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

19 Plaintiffs,

20 v.

21 CITY OF OAKLAND, a California  
22 municipal corporation,

23 Defendant.

**ELECTRONICALLY FILED**  
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County of Alameda  
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Unlimited Civil Case/Assigned to Dept. 514  
(Hon. Noël Wise)

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
DEFENDANT/COUNTER-PLAINTIFF  
CITY OF OAKLAND'S MOTION TO  
BIFURCATE**

**Reservation No.: 075095020596**  
Hearing Date: May 18, 2023  
Time: 3:00pm  
Dept.: 514

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

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1 **INTRODUCTION**

2 Defendant and Counter-Plaintiff the City of Oakland respectfully requests that this Court  
3 bifurcate the upcoming trial in this case, currently set for July 10, 2023, into two phases: an  
4 equitable phase for a bench trial first, and then, only if necessary, a legal phase for a jury.  
5 Equitable issues that require this Court’s resolution—including excuse of performance, force  
6 majeure, and competing claims for specific performance of a contract—sit at the heart of this  
7 case. In these circumstances, California law grants this Court the discretion to hold a bench trial  
8 on equitable claims and defenses prior to resolving any remaining legal claims, and instructs that  
9 ‘equity first’ is the preferred order of resolution. *See, e.g., Hoopes v. Dolan* (2008) 168  
10 Cal.App.4th 146, 158. As set forth below, proceeding in this manner will “minimize[]  
11 inconsistencies,” “avoid[] giving one side two bites of the apple,” and “prevent[] duplication of  
12 effort,” *id.*, as well as avoid unnecessary waste of the Court’s, the parties’, and jurors’ time.

13 This case presents competing breach of contract claims between the City of Oakland and  
14 the Developers,<sup>1</sup> who failed to build a promised bulk commodity shipping terminal on City-  
15 owned land. Equitable issues are key to this case in two ways. First, the central issue in dispute  
16 is for the Court to resolve: the Developers’ contention that the City’s conduct prevented them  
17 from commencing construction of the terminal as the contract required, and that the contract  
18 deadlines therefore should be extended by force majeure.<sup>2</sup> The Court’s resolution of that issue  
19 will determine whether OBOT’s performance was excused (and, accordingly, whether the City’s  
20 termination of the Ground Lease was a breach of contract) or whether OBOT’s failure to begin  
21 building the promised multi-commodity terminal breached the Ground Lease. As explained

22 \_\_\_\_\_  
23 <sup>1</sup> The “Developers” are: 1) Plaintiff and Counter-Defendant Oakland Bulk and Oversized  
24 Terminal (“OBOT”), which held the contract at issue with the City (the 2016 West Gateway  
25 Ground Lease); 2) OBOT’s owner, Counter-Defendant California Capital Investment Group  
26 (“CCIG”); and 3) OBOT’s affiliate, Plaintiff Oakland Global Rail Enterprise (“OGRE”).

27 <sup>2</sup> There is no dispute over other significant issues, including: that there was a contract (the 66-year  
28 West Gateway Ground Lease); that OBOT failed to perform the centerpiece contractual  
requirement of commencing construction of the promised bulk commodity terminal within two-  
and-a-half years (the “Initial Milestone” deadline); and that the City subsequently declared OBOT  
in default and terminated the contract by its own terms. OBOT contends that the City breached  
the contract in myriad ways flowing from this termination (some of which are factually disputed),  
but those contentions are moot if OBOT cannot establish excuse of performance. CACI 303.

1 below, this central issue of excused performance by way of prevention of performance and/or  
2 force majeure—which is both an affirmative element of OBOT and OGRE’s claims and OBOT’s  
3 defense to the City’s claim—is an equitable one for the Court and not a jury to resolve.

4         Second, both sides bring contract claims for specific performance. OBOT and OGRE  
5 seek an order extending the contract deadlines (allowing the Developers to retain possession of  
6 the City land), while the City seeks the return of the land via enforcement of the contract’s early  
7 termination provisions. These claims are for the Court, and a jury cannot award either remedy.  
8 And while OBOT and OGRE also seek contract damages as an *alternative* remedy, California law  
9 is clear that in such hybrid cases, where a plaintiff seeks specific performance and contract  
10 damages, the “better practice” is to hear the equitable specific performance claim first. *Hoopas*,  
11 168 Cal.App.4th at 158.

12         Hearing the equitable claims first is also more efficient and prevents the unnecessary  
13 waste of jury time. *Id.* If the City prevails in an initial bench trial, the Court’s factual findings on  
14 liability will be binding and OBOT/OGRE’s alternative damages claims will be moot. In that  
15 case, there will be no need for a jury trial. If, on the other hand, OBOT and/or OGRE prevail in  
16 an initial bench trial, the Court’s factual findings will be binding and the only remaining issue for  
17 the jury to resolve (*if* OBOT or OGRE elects the contract damages remedy) will be the fact and  
18 amount of damages, which would require a one-day rather than month-long jury trial.

19         By contrast, if this Court sends the case to a jury first, the Court must spend substantial  
20 additional time and work on jury-related filings and requirements. In addition, this particular case  
21 poses substantial concerns regarding juror confusion that will require the Court’s time and  
22 attention. The central disputed element and defense of prevention of performance and force  
23 majeure would still require resolution by the Court, not a jury, requiring careful instruction and  
24 leaving the jury perhaps to wonder what if anything in dispute they are deciding. Likewise, the  
25 impact of this Court’s prior *res judicata* rulings specifically limiting the claims and defenses that  
26 are allowed in this case (because OBOT already sued once for breach of contract in federal court),  
27 will also demand time and careful instruction to avoid juror confusion. *See* Orders of May 16,  
28

1 2019. And, proceeding to a jury first would require the Court to expend resources resolving the  
2 parties' competing motions to exclude damages experts that a bench trial could render moot.

3 For these reasons and those below, proceeding with equity first, as California law prefers,  
4 is the most efficient option, and serves the best interests of the parties, this Court, and the public.

### 5 **BACKGROUND<sup>3</sup>**

6 This case involves a failed development project on the "West Gateway." City Compl. ¶2.  
7 The West Gateway is City-owned land that is part of the former Oakland Army Base ("OAB") at  
8 the foot of the Bay Bridge. *Id.* OBOT, along with its corporate parent CCIG, is a development  
9 company that contractually agreed, in the 2016 West Gateway Ground Lease ("Ground Lease" or  
10 "GL"), to construct a bulk commodity shipping terminal and related rail improvements on the  
11 City's land. *Id.* ¶4; GL §6.1. That construction never occurred, resulting in the parties'  
12 competing breach of contract claims. City Compl. ¶¶6-7, 39, 58; FAC ¶¶6-7, 102-103.

13 The City signed the Ground Lease with OBOT in 2016 as part of a multi-stage  
14 development intended to put the valuable but vacant City-owned land to productive use. City  
15 Compl. ¶4. Prior to entering into the Ground Lease, the parties had entered into a 2013  
16 Development Agreement ("DA") that provided general parameters for the public-private  
17 development project on multiple parcels within the OAB (a contract that played a central role in  
18 the federal trial, discussed below). *Id.*

19 The Ground Lease granted OBOT possession of the West Gateway land for 66 years  
20 (§§1.1, 1.2). To jump-start the project, the City also agreed to bear the cost and expense of the  
21 public improvements needed to ready the land for private development and gave OBOT two years  
22 of free rent (§1.7.2). OBOT, in exchange, agreed to pay rent to the City once the two years  
23 expired, to bear the burden and cost of constructing and operating the private improvements (the  
24 terminal project and related railway improvements), and to develop the land within the

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25 \_\_\_\_\_  
26 <sup>3</sup> Citations herein are to the operative complaints: the City's Complaint ("City Compl.") filed  
27 May 28, 2020, and the Developers' First Amended Complaint ("FAC") filed December 11, 2020.  
28 The central contract in dispute, the 2016 Ground Lease, is an Exhibit to the City's Complaint (and  
is incorporated by reference into the Developers' Complaint). For the Court's convenience, the  
City has provided along with this Motion the Appendix of Contract Provisions cited herein.

1 enumerated timeframes (Art. 2, 6). The deadlines were so central to the project that the Ground  
2 Lease links those construction deadlines to early termination provisions authorizing the City to  
3 terminate the entire 66-year lease for OBOT’s failure to meet the Initial Milestone (§6.1.2).

4 The Ground Lease, which the City signed solely in its capacity as a landowner and not in  
5 any regulatory or legislative capacity (§5.1), expressly states that any legislative action by the  
6 City *cannot excuse OBOT’s required performance* (§5.1.1.2).<sup>4</sup> Nonetheless, in the background of  
7 the present dispute is the City’s legislative activity with respect to a single potential commodity—  
8 coal. At the time the 2016 Ground Lease was signed, all parties were aware of this ongoing  
9 legislative activity, which included a 2014 City Council resolution opposing coal, and 2015 City  
10 Council hearings contemplating the banning of the storage and handling of coal in Oakland  
11 because of coal’s health and safety impacts, in which the Developers participated. City Compl.  
12 ¶51. In July 2016, the City concluded that coal would present a substantial risk to public health of  
13 Oakland residents, and enacted an Ordinance and Resolution prohibiting the storage and handling  
14 of coal in Oakland, including at the West Gateway. *Id.* ¶52. In response, OBOT sued in federal  
15 court, contending that the 2016 Ordinance and Resolution breached the development contracts for  
16 this project, including the DA and Ground Lease. *Id.* ¶53; FAC ¶1. In May 2018, the federal  
17 court ruled that the evidence before the City Council did not meet the standard for new health and  
18 safety regulations permitted in the parties’ 2013 DA and therefore the City’s coal restriction  
19 breached that contract. The Ninth Circuit eventually affirmed. *Oakland Bulk & Oversized*  
20 *Terminal, LLC v. City of Oakland*, 321 F. Supp. 3d 986 (N.D. Cal. 2018), *aff’d*, 960 F.3d 603 (9th  
21 Cir. 2020). Despite the litigation, OBOT never sought relief from the contract’s deadlines from  
22 the federal court. *Id.*

23 While the federal litigation was ongoing, OBOT ignored its contractual agreement and  
24 pending Initial Milestone deadline to *commence* construction of a terminal “capable of servicing  
25

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26 <sup>4</sup> “No occurrence or situation arising during the Term, *nor any present or future Law, whether*  
27 *foreseen or unforeseen, and however extraordinary, shall relieve Tenant of its obligations*  
28 *hereunder, nor give Tenant any right to terminate this Lease in whole or in part or to otherwise*  
*seek redress against Landlord.” §5.1.1.2 (emphasis added); see also §5.1.1., 5.2.1.*



1 one or more lines of export products” within two-and-one-half years of the signing of the Ground  
2 Lease (§§1.7.3; 6.1). The August 14, 2018 Initial Milestone deadline came and went. City  
3 Compl. ¶39; *see generally* FAC ¶¶6-7 (alleging City prevented OBOT performance). In that  
4 time, besides its failure to commence construction, OBOT had failed to comply with any of the  
5 pre-construction steps expressly set forth in the Ground Lease, such as applying for any  
6 construction permits, submitting the Initial and Final construction documents, and entering into  
7 required construction contracts (§6.2). City Compl. ¶¶40-43. Accordingly, the City declared  
8 OBOT in default of the Initial Milestone deadline. *Id.* ¶¶44-46. In December 2018, after OBOT  
9 did not cure the default, the City terminated the Ground Lease under its express terms, which  
10 provide for early termination of the 66-year lease if OBOT failed to meet the Initial Milestone  
11 (§6.1.2). *Id.* ¶47.

12 OBOT refused to accept the termination, refused to relinquish possession of the land, and,  
13 along with its affiliate OGRE, sued the City (again), this time in state court (the present  
14 litigation). *See generally* FAC. OBOT claims that the City’s actions, including the enactment of  
15 the 2016 no-coal ordinance, either excused its failure to perform or constituted force majeure  
16 events under the terms of the Ground Lease, thus extending the deadlines for OBOT’s  
17 performance. *Id.* OBOT then contends that the City’s actions in 2018, primarily the termination  
18 of the contract, breached the Ground Lease (because if OBOT’s time for performance was  
19 extended, the City’s termination was improper).<sup>5</sup> *Id.* ¶¶6, 102. OBOT seeks specific  
20 performance in the form of the extension, via force majeure, of the contract’s construction  
21 deadlines and life of the contract, or in the alternative, contract damages. FAC ¶¶140. While  
22 OBOT and OGRE now claim lost future profits of approximately \$130 million (from a business  
23

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24 <sup>5</sup> This Court previously concluded that *res judicata* limits OBOT to relying on actions taken by the  
25 City after the federal district court’s May 2018 decision to prove its breach of contract claims,  
26 since OBOT already sued the City for *breach of the same contract* in federal court. Orders of  
27 May 16, 2019. OBOT and OGRE’s now operative complaint is the First Amended Complaint  
28 (“FAC”) filed December 11, 2020, following the resolution of the appeal on the pleadings  
motions. That Complaint, consistent with this Court’s May 16, 2019 Orders, makes explicit the  
Developers’ claims are based only on post-May 15, 2018 events. FAC ¶¶6, 102. (contending that  
“[since] the issuance of the Federal Ruling in May 2018” the City has prevented performance and  
breached the Ground Lease).

1 that has never been constructed, let alone operational), the Ground Lease expressly waives such  
2 consequential damages (§24.1). FAC ¶¶107, 119.<sup>6</sup>

3 The City filed its own breach of contract claim against OBOT in light of OBOT's refusal  
4 to return possession of the land. City Compl. ¶58. The City contends that OBOT's breach of the  
5 Initial Milestone deadline triggered the Ground Lease's express early termination provisions. *Id.*  
6 ¶¶47, 49, 60. The City seeks specific performance in the form of enforcement of the early  
7 termination provisions, including the provision requiring OBOT to relinquish the land back to the  
8 City. *Id.* ¶60.

9 This Court consolidated the cases for all purposes in 2020. The pending claims include:

- 10 • Plaintiff OBOT's contract claims against Defendant City (including breach of  
11 contract, breach of the implied covenant of good faith and fair dealing, anticipatory  
12 breach, and declaratory relief; all seeking the specific performance remedy of  
13 extended contract deadlines, or in the alternative, contract damages);
- 14 • Plaintiff OGRE's claims against the City for third-party breach of contract and  
15 declaratory relief (seeking the same relief as OBOT, specific performance or in the  
16 alternative, contract damages); and
- 17 • Counter-Plaintiff the City's claims against Counter-Defendants OBOT and parent  
18 CCIG for breach of contract (seeking specific performance).

19 Trial on these claims was initially scheduled to commence March 5, 2022. The City  
20 moved for summary judgment on all claims, which this Court denied in light of factual disputes  
21 on January 6, 2022. On February 1, 2022, following private mediation, the parties reached a  
22 Term Sheet and jointly requested a stay pending negotiation of a Settlement Agreement. This  
23 Court granted the request, taking the remaining pre-trial deadlines and trial off-calendar. The  
24 parties have not reached a Settlement Agreement. In June 2022, Judge Gee, formerly presiding in  
25 this Department, rescheduled trial to commence April 21, 2023. This case was reassigned upon  
26 Judge Gee's retirement to Judge Noël Wise. OBOT moved the Court to reopen all discovery. On

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27 <sup>6</sup> OBOT and OGRE rely on an accountant opinion estimating \$129 million in present value for  
28 lost future profits and \$5 million in out-of-pocket expenses. At the appropriate time, if necessary,  
the City will establish that OBOT (and OGRE by extension)'s damages are limited by the express  
contract terms to out-of-pocket expenses. *See* §§22.1, 23.1, 24.1, 24.4). Also, at the appropriate  
time, the City will establish that the express waiver of third party beneficiaries (*see* §38.4)  
precludes OGRE's third party claims.

1 October 7, 2022, this Court granted OBOT’s motion in limited part, re-opening discovery only as  
2 to events after the previous close of discovery, from December 21, 2021 forward. On December  
3 12, 2022, the City applied ex parte for a new pre-trial scheduling order and to hear certain pre-  
4 trial motions (including this one) on a specific schedule. The next day, this Court denied the  
5 application and moved the trial to July 10, 2023, which permitted this motion to be heard on a  
6 regular noticed schedule.

## 7 ARGUMENT

8 Bifurcation, with the significant equitable issues tried first by the Court, is the best  
9 approach to resolve this “hybrid” contract case. Contract disputes often give rise to “hybrid”  
10 cases that include both equitable claims and defenses for the judge and legal claims for a jury,  
11 particularly where a plaintiff seeks both specific performance and contract damages as alternative  
12 remedies. *See, e.g., Darbun Enterprises, Inc. v. San Fernando Cmty. Hosp.* (2015) 239  
13 Cal.App.4th 399 (equitable specific performance and legal contract damages claims); *see also*  
14 *Hoopes*, 168 Cal.App.4th at 153 (equitable estoppel defense and legal breach of contract claims);  
15 *Walton v. Walton* (1995) 31 Cal.App.4th 277, 293 (equitable specific performance and legal  
16 damages claims). The appellate courts have long encouraged trial courts to exercise their  
17 discretion in these cases to bifurcate the equitable and legal issues and try the equitable issues  
18 first.<sup>7</sup> That approach is the most efficient and avoids a wasteful jury trial because “under  
19 established California precedent, when a case involves both legal and equitable claims or issues,  
20 the trial court may decide the equitable issues first, and this decision may result in factual and  
21 legal findings that effectively dispose of the legal claims.” *Rincon*, 43 Cal.App.5th at 993  
22 (quotations omitted); *see also Raedeke v. Gibraltar Sav. & Loan Assn.* (1974) 10 Cal.3d 665, 671  
23 (describing equity first resolution in mixed cases as “well-established”; collecting cases).

24  
25  
26  
27 <sup>7</sup> *E.g., Nationwide Biweekly*, 9 Cal.5th at 317; *Rincon EV Realty LLC v. CP III Rincon Towers, Inc.* (2019) 43 Cal.App.5th 988, 993; *Orange Cnty. Water Dist. v. Alcoa Glob. Fasteners, Inc.* (2017) 12 Cal.App.5th 252, 355; *Darbun*, 239 Cal.App.4th at 408–09; *Hoopes*, 168 Cal.App.4th at 157; *Nwosu*, 122 Cal.App.4th at 1238; *see also Walton*, 31 Cal.App.4th at 293.

1 We explain first below why this case primarily raises equitable issues, and then in the  
2 second section, explain the efficiencies that weigh heavily in favor of proceeding in the “equity  
3 first” manner preferred under California law.

4 **A. The Competing Contract Claims in This Case Raise Two Sets of Significant**  
5 **and Potentially Dispositive Equitable Issues**

6 **1. The resolution of all claims will depend on this Court’s disposition of**  
7 **OBOT’s equitable prevention of performance and force majeure theories**

8 First, *both* OBOT’s breach of contract claim *and* its defense against the City’s claim  
9 depend on the Court’s resolution of equitable theories: prevention of performance and force  
10 majeure. Those doctrines are essential to the second element of OBOT’s (and OGRE’s)  
11 affirmative breach of contract claim—which is proof that plaintiff either performed or had its  
12 performance excused. CACI 303. They are also OBOT’s defenses to the City’s breach of  
13 contract claim based on OBOT’s failure to construct the terminal by the Initial Milestone  
14 deadline. Thus, resolution of these equitable issues is potentially dispositive of both sides’  
15 contract claims.

16 OBOT must rely on equity to win this case because, under the express terms of the  
17 Ground Lease, it is undeniably in breach. The contractual deadlines in this case are plain, and the  
18 Developers have admitted in discovery that they did not meet the Initial Milestone requirement to  
19 commence construction of the terminal absent a force majeure extension. OBOT (and OGRE)  
20 can prevail on their breach of contract claim or defeat the City’s claim only by reaching beyond  
21 their express performance obligations to demonstrate that their failed performance of obligations  
22 by the contractual deadlines was excused. *See Consolidated World Investments v. Lido Preferred*  
23 *(1992) 9 Cal.App.4th 373, 380; Spinks v. Equity Residential Briarwood Apartments (2009) 171*  
24 *Cal.App.4th 1004, 1031 (2009).*

25 To make that demonstration, OBOT relies on two distinct but related equitable theories:  
26 (1) the City’s actions prevented its performance, and (2) the City’s same actions triggered the  
27 force majeure clause in the contract and extended OBOT’s deadline for performance. Both  
28

1 arguments will require resolution by this Court, not a jury, because they ask this Court to exercise  
2 its traditional equitable authority to excuse the Developers’ failure to meet their contractual  
3 obligations. The arguments that OBOT (and OGRE) assert here—prevention of performance and  
4 force majeure—are the type of claims that state law *requires* be resolved by this Court. *See, e.g.,*  
5 CACI No. 303 (frustration of purpose, impossibility, and impracticability “are decided as  
6 questions of law, not as questions of fact.”).

7 In California, the determination of whether a given claim is legal or equitable requires a  
8 historical inquiry into the nature of the claim. If the claim or its analogue was typically heard by  
9 a jury in 1850, when the California Constitution was ratified, it is legal. *See Nationwide Biweekly*  
10 *Admin., Inc. v. Superior Ct. of Alameda Cnty.* (2020) 9 Cal.5th 279, 315. If the claim, defense, or  
11 its analogue was typically heard by a judge at that time, it is equitable. *Id.* Here, both theories—  
12 prevention of performance and force majeure—draw from the doctrinal tradition of equitable  
13 theories such as frustration of purpose, impossibility, and impracticability.

14 Prevention of performance based on a counterparty’s conduct, for example, is a variation  
15 of frustration of purpose. Both legal theories require the trier of fact to determine whether some  
16 event not contemplated by the parties, and therefore not anticipated in contract, relieves a party of  
17 its legal duties. Prevention of performance is thus “a conclusion of law drawn *by the court* from  
18 the facts of a given case,” *Mitchell v. Ceazan Tires, Ltd.* (1944) 25 Cal.2d 45, 48 (emphasis  
19 added), and there is no jury instruction for this claim. *See also Glen Falls Indemnity Co. v.*  
20 *Perscallo* (1950) 96 Cal.App.2d 799, 802 (same). Judges, not juries, must make the legal  
21 determination regarding which circumstances excuse a party from meeting its express and  
22 unambiguous contractual commitments.

23 Similarly, contractual force majeure clauses “invoke[] a body of common law doctrine  
24 that is largely indistinguishable from the doctrine of impossibility.” *Watson Labs., Inc. v. Rhone-*  
25 *Poulenc Rorer, Inc.* (C.D. Cal. 2001) 178 F.Supp.2d 1099, 1110. Indeed, the legal standard for  
26 proving force majeure in California is indistinguishable from impossibility: a party asserting force  
27 majeure must prove that performance “became impossible or unreasonably expensive” to prevail.  
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1 *Oosten v. Hay Haulers Dairy Emps. & Helpers Union* (1955) 45 Cal.2d 784, 789. Thus, like  
2 impossibility, there is no jury instruction for force majeure, and courts resolve force majeure  
3 clauses as equitable defenses. *See San Mateo Cmty. Coll. Dist. v. Half Moon Bay Ltd. P'ship*  
4 (1998) 65 Cal.App.4th 401, 76, as modified; *SVAP III Poway Crossings, LLC v. Fitness Int'l,*  
5 *LLC*, 2023 WL 333705 (Cal. Ct. App. Jan. 20, 2023)

6 **2. The competing claims for specific performance must be tried in equity**

7 OBOT and OGRE seek specific performance, which is an equitable claim that must be  
8 submitted to a judge. *Walton*, 31 Cal.App.4th at 293 (“There is no constitutional right to a jury  
9 trial in an action for specific performance, even though such action implicates legal issues  
10 regarding contract formation.”); *see also Hastings v. Matlock* (1985) 171 Cal.App.3d 826, 835  
11 (“The fact that in an action for specific performance of an agreement the court must determine the  
12 existence of the agreement does not in itself transform the action into one at law.”). As explained  
13 above, where a party seeks both specific performance and damages, it is well-established that  
14 California courts can and should hear the entire equitable breach of contract claim for specific  
15 performance first, even where that claim will resolve issues relevant to any alternative damages  
16 claim. *Walton*, 31 Cal.App.4th at 293; *see also Nwosu v. Uba* (2004) 122 Cal.App.4th 1229.

17 OBOT and OGRE do seek truly alternative remedies. “A plaintiff may not receive both”  
18 damages and specific performance in a breach of contract claim, as “such an award would  
19 constitute double recovery.” *Darbun*, 239 Cal.App.4th 399 at 409; *see also Walton*, 31  
20 Cal.App.4th at 293. Despite this rule, OBOT and OGRE seek both (1) to extend the contract’s  
21 project deadlines via force majeure and thereby retain possession of the land, and (2) to recover  
22 damages for 66 years of supposed “lost” profits. OBOT and OGRE have not yet elected between  
23 these remedies, and the Court need not force such an election to resolve this motion. Equity first  
24 resolution prevails even when, as here, these remedies are sought in the alternative.<sup>8</sup>

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27 <sup>8</sup> As explained further below, equity first preclusion in no way intrudes on the right to have a jury  
28 decide a breach of contract claim for damages. *Walton*, 31 Cal.App.4th at 293; *see also Raedeke*  
*v. Gibraltar Sav. & Loan Assn.* (1974) 10 Cal.3d 665, 671.

1 OBOT’s ancillary contract claims (breach of the implied covenant; anticipatory breach)  
2 similarly all seek both specific performance and damages remedies, and thus present the same  
3 opportunity for equity first resolution. These claims are also well-suited to a bench trial because  
4 each suffers from threshold legal flaws that this Court will be called upon to resolve as a matter of  
5 law.<sup>9</sup> Likewise, OGRE’s thirty-party claims duplicate OBOT’s theories of breach and mutually  
6 exclusive specific performance and damages remedies. These claims also suffer from a threshold  
7 contract interpretation issue (i.e., that the contract expressly precludes third party beneficiaries)  
8 that requires the Court’s resolution and is well-suited to a bench trial.

9 Finally, the City’s claims sound *only* in equity. The City seeks specific performance in  
10 the form of enforcement of the Ground Lease’s express early termination for OBOT’s failure to  
11 meet the Initial Milestone deadline: OBOT must relinquish possession of the City’s land. *See*  
12 *Nwosu*, 122 Cal.App.4th at 1240–41 (specific performance, including the execution of a quitclaim  
13 deed, is an equitable claim). The City will be able to put to productive use the dormant land  
14 OBOT has occupied since 2016 only by proceeding in equity.<sup>10</sup>

15 **B. Equity First Will Avoid a Lengthy and Complicated Jury Trial**

16 As discussed above, a chorus of California appellate courts urge trial judges to resolve  
17 equitable issues before legal ones in hybrid cases. *See supra* n.9. This consensus has historical  
18 roots, but the most important justifications are practical: California applies the rule of equity-first  
19 preclusion, and encourages courts to avoid the time, expense, and burden of unnecessary jury  
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21 <sup>9</sup> OBOT has never treated the repudiation of the Ground Lease as final (because it seeks to extend  
22 deadlines) and therefore is foreclosed from any anticipatory breach claim. *See Central Valley*  
23 *Gen. Hosp. v. Smith* (2008) 162 Cal.App.4th 501, 514; *Guerrieri v. Severini* (1958) 51 Cal.2d 12,  
24 18-19. Further, OBOT’s breach of the implied covenant claim is not cognizable because it is  
25 entirely duplicative of OBOT’s express breach of contract claims. *See, e.g., Guz v. Bechtel Nat.*  
*Inc.* (2000) 24 Cal.4th 317, 326, 352-53; *Levy v. Only Cremations for Pets, Inc.* (2020) 57  
26 Cal.App.5th 203, 215. These threshold legal issues are questions for the Court.

26 <sup>10</sup> The City does also seek to enforce the Ground Lease’s provision that provides for liquidated  
27 damages as an additional early termination remedy. City Compl. ¶60. The validity of a  
28 liquidated damages provision, however, is “a matter for the court to decide.” *Beasley v. Wells*  
*Fargo Bank* (1991) 235 Cal.App.3d 1383, 1393. Once validity is established, enforcement of this  
provision will not require resolution of any facts and does not convert the City’s claim for  
specific performance into a legal claim for damages.

1 trials. “[T]he first factfinder binds the second,” much like collateral estoppel, in order to  
2 “minimize[] inconsistencies and avoid[] giving one side two bites at the apple.” *Hoopes*, 168  
3 Cal.App.4th at 158. Bifurcating the trial, therefore, “may result in factual and legal findings that  
4 effectively dispose of the legal claims.” *Nwosu*, 122 Cal.App.4th at 1244. By resolving equitable  
5 issues first, this Court can eliminate or significantly shorten any subsequent jury trial, thus  
6 making the trial more efficient for all parties.

7 **1. Trying the equitable issues first may obviate the need for, or significantly limit**  
8 **the issues to be decided in, a subsequent jury trial**

9 The implications of equity-first preclusion are clear in this case: if the City wins the  
10 bench trial, there will be no jury trial. That is because, if OBOT cannot meet its burden to  
11 establish it was not in fact possible to commence construction on a bulk commodity terminal by  
12 the contract deadline (and OBOT therefore will be unable to satisfy its burden of proving force  
13 majeure or prevention of performance), the deadlines in the contract would apply, OBOT would  
14 be in breach, and OBOT would be required to relinquish the land. The Court’s factual findings  
15 with respect to the elements of the City’s claim and OBOT’s defenses (including force majeure  
16 and prevention of performance) would be dispositive as to any alternative legal breach of contract  
17 claim for damages, and there will be nothing for a jury to resolve.

18 If, on the other hand, OBOT and/or OGRE prevail in the bench trial, the bench trial  
19 findings would be preclusive on the elements of both sides’ contract claims. In that case, the only  
20 remaining issue for a jury, *if* OBOT/OGRE elect to pursue damages rather than equitable relief,  
21 would be the fact and amount of damages—requiring at most a one-day trial, as compared to a  
22 month-long jury trial if the Court were to hear legal issues first or the legal and equitable issues  
23 together.<sup>11</sup> And if OBOT has instead elected to pursue specific performance in order to retain  
24 possession of the land, and prevails, then this Court will be called upon to shape that remedy  
25 without any jury trial. Thus, regardless of which remedy a prevailing OBOT or OGRE ultimately  
26 elects, proceeding with equity first allows for a more efficient resolution of the issues at stake.

27 <sup>11</sup> Based on the damages evidence produced in this case, and the nature of damages allowed by  
28 the Ground Lease, which are limited to out-of-pocket expenses (*see* §§22.1, 23.1, 24.1, 24.4), the  
City reasonably estimates a one-day trial on OBOT and/or OGRE’s out-of-pocket expenses.



1 Bifurcating a trial and proceeding in equity first happens frequently, and California law is  
2 clear that this in no way violates the Constitutional right to a jury trial. In *Walton*, for example,  
3 two sons filed suit against their father’s estate, alleging that he promised to devise certain  
4 amounts of stock to them in his will. 31 Cal.App.4th at 282. The sons’ claims included quasi-  
5 specific performance (the effective equivalent of specific performance in estate law) and breach  
6 of contract. *Id.* at 282–83 and n.2. The trial court granted the plaintiffs’ motion to bifurcate and  
7 to try the equitable claim for specific performance before the remaining legal claim. After a  
8 bench trial on the equitable claim, the trial court found in favor of plaintiffs, obviating the need  
9 for further proceedings on the remaining legal issues. *Id.* at 285. The Court of Appeal rejected  
10 the defendant’s argument on appeal that this procedure ran afoul of the California Constitution’s  
11 guaranteed right to a jury trial, reasoning that “there is no constitutional right to a jury trial in an  
12 action for specific performance” and that the court’s determination of the equitable issues was  
13 dispositive of the legal ones, rendering a jury trial unnecessary. *Id.* at 287–88, 293–94.

14 Finally, because of equity first preclusion, there is no scenario under which the Court  
15 would be required to *repeat* any trial. As previously discussed, California law is crystal clear that  
16 a plaintiff pleading damages as an alternative contract remedy to specific performance has no  
17 *right* to proceed to a jury on a damages claim if the Court resolves the issues in equity first.  
18 Further, because this Court’s findings in the equitable phase would be binding as to all remaining  
19 claims, there will not be any duplication of evidence or any need for witnesses to testify twice  
20 should a damages trial on out-of-pocket expenses be necessary.

21 **2. Holding a jury trial first, or trying the case in law and equity simultaneously, will**  
22 **be more inefficient and complicated**

23 On the other hand, failure to carefully consider the order of operations in hybrid trials can  
24 result in unnecessary duplication and waste of resources. In *Hoopes*, for example, a commercial  
25 tenant brought several causes of action, including breach of contract, against his landlord. 168  
26 Cal.App.4th at 151–52. The trial court denied the landlord’s motion to bifurcate and hear the  
27 equitable issues (the landlord’s equitable estoppel defense) first. *Id.* After a 13-day jury trial, the  
28 jury returned a verdict in favor of the tenant. Only then did the trial court conduct a bench trial on

1 the equitable issues and determine that the tenant was equitably estopped. *Id.* at 154. The trial  
2 court had thus conducted a fruitless jury trial, generated more litigation, and provided “a powerful  
3 example of why it is generally considered ‘better procedure to rule upon the [equitable issues]  
4 before submitting the matter for jury determination.’” *Id.* at 163 (citing *DRG/Beverly Hills Ltd. v.*  
5 *Chopstix Dim Sum Cafe & Takeout III, Ltd.* (1994) 30 Cal.App.4th 54, 61–62). Here, much like  
6 in *Hoopes*, proceeding with equity first would be the far more efficient method of resolving the  
7 case. Each party’s equitable claims are potentially dispositive and warrant being heard first to  
8 avoid the time, expense, and labor of a lengthy jury trial.

9         Moreover, proceeding with the legal claims first to a jury would result in significant  
10 additional complications in this case. Because issues of contract interpretation and equitable  
11 theories are central to this case, this Court would be required to resolve significant substantive  
12 questions even if a jury were seated. If the Court were to try the equitable and legal claims  
13 simultaneously, additional issues would arise—clarifying when the jury findings are only  
14 advisory versus dispositive, keeping distinct the equitable and legal arguments, ensuring that each  
15 fact finder’s determinations do not conflict—which would likely “result[] in confusion and  
16 complicate[] the issues on appeal.” *Darbun*, 239 Cal.App.4th at 409. The danger is particularly  
17 acute in this case, where this Court *must* resolve the equitable arguments for either party to  
18 prevail. Indeed, a jury might be quite confused as to why jurors were hearing this case at all  
19 when (1) the fact of the contract is not disputed, (2) the Court instructs it as to contract  
20 interpretation, and (3) the only real issue in dispute (whether OBOT’s performance was excused  
21 or extended) is out of the jury’s hands entirely.

22         Conducting a jury trial would also give rise to several additional trial management issues  
23 that would require substantial attention and resources from this Court (beyond the usual  
24 substantial time needed to make decisions regarding jury instructions, jury questionnaires, verdict  
25 forms, and motions in limine). For example, *res judicata* based on the prior federal case will  
26 prevent OBOT from attempting to relitigate any breach of contract based on the 2016 Ordinance  
27 and Resolution. *See* Orders of May 16, 2019. However, the fact of the Ordinance and Resolution  
28

1 and the context and timeline of the federal litigation are likely to be relevant to OBOT's  
2 prevention of performance argument, creating the potential for serious juror confusion when  
3 jurors are instructed that they may consider the Ordinance and Resolution for some purposes but  
4 must disregard them for others. This Court would be called upon to approve jury instructions that  
5 help the jury navigate some difficult lines. There is also the significant issue of the parties'  
6 competing motions to exclude experts and the City's motion to exclude evidence of consequential  
7 damages (both of which were filed prior to the original trial date, and would presumably be  
8 renewed by the parties), which would be moot if the City prevails in an equity-first trial.  
9 Proceeding with equity first could obviate all these questions and allow for a more  
10 straightforward trial, on a schedule determined by this Court.

11 \*\*\*

12 In sum, the Court will be required to resolve a multitude of issues even if OBOT is  
13 permitted to elect to send its contract damages claim to a jury in the first instance. That extended  
14 jury trial would require the Court to resolve issues that will never arise in the context of a bench  
15 trial. By contrast, holding a bench trial first will eliminate the need to seat a jury for a month-  
16 long trial, even if OBOT were eventually to prevail.

17 The alternatives here are (1) a concise bench trial during which the parties and the Court  
18 can cooperate to present the testimony and documents in the most efficient manner for judicial  
19 resolution, after which a jury trial will either be entirely unnecessary or, at most, a one-day jury  
20 trial on the fact and amount of damages; or (2) a lengthy jury trial filled with complex instructions  
21 regarding judge versus jury issues, complicated res judicata issues, and replete with the potential  
22 for juror confusion. The far more efficient use of the resources of the Court, the parties, and the  
23 public is to quickly and efficiently resolve the competing equitable claims in a bench trial, which  
24 very well may eliminate the need for a jury to ever be called upon to sit in this case.

### 25 CONCLUSION

26 For the foregoing reasons, the City respectfully requests this Court grant the City's motion  
27 to bifurcate and hear the parties' equitable claims and defenses first.

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Respectfully submitted,

Dated: March 17, 2023

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CITY OF OAKLAND