obligations. The parties had allocated their risk, often by authorizing *specific and exclusive remedies*. The trial court's interpretation of Force Majeure conflicted with the applicable contract provisions—several of which the court failed even to *cite*—replacing the parties' deal with the court's hindsight view of fairness, which is contrary to California law. (E.g., *West Pueblo Partners, LLC v. Stone Brewing Co., LLC* (2023) 90 Cal.App.5th 1179, 1188; *SVAP III Poway Crossings v. Fitness Int'l* (2023) 87 Cal.App.5th 882, 891–92).

Of particular importance here, the trial court believed that the City's legislative and regulatory actions (including specifically, legislation regarding coal) were events of "Force Majeure" because the court concluded those actions interfered with OBOT's ability to move this development project forward. Thus, the court opined that OBOT was not "legally obligated to spend countless additional millions of dollars and time to advance

the development of the Project that would transport unknown commodities." (AA1144(SOD).)[1] But no developer is guaranteed the regulatory certainty the court wanted here, and the court's conclusion defied the contract. At the time the contract was signed, the parties were already engaged in a dispute over whether the City could prohibit the shipment of coal through this terminal. Anticipating that this dispute could lead to the passage of legislation (and ensuing litigation), the parties *agreed* that any legislative or regulatory action (or inaction) undertaken by the City *would not excuse OBOT's performance*, and went even further, agreeing that OBOT need not comply with any challenged legislation during such a challenge. (*Infra* at 20.)

The parties in February 2016 thus agreed to move the project forward, while each party assumed the risk of losing any dispute over the City's legislative or regulatory authority. When the City and OBOT each later blamed the other for backing out of this deal, the trial court should have enforced the contract terms *as written*, which plainly required OBOT to perform. Instead, the trial court accepted OBOT's invitation to rebalance the risks the parties had already allocated, using the court's own notions of fairness to forgive OBOT's *choice* to delay performance. This decision overrode the very deal that made this contract possible—

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[1] Citations herein are: "SOD" (the 11/22/23 Statement of Decision on liability, AA1061–1156); "GL" (the Ground Lease, Trial Exhibit 68, AA1422); "RT" (Reporter's Trial Transcript); and "Ex." (Trial Exhibits). The City has also attached as an Addendum here a Glossary (AA0651) and Timeline (AA0653) provided as aids to the trial court. There is also a Summary of Contract Terms at AA0317–21.

the deal to move forward and build a multi-commodity terminal *anyway*—and also ignored the scores of other bulk commodities that OBOT *admittedly* could have designed and built this terminal to ship. In the end, the court allowed OBOT's central pitch—that it would be unfair and harsh to hold OBOT to its contractual obligations given its disputes with the City over a single commodity, coal—to cloud the court's interpretation of the lease and the law. (AA1108 fn.14, 1144(SOD).)

The court committed similar legal errors in concluding that these same Force Majeure events and the contract termination constituted a "bad faith" breach of the implied covenant. Time and again, the court faulted the City for failing to do things that the court believed were required to better "cooperate" with OBOT, and speculated regarding the City's motive for terminating the contract (including by reference to *settlement* positions, *infra* at 62). The trial court thus used the implied covenant to excuse performance where California law says it cannot: because the implied covenant cannot be breached by the *same* events alleged to have been an express breach, and because a court also cannot invent and alter substantive contract terms and then call it "bad faith" that a party does not comply with those new, hindsight requirements. (E.g., *Guz v. Bechtel Nat. Inc.* (2000) 24 Cal.4th 317, 349–50; *Carma Devs. (Cal.), Inc. v. Marathon Dev. California, Inc.* (1992) 2 Cal.4th 342, 374).)

For these reasons and more, the legal errors in the trial court's Force Majeure and implied covenant holdings require reversal. The City also addresses two further errors of law made

by the trial court: the flawed claim preclusion analysis permitting OBOT to sue again for contract remedies in state court that it *pled then abandoned* in the earlier federal litigation; and granting judgment to third party Respondent and Plaintiff Oakland Global Rail Enterprise ("OGRE"), despite an express "No Third Party Beneficiaries" provision of the Ground Lease that the trial court did not even address and which bars OGRE's third-party contract claims.

Thus, the trial court erred in granting judgment to OBOT and OGRE instead of to the City. Accordingly, it is well past time for the termination of this lease to be confirmed, and for the land to be returned to its rightful owner, to be put to productive use for the benefit of Oakland and its residents. The City therefore respectfully requests this Court reverse the judgment in favor of OBOT and OGRE rather than the City on the grounds that *OBOT* breached this contract, and return this case to the trial court with instructions to proceed to a new remedy phase on the City's breach of contract claim.

STATEMENT OF THE CASE

I. The West Gateway Ground Lease

A. Parties to the Contract

The February 16, 2016 West Gateway Ground Lease ("Ground Lease") is a 66-year commercial lease between the City and OBOT that contains 40 Articles and 146 pages, 594 with exhibits. (AA1422(GL).) OBOT is a single-purpose entity owned by real estate developer Respondent and Counter-Defendant California Capital Investment Group ("CCIG"), which is run by

Phillip Tagami. (AA1062 fn.3(SOD).) CCIG also owns OGRE, which is not a party to the Ground Lease. (AA1430(GL); AA1062 fn.3(SOD).)

Years before this Ground Lease, the City selected a CCIG-Prologis joint venture as its development partner for all 130 acres of City-owned OAB property. (AA1430–31(GL, Recitals); AA1845(Ex.378, Rec.¶N); AA1062 fn.3(SOD).) Those parties entered into a 2012 Lease Disposition and Development Agreement ("LDDA"), and a 2013 Development Agreement ("DA"). (AA1430–31(GL, Recitals); AA1838(Ex.378); AA1336(Ex.7).) The LDDA and DA establish the legislative and regulatory framework applicable to private development on the OAB, and set the stage for ground leases (in the City's proprietary landlord capacity) of the various sub-parcels of land. Per their express terms, any Ground Lease and the LDDA and DA are not integrated, and the terms of the Ground Lease supersede conflicting terms in the prior contracts. (AA1849(Ex.378, §1.3.3); AA1386, 1391(Ex.7, §§14.6, 14.27); AA1436, 1512, 1541(GL, §§1.4, 22.1, 38.7).)

B. The Land

The 34-acre Premises lies directly to the south of the Oakland-side approach to the Bay Bridge, and is comprised of: the 26-acre "West Gateway," and a smaller "Rail Right of Way" connecting the West Gateway to the Port of Oakland's rail network. (AA1432(GL, §1.1.1).)

OBOT agreed that its use of the Premises was subject to the City's construction of ongoing Public Improvements, including

environmental remediation, utilities, and roads. (AA1432, 1433, 1437(GL, §§1.1.1, 1.1.2, 1.6).) The 2012 LDDA made the completion of Public Improvements a condition precedent to any ground lease, but OBOT waived this condition to enter this Ground Lease in February 2016. (AA1431, 1537(GL, Recitals, §37.9); AA2001(Ex.561, §5.3.1).) Accordingly, the Ground Lease states:

> The Parties acknowledge that (a) they are entering into this Lease prior to City's completion of the Public Improvements and (b) the completion of the Public Improvements may involve the construction of improvements or grant of property rights to third parties that materially limits the utility of portions of the Premises for Project operations. (AA1432(GL, §1.1.1).)

The parties also agreed that until completion of the Public Improvements, "the parties' rights and obligations under this Lease shall continue unabated." (*Id.*) OBOT's "sole and exclusive remedy" should the City fail to complete the Public Improvements was "to terminate th[e] Lease." (AA1538(GL, §37.9.2).)

C. OBOT's Performance Obligations

OBOT agreed to pay rent (AA1439(GL, Article 2)), and to develop and operate the property for specific uses (AA1444–46, 1452–67, 1586(GL, Article 3, Article 6 & Ex. 3.1)).

Required Uses. The primary required use was the construction and operation of the bulk terminal, to be served by rail rather than trucks, thus providing environmental benefits in an area of Oakland that had long suffered from extreme

pollution. (AA1444, 1586(GL, §3.1.1 & Ex. 3.1); AA1062, 1103–04(SOD).)

Minimum Project. The required "Minimum Project" included "the Bulk and Oversized Terminal … *capable of servicing one or more lines of export products*" (AA1452–53(GL, §6.1) (emphasis added).) It also included five "Minimum Project Rail Improvements," which were specific sections of track on both City and Port land. (*Id.*)[2]

Milestone Deadlines. The "Initial Milestone" (the deadline OBOT missed, *infra* at 28) required OBOT to have:

> Commenced Construction of the Bulk and Oversized Terminal and at least one of the components of the Minimum Project Rail Improvements listed in Section 6.1(b).

(AA1454(GL, §6.1.1.1); AA1109(SOD).) "Commenced Construction" was defined as obtaining building permits, laying foundation, and active and on-going construction. (AA1550(GL, Article 40).)

The Initial Milestone was 180 days after signing. (AA1454(GL, §6.1.1.1).) The Lease also included a tolling provision providing a two-year extension on both rent and the Initial Milestone, if OBOT met certain conditions. (AA1438(GL, §1.7.2).)

A further deadline, the Second Milestone, required OBOT to complete construction of the entire Minimum Project by two years later. (AA1454(GL, §6.1.1.2).)

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[2] The City had construction easements available to OBOT and others for work on Port land. (RT3734:8–3735:5.)

OBOT agreed these deadlines were crucial to the contract, (AA1457(GL, §6.2.5)), and "time was of the essence." (AA1540(GL, §38.1.4).) OBOT's failure to meet any Minimum Project requirement, including the Initial Milestone, triggered the City's right to early termination. (AA1454(GL, §6.1.2).)

Pre-Construction Requirements. The parties agreed to a host of "Pre-Construction Requirements" that were conditions to commencement of construction (AA1455–62, 1457(GL, §§6.2, 6.2.6).)

OBOT agreed to be "responsible for applying for and diligently pursuing the issuance of… all permits and regulatory approvals." (AA1451, 1457, 1461(GL, §§5.2.2.1, 6.2.4, 6.2.6.2, 6.2.13).) OBOT estimated the project needed 76 permits from the City and other regulatory entities. (AA2203(Ex.750).)

OBOT also agreed to apply for and obtain Landlord approval of three types of Construction Documents (Schematic Drawings, then Preliminary and Final Construction Documents). (AA1456, 1457(GL, §§6.2.1, 6.2.6.1).) The City agreed to "approve or disapprove Construction Documents … within [30] days." (*Id*.) The parties also included an *express remedy* should the City fail to respond: upon notice from OBOT that it "intends to deem said Construction Documents so approved," the documents "shall be deemed approved." (*Id*.)

OBOT also agreed it would bear all costs of obtaining regulatory approvals and of construction. (AA1457, 1459(GL, §§6.2.4, 6.2.9).)

D. The City's Regulatory and Legislative Authority

The City entered the Ground Lease in its landlord capacity only (AA1449(GL, §5.1)), and therefore assumed no obligations or outcomes with respect to legislative actions or regulatory approvals. (AA1450(GL, §5.2.1) [The Ground Lease "shall not be deemed to imply that Tenant will be able to obtain any required approvals from City departments … including the City itself in its regulatory capacity"].)

OBOT and the City went even further, agreeing that:

> No occurrence or situation arising during the Term, nor any present or future Law, whether foreseen or unforeseen, and however extraordinary, *shall relieve Tenant of its obligations hereunder*[.]

(AA1450(GL, §5.1.1.2) (emphasis added).) The parties also correspondingly agreed that the City would not be liable for regulatory actions. (AA1450, 1449(GL, §§5.2.1, 5.1).

At the same time, OBOT expressly reserved the right to challenge laws and regulatory approvals applicable to the project:

> Nothing in this Lease shall be deemed a waiver by Tenant of its right to challenge the applicability to the Project of any Laws promulgated by the City during the Term.

(AA1450–51(GL, §5.2.1).) The parties further agreed that if OBOT did so, OBOT could continue with the project *without* adhering to any contested law:

> 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[.]

(AA1449(GL, §5.1).)

The parties thereby allocated their respective risks in the event a new law was enacted and OBOT challenged it, and even under those circumstances, OBOT would still be bound to perform by the agreed-upon deadlines, including by building the bulk terminal.

E. Assorted Rail-Related Provisions

The planned project involved constructing railroad track on the Rail Right of Way, the West Gateway, and Port land. (AA1453, 1586(GL, §6.1(b) & Ex.3.1).) The Initial Milestone involved only a fraction of this planned track (only the Minimum Project Rail Improvements, and only one of the five of those). (AA1454(GL, §6.1.1.1).)

The parties also addressed a future rail operations agreement between the City and the Port called the Rail Access Agreement ("RAA"). (AA1452(GL, §5.2.3(a)).) The LDDA had made a completed RAA a condition precedent to any ground lease, and OBOT waived that condition to enter this Ground Lease. (AA1431(GL, Recital D); AA1878(Ex.378, §6.4.8.3).) The Initial Milestone is not contingent on execution of the RAA. (AA1452, 1454(GL, §§5.2.3(a), 6.1.1.1.) The Ground Lease required the City to use commercially reasonable efforts to negotiate the RAA, but imposed no deadline. (AA1452(GL, §5.2.3(a).) OBOT also agreed that its "sole and exclusive remedy" if the RAA could not be executed would be "to terminate th[e] Lease." (*Id.*)

F. Force Majeure Provision

The "Delay Due to Force Majeure" section reads:

> Delay Due to Force Majeure. For all purposes of this Lease, a Party whose performance of its obligations hereunder is hindered or affected by events of Force Majeure shall not be considered in breach of or in default in its obligations hereunder to the extent of any delay resulting from Force Majeure, provided, however, that the provisions of this Section 16.1 shall not apply to Tenant's obligation to pay Rent, including Additional Rent. A Party seeking an extension of time pursuant to the provisions of this Section 16.1 shall give notice to the other Party describing with reasonable particularity (to the extent known) the facts and circumstances constituting Force Majeure within (a) a reasonable time (but not more than thirty (30) days unless the other Party's rights are not prejudiced by such delinquent notice) after the date that the claiming party has actual knowledge of the scope and magnitude of the applicable Force Majeure event or (b) promptly after the other Party's demand for performance.

(AA1505–06(GL, §16.1).) "Force Majeure" is further defined as:

> Force Majeure means events which result in delays in a Party's performance of its obligations hereunder due to causes beyond such Party's control, including, but not restricted to, acts of God or of the public enemy, acts of the government, acts of the other Party, fires, floods, earthquakes, tidal waves, terrorist acts, strikes, freight embargoes, delays of subcontractors and unusually severe weather and, in the case of Tenant, any delay resulting from a defect in Landlord's title to the Premises other than a Permitted Exception. Force Majeure does not include failure to obtain financing or have adequate funds.

(AA1553(GL, Art. 40).)[3]

[3] OBOT did not contend below that this provision or any other was ambiguous, or submit any extrinsic evidence pertaining to the negotiation of any particular term. The court likewise

II. Existing Disputes over the Regulatory and Legislative Framework for this Project

The parties' dispute over the City's authority to regulate coal and impose other future regulatory approvals pre-dated the Ground Lease.

With respect to coal, the Oakland City Council passed a Resolution opposing coal in 2014 (AA1394(Ex.13)), and pursued further legislation starting in 2015, (AA2410(Ex.839); RT971:11–973:1, 975:6–976:3). In connection with a September 2015 Council hearing on coal, OBOT informed the City that it intended to contract with Terminal Logistics Solutions ("TLS") to construct and operate a "multi-commodity" terminal, and sent the City a joint OBOT-TLS "Basis of Design" for the terminal ("2015 OBOT-TLS BOD"). (AA1399(Ex.51); AA2183(Ex.750).)[4] That document was described as a "conceptual" framework, to be followed by construction documents "which will be advised by and in coordination with the [TLS] operating plan." (AA2188, 2208,

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explained: "it is not the court's intention to take extrinsic evidence as it relates to [the lease or the other contracts]; that the documents will speak for themselves." (RT3501:13–17.)

[4] The City had not worked with TLS before; TLS was a single-purpose entity created by OBOT's business partners for this project. OBOT did not reveal at the time that TLS was owned by a Kentucky coal company, run by a coal executive named John Siegel (RT1335:13–1339:8, 2767:20–2768:16, 3612:6–21, 3864:5–3865:14), with whom OBOT had entered into a deal to ship millions of tons of coal (RT3874:5–3877:11) notwithstanding ongoing representations to the City that OBOT and TLS had not made any "commitment" to any commodity. (AA1404(Ex.57); AA1399(Ex.51); AA2025(Ex.589); AA2033(Ex.598).)

2245(Ex.750).) OBOT and TLS provided information on 20 "potential commodities" that "may be shipped thru [sic] the facility" (AA2206–07(Ex.750); AA1399(Ex.51).)

Throughout 2015, OBOT and the City corresponded regarding the regulatory framework for this proposed project. OBOT argued the California Environmental Quality Act (CEQA) should be considered "complete," and that there would be no basis for any "discretionary" review by the City. (E.g., AA1404(Ex.57).)[5] The City repeatedly explained (prior to entering into the Ground Lease) the terminal would be subject to any discretionary permitting and environmental review required by law, including CEQA. (AA1968(Ex.555, 12/8/2015 letter); AA1412(Ex.66, 2/11/2016 letter).)

OBOT and the City expressly acknowledged in the Third Amendment to the LDDA, signed the same day as the Ground Lease (February 16, 2016), that execution of the Ground Lease would not waive the City's right, subject to the DA, to "adopt and apply to the Project … *regulations pertaining to the transportation, transloading, handling and/or export of coal or petroleum coke*." (AA2016(Ex.561, §13) (emphasis added).)

Thus, at the time the Ground Lease was signed on February 16, 2016, the parties were well aware of these disputes over the City's legislative and regulatory authority. As the trial

[5] Notably, these positions were contrary to the plain language of the DA addressing future application of CEQA, and future discretionary regulatory approvals. (AA1351–52, 1358–61(Ex.7, §§1.1, 3.4.2, 3.4.6, 3.5.2).)

court found, "the parties broke their stalemate over the City's regulation of coal by agreeing [in the Ground Lease] to set that dispute to one side and let it play out elsewhere, while the parties moved forward with the multi-commodity bulk terminal project by these deadlines." (AA1102 fn.12(SOD); see also AA1099–1101(SOD).)

As expected, in June 2016, four months after the Ground Lease was signed, the Oakland City Council enacted an Ordinance and Resolution prohibiting the storage and handling of coal. (AA1602(Ex.87); AA1935(Ex.499).)

OBOT sued the City in federal court in December 2016, alleging that the City breached the DA by applying the Ordinance to the West Gateway, and seeking, among other remedies, delay damages and *relief from the pending Ground Lease deadlines*. (AA0154; AA0356–59.) OBOT eventually abandoned those remedies in the federal litigation. (AA0367–69.)

On May 15, 2018, the federal court ruled that the City had not met the DA's standard for imposing additional health and safety legislation and therefore breached the DA. (*OBOT v. City of Oakland* (N.D.Cal.2018) 321 F.Supp.3d 986, 1011.) The City appealed, and the Ninth Circuit ultimately affirmed on May 26, 2020. (*OBOT v. City of Oakland* (9th Cir.2020) 960 F.3d 603, 621.)

III. The Ground Lease Performance Period, OBOT's Default, and the City's November 22, 2018 Termination of Contract

While the parties litigated in federal court, the clock was ticking on OBOT's Initial Milestone deadline, which originally

was just 180 days. There was no dispute at trial that the City granted OBOT two years tolling, thereby extending that deadline to August 14, 2018, even though OBOT did not meet the conditions in §1.7.2. (RT3609:19–3610:23.) Notwithstanding the federal litigation, however, OBOT never requested, nor received, any further tolling agreement from the City. (RT2981:23–2982:7, 2983:21–25, 2985:4–15, 3943:6–7, 4070:13–16.) The City briefly summarizes here the events pertinent to OBOT's default, and the trial court's excuse of that default via force majeure and the implied covenant.

A. OBOT's Failure to Submit Required Construction Documents

OBOT did not submit any Schematic Drawings for landlord review pursuant to §6.2.1 prior to the Initial Milestone deadline. The first written request for approval of Schematic Drawings for the terminal occurred on September 28, 2018, after OBOT's deadline. (AA1747(Ex.239).)

At trial, OBOT inconsistently claimed that the 2015 OBOT-TLS BOD itself contained Schematic Drawings, or that it could not make that submission in light of the City's lack of "feedback" on the BOD. The trial court credited the latter claim. (AA1143(SOD).)

However, the trial court did not address other important representations made to the City by OBOT about that BOD.

In May 2016, soon after signing the Ground Lease, OBOT began telling the City *not* to review the 2015 TLS-OBOT BOD, which "never was intended to serve as a 'Project Design,'" and

that OBOT and its sublessee TLS would return to the City with *revised plans*. (AA2024–26(Ex.589); AA2034(Ex.598).)

OBOT thus downplayed the BOD: "[t]he simple fact is that there is no 'OBOT Project Design' in existence today" (AA2025(Ex.589)), and any review of the BOD "would be, at best, premature and at worst, unsubstantiated, speculative, and a true waste of taxpayer funds." (AA2024(Ex.589).) OBOT (and its lawyer) specifically told the City its design plans for the terminal would be revised after it entered into a sublease with a terminal operator (AA2024–26(Ex.589); AA2034(Ex.598)), and that OBOT would return with those revised plans *after* signing that sublease: "We look forward to meeting with the City and presenting TLS' further refined design parameters, operations protocols, and [a] proposed permitting approach *once they* [TLS] *have exercised their option*[.]" (AA2034(Ex.598) (emphasis added).) Neither OBOT nor TLS ever submitted these revised plans; and TLS never exercised its sublease option (*Infra* at 29; see also RT2323:4–25.)

And even if OBOT believed that the 2015 TLS-OBOT BOD contained "Schematic Drawings," prior to August 14, 2018, OBOT never invoked its right in §6.2.1 to deem the BOD "approved" and move on.

Nor did OBOT ever submit Preliminary or Final Construction Documents (or enter into any Construction Contracts). (RT1036:24–1037:3, 1706:23–1708:17, 2356:13–2358:20, 3115:17–3116:4.)

B. OBOT's Failure to Apply for Required Regulatory Approvals

Prior to the August 14, 2018 deadline, OBOT never applied to the City or any other regulatory agency for *any* of the 76 required permits, as required by the contract (*supra* at 19). (RT1706:14–1707:5, 3940:18–22, 3943:9–15.)

The only step forward OBOT took on the regulatory side of its obligations was to request a "kick-off" meeting. (RT766:2–4, 2801:6–2803:13.) On March 9, 2016, the City brought together a variety of city departments to discuss the project. (RT2247:25–2248:21, 2318:10–16, 2801:6–2802:5, 3525:1–9, 3525:17-3526:5.) The parties contested what was said at that meeting. (AA1116(SOD).) All witnesses agreed that the meeting ended early when Mr. Tagami became upset at the City's (previously communicated) legal positions with respect to future regulatory and environmental review and walked out. (RT817:23–818:6, 2849:1–12, 3525:20–3528:2; see RT1013:18–1014:5; AA1968(Ex.555); AA1412(Ex.66).)

From March 9, 2016 on, OBOT never returned to the City with any development review applications or requests for further planning meetings until *October 19, 2018*, well after OBOT's deadline. (AA1827(Ex.249); see also AA2092(Ex.660).)

C. OBOT's Failure to Meet Initial Milestone

OBOT did not meet the Initial Milestone by August 14, 2018. (AA1095 fn.6(SOD).) OBOT did not Commence Construction of the required terminal or rail, *and* it did not satisfy *any* of the §6.2 Pre-Construction Requirements either.

With respect to construction of rail, OBOT inconsistently contended at trial both that it could not commence construction of any track because the City had not "turned over" possession of City-owned land in light of ongoing Public Improvements, *and* that it *had* commenced construction of track sufficient to meet the Initial Milestone. The trial court resolved this by rejecting OBOT's argument that it commenced the rail construction required for the Initial Milestone. (*Id.*)

D. OBOT's Ability to Perform and Choice to Delay the Terminal

Uncontroverted evidence and admissions established that OBOT could have performed by the Initial Milestone, but *chose* not to.

1. Mr. Tagami repeatedly confirmed that OBOT's plan was for a sublessee, rather than OBOT, to pay for, construct, and operate the terminal. (RT1706:14–1708:21, 1717:3–7; see also AA2092(Ex.660); AA2261(Ex.801).) He admitted that from 2015 until 2018 he chose to wait for his preferred sublessee to pay for the project before proceeding. (RT1609:21–1613:21.) OBOT granted TLS *ten extensions* on a sublease option (all in exchange for substantial payments to OBOT) that TLS never exercised. (*Id.*)[6]

2. Mr. Tagami admitted that in light of TLS's delays, in 2017, CCIG and OBOT explored constructing the Minimum

[6] AA1944(Ex.514); AA1954(Ex.517); AA1966(Ex.549); AA2020(Ex.574); AA2029(Ex.590); AA2043(Ex.618); AA2047(Ex.620); AA2052(Ex.630); AA2057(Ex.632); AA2062(Ex.637); AA2068(Ex.638).

Project themselves. Mr. Tagami had always represented to the City that he would build a "multi-commodity" terminal (e.g. AA1404(Ex.57), AA2206–07(Ex. 750)), and admitted there were many commodities other than coal that such a terminal could ship. (RT1175:18–20, 1176:23–1177:24 ["I mean, who knows what could come. It depends on what someone is shipping that day."].)

Significantly, Mr. Tagami *admitted* that OBOT's owners could have self-funded not just the Initial Milestone, but the entire Minimum Project: "there were a variety of ways" OBOT could have built the bulk terminal, and OBOT "could have self-funded the minimum project requirements." (RT1611:22–1614:16.) He admitted that nevertheless, he decided to wait (and wait) for the sublessee. (RT1609:21–1612:14.) He wanted the sublessee to pay for the project, rather than pay for it himself.

3. By early 2018, OBOT had moved on from TLS to a new entity called Insight Energy Solutions ("IES").[7] OBOT submitted an IES sublease to the City for review in January 2018. (AA1616(Ex.137).) But when the City asked for financial information for its review (AA1618(Ex.145); AA2090(Ex.654)), from January through September 2018, OBOT *never responded with that information* (despite the City's repeated requests). (AA1667(Ex.165); AA2084(Ex.643); AA2086(Ex.644).) Throughout 2018, the City was asking OBOT when it intended to submit plans for the project. (RT4103:21–4104:1.)

[7] Also owned by John Siegel, the coal executive and OBOT's preferred business partner.

4. In fact, as of May 2018, OBOT had secretly nullified the IES Sublease (in light of millions of dollars past due to OBOT), without telling the City. (AA1629(Ex.152).) OBOT and its business partners then began to negotiate a sublease with yet another Siegel entity, Insight Terminal Solutions ("ITS"). After the federal court decision on May 15, 2018, and all throughout the summer of 2018, OBOT and ITS did not move the project forward while they negotiated *financial* terms for the ITS sublease, including OBOT's demanded up-front $6.3 million payment. (AA1628(Ex.151); AA1629(Ex.152); AA1631(Ex.158); AA1674(Ex.173); AA1693(Ex.194); AA1695(Ex.201); AA1700(Ex.206); AA2088(Ex.652); RT1472:20–1473:4, 1474:7–13.)

It was not until September 28, 2018, after OBOT's deadline, that OBOT submitted, for the first time, a proposed sublease with ITS along with its first-ever request for approval of Schematic Drawings. (AA1718(Ex.237); AA1747(Ex.239).) And OBOT finally told the City that the IES sublease was "void" only when OBOT submitted that ITS sublease on September 28, 2018. (AA1719(Ex.237).)

Thus, OBOT delayed the project until the ITS sublease was signed; delayed the ITS sublease until ITS paid OBOT; and ITS did not make that $6.3 million payment until September 24, 2018. (RT1474:7–13; AA2261(Ex.801).) It was four days after that payment that OBOT and ITS submitted their drawings to the City for approval for the first time. (AA1747(Ex.239).)

E. OGRE and the Rail Improvements

Evidence at trial established that: 1) construction of the rail was not necessary to construct the terminal; and 2) OBOT and OGRE could have constructed track (and indeed started to) but again chose to delay.

1. OBOT's witnesses admitted at trial that construction of the rail was not necessary for construction (as opposed to operation) of the terminal. (RT2193:23–2194:12.)

2. OBOT's witnesses also admitted that the RAA was not related to construction of track. (RT3783:1–3784:9.) In addition, witnesses for both parties confirmed that the issues involved in the RAA were complex, and the City and Port continued to negotiate the RAA throughout 2016, 2017, and 2018, and at the City's invitation, included OBOT/OGRE's officers and counsel in those negotiations. (RT1144:12–1145:12, 1146:6–21, 3785:14–3786:23, 4170:10–25, 4175:8–21, 4181:3–6, 4335:20–4336:6; AA2101–2182 (Exs.719, 720, 727, 728, 734).)

3. With respect to OBOT/OGRE's ability to perform, the trial evidence established that OBOT was granted legal possession of the Rail Right of Way from the outset (AA1432(GL, §1.1)), and that OGRE had previously started construction of track on City land but halted construction in May 2018 upon orders of OGRE principal Mark McClure (RT1076:7–19, 1096:19–1097:5, 4095:12–16.) Consistent with this May 2018 order to halt construction, on June 26, 2018, OBOT subleased the Rail Right of Way to OGRE, and thereby assigned OGRE responsibility to construct the rail. (AA1632(Ex.162).) And they expressly agreed

in that document that OGRE's obligations to construct rail would not start until *years later* (after resolution of OGRE's "common carrier" applications to the federal Surface Transportation Board). (AA1638(Ex.162 §2.2).)

Subsequently, the first written request in the record by OBOT or OGRE for approval of Schematic Drawings for rail was not sent to the City until *2019*, well after OBOT's deadline and after contract termination. (AA2255(Ex.765).)

F. Default and Termination

Because OBOT did not meet the Initial Milestone, the City issued a Notice of Unmatured Event of Default on September 21, 2018. (AA1703(Ex.217).)

As discussed, on September 28, 2018, OBOT submitted, for the first time, the ITS sublease and request for approval of Schematic Drawings. (AA1718(Ex.237); AA1747(Ex.239).)[8] Upon review, those drawings were the same 2015 OBOT-TLS Basis of Design, substantively unchanged, which made clear to the City that no aspect of the project had been advanced by OBOT or its sublessees since 2015. (RT4129:14–22, 1688:6–1691:11; compare AA2183–2254(Ex.750) with AA1749–73(Ex.240).) OBOT and ITS also proposed a new "conceptual schedule" that extended the time prior to construction for many *years*. (AA1766–73(Ex.240); RT2385:13–2401:24, 4129:18–4132:25.) The proposal was more than a do-over; it vastly exceeded the timeframes required by the contract. (*Id.*)

[8] The Ground Lease prohibited subleases during an outstanding default. (AA1511(GL, §19.3.4).)

During the cure period, the City timely responded to all requests from OBOT under the Ground Lease, including responding to the inadequacies in the Schematic Drawings. (AA1774(Ex.247)); see also AA1706(Ex.226); AA1926(Ex.485); AA1928(Ex.486); AA2094(Ex.674); AA2096(Ex.675); AA2099(Ex.676).) OBOT did not respond to this letter until October 25, 2018, after the cure period had expired. (AA1832(Ex.252).) The City also met with OBOT and ITS, at their request, to hear their proposal. (RT4328:9–4329:6.) The City ultimately found the proposal inadequate. (RT4124:7–4125:24, 4130:21–4131:10, 4330:16–19; see AA1721(Ex.237).)

On October 23, 2018, the City concluded that OBOT had not cured its default and invoked the express early termination provisions. (AA1830(Ex.250).) On November 22, 2018, pursuant to §6.1.2, the Ground Lease was terminated. (*Id.*)

OBOT refused to relinquish its possession of the Premises, and sued. (AA0045.)

G. OBOT's Notices of Force Majeure

The Ground Lease required OBOT to notify the City of any Force Majeure claim. (AA1505(GL, §16.1).) Prior to August 14, 2018, the only communications with the City discussing Force Majeure were:

- OBOT's March 11, 2016 Force Majeure claim regarding a then-overdue DA requirement for a binder of regulations transmitted to CCIG/OBOT (AA1589(Ex.76));[9]

[9] The trial court correctly rejected this DA binder force majeure claim as a "red herring." (AA1119(SOD).)

- City's March 22, 2016 response (AA1593(Ex.81)), to which OBOT did not respond further, including after the City provided the binder in June 2016 (AA1596(Ex.84));

- OBOT's April 11, 2018 letter, which contained no new claim, and only re-forwarded the long-resolved 2016 letter regarding the DA binder (AA1621(Ex.148));

- OBOT's July 30 and August 3, 2018 letters claiming that the 2016 Ordinance was Force Majeure (AA1675(Ex.174); AA1677(Ex.176).)

These letters regarding the Ordinance—two years after the fact—were sent only after the City noticed OBOT's default on rent on July 24, 2018 (overdue since February 2018). (AA1672(Ex.169); (AA1675(Ex.174); AA1677(Ex.176).)

All of OBOT's other substantive Force Majeure claims were made in hindsight, after the performance deadline. (AA1683(Ex.191, 8/28/18 letter); AA1776(Ex.248, 10/19/2018 letter).) On September 21, 2018, the City responded to OBOT's recent letters, rejecting all claims of Force Majeure to date. (AA1703(Ex.217).)[10]

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[10] It is surprising that the trial court faulted the City for delays of three weeks in responding to some of OBOT's letters (AA1133(SOD)), while ignoring that OBOT waited *over two years* to claim the 2016 Ordinance was an event of Force Majeure. (AA1675(Ex.174); AA1677(Ex.176).)

The City declined to make a failure of notice argument below, but established that OBOT's failure to ever say to the City that these alleged events would interfere with OBOT's performance required to meet its deadline (in a formal Force Majeure claim or any other document in the record) supported

IV. This Litigation and Appeal

OBOT initially sued the City in December 2018 in contract and tort. (AA0045.) The trial court dismissed the tort claims on the merits, but overruled the City's demurrer as to res judicata with respect to the contract claims. (AA0155–0165.) The trial court stayed the litigation pending the City's unsuccessful appeal from the various pleadings motions. (See Case No. A157330.)

The City brought its competing breach of contract claim (AA0166), and the cases were eventually consolidated, (AA0229). The City sought summary judgment, which the court denied in light of disputes of fact. (AA0230.) The parties eventually proceeded to a bench trial on liability, commencing in July 2023. (AA1063(SOD).)

The trial court issued its Statement of Decision on Liability on November 22, 2023. (AA1061–1156(SOD).) The court explained that to avoid resolving the City's res judicata arguments it limited its holdings to events postdating the federal court's decision on May 15, 2018. (AA1151 fn.38(SOD).)[11] The court concluded six events of Force Majeure occurred between May 15, 2018 and August 14, 2018:

1) the continuing impact of the 2016 Ordinance;

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what should have been the inescapable conclusion that OBOT actually *could* perform, but *chose* not to. (*Supra* at 29–33.)

[11] That limitation was consistent with OBOT's operative complaint, which limited claims to events post-dating the federal court's May 15, 2018 decision. (AA0193–96.)

2) the City's continuing failure to "clearly and unequivocally inform OBOT what commodities the City viewed as impermissible";

3) the City's continuing "failure to provide substantive, written feedback" on the BOD;

4) the City's continuing failure to complete the RAA;

5) the City's continuing failure to complete Public Improvements in the Rail Right of Way; and

6) the City's breach of the implied covenant.

(AA1150–51(SOD).)

The court held that in light of these events of Force Majeure, OBOT was "not in breach or in default of its obligations," and the City's termination breached the Ground Lease. (AA1152(SOD).) The court then concluded that the City's actions showed a "lack of good faith" and therefore also breached the implied covenant. (AA1155(SOD).) Finally, the trial court defined OBOT to include OGRE, but never addressed the basis for OGRE's third-party claims. (AA1062(SOD); AA1194(Judgment).)

At the subsequent remedies phase, OBOT and OGRE sought as contract damages nearly a billion dollars in "lost future profits" damages, reduced to $160 million in present day value, or in the alternative, an equitable remedy extending contract deadlines accompanied by $19.3 million in "delay" damages. (AA1161.) The court found that OBOT had proven no damages beyond $317,683 in out-of-pocket payroll expenses, and that OBOT's lost future profits were entirely speculative and unsupported. (AA1170–87.) The Court offered the alternative remedies of $317,683 or a 2.5-year Initial Milestone extension.

(AA1187–88.) OBOT elected the equitable remedy, and the trial court entered final Judgment in favor of OBOT and OGRE on January 23, 2024. (AA1194.)

This appeal by the City immediately followed. (AA1198; C.C.P. 904.1(a)(1).)

On May 3, 2024, the trial court awarded OBOT and OGRE attorneys' fees and costs. (AA1208, 1221.) The City appealed those post-judgment orders (AA1238), and seeks consolidation.[12]

ARGUMENT

I. Appellate Standard of Review

Following a bench trial, this court reviews questions of law de novo, including contract interpretation and the application of res judicata. (*Thompson v. Asimos*, (2016) 6 Cal.App.5th 970, 981; *People ex rel. Lockyer v. R.J. Reynolds Tobacco* (2003) 107 Cal.App.4th 516, 520; *City of Oakland v. Oakland Police & Fire Retirement System* (2014) 224 Cal.App.4th 210, 228.) This court applies substantial evidence review to findings of fact. (*Thompson,* 6 Cal.App.5th at 981.)

As discussed herein, the trial court's statement of decision contains notable omissions, including failing to address contract provisions, uncontroverted evidence directly on point, and in the case of OGRE, required elements. All were detailed in the City's objections. (AA1017.) "[U]nder [C.C.P.] section 634, if the statement of decision does not resolve a controverted issue or is ambiguous, and the omission or ambiguity was brought to the

[12] The City does not contest here the amount of the fees or costs awards, and filed the protective appeal only as to prevailing party status arising from judgment.

attention of the trial court, it shall not be inferred on appeal that the trial court decided in favor of the prevailing party as to those facts or on that issue." (*Thompson*, 6 Cal.App.5th at 981 (quotations omitted).)

II. The Trial Court's Force Majeure Holding Is Contrary to the Ground Lease and California Law

OBOT asked the trial court to use the force majeure provision to override the comprehensive pre-construction and construction obligations in the Ground Lease, and the court obliged. The trial court misapplied the law by failing to treat force majeure as the limited, exceptional remedy it is. (See, e.g., *West Pueblo Partners*, 90 Cal.App.5th at 1188 ["This standard derives from the doctrines of impossibility and impracticability"]; *Butler v. Nepple* (1960) 54 Cal.2d 589, 599; *Oosten v. Hay Haulers Dairy Emp. & Helpers Union* (1955) 45 Cal.2d 784, 788-89.)

A. Force Majeure Does Not Supersede Express Terms

Each of the six events of Force Majeure found by the trial court was *already addressed* by specific terms of the Ground Lease in which the parties defined their performance obligations and allocated risk, often with *exclusive remedies*. The trial court's interpretation of the force majeure provision effectively nullified those terms and the risk allocation agreed to by the parties, contrary to California law, which has long held that a general force majeure clause does not override more specific contract terms. (See, e.g., *SVAP*, 87 Cal.App.5th at 891–92; *Horsemen's Benevolent & Protective Assn. v. Valley Racing Assn.* (1992) 4 Cal.App.4th 1538, 1565 ["A force majeure clause is not intended

to buffer a party against the normal risks of a contract ... A force majeure clause interpreted to excuse the buyer from the consequences of the risk he expressly assumed would nullify a central term of the contract."]; *Glenn R. Sewell Sheet Metal v. Loverde* (1969) 70 Cal.2d 666, 676 ["[I]f the parties have contracted with reference" to an event, they may not invoke exculpatory doctrines like force majeure to "escape their obligations."].) Where express terms reflect "risk [that] has been contemplated and voluntarily assumed," the parties "will be held to the bargain they made." (*Glenn*, 70 Cal.2d at 676 fn.13; *Horsemen's,* 4 Cal.App.4th at 1565.) And of course, contracts must be interpreted "so as to give effect to all provisions and avoid rendering some meaningless" (*SVAP*, 87 Cal.App.5th at 891; Civ. Code §1641), and a "specific provision controls over the general provision." (*Starlight Ridge S. Homeowners Assn. v. Hunter-Bloor* (2009) 177 Cal.App.4th 440, 447.) Each of the trial court's "force majeure" conclusions errs by violating this governing law, and the judgment must be reversed on this basis alone.

1. The 2016 Ordinance and Resolution

The trial court concluded the 2016 Ordinance and Resolution was a Force Majeure event. (AA1150(SOD).) But the parties *expressly contemplated* the risk that the City might pass new laws, that OBOT might challenge those laws, and OBOT

agreed to perform *anyway*, all without agreeing to extend OBOT's time to perform. (*Supra* at 20.)[13]

Article 5 of the Ground Lease expressly states that no City legislation "shall relieve Tenant of its obligations hereunder." (AA1450(GL, §5.1.1.2).) In a clear compromise concession by the City, the parties also agreed that OBOT *would not need to comply with such laws while it challenged them in court*. (AA1449–51(GL, §§5.1, 5.2.1).) The parties thus already contemplated the risk of legislative actions impacting the project and any challenge to those laws, and expressly allocated the risks that they may win *or* lose. OBOT expressly agreed that it had the *option* to perform as if the coal ordinance did not exist (including in the manner it would comply with the Pre-Construction steps in §6.2), subject to the risk that it would eventually lose and have to comply with the law. The City, in turn, bore the risk that OBOT would successfully challenge the ordinance. But regardless, the project *would get built, by OBOT, on time.*[14]

Moreover, OBOT further assumed the risk of future legislative and regulatory actions impacting this project by agreeing to build a terminal "capable of servicing one or more

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[13] The trial court's conclusion that the enactment of the Ordinance/Resolution was a Force Majeure event *after May 15, 2018* is also incoherent. The legislation was *enjoined* by the federal court on that date. (AA1064(SOD).)

[14] The financial prudence of this agreement, from OBOT's perspective, was OBOT's decision to make in February 2016, and *is not relevant* to any force majeure claim; the Court erred by imposing its hindsight view of the expense of compliance. (AA1144(SOD).)

lines of export products" (AA1453(GL, §6.1).) OBOT had represented from the outset that it could and would build a "multi-commodity" terminal that could accommodate *any legal commodity*. (RT602:18–603:2; AA1399, 1404(Exs. 51, 57).)

The trial court relieved OBOT of its performance deadlines *without analyzing these expressly applicable provisions*. The court's conclusion ignores the plain language, redistributes the parties' agreed allocation of risk, and is error.

2. Advance Approval of Commodities

The court conclusion that the City's failure to provide OBOT with a list of approved and disapproved commodities was Force Majeure (AA1151(SOD)), is also contrary to contract language—and, potentially, state law.

First, Article 5 expressly states that the City entered this contract solely in its Landlord, not regulatory, capacity, that the regulatory capacity is not constrained, and that OBOT was "solely responsible" for obtaining all Regulatory Approvals without any advance assurances from the City. (*Supra* at 19–20.) Essentially, OBOT agreed that the City, entering the lease as a landlord, made *no promises* regarding *regulatory* approvals for this project.

Nevertheless, the trial court faulted the City for not making those promises and providing regulatory certainty by telling OBOT what it could and could not ship over the life of a 66-year lease. (AA1122(SOD).) But "nothing in the Ground Lease or the other agreements between the Parties obligated the City to provide OBOT with a list of 'approved' commodities."

(AA1119(SOD).) Indeed, it would be a massive change in the law if every government contractor could invoke force majeure to evade obligations because the government failed to provide *advance* regulatory certainty. The trial court's holding plainly contradicts Article 5.

Next, the *parties* did not agree that OBOT would build a terminal consistent with, or after receiving any pre-approved list. OBOT agreed it would build a terminal "capable of servicing one or more lines of export products" (AA1453(GL, §6.1).) The court's conclusion re-writes Article 6 by qualifying the Minimum Project to require the City to first provide such a list.

The trial court also concluded that the City somehow breached the Development Agreement (AA1120 fn.20(SOD)), without reference to, or analysis of, that contract. But the DA's express requirements for future approvals do not allow for such pre-approval or pre-disapproval (which would likely violate laws like CEQA). (*Supra* at 24 fn.5.)[15] And unless the covenants are explicitly dependent, an alleged breach of one contract does not excuse performance of another (particularly where, as here, the contracts are expressly independent, *supra* at 16). (See *Colaco v. Cavotec SA* (2018) 25 Cal.App.5th 1172, 1176, 1185.)

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[15] Bulk commodity shipping implicates a complex network of local, state, and federal laws on a range of topics (from transportation to air quality to workplace health protections). Requiring the City to synthesize this complexity to confirm which of the 15,000 bulk commodities would or would not be permissible, before OBOT had even begun the regulatory and design review process, is as impractical as it is unreasonable.

Finally, requiring the City to pre-approve or reject commodities also raises serious constitutional concerns. Government contracts generally cannot contain any implied promises regarding how the government will exercise legislative and regulatory powers. (*Discovery Builders, Inc. v. City of Oakland* (2023) 92 Cal.App.5th 799, 812; *City of Glendale v. Superior Ct.* (1993) 18 Cal.App.4th 1768, 1777–78.)

3. Approval of Construction Documents

The trial court invented a requirement that the City provide "substantive, written feedback to OBOT regarding the Basis of Design" before OBOT would have to move forward. (AA1098–99, 1151(SOD).)

The parties were well aware of the BOD when this contract was executed, and *did not agree* that feedback on that document was a prerequisite to OBOT's performance—under *either* §6.2.1 (process for landlord approval of Construction Documents)), *or* §§6.2.4 and 6.2.13 (OBOT must obtain regulatory approvals). (See RT1020:7–1021:2 [Tagami admitting he could have negotiated contingencies on "a number of" issues, but did not].) The trial court imposed this extra-contractual requirement on *the Cit*y, while ignoring what the contract required of *OBOT*.

As discussed above, OBOT wavered at trial regarding whether or not it was contending that BOD contained Schematic Drawings. (*Supra* at 26.) Even assuming arguendo that the BOD was such a submission, OBOT never deemed the documents approved, or took any further steps under §6.2.1 (*Supra* at 27).

The court erred by using the force majeure provision to rewrite these steps.[16]

In sum, "[t]here was no provision in the contract for extensions of time under those circumstances." (*Nomellini Constr. Co. v. State of California ex rel. Dept. of Wat. Resources* (1971) 19 Cal.App.3d 240, 243–244.)

4. Ongoing RAA Negotiations

The trial court also disregarded express contract terms in concluding that the City's failure to use "commercially reasonable efforts" to enter into the RAA with the Port qualified as Force Majeure. (AA1151(SOD).)

The RAA was an *operations* agreement, and the contract did not make OBOT's construction deadlines contingent on execution of this document. (AA1452, 1454(GL, §5.2.3(a); §6.1.1.1).) OBOT explicitly *waived* the completion of the RAA as a condition precedent (*supra* at 21), and the parties set no deadline, let alone one prior to the Initial Milestone, for its completion. The parties further recognized that the City and Port might fail to execute an RAA, and in that event OBOT would have, as a "sole and exclusive remedy," the right to "terminate this Lease." (AA1452(GL, §5.2.3(a).)[17] The parties thus already

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[16] The trial court also ignored OBOT's statements during the contract period advising the City *not* to review the BOD because OBOT and TLS would revise their plans and return after OBOT signed a sublease, which it never did during the performance period. (*Supra* at 26–27; AA2024(Ex.589); AA2033(Ex.598).)

[17] The trial court's conclusion that the City had not engaged in commercially reasonable efforts to negotiate the RAA is also

navigated and allocated risks with respect to the RAA, and the court erred by using force majeure to override those terms.

5. Public Improvements in the Rail Corridor

Next, the trial court's conclusion that City's supposed failure to "complete the Public Improvements and the related survey of the rail corridor" was a Force Majeure event (AA1151(SOD)), again conflicts with express contract language.

OBOT agreed in this contract that the Public Improvements were ongoing; that their completion could "materially limit[] the utility of portions of the Premises for Project operations"; and that OBOT's "obligations under [the] Lease shall continue unabated." (*Supra* at 17.) The parties set no deadline for completion; did not make the Initial Milestone contingent; and negotiated a "sole and exclusive" remedy: termination. (AA1538(GL, §37.9.2(b).) The trial court's grant of a performance extension impermissibly alters these provisions.

When the trial court addressed the two exclusive remedy provisions for the Public Improvements and the RAA, it revealed its intent to re-write the parties' deal. Ignoring the word "exclusive," the court reasoned that the exclusive remedies were too "extreme," and that force majeure was another "option" that was "significantly less dire and [was] collaborative." (AA1108 fn.14(SOD).) But "courts cannot make better agreements for

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unsupported by substantial evidence in light of the uncontroverted proof, ignored by the court, that extensive RAA negotiations between OBOT, the City, and the Port were ongoing between 2016 and 2018 and included CCIG/OBOT/OGRE's lawyers. (*Supra* at 32.)

parties than they themselves have been satisfied to enter into or rewrite contracts because they operate harshly or inequitably." (*Third Story Music v. Waits* (1995) 41 Cal.App.4th 798, 809.)

6. Breach of the Implied Covenant

Finally, the court found that the City's breach of the implied covenant by "not diligently advanc[ing] the project" and "[taking] repeated measures to terminate the Lease" was also an event of Force Majeure. (AA1151(SOD).) As demonstrated *infra* at 57–63, the City did not breach the implied covenant. And terminating the contract on November 22, 2018 could not be a force majeure event excusing a deadline months earlier. Moreover, the court's legal premise—that a breach of this contract by way of this implied term can *also* be an event of force majeure—is wrong, because the parties agreed to OBOT's "sole and absolute" remedies for a breach by the City that do not include force majeure. (AA1512–13(GL, Article 22).)

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Finally, the court also concluded, in a footnote, that even if OBOT had "moved forward, at an unknown cost" without feedback on drawings or "without clarity" on commodities, then the RAA and Public Improvements in the rail corridor *alone* would have excused OBOT's performance. (AA1152 fn.40(SOD).) But the court again ignores the contract, in which OBOT agreed to build *both* the terminal "*and*" one of five pieces of rail by the Initial Milestone. (AA1454(GL, §6.1.1.1).) The parties did not agree to make OBOT's construction of the terminal *contingent* on whether it could construct rail; they agreed that OBOT must

build both. The conclusion that OBOT was excused from complying with its obligations to build the terminal by any interference with the rail, on its face, is another error of law.

B. Each "Event" of Force Majeure Was Anticipated

"Under California law, unless a contract explicitly identifies an event as a force majeure, the event must be unforeseeable at the time of contracting to qualify as such." (*Free Range Content v. Google, Inc.* (N.D.Cal. May 13, 2016) 2016 WL 2902332, *6.) Consistent with this principle, force majeure events must be "due to causes beyond such Party's control." (AA1553(GL, Art. 40, def: "Force Majeure").) As the court explained in *Watson Laboratories v. Rhone-Poulenc Rorer,* "[i]n contrast" to events "beyond the reasonable control of either party":

> [W]hen parties expressly contemplate a known risk of a regulatory prohibition, they should be expected to allocate that risk expressly, rather than rely upon a boilerplate clause enumerating a parade of horribles that are so unlikely to occur as to make them qualitatively different. In the absence of such allocation, only governmental action not previously contemplated could qualify as force majeure.

((2001) 178 F.Supp.2d 1099, 1113-14; see also *London Guarantee & Accident v. Industrial Accident Comm'n* (1927) 202 Cal. 239, 242; Black's Law Dictionary 657 (7th ed.1999) [defining Force Majeure Clause]; 30 WILLISTON ON CONTRACTS §77:31 (4th ed.2020).) Courts understand that commercially sophisticated parties have the ability and control to negotiate terms addressing *anticipated* issues. If a risk of some supervening event that prevents performance was *foreseeable* "there should have been

provision for it in the contract, and the absence of such a provision gives rise to the inference that the risk was assumed." (*Lloyd v. Murphy* (1944) 25 Cal.2d 48, 53–54; see also *Guthrie v. Times-Mirror Co*. (1975) 51 Cal.App.3d 879, 885 ["Where parties are aware at the time the contract is entered into that a doubt exists in regard to a certain matter and contract on that assumption, the risk of the existence of the doubtful matter is assumed as an element of the bargain."].) This is particularly true of political and regulatory risks known to experienced parties. (*Lloyd,* 25 Cal.2d at 55–56.) And this is particularly true when accounting for foreseeable actions *of the other negotiating party*.

Foreseeability in this case is established in the plain terms of the contract. As explained, each of the court's Force Majeure "events" pertains to terms that already allocate risk and address the parties' respective obligations. (*Supra* at 39–47.)

The trial record also established, as a matter of fact, that the parties were aware of each issue before executing the contract: the Ordinance (and any challenge by OBOT thereto) (*supra* at 23–25; AA2016(Ex.561 §13)); future regulatory approvals for particular commodities (AA1411(Ex.66); AA1968(Ex.555); AA1361(Ex.7, §3.5.2); AA1102 fn.11(SOD)); the 2015 OBOT-TLS BOD (AA1399(Ex.51); RT771:14–23, 773:18–25); the ongoing RAA negotiations (RT1379:10–1381:1, 1525:5–

1526:13); and the ongoing Public Improvements construction (RT1379:10–1381:1).[18]

These are not the type of unexpected events that the parties could not have negotiated for—indeed, they *did*—and were not "force majeure." (See *West Pueblo Partners*, 90 Cal.App.5th at 1188 [courts should construe contract provisions in light of long-standing law interpreting force majeure].)

OBOT argued below that the contract's inclusion of "acts of the other party" overrides this well-established California law, indicating an intent to include anticipated events simply because they were caused by the other party. That is not at all what this contract says. Including "acts of the other party" in the laundry list of events that *could* qualify as force majeure does not indicate any intent to change this background law requiring events to be unforeseeable, particularly where the parties have negotiated more specific terms that apply to the anticipated events that do not provide exculpatory conditions or extensions of time. Interpreting those words in the context of a general force majeure provision to *silently rewrite* all of the applicable contract terms and remedies to which the parties carefully agreed would be absurd. A far more reasonable interpretation than OBOT's is that the parties intended to allow unanticipated events caused by their counterparty that are not otherwise addressed by more specific terms to qualify as force majeure, if they otherwise meet

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[18] The trial court stated in a conclusory footnote that these events were all unanticipated, but that conclusion (lacking citation or explanation) contradicted both the contract itself and this record evidence. (AA1150 fn.35(SOD).)

the standard. The term "acts of the other party," like all the other types of events listed here, is subject to the standards that apply to the terms "force majeure" and "beyond a party's control" unless the parties have expressly stated otherwise, which this contract does not do. (*West Pueblo Partners*, 90 Cal.App.5th at 1188.)

C. The Court Failed to Connect Any of the Alleged Events of Force Majeure to OBOT's Actual Performance Obligations

The trial court also erred by reasoning that each "force majeure" event interfered with the "Project" without closely analyzing OBOT's actual performance obligations. A force majeure event must make it impossible or legally impracticable to perform *specific contractual obligations*. (*Oosten*, 45 Cal.2d at 789; *KB Salt Lake III, LLC v. Fitness Int'l* (2023) 95 Cal.App.5th 1032, 1050; *West Pueblo Partners*, 90 Cal.App.5th at 1188; see also AA1505(GL, §16.1 ("whose performance *of its obligations hereunder*…"); AA1553(GL, Art. 40 (Def: "Force Majeure: events that "result in delays in a Party's performance *of its obligations hereunder*").) Consistent with *West Pueblo Partners*, 90 Cal.App.5th 1179, other Districts have also recently rejected the argument that interference with general business prospects establishes force majeure. (*SVAP*, 87 Cal.App.5th at 893); *KB Salt Lake III,* 95 Cal.App.5th at 1050) [the force majeure provision "plainly applies only when an 'act' required under the lease, not its 'purpose,' is delayed, hindered, or prevented."].)

The specific requirements of Section 6.2 are *never* discussed in the decision. As explained, OBOT failed to take *any* of the

steps available to it to advance the design and construction of a terminal capable of exporting just one commodity during the performance period. OBOT's performance should not be excused by its *speculation* about what the City would or would not have done if OBOT had taken these steps: "the test [to satisfy the impossibility standard] is not the *risk* of a substantially greater burden, but the *fact* of an *actual* substantially greater burden." (*G. W. Andersen Construction v. Mars Sales* (1985) 164 Cal.App.3d 326, 335–36.) The court's vague (and incorrect) conclusions about the "Project" are no substitute for the precise and careful analysis required by law of the actual contract obligations.

The court also side-stepped the required showing of OBOT's diligence with respect to actual contract requirements with a conclusory footnote claiming OBOT "acted with skill, diligence, and good faith." (AA1150 fn.35(SOD).) But the record was clear (because OBOT admitted it, *supra* at 29–31) that OBOT could have, but did not, pursued the design and construction of the multi-commodity terminal that it promised, to ship commodities *other* than coal. Because it chose not to pursue the options available to it (for *financial reasons*), OBOT never submitted any Schematic Drawings, Preliminary or Final Construction Documents; never invoked its right to deem documents approved; never submitted a single regulatory permit application; and never entered into any construction contract. (*Supra* at 26–28.)[19]

[19] As the Court's remedy decision confirms, OBOT never spent any of its own money on fulfilling these obligations, either. (AA1167–72).

Even if OBOT and its business partners were waiting out the federal litigation (which the contract *did not permit*), they did not submit plans on May 16, 2018 either. Instead, OBOT and ITS spent the summer of 2018 haggling over millions of dollars rather than moving through the required steps OBOT agreed to perform. (*Supra* at 31.) This is not *diligence.*

And although OGRE began some rail construction, it was uncontroverted that in 2018 it ordered its contractor to stop (and the court ignored the sublease in which OGRE and OBOT put off that construction, potentially for years). (*Supra* at 32–33.) This is not diligence, either.

The court's footnote did not employ the correct legal standard (by ignoring the contract requirements) and was not remotely supported by substantial evidence.

D. Admissions that Conclusively Defeated Impossibility and Causation

The court had to ignore dispositive admissions by OBOT and other evidence to conclude the City's actions prevented performance.

1. *Impossibility*. As this Court recently held, California courts interpret "force majeure" clauses against a longstanding backdrop of California law and through "the doctrines of impossibility and impracticability." (*West Pueblo Partners*, 90 Cal.App.5th at 1188; *Butler*, 54 Cal.2d at 597–99; *Watson Laboratories*, 178 F.Supp.2d at 1110); see also *Oosten,* 45 Cal.2d at 789 ["No contractor is excused under such an express provision unless he shows affirmatively that … in spite of skill, diligence

and good faith on his part, performance became impossible or unreasonably expensive."].) [20]

In *West Pueblo Partners*, this court held dispositive a party's admissions that it could have performed but did not. (90 Cal.App.5th at 1188 [holding that there was "no triable issue of fact" as to impossibility "because Stone admitted that it had the financial resources to pay rent"]; *KB Salt Lake*, 95 Cal.App.5th at 1053 (same).) So too here, OBOT admitted at trial that *it* had many ways of complying with the Minimum Project, that it could have self-funded, but chose to wait until its sublessee funded the project. (*Supra* at 30.)

OBOT's options to proceed throughout 2016, 2017, and 2018 defeat force majeure even if those options were less financially attractive. (*See Guilbert Tex., Inc. v. United States Fed. Grp. Consortium Syndicate* (C.D.Cal. Apr. 22, 2022) 2022 WL 1599867, *8 ["[T]he 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."].)

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[20] The parties disputed below whether the term "hinder" in §16.1 altered the "force majeure" standard. OBOT argued for a lesser standard; the City argued that this commonly-used word (see, e.g., *SVAP,* 87 Cal.App.5th at 892–93; *KB Salt Lake*, 95 Cal.App.5th at 1050–51) described causation and does not expressly alter the standard meaning of "force majeure" and events "beyond a party's control." The trial court purported to follow this Court's standard from *West Pueblo Partners*. (AA1149(SOD).) Had the court actually applied the correct legal standard, it would have concluded that both the contract and the facts supported the City, not OBOT.

The facts, as admitted by Mr. Tagami, also foreclosed the trial court's conclusion that Force Majeure events in the last *three months* of the 2.5-year performance period rendered OBOT's performance impossible. In particular, Mr. Tagami conclusively admitted that by May 15, 2018 *it was too late to perform with respect to the terminal*, because meeting the Initial Milestone would take "at least a year." (RT1724:17–21.)

This too is conclusive: having done nothing until May 15, 2018, OBOT could not have fulfilled the contract requirements between May 15, 2018 and the August 2018 Initial Milestone, regardless of the City's actions (or inaction) in those three months. The court again erred in ignoring this significant admission.

Finally, the court concluded that the ongoing RAA negotiations and Public Improvements on the Rail Right of Way prevented OBOT from performing with respect to the rail required for the Initial Milestone. But the contract language and trial testimony conclusively established that the RAA was needed to *use*, not build, track. (*Supra* at 21, 32.) And the court ignored entirely that three of the five Minimum Project Improvements (of which only one was required to be constructed by the deadline), were not on the Rail Right of Way at all. (*Supra* at 18.)

2. *Causation*. A party invoking force majeure must also demonstrate that the alleged force majeure event "proximately caused" its failure to perform. (*Oosten*, 45 Cal.2d at 789; *KB Salt Lake*, 95 Cal.App.5th at 1053 [a force majeure event must

"cause[] a party's timely performance under the contract to 'become impossible or unreasonably expensive'"].)

The contention endorsed by the trial court—that the City's actions from May through August 2018 prevented OBOT's performance—ignored that when OBOT and its sublessee ITS finally took steps to advance the project forward in September 2018, *nothing had changed since May 15, 2018*. None of the City's alleged failures had been addressed when, in late September 2018, OBOT and ITS at long last submitted designs for approval and sought to begin the regulatory process. (AA1718(Ex.237); AA1747(Ex.239); AA1827(Ex.249).) On these facts, OBOT cannot establish that *the City* caused OBOT's failure to perform.

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All told, the trial court focused on what outcome it believed was fairest after May 15, 2018 (in light of the outcome of the federal litigation, unusually set forth in its entirety within the court's decision, AA1066–94), rather than on the outcome the express terms of this contract required. But that hindsight vision of fairness cannot override the contract terms or authorize the use of Force Majeure to nullify the deal that OBOT and the City actually agreed to in February 2016, and must be reversed.

III. The Trial Court Also Erred by Construing the Implied Covenant to Alter Express Contract Terms[21]

The trial court found acts of "bad faith" after May 15, 2018 violated the implied covenant. (AA1151 fn.38(SOD).) The court erred by interpreting the implied covenant to duplicate or alter express terms, which it cannot do. (E.g., *Guz*, 24 Cal.4th at 327, 349–50 [the implied covenant "cannot be endowed with an existence independent of its contractual underpinnings" and "cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement"; "where an implied covenant claim alleges a breach of obligations beyond the agreement's actual terms, it is invalid"]; accord *Carma*, 2 Cal.4th at 374).) While the implied covenant serves to protect the express terms by constraining the unreasonable exercise of discretion, that implied term can never be used, as the court did here, to override those express terms. (*Carma*, 2 Cal.4th at 372, 374.)

A. The City's "Unjustified" Termination of the Contract Cannot Violate the Implied Covenant

The trial court legally erred by concluding that the City's contract termination also breached the implied covenant. (AA1155(SOD).) The parties' competing *express* breach claims

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[21] If this Court concludes that OBOT was not entitled to a force majeure extension, it need not reach the implied covenant claim. A critical second element of that claim is that OBOT performed or was excused from performing. (See CACI No. 325.) Without an extension, OBOT's performance by the deadline was not excused, and its implied covenant claim fails at the second element without ever reaching any City breach.

turn on whether the City's termination of the contract was a breach of contract. If the City breached the express terms because OBOT was entitled to a force majeure extension there is no duplicative implied covenant claim. (*Storek & Storek, Inc. v. Citicorp Real Estate* (2002) 100 Cal.App.4th 44, 62 ["Such a challenge… is a claim of nonperformance of the express terms of the contract, not a claim of breach of the implied covenant."]; *Guz*, 24 Cal.4th at 352–53 [implied covenant claim based on the same breach is "superfluous"].) On the other hand, if there were no events of force majeure, the termination was expressly authorized, also foreclosing any implied covenant claim. (*See Carma*, 2 Cal.4th at 376 [conduct "expressly permitted by the lease… can never violate an implied covenant of good faith and fair dealing"].) Either way, there is no breach of this implied term.

The trial court was clearly concerned with the City's *motive* for terminating the contract. (AA1137, 1155(SOD).) But motive is not relevant to an express breach claim, and the implied covenant cannot circumvent that law. (E.g., *Carolina Beverage Corp. v. FIJI Water Co.* (2024) 102 Cal.App.5th 977, 993–94 ["[A]llegedly 'malevolent' 'motive[s]' are 'irrelevant to a breach of contract claim.'"]; accord *Applied Equip. Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 516; see also *Thrifty Payless, Inc. v. Mariners Mile Gateway* (2010) 185 Cal.App.4th 1050, 1064 [courts cannot use the implied covenant to "read [a lease termination provision] out of the lease simply because one party feels its operation was harsh or unfair"].) The court's projections

regarding the City's motivations (AA1137, 1155(SOD)) never should have been considered relevant.[22]

B. The Force Majeure Events Cannot Violate the Implied Covenant

The trial court also relied on "the City's lack of good faith efforts to address various obstacles (some of which were created by the City) in OBOT's path[.]" (AA1155(SOD).) To the extent the trial court was relying here on the five previously identified Force Majeure events, this is further legal error.[23] The implied covenant does not duplicate express terms, which includes the Force Majeure and early termination clauses. Either OBOT was correct that the events extended the deadline and the City breached the express terms, or the City was correct and OBOT therefore breached; the implied covenant cannot duplicate these conclusions. (*Guz*, 24 Cal.4th at 352–53.) Nor can the implied

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[22] The City takes serious issue with the trial court's unsupported statement that the City provided "no justification" for terminating the Ground Lease: the justification was OBOT's failure to meet its deadlines, which the parties *agreed* would trigger termination. The City had no obligation to provide any additional justification. The City's witnesses went further, however, and explained how OBOT's failure to take *any steps to move the project forward for two and a half years*; its proposed "conceptual" schedule contemplating additional years before construction; and its ever-shifting slate of business partners (to which OBOT wished to turn the entire project over) gave the City no confidence that it had a trustworthy partner that would meet its obligations for the next 66 years. (*Supra* at 33–34.)

[23] The sixth Force Majeure event the court identified is the breach of the implied covenant; this is circular and leaves five others.

covenant alter or augment all of the express terms that pertain to each issue discussed above, *supra* at 39–47. (*Id.*; accord *Carma*, 2 Cal.4th at 374; *Storek & Storek,* 100 Cal.App.4th at 62; see also *Avidity Partners, LLC v. California* (2013) 221 Cal.App.4th 1180, 1208 [There "can be no implied covenant where the subject is completely covered by the contract."].)[24]

C. The Other "Obstacles"

To the extent the trial court made *other* findings of "bad faith," the events identified within the court's post-May 15, 2018 time frame all involve the City's responses to various letters regarding force majeure, default, and termination. (AA1155(SOD, citing §B.5).) The court again erred as a matter of law to the extent it concluded such conduct violated the implied covenant.

The trial court took issue, repeatedly, with the timing and content of the City's responses to OBOT's communications regarding the contract. (AA1133(SOD) ["the City's response [three weeks later] ignored its responsibility for its contractor"]; AA1134(SOD) [faulting "unexplained failure to substantively respond" to certain force majeure notices]; AA1137(SOD) [critiquing "City's general apathy to substantively responding"];

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[24] In particular, courts have consistently enforced contract language reserving regulatory authority against implied covenant claims. (See, e.g., *Interstate Marina Dev. Co. v. Cnty. of Los Angeles* (1984) 155 Cal.App.3d 435, 451; *RUI One Corp. v. City of Berkeley* (9th Cir. 2004) 371 F.3d 1137, 1150; *Marina Plaza v. California Coastal Zone Conservation Com.* (1977) 73 Cal.App.3d 311, 323–24.)

AA1138(SOD) [City made "inaccurate[] suggest[ion]" in letter]; AA1141(SOD) [faulting City for "defer[ring]" a response to certain letters]; AA1146(SOD) [criticizing City's decision to "terminate the Lease instead of substantively responding" to correspondence]; AA1147(SOD) [blaming City for not responding to post-default correspondence].) The court faulted the City for failing, in the court's view, to "collaborate" by explaining its legal position quickly enough. But the court again substituted its preferred view of how a city and developer should work together for the actual terms of this contract. (*Avidity Partners*, 221 Cal.App.4th at 1204 [implied covenant "does not impose substantive terms … beyond those to which the parties actually agreed"].)

The Ground Lease does not require the City to explain to OBOT the rationale for its actions taken pursuant to express contract terms unless those terms say so. In particular, the parties did not agree to require the City to respond to force majeure notices (AA1505–06(GL, §16.1)), or give a detailed explanation in a notice of default, (AA1507–08(GL, §18.1.7)). There is no allegation that the City violated any timeframe actually required by the contracts, and that is conclusive. While the trial court may have believed that such efforts might have helped the parties resolve their differences, they are not required by the Ground Lease, and action consistent with the contract cannot be "bad faith."[25]

[25] The City *did* respond to every claim of force majeure OBOT made. (*Supra* at 35.)

As for the trial court's conclusion that the City acted in "bad faith" by articulating its legal positions (AA1138, 1145(SOD)), there is no support for the proposition that such conduct breaches the implied covenant. (*Cf. VFLA Eventco v. William Morris Endeavor Ent.* (2024) 100 Cal.App.5th 287, 313 [no breach of the implied covenant where "both sides took a hardline but good faith position with respect to the force majeure provision, which they were entitled to do"].)

The City's responses to OBOT's letters in August, September, and October 2018 could not have possibly impaired OBOT's ability to perform its substantive contract obligations by the August 14, 2018 deadline. OBOT was not denied the "benefit of its bargain" in violation of the implied covenant if the City's actions did not impair the bargain *OBOT* was required to uphold. For that reason, the court's concerns with a City letter requesting that OBOT sort out its own dispute with the City's public works contractor (with whom OBOT had a separate contractual relationship) are also misplaced: there is no relevant "lack of good faith" or "cooperation" when this had nothing to do with the Initial Milestone. (AA1133(SOD).)

Finally, the trial court tipped its hand by its repeated (inappropriate) references to settlement. (AA1129, 1155(SOD).) The City should not have been penalized for failing to settle this or any other case. Indeed, the court speculated that the City terminated the contract to "create leverage" and gain "concessions" vis-à-vis coal (AA1155(SOD)), seemingly referencing the parties' then-pending Ninth Circuit litigation

regarding the City's authority to regulate coal. Such considerations should have had no place in this decision.

IV. Claim Preclusion Also Requires Reversal

Claim preclusion provides an independent ground to reverse the trial court's liability decision. The trial court recognized the serious claim preclusion questions raised by OBOT's successive lawsuits against the City, but attempted to avoid resolution by limiting its decision to events post-dating the federal decision ("*OBOT I*"). (AA1151–52 fn.38(SOD).) But the trial court's decision contains a facial problem: the court's judgment in favor of OBOT is barred by claim preclusion because it rests entirely, in the court's view, on events that are merely the *continuation* of conduct that began before or during the pendency of *OBOT I*, *and* because OBOT could have (and in fact did) seek in *OBOT I* the identical relief it was awarded here.[26]

Claim preclusion, or res judicata, "prevents relitigation of the same cause of action in a second suit between the same parties or parties in privity with them." (*Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 896.) It bars not only claims actually raised, but also claims, theories, or remedies that could have been raised. (*Atwell v. City of Rohnert Park* (2018) 27 Cal.App.5th 692, 698.) Whether second-filed claims are barred turns on whether both suits involve the same "primary right,"

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[26] As explained above, any implied covenant claim fails at the second element if the court's conclusion with respect to Force Majeure is wrong and OBOT's deadline is not excused. (*Supra* at 57.) Therefore this Court need not reach the question of whether the implied covenant claim is also barred by claim preclusion.

which is "the right to be free from a particular injury." (*Atwell*, 27 Cal.App.5th at 699.) Accordingly, if the second suit involves the same harm, "the same primary right is at stake even if in the second suit the plaintiff pleads different theories of recovery, seeks different forms of relief and/or adds new facts supporting recovery." (*Id.*)

First, the claims granted by the trial court here are barred because OBOT sought the relief from the injury it asserts now (delays in its right to develop the Terminal, caused by the City's actions) in the federal litigation. We need not speculate: OBOT did seek relief from the Ground Lease deadlines from the federal court. The amended complaint in *OBOT I* requested "*relief prohibiting the City from asserting that OBOT has breached the … Ground Lease … by any failure to perform resulting from the City's misconduct*." (AA0154; accord AA0356.) While OBOT later abandoned this remedy along with delay damages (which it again sought here), that matters not. (*Atwell*, 27 Cal.App.5th at 698.)

This conclusion is not altered simply because the claims there and here arose under different contracts (the DA versus the Ground Lease). Again, OBOT sought relief *from the Ground Lease* in the federal litigation as a remedy for the alleged breach of the DA and what it claimed was resulting interference. The court should have reached the same result as in *Weikel v. TCW Realty Fund II Holding Co.* (1997) 55 Cal.App.4th 1234, 1247–51. That case involved the plaintiff's primary right to build a structure on a specific plot of land, and the defendant's alleged interference with that right. (*Id.* at 1247–51.) Even though his

second suit (filed years later) alleged different causes of action and was premised on different underlying legal documents, res judicata applied because both suits implicated the same primary right. (*Id.*; see also *Atwell*, 27 Cal.App.5th at 699–702 [suit challenging 2015 city resolution barred by prior suit challenging 2010 resolution because "material facts" had not changed].)

This conclusion does not change because certain alleged harms continued after the conclusion of *OBOT I*. Intervening facts do not give rise to a new suit where they are merely the continuation of a harm that arose during the first suit. (*Mycogen*, 28 Cal.4th at 907; see also *Miller v. Collectors Universe, Inc.* (2008) 159 Cal.App.4th 988, 1006–08 [under primary rights theory "a series of related acts causing the same injury or harm gives rise to" a single cause of action] [collecting cases]; *McCloskey v. Carlton Builders* (1985) 165 Cal.App.3d 689, 692–93 [plaintiffs who won a suit for damage to their home arising from fraudulent concealment of defect could not file second suit for additional damages arising from soil subsidence that occurred after first suit].)

In *Mycogen*, the plaintiff obtained specific performance for breach of contract. (28 Cal.4th at 893.) Four years later, the plaintiff sued again requesting delay damages arising from the defendant's alleged failure to comply with specific performance. Plaintiff argued that because the defendant's tactics postdated the conclusion of the first suit, they were not barred. The Supreme Court *disagreed*, holding that "[d]elay damages must be requested in the initial action for breach of contract, even if they

are still speculative at the time of the suit." (*Id.* at 907.) Because those damages *could have* been sought in the first suit, and the second suit arose out of the same primary right, the second suit was barred. (*Id.* at 907–08; see also *Weikel*, 55 Cal.App.4th at 1248–49.)

The case for preclusion is even stronger here. Far from being "speculative," it is undisputed that each and every event that the trial court relied on to rule that the City should have extended the contract deadline was already occurring and well-known to OBOT prior to June 14, 2017—the date that OBOT filed its operative complaint in *OBOT I*, and thus the date on which the bar to filing a successive suit attached. (See *Yager v. Yager* (1936) 7 Cal.2d 213, 217.)

Event relied on by trial court	**Date that alleged harm began**
Failure to provide feedback on OBOT-TLS BOD. (AA1151(SOD))	September 2015 (BOD given to City) (AA1097(SOD))
Failure to enter RAA (AA1151(SOD))	At least February 2016 (known since GL signing) (AA1106(SOD))
Coal Ordinance & Resolution (AA1150 fn.37(SOD))	June 2016 (AA1160(SOD))
Failure to complete Public Improvements (AA1151(SOD))	At least February 2016 (known since GL signing) (AA1096–97, 1106–08(SOD))
Failure to provide list of prohibited commodities (AA1120 fn.20, 1151(SOD))	At least February 2016 (known since GL signing) (AA1122(SOD))

The trial court's analysis is accordingly irreconcilable with *Mycogen* and must be reversed.

V. The Trial Court Also Erred By Granting Judgment to OGRE[27]

The trial court further erred by *entering judgment* (and fees and costs) to OGRE on third party breach of contract claims, without ever addressing the Ground Lease's "No Third Party Beneficiaries" clause. (AA1194–96, 1208–19.)

OBOT and the City unambiguously agreed that "[t]his 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 …." (AA1541(GL, §38.4); see also AA1384(Ex.7, §14.1) [similar language in DA].) This express contract language is conclusive proof that the parties did *not* intend to vest in OGRE the right to sue. (See, e.g., *The Ratcliff Architects v. Vanir Constr. Mgmt., Inc.* (2001) 88 Cal.App.4th 595, 603–04; *Balsam v. Tucows Inc.* (9th Cir. 2010) 627 F.3d 1158, 1163; accord *Wexler v. Cal. Fair Plan Ass'n* (2021) 63 Cal.App.5th 55, 65–66; see also Civ. Code §1638.)

To overcome this unambiguous language, OGRE pointed below only to one provision of the Ground Lease that parenthetically mentions OGRE as a potential sublessee. (AA1535(GL, §37.8.1).) That provision (involving another rail operating agreement) grants OGRE no rights or role in the Minimum Project. To conclude that this minor provision (on a

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[27] If this Court agrees that OBOT, not the City, breached the contract, OGRE's claims necessarily fail; a third-party has no greater rights than a party to the contract. (*Souza v. Westlands Water Dist.* (2006) 135 Cal.App.4th 879, 894–95.)

side issue) elevates OGRE to the status of a party is absurd and contrary to law: "The fact that [a] third party is incidentally named in the contract, or that the contract … would inure to his benefit, is not sufficient to entitle him" to enforce it. (*LaBarbera v. Sec. Nat'l Ins. Co.* (2022) 86 Cal.App.5th 1329, 1341.) Indeed, that OGRE was mentioned but was *not* identified as a third-party beneficiary is powerful evidence of the parties' intent.

The judgment to OGRE must be reversed.

VI. This Court Should Reverse and Remand to Determine the City's Contract Remedies

The holding that the City, rather than OBOT, breached the Ground Lease must be reversed. The trial court also rejected the City's breach claim on the same grounds. (AA1156(SOD).) Because OBOT proved no Force Majeure extension, OBOT breached the Ground Lease by failing to meet the Initial Milestone deadline, and the City's termination was proper. Nothing remains to prove the City's competing breach of contract claim, and this Court should remand with instructions to proceed to a remedy phase for the City. The orders granting attorneys' fees and costs to OBOT and OGRE as prevailing parties must correspondingly be vacated.

CONCLUSION

For the foregoing reasons, the City respectfully requests this Court reverse the Judgment of the trial court in favor of OBOT and OGRE, vacate the orders on fees and costs, and remand for further proceedings on the City's contract remedies.

Dated: August 27, 2024

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

I hereby certify pursuant to Rule 8.204(c)(1) of the California Rules of Court that the attached OPENING BRIEF OF DEFENDANT/COUNTER-PLAINTIFF AND APPELLANT CITY OF OAKLAND, is proportionally spaced, has a typeface of 13 points or more, and contains 13,994 words, excluding the cover, tables, certificates, and signature block. Counsel relies on the word count of the word-processing program used to prepare this brief.

Dated: August 27, 2024

By: /s/*Danielle Leonard*

Danielle Leonard

Attorney for Defendant/Counter-Plaintiff and Appellant City of Oakland

ADDENDUM

The City attaches the following two documents from the record for the Court's convenience:

1. Glossary (AA00651)
2. Timeline (AA0653)

APPENDIX A: KEY ACROYNMS AND ABBREVIATIONS

Plaintiffs/Counter-Defendants:

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

CCIG/OBOT's Proposed Sublessees:

IES	Insight Energy Solutions
ITS	Insight Terminal Solutions
TLS	Terminal Logistics Solutions

Contracts Between the City and CCIG/OBOT:

LDDA	December 4, 2012 City-Prologis/CCIG Lease Disposition and Development Agreement (Ex. 378; *see also* Ex. 561 (Third Amendment to the LDDA)
PMA	October 23, 2012 City-CCIG Property Management Agreement (not in evidence, *but see* Ex. 127, letter re: expiration)
DA	July 16, 2013 City-Prologis/CCIG Development Agreement (Ex. 7)
WGW GL	February 16, 2016 City-OBOT West Gateway Ground Lease (Ex. 68)

Contracts Between CCIG/OBOT and other entities:

ENA	April 24, 2014 OBOT-TLS Exclusive Negotiating Agreement (Ex. 514, *extended by* Exs. 517, 549, 574, 590, 618, 620, 630, 632, 637, 638)
DMA	April 24, 2015 CCIG-TLS Development Management Agreement (Ex. 25)

Regulatory Agencies/Other:

ACTC	Alameda County Transportation Commission
BCDC	San Francisco Bay Conservation and Development Commission
BNSF	Burlington Northern Santa Fe Railroad
BOD	Basis of Design
BRP	Bowie Resource Partners
EBMUD	East Bay Municipal Utility District
OAB	Oakland Army Base

RAA	Rail Access Agreement
ROA	Rail Operating Agreement
R/O/W	Rail Right of Way
STB	Surface Transportation Board (Federal)
TCIF	Cal. Department of Transportation Trade Corridors Improvement Fund
UPRR	Union Pacific Railroad
WOPR	West Oakland Pacific Railroad

APPENDIX B: TIMELINE OF KEY EVENTS AND DOCUMENTS

Date	Event/Document
2012	
May 29, 2012	2012 CEQA Addendum for Oakland Army Base (Ex. 1)
December 4, 2012	City of Oakland-CCIG/Prologis Lease Disposition and Development Agreement (LDDA) (Ex. 378)
2013	
July 16, 2013	City of Oakland-CCIG/Prologis Development Agreement (DA) (Ex. 7)
December 14, 2013	Oakland Global Newsletter (Ex. 506)
2014	
April 17, 2014	OBOT-TLS Exclusive Negotiating Agreement (Ex. 514) and Confidentiality Agreement (Ex. 513)
June 14, 2014	City of Oakland Resolution Opposing Transportation of Coal through Oakland (Ex. 13)
June 27, 2014	OBOT-TLS Term Sheet (Ex. 515)
November 4, 2014	First extension of OBOT-TLS ENA (Ex. 517)
2015	
April 7, 2015	Richfield Reaper reports on Utah coal plans for West Gateway (Ex. 523)
July 16, 2015	Oakland City Council schedules September 21, 2015 public hearing regarding health and safety impacts of coal (Ex. 797)
July 21, 2015	OBOT-TLS Summit ("pencils down" on TLS BOD) (Ex. 539)
July 31, 2015	Letter from City (Mayor Schaaf) to ACTC requesting funds for public infrastructure (Ex. 42)
September 8, 2015	OBOT provides TLS BOD to City of Oakland (Exs. 51, 750)
September 21, 2015	City Council hearing on Public Health and/or Safety Impacts of Coal (Ex. 839)
October 19, 2015	Second extension of OBOT-TLS ENA (Ex. 549)

November 6, 2015	Claudia Cappio Memorandum to Planning and Building Department re: protocols for upcoming OBOT permit review (Ex. 61)
December 8, 2015	Letter from City of Oakland Direct of Planning and Building (Rachel Flynn) letter to CCIG CEO Phil Tagami re: Annual Compliance Review/Oakland Global (Ex. 555)
2016	
February 11, 2016	Letter from Oakland City Administrator Sabrina Landreth to CCIG CEO Phil Tagami re: West Gateway Ground Lease (Ex. 66)
February 16, 2016	Third Amendment to LDDA between City of Oakland and CCIG-Prologis (Ex. 561)
February 16, 2016	**City of Oakland-OBOT West Gateway Ground Lease (Ex. 68)**
February 16, 2016	Memorandum of City-OBOT Lease Agreement (Ex. 747)
March 9, 2016	City and CCIG hold "pre-application" meeting for OBOT project
March 11, 2016	OBOT letter re: Force Majeure claim regarding DA Binder of City regulations (Ex. 76)
March 18, 2016	Third extension to OBOT-TLS ENA (Ex. 574)
March 22, 2016	City of Oakland letter to OBOT re: response rejecting OBOT claim of Force Majeure re: Binder (Ex. 81)
May 2, 2016	Fourth extension of OBOT-TLS ENA (Ex. 590)
May 2, 2016	OBOT counsel letter to City of Oakland (Claudia Cappio) re: TLS Basis of Design (Ex. 589)
May 11, 2016	City of Oakland (Claudia Cappio) e-mail inquiry to CCIG/OBOT re: whether any update to TLS BOD (Ex. 594)
May 16, 2016	CCIG/OBOT (Phil Tagami) letter to City of Oakland (Claudia Cappio) re: TLS BOD stating OBOT "look[s] forward to meeting with the City and presenting TLS's further refined design parameters, operations protocols, and proposed permitting approach once they have exercised their option." (Ex. 598)
June 15, 2016	City of Oakland letter to CCIG enclosing DA "Binder" of City Regulations (Ex. 84)
June 27, 2016/ July 19, 2016	City of Oakland Ordinance No. 13385 and Resolution No. 886234 regarding coal storage and handling (Exs. 87, 499)
September 30, 2016	Fifth extension of OBOT-TLS ENA (Ex. 618)
October 13, 2016	Letter from City of Oakland (Claudia Cappio) to

	CCIG/OBOT/OGRE (Phil Tagami and Mark McClure) discussing various rail agreements and status (Ex. 95)
November 10, 2016	Sixth extension of OBOT-TLS ENA (Ex. 620)
December 7, 2016	OBOT sues City of Oakland in federal court. *Oakland Bulk & Oversized Terminal, LLC v. City of Oakland*, No. 16-cv-07014-VC (N.D. Cal.)
2017	
February 9, 2017	Draft of RAA exchanged between parties (Ex. 727)
April 10, 2017	Draft of RAA exchanged between parties (Ex. 719)
April 21, 2017	Seventh extension of OBOT-TLS ENA (Ex. 630)
April 27, 2017	Draft of RAA exchanged between parties (Ex. 720)
May 17, 2017	Eighth extension of OBOT-TLS ENA (Ex. 632)
May 17, 2017	CCIG and TLS suspend Development Management Agreement (Ex. 117)
June 14, 2017	First Amended Complaint filed in federal lawsuit. *Oakland Bulk & Oversized Terminal, LLC v. City of Oakland*, No. 16-cv-07014-VC (N.D. Cal.)
June 16, 2017	Extension of temporary construction easement in Inner and Outer Claw on Port OAB property (Ex. 775)
September 7, 2017	Ninth extension of OBOT-TLS ENA (Ex. 637)
September 28, 2017	Tenth extension of OBOT- TLS ENA (Ex. 638)
2018	
January 12, 2018	Letter from OBOT (Skyler Sanders) to City of Oakland presenting IES Sublease for West Gateway (Ex. 137)
January 22, 2018	Draft of RAA exchanged between parties (Ex. 728)
February 1, 2018	City of Oakland Letter to OBOT requesting further information regarding IES (Ex. 145)
February 5, 2018	Letter from OBOT (Skyler Sanders) to City of Oakland responding re: promising detailed response regarding IES (Ex. 643)
March 20, 2018	Counsel for CCIG/OBOT/OGRE (Marc Stice) circulates to City of Oakland (Betsy Lake) a summary of open issues related to the draft RAA (Ex. 734)
April 10, 2018	Letter from OBOT (Marc Stice) to City re-forwarding 2016 Force

	Majeure claim regarding DA Binder (Exs. 148, 149)
May 8, 2018	Email from Phil Tagami to John Siegel (IES) declaring IES sublease "null and void" in light of unpaid debt to CCIG/OBOT (Ex. 152)
May 15, 2018	Decision issued in *Oakland Bulk & Oversized Terminal, LLC v. City of Oakland*, No. 16-cv-07014-VC, 321 F.Supp.3d 986
May 23, 2018	OGRE's Petition to the STB, for an exemption allowing it to rehabilitate the track in the Rail R/O/W (Ex. 155)
June 27, 2018	OBOT letter to City of Oakland submitting June 26, 2018 OBOT-OGRE Sublease (Ex. 162)
June 29, 2018	City of Oakland reply to OGRE's May 23, 2018 STB petition (Ex. 163)
July 17, 2018	Letter from City of Oakland to OBOT repeating request for further information regarding IES Sublease (Ex. 654)
July 24, 2018	City of Oakland to OBOT Notice of Past Due Rent (Ex. 169)
July 30, 2018	Letter from OBOT (Skyler Sanders) to City of Oakland "reiterat[ing]" Force Majeure Claims for June 2016 Ordinance and Resolution, and DA Binder (Ex. 174)
August 1, 2018	STB Order requiring OGRE to answer questions re: May 23 2018 petition Ex. 752)
August 3, 2018	Letter from OBOT (Skyler Sanders) to City of Oakland repeating force majeure claims based on Ordinance and Resolution and DA Binder (Ex. 176)
August 14, 2018	**Initial Milestone Deadline under West Gateway Ground Lease (per City's grant of two-year tolling pursuant to 1.7.2)**
August 20, 2018	City of Oakland letter to CCIG/OBOT stating OBOT failed to meet Initial Milestone deadline on August 14, 2018 (Ex. 185)
August 21, 2018	Phil Tagami (CCIG/OBOT) e-mail to John Siegel (ITS) stating "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 and several other critical path agencies." (Ex. 661)
August 21, 2018	Phil Tagami (CCIG/OBOT) email to City (Betsy Lake) raising general contractor "turnover" of rail right of way for private OGRE track installations (Ex. 189)
August 21, 2018	OGRE response to STB's August 1, 2018 request for information (Ex. 186)

August 27, 2018	City of Oakland letter to OBOT re: DA Compliance (Ex. 188)
August 28, 2018	OBOT (Phil Tagami) letter to City of Oakland responding to DA Compliance and describing Force Majeure claims (Ex. 191)
September 7, 2018	Letter from OBOT (Sanders) to City of Oakland requesting OGRE NDA (Ex. 205)
September 18, 2018	Port of Oakland comments to STB regarding OGRE's fourth petition (Ex. 214)
September 21, 2018	City of Oakland Notice to Cure with respect to an Unmatured Event of Default (Ex. 217)
September 24, 2018	OBOT-ITS Sublease signed (Ex. 801)
September 27, 2018	Letter from City of Oakland to OBOT Re: OGRE NDA and OBOT Default (Ex. 226)
September 28, 2018	OBOT letter to City of Oakland Re: Notice of OBOT-ITS Sublease (Ex. 237)
September 28, 2018	OBOT letter to City of Oakland requesting Landlord Approval of "Schematic Drawings" Pursuant to Section 6.2.1. for ITS Basis of Design (Ex. 239 (letter), Ex. 240 (ITS BOD)
September 28, 2018	OBOT letter to City of Oakland requesting Estoppel Certificate for ITS Sublease (Ex. 235)
September 28, 2018	OBOT letter to City of Oakland requesting Non-Disturbance Agreement for ITS Sublease (Ex. 236)
October 17, 2018	City of Oakland letter to OBOT re: ITS Sublease NDA Request (Ex. 485)
October 18, 2018	City of Oakland Determination of Incomplete Construction Drawings to OBOT (Ex. 247)
October 18, 2018	City of Oakland Estoppel Certificate (OGRE Sublease) (Ex. 486)
October 18, 2018	City of Oakland Estoppel Certificate (ITS Sublease) (Ex. 676)
October 19, 2018	Letter from OBOT counsel (Manatt Phelps) re: Notice of Claim Regarding West Gateway Project (Ex. 248)
October 23, 2018	City of Oakland Notice of Event of Default to OBOT for failure to cure (Ex. 250)
October 25, 2018	OBOT letter responding to Determination of Incomplete Construction Drawings (Ex. 252)
December 4, 2018	Complaint filed in *Oakland Bulk and Oversized Terminal, LLC v. City of Oakland*, No. RG18930929 (Alameda Sup. Ct.)

2019

January 24, 2019	OGRE submits complete fence permit application in person to City of Oakland (Ex. 271)
March 19, 2019	OBOT and OGRE letter to City of Oakland requesting Landlord Approval of "Schematic Drawings" Pursuant to Section 6.2.1 for Rail Improvements (Ex. 765)

PROOF OF SERVICE
Code of Civil Procedure §1013

I am employed in the City and County of San Francisco, California. I am over the age of eighteen years and not a party to the within action; my business address is 177 Post Street, Suite 300, San Francisco, California 94108. On August 27, 2024, I served the following documents on the parties, through their attorneys of record, as designated below:

OPENING BRIEF OF DEFENDANT/COUNTER-PLAINTIFF AND APPELLANT CITY OF OAKLAND

APPELLANT'S APPENDIX (FILES 1–6, VOLUMES 1-9)

Via Electronic Mail: I caused such documents to be delivered in PDF format by electronically transmitting a PDF version to the email addresses listed in the service list below.

BARRY LEE CHRISTOPHER WANGER JUSTIN RODRIGUEZ BENJAMIN SHATZ MISA EIRITZ Manatt, Phelps & Phillips, LLP One Embarcadero Center, 30th Floor San Francisco, CA 94111 Telephone: (415) 291-7400 Facsimile: (415) 291-747 bwlee@manatt.com cwanger@manatt.com jjrodriguez@manatt.com bshatz@manatt.com meiritz@manatt.com	*Attorneys for Oakland Bulk and Oversized Terminal et al.*

Via TrueFiling: I caused such documents to be filed and served via the TrueFiling Filing System which delivers an electronic PDF copy of all filed documents to recipients on the service list therein.

Via Courier: On August 27, 2024, I caused a hard copy of the above "**OPENING BRIEF OF DEFENDANT/COUNTER-PLAINTIFF AND APPELLANT CITY OF OAKLAND"** to be delivered via courier to the service address listed below.

The Honorable Noël Wise
Superior Court of California, County of Alameda
1221 Oak Street, Dept. 21
Oakland, CA 94612

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed August 27, 2024, at San Francisco, California.

/s/ Giorgia Lingiardi

Giorgia Lingiardi