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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA

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

Plaintiffs,

v.

CITY OF OAKLAND, a California municipal corporation,

Defendant.

CITY OF OAKLAND

Counter-Plaintiff,

v.

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

Counter-Defendants.

Consolidated Case Nos. RG18930929 / RG20062473

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

CITY OF OAKLAND'S [PROPOSED] STATEMENT OF DECISION

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

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INTRODUCTION

This case concerns a public-private development project on land owned by the City of Oakland and located adjacent to the Bay Bridge, which was formerly part of the Oakland Army Base ("OAB"). After the federal government decommissioned the OAB, it transferred the land to the City of Oakland ("City") and the Port of Oakland ("Port") for redevelopment. In 2012, the City selected an Oakland-based real estate development firm, California Capital Investment Group ("CCIG"), as one of its partners in the redevelopment of the City's OAB land. The shared goal of the City and the developers for this project was, after the completion of significant publicly-funded environmental remediation and infrastructure work, to convert the old base to productive use through private development, including through the creation of a bulk commodity marine terminal at a location called the West Gateway. To that end, the City and the developers entered into a series of development contracts, initially for the OAB in general, and then for each specific "Gateway" area within the OAB. Unfortunately, the goals to which this redevelopment project aspired have not been fully realized, as the developers never built the planned bulk commodity terminal at the West Gateway, resulting in this lawsuit between the developers and the City. The core dispute is whether the developers were obligated to adhere to the contract construction deadlines, or whether those obligations were excused by acts of the City.

This is not the first litigation between the City and the developers regarding the West Gateway bulk commodity terminal project. On July 13, 2013, the City and CCIG entered into a Development Agreement ("DA") that governs the regulatory framework for the OAB redevelopment, including the West Gateway project. A dispute subsequently arose over whether the City could enact new legislation regulating one of the commodities that the developers wanted to ship through the proposed bulk terminal: coal. After an initial non-binding resolution opposing coal in Oakland in 2014, and hearings about the health and safety impacts of coal in 2015 and 2016, on July 19, 2016, the Oakland City Council enacted an Ordinance banning the storage and handling of coal in Oakland and a Resolution applying that Ordinance to the future West Gateway project. The developers sued in federal court, claiming breach of the DA's provisions governing the application of new laws to the development project. On May 15, 2018, the developers

prevailed on their claim that the City had not met the contractual standard for applying new health and safety regulations to the project. *OBOT v. City of Oakland* (N.D. Cal. 2018) 321 F.Supp.3d 986, *aff'd* (9th Cir. 2020) 960 F.3d 603.

As of 2015, the parties' brewing dispute over the City's legislative authority to regulate coal threatened to derail the whole project. But the developers assured the City that the multi-commodity terminal project was not dependent on coal, and in early 2016 the parties found a way to move forward with the terminal project at the West Gateway notwithstanding that dispute. Thus, on February 16, 2016, the City and CCIG's wholly-owned subsidiary Oakland Bulk and Oversized Terminal, LLC ("OBOT") entered into the 66-year Ground Lease for the 34-acre West Gateway property. The parties were able to reach agreement on the Ground Lease by including provisions that (1) preserved OBOT's right to challenge any future legislation that the City adopted and (2) specified that OBOT could not be held in default under the Ground Lease for failing to comply with such legislation while a challenge was ongoing. Ex. 68-28 §5.1; Ex. 68-30 §5.2.1. At the same time, the contract made clear that the City's legislative acts would not excuse OBOT's performance. Ex. 68-29 §5.1.1.2. In other words, the terminal project had to go forward, and OBOT had to meet its deadlines, regardless of the outcome of legislative proceedings to regulate coal and any judicial proceedings to challenge that regulation.

Thus, the parties entered into the Ground Lease fully aware that the City was likely to regulate coal, and agreed as to how they would proceed: the City could legislate with respect to coal, OBOT could challenge that legislation, OBOT could not be held in default for failing to comply with that law while its challenge was pending, and construction would move forward in the meantime. Each side agreed to bear the risk of what the outcome of any such challenge would be: The City bore the risk that OBOT ultimately would prevail in its challenge to the legislation and so no Oakland law would prohibit coal at the terminal, and OBOT bore the risk that the legislation would stand and it would not be able to do business with coal. Either way, OBOT and the City agreed that the terminal would be built on a contractually set timeline.

Accordingly, in exchange for possession and use rights to the West Gateway land, OBOT agreed to pay rent to the City and to build and operate a multi-commodity bulk terminal, along

with associated rail and wharf improvements on that land and in a connecting rail corridor. The Ground Lease did not address which commodities would be shipped, beyond requiring OBOT to construct a Bulk and Oversized Terminal, capable of exporting at least one commodity by specific deadlines, that complied with applicable laws. OBOT also agreed in the contract to take sole responsibility for preconstruction steps required to move the project forward, including by submitting construction drawings for the City's review and approval as a landlord, obtaining all requisite permits and regulatory approvals, entering into construction contracts, and paying all costs of construction. The contract deadline for commencing construction—what the contract called the "Initial Milestone"—was to be, after a two-year tolling period of free rent granted by the City, August 14, 2018. The contract made clear that time was of the essence, and provided for a serious remedy if construction did not commence by the deadline: the City was authorized to terminate the Ground Lease.

Even though the parties were well aware that there would be further legislative and likely judicial proceedings over the City's regulation of coal, the parties did not include in the Ground Lease contained any contingencies for the contract deadlines for any such legislation or litigation.[1] In other words, the parties broke their stalemate over the City's regulation of coal by agreeing 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.

After entering into this contract, however, OBOT did not move the project forward. The evidence at trial revealed that even before signing the Ground Lease, OBOT had entered into a series of exclusive option agreements with a proposed subtenant that was owned by a coal company. These arrangements, which were extremely lucrative for OBOT, contemplated that the

[1] By contrast, the 2012 LDDA between CCIG and the City provided that: "'Litigation Force Majeure' means any action or proceeding before any court, tribunal, arbitration or other judicial, adjudicative or legislation-making body, including any administrative appeal, brought by a third party, who is not an Affiliate or related to Developer, which (i) seeks to challenge the validity of any action taken by the City in connection with the Project, including the City's approval, execution and delivery of this Agreement, the Ground Lease, and its performance thereunder, including any challenge under the California Environmental Quality Act, the performance of any action required or permitted to be performed by the City hereunder, or any findings upon which any of the foregoing are predicated, or (ii) seeks to challenge the validity of any other Regulatory Approval." Ex. 378-62 §10.1.3.

proposed subtenant would finance the development project. But during the time that the federal litigation over the City's coal Ordinance and Resolution was pending, that proposed subtenant neither signed the sublease nor funded the design and construction required by the Ground Lease. Nonetheless, and although numerous other viable options were available for financing and moving the project forward, OBOT did not pursue those other options, and instead stayed with this potential subtenant, extending the sublease option agreement ten times. And then, even after OBOT prevailed in federal court on May 15, 2018, OBOT and its proposed subtenant still did not initiate the pre-construction steps that were required prior to the construction deadline of August 14, 2018. Only in late September 2018, well after that deadline had passed, did OBOT seek to *begin* the pre-construction process by signing a sublease, submitting preliminary design drawings for approval, and initiating the permitting pre-application process. In other words, as of September 2018, OBOT was no further along in the design or construction process than it had been in February 2016 when the contract was signed.

When, as of the contractual deadline of August 14, 2018, OBOT had not commenced construction (or even taken any significant steps toward that milestone), the City called default and invoked the Ground Lease's early termination provisions linked to that deadline.

OBOT responded to the City's default and termination by blaming the City. OBOT claimed that actions by the City constituted force majeure events that prevented OBOT from meeting the contract deadline to commence construction, and thereby extended that deadline. OBOT's explanation was that the City's political opposition to coal caused the City not only to enact the Ordinance and Resolution, but to change the regulatory regime applicable to the project, impose new permitting procedures, fail to cooperate with respect to third-party regulatory agencies and funding, and prevent forward movement on the rail aspects of the project. OBOT therefore disputed the termination, refused to relinquish possession of the land, and along with its CCIG-owned affiliate Oakland Global Rail Enterprise ("OGRE"), sued the City. The City in turn sued OBOT and CCIG to enforce the termination provisions, resulting in the parties' competing claims for breach of contract.

OBOT (and OGRE, as a claimed third-party beneficiary) now assert a variety of related contract claims: express breach, anticipatory breach, and breach of the implied covenant of good faith and fair dealing. The City in turn sues for express breach, in light of OBOT's failure to meet the contract deadlines. This Court bifurcated liability and remedy, and conducted a court trial beginning on July 10, 2023, taking evidence through August 31, 2023 in an initial phase to decide the merits of the parties' competing breach claims and defenses. Because the City had terminated the Ground Lease on November 22, 2018, no acts of the parties after that date could be relevant to whether the termination was warranted, and the Court limited evidence in this phase of the trial accordingly. The Court heard evidence from 15 witnesses (live and by deposition testimony) and admitted 321 exhibits.

The disputed issues at trial centered on whether events of force majeure operated to extend the August 14, 2018 contract deadline such that the City prematurely declared OBOT to be in default and thereby breached the contract by seeking termination. The Ground Lease contained a force majeure clause that provided that if a party's "performance of its obligations hereunder is hindered or affected by events of Force Majeure," that party would not be deemed in breach or default of those obligations. And the contract included "acts of the other Party" among the types of events that could constitute "events of Force Majeure." OBOT contends that the City's actions "hindered" its efforts to proceed and therefore that the force majeure provision extended its deadline to commence construction. As discussed further later in this decision, however, the parties' use of the term "Force Majeure," as well as the definition's specification that such events must be "due to causes beyond [the] control" of the party invoking force majeure, imports the well-established plain meaning of such terms under California law, including that the "events of Force Majeure" must have been unanticipated or unforeseeable at the time the parties entered the contract, that the party invoking force majeure must have diligently attempted to perform, and that the events must have made performance impossible or unreasonably expensive. *See West Pueblo Partners, LLC v. Stone Brewing Co., LLC* (2023) 90 Cal.App.5th 1179, 1188 (citing *Oosten v. Hay Haulers Dairy Employees & Helpers Union* (1955) 45 Cal.2d 784, 788).

The Court begins by discussing the important Ground Lease terms and the facts relevant to the parties' respective performance obligations and to OBOT's claims that its performance was excused by acts of force majeure committed by the City. The Court then discusses the legal standards that apply to the parties' claims and defenses, including the standards for contract interpretation, interpretation of the contract's force majeure provision, and the res judicata issues raised by the successive litigation between the parties. Finally, the Court applies these standards to the facts at trial to determine whether the City or OBOT performed or failed to perform, whether performance was excused, and ultimately whether the City or OBOT breached this contract in 2018.

As set forth below, having carefully considered all the evidence and applicable law, the Court concludes that under the contract's plain terms OBOT, and not the City, breached the Ground Lease by failing to meet the August 14, 2018 Initial Milestone construction deadline.

Initially, the Court concludes that res judicata bars OBOT from relying on events prior to June 14, 2017 (the date of OBOT's amended federal complaint), including but not limited to the City's 2016 enactment of the coal Ordinance and Resolution, either to support OBOT's breach claims or to support its claim that its performance was excused by force majeure events. Res judicata requires parties to assert all claims and remedies that can be asserted in a single action. Because "one injury gives rise to only one claim for relief," all legal theories challenging a wrongful act (whether meritorious or not), and all remedies claimed for that wrongful act, must be pursued in the first case, or else they are forfeited. *See Boeken v. Philip Morris USA Inc.* (2010) 48 Cal.4th 788, 798 (quotations omitted). Even if future harm is speculative or has not yet occurred, remedies for that wrongful act must be sought in the first action. *See id.*; *Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 907. Here, OBOT could have pursued (and, in fact, initially *did* pursue) remedies for the City's pre-June 2017 actions that it claimed impacted this development project—including requesting that the federal court postpone OBOT's contractual deadline to commence construction and award damages from any alleged "delay" that OBOT alleged was caused by the City's acts. OBOT's failure to pursue or obtain such remedies in that earlier action precludes it from now doing so, under blackletter California law. The Court

further concludes that up until the trial of this case, OBOT has pled and pursued only breach claims relying on events *after* the federal court decision, and that breach claims asserted at trial arising from City action before that date (May 15, 2018) are therefore barred by estoppel.

Even if this were not the case, OBOT has not established that its obligation to commence construction by the August 14, 2018 deadline was excused by any event of force majeure or otherwise prevented by any act of the City. The evidence was conclusive that the contract required OBOT to perform notwithstanding the dispute over coal, and OBOT instead made business decisions to delay performance rather than to comply with the terms it had agreed to on February 16, 2016 while fully anticipating the parties' regulatory disputes. In particular, the evidence showed that the parties were well aware at the time they signed the Ground Lease that the City was likely to adopt coal legislation, but included no contingency for that event. OBOT could still have performed its contractual obligation (including, the evidence showed, by financing the construction itself or pursuing options with other interested parties, and in particular because the contract expressly said OBOT would not be held in default for failing to comply with any law it challenged), but chose not to do so. Nor did OBOT prove that any force majeure events prevented its performance. Force majeure does not permit a party to wait when it could otherwise timely perform. Because none of OBOT's contentions therefore meet the standard required by the plain terms of this contract to extend the deadline, the City had the contractual right to declare OBOT in default and to terminate the Ground Lease in light of OBOT's failure to perform.

The Court's findings of fact and conclusions of law are fatal to both OBOT's breach claims and its defense to the City's breach claims, and therefore to OGRE's claims as an asserted third-party beneficiary as well. Further, nothing in the evidentiary record established either that the City repudiated the Ground Lease (and thereby committed anticipatory breach) or engaged in actions that violated the implied covenant of good faith and fair dealing, as properly considered in light of the express terms of the parties' agreement. Therefore, in light of the Court's determination with respect to these competing express breach claims, and for the additional reasons explained below, OBOT and OGRE's remaining claims all fail as well. Accordingly, the

Court concludes that this case shall proceed to the next phase to determine the City's remedies for OBOT's breach of contract.

FINDINGS OF FACT

The history of the West Gateway terminal project is long and complex. To assist the reader of this decision, the Court has attached Appendices, including a list of Key Terms and Abbreviations and a Timeline of Key Dates.

I. The Oakland Army Base Redevelopment Project, the LDDA, and the DA

A. *The OAB Redevelopment Project*

In August 2006, approximately 170 acres of the former OAB, located in western Oakland along the shoreline of the San Francisco Bay, were conveyed to the Oakland Redevelopment Agency to comprise the Gateway Development Area. Ex. 1-35-36. That land was subsequently transferred to the City of Oakland, and an additional 200 acres of the OAB was transferred to the Port of Oakland for redevelopment. Ex. 1-35. The former OAB had been officially decommissioned since September 1999. Ex. 1-33. The closure of the OAB, which employed more than 1,800 civilian workers, had a severe impact on West Oakland. Ex. 8-38. For that reason, economic development and jobs creation in the area were among the primary redevelopment goals. Ex. 8-14, 8-38; Ex. 378-6.

In 2008, the City issued a request for qualifications "to identify potential development teams for redevelopment of certain portions of the Gateway Development Area, generally consisting of the West Gateway, Central Gateway, East Gateway and AMS Site[.]" Ex. 378-8. The City selected CCIG-Prologis, a joint venture between CCIG and the international logistics company Prologis, "to negotiate with regarding development on portions of the Gateway Development Area." Ex. 378-8; Trial Tr. 313:2-11. The Port and the City also applied for and were awarded more than $200 million in public funds from the State of California's Trade Corridors Improvement Fund to construct public infrastructure improvements at the OAB. Ex. 378-8; Ex. 453-2.

The City was required to clean up extensive contamination on the OAB, and "to rebuild every major piece of infrastructure." Trial Tr. 2386:20-2387:13; Ex. 1-258 (describing City

remediation efforts); Ex. 1-56 (detailing infrastructure improvements). It relied on public funds to prepare that land for private development. Trial Tr. 2387:14-16; Ex. 453-6 (City completed "extensive public improvements on the site that remediated the soil, raised the site by an average of 3 feet for sea level rise protection, and rebuilt the roads, infrastructure and bike paths and prepared the location for development."); Ex. 819-2, 819-7 (budget of $235 million for public improvements). The City anticipated numerous benefits from the project, including employment and job opportunities, environmental justice and safety benefits, and financial benefits to the City. Trial Tr. 2385:23-2386:19; Ex. 1-343, Ex. 378-10; Ex. 1-244-248, Ex. 378-10; Ex. 68-18-20 (Article 2, Rent).

The City originally prepared an Environmental Impact Report under the California Environmental Quality Act ("CEQA") for the entire OAB redevelopment project in 2002. Ex. 1-15, 1-34-35. At that time, the plans for the West Gateway in particular were not yet confirmed and were generally described as office and open space. Ex. 1-18-22. In May 2012, the City prepared an Addendum to that 2002 EIR that evaluated two possible uses for the West Gateway land: a bulk commodity terminal/working waterfront ("Variant A") or a research and development complex and open space ("Variant B"). Ex. 1-15-16; Ex. 1-43-44, 1-58.

B. *The 2012 LDDA*

On December 4, 2012, the City entered into the Lease Disposition and Development Agreement ("LDDA") with the CCIG-Prologis joint venture for the City-owned OAB land. Ex. 378; *see also* Ex. 7-15. CCIG was an Oakland-based real estate development firm with a history of local public-private real estate development projects including Oakland's Fox Theater and Rotunda Building. Trial Tr. 132:12-14; Trial Tr. 132:20-133:2; Trial Tr. 133:25-134:4; Trial Tr. 134:9-12. CCIG created two wholly owned subsidiaries: OBOT, to develop the bulk terminal, and OGRE, to develop the related rail network. Trial Tr. 200:1-6, 200:17-24. Phil Tagami was the CEO of CCIG and, along with CCIG partners Mark McClure and Len Epstein, owned CCIG, OBOT, and OGRE. Trial Tr. 131:10-13; 133:3-6; 199:10-16; 200:1-24; 202:8-11.

Through the LDDA, the City expressed its plan to lease to CCIG-Prologis the 42.5-acre Central Gateway, 30.33-acre East Gateway, and 34.53-acre West Gateway "for purposes of

developing and operating mixed-use industrial (warehousing and logistics), commercial, maritime, rail, and related support uses ….” Ex. 378-9 ¶U; Ex. 378-12 §1.3.3. The LDDA "contemplate[d] a separate Ground Lease for each of the three (3) Phases of the Lease Property: the West Gateway, the Central Gateway, and the East Gateway…" Ex. 378-12 §1.3.3. It identified a variety of conditions precedent to the parties' obligation to enter into those Ground Leases, including completion of the public infrastructure improvements. Ex. 378-12 §1.3.3, 378-34 §6.1.1, 378-38 §6.2.8.6, 378-41-42 §6.4.9. It also expressly provided that the Ground Leases, once entered into, would govern the private development of those parcels of land. Trial Tr. 313:2-17; Ex. 378-12 §1.3.3, 378-34 §6.1. The LDDA contemplated private development of the West Gateway property, including a "Bulk Oversize Terminal." Ex. 378-9-10 §U, 378-74, 88.

The LDDA also provided that CCIG would "act as the City's agent to manage the Gateway Development Area for leasing, pre-construction work …, the remediation of Hazardous Materials, and the construction of the Public Improvements …." Ex. 378-9 ¶T. Thus, in addition to its contemplated role as private developer, CCIG would act as the construction project manager, via a property management agreement, for the City's public infrastructure improvement project. Ex. 378-12 §1.3.2, 378-21 §3.2. After the LDDA was signed, on October 23, 2012, the City and CCIG entered into a five-year Property Management Agreement, under which CCIG managed the public infrastructure improvements (including managing the general and sub-contractors) for all of the City's OAB land. *See* Ex. 378-12 §1.3.2, 378-21 §3.2; Ex. 127-1.

C. *The 2013 DA*

On July 16, 2013, the City and CCIG-Prologis entered into the DA for the OAB land including the West Gateway. Ex. 7. Under California law, a Development Agreement is both a contract and "a legislative act." Gov. Code §65867.5(a). It must "be approved by ordinance and is subject to referendum." *Id.* The "procedural and substantive limitations" imposed upon Development Agreements by California law allow local governments to provide some measure of regulatory certainty to developers, by allowing them to freeze certain "zoning and other land use regulation applicable to specified property," *Center for Community Action & Enviro. Justice v. City of Moreno Valley* (2018) 26 Cal.App.5th 689, 696, without that amounting to "an

unconstitutional surrender of the police power," *Trancas Property Owners Ass'n v. City of Malibu* (2006) 138 Cal.App.4th 172, 182. The procedural limitations imposed by California law include the requirements of notice and a public hearing, Gov. Code §65867, while the substantive limitations prevent a local government from foreclosing its police power authority to enact certain new regulations, *id.* §65866. *See also id.* §65865.1, 65865.2. In return for this regulatory certainty, local governments may "extract promises from the developers concerning financing and construction of necessary infrastructure." *Mammoth Lakes Land Acquisition, LLC v. Town of Mammoth Lakes* (2010) 191 Cal.App.4th 435, 443-44.

Like the LDDA, the DA contemplated that the City and the developers would enter into Ground Leases specific to the private development of the Gateway parcels of land. Ex. 7-14, 7-21 §3.3. The DA also described the plan for the development of a bulk and oversized terminal for the import and export of bulk commodities on the West Gateway land. Ex. 7-8 ¶H, 7-107 (Ex. D-2 §C). And like the LDDA, the DA provided that those private development projects, including the bulk terminal on the West Gateway, would be subject to the provisions of the applicable Ground Lease. Ex. 7-20 §3.2 (permitted uses "subject to" applicable Ground Lease); 7-21 §3.3 (development schedule and sequencing "subject to" provisions of applicable Ground Lease); 7-106-107 (Ex. D-2 §§A, B, C) ("development" of East, West, and Central Gateways are "subject to the provisions of the applicable Ground Lease"). The DA further specified that "in the event of any conflict between any provision of [the DA] and any provision of any applicable Ground Lease, the provision of the applicable Ground Lease shall govern and control." Ex. 7-56 §14.27. And it provided that it did not "limit, modify, restrict or alter the rights of the City, in its capacity as Landlord under each Ground Lease, to control development of each Phase or to otherwise exercise any other rights or remedies of Landlord under each Ground Lease." Ex. 7-21 §3.3.

The DA established the then-existing local laws as the legislative and regulatory framework applicable to the future developments, allowing for certain exceptions if the City "determine[d] based on substantial evidence and after a public hearing" that otherwise Oakland residents would face "a condition substantially dangerous to their health or safety." Ex. 7-21-23 §3.4, §3.4.2. The DA specifically contemplated the that the projects would be subject to

"Subsequent Approvals," including permits or approvals "considered or granted after the Adoption Date" of the DA. Ex. 7-16-17. The DA listed approximately 20 types of Subsequent Approvals that might be required for any future project, a number of which would involve the exercise of discretionary judgment. Ex. 7-17 (including, e.g., grading permits and other discretionary approvals); Trial Tr. 2367:4-2368:13. In connection with the "review and processing of subsequent approvals," the DA also specifically addressed existing and future CEQA analysis for the future private development projects. Ex. 7-25-26 §3.5. The DA expressly acknowledged that "Subsequent CEQA Review" might be required by state law. Ex. 7-26 §3.5.2; Ex. 7-25 §3.4.6.

II. Controversy over Coal During 2014 and 2015.[2]

In both the LDDA and DA, as previously discussed, the parties contemplated the construction of a multi-commodity bulk terminal on the West Gateway property. Ex. 378-74, Ex. 7-107. Neither of these contracts discussed any specific commodities to be shipped. *See generally* Ex. 7, 378. From the outset of the project, Mr. Tagami represented to the City that the terminal project's viability did not depend on any single commodity, but rather was intended to be a multi-commodity bulk terminal capable of shipping "any legal commodity." Trial Tr. 269:18-270:2; Ex. 24. In particular, in December 2013, Mr. Tagami had publicly announced that the multi-commodity terminal project did not intend to rely on coal: "One bulk material OBOT does not plan to export or import is coal." Ex. 506-4; *see also id.* ("CCIG is publicly on record as having no interest or involvement in the pursuit of coal-related operations at the former Oakland Army Base."); Trial Tr. 846:23-847:1; *see also* Trial Tr. 866:10-25. As Mr. Tagami frequently explained, the planned multi-commodity bulk terminal would be flexible enough to accommodate

[2] The Court is not relying on the circumstances described here leading up to the execution of the 2016 West Gateway Ground Lease as extrinsic evidence to inform the interpretation of that contract's plain language. Rather, evidence of the parties' knowledge and understanding prior to entering the contract is relevant to whether certain issues were anticipated or foreseeable for purposes of OBOT's claims of force majeure.

The pre-contract evidence also sheds light on the parties' post-contract actions, in particular the reasons OBOT failed to perform and its allegations that City actions prevented its performance, as well as the credibility of certain witnesses, including Mr. Tagami, Mr. McClure, and CCIG former General Counsel Skyler Sanders.

a wide range of the 15,000 potential bulk commodities based on market demand over the 66-year term of the Ground Lease. *E.g.*, Trial Tr. 838:16-24 (general statement); Trial Tr. 414:20-25 (there were "15,000 commodities that were under consideration"). Mr. Tagami agreed that the City could have reasonably understood that OBOT had a plan to construct and operate the bulk terminal to ship many other commodities without the need for coal. Trial Tr. 867:14-25.

A. *CCIG/OBOT's Deal with Bowie and TLS and Involvement in Utah*

Notwithstanding his public statements, in early 2014, CCIG principals Mr. Tagami and Mr. McClure entered into the first of a series of contracts regarding the West Gateway terminal project with John Siegel, who was then the Chief Executive Officer of Bowie Resource Partners ("Bowie"), a coal company. Ex. 513 (confidentiality agreement); Ex. 514 (ENA). Bowie's February 2014 economic proposal to CCIG included guaranteed "throughput" of coal from its mines for the proposed bulk terminal. Ex. 508-14, 508-28; Ex. 510B Trial Tr. 877:14-25, 878:23-25. After Mr. Tagami and Mr. McClure toured Bowie's coal mines, CCIG proposed a contract directly with Bowie, but then Mr. Siegel quickly established a company called Terminal Logistics Solutions ("TLS"), and had TLS enter into an exclusive option agreement with OBOT. Exs. 511, 514; Trial Tr. 885:22-886:15; Trial Tr. 900:18-20, 984:17 (Tagami) (admitting that TLS was wholly owned by Bowie).

The agreement between OBOT and Mr. Siegel contemplated that TLS would sublease the West Gateway property from OBOT and that TLS would assume OBOT's responsibilities and obligations to construct and operate the bulk terminal. Ex. 511; Ex. 514. A few months later, OBOT and TLS entered into a term sheet under which OBOT would be paid over $50 million dollars within the first five years of any future sublease. Ex. 515-3; Trial Tr. 904:17-907:13. Mr. Tagami later wrote to Mr. Siegel confirming that his "attraction" to Bowie was its "role in a commodity" (i.e., as a beneficial cargo owner of coal mines). Ex. 610-1; Trial Tr. 912:23-25, 991:24-992:2, 1014:13-1015:3. Mr. McClure later referred to these arrangements with Mr. Siegel internally to his partners as the "coal deal." Ex. 758-1; Trial Tr. 3495:20-3496:6.[3] CCIG also

[3] Mr. McClure also participated in a presentation by Bowie to the Union Pacific Railroad in

entered into a separate contract with TLS under which CCIG would be paid to manage the development of the bulk terminal project for TLS. Ex. 25; Trial Tr. 995:19-22.

CCIG entered into the term sheet with TLS notwithstanding that the Oakland City Council had already adopted a resolution opposing the transport of hazardous fossil fuel materials, including coal, through the City—a 2014 resolution of which Mr. Tagami was aware. Ex. 13; Trial Tr. 909:6-9. CCIG did not reveal to the City that TLS was owned by a coal company, nor did it reveal to the City any connection between TLS and Mr. Siegel or Bowie until years later. Trial Tr. 2404:20-2405:12 (Cappio); Trial Tr. 3237:6-21, 3945:11-18 (Lake); Trial Tr. 3485:5-3486:13 (McClure, re: Schaaf call).

In approximately April 2015, news broke of a potential arrangement for public funds from the State of Utah to be invested in the bulk terminal project at the West Gateway in exchange for guaranteed throughput of Utah coal. Ex. 523; *see also* Exs. 24-2-3, 524-1, 556-9, Trial Tr. 923:15-19. CCIG had in fact been an active participant in lobbying for the Utah funds, both by traveling to Utah and by hosting Utah delegations in Oakland. Exs. 685, 742, 743, 745; Trial Tr. 988:15-19, 995:7-14, 1148:7-1150:11, 3521:12-3530:17. However, Mr. Tagami and Mr. McClure both publicly denied CCIG's involvement in the Utah deal. Ex. 556-9 (Mr. Tagami's attorney: "Neither CCIG nor its affiliates is a party to *or involved in* negotiations for financing through the Utah CIB … OBOT has never contemplated funding from the Utah CIB as a part of project financing.") (emphasis added); Ex. 733 (Mr. McClure's op-ed: "*We have had nothing to do with that*.") (emphasis added); Trial Tr. 995:2-997:13 (Tagami), 3537:23-3541:17 (McClure).

Notwithstanding OBOT's numerous existing contracts with Bowie's subsidiary TLS, Bowie's ownership of coal mines, and the "coal plan" for guaranteed throughput, Mr. Tagami repeatedly represented to the City during the spring and summer of 2015 that neither OBOT nor TLS had any "commitment" to any particular commodity and that the terminal project did not depend on coal. Exs. 24, 28-2, 524, 525, 531, 534, 536. For instance, in an April 23, 2015 email

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which the Bowie-CCIG plan for the terminal was described as Bowie's "coal operations" providing the "anchor tenant" for the bulk terminal, and guaranteeing at least four million metric tons of coal annually. Ex. 516-4, 516-11, 516-32; Trial Tr. 3490:10-22, 3495:2-4.

to the City and the Port, Mr. Tagami called the news reports about coal "grossly inaccurate" and represented that "[o]ver the TLS option period we have had a dozen customer calls from a wide range of bulk product types including; Pot ash, Soda ash, Borax, Magnetite, Copper concentrate, Sodium bicarbonate, Heirloom grains, but no deals with any commodities have been finalized[.]" Ex. 525-1. In May 2015, then-Mayor Elizabeth Schaaf informed Mr. Tagami that she opposed any efforts to ship coal through Oakland in light of the health and safety and environmental impacts. Ex. 29; Trial Tr. 1791:20-25 (Schaaf).[4] Mr. Tagami responded by asking the City to "keep its proverbial powder dry" because although "the terminal needs to handle whatever legal bulk goods the potential customer may need to pass through the facility," the terminal operations would not be "driven by nor defined by any single commodity," since OBOT had "sought from the City an industry-standard facility, a multi-commodity bulk marine terminal." Ex. 28-2.[5]

B. *The City's 2015 Health and Safety Hearing and Investigation into Coal*

After news of OBOT's possible plan to ship coal leaked in spring 2015, a public controversy ensued. The City announced in July 2015 that the City Council would hold a

[4] Mr. McClure also testified regarding a telephone call from then-Mayor Schaaf in the Fall of 2015 in which he claimed she threatened to "kill" the project if OBOT would not agree to forgo shipping coal. Trial Tr. 1549:19-1550:6; Ex. 59A. Mr. McClure admitted he was not entirely forthcoming with the Mayor regarding OBOT's plans with TLS to ship coal on that call. Trial Tr. 3485:5-3486:13, 3487:18-3488:2, 3502:8-23. Mayor Schaaf testified that she wanted the terminal project to go forward. Trial Tr. 1803:18-1804:1, 1804:23-1805:7. The Court need not resolve any credibility dispute over what was said, given that call was months prior to entry of the West Gateway Ground Lease in which the parties agreed to move forward with the project, and there is no record evidence of any action taken by Mayor Schaaf (or any other Oakland official) during the relevant time period to "kill" the project or otherwise connecting that call to any events after the signing of that contract. There is no dispute that Mayor Schaff supported (indeed co-sponsored) the City's legislation with respect to coal, and she testified credibly that she opposed coal in Oakland for environmental, health and safety concerns, while also wanting the terminal project to proceed for the economic benefits of the City. Trial Tr. 1791:20-25, 1792:19-1793:1.

[5] OBOT made many similar representations to the City throughout this period: *e.g.*, Ex. 524 (April 8, 2015 ("TLS is full speed ahead with a 'multi' commodity terminal that is close to signing SVM (potash, soda ash and Borax) and a bulk Rail to ship grain operation."); Ex. 24 (April 24, 2015: "Pot ash and soda ash are front runners – copper concentrate and heirloom grains look promising."); Ex. 531 (June 24, 2015: "Nothing has changed since the 2012 approval… Neither CCIG nor any prospective terminal operator has made commitments to shipping any particular commodity through the terminal at this point in time."); Ex. 534-2-3 (July 22, 2015: terminal will "accommodate[e] three or four of the full spectrum of approximately 15,000 bulk commodities regulated by federal law…[T]here has been no commitment to include or exclude any particular commodity."); Ex. 536 (July 29, 2015: "To date, OBOT understands that no commodity contracts have been executed by TLS."); *see also* Trial Tr. 266:6-25, 923:24-924:15, 1012:14-1014:6, 1019:19-22, 1151:3-9.

September 2015 hearing investigating the health and safety of coal and petcoke. Ex. 797-4. In connection with the City Council's investigation, at the City's request for further information regarding the Developers' plans for the West Gateway, OBOT provided the City a conceptual TLS "Basis of Design" ("BOD") prepared by HDR, an engineering company. Ex. 750; Trial Tr. 1349:9-18. The BOD contained a "conceptual" description of the design for a multi-commodity bulk terminal intended to ship and store different categories of commodities, labeled as "Commodity A" and "Commodity B" for purposes of the design.[6] Ex. 750-10, 750-13. The TLS BOD did not explain the sublease arrangement or disclose the ownership or management of TLS by Bowie. *See* Ex. 750-12.[7]

On September 21, 2015, the City Council conducted a hearing regarding the health risks to City residents presented by the storage and handling of coal at the West Gateway. Ex. 54-1; Ex. 839. OBOT, CCIG, and TLS participated in that legislative process, Trial Tr. 357:22-358:2; Exs. 57, 548, 598, and opposed the regulation of coal. Trial Tr. 634:11-24 (Tagami), 2402:25-2403:11 (Cappio). In further communications with the City following the hearing in the fall of 2015, OBOT continued to downplay its and TLS's commitment to coal, promoting the project as a multi-commodity terminal not reliant on any particular commodity. Ex. 57 (October 6, 2015: "[A]s we have stated repeatedly, there has been no commitment to include or exclude any particular commodity to or from the Terminal. Over its generational life, the Terminal will

[6] OBOT did not provide the City with the drafts prepared by HDR that used the words "Bituminous Coal" rather than "Commodity A," and instead removed those references to coal from the version of the BOD provided to the City days later. Ex. 37-7 (identifying the objective as "creat[ing] a terminal for the receipt by rail, storage and shipment of coal," with a "desired throughput" of 5 million metric tons.); Trial Tr. 1018:18-1019:3; 1942:24-1943:22 (Morodomi); *compare* Ex. 37 and 38; 1018:4-1021:22; *see also* Trial Tr. 1024:17-1025:11, 1025:24-1027:5 (CCIG's consultant's flyers called it a "myth" that "[p]art of the Oakland Bulk and Oversized Terminal's shipping capacity would be dedicated to the shipping of coal," an assertion Mr. Tagami admitted might not have been true); Ex. 542-3.

[7] Jerry Bridges, a former Port of Oakland Director, was hired by Bowie to be the President of TLS. Ex. 540; Trial Tr. 1065:15-16 (Wolff), 1462:5-6 (Tagami), 3487:1-4 (McClure). The City was under the impression that the proposed sublessee TLS was a local company run by Oakland-based individuals. Trial Tr. 3237:6-21 (Lake); 2403:25-2404:6, 2405:5-6 (Cappio); Trial Tr. 3486:15-19, 3502:24-3503:3, 3509:16-3510:12 (McClure); Ex. 763. Mr. McClure initially denied portraying TLS as an Oakland-based, African-American owned business, but admitted when confronted with documents that he participated in communications regarding a public relations strategy falsely portraying TLS in that manner. Exs. 59A, 763; Trial Tr. 3504:3-3519:16.

undoubtedly handle a wide variety of commodities based on market demand."); Ex. 548; Ex. 71; *compare* Exs. 544-4, 545-3 (changing the title of report from "coal terminal" to "multi-commodity terminal"); Trial Tr. 1029:11-1032:1.

The trial evidence was undisputed that OBOT was aware as of the fall of 2015 that the City Council was considering a ban on the handling of coal and fossil fuels and that a no-coal ordinance might be applied to the West Gateway. Trial Tr. 635:16-636:1; 638:21-639:3.

C. *Communications with OBOT Regarding the Project's Subsequent Approvals*

During its communications with the City in 2015 regarding the health and safety hearing, OBOT began to stake out a position that no subsequent environmental or "discretionary" regulatory review was permitted for the terminal project. Ex. 57-1. The City responded by informing OBOT on several occasions of the City's position under the governing contracts and applicable law that the project as presented could trigger discretionary permitting requirements and/or additional environmental analysis, including under CEQA. Ex. 66; *see also* Ex. 7-16-17, 7-20-21 §3.2, 7-25-26 §3.5 (DA provisions contemplating subsequent approvals and additional environmental review).[8] Thus, on December 8, 2015, Rachel Flynn, the Director of Planning and Building for the City, wrote to Mr. Tagami in response to a letter from him, explaining that "the City is also evaluating discretionary decisions it may take in the future with respect to OBOT (e.g., additional permit requirements) and the scope of additional environmental review, if any, that it may require in connection with any such decision(s), consistent with its existing contractual obligations." Ex. 555-1; Trial Tr. 1195:11-1197:11, 1435:14-1436:16 , 2430:1-24, 2620:19-24.

Then, on February 11, 2016, five days prior to the execution of the West Gateway Ground Lease, City Administrator Sabrina Landreth wrote to Mr. Tagami to "provide[] clarification of the

[8] In 2015, the City was also sued by the Sierra Club for failing to properly follow CEQA's requirements in connection with the West Gateway Terminal project. Trial Tr. 1372:22-1373:11, 2431:20-2432:5. Ms. Cappio testified that there was a "high level of scrutiny" on the project from the public at this time, which made the City "more rigorous in making sure that we crossed our T's and dotted our I's." Trial Tr. 2432:5-9. In November 2015, Ms. Cappio issued a memo to the Planning and Building Department regarding permits for the West Gateway project, Ex. 61, discussed *infra* at 105-106, the purpose of which was to coordinate among City staff regarding this high-profile project. Trial Tr. 2253:13-16, 2257:3-7, 3141:18--3143:6, 3145:16-24, 3257:13-3258:11, 3732:1-11, 3732:12-25.

City's position with respect to the LDDA Third Amendment between CCIG Oakland Global and Prologis and the West Gateway Lease." Ex. 66-1. Her letter reiterated the same points made in Ms. Flynn's prior letter—specifically, that the City was evaluating the need for future discretionary decisions, such as permit requirements, as well as the need for additional environmental review, "consistent with [the City's] existing contractual obligations." Ex. 66-2; Trial Tr. 400:18-22, 676:18-677:5 (Mr. Tagami confirming his contemporaneous understanding, prior to execution of the Ground Lease, of the City's intent with respect to discretionary decisions, permit requirements, and further environmental review); Trial Tr. 2905:1-20 (Skyler Sanders understood Ms. Landreth's letter to contemplate a commodity-by-commodity review), 2919:4-8; Trial Tr. 3253:3-23 (Landreth); *see also* Ex. 7-25-26 §3.5 (DA provisions re: Subsequent Approvals and Subsequent CEQA Review).

Mr. Tagami responded to Ms. Landreth's letter on February 19, 2016 (after the parties had executed the Ground Lease, discussed further below). Ex. 71. Mr. Tagami's letter "concur[red]" that "the relationship between the project developers and the City remains governed by the terms of the LDDA, as amended, and the Development Agreement (DA) for Oakland Global." Ex. 71-1. Mr. Tagami expressed no surprise or disagreement with Ms. Landreth's statements regarding future discretionary decisions or additional environmental review, and stated that "[w]hatever future approvals and the related discretion, or lack thereof, associated with them will, of course, be as proscribed [sic] by law." Ex. 71-1; Trial Tr. 2924:17-2926:18 [Sanders].

III. The February 16, 2016 WGW Ground Lease

A. *Negotiation of the Ground Lease and the Third Amendment to the LDDA*

The original LDDA set forth several conditions precedent to entry into the West Gateway Ground Lease that were still outstanding as of 2015, including completion of the public infrastructure improvement project and the execution of the Rail Access Agreement ("RAA") between the City and the Port of Oakland. Ex. 378-36-43 §§6.2-6.4; Trial Tr. 1037:15-1038:14, 1039:16-1040:1, 1170:17-1171:7, 1179:8-11 (Tagami). The parties understood that there was no

existing deadline for the Ground Lease to be executed.[9] However, in connection with a reworking of the budget for the public improvements project (the "Mid-Project Budget Revise"), the City and OBOT agreed to advance the West Gateway, and that OBOT would waive certain conditions precedent via an amendment to the LDDA. Trial Tr. 3224:1-19, 3225:22-3226:2; Ex. 561-2-3 ¶E, 561-25 §5.3.1. Negotiation of the specific terms of the Ground Lease and a corresponding LDDA amendment ensued in 2015. Trial Tr. 3226:9-3228:2; Exs. 68, 561.

In late 2015, however, the contract negotiations appeared to be reaching a stalemate. Trial Tr. 2436:25-2437:22, 2506:18-2507:18, 3228:3-7; Exs 64, 65. The primary remaining unresolved issue was the City's authority to enact health and safety legislation regarding the shipment of coal, and the developers' desire to ship commodities without further regulation. Trial Tr. 2436:25-2437:22, 2506:18-2507:18, 3228:3-7.

In early January 2016, Mr. Tagami told the City he had found a way forward that would permit OBOT to build a "smaller 'multi commodity bulk terminal operation' that will still meet and exceed the minimum project requirements by way of cost/spend, but would handle fewer products and require less storage initially"—that is, a terminal that would ship commodities other than coal while the parties' dispute played out. Ex. 64; Trial Tr. 2435:16-2436:10 (Cappio), 2456:2-11 (Cappio). Mr. Tagami also explained to the City that OBOT could move the project forward through a "multi-phased build out," which would involve construction of an "initial facility for [a] single commodity and then a schedule to adopt subsequent improvements for the storage and handling of alternative commodity." Trial Tr. 464:16-22; Ex. 562-3. This phased approach was consistent with Mr. McClure's January 2016 notes for a minimum project "to move pot ash and soda ash" and to "get at least one commodity going," after which the "[s]econd commodity could be grain." Ex. 557-1; *see also* Ex. 557-2 ("This is how we discussed starting the project anyway. A phased approach to getting up and running."); Trial Tr. 2610:20-25 (Mr. McClure confirming that OBOT "could get up and running with products other than coal").

[9] CCIG received legal advice that because of the numerous remaining unsatisfied conditions precedent, either side could hold up the deal, and any dispute would last years. Ex. 553-4; Trial Tr. 1040:2-8 (Tagami). The City similarly understood that it was not required to enter into the Ground Lease. Trial Tr. 2437:23-2438:2 (Cappio).

In late January 2016, the parties reached an agreement to move past their dispute over coal. Trial Tr. 2436:17-24, 2437:6-22, 2506:18-2507:18 (Cappio); Trial Tr. 3276:24-3277:6 (Landreth); Trial Tr. 3229:5-23 (Lake). And on February 16, 2016, the City and OBOT signed two related agreements: the Third Amendment to the LDDA, and the West Gateway Ground Lease. Exs. 68, 561. The Third Amendment waived the previous conditions precedent to the entry into the Ground Lease, including, as most relevant here, the execution of the Rail Access Agreement with the Port, the securing of $22 million in funding for certain publicly-funded wharf improvements from the Alameda County Transportation Commission ("ACTC"), and the completion of the City's public infrastructure improvements. Ex. 561-25 §5.3.1; Ex. 68-10 (Recital D); Trial Tr. 1171:9-13, 1175:12-1177:11, 1180:5-14 (Tagami). In that Third Amendment, the City and OBOT also memorialized their mutual understanding at the time that they were both reserving their rights with respect to the ongoing legislative process regarding potential coal legislation:

> The Parties acknowledge and agree that the Parties' execution of this Third Amendment and the subsequent execution of a Ground Lease shall not in any way cause or be interpreted as a waiver of or create a defense to the exercise or performance of, the Parties' respective rights and obligations under the LDDA or [the DA], including, without limitation, the Developer Parties' vested development rights pursuant to applicable provisions of the Development Agreement or the City's rights, notwithstanding any vested development rights of the Developer Parties, to fully consider, and when applicable adopt and apply to the Project future City regulations pursuant to applicable provisions of the Development Agreement, *including but not limited to regulations pertaining to the transportation, transloading, handling and/or export of coal or petroleum coke….*

Ex. 561-40-41 §13 (emphasis added).[10]

[10] Mr. Tagami testified that he knew any TLS sublease was required (by the Ground Lease) to be in essentially the same form as the Ground Lease, and that anything he agreed to in the Ground Lease would thus be something Mr. Siegel would have to agree to in the sublease. Trial Tr. 658:18-659:3. In response to Mr. Siegel's strong negative reaction to the inclusion of this "pejorative and potentially restrictive language regarding coal" in the Ground Lease, Ex. 687-2; Trial Tr. 657:10-658:4, Mr. Tagami informed Mr. Siegel in an email that OBOT had rejected it, without mentioning that the same language was included in the Third Amendment to the LDDA. Trial Tr. 660:6-25; Ex. 687-1.

B. *Key WGW Ground Lease Terms*

The West Gateway Ground Lease is a lengthy, highly-negotiated document between sophisticated and experienced contracting parties represented by counsel, and runs a total of 136 pages, 594 with exhibits. Ex. 68. The Court summarizes the relevant provisions here:

Premises. The City leased approximately 34 acres of waterfront land and the connected rail corridor to OBOT for 66 years to build and operate the bulk commodity terminal and associated wharf and rail improvements. Ex. 68-11 §1.1, 68-13 §1.2, 68-31-32 §6.1; Trial Tr. 200:7-9; Trial Tr. 538:4-6; Trial Tr. 1042:7-19.. The leased Premises consisted of two parcels: the 26-acre "West Gateway Property," consisting of the West Gateway and the West Gateway Rail Right of Way (Ex. 68-11(1.1.1) and 68-149-56 (Ex. 1.1.1.-A); and the "Rail R/O/W/ Property," consisting of 8 acres in the rail corridor (Ex. 68-11(1.1.1) and 68-157-90 (Ex. 1.1.1.-B). The ownership and easement rights within the entire rail corridor connecting the Port's rail terminal with the West Gateway property were complex and involved multiple entities: the City, the Port, the two major railroads (Union Pacific, or "UPRR"), and Burlington-Northern-Sante Fe, or "BNSF"), and East Bay Municipal Utilities District (EBMUD). Ex. 68-32 §6.1(b); Ex. 68-242 (Ex. 6.1-B); Trial Tr. 781:21-782:10 (Stotka); Trial Tr. 1845:9-1847:20 (McClure).

Waiver of Conditions Precedent. Consistent with the Third Amendment to the LDDA, the City and OBOT expressly waived all conditions precedent to the execution of the Ground Lease upon its execution. Ex. 68-10 (Recital D); Trial Tr. 1180:5-9.

Specifically, OBOT expressly agreed to take the Premises subject to the City's ongoing completion of the public infrastructure improvements that "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." Ex. 68-11 §1.1.1. OBOT did not negotiate a deadline for completion of those improvements, did not include any contingency for its construction deadlines, and agreed that the sole and exclusive remedy if the City failed to complete them be that OBOT would have a right to terminate the Ground Lease. Ex. 68-117 §37.9.2(b).

OBOT likewise expressly agreed to take the land subject to the City and Port's future completion of an agreement, called the Rail Access Agreement ("RAA"), that would facilitate City access to the rail terminal to be constructed on the Port's section of the OAB land. Ex. 68-31 §5.2.3(a).[11] The City agreed to use "commercially reasonable efforts" to enter into such an agreement, and the parties acknowledged the possibility that such an agreement may not be completed. *Id*. OBOT did not negotiate any deadline for the RAA with the Port, did not include any contingency for its construction deadlines, and provided that OBOT's "sole and exclusive remedy" if the City failed to enter that agreement was to terminate the Lease. *Id.*; Trial Tr. 3228:17-3229:4.

OBOT also released preexisting claims and took the land as is, including specifically waiving Civil Code section 1542. Ex. 68-12-14 §1.1.3.

Rent. In exchange for the land and development rights conveyed by the Ground Lease, OBOT agreed to pay a base rent amount and a share of the revenue from the terminal once it was operational. *See generally* Ex. 68-18 (Article 2 (Rent)).

OBOT's Construction Obligations and Deadlines. In Article 3 (Permitted Uses), the parties agreed that OBOT "shall develop, use, and operate" the land for the purposes laid out in the Scope of Development (Exhibit 3.1 to the contract). 68-23 §3.1.1; 68-239 (Ex. 3.1). That Scope of Development included the "Bulk and Oversized Terminal," "Railroad Improvements," and certain permitted "Ancillary" and "Conditional" uses of the land. Ex. 68-239.

The Bulk and Oversized Terminal was defined in the Scope of Development as "A ship-to-rail terminal designed for the export of non-containerized bulk goods and import of oversized or overweight cargo consistent with the Master Plan," and defined to include the improvements to the wharf. *Id*. The "Railroad Improvements" were separately defined and included two types of rail work: the construction of rail improvements consistent with the Master Plan, including West Gateway Lead Tracks No. 1 and No 2, and the rail improvements included in the OBOT Wharf

[11] As planned, the train cars serving the West Gateway and other tenants on City land would originate at the Port's terminal. Ex. 3-33 (Amended and Restated Cost Sharing Agreement project description). The City and Port had agreed to share capacity for this new rail terminal on the Port's OAB land. Ex. 3-17-18 (Section 11).

and Rail Improvements (at the West Gateway property). *Id*. "Railroad Improvements" excluded any rail improvements constructed as part of the City's public infrastructure improvements. *Id.*

In Article 6 (Improvements), the parties agreed that OBOT would construct the agreed-upon "Minimum Project," by particular deadlines. Ex. 68-31-32 §6.1. The Minimum Project was then defined to include a Bulk and Oversized Terminal "capable of servicing one or more lines of export products"; the "Minimum Project Rail Improvements"; and the "OBOT Wharf and Rail Improvements." *Id.* The Minimum Project Rail Improvements were five specific pieces of connecting track located in the rail corridor land that were to connect the Port's new rail terminal with the West Gateway. Ex. 68-32 §6.1(b). The five pieces of track that were to comprise the Minimum Project Rail Improvements are:

(1) The BNSF Rail Improvement: Lead Track No. 1 in the BNSF Easement, on City-owned land (§6.1(b)(i)).
(2) East of Wake Rail Improvement. Lead Track No. 2 in the Port Rail Easement east of the Wake Avenue crossing, on City-owned land (§6.1(b)(ii)).
(3) Lead Track No. 2 in the Outer Claw, on Port property (§6.1(b)(iii)).
(4) Lead Track No. 1 in the Outer Claw, on Port property (§6.1(b)(iv)).
(5) Industrial Drill Track spur, on Port property (§6.1(b)(v)).

68-32 §6.1(b); *see also* Ex. 68-241-242 (Ex. 6-B). The ownership and use rights for the land at issue for these five pieces of track was complex, and included land owned by the City but subject to easements to the BNSF and the Port, and land owned by the Port. *Id.*; *see also* Ex. 68-12 §1.1.2 (Permitted Title Exceptions).

The first construction deadline for this Minimum Project was called the Initial Milestone. 68-32-33 §6.1.1. The Initial Milestone defined both *what* needed to be built and by *when*.

With respect to *what*: OBOT agreed to "Commence Construction" of two specific parts of the Minimum Project: the "Bulk and Oversized Terminal and at least one of the [five] components of the Minimum Project Rail Improvements." 68-32-33 §6.1.1. "Commence Construction" was also specifically defined to "mean[], with respect to any and all improvements on all or any portion of the Premises, that a Building Permit has been obtained for such Improvements, where applicable a foundation (slab or other type) has been installed and such

Improvements are subject to active and on-going construction." Ex. 68-129. The remainder of the Minimum Project was to be completed by the Second Milestone date. Ex. 68-33 §6.1.1.2.

With respect to *when*: the Initial Milestone deadline was set as no later than 180 days from the Commencement Date of the Ground Lease. Ex. 68-32-33 §6.1.1.1. The Second Milestone was for the "entire, operating Minimum Project," and was defined as two years after the first Building Permit for the terminal. Ex. 68-33 §6.1.1.2.

The Lease also contained a time-is-of-the-essence provision, requiring OBOT to accomplish all construction "expeditiously, diligently, and within the timeframes set forth" therein. Ex. 68-36 §6.2.5. The parties also agreed to a specific "Exclusive Remedy" for OBOT's failure to perform with respect to any of the Minimum Project requirements, including the Initial Milestone, granting the City early termination rights with respect to the portion of the property on which OBOT has not commenced construction of the Minimum Project. Ex. 68-36 §6.1.2.

In addition to these deadlines, OBOT also agreed to certain Preconstruction Requirements. Ex. 68-34 §6.2. Before construction, OBOT agreed to satisfy certain specified conditions and requirements (unless the City, in its sole discretion, waived such conditions and requirements), including that the City must have approved the Final Construction Documents; OBOT must have obtained all Construction Permits; and OBOT must have entered into the Initial Improvements Construction Contract. Ex. 68-36 §6.2.6. With respect to Construction Documents, OBOT agreed to submit and obtain landlord approval of "reasonably detailed Schematic Drawings," then "Preliminary," and then "Final Construction Documents," and the Ground Lease set forth detailed procedures and timeframes for that approval. Ex. 68-35 §§6.2.1.-6.2.3. The parties agreed to "progress meetings," to be held "from time to time at the request of either party" for the purpose of "coordinat[ing] the preparation, review and approval of the Construction Drawings," as well as to "informal" communication as needed "to ensure that the formal submittal of any Construction Documents to Landlord can receive prompt and speedy consideration." Ex. 68-35 §6.2.2. The parties also agreed to a specific remedy for OBOT in the event of Landlord delays with respect to these Construction Documents: upon notice to the City, OBOT could "deem" the documents

approved, and "such a failure shall not constitute and Event of Default" by the City. Ex. 68-35 §6.2.1.

OBOT also agreed to "bear and pay all costs and expenses of construction of the Initial Improvements and all other Improvements," and was "responsible for performing all site preparation work necessary for construction of the Initial Improvements." Ex. 68-38 §6.2.9; *see also* Ex. 68-46-47 Art. 7 (OBOT solely responsible for management, operation, maintenance, and repairs).

City's Retention of Regulatory Authority. OBOT and the City agreed that the City was entering the Ground Lease solely in its capacity as a landlord:

> Tenant acknowledges and agrees that Landlord is entering into this Lease in its proprietary capacity as the holder of fee title to the Property, and not in its capacity as a governmental regulatory agency and that the status, rights and obligations of Landlord, in such proprietary capacity, are separate and independent from the status, functions, powers, rights and obligations of the City in such governmental regulatory capacity…

Ex. 68-29 §5.2.1.[12] OBOT and the City agreed that the Ground Lease therefore did not limit or in any way affect the City's legislative and regulatory authority: "[N]othing in this Lease shall be deemed to limit or restrict City in the exercise of its governmental regulatory powers and authority with respect to Tenant, the Premises or otherwise, or to render Landlord obligated or liable under this Lease for any acts of omissions of the City in connection with the exercise of its independent governmental regulatory powers and authority." Ex. 68-29 §5.2.1.

OBOT and the City expressly agreed that the City's exercise of its regulatory or legislative authority also could not excuse OBOT's performance obligations under the Ground Lease: "No

[12] These provisions are consistent with the California rule that "a promise made as lessor cannot result in the loss of a proper governmental power." *City of Glendale v. Superior Ct*., 18 Cal.App.4th 1768, 1775-78 ("a governmental entity may not contract away its sovereign authority"); see also *Discovery Builders, Inc. v. City of Oakland* (2023) 92 Cal.App.5th 799, 2023 WL 4115074, *6-9 (city cannot contract away its police powers); *Richeson v. Helal* (2007) 158 Cal.App.4th 268, 280 ("Reservation of the police power is implicit in all government contracts and private parties take their rights subject to that reservation.") (quoting *108 Holdings, Ltd. v. City of Rohnert Park* (2006) 136 Cal.App.4th 186, 196)). The Development Agreement Statute allows certain limited waivers of the police power subject to procedural protections and substantive limitations. S*ee supra* at 10-11. No similar law allows a city to waive its police power through a ground lease.

… present or future Law, whether foreseen or unforeseen, and however extraordinary, shall relieve Tenant of its obligations hereunder, nor give Tenant any right to terminate this Lease in whole or in part or to otherwise seek redress against Landlord." Ex. 68-29 §5.1.1.2.

OBOT and the City also agreed that OBOT would comply "with all applicable Laws," Ex. 68-28 §5.1; *see also id.* (OBOT's required compliance with laws "shall not be deemed to limit Landlord's ability to act in its legislative or regulatory capacity, including the exercise of its police powers"); *id.* ("Tenant's obligation under this Section 5.1 to comply with all present or future Laws is a material part of the bargained-for consideration under this Lease.").

OBOT likewise assumed complete responsibility for obtaining all regulatory approvals for the Improvements:

> Without limiting the preceding sentence, Tenant acknowledges that the Permitted Uses under Section 3.1 do not limit Tenant's responsibility to obtain all Regulatory Approvals (and pay all related processing and development fees and satisfy all related conditions of approval) for such uses, including but not limited to, the Master Plan, PUD or Building Permits, nor do such uses limit City's responsibility in the issuance of any such Regulatory Approvals to comply with applicable Laws, including the California Environmental Quality Act.

Ex. 68-29 §5.2.1; *see also* Ex. 68-30 §5.2.2.1 ("The Parties acknowledge that the Project and Tenant's contemplated uses and activities on the Premises, any subsequent changes in Permitted Uses, and any construction or alterations of Improvements, may require that Regulatory Approvals be obtained from governmental agencies (other than City) with jurisdiction over the Premises or the Project. Tenant shall be solely responsible for obtaining all such Regulatory Approvals as further provided in this Section."); Ex. 68-36 §6.2.4 ("Tenant, at its cost, shall be responsible for applying for and diligently pursuing the issuance of, and thereafter compliance with, all permits and other Regulatory Approvals…"); Ex. 68-40 §6.2.13 ("Tenant shall be responsible for obtaining its own regulatory permits (including, without limitation, any required BCDC Permit) for the Improvements to be Completed by Tenant pursuant to this Lease.").

The parties also expressly agreed that OBOT reserved its rights to challenge the City's regulatory authority. In the event that OBOT disagreed with the application of any law to this

project, the contract provided that "[n]othing 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." Ex. 68-30 §5.2.1. Moreover, the parties agreed that should such a challenge occur, OBOT could not be called in default for failure to comply with the challenged law or regulatory approval: "Notwithstanding anything to the contrary herein, Tenant shall not be in default hereunder for failure to comply with any Laws or insurance requirements if Tenant is contesting the applicability of such Laws (including Regulatory Approvals) to Tenant or this Lease... *"* Ex. 68-28 §5.1.

Tolling and Force Majeure. The parties agreed to two specific tolling provisions and one general Force Majeure provision. First, "[o]n condition that, promptly following execution of this Lease, [OBOT] commences, and thereafter diligently pursues to Completion, the design and construction of the OBOT Wharf and Rail Improvements," the City agreed to toll the commencement of time periods for paying rent and commencing construction by up to two years. Ex. 68-17 §1.7.2. If the City granted that tolling, the Initial Milestone deadline would be no later than August 14, 2018 (180 days from February 15, 2018). Ex. 68-17 §1.7.2; Ex. 68-32-33 §6.1.1.1.

Second, the City agreed to rent abatement in the event of delays in issuing any building permit of more than 60 days. Ex. 68-34 §6.1.3.

As discussed in greater detail *infra* at 72-82, the parties agreed to a general provision for "Delay Due to Force Majeure." Ex. 68-84 §16.1; Ex. 68-132, Art. 40 (definition of "Force Majeure").

Remedies and Termination Rights. The parties agreed to specific, and somewhat asymmetrical, exclusive remedies and termination rights. First, both parties were required to provide written notice of any default by the other. Ex. 68-86 (§18.1), 68-91 (§22.1).[13]

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[13] California law enforces these default notice and cure provisions. *See*, *e.g.*, *Extension Oil Co. v. Richfield Oil Corp.* (1942) 52 Cal.App.2d 105, 107–08 (enforcing notice-and-cure provision); *Warner Bros. Int'l Television Distribution v. Golden Channels & Co*. (C.D. Cal. Mar. 31, 2003) 2003 WL 27384425, *13-15 (same).

OBOT specifically agreed to the City's right to terminate the Ground Lease for any OBOT default pertaining to the Minimum Project, along with liquidated contract damages. Ex. 68-33-34 §6.1.2. OBOT also generally agreed to the City's right to terminate the Ground Lease in the event of OBOT's uncured default. Ex. 68-89 §19.3; *see also* Ex. 68-87 §19.1 ("Upon the occurrence and during the continuance of an Event of Default under this Lease (but without obligation on the part of Landlord following the occurrence of an Event of Default to accept a cure of such Event of Default other than as required by law or the terms of this Lease), Landlord shall have all rights and remedies provided in this Lease or available at law or equity."). And OBOT agreed that in the event of its own default it would have "no right to sublet or assign its interest in the Premises or this Lease without [the City's] written consent, which may be given or withheld in [the City's] sole and absolute discretion." Ex. 68-90 §19.3.4.

With respect to any potential City default, OBOT specifically further agreed that "[The City] shall be deemed to be in default hereunder *only* if [the City] shall fail to perform or comply with any obligation on its part hereunder *and*" certain notice and cure provisions were satisfied. Ex. 68-91 §22.1 (emphasis added). OBOT agreed to obtain remedies only for defaults that "substantially and materially interfere[] with the ability of [OBOT] to conduct its Permitted Uses of the Premises provided for hereunder." Ex. 68-91 §22.1.

OBOT agreed to exclusive and limited remedies for any City default, including that its remedies for the City's default did *not* include termination (except as where more specifically set forth as a sole and exclusive remedy throughout the contract). Ex. 68-91 §22.1; *see also* Ex. 68-90 §20.2. And the "sole and absolute" remedy for any City substantial and material interference was that OBOT could seek injunctive relief and "offset or deduct only from the Rent becoming due hereunder, the amount of all actual damages incurred by Tenant." Ex. 68-91-92 §22.1.[14]

[14] In addition to OBOT's expressly limited remedies, both parties agreed to waive any consequential damages, and agreed to a prevailing party attorney's fees provision. Ex. 68-92 §24.1; Ex. 68-121 §38.13.

Notably, OBOT agreed that in the event of any City default: "*Tenant shall have no remedy of self-help*." *Id.* (emphasis added).[15]

IV. Performance Period: February 16, 2016 – August 14, 2018

A. *The Parties' Initial Regulatory Pre-Application Meeting, the Binder and the Basis of Design*

1. March 9, 2016 meeting. Once the Ground Lease was signed, OBOT requested and the City agreed to conduct a "pre-application" meeting to discuss OBOT's proposed project and the potential permitting and other requirements. This meeting featured prominently in testimony from both sides. There was no dispute regarding these basic facts: Assistant City Administrator Claudia Cappio proposed an agenda to CCIG to which CCIG raised no objection in advance of the meeting. Ex. 567-2; Trial Tr. 2440:8-13. That agenda that included a presentation by CCIG regarding its TLS BOD, an opportunity for questions by the City, a discussion of the City's position regarding further regulatory approvals including possible discretionary approvals and other types of review, a discussion of the "City review process" including "coordinated review," and then a discussion of next steps. *Id.* There was also no dispute that Ms. Cappio gathered high-level representatives from many City departments who might be involved in regulatory approvals to attend the meeting and learn about the project, including Darin Ranelletti from the Planning and Building Department. Trial Tr. 1891:17-21, 1961:10-16 (Morodomi), 2438:6-2439:5 (Cappio), 3150:1-9, 3150:17-23, 3152:2-6 (Ranelletti). Nor was there dispute that, consistent with the agenda, the City discussed the potential for additional discretionary approvals or environmental review under CEQA. Trial Tr. 2300:1-2301:2, 2485:14-19, 2484:1-7, 3153:3-11. Finally, there was no dispute that at the mention of these issues, Mr. Tagami grew angry and left the meeting, prior to the completion of the agenda and any discussion of next steps. Trial Tr. 2484:1-12, 3152:20-3153:2. The meeting therefore ended.

The City's witnesses explained that Mr. Tagami effectively prevented them from making

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[15] Under contract law, a party exercises a "self-help" remedy by "suspending performance" when it believes the other party is in breach. Farnsworth, Contracts (3d Ed. 2004) 525, Section 8.18; *see also*, *e.g.*, *Warner Bros. Int'l Television Distribution v. Golden Channels & Co.* (C.D. Cal. Mar. 31, 2003) 2003 WL 27384425, *14. Significantly, *OBOT expressly agreed it had no such remedy under this contract.*

further progress, and without a further proposal from the developers, there was nothing for the City to do with respect to approvals. Trial Tr. 2075:2-14, 2285:3-8, 2291:2-12, 3151:6-15, 3155:6-20. OBOT's witnesses, in contrast, claimed that the City had "hijacked" the meeting in an effort to block the project by discussing additional approvals, which was a "surprise." Trial Tr. 1892:14-21, 2903:3-9. But each OBOT witness described the problem slightly differently. Trial Tr. 474:10-14 (Tagami: "The meeting was about reopening CEQA" and other issues); 1591:2-8 (McClure: "The primary part of the meeting" was about informing OBOT that "the existing zoning and land use designations … no longer applied to us" and other issues); 2903:1-12 (Sanders: issue at meeting was about permitting and commodity-by-commodity review); 1892:14-21 (Morodomi: issue at meeting was about CEQA's application to commodities).

Although Plaintiffs' witnesses testified that they were surprised by the City's communications at the March 9 meeting regarding discretionary permits, CEQA, or "commodity-by-commodity review," the undisputed evidence showed—and OBOT's witnesses themselves admitted—that the City had alerted OBOT to the City's position on these legal issues well before that meeting. *See supra* at 17-18; Exs. 66-2, 555-1; Trial Tr. 400:18-22, 676:18-677:5, 1195:11-1197:11, 1435:14-1436:16, 2430:1-24, 2620:19-24, 2905:1-20. The evidence also showed that the City's communications were consistent with language in the DA and Ground Lease regarding subsequent approvals and further environmental review. Ex. 7-16-17; Ex. 7-25-26 §3.5; Ex. 68-29 §5.2.1; Trial Tr. 2368:5-13 (Cappio), 2669:14-2670:12 (McClure). On this record, Plaintiffs' claims to have been "blindsided" by the City's statements at the March 9 meeting, Trial Tr. 474:6-8, are not credible.[16]

In particular, with respect to Mr. McClure's allegations regarding zoning, the trial record showed that the zoning for the project was never in question. Trial Tr. 2254:23-25, 3101:17-24.

[16] Mr. Tagami also complained about the City's "out-of-sequence introduction of the creek protection permit" at the March 9 meeting, Trial Tr. 479:4-24, but subsequently admitted that he knew the City's position that the project might require a creek protection permit no later than July 2015, well before the Ground Lease and well before the kickoff meeting. Trial Tr. 1190:4-1191:13; Trial Tr. 1960:16-20 (discussing Ex. 565) (Morodomi); *see also* Trial Tr. 2059:25-2060:5 (Morodomi testimony that creek protection permit can be required when working next to water).

Ms. Cappio credibly testified that she never even mentioned zoning at the March 9 meeting, because zoning "wasn't at issue. The proposal as outlined in the basis of design was a permitted activity within the zone[.]" Trial Tr. 2486:16-19, 2487:3-7. Mr. Ranelletti's memory was similar: zoning was discussed "[o]nly in the sense that the property had been zoned to facilitate the project. But the zoning designation, that was all done and settled. And we were supposed to be focusing on moving the project forward through the permitting process." Trial Tr. 3154:5-10. No documentary evidence supports the claim that the City announced any change to the project's zoning at the March 9 meeting. Notably, neither OBOT's March 11, 2016 force majeure letter nor any other force majeure notice ever mentioned zoning. Ex. 76; Trial Tr. 2680:25–2681:5. Indeed, neither Mr. Sanders nor Ms. Morodomi (nor Ms. Cappio nor Mr. Ranelletti) testified that anything about the zoning for the project was at issue in the March 9 meeting. Trial Tr. 1892:14-21, 2486:16-19, 2903:1-12, 3154:5-10.[17]

Mr. Ranelletti also explained that whether an activity is permitted (allowed) under the zoning is a "totally separate" issue from any later permitting that is required—"[s]o even if a project complies with zoning, they still need to comply with each and every other code and regulation." Trial Tr. 3109:13-18; *see also* Trial Tr. 3111:18-24. And he also explained that whether a permit (such as a grading permit) is discretionary does not depend on whether the permit applicant is engaged in a permitted (allowed) activity under the zoning code. Trial Tr. 3117:2-11. Plaintiffs presented no credible evidence to contradict Mr. Ranelletti's explanation of the City's normal permitting process and the role of discretionary approvals.

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[17] Mr. McClure and Mr. Tagami's contrary testimony was inconsistent with the record as a whole and not credible. In his direct examination, Mr. McClure focused extensively on zoning, testifying that "the primary part" of the March 9 meeting "was Ms. Cappio instructing us that the existing zoning and land use designations that were in place no longer applied to us, and that we were going to start a new process," Trial Tr. 1591:2–8. He stated that he understood "it was her intention to reinvent the land use rights that we had under the lease," Trial Tr. 1593:9–11, and that this was "completely a surprise to us." Trial Tr. 1593:22–1594:9. He labeled this the "seaport zoning shuffle," Trial Tr. 1593:14-17, and claimed OBOT couldn't move forward "in the absence of having a clear decision about what the zoning actually was." Trial Tr. 1602:23-1603:2. But on cross-examination, Mr. McClure appeared to walk back his testimony, testifying that his understanding of the discussion at the March 9 meeting regarding the permitting process was that it "was more related to building permits rather than restarting the zoning and discussion over what was allowed in this area." Trial Tr. 2673:11-15.

Likewise, the evidence uniformly supported the reasonableness of the City's position that further environmental review was potentially necessary, as the parties' DA and Ground Lease expressly stated. Ex. 7-16-17; Ex. 7-25-26 §3.5; Ex. 68-29 §5.2.1; *see also* Cal. Code Regs. tit. 14, §15162.[18] The testimony of Plaintiffs' lay witnesses that CEQA might require further review only in extreme circumstances, such as "if we wanted to stop the seaport use and build residential," was untethered to any law and unsupported in the record. Trial Tr. 2635:16-2636:2. And internal CCIG documents showed that CCIG itself acknowledged the possibility of additional environmental review for the project, for instance regarding rail impacts and dredging. Ex. 564-2; Trial Tr. 2629:2-2632:3, 2666:23-2667:16, 2668:14–21.

There is no record evidence of any request in writing by OBOT following the March 9, 2016 meeting for another "pre-application" meeting until September 2018 (after the ITS sublease was signed, and after the August 14, 2018 deadline).[19] *See* Trial Tr. 3155:6-12. And as the City's witnesses explained, without a request to re-start the pre-application process or submission of plans, there was nothing for the City's Planning and Building Department to review to determine whether ministerial or discretionary permits were required, or additional environmental analysis was warranted. Trial Tr. 2075:2-14, 2285:3-8, 2291:2-12, 3151:6-15, 3155:6-20.

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[18] As Ms. Cappio explained, the 2002 EIR and the 2012 Addendum for the Oakland Army Base project provided only "a programmatic level of detail" regarding the project, addressing two Variants for the West Gateway without much detail. Trial Tr. 2284:25-2285:3, 2426:1-19, 2427:12-16. In Ms. Cappio's view, therefore, the City was "required to perform an analysis contained in CEQA," which is "a standard part of our review and analysis process in the planning and building departments when projects come in for a more detailed building permit set of plans, to see, based on the basis of the 2002 EIR and the addendum, whether further environmental review is justified or required." Trial Tr. 2285:13-20.

For example, the OBOT/TLS basis of design proposal included large "dump pits" (which Mr. McClure testified were 100 feet by 12 feet wide and 25 feet deep, and bordering the San Francisco Bay itself), but the 2012 Addendum contained no discussion of dump pits. Trial Tr. 2640:1-12, 2649:13-2653:16; Ex. 1. Likewise, the Court heard testimony regarding the TLS/ITS plans to serve "Capesize" vessels (which required greater draft than the less than 40 feet available at the West Gateway), but the 2012 Addendum discussed only the smaller "Panamax vessels" and was predicated on *no additional dredging.* Exs. 1-44, 1-58, 750-14 §8.2; Trial Tr. 2655:1-11, 2656:22-25, 2659:18-2660:17, 2661:21- 2662:4, 2662:18-2663:5, 2664:6-13. Furthermore, the 2012 Addendum did not analyze the impacts of *any* specific commodities that could pass through the terminal over the course of the 66-year lease. Ex. 1-44; Trial Tr. 2071:12-15.

[19] CCIG acknowledged in July 2016 the need for another "all-hands" meeting similar to what the March 9 meeting was supposed to be, Ex. 601-3; 1985:25-1986:11, 1989:14-19, but Ms. Morodomi could not recall a single email making such a request of the City, Trial Tr. 1990:1-5.

The parties disputed whether OBOT made an oral request for such a meeting. There is no record evidence referring to such a request, or any refusal of the City to meet.[20] There was considerable testimony regarding Mr. Tagami's predilection for documentation, including his own acknowledgment that he likes to memorialize his conversations in writing, Trial Tr. 1208:2-7, and his maintenance of a room with hundreds of binders of documents pertaining to the project, which CCIG staff was required to maintain. Trial Tr. 1274:16-19, 1989:3-13, 2900:21-2901:8, 2983:15-18. Former Assistant City Administrator Cappio testified that had such a request been made, the meeting would have been granted. Trial Tr. 2488:19-23.

2. <u>Binder of City Regulations</u>. Prior to the signing of the Ground Lease, in 2016, Mr. Tagami asked the City to provide a binder of applicable regulations that was overdue pursuant to a provision of the DA. Ex. 65-1. There was no dispute that Mr. Tagami made several follow up requests, and on March 11, 2016, had OBOT's counsel submit a force majeure claim with respect to the then-three-week-old Ground Lease pertaining to these binders. Ex. 76.

There was also no dispute that on June 15, 2016, the City provided CCIG and OBOT with an electronic set of the regulations applicable to the project. Ex. 84; Trial Tr. 687:4-6, 2351:23-2352:1; *see also* Trial Tr. 2514:1-5 (after June 16, 2016, Ms. Cappio did not understand the binder to be an open issue). Mr. Tagami initially repeatedly claimed that he did not receive any binders because the City provided only an "electronic version" (Trial Tr. 559:3-8; 327:6-12; 397:9-11, 559:17-24, 687:21-25) and "nothing was signed" (Trial Tr. 325:18-20, 327:10, 397:10-11, 559:17-24, 687:21-25). When confronted with his emails, however, he conceded that he had

[20] Ms. Cappio met in person with Mr. Tagami "at least a few times a month," with phone calls in between. Trial Tr. 2390:1-4, 2495:13-20. They had regularly scheduled biweekly meetings in City Hall or CCIG's offices, lasting an hour or more. Trial Tr. 2390:5-22. There were also other regularly scheduled meetings between CCIG and the City. Trial Tr. 2391:4-14. All told, Ms. Cappio estimated that she spent at least five to eight hours per month speaking with Mr. Tagami. Trial Tr. 2391:15-2392:3. Mr. Tagami admitted that Ms. Cappio generally responded to his requests regarding the project and tried to help him move things forward, met with him frequently about the project, and responded to his calls and emails. Trial Tr. 1202:25-1203:2. He could not identify any email or letter requesting a meeting to which Ms. Cappio failed to respond. Trial Tr. 1204:4-8. Ms. Landreth also met with Mr. Tagami when he requested, and she never refused a meeting with him or Mr. McClure. Trial Tr. 3250:25-3252:7; *see also* Trial Tr. 1990:1-5, 2058:6-14, 2063:14-23, 2063:24-2064:6 (Ms. Morodomi did not remember having ever personally requested meeting, or any written communication from OBOT requesting a further meeting before 2018); Trial Tr. 735:23-736:4 (Stotka testimony that City regularly met with OGRE).

agreed to receive the materials in electronic format, and when shown the City's letter providing the regulations, he admitted that it was in fact signed. Exs. 84-1-2, 688; Trial Tr. 688:19-690:14, 692:7-693:4, 693:25-694:10, 695:10-13.

Mr. Tagami also claimed that the City's set of regulations contained errors, and that he provided a "red-letter" or "red-lined" version of the compilation back to the City. Trial Tr. 325:18-326:11, 397:5-13, 687:15-20, 1450:6-7. Ms. Morodomi testified that OBOT internally identified a "handful" of extraneous regulations that she believed were inapplicable. Trial Tr. 1897:21-24. But despite Mr. Tagami's careful record-keeping, *supra* at 33, Plaintiffs provided no documentary evidence that mentioned or supported in any way that any "red-letter version" was compiled or sent to the City, and Ms. Morodomi admitted she did not know whether any such version was actually provided to the City. Trial Tr. 694:14-18 (Tagami), 1899:25-1900:3 (Morodomi). Mr. Tagami also did not dispute that the DA did not require the City to meet and confer regarding the binder's contents. Trial Tr. 696:17-697:2. The City's witnesses testified that they never received any response or corrections. Trial Tr. 2352:2-16 (Cappio), 3156:25-3157:5 (Ranelletti), 3729:22-25 (Lake).

The evidence also showed that even prior to receiving the binder of regulations from the City, OBOT had compiled its own version of the regulations, had identified the 76 permits needed for the project, and used its analysis of the regulatory framework to create the Basis of Design. Ex. 565-2, 565-16; Ex. 750-7; Trial Tr. 325:15-17, 384:15-385:13, 1449:16-21, 1896:16-22, 1959:11-19.

3. <u>2015 TLS Basis of Design.</u> As part of the City's health and safety hearings, as discussed above, OBOT provided the City with copies of the TLS BOD dated July 21, 2015, before the lease was signed. Ex. 540 (providing BOD "for inclusion in your city staff report for the upcoming hearing"); Ex. 750; Trial Tr. 699:14-700:3 (Tagami). The TLS BOD stated it was the "first step in a project's design process," setting forth "a project's operating environment" and "desired project performance parameters," and representing less than ten percent of the design. Ex 750-7; *id*. ("The next phase in the design process will be design development (10% to 65%)…").

Although OBOT contends that the 2015 TLS BOD contained "schematic drawings"—a preconstruction step required under the Ground Lease—the evidence showed that OBOT never submitted any BOD as schematic drawings for landlord approval under the Ground Lease until September 28, 2018. Ex. 239; Trial Tr. 558:1-6, 699:21-700:9, *see also* Trial Tr. 3213:14-17. As Mr. Tagami acknowledged, the 2015 TLS BOD could not possibly have been submitted in 2015 for landlord approval under the Ground Lease, which had not yet been signed. Trial Tr. 699:14-700:3.

The City's witnesses credibly testified that they reviewed the BOD and were prepared to discuss it at the March 9, 2016 meeting, which was adjourned when Mr. Tagami walked out. Ex. 72 (Ms. Cappio hoping to discuss "basis of design so far"); Trial Tr. 2279:7-24, 2410:9-14, 2457:14-20, 2459:16-25, 2484:2-7, 3211:5-19; *see also* Trial Tr. 1590:25-1591:8 (McClure admitting that the BOD was not discussed at the March 9 meeting), 2054:14-19 (Morodomi admitting BOD was not discussed).[21] Mr. Tagami claimed that thereafter he repeatedly asked for feedback on this document, but no documentary evidence of any such request, formal or informal, was introduced. *See* Trial Tr. 705:17-706:4, 1143:18-1144:16.

Moreover, Mr. Tagami's testimony is inconsistent with the documentary record. In May 2016, the City asked Mr. Tagami whether the 2015 TLS BOD had been updated or revised, again in the context of collecting information for the health and safety investigation. Ex. 594. In response, Mr. Tagami and his counsel each sent letters to the City stating that the City should

[21] Ms. Cappio also testified the City "did provide feedback" on the 2015 BOD, Trial Tr. 2272:5, and "let the developer know that it was a very generalized conceptual design[.]" Trial Tr. 2240:16-20; *see also* Trial Tr. 1604:3-17 (McClure contending that the City's feedback on the BOD prior to March 9, 2016 was not "constructive"). The City communicated to Mr. Tagami that the BOD "was fairly incomplete or fairly spare" and that it "didn't afford us a lot of detail that was needed." Trial Tr. 2457:18-20, 2459:6-10. Ms. Cappio testified that many of the drawings in the Basis of Design were lacking important detail and information. Trial Tr. 2460:15-24, 2464:12-13 (discussing Ex. 750.0024, the site plan); Trial Tr. 2461:22-2462:9 (discussing Ex. 750.0524, Commodity B Receiving Conveyor); Trial Tr. 2462:12-20 (discussing Ex. 750.0532, proposed storage building); Trial Tr. 2463:11-2464:2 (discussing Ex. 750.0539, conveyor system). Similarly, the HDR Preliminary Engineering section of the Basis of Design did not give the City the information it needed to fully understand the design proposal from OBOT at the time of the March 9 meeting. Trial Tr. 2465:25-2466:21, 2473:11-20; *see, e.g.*, Trial Tr. 2466:23-2467:24 (earthworks section); Trial Tr. 2467:25-2469:8 (ground improvements section); Trial Tr. 2469:9-24, 2470:9-2471:19 (dredging); Trial Tr. 2472:3-13 (safety). For his part, Mr. Tagami agreed that the Basis of Design was "skeletal." Trial Tr. 1027:23.

disregard the BOD because review of those plans would be "premature" and "speculative." Exs. 589-2, 598-3. Mr. Tagami urged the City not to review the BOD and explained:

> We look 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 and have made the requisite determinations and preliminary analysis. Again, they are simply not there yet.

Ex. 598-2. He explained further: "As to the Basis of Design (BoD), we have been clear since its compilation on behalf of TLS, and indeed introductory pages in the document itself explain, what the BoD is and is not. It is a foundation of regulations and standards upon which any future design must be premised…." He told the City not to review "[t]he design and operations of a facility that simply does not exist." Ex. 598-3; *see also* Trial Tr. 1965:10-1966:25, 1965:7-1966:25 (Morodomi). OBOT's counsel emphasized these same points. Ex. 598-1 (OBOT counsel's letter: "[N]o such design specifications or operations regime yet exist"); *id*. at 2 ("[T]here is not yet a confirmed terminal operator that would confirm what commodities have been committed for shipping through the terminal."); *id*. at 3 ("The "BoD is not and never was intended to serve as a "Project Design" or confirmation of specific "Activities" for operations at the Terminal…"); *id*. at 4 ("[O]nce the operator and commodity(ies) to be shipped are confirmed, the next step will be construction documents…"); Trial Tr. 702:9-703:10, 705:3-16, 706:8-23, 708:17-709:4.[22] These documents informed the City that OBOT would return with a revised BOD, with an actual design proposal, for further discussion once it had a sublease (and therefore "confirmed" terminal operator) in place.

The City's witnesses testified that in light of these letters, they were understandably waiting for submission of a sublease from TLS and a revised project proposal. Trial Tr. 2272:5-9,

[22] Mr. Tagami also told the City in this letter: "The ultimate design for the terminal at the West Gateway has not been completed" (Ex. 598-1); "The analysis will have to be premised upon assumptions as to design, operations, surrounding conditions, and numerous other variables which will ultimately have to be pinned down, but as yet remain unknown" (Ex. 598-1); "[F]oundational and defining aspects of the ultimate design for the terminal remain unconfirmed (Ex. 598-2); "a design and operations analysis… will be [nothing] more than assumption-rich and speculative." (Ex. 598-2); "To re-imagine a yet-to-be designed facility based upon an infinite number of assumptions on variables on a commodity-by-commodity basis produces, again, nothing but an endless stream of hypothetical and speculative musings." (Ex. 598-3).

2494:3-13, 3720:25-3721:12, 3722:4-19; *see also* Ex. 846-9 n.5. Ms. Lake testified that she "asked Mr. Tagami on many occasions when we would expect to receive the schematic drawings and the project proposal," but none were forthcoming. Trial Tr. 3722:24-3723:1.

Ms. Morodomi admitted that between 2016 and 2018 neither OBOT nor any of its proposed subtenants provided the City with any "further refined design parameters, operations protocols, [or] proposed permitting approach" until OBOT submitted the ITS BOD for landlord approval on September 28, 2018. Ex. 239; Trial Tr. 1966:4-25. From 2016 to 2018, TLS never signed a sublease and never submitted a revised BOD for the City's review as a landlord or as part of a pre-application process for regulatory review. Ex. 957-21 at 67:4-13; Trial Tr. 1966:4-25, 2291:2-10. Once the IES Sublease was submitted in 2018, the City expected that OBOT would submit a revised BOD to review, but did not receive one. Trial Tr. 3722:4-19.

Finally, the first and only record evidence of any written request for the City's review of any BOD (in any capacity, whether as landlord or regulator) is OBOT's September 28, 2018 letter submitting the ITS BOD for landlord review of "Schematic Drawings" pursuant to section 6.2.1 of the Ground Lease. Ex. 239.

B. *The 2016 Coal Ordinance and Resolution and Ensuing Federal Litigation*

On June 27, 2016, the Oakland City Council introduced an Ordinance prohibiting the storage and handling of coal within the City, invoked the DA's health and safety provision, and enacted a Resolution applying that Ordinance to the West Gateway project. Ex. 87. The two-step process for enacting an Ordinance in Oakland was completed on July 19, 2016. *Id.*

In December 2016, OBOT sued in federal court, alleging, among other claims, that the Ordinance and Resolution breached the DA. *OBOT v. City of Oakland* (N.D. Cal. 2018) 321 F.Supp.3d 986. In particular, OBOT alleged that the City's restriction on coal had interfered with its efforts to secure a sublease with TLS and, along with other remedies, sought declaratory and injunctive relief precluding the City from enforcing the performance deadline in the West Gateway Ground Lease. First Amended Complaint, *OBOT v. City of Oakland* (N.D. Cal. June 14, 2017) at ¶¶34-35, ¶¶122-123, ¶167, Prayer for Relief ¶D. As the litigation progressed OBOT also asserted and then expressly waived the right to seek delay in performance damages. However, by

the end of the case, OBOT had abandoned those remedies. City's Federal Litigation Br. (8/7/2023) Ex. B (OBOT Post-Trial Br. dated 2/9/18).

On May 15, 2018, the federal court ruled that the evidence before the City Council was insufficient to meet the DA's substantial evidence standard, and therefore enjoined the City "from relying on the resolution either to apply the ordinance to OBOT or to restrict future coal operations at the facility." 321 F.Supp.3d at 1010. The Court did not hold that the Ordinance itself was unlawful, and it left open the possibility that the City Council "could pursue future regulation of the project" so long as the City complied with its legal and contractual obligations. *Id.* at 1010-11. The Ninth Circuit affirmed that ruling in 2020. *OBOT v. City of Oakland* (9th Cir. 2020) 960 F.3d 603.

C. *Meanwhile, OBOT Suspends Work and Decides to Wait for a Sublease*

As previously discussed, OBOT entered a series of contracts, beginning in April 2014, that granted TLS, a wholly owned subsidiary of coal company Bowie, exclusive rights to sublease, construct, and operate the contemplated West Gateway terminal in return for large sums of money to OBOT and guaranteed throughput of coal to Bowie. *Supra* at 13-15. OBOT's plan was always to place the responsibility for the actual construction of the terminal, including for the design and for all permit applications, on its sublessee. Trial Tr. 1360:10-19; Trial Tr. 1369:3-8; Trial Tr. 1358:16-1359:7; Trial Tr. 1940:20-1941:8, 1960:21-24 (Morodomi); Ex. 660 (Tagami email to Siegel); Ex 645-13-16 (IES Sublease Abstract); Ex. 565 (Pre-Operation Requirements). The evidence demonstrated that this plan never changed. OBOT and CCIG entered into a series of extensions of an exclusive negotiating agreement (ENA) and updated versions of the term sheet, which resulted in a very lucrative revenue stream for OBOT but no actual movement forward on the project. Ex. 653; Trial Tr. 1267:11-14; Trial Tr. 1277:25-1278:8. The Court outlines here the evidence related to the choices made by OBOT to delay its own performance in favor of waiting on a sublessee:

1. <u>OBOT Goes Pencils Down in July 2015 and Never Picks Them Up Until September 2018</u>. After Mr. Tagami and Mr. Siegel learned that the City Council was considering the regulation of coal in the summer of 2015, they decided to go "pencils down" on the design

work for the terminal. Exs. 82-1, 539; Trial Tr. 1944:4-15 (Morodomi); Trial Tr. 1102:6-9 (Wolff). CCIG and TLS instructed the engineering and architectural consultants designing the terminal to stop working on the design in July 2015, and they did not resume work again until September 2018. Trial Tr. 1102:6-9, 1102:17-1103:21 (Wolff); Trial Tr. 1944:4-15 (Morodomi).[23] And the development management agreement between CCIG and TLS for work managing the West Gateway terminal project development was formally suspended in May 2017 in light of Mr. Siegel's debts. Trial Tr. 1953:3-6 (Morodomi); Ex. 117 (DMA suspension agreement).

2. Meanwhile, TLS Never Funds the Alternative Phased Plan. In early 2016, well aware that he would need at least a year to meet the Minimum Project Initial Milestone, Trial Tr. 1378:17-1379:1; Trial Tr. 1376:18-22, and of the importance of this deadline, Trial Tr. 1221:4-6, Mr. Tagami made plans to pursue soda ash as a first phase of development. Mr. Tagami corresponded with Ms. Cappio about upcoming discussions with a soda ash producer, including inviting her to a meeting, which she attended. Trial Tr. 1041:12-1043:14; Ex. 560; Trial Tr. 2084:24-2085:4 (Cappio).[24]

Cognizant of the Initial Milestone deadline, OBOT attempted to persuade Mr. Siegel to fund a smaller project while they fought with the City over coal. Ex. 581 (Tagami email to Siegel re: tightening schedule); Trial Tr. 681:16-682:8. In March 2016, immediately following a meeting with the City to review the proposed project and discuss upcoming regulatory approvals, Mr. Tagami expressed concern to Mr. Siegel about meeting the contractual deadlines. Trial Tr. 681:16-682:10; Ex. 570 (email from Tagami to Siegel re: comfort with lease takedown). CCIG

[23] This "pencils down" stop-work directive was issued even though Cardno, a design and engineering firm CCIG retained to conduct a peer review of HDR's work, had in an October 5, 2015 review raised a number of safety concerns regarding the 2015 TLS BOD that needed to be addressed. Trial Tr. 1944:17-25; Trial Tr. 1949:10-19; Ex. 58; Trial Tr. 1949:21-1950:2Trial Tr. 1950:7-16 (Morodomi). HDR was never asked to go back to address Cardno's concerns. Trial Tr. 1952:14-1953:1.

[24] CCIG was working on a schedule that would complete the Minimum Project and allow OBOT to begin generating revenue before OBOT was required to start paying rent under the West Gateway Ground Lease. Trial Tr. 1983:18-22, 1985:14-18, 1986:18-25 (Morodomi); Ex. 601 (July 2016 Use Concepts Meeting minutes). Meeting that schedule would have required new contracts with Architectural Dimensions (a CCIG consultant), with potential cash flow implications. Trial Tr. 1987:8-17 (Morodomi); Ex. 601-4. CCIG estimated that three packages presented by Architectural Dimensions would cost roughly $1.5 million total, to be funded by TLS. Trial Tr. 1982:4-17 (Morodomi); Ex. 588-3 (TLS cashflow spreadsheet).

continued to send Mr. Siegel and Jim Wolff, the then-chief financial officer of Bowie, information on how to meet the initial milestone deadline. Ex. 579 (TLS powerpoint); Trial Tr. 1971:6-11, 1972:23-24, 1975:22-1976:5, 1975:4-7 (Ex. 579), 1973:6-10, 1975:22-1976:5 (Morodomi); Trial Tr. 1065:13-1066:4.

Meanwhile, Mr. Tagami continued to stress to Mr. Siegel the importance of meeting the August 14, 2018 Initial Milestone deadline. Trial Tr. 1218:3-16; Ex. 604-3 (TLS/OBOT milestone schedule); Trial Tr. 1207:15-18; Ex. 581 (Tagami email to Siegel re: tightening schedule); Trial Tr. 1217:21-1221:14.[25] He suggested to Mr. Siegel that they could "accelerate the delivery" of the terminal by "announcing the first commodity to volumes equal to 50 percent of the facility's designated capacity not being coal." Trial Tr. 1207:19-1208:4; Ex. 581 (Tagami email to Siegel re: tightening schedule). And he tried to convince Mr. Siegel to fund a phased approach that would initially involve shipping commodities other than coal. Trial Tr. 1218:3-16 Ex. 604; Trial Tr. 1207:15-18; Trial Tr. 1217:21-1221:14; 1207:19-1208:4; Ex. 604; Ex. 645 (IES sublease abstract); Ex. 581 (Tagami email to Siegel re: tightening schedule).

These efforts escalated to demands by OBOT in July 2016 that Mr. Siegel contractually agree to meet the Initial Milestone deadlines, and to pay liquidated damages to OBOT if TLS failed to do so. Ex. 604-5; Trial Tr. 1219:18-1220:13 (Tagami); Trial Tr. 1222:15-21 (Tagami); Trial Tr. 1217:17-1218:22 (Tagami); Trial Tr. 1990:12-19 (Morodomi), 1991:6-17 (Morodomi).[26] Mr. Tagami again provided a "TLS/OBOT milestone schedule" that set forth milestones from the Ground Lease, including the August 14, 2018 minimum project initial milestone. Trial Tr.

[25] OBOT repeatedly acknowledged the August 14, 2018 Initial Milestone deadline. A July 2017 letter to the City acknowledged the February 15, 2018 minimum project commencement date and made no claim that its performance deadlines were extended. Ex. 633-2; Trial Tr. 1361:24-1362:15. Then in January 2018, in the IES sublease abstract, OBOT again acknowledged the August 14, 2018 deadline, and included a liquidated damages provision should IES fail to meet it. Ex. 645-4, Ex. 645-14; Trial Tr. 1365:9-18, 1367:13-1368:17, 1368:18-1369:1.

[26] Under the proposed schedule sent to TLS in July 2016, the construction drawings process would begin in October 2016 and finish in January 2017. Trial Tr. 1991:20-25 (Morodomi); Ex. 604. The schedule contemplated 300 days for TLS to acquire all the requisite permits, to be completed by November 2017. Trial Tr. 1992:1-9 (Morodomi); Ex. 604. OBOT's schedule proposed that construction would commence in April 2017 and run through November 2019. Trial Tr. 1992:10-12 (Morodomi); Ex. 604.

1218:3-16; Ex. 604-3 (TLS/OBOT milestone schedule). Under that schedule, permit applications would begin to be submitted in January 2017, with construction beginning in April 2017—which Mr. Tagami believed would "allow [him] pretty handily to meet th[e] minimum project milestone." Trial Tr. 1218:23-1219:4, 1219:13-17; Ex. 604-3. Mr. Tagami then reached back out in August 2016 to TLS to "underscore the importance of meeting the milestones we incorporated into the fourth extension of the option agreement." Trial Tr. 1222:10-21; Ex. 605-1.[27]

Plaintiffs' own witnesses acknowledged the viability of alternative plans. According to the testimony of Mr. Wolff, the West Gateway project garnered significant interest from beneficial cargo owners regarding a wide range of "viable commodities" including soda ash, iron ore, alumina, aluminum, potash, wood pellets, and borax. Trial Tr. 1095:6-16. Mr. Wolff created a financial model predicting that a soda ash terminal would generate over $300 million in net present value and shared this model with both Mr. Tagami and Ciner, the soda ash company that had expressed interest in shipping through the West Gateway terminal. Trial Tr. 1113:25-1114:24; 1114:23-1115:8.[28] And Mr. Wolff testified that TLS intended to build a multi-commodity terminal that could "handle any commodity," cognizant of the need to evolve continually to meet market demands. Trial Tr. 1071:8-14, 1138:23-1139:10.

Despite the existence of viable alternatives, Mr. Siegel ultimately made a business decision that coal would be more profitable and decided not to go forward with a soda ash deal. Trial Tr. 1325:9-23; Trial Tr. 1266:4-9. And OBOT likewise made a business decision to stick with Bowie and Mr. Siegel. Trial Tr. 1266:7-1267:10. Mr. Tagami admitted that each time one of the options extensions lapsed, he could have walked away from their arrangement. Trial Tr. 1266:13-17. But each time Mr. Tagami extended Mr. Siegel's option deadline, Mr. Siegel paid him more money. Trial Tr. 1267:11-14. Mr. Tagami acknowledged that this TLS revenue stream

[27] Ms. Morodomi continued to generate similar schedules on a regular basis thereafter. Trial Tr. 1992:13-19. A September 2016 schedule she sent to Mr. Tagami, Trial Tr. 1993:2-15, Ex. 770, was also designed to allow OBOT to meet the Initial Milestone. Trial Tr. 1994:17-20. By this time, the "start date for th[e] design work" on the project had moved from April 1 to October 1, 2016. Trial Tr. 2059:14-22; Ex. 770 (Morodomi).

[28] Mr. Wolff was also positive regarding iron ore, testifying that iron ore producers have sufficient reserves to ship seven million tons, similar to what was envisioned for coal, annually. Trail Tr. 1098:16-1099:1.

was very attractive. Trial Tr. 1271:23-24; Ex. 580 (TLS revenue stream email).

3. The Siegel Shuffle: OBOT Chose to Stay with TLS/IES/ITS. As time passed, Mr. Siegel's financial position became increasingly precarious, and he began falling behind on his payments to Mr. Tagami. Trial Tr. 1241:24-1242:15. The trouble started early in the relationship. In August 2016, Mr. Siegel was already involved in a search for "equity and debt relationships for his various companies," and was thinking about selling off his interest in the terminal project but reserving rights with respect to coal. Trial Tr. 1241:24-1242:15; Ex. 607 (email exchange re: term sheet/foxhole email). By November 15, 2017, Mr. Siegel owed OBOT almost $20 million. Trial Tr. 1261:4-6. As Mr. Siegel repeatedly missed deadlines in December 2017, Mr. Tagami became concerned about Mr. Siegel's ability to meet his financial commitments, but took no action other than to demand more payments. Trial Tr. 1314:11-16; *see also* Trial Tr. 1316:7-14. By July 2018, Mr. Siegel had agreed to pay Mr. Tagami $5,000 a day in late fees to compensate for delays in closing the sublease. Ex. 173 (email from Siegel to Tagami re: executed term sheet); Trial Tr. 1311:15-1312:6. Mr. Tagami and Mr. Siegel had even discussed Mr. Siegel pledging title to his yacht to meet his financial obligations. Trial Tr. 1317:2-8; Ex. 639. As of September 2018—after the Initial Milestone deadline had passed—Mr. Tagami was aware that Mr. Siegel was still attempting to line up funding for the project. Trial Tr. 1302:2-7; Ex. 206 (September 2018 email from Tagami to Rosen re: status).

Despite these warning signs, Mr. Tagami chose to extend Mr. Siegel's option agreement *ten times* over the course of 2016 and 2017. Exs. 514, 517, 549, 574, 590, 618, 620, 630, 632, 637, 638; Trial Tr. 1265:12-15; Trial Tr. 1266:10-17. Mr. Tagami understood that Mr. Siegel was buying time and attempting to "stay[] alive" throughout this process—an effort he described to his partners at CCIG as the "Siegel Shuffle." Trial Tr. 1264:21-1265:15; Trial Tr. 1264:3-8. And he knew that at any point throughout the Siegel Shuffle he could have opted not to extend Mr. Siegel's options, but nonetheless chose to continue that relationship. Trial Tr. 1266:10-1267:10.

4. OBOT Admits It Could Have Performed. In sticking with Mr. Siegel despite Mr. Siegel's repeated delays in entering a sublease, Mr. Tagami and OBOT passed up other opportunities to fund the project and meet the Initial Milestone deadline.

Under the plain terms of the Ground Lease, OBOT had the contractual right and responsibility to construct and operate the terminal, and did not need a sublessee to meet its contractual obligations. Trial Tr. 1267:15-1268:3; Ex. 68. Mr. Tagami acknowledged that OBOT had the capacity to self-finance the initial construction of the terminal and had access to sufficient capital to pay for the entire Minimum Project without Mr. Siegel or any other third-party operator. Trial Tr. 1268:1-3; Trial Tr. 1267:22-25; Trial Tr. 1269:11-16, 1268:19-21 (Tagami). Self-financing would also have enabled OBOT to enter into contracts with additional customers once the terminal was operational. Trial Tr. 2609:24-2610:4 (McClure); Ex. 557 (McClure notes). By declining to proceed, OBOT left itself at the mercy of Mr. Siegel's financial instability, as customers would not sign a contract until the project was actually constructed. Trial Tr. 1095:20-1096:18; Trial Tr. 1097:23-1098:15 (Wolff). Even OBOT's business partners at TLS expressed concern that instead of moving the terminal project forward, Mr. Tagami was focused on negotiating for more revenue and expending resources on lawyers and lobbying. Trial Tr. 1100:22-1102:5; Ex. 82-1 (Bridges email to Wolff re: account replenishment request).

Further, Mr. Tagami, OBOT, and TLS were aware of evidence that commodities other than coal were financially viable options at the time. Soda ash had sufficient supply, demand, and volume to support a purpose-built shipping terminal. Trial Tr. 520:12-521:9. Mr. Tagami's modeling determined that such a terminal would have been less expensive to build than the multi-commodity terminal described in the BOD. Ex. 961. At least one producer, Searles Valley Mineral, had signed a letter of intent to provide throughput through the terminal, Trial Tr. 1071:15-1072:1 (Wolff), and Mr. Tagami had received financial modeling that predicted a soda ash terminal would generate over $300 million in net present value. Trial Tr. 1113:25-1114:25 (Wolff). Third-party financiers, such as Macquarie Capital and Brookhaven Capital, also expressed interest in a non-coal and/or soda ash terminal. Ex. 89; Trial Tr. 1229:9-14 (Tagami); Trial Tr. 1232:6-12 (Tagami); Ex. 609 (Tagami Brookhaven sitdown notes); Ex. 99 (McClure email re: M&N supply chain analysis). Brookhaven's analysis expressed no concerns about the regulatory environment, and instead described the project as possessing "compelling economics as a long term hold" for "non-coal commodities with deep overseas market demand." Ex. 89-2. It

proposed proceeding "as a multi-commodity terminal for all other commodities" including soda ash, pot ash, alunite, heirloom grains, sodium sulfate, and borax. Ex. 89-5, 89-10. Black Quay also did not express any regulatory concerns, but characterized coal as an "unlikely prospect" due to the "political climate on the West Coast for the development of new coal ports" and the "uncertain future" of the coal industry. Trial Tr. 1251:19-1252:10, 1253:7-24. Mr. Wolff similarly considered iron ore, alumina, aluminum, potash, wood pellets, and borax to be viable commodities. Trial Tr. 1095:6-16; *see also* Trial Tr. 1120:14-1121:3, 1128:8-12. The potential $50 million in funding from Utah did not depend on what commodity would be shipped, and Utah had many commodities. Trial Tr. 1100:10-21. CCIG and TLS's communications between 2016 and 2018 further demonstrate their contemporaneous understanding that it was possible for them to move forward with the terminal project. *See, e.g.*, Exs. 608, 621, 635; Trial Tr. 1229:9-17, 1232:13-18.[29]

Finally, as discussed *supra* at 39-41, OBOT planned and could have opted for a phased approach to constructing the terminal that would have allowed OBOT to meet the Initial Milestone deadline by initially shipping a commodity other than coal, and then incorporating other commodities as the legal and financial landscape unfolded. Trial Tr. 2609:11-21 (McClure); Ex. 557-2 (McClure notes); Ex. 581 (Tagami email to Siegel re: schedule). Plaintiffs did not attempt at trial to demonstrate that such an approach was not viable.

5. Abandoned IES Sublease. By January 2018, Mr. Siegel's "extremely complicated" business and financial arrangements required the dissolution of TLS and the creation of Insight Energy Solutions (IES), a new entity that Mr. Siegel created with new financing to construct and operate the terminal, which signed a sublease with OBOT. Trial Tr. 205:8-22; Ex. 137 (notice of IES sublease). Under that sublease, IES assumed responsibility for obtaining construction permits and acknowledged the fast-approaching Initial Milestone deadline. Ex. 645-14 (IES sublease abstract). The sublease also included a liquidated damages provision (paying OBOT)

[29] Indeed, Mr. Tagami told his business partners in 2018 that, contrary to his testimony at trial, there was "broad governmental support" for the terminal and the City did want the project to move forward, but simply did not want OBOT to ship coal. Ex. 957 at 206:3-21, 207:10-15; *see also* Ex. 957 at 200:11-16, 200:25-201:11, 203:8-19, 205:2-5.

should IES fail to meet that deadline. Ex. 645-14.

At the closing of the sublease, Mr. Siegel owed OBOT approximately $8.4 million in payments for past subleases and services provided by OBOT, and would soon owe several other additional balloon payments amounting to $54 million. Ex. 653 (summary of payments due at sublease closing). In May 2018, Mr. Tagami was still attempting to collect these amounts owed from Mr. Siegel and offered various proposals. Ex. 151 (May 2018 email from Siegel to Tagami re: potential next steps); Trial Tr. 1284:2-6 (Tagami). But these efforts were unsuccessful, and in May 2018 Mr. Tagami informed Mr. Siegel that the IES sublease was "null and void" due to Mr. Siegel's failure to make payments. Ex. 152 (May 2018 email from Tagami to Rosen re: new process).

OBOT did not inform the City that the IES Sublease was "null and void" until *September*. Ex. 237. OBOT also never responded to the City's requests since January 2018, pursuant to the Ground Lease, for information regarding IES. Ex. 145 (City letter requesting information re: IES); Ex. 643 (OBOT letter promising information); Ex. 654 (City letter repeating request for information).

6. <u>OBOT Defaults on Rent</u>. After the end of the two-year tolling period under section 1.7.2 of the Ground Lease in February 2018,[30] OBOT did not begin paying rent. Ex. 169 (City notice of past due rent). The City noticed a default, and, in late July 2018 OBOT cured the default by paying the back rent. Ex. 169 (City notice of past due rent); Ex. 174 (OBOT paying rent).

7. <u>Summer of 2018: OBOT Negotiates Payments Rather than Moving Forward with the Project</u>. While the Siegel Shuffle was taking place, the federal district court issued its decision in May 2018. Instead of resuming design of the terminal or moving the project forward by presenting the City with either a sublease or a project proposal, however, Mr. Tagami and Mr. Siegel spent the summer negotiating over additional payments to OBOT. Ex. 158 (email from

[30] The City granted OBOT this two-year tolling notwithstanding OBOT's failure to commence and diligently pursue construction of the wharf improvements. Trial Tr. 3234:19-3235:23 (Lake).

Siegel to Rosen re: IES exclusivity payment revisions); Ex. 173 (email from Siegel re: GACP term sheet and closing late fees); Ex. 201 (email from Tagami to Siegel/Rosen re: outstanding ITS items/payments); Ex. 957 at 185:12-22, 186:8-11, 186:13. Mr. Siegel continued to try to line up funding all the way through September 2018. Trial Tr. 1320:2-23.[31] But he lost support from his investors, Trial Tr. 1240:21-1241:18, considered selling off his rights with respect to the terminal project while retaining rights with respect to coal, Trial Tr. 1242:11-15, and dipped into his personal funds to meet his financial obligations to Mr. Tagami, Trial Tr. 1256:4-7. Nonetheless, Mr. Tagami stuck with Mr. Siegel. Ultimately, however, "Mr. Siegel ran out of time and ran out of runway." Trial Tr. 1322:2-10.

During that time, the City expected a project to be submitted and for OBOT to move forward with the terminal, in particular after submitting the IES sublease. Trial Tr. 3722:21-3723:1 (Lake). The City repeatedly asked Mr. Tagami to submit plans for the City's consideration and approval, but none were submitted. *Id.*[32]

In the end, Mr. Siegel never entered a sublease that could be approved by the City. The first Siegel entity, TLS, never entered into a sublease at all. Mr. Tagami declared the IES sublease "null and void" due to Mr. Siegel's failure to meet his financial obligations.[33] Trial Tr. 1289:4-10; Trial Tr. 1308:11-16; Ex. 152 (May 2018 email from Tagami to Rosen re: new process). And finally, ITS submitted a sublease to the City on September 28, 2018, only after the August 14, 2018 Initial Milestone deadline had come and gone and OBOT was already in default. Trial Tr. 1385:8-11; Trial Tr. 3742:6-8; Ex. 237 (notice of ITS sublease).

[31] At that time, money had failed to come through from Mr. Siegel's purportedly "rock-solid" backup lender and Mr. Siegel had defaulted on several option extensions. Trial Tr. 1318:6-16.

[32] Mr. Tagami did not inform the City as to his negotiations with IES/ITS, and attempted to prevent Mr. Siegel's lenders from contacting the City directly. Ex. 204 (email requesting to be put in direct contact with City). Mr. Tagami also withheld information from his business partners (the September 21, 2018 Notice of Unmatured Event of Default) to obtain the more than $6 million sublease take-down payment from Mr. Siegel's lender Autumn Wind. Ex. 957 at 155:2-22, 157:13-22; Ex. 233 (Rosen email re: Call me).

[33] The City was not informed of this fact until OBOT submitted the ITS sublease on September 28, 2018. Trial Tr. 3742:23-3743:6; Ex. 237-2 ("[T]he City is hereby notified" that the IES sublease is "null and void *ab initio* and the City is instructed to look only to the Sublease for the rights and obligations of OBOT and ITS.").

D. *Rail Improvements*

1. The Rail and Terminal Construction Were Independent Ground Lease Requirements. The Ground Lease, as explained above, required OBOT to commence construction of two aspects of the Minimum Project to meet the Initial Milestone deadline: the Bulk and Oversized Terminal and one of five specified Minimum Project Rail Improvements. *Supra* at 22-23.

Plaintiffs attempted, on multiple occasions, to conflate construction of the terminal with construction of the rail. Trial Tr. 209:12-15 (Tagami); Trial Tr. 1836:17-1837:16 (McClure);. This position was refuted by both documentary evidence and testimony. First, the Ground Lease draws a clear distinction between the terminal itself and the Rail Improvements and the locations of each. Ex. 68-11 (§1.1.1); Ex. 68-31-32 (§§ 6.1(a) and (b); Ex. 68-239 (Ex. 3.1, Scope of Development); Ex. 68-150 (Ex. 1.1.1-A); Ex. 68-157 (Ex.1.1.1-B); Ex. 68-242 (Ex. 6.1-B); *supra* at 22-23.

Next, City and Plaintiff witnesses testified that while rail was always considered part of the overall completed project, construction of the rail was not necessary in order to construct the terminal itself. Mr. McClure, in particular, initially testified that some rail (in particular, in the West Gateway Rail Right-of-Way—which is *not* one of the five Rail Improvements identified as the Minimum Project) needed to be constructed as part of the terminal in order for OBOT to meet the Initial Milestone. Trial Tr. 1836:25-1837:7; Trial Tr. 1837:10-16; Trial Tr. 1838:4-15; Trial Tr. 1838:17-25; Trial Tr. 1839:5-1839:21. But Mr. McClure eventually conceded (reluctantly, after repeatedly giving nonresponsive answers to the same question) that it was not necessary to construct that rail in the rail right-of-way at the West Gateway as part of the terminal in order for OBOT to meet the Initial Milestone deadline. Trial Tr. 1839:23-1840:6; see also Trial Tr. 204:20-205:2, 292:7-17 (Tagami). He eventually admitted that none of the Minimum Project Rail Improvements that are required for the Initial Milestone were to be located in the West Gateway right-of-way, Trial Tr. 1840:8–12.

Ms. Lake, meanwhile, credibly testified that her understanding was that rail was not included within the scope of the bulk and oversized terminal definition, Trial Tr. 3919:6-20, and

that the terminal portion of the Initial Milestone Minimum Project could not be satisfied by the construction of track, Trial Tr. 3920:12-19, and that she never heard anyone from CCIG/OBOT suggest that the terminal would be satisfied by the construction of track. Trial Tr. 3920:21-3921:9.

Finally, the ITS Basis of Design submitted by OBOT to obtain the City's landlord approval of their plans for the terminal did not include any rail drawings. Ex. 240; Ex. 247; *see also* Trial Tr. 2733:18-25 (McClure); Trial Tr. 3921:19-22 (Lake); Trial Tr. 3922:8-18 (Lake); Ex. 239;. When the City rejected the plans for the "Initial Improvements" as incomplete and specifically noted the absence of any rail drawings, OBOT responded that the terminal plans were complete, without submitting plans for rail. Exs. 247, 252; Trial Tr. 3922:3-18 (Lake); Trial Tr. 2742:7-2743:15 (McClure).

2. <u>OBOT Had the Access Necessary to Construct Track for the Initial Milestone</u>. The parties disputed at trial whether OBOT had access to the land needed to construct one of the five pieces of connector track required to meet the Initial Milestone. The Court concludes the record evidence demonstrated that OBOT did have the access needed to commence construction.

Plaintiffs' witnesses initially provided extensive testimony that they could not construct track for the five Minimum Project Rail Improvements because they lacked "access" to the land on which the improvements were to be constructed, as the City had not "turned over" possession of the land. *E.g.*, Trial Tr. 1625:17-1626:5, 1637:11-19, 1627:6-13; 1628:13-17, 1630:3-9, 1656:23-1658:2 (McClure); 541:2-3 (Tagami).

The evidence did not support this testimony. First, the Ground Lease granted OBOT *legal* possession of the land on which the Rail Improvements were to be constructed as of February 16, 2016, as stated in the Lease and memorialized by the parties in a contemporaneous memorandum of lease recorded with the County of Alameda. Ex. 68-11 (§1.1.1); Ex. 747; Trial Tr. 1850:19-1852:4; 1852:20-1853:4 (McClure). OBOT's witnesses also admitted OBOT and OGRE had physical access to the land. Trial Tr. 1853:13-23 (McClure); *see also* Trial Tr. 4030:7-16 (Lake). Indeed, OBOT and OGRE's rail contractor, Chris Stotka, was able to access the land and unload and store materials he needed to start building track prior to the Initial Milestone deadline, Trial

Tr. 759:17-760:2; Trial Tr. 795:12-21.

Most importantly, the evidence showed that OGRE had access to and began building track within at least two different areas of the rail corridor on which the Minimum Project Rail Improvements were to be located—the BNSF Easement (on City-owned land) and the Claw (on Port-owned land)—before the Initial Milestone deadline. Plaintiffs' rail contractor, Chris Stotka, testified that he had started, but not finished, laying track in the BNSF easement, West of the Wake Avenue crossing, as of 2018. Trial Tr. 756:17-757:16, 758:11-759:6 (Stotka); Ex. 837 ("The rail improvements *are WGW Lead Track No.2* (west of Wake Avenue). This area is not called out in Exhibit 6.1-B"). This was confirmed by Ms. Lake. Trial Tr. 3975:17-3977:13. Mr. McClure also admitted that Mr. Stotka was laying track in that area during that time as well. Trial Tr. 1860:19-1862:1313. As discussed below, in the next subsection, Mr. Stotka only stopped construction in May 2018 because Mr. McClure ordered him to stop, *not* because Plaintiffs lacked access to the property. Trial Tr. 737:7-19; 757:19-758:5; 759:1-6; 766:21-25 (Stotka); Trial Tr. 1862:7-13, 1863:7-1864:16-1867:3, 1868:25-1868:19; 3714:15-16 (McClure).[34]

As for the Claw, a March 2016 email from Mr. Tagami to Ms. Cappio discussing the "private rail work" that Plaintiffs had been building "for the past few months" confirms that they had access to that area as well. Ex. 783. Mr. McClure admitted that Mr. Tagami's email referred to work paid for by OGRE on Port property. Trial Tr. 3328:17-23.

Mr. McClure placed blame for the lack of access on the ongoing public improvements, which, according to him, meant the City's contractor was occupying the land. However, the evidence showed that public improvements necessary to contract track were finished in the rail corridor by at least the time Mr. Stotka built track. First, Mr. McClure confirmed that in order to build private rail, the public improvement work of grading and drains must have been completed. Trial Tr. 3314:25-3315:11. Mr. McClure admitted this work was complete for the areas on which

[34] As explained further below, while it appears that OBOT and OGRE had access to this land and did begin construct track, they chose to stop and not continue that construction, and therefore did not meet the Initial Milestone requirement of "active and ongoing" construction necessary to meet the deadline. *Infra* at 42-53.

IRC started building the track described above. Trial Tr. 3337:13-25. And, despite being the manager of the City's public improvements, Mr. McClure avoided testifying as to the actual timing of the completion of the public improvements in the various parts of the rail corridor. The only evidence before the Court regarding the timing of the actual completion of public improvements was provided by the City. Ex. 777; *see also* Ex. 847. That general contractor schedule showed grading and drainage work complete with respect to WGW Leads 1 and 2 on dates ranging from 2015 to 2017. Ex. 777-2. That is the exact work Mr. McClure admitted was needed prior to constructing track.[35] Mr. McClure, after initially denying, admitted the accuracy of the general contractor schedules of improvements kept by CCIG as the City's manager of these public improvements. Trial Tr. 3346:10- 3349:4. Ms. Lake's testimony was consistent with that general contractor schedule, and confirmed the public improvements on the Lead Tracks 1 and 2 in the rail right of way were done by the spring of 2018. Trial Tr. 4109:9-4110:5; *see also* Trial Tr. 4049:24-4050, 4107:18-4108:1. Ms. Lake's staff also reported to her in May 2018 that this work was done. Ex. 847 (May 2018 email exchange between Kennedy/Monetta/Lake re rail improvements: "We have done our grading and sub-ballast work across the other side of the NGW including the claw area, that is for WGL 1 and 2 and Ind Drill 1"). Plaintiffs did not offer any evidence to refute the timing of the completion of the necessary public improvements in the rail corridor.

With respect to the three Minimum Project Rail Improvements to be located on Port-owned land, Mr. McClure also testified that OGRE lacked access. But the evidence showed that the Port had granted the City's temporary construction easements for the Port land. Ex. 780; Ex. 775; Trial Tr. 2759:7-2763:19. These easements covered the City's "consultants, contractors (including without limitation all sub-tier contractors), licensees, *tenants*, and authorized representatives." Ex. 780 (emphasis added); Trial Tr. 2762:13-19 (McClure); Trial Tr. 3357:8-3358:5 (McClure); Trial Tr. 3784:1-18, 3785:9-123785:20-3786:20 (Wan). Plaintiffs were aware of these easements, Trial Tr. 2759:7-14, 2759:24-2760:2, and as the City's contractor for the

[35] Mr. Stotka agreed that once that preliminary work was done, to build track, "you lay the ties, you put the rails on, you add the rock and surface, and there you go." Trial Tr. 795:6-11.

public improvements at the time, in fact were involved in the discussions and negotiations that led to their creation. Trial Tr. 2762:21-24, 2763:2-9. Mr. McClure could not recall ever asking the Port for access for the purpose of construction, nor did he ever ask the City for access to the Port land for the purpose of construction, or request that the City extend the temporary construction easements.[36] Trial Tr. 2777:19–2779:11; (McClure). Moreover, as discussed above, in March 2016, Mr. Tagami sent an email to Ms. Cappio stating that "*our private rail work has been underway for the last few months* and we will be in this area building" additional track. Ex. 783 (emphasis added). Mr. McClure conceded some of this private rail construction was on Port land. Trial Tr. 3351:13-3352:6.[37]

Plaintiffs also relied on an email exchange with the City that began on August 21, 2018 to claim that the City admitted that it had not "turned over" the land. Ex. 189. The City's witness, Ms. Lake, explained the context of that discussion (which was initiated by Mr. Tagami one day after the City told OBOT it had breached the Initial Milestone, *see* Ex. 189), was a separate requirement for the certification of *all* of the public improvements, and a survey. Trial Tr. 4111:4-4114:16. The Ground Lease specifically states that OBOT's obligations run with the Premises notwithstanding that survey. Ex. 68-11 §1.1.1. While the use of the terminology was not clear, the Court does not find that this exchange supports the contention that OBOT and OGRE did not have access to the land prior to August 21, 2018 for purposes of construction.

Finally, it was undisputed that the West Gateway Ground Lease contemplated construction of rail beyond the Minimum Project Rail Improvements. Plaintiffs spent a

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[36] Mr. Wan, the current Executive Director of the Port and Port Attorney from 2012 to 2018, was also unaware of any communications by OGRE raising concerns about access to the Port's property under the temporary construction easements. Trial Tr. 3805:17-20, 3805:24-3806:4, 3806:7-8.

[37] Mr. McClure was less than clear what entity controlled all of the land in the Claw on which OGRE constructed track. He initially testified OGRE had not constructed track. *See, e.g.*, Trial Tr. 1637:4-25. Then, when confronted with evidence that OGRE had constructed track in the Claw, he first testified that it was land in control of the Port, but later admitted that OGRE constructed track on land controlled by Union Pacific (that was therefore not part of the Minimum Project Rail Improvements). Trial Tr. 37109:24-3710:13; 3711:11-22. Mr. McClure certainly should have been able to describe the location and timing of OGRE's construction of track to the Court without such confusion. The Court concludes that Mr. McClure's testimony supports the conclusion that OGRE at least had access to and began constructing track on Port land but decided to stop.

considerable amount of time at trial introducing testimony and evidence on this other track. But only the Minimum Project Rail Improvements are at issue here with respect to the Initial Milestone, and any evidence pertaining to other rail improvements—for example, whether Plaintiffs paid for the construction of any of the rail crossings, or whether the City's contractor completed public improvements on areas not included in the Minimum Project—is not pertinent to OBOT's claims of excuse of performance for the Initial Milestone deadline.

The weight of the evidence supported the City and did not support OBOT's contention that it could not access this land to build the required track.

3. <u>OBOT/OGRE's Decision to Halt Track Construction</u>. The undisputed evidence showed that sometime in 2018, OGRE stopped constructing track. Mr. McClure and Mr. Stotka agreed that Mr. McClure gave an order in May 2018 to Mr. Stotka to stop building track. Trial Tr. 1862:10-13; Trial Tr. 3714:15-16 (McClure); Trial Tr. 737:7-19; 757:19-758:5; 759:1-6; 766:21-25 (Stotka). As far as Mr. Stotka was concerned, Plaintiffs had the designs and materials necessary to commence construction, and the track was "ready to go" as of 2017. Trial Tr. 759:17-760:2; Trial Tr. 761:2-9; 767:5-10; 789:19-25. Mr. McClure admitted he told Mr. Stotka in May 2018 there was a long list of prerequisites that OGRE wanted before resuming track construction on the OAB, including: "[r]ail access agreement, rail operating agreement, STB approval, UPRR ITA, [and] resolution with the City on our OBOT lease." Trial Tr. 1863:2-1869:3 (McClure). He also admitted that he may have told Mr. Stotka that rail construction needed to wait until the ITS sublease was signed (for financial reasons). Trial Tr. 1866:21-1867:3. Testimony was undisputed that unlike the terminal, OBOT and OGRE expected to finance the construction of track themselves. Trial Tr. 1522:15-1523:6 (McClure).

Notably, Mr. Stotka never referenced any interference or prevention by the City that stopped him from building track; only Mr. McClure was the barrier. Trial Tr. 789:19-25. And Mr. McClure's email instructing Mr. Stotka to stop construction likewise did not state anything about a lack of access or ongoing public improvements, but instead listed a bevy of preconditions to continuing construction that were not in the Ground Lease and did not physically prevent the laying of track. Trial Tr. 1863:2-1869:3 (McClure).

One of the preconditions that Mr. McClure listed for Mr. Stotka in May 2018 before OGRE would resume building track was OGRE's desire for particular approvals from the federal Surface Transportation Board (STB). Trial Tr. 1864:18-24. Mr. McClure acknowledged that OGRE had previously filed and withdrawn its requests to the STB in 2014 and 2015. Ex. 52. Although he testified that OGRE believed (at least as of 2018) that STB approval was a requirement to commence construction, OGRE did not approach the STB for approval at any time from 2015 until late May 2018, a few months before the Initial Milestone deadline. Ex. 155; Ex. 694. Plaintiffs did not offer any justification for the delay in filing between 2015 and 2018. In addition, OGRE's STB filing informed the STB that OGRE intended to commence construction "as soon as possible," informed the STB it had possession of the land, and did not mention any issues about rail access or ongoing public improvements that would have prevented them from doing so. Ex. 155; Trial Tr. 2689:18-2690:11 (McClure).

Moreover, OBOT and OGRE appear to have entered into an agreement in June 2018 to delay OGRE's responsibilities even further. First, Plaintiffs' witnesses testified that the plan was always for OGRE to construct rail. Trial Tr. 1522:15-1523:6 (McClure); Trial Tr. 205:3-5, 293:3-7 (Tagami). Indeed, that is what OGRE told the STB in 2018. Ex. 155-12-13 (McClure affidavit). But Mr. McClure admitted that OGRE and OBOT signed a sublease in June 2018 that delayed OGRE's assumption of responsibility for the property and the rail until after certain conditions were met, including OGRE's being granted a common carrier status that it had not yet even applied for from the STB (a delay that was likely to last years). Ex. 162-7; Trial Tr. 1869:23-1871:21. Specifically, on June 29, 2018, OBOT and OGRE agreed to delay OGRE's assumption of responsibility pending: (1) "written confirmation from the Surface Transportation Board ("STB") that rehabilitation of the rail improvements located within the Subleased Premises does not require STB approval, (2) "[OBOT's] completion of rail improvement rehabilitation, and (3) "[OGRE] having received an approval from STB for an exemption to operate on the rail lines within the Subleased Premises as a Class III common carrier." Ex. 162-7.[38] This agreement

[38] Mr. McClure provided no explanation for this sublease language delaying OGRE's

refutes OGRE's attempt to place blame for delays in rail on the City.

4. Rail Drawings. The record evidence was also undisputed that the Ground Lease required OBOT to submit Schematic Drawings for landlord approval of the Minimum Project Rail Improvements, and the first request for such approval was submitted by OGRE to the City in 2019, well after the deadline to commence construction. Ex. 765; Trial Tr. 2753:12-2754:18.

5. Rail Access Agreement. All parties acknowledge that the RAA was not finalized or signed during the relevant time period. But Mr. Tagami recognized that in connection with entering into the Ground Lease on February 16, 2016, OBOT waived as a condition precedent the finalization of the RAA. Trial Tr. 1180:5-14; Trial Tr. 1181:3-13; Ex. 68-31 (Ground Lease §5.2.3(a)); Ex. 378-16 (LDDA §2.2.5). OBOT was well aware that the RAA was not yet completed, Trial Tr. 1038:10-14, but failed to include any deadline or contingency in the contract. Trial Tr. 1179:8-11 (acknowledging that the RAA was a condition precedent to closing escrow in the LDDA); 1180:5-14 (acknowledging that in the Ground Lease, OBOT waived all conditions precedent to the execution and delivery of the lease as set forth in the LDDA); *see also* Trial Tr. 683:23-684:2 (there were "a number of other things that I guess I could have made contingent" but did not).

Plaintiffs admitted that the RAA was not necessary for OGRE or OBOT to actually construct the terminal or the rail. Trial Tr. 3385:20-3386:2, 3406:1-3407:9 (McClure). The RAA was intended to facilitate rail operations between the Port and City. Ex. 68-31 (Ground Lease §5.2.3(a)); Trial Tr. 3406:1-3407:9 (McClure). Mr. Wan testified, and Plaintiffs' witness Mr. Stotka confirmed, that the purpose of the RAA was for the use of the rail system by the City, OGRE, and the Port. Trial Tr. 3801:23-3802:24; Trial Tr. 806:13-807:5, Ex. 121. There was no need for the RAA to provide OGRE with access to the land on which one of the five rail improvements was to be constructed, because easements by the Port already provided such

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assumption of responsibility for rail. Mr. Sanders attempted to justify this as a response to the City's STB filing, and explanation that was undermined when confronted with the dates of the sublease (June 26, 2018) and the City's filing (three days later, on June 29, 2018); Ex. 162, 163. Trial Tr. 2999:14-3000:17. Plaintiffs provided no other explanation for this OGRE sublease language delaying the rail.

access. Ex. 780; Ex. 775; *supra* at 49-51. There was no credible testimony that OGRE was unable to access the property on which the rail improvements were to be built in the absence of an RAA, and Plaintiffs presented no documentary evidence that CCIG, OBOT or OGRE ever told the City (or anyone else), from 2016 through 2018, that the lack of a signed RAA made it impossible for them to construct the terminal or rail.

Plaintiffs' witnesses asserted that the City failed to use commercially reasonable efforts to negotiate the RAA with the Port, by relying exclusively on the fact that the City and Port had a term sheet in 2015 but had yet not signed the agreement as of 2018. But in fact, the City and the Port continued to negotiate the RAA throughout 2016, 2017 and 2018, and representatives of OGRE were at the table during much of that time period. Trial Tr. 805:12-806:12, 807:6-21; Ex. 121; Trial Tr. 3408:14–3415:20 (McClure); Trial Tr. 3787:21-25; Trial Tr. 3792:19-21; Trial Tr. 3798:3-6 (Wan); Trial Tr. 3952:20-3953:6 (Lake). The documentary evidence, including emails from OGRE's counsel redlining multiple RAA drafts, showed that the City shared several discussion drafts of the RAA with OGRE in 2017, and that OGRE was raising issues as part of those ongoing negotiations. Exs. 727, 720, 719, 728.

In fact, in March 2018, OGRE's attorney sent Ms. Lake a document summarizing the RAA outstanding issues, which witnesses confirmed were not resolved as of August 2018. Ex. 734; Trial Tr. 3953:1-6 (Lake); Trial Tr. 3461:4-15 (McClure). Several of those issues, including the payment of fees, whether OGRE would obtain common carrier status, and the notice requirements prior to the expiration of any term of the agreement, were the result of the City's advocacy for OGRE's position at the negotiating table. Trial Tr. 3453:11-3454:23 (McClure); Trial Tr. 798:19-799:10, 802:12-14, 801:6-802:3; Ex. 106; Ex. 734. Further, Port Executive Director Danny Wan credibly testified, consistent with the documentary record, that the negotiations of a Rail Operating Agreement for the Port terminal (or, "ROA") between the Port and OGRE were intertwined with the RAA negotiations, and the ROA negotiations were complicated by the issues raised by OGRE. Trial Tr. 3810:10-3811:15.

V. OBOT's August 2018 Failure to Meet the Initial Milestone Deadline and the City's Termination of the Ground Lease

A. *OBOT Did Not Commence Construction*

While OBOT was negotiating with Mr. Siegel for his payments to enter into the ITS sublease, the August 14, 2018 Initial Milestone construction deadline came and went. As of August 14, 2018, OBOT had not commenced construction of the terminal or rail improvements required to meet the Initial Milestone deadline. Trial Tr. 3741:22-3742:3 (Lake); Ex. 957 at 173:1-4, 173:7-8, 173:10-18 (Rosen); Trial Tr. 1997:4-20 (Morodomi), 1340:6-1343:11 (Tagami), 3564:9-15 (McClure); Ex. 217 (City Notice to Cure).

OBOT also had not completed any of the pre-construction requirements for either the terminal or the rail. As of August 14, 2018, OBOT had not applied for any permits for the terminal project. Trial Tr. 1997:4-19, 1999:13-19 (Morodomi), 1358:14-1359:5 (Tagami), 3561:18-22, 3564:9-15 (McClure), 2291:2-6 (Cappio), 3148:1-9 (Ranelletti); Ex. 188-1-2. The only permit applied for by CCIG, OBOT or OGRE—in July 2018—was OGRE's application for a fence along the rail right-of-way that was unrelated to terminal or rail construction. Trial Tr. 1922:9-12, 1935:19-1936:4, 1937:16-18, 1997:4-20, 2001:13-20 (Morodomi); Trial Tr. 3561:10-22 (McClure); Ex. 458 (Morodomi email re fence application); Ex. 217 (City Notice to Cure); Exs. 459, 658, 178, 462, 464, 180, 182, 183, 463, 465, 667, 271. OGRE did not finalize that fence permit application until 2019, after the City terminated the Ground Lease, Trial Tr. 2012:5-16 (Morodomi); Ex. 271, and Plaintiffs' witnesses admitted the fence was not necessary for the construction of the terminal (and therefore irrelevant to performance of the Initial Milestone). Trial Tr. 1937:16-18 (Morodomi); Trial Tr. 3561:18-22 (McClure). In any event, the City approved this fence permit application, Ex. 667, and gave OGRE the required landlord approval for its design plan so that it could apply for a permit from BCDC.[39] Trial Tr. 2016:24-2017:8, 1915:15-17; Ex. 462.

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[39] Ms. Lake provided further context for the fence permit, explaining that Mr. Tagami had attempted to have this fence be included in the public improvements and had comingled the public and private improvements on a prior BCDC permit, requiring the City to help untangle the mess. Trial Tr. 3734:17-3735:3; Ex. 467.

OBOT had not yet formally submitted any of the construction documents for landlord approval for either the terminal or rail (including Schematic Drawings, Preliminary Construction Drawings, or Final Construction Drawings). Trial Tr. 2001:13-20 (Morodomi); Ex. 188 (Gilchrist Letter); Ex. 957 at 173:10-18; Trial Tr. 1358:23-1359:5 (Tagami); Trial Tr. 1340:6-1343:11 (Tagami); Trial Tr. 2748:17–2749:4 (McClure); Ex. 240 (2018 BOD); Ex. 765.[40]

As explained above, the definition of "Commence Construction" required three things: to lay a foundation where required, obtain a building permit where required, and be engaged in active and ongoing construction. Regarding the terminal, OBOT never commenced any construction on the terminal, much less construction sufficient to allow it to install "a foundation (slab or other type)." Trial Tr. 4117:11-16; Ex. 957-65-66 at 186:15-187:6. And there was no "active and on-going construction." *Id*.

With respect to rail, the parties' witnesses agreed that OGRE may have started building some track on Lead Track *No.2* on the BNSF easement, but not on Lead Track *No. 1* (which is the track included in the Minimum Project Rail Improvement BNSF Rail Improvement, §6.1(b)(i)). Trial Tr. 4102:13-4107:17 (Lake); Trial Tr. 3706:21-3708:21 (McClure); Ex. 829, 847 (Mr. Monetta: "The rail improvements are on Lead Track No. 2"). The City and Plaintiffs' witnesses agreed that OBOT/OGRE had, on Mr. McClure's direct order, *stopped* any construction of track in that easement by May 2018. Trial Tr. 3975:17-3977:13 (Lake); Trial Tr. 789:19-23 (Stotka); Trial Tr. 755:14-757:16 (Stotka); Trial Tr. 1862:10-13 (McClure); Trial Tr. 3714:15-16 (McClure); Ex. 837 (Photo West of Wake); *see supra* at 52-53. The parties' witnesses agreed that OBOT/OGRE may have started building track in the Claw, but also stopped and did not complete that construction. Trial Tr. 3337:3-8 (McClure); Trial Tr. 1678:11-13 (McClure); Ex. 833 (Photo of the Claw).

The testimony was undisputed that between May 2018 and August 14, 2018, OGRE was not engaged in active and ongoing construction of track; that as of August 14, 2018, OGRE was

[40] Nor had any of the John Siegel entities (TLS, IES, or ITS) submitted construction documents, signed a construction contract, or applied for any permits. Trial Tr. 1999:13-19 (Morodomi); Ex. 957 at 182:20-183:12.

not engaged in active and ongoing construction of track. Trial Tr. 3612:12-20 (McClure); Trial Tr. 3715:23-3716:5 (McClure); Ex. 68-329. These admissions are conclusive with respect to the Initial Milestone requirements with respect to rail. Ex. 68-129 (Art. 40, Def. "Commence Construction": "…active and on-going construction…").

B. *City Communications Re: Milestone Deadline and Default*

On August 20, 2018, the City informed OBOT of its belief that OBOT had not met the Initial Milestone deadline for the Minimum Project. Ex. 185 (8/20/18 City letter). The City formally noticed the unmatured event of default on September 21, 2018, commencing the contractual 30-day cure period. Ex. 217.

Only after the ITS sublease was signed did OBOT present that sublease and another version of the Basis of Design to the City for landlord approval a week later, on September 28, 2018. Ex. 237 (Notice of ITS sublease); Ex. 238 (2018 ITS BOD); Ex. 239 (Request for approval of Schematic Drawings). This is the first record evidence of any request by OBOT for landlord approval of schematic drawings related to this project. Ex. 239. On that same day, OBOT requested estoppel certificates and an NDA for ITS. Ex. 236.

The City reviewed the submission of the ITS BOD for landlord approval and timely responded during the cure period. Ex. 247. Upon review, the City discovered that submission used the same July 16, 2015 materials from HDR that were part of the TLS BOD. Trial Tr. 3748:14-22 (Lake); Trial Tr. 1954:11-1955:1 (Morodomi); Trial Tr. 1340:6-1343:11 (Tagami); Ex. 750 (2015 BOD); Ex. 240 (2018 BOD). The City's impression of the submission was that no work had been done during the 2.5-year performance window at all, particularly because the 2018 BOD included a conceptual schedule that delayed the completion of key elements of the project by several years. Ex. 240-496. Trial Tr. 3748:14-3751:25; Trial Tr. 2026:13-2042:24 (Morodomi). In light of the lack of progress and the nature of this submission, the City expressed serious doubts as to OBOT's ability to perform. Trial Tr. 3749:21-3751:11 (Lake). OBOT's failure to provide financial information previously requested by the City regarding IES, Trial Tr. 3742:16-22 (Lake), and then the submission of very superficial information regarding ITS (for example, an "organizational" chart that simply showed that Mr. Siegel's wife owned the company

and no actual organizational structure at all) also raised serious doubts regarding OBOT's ability to perform. Trial Tr. 3743:7-3744:7; Ex. 237-4. The City agreed to hear a presentation from OBOT and ITS, at which Mr. Tagami left the room from the outset, giving the City the impression he did not stand by the project. Trial Tr. 3945:9-3946:6 (Lake). Mr. Siegel was "nervous" and the video was superficial and cartoonish rather than a serious proposal, giving the City the impression there was no real plan. Trial Tr. 3946:23-3947:4; 3947:9-19.

In fact, the "conceptual schedule" that accompanied the submission indicated that design work for the wharf improvements and storage buildings would not be completed for years—in September 2021 and September 2022 respectively—and that construction of many components of the terminal would not commence for four years or be completed for six years. Ex. 672 (Conceptual Schedule); Trial Tr. 2026:13-2042:24 (Morodomi). The submission included no drawings for rail or wharf improvements. Trial Tr. 2733:18-25 (McClure); Trial Tr. 3921:19-22 (Lake); Trial Tr. 3922:8-18; Ex. 239; Ex. 240; Ex. 247.

The City determined that the ITS BOD was insufficient to warrant landlord approval and issued a Notice of Incomplete Construction Drawings on October 18, 2018. Ex. 247. During the cure period, the City generally responded to OBOT's requests in accordance with the contract timeframes, including to requests for an NDA and estoppel certificates for ITS and OGRE. Ex. 675 (City's estoppel response re: OGRE); Ex. 676 (City estoppel response re: ITS). Plaintiffs did not present record evidence demonstrating that they took any further steps towards commencing construction of either the terminal or the rail during the cure period. *See infra* at 114.

On October 23, 2018, the City notified OBOT of its determination that OBOT had failed to cure the default, and that by the terms of the Ground Lease the contract would terminate in 30 days with no further notice. Ex. 250 (notice of default). Thus, the City's position is that the Ground Lease terminated on November 22, 2018. Ex. 250 (Notice of Default); Ex. 259 (Three-Day notice to cure or quit); Ex. 283 (Monetta to McClure re: rail drawings). OBOT declined to relinquish possession of the land and remains in possession.

VI. OBOT's Force Majeure Claims

The Ground Lease requires notice of an event of Force Majeure by the party seeking an extension of time for any deadline. Ex 68-84 §16.1. Such notice must "describ[e] 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." Ex. 68-84-85 §16.1.

While the parties dispute the adequacy of OBOT's claims of force majeure, there was no dispute as to which letters OBOT sent the City that mention "force majeure." There were four such letters prior to the August 14, 2018 performance deadline, and two additional such letters prior to November 22, 2018:[41]

1. March 11, 2016 letter from OBOT's counsel to the City making a claim of an event of Force Majeure for a binder set of City regulations overdue under the 2013 DA. Ex. 76. The City responded on March 22, 2016 with its position disagreeing with the claim and explaining its reasons (and quickly resolved the underlying binder issue in June 2016, *see* Ex. 64). Ex. 81. (FM#1 (Binder)).

2. April 10, 2018 letter from OBOT's counsel to the City forwarding again the March 11, 2016 letter regarding the binder and "reiterat[ing]" the prior claim, but giving notice of no additional claimed events of Force Majeure. Ex. 148. (FM#1 (Binder)).

3. July 30 and August 3, 2018 letters from OBOT's counsel to the City "reiterating" a claim of Force Majeure for the 2016 Ordinance and Resolution. Ex.174, 176. Plaintiffs conceded at trial that there was no prior claim for the 2016 Ordinance and Resolution. (FM#2 (Ordinance)).

[41] OBOT referred at trial to the following letters as "Article 16.1 Notices," but upon review these letters from OBOT's counsel to the City each reference prior force majeure claims and provide no additional notice of any claimed event of Force Majeure: August 28, 2018 (Ex. 193); September 19, 2018 (Ex. 216); September 24, 2018 (Ex. 222); September 28, 2018 (Ex. 670); October 4, 2018 (Ex. 243). While there is a question as to whether any of OBOT's notices meet the notice requirement set forth in Article 16, for the reasons set forth herein, this Court need not resolve that issue, because none of the claimed events otherwise qualify as Force Majeure. The Court will therefore assume without deciding that OBOT provided proper notice.

4. August 28, 2018 letter from Mr. Tagami to the City referencing the following claimed force majeure actions by the City that Plaintiffs continue to pursue at trial (Ex. 191):

- The City's alleged failure to provide "substantive comments" on the TLS Basis of Design (FM #3 TLS BOD);
- The City's "intentional refusal to process permits," including by the November 2015 memo from Assistant City Administrator Claudia Cappio to the Planning and Building Department (FM #4 Cappio Memo);
- Statements by the City at the March 9, 2016 pre-application meeting with CCIG regarding potential discretionary permitting and environmental review for the project, including on a "commodity-by-commodity" basis (FM #5 Permitting and Environmental Review);
- Actions with respect to rail including:
    - Alleged failure to "turn over" the rail right-of-way (FM #6 Completion of Public Improvements);
    - Alleged failure to sign the RAA with the Port (FM #7 Execution of RAA);
    - The City's position at the Surface Transportation Board ("STB") (FM #8 City's Position at the STB);
    - The City's "overly burdensome and costly process" for a fence permit along the rail right-of-way; (FM #9 Fence Permit);
- Failing to "cooperate" in obtaining funds from the Alameda County Transportation Commission (ACTC) (FM #10 ACTC Funding).

5. October 19, 2018 letter from OBOT's counsel to the City (Ex. 248), which repeats the following claimed force majeure events addressed above: FM #1 Binder, FM #2 Ordinance, FM #3 TLS BOD, FM #4 Cappio Memo, FM #5 Permitting and Environmental Review, FM #6 Completion of Public Improvements, FM #7 Execution of RAA, FM #8 City's Position at the STB, FM #9 Fence Permit, FM #10 ACTC Funding. This letter adds two additional Force Majeure claims that arose after the performance deadline and therefore could not have extended that deadline: the City's responses to requests for Non-Disturbance Agreements for OBOT's subtenants (FM #11 NDAs), *see* Exs. 485, 674; and the City's responses to requests for Estoppel Certificates for OBOT's subtenants (FM #12 Estoppel), *see* Exs. 675, 676.[42]

[42] The Court understands the Force Majeure events pursued by OBOT at trial to be those identified as such in Plaintiffs' July 11, 2023 Alleged Breaches of Contract by City of Oakland, wherein Plaintiffs explained to the Court that "the City engaged in multiple acts to hinder, delay and adversely affect Plaintiffs' performance of its obligations under the West Gateway Lease… The acts and omissions above by the City entitled Plaintiffs to lengthy extensions of the Initial

The Court agrees with the City that the lack of contemporaneous notice for any of the above events is relevant circumstantial evidence that OBOT did not believe its performance was delayed or interfered with at the time.

PROCEDURAL HISTORY

OBOT and OGRE filed this case on December 4, 2018. The initial complaint repeated allegations and claims that had been previously litigated in federal court regarding the 2016 Ordinance and Resolution while seeking damages OBOT had previously waived in that action, and adding new post-May 15, 2018 allegations and additional tort claims. The City demurred and filed a motion to strike as well as a special motion to strike under California's Strategic Lawsuit Against Public Participation law. In particular, the City argued that OBOT's claims (and OGRE's derivative claims) were barred by res judicata in light of the prior federal litigation.

On May 16, 2019, this Court granted in part the City's motion to strike with respect to various claims, requiring OBOT and OGRE to amend their complaint and overruled the City's demurrer. The Court also denied the special motion to strike and dismissed OBOT and OGRE's tort claims. In ruling on these motions, this Court held that res judicata prevented OBOT from basing their claims on events that predated the federal litigation (including the Ordinance and Resolution), but permitted OBOT's claims to proceed to the extent that "there [is] post-federal action conduct that exist[s] as a valid basis for the claims." Demurrer Order (5/16/2019) at 3-4; Motion to Strike Order (5/16/2019). The City appealed the denial of its special motion to strike, and the Court stayed the case (on its own motion) pending that appeal.

Milestone Deadline under the Lease terms." *See also* Plaintiffs' Response to City's Trial Brief on Prior Federal Litigation (filed 8/17/23); Plaintiffs' opening statement demonstrative listing OBOT's claims of force majeure (Opening Slides 7-10-23, slide 16).

The Court will not consider other allegations set forth in these lengthy letters that Plaintiffs did not pursue at trial, which include the allegations that all of the following are "events" of force majeure: the federal lawsuit; the City's health and safety hearings; the public improvements funding "shortfall"; the timing of the City's completion of the "Northern Interface"; Various public improvement-related allegations (i.e., the "Community Facilities District," "Mid-Project Budget Revise," the "Joint Environmental Remediation Fund"; the City's "premature" response to the 2017 DA compliance report; Rail right of way "edge conditions"; Community group "Cooperation Agreement." Ex. 856.

As OBOT and OGRE had not yet answered, and the case was stayed, pursuant to the applicable Code of Civil Procedure, on May 20, 2020, the City filed its own complaint (rather than a counter-claim) against OBOT and OBOT's corporate parent CCIG, alleging breach of the Ground Lease and seeking enforcement of the early termination provisions triggered by the failure to meet the Initial Milestone deadline. The parties proceeded by agreement with discovery covering all claims during the time that the stay of Plaintiffs' case was in effect.

After the Court of Appeal affirmed this Court's denial of the City's special motion to strike in November 2020, OBOT and OGRE filed an Amended Complaint ("FAC") on December 11, 2020. That Amended Complaint alleged contract claims that were limited in time to post-May 15, 2018 events (and no tort claims). The two cases were consolidated. The City moved for summary judgment, which this Court denied.

Discovery closed on December 21, 2021, and the case was set for trial on March 5, 2022. That trial date was vacated at the parties' request in light of settlement efforts. The case was eventually reset for trial. Plaintiffs moved to reopen discovery, and this Court permitted a limited supplemental discovery period for events after the prior discovery period had closed. Discovery closed again on May 30, 2023.

A bench trial commenced on July 10, 2023, and continued through August 31, 2023. Plaintiffs presented ten witnesses (eight live and two by deposition): Phil Tagami, Mark McClure, Skyler Sanders, former CCIG Project Manager Megan Morodomi, former TLS/Bowie official Jim Wolff, former OGRE contractors Chris Stotka and David Buccolo, former Oakland Mayor Elizabeth Schaaf, former Assistant City Administrator Claudia Cappio, and former City employee Douglas Cole. The City called an additional four live witnesses: former City Administrator Sabrina Landreth, former Oakland interim Director of Planning and Building Darin Ranelletti, Assistant City Administrator Betsy Lake, and Port of Oakland Director Danny Wan. The City also designated deposition testimony from an investment banker who worked on the financing for the terminal project (B. Riley executive Adam Rosen) and from Phil Tagami. The parties introduced 321 exhibits into evidence.

Prior to trial, Plaintiffs asserted breach of contract claims based on City conduct occurring *after* the federal court decision on May 15, 2018. *E.g.*, FAC at 3¶6 ("*After* the federal court enjoined the City from legislating a ban on a legally permissible use of the Terminal, the City breached its material obligations under the Lease and DA…"); ¶7 ("The City's breaches of the Lease and DA occurring *after* the issuance of the Federal Ruling…"); ¶41 ("*After* the Federal Ruling was issued in May 2018, rather than cooperating with Plaintiffs to proceed with the Project, the City renewed its efforts to kill the Project by breaching the DA and Lease and by withholding contractual benefits from Plaintiffs."); ¶¶43-95. At trial, however, Plaintiffs attempted to expand their allegations to encompass ten alleged breaches of the Ground Lease based on City conduct going back to 2015 (prior even to the execution of the Ground Lease) and three alleged breaches of the DA. *See* Plfs' Alleged Breaches of Contract by City of Oakland (dated July 11, 2023); Plfs' Response to City's Trial Brief on Prior Federal Litigation (filed 8/17/2023) at 4 (alleging "thirteen breach claims—the ten Ground Lease claims and three Development Agreement claims").[43]

Following trial, this Court held argument on certain legal issues on September 19, 2023, and accepted proposed Statements of Decisions from the parties on September 25, 2023, to which

[43] The Court understands Plaintiffs' alleged contract breaches to substantially but not entirely overlap with Plaintiffs' alleged events of Force Majeure described above. By Plaintiffs' description, the alleged breaches include, with respect to the Ground Lease: Termination of the Ground Lease; failure to "Turn Over" the Railroad R/O/W Property (*see also* FM #6 Completion of Public Improvements); failure to use commercially reasonable efforts to enter the RAA (*see also* FM #7 RAA); failure to "consider and comment" on the Basis of Design (*see also* FM #3 TLS BOD); failure to issue non-disturbance agreements (*see also* FM #11 NDA); failure to "cooperate to secure third-party funding" (*see also* FM #10 ACTC Funding); failure to "cooperate with OBOT's efforts to obtain regulatory approvals" (*see also* FM #8 City's Position at the STB and FM #9 Fence Permit); failure to issue estoppel certificates (*see also* FM #12 Estoppel); failure to "re-survey the Premises"; failure to "acknowledge Force Majeure claims." With respect to the DA, Plaintiffs described the three alleged breaches as: "failing to certify a list of then-existing regulations" (*see also* FM #1 Binder); "adopting a novel process that would evaluate permits on a commodity-by-commodity basis, require discretionary reviews, and reopen California Environmental Quality Act ("CEQA") for ordinarily ministerial approvals instead of relying on the existing environmental impact report ("EIR") to the maximum extent possible" (*see also* FM #4 Cappio Memo and FM #5 Permitting and Environmental Review); and "refusing to meet and confer about those breaches."

the parties filed responsive briefs on October 6, 2023. The Court heard closing argument on October 11, 2023 with respect to this phase of trial.

DISCUSSION

I. Legal Standards and Conclusions Applicable to the Parties' Competing Claims

A. *The Competing Breach of Contract Claims*

The parties' competing breach of contract claims are largely mirror images of one another: the City contends that OBOT breached the Ground Lease by failing to perform by the August 14, 2018 contract deadline, and OBOT defends by invoking excuse of performance by force majeure events that it claims extended the deadline; and OBOT contends the City breached the Ground Lease by failing to recognize that OBOT's performance was excused and extended by force majeure, and therefore calling default and terminating the Ground Lease in 2018.

The City asserts a single contract claim, alleging that OBOT's failure to meet the Initial Milestone deadline breached the express terms of the West Gateway Ground Lease. OBOT and OGRE nowallege that the City's actions breached a host of different contract provisions in the DA and Ground Lease, and raise multiple contract theories in the apparent alternative, including express breach, anticipatory breach, and breach of the implied covenant of good faith and fair dealing. The Court therefore first addresses the law that applies to these assorted contract claims before assessing the competing claims on the factual record described above.

1. Express Breach. The elements of the parties' competing breach of contract claims are familiar and undisputed: "The elements of a cause of action for breach of contract are (1) the existence of the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to the plaintiff." *Oasis W. Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 821 (2011); *see also* CACI No. 303. Both sides contend that the contract language in this case is unambiguous (albeit offering different proposed interpretations of this unambiguous language), and both sides contend that the other breached express contract provisions.

As discussed further *infra*, this case largely turns on whether OBOT can establish that its performance was excused because the deadlines under the Ground Lease should have been

extended. "It is elementary [that] a plaintiff suing for breach of contract must prove it has performed all conditions on its part or that it was excused from performance." *Consol. World Invs., Inc. v. Lido Preferred Ltd.* (1992) 9 Cal.App.4th 373, 380. OBOT bears the burden of proof with respect to both its affirmative claims and its defenses to the City's claims: it must prove excuse by way of force majeure as an affirmative defense against the City's claim, and it must prove excuse by way of force majeure as an affirmative element of its own claim. *See Butler v. Nepple* (1960) 54 Cal.2d 589, 598-99; *San Mateo Cmty. Coll. Dist. v. Half Moon Bay Ltd. P'ship* (1998) 65 Cal.App.4th 401, 414.[44]

At trial, the Court requested the parties each clarify their breach of contract claims by specifying which acts breached which provisions of which contracts and when those breaches occurred. The City confirmed that it contends that OBOT breached the Initial Milestone deadline set forth in section 6.1.1.1 of the Ground Lease on August 14, 2018. In response to this Court's request for clarification, OBOT and OGRE asserted a host of City actions and inactions, involving time periods from 2015 through 2018, which they contend breached either the West Gateway Ground Lease or the DA. *Supra*, at 64.

To the extent that OBOT is therefore now asserting claims for breach of contract based on events for which it never provided a notice of default required by the DA or Ground Lease, California courts enforce those notice and cure provisions. *Supra*, at 27 n.13; Ex. 68-91 (§22.1, stating that the City shall "only" be in default if notice and cure is given for any event that does not set forth an express cure period); Ex. 7-37 (§8.1). The Court concludes the record evidence does not contain any notice of default provided by OBOT to the City prior to the City's termination, for which the Court will construe counsel's notice of a claim letter as a notice of default, despite the potential procedural deficiencies in that document, Ex. 248.

2. <u>Anticipatory Breach</u>. An anticipatory breach claim requires proof that the defendant/promisor repudiated its contractual obligations before its performance was due. *See*

[44] The claims of OGRE, as an asserted third-party beneficiary to the Ground Lease that cannot assert rights beyond those of the parties, rise and fall with OBOT's. *See Souza v. Westlands Water Dist.* (2006) 135 Cal.App.4th 879, 894-95; *Syufy Enterprises v. City of Oakland* (2002) 104 Cal.App.4th 869, 888.

CACI No. 324. That repudiation must either be express, which requires "a clear, positive, unequivocal refusal to perform," or implied, "where the promisor puts it out of his power to perform so as to make substantial performance of his promise impossible." *Taylor v. Johnston* (1975) 15 Cal. 3d 130, 137; *see also Central Valley Gen. Hosp. v. Smith* (2008) 162 Cal.App.4th 501, 514. California law does not allow a party to avoid its contractual obligations based on a *prediction* or subjective belief that its counterparty is not going to perform. Rather, the party asserting repudiation, whether express or implied, bears "a heavy burden, for '[a]nticipatory breach must appear only with the clearest terms of repudiation of the obligation of the contract.'" *Martinez v. Scott Specialty Gases, Inc*. (2000) 83 Cal.App.4th 1236, 1246 (quoting *Guerrieri v. Severini* (1958) 51 Cal.2d 12, 18).[45]

Moreover, upon such a repudiation, the promisee faces an election: it can either confirm the repudiation and immediately seek damages for anticipatory breach, *before* the time that the promisor was supposed to perform, or it can "treat the repudiation as an empty threat, wait until the time for performance arrives" and then sue for actual breach. *Romano v. Rockwell Internat., Inc*. (1996) 14 Cal.4th 479, 489. Here, Plaintiffs did not sue for *anticipatory* breach before the time it contends the City should have performed. Instead, it sued for *actual* breach, after the City called default; for that reason, there is no cognizable anticipatory breach claim here, only an express breach claim.

Finally, under California law a plaintiff asserting anticipatory breach must she that it would have been able to fulfill its own contractual obligations. *See* CACI No. 324; *Ersa Grae Corp. v. Fluor Corp*. (1991) 1 Cal.App.4th 613, 625.

3. Implied Covenant of Good Faith and Fair Dealing. A claim for breach of the implied covenant of good faith and fair dealing is a breach of contract claim—a claim that a party breached an implied rather than express provision. *Digerati Holdings, LLC v. Young Money*

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[45] As discussed further below, *infra* at 115, this contract theory does not fit the facts or Plaintiffs' allegations in this case, in particular because Plaintiffs submitted no evidence of any express statement of repudiation, nor any act of the City that rendered the City's own performance impossible, but also because Plaintiffs elected to sue for actual breach after the time for performance had run and because Plaintiffs did not prove that OBOT would have been able to fully perform.

Entertainment, LLC (2011) 194 Cal.App.4th 873, 885.[46] Therefore, as with an express breach claim, a plaintiff must prove its own performance or excuse of performance, before the court reaches the element of breach. *See* CACI No. 325.

The covenant of good faith and fair dealing is also not a freestanding claim requiring contracting parties to act in good faith.[47] It "exists merely to prevent one contracting party from unfairly frustrating the other party's right to receive the *benefits of the agreement actually made*," and "cannot be endowed with an existence independent of its contractual underpinnings." *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 349 (quotations omitted). Thus, "[i]t is universally recognized the scope of conduct prohibited by the covenant of good faith is circumscribed by the purposes and express terms of the contract," and the covenant "is read into contracts in order to protect the *express covenants or promises of the contract*, not to protect some general public policy interest not directly tied to the contract's purpose." *Carma Developers (Cal.), Inc. v. Marathon Development Cal., Inc.* (1992) 2 Cal.4th 342, 373 (emphasis added; internal quotations omitted).

For these reasons, the covenant "cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement." *Guz*, 24 Cla.4th at 349-50. It cannot "prohibit a party from doing that which is expressly permitted by [the] agreement," *Carma Developers*, 2 Cal.4th at 374, nor "operate to supply a term that the express contract does not otherwise contain." *Avidity Partners, LLC v. State of Cal.* (2013) 221 Cal.App.4th 1180, 1184. The covenant also cannot "be used to limit or restrict an express grant of discretion to one of the contracting parties," or to "read [a provision] out of the lease simply because one party feels its operation was harsh or unfair." *Thrifty Payless, Inc. v. Mariners Mile Gateway, LLC* (2010) 185 Cal.App.4th 1050, 1062, 1064. "[I]f defendants were given the right to

[46] There is no tortious breach of the implied covenant in California outside the insurance context. *Freeman & Mills, Inc. v. Belcher Oil Co.* (1995) 11 Cal.4th 85; *Carma Developers,* 2 Cal.4th at 371-73.

[47] Motive is also irrelevant to any claim of express breach. *See Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 516 ("[T]he law generally does not distinguish between good and bad motives for breaching a contract"); *Alki Partners LP v. DB Fund Servs.* (2016) 4 Cal.App.5th 574, 597 ("A party's purported motive to breach a contract is not relevant to the issue of whether there has been a breach.").

do what they did by the express provisions of the contract there can be no breach" of the covenant. *Carma Developers*, 2 Cal.4th at 374 (quotations omitted).[48]

Further, a breach of the implied covenant claim must be based on facts that go beyond the those that are contended to constitute express breaches. Otherwise, the implied covenant claim "may be disregarded as superfluous as no additional claim is actually stated." CACI No. 325, Directions for Use (quoting C*areau & Co. v. Security Pacific Business Credit, Inc*. (1990) 222 Cal.App.3d 1371, 1395).

Thus, for OBOT and OGRE to assert an implied breach claim that truly goes beyond their express breach claims, they must prove that the City acted in a manner that is neither expressly authorized by the contract (which cannot be a breach of an implied term), nor is an express breach (which is not a breach of an implied term), but that nonetheless deprived OBOT of the benefit of its bargain, while "subjectively lack[ing] belief in the validity of its act" or by "objectively unreasonable conduct, regardless of the actor's motive." *Carma Developers*, 2 Cal.4th at 372-73.

From the outset, the Court notes that Plaintiffs have not clearly articulated the basis for any implied covenant claim.[49] As explained, general allegations of "bad faith" cannot suffice. Nor can allegations of conduct that is expressly contemplated and permitted by the contract at issue. Nor can the same facts alleged to constitute an express breach support this claim. Nonetheless, the Court will apply these standards to the record facts below.[50]

[48] This is particularly significant here, where OBOT's express breach/force majeure claims each implicate other express terms of the contract that the parties more specifically negotiated. *Infra* at 78-81.

[49] In responding to this Court's request for a list of the contract breaches, Plaintiffs did not identify any independent breach of the implied covenant, and each alleged breach corresponds to a specific express contract term named by Plaintiffs. Plaintiffs' July 11, 2023 Alleged Breaches of Contract by City of Oakland. The allegations in Plaintiffs' FAC also duplicate those supporting their express breach claims. *Compare* FAC (12/11/2020) ¶102, *with id.* ¶130

[50] As explained *infra* at 115, nothing in the evidence received by this Court established the requisite *subjective* belief by the City in the lack of validity of its actions with respect to this project, or demonstrated the City's objectively unreasonable conduct, particularly when considered in view of the agreed-upon terms of the contract at issue. OBOT cannot use the implied covenant to re-write the contract terms to which it agreed, or as a back-up to express breach terms that fail because the City did not breach those terms.

4. OGRE's Third Party Beneficiary Claims. While it is unnecessary to reach this issue because OBOT is not entitled to relief, *see supra* at 66 n.44 (third-party beneficiary has no greater rights than party to contract), the Court also concludes that OGRE bears the burden to demonstrate that the Ground Lease includes an unambiguous expression of the parties' intent to benefit OGRE that is sufficient to overcome the contract's no-third-party-beneficiaries clause.

"A putative third party's rights under a contract are predicated upon the contracting parties' intent to benefit' it." *Hess v. Ford Motor Co*., 27 Cal.4th 516, 524 (2002). Ascertaining this intent is "a question of ordinary contract interpretation." *Id*. Thus, the mere "circumstance that a literal contract interpretation would result in a benefit to the third party is not enough to entitle that party to demand enforcement." *Id*. (quoting *Neverkovec v. Fredericks* (1999) 74 Cal.App.4th 337, 348)).

The West Gateway Ground Lease contains an express no third party beneficiaries clause: "[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 …." Ex. 68-120 §38.4. Similarly, the DA states, "Nothing in this Agreement shall confer any rights in favor of any third party or third parties." Ex. 7-56 §14.24.

To overcome this express and unambiguous expression of the parties' intent, California law requires unambiguous contract language expressing the parties' intent to benefit a third party. *See The Ratcliff Architects v. Vanir Constr. Mgmt., Inc*. (2001) 88 Cal.App.4th 595, 603–04 (no-third-party-beneficiary clause "make[s] the intention of the parties clear: they intended to limit the right sunder the contract to the parties to the contract"); *accord Wexler v. Cal. Fair Plan Ass'n* (2021) 63 Cal.App.5th 55, 65-66; *see also Goonewardene v. ADP, LLP* (2019) 6 Cal.5th 817, 830 ("[T]he contracting parties must have a motivating purpose to benefit the third party, and not simply knowledge that a benefit to the third party may follow from the contract"). It is also well-established that "[t]he fact that a third party is incidentally named in the contract, or that the contract, if carried out according to its terms, would inure to his benefit, is not sufficient to entitle him to enforce it," because it does not establish "an intent to make the obligation inure to the

benefit of the third party." *Martin v. Bridgeport Commun. Ass'n, Inc.* (2009) 173 Cal.App.4th 1024, 1034 (citing *Jones v. Aetna Casualty & Surety Co*. (1994) 26 Cal.App.4th 1717, 1724-25).[51]

B. *Contract Interpretation, Including the Meaning of the Force Majeure Clause*

1. Contract Interpretation Standards

In assessing the parties' respective claims of performance, excuse of performance and breach, this Court must interpret the contracts at issue. Again, the standards are familiar: "When interpreting a contract, a court seeks to ascertain the mutual intent of the parties solely from the written contract so long as possible…. And where the language is clear and explicit, and does not involve an absurdity, the plain meaning governs." *West Pueblo Partners*, 90 Cal.App.5th at 1185 (citing Civ. Code §1638); *Bank of the West v. Superior Ct.* (1992) 2 Cal.4th 1254, 1264 ("If contractual language is clear and explicit, it governs"). "When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible …" Civ. Code §1639. "This is particularly true with documents relating to real estate transactions," like the Ground Lease at issue in this case. *Abers v. Rounsavell* (2010) 189 Cal.App.4th 348, 356.

California recognizes the objective theory of contracts, *Berman v. Bromberg* (1997) 56 Cal.App.4th 936, 948, under which "[i]t is the objective intent, as evidenced by the words of the contract, rather than the subjective intent of one of the parties, that controls interpretation." *Id*. The parties' undisclosed subjective intent or understanding is irrelevant to contract interpretation. *Winograd v. American Broadcasting Co*. (1998) 68 Cal.App.4th 634, 632; *Berman* 56 Cal.App.4th at 948.

Both sides in this dispute take the position that the contract language at issue in this case is unambiguous, and rely on plain meaning rather than extrinsic evidence to support their interpretation, although they disagree as to the proper interpretation of some provisions. As an initial matter, the mere fact of the parties' disagreement does not render contract language ambiguous or require extrinsic evidence: "When a dispute arises over the meaning of contract

[51] *See*, *infra*, at 116, explaining why one passing reference to OGRE in §37.8.1(c) of the Ground Lease overcomes the unambiguous statement that the parties intend no third-party beneficiaries.

language, the first question to be decided is whether the language is 'reasonably susceptible' to the interpretation urged by the party. If it is not, the case is over." *Dore v. Arnold Worldwide, Inc.* (2006) 39 Cal.4th 384, 393 (quotations omitted).

This Court concludes, upon careful review of the language of this Ground Lease, that the language implicated by the disputes in this matter, particularly the force majeure provision, is generally unambiguous, and so consideration of extrinsic evidence is unwarranted. The Court now explains the reasons it believes the force majeure contract provision is not reasonably susceptible to more than one meaning, what that provision unambiguously means.

2. Ground Lease Force Majeure Provision

Initially, OBOT makes a threshold argument that any party claiming force majeure *automatically* extend its performance deadline pursuant to Article 16 simply by sending the other party notice. That is not what the language of this provision says, and not a reasonable interpretation of what it means. Section 16.1 provides that a party will not be considered in default of its obligations under the Ground Lease "to the extent of any delay *resulting from* Force Majeure." Ex. 68-84 §16.1 (emphasis added). The definition of "Force Majeure" includes 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…" Ex. 68-132 (Art 40, Def. "Force Majeure"). Nothing in this contract language waives the need for OBOT to demonstrate that the event in question *qualifies* as "Force Majeure," or to otherwise satisfy the causation requirements expressed in the plain terms of section 16.1 and this definition. There is no basis for OBOT's interpretation, which would permit OBOT to unilaterally waive any and all of the contract performance deadlines by sending a letter. This is not how the Court of Appeal recently approached a similar clause recently in *West Pueblo Partners,* 90 Cal.App.5th 1179, and this Court declines to give this contract such an extreme meaning (which would permit OBOT to unilaterally escape all performance deadlines). *See* Civ. Code §§1636, 1638, 1641.[52]

[52] Article 16 requires a party to give notice of an event of Force Majeure. 68-84 §16.1. As discussed *supra* at 60 n.41, the Court agrees with the City that it need not resolve the question whether OBOT's force majeure claims were timely noticed, because none of the City's actions actually qualify as events of Force Majeure for purposes of this contract.

Next, OBOT contends that any action by the City that "hindered or effected" OBOT's ability to perform triggers an extension, relying on the use of those terms in Article 16. But OBOT skips over the language stating that this provision is triggered only when performance is "hindered or affected *by events of Force Majeure,"* and grants extensions "to the extent of any delay *resulting from Force Majeure.*" Ex. 68-84 §16.1 (emphasis added). It is not *any* event that hinders or affects performance that results in an extension of contract deadlines, which, again, would be an interpretation so broad as to render meaningless all contractual performance deadlines. This provision is expressly limited to events that qualify under the definition of Force Majeure, and to delays in performance that are *caused* by such events.

There is no common plain meaning of the words "force majeure," which is a legal concept with meaning under California law, with a long history.[53] As the First District Court of Appeal very recently reiterated, the use of that legal term in a contract invokes a long history of caselaw and particular standards "deriv[ing] from the doctrines of impossibility and impracticability." *West Pueblo Partners,* 90 Cal.App.5th at 1188 (*citing Oosten v. Hay Haulers Dairy Employees & Helpers Union* (1955) 45 Cal.2d 784, 788).

The California Supreme Court has interpreted the phrase "due to causes beyond such Party's control," commonly used in force majeure provisions and in the contract at issue here, against the backdrop of doctrines of impossibility and impracticability to impose a high hurdle for those invoking such clauses to excuse performance. *Oosten*, 45 Cal.2d at 787–88; *Butler*, 54 Cal.2d at 593–99 (applying *Oosten's* impossibility standard to force majeure language). Tellingly, Plaintiffs cite no case law contrary to *West Pueblo*, adopting a different plain meaning of "force majeure" and outside or beyond "a party's control."[54]

[53] The direct translation from the French ("greater force") is not particularly illuminating.

[54] In briefing to this Court, Plaintiffs tried to distinguish the recent *West Pueblo* case by claiming it was limited to the payment of rent. It is not. Plaintiffs also, without support, called *West Pueblo* an "outlier" case. Outlier or not (it is not), it is directly on point here, from the very Division of the First District assigned to this case.

Parties can contract around these baseline standards through language that expresses an unambiguous intent to do so. *E.g.*, *Watson Laboratories, Inc. v. Rhone-Poulenc Rorer, Inc.* (C.D. Cal. 2001) 178 F.Supp.2d 1099, 1111. The question for this Court is whether the parties to this contract used language demonstrating an unambiguous intent to alter the longstanding background established meaning of force majeure and beyond a party's control. The Court will therefore first discuss the meaning of force majeure under California law and what those general standards require, and next whether any of the language used by the parties here gives any reason to alter the usual meaning of force majeure.

First, under California law, an event of "force majeure," it must have been unforeseen or unanticipated by the parties at the time of contract. *See, e.g.*, *Watson Laboratories* 178 F.Supp.2d at 1111 (rejecting argument that contractual force majeure provision did not require event to be "unforeseeable": "California law requires (not 'permits') that each event claimed to be a '*force majeure*' be beyond the control of the breaching party."); *Free Range Content, Inc. v. Google Inc*. (N.D. Cal., May 13, 2016, No. 14-CV-02329-BLF) 2016 WL 2902332, at *6 ("Under California law, unless a contract explicitly identifies an event as a force majeure, the event must be unforeseeable at the time of contracting to qualify as such." (citing *Watson Laboratories*, 178 F.Supp.2d at 1111); *see also London Guarantee & Accident Co. v. Industrial Accident Comm'n of Cal.* (1927) 202 Cal. 239, 242 ("force majeure" events are those "which human vigilance and industry can neither foresee nor prevent").[55] This is consistent with the notice requirement triggered by the claiming party's "actual knowledge of the scope and magnitude of the applicable Force Majeure event." Ex. 68-85 §16.1. There is no express language in the Ground Lease Force

[55] *See also Aristocrat Hwy. Displays v. Stricklen* (1945) 68 Cal.App.2d 788, 790 (citing *Mitchell v. Ceazan Tires, Ltd.* (1944) 25 Cal.2d 45, 47); *Conlin v. Coyne* (1937) 19 Cal.App.2d 78, 86-87; *OWBR LLC v. Clear Channel Commc'ns, Inc.* (D. Haw. 2003) 266 F.Supp.2d 1214, 1222-24 (force majeure clauses "define[] the scope of unforeseeable events that might excuse nonperformance by a party"); Black's Law Dictionary 657 (7th ed.1999) (defining Force Majeure Clause as "[a] contractual provision allocating the risk if performance becomes impossible or impracticable as a result of an event or effect that the parties could not have anticipated or controlled"); 30 WILLISTON ON CONTRACTS § 77:31 (4th ed. 2020); *cf. Crossman v. Burrill* (1900) 179 U.S. 100, 113 (explaining the 'vis major' defense "so pleaded was, in the words of opinions above cited, a 'superior force acting directly upon the discharge of the cargo;' 'a direct and immediate vis major;' an 'unusual and extraordinary interruption that could not have been anticipated when the contract was made…'").

Majeure definition or Article 16 altering this baseline requirement for acts of force majeure. And, Plaintiffs have provided the Court with no caselaw to the contrary. The Court therefore concludes that the West Gateway force majeure definition incorporates this longstanding standard.

Second, California law requires that the party invoking force majeure have acted with "skill, diligence and good faith" to meet its performance requirements, even in the face of the force majeure event, again arising from the concept of an event beyond a party's control. *Oosten*, 45 Cal.2d at 789; *see also Butler*, 54 Cal.2d at 599; *Horsemen's Benevolent & Protective Ass'n v. Valley Racing Ass'n* (1992) 4 Cal.App.4th 1538, 1564, *opinion modified; Nissho-Iwai Co., Ltd. v. Occidental Crude Sales* (1984) 729 F.2d 1530, 1540. Again, no express language in the Ground Lease Force Majeure definition or Article 16 modifies this baseline requirement, and Plaintiffs cite no caselaw to the contrary.

Third, California law requires that the party claiming force majeure demonstrate that the qualifying event (having met the two above requirements), rendered timely performance "impossible or unreasonably expensive." *Oosten*, 45 Cal.2d at 787–89 ("No contractor is used 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."); *West Pueblo Partners,* 90 Cal.App.5th at 1182; *see also Butler,* 54 Cal.2d at 593–99; *Watson Laboratories, Inc.*, 178 F.Supp.2d at 1109–10. "[A]cts that merely make performance unprofitable or more difficult or expensive do not suffice to excuse a contractual obligation." *SVAP III Poway Crossings, LLC v. Fitness International, LLC* (2023) 87 Cal.App.5th 882, 895; *accord Butler*, 54 Cal.2d at 599 (a "mere increase in expense does not excuse the performance unless there exists 'extreme and unreasonable difficulty, expense, injury, or loss involved.'"); *see also West Pueblo Partners*, 90 Cal.App.5th at 1188 ("The mere fact that Stone was generating less revenue during this time period did not render its performance impossible or impracticable, and the force majeure event therefore did not impair Stone's ability to pay its rent. Stone merely argues that the force majeure event made it more costly to do so.").

The provision need not use the word "impossible" to incorporate this standard. *West Pueblo Partners*, 90 Cal.App.5th at 1188; *SVAP III Poway Crossings,* 87 Cal.App.5th at 882.

Because force majeure "derives from the doctrines of impossibility and impracticability," the appellate courts have directed that the *Oosten* standard applies even where the clause in question uses common terms like "delay," or "interfere" or "hinder" rather than "impossible." *West Pueblo Partners*, 90 Cal.App.5th at 1182, 1188 ("delay"); *SVAP III Poway Crossings*, 87 Cal.App.5th at 892 ("hinder"). Indeed, the provision that the Court of Appeal recently found to *unambiguously* require the *Oosten* "impossible or unreasonably expensive" standard did not include the words impossible or unreasonably expensive, but read: "If either Party is delayed, interrupted or prevented from performing any of its obligations under this lease, and such delay, interruption or prevention is due to [a force majeure event], then the time for performance of the affected obligations of the Party shall be extended for a period equivalent to the period of such delay, interruption or prevention." *West Pueblo Partners*, 90 Cal.App.5th at 1187. The Court of Appeal rejected the argument that the plain and common meaning of "delayed, interrupted, or prevented" required rejecting the *Oosten* standard. *Id*. Instead, the Court concluded that the standard applied as a matter of the plain meaning of the force majeure provision. *Id.* Likewise, this Court concludes that the plain language of the provision at issue requires OBOT to prove that notwithstanding its own diligent efforts to perform, an unforeseen event rendered performance impossible or unreasonably expensive.

The Ground Lease's Force Majeure clause is somewhat unusual in that it specifies that "acts of the other Party" may qualify as force majeure events. Ex. 68-132 Art. 40 (Def. "Force Majeure"). But including acts of the other party on the laundry list of triggering events is not "unique," as Plaintiffs argued. *E.g., Decker Coal Co. v. Commonwealth Edison Co*. (9th Cir. 1986) 805 F.2d 834, 837 (describing provision: "Article XI of the contract contained a force majeure provision which allowed performance to be deferred or excused upon certain events. Such events included 'fire, flood, explosion, strikes, labor disputes, sabotage, riots, civil commotion, ... major equipment failures, unavailability of major transportation facilities or *acts of the other party*.'"). This language harkens back to old cases interpreting the original 1879 codification of the force majeure provision in Civil Code §1511, which includes acts of the other

party. *See Carlson v. Sheehan* (1910) 157 Cal. 692 (discussing acts of the other party in the context of Civil Code 1511 and the doctrine of prevention).

The addition of this term to the list of potentially triggering events does not expressly alter the applicability of any of the above requirements. Nor can this language reasonably be construed to mean that *every* act of the other party is an automatically triggering event—which would, again, swallow the contract terms imposing obligations on the parties. This is not specifically negotiated language identifying particular anticipated events that the Court would read as specific intent to alter the usual foreseeability requirement. Compare the far more specific language in the LDDA force majeure provision quoted (*supra* at 3 n.1), in particular the "Litigation Force Majeure" definition, Ex. 378-62 §10.1.3, which the City and the OBOT *did not include* in this Ground Lease.

The language "due to causes beyond such Party's [OBOT's] control" qualifies every category on the list, and nothing indicates any intent by the parties to treat "acts of the other party" as subject to a different standard than other qualifying events. Ex. 68-132 Art. 40 (Def. "Force Majeure"). Likewise, *removing* events from the qualifying list (such as the express agreement here that "Force Majeure does not include failure to obtain financing or have adequate funds," *id.*, does not alter the applicable standards either.

Finally, basic maxims of contract interpretation require this Court to assess the meaning of this force majeure in the context of other terms of the Ground Lease. Civ. Code §1641 ("The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other."). In this complex and highly negotiated contract, there are numerous terms whereby OBOT expressly assumed risk, or the parties negotiated specific procedures or remedies for particular issues. Notably, almost all of the actions or inactions that OBOT now claims as Force Majeure events are already addressed by particular provisions of this contract. This Court must exercise caution, because a general exculpatory term should not be used to invalidate the specific express terms to which the parties agreed. *See Glenn R. Sewell Sheet Metal, Inc. v. Loverde* (1969) 70 Cal.2d 666, 676–78 (J. Traynor) (holding that party who has expressly assumed risk of some event in contract, including risk of "undertaking

for himself the duty to comply with all laws and orders respecting the premises," cannot claim excuse of performance); *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."). As the Court of Appeal explained in *Horsemen's Benevolent & Protective Assn:*

> 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.

4 Cal.App.4th at 1565, modified (Apr. 6, 1992) (quotations omitted).

The alleged force majeure events (using the descriptions provided to the Court in Plaintiffs' Alleged Breaches of Contract by City of Oakland (submitted July 11, 2023)) and the corresponding contract language that sets forth the parties' more specific agreement on these issues are described in the following chart:

FM #2: 2016 Ordinance and Resolution	*But see:* **§5.1** ("The foregoing sentence shall not be deemed to limit Landlord's ability to act in its legislative or regulatory capacity, including the exercise of its police powers."); **§5.1** ("Notwithstanding anything to the contrary herein, Tenant shall not be in default hereunder for failure to comply with any Laws or insurance requirements if Tenant is contesting the applicability of such Laws (including Regulatory Approvals) to Tenant or this Lease…"); **§5.1.1.2** ("No occurrence or situation arising during the Term, nor any present or future Law, whether foreseen or unforeseen, and however extraordinary, shall relieve Tenant of its obligations hereunder, nor give Tenant any right to terminate this Lease in whole or in part or to otherwise seek redress against Landlord") **§5.2.1** ("… nothing in this Lease shall be deemed to limit or restrict City in the exercise of its governmental regulatory powers and authority with respect to Tenant, the Premises or otherwise, or to render Landlord obligated

	or liable under this Lease for any acts of omissions of the City in connection with the exercise of its independent governmental regulatory powers and authority.”); **§5.2.1** (“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.”)
FM #3: TLS BOD “Refusal to consider in good faith and provide comment on OBOT’s Basis of Design for the Project (GL § 6.2.1)”	*But see:* **§6.2.1.** Approval of Construction Documents (procedures for approval; sole and exclusive remedy for delay/failure to approve)
FM #5: Permitting and Environmental Review “Reopening CEQA and conducting discretionary reviews, and approval of future permits on a commodity-by-commodity basis and generally failing to process Plaintiffs’ permit applications in good faith (DA § 3.5.1)”; “Requiring additional discretionary approvals, such as subjecting the Project to the Creek Protection Permit, in contravention of the EIR (and thus the Development Agreement) (DA § 3.5.1)”;	*But see:* **§5.2.2.1** (…“Tenant shall be solely responsible for obtaining all such Regulatory Approvals as further provided in this Section.”); **§5.2.1** (“ …nothing in this Lease shall be deemed to limit or restrict City in the exercise of its governmental regulatory powers and authority with respect to Tenant, the Premises or otherwise, or to render Landlord obligated or liable under this Lease for any acts of omissions of the City in connection with the exercise of its independent governmental regulatory powers and authority.”); **§5.2.1** (“Tenant acknowledges that the Permitted Uses under Section 3.1 do not limit Tenant's responsibility to obtain all Regulatory Approvals (and pay all related processing and development fees and satisfy all related conditions of approval) for such uses, including but not limited to, the Master Plan, PUD or Building Permits, nor do such uses limit City's responsibility in the issuance of any such Regulatory Approvals to comply with applicable Laws, including the California Environmental Quality Act.”); **§5.2.1** (“Nothing in this Lease shall be deemed a waiver by Tenant of its right to challenge the applicability to the Project of any Laws promulgated by the City during the Term.”) **§6.1.3** Rent Abatement for Delay in Building Permit (provision negotiated to permit rent abatement in event of delay in building permit)

FM #6: Completion of Public Improvements "Failing to turn over possession of the Property (GL § 1.1.1; 1.1.2; 1.5.1; 1.5.2)"	*But see*: **§1.1.1** ("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."); **§1.1.1** ("The Parties' rights and obligations under this Lease shall continue unabated with respect to the original Premises until the Parties' agreement upon the adjustments to the Premises set forth in the certification (or the final resolution or determination of any such disagreement)"); **§37.9.2(b)** (sole and exclusive remedy for failure to complete public improvements)
FM #7: Execution of RAA "Failing to use commercially reasonable efforts to pursue the Rail Access Agreement with the Port (GL § 5.2.3)"	*But see:* **§5.2.3** (commercially reasonable efforts to enter into RAA with Port; "sole and exclusive" remedy to OBOT for failure to enter into RAA)
FM #8: City's STB Position **FM #9: Fence Permit (BCDC)** "Failing to cooperate with OBOT's efforts to obtain regulatory approvals, such as the BCDC fence permit and the Surface Transportation Board approval (GL § 5.2.2.2)"	*But see:* **§5.2.2.1** ("Tenant shall be solely responsible for obtaining all such Regulatory Approvals as further provided in this Section."); **§6.2.13** ("Tenant shall be responsible for obtaining its own regulatory permits (including, without limitation, any required BCDC Permit) for the Improvements to be Completed by Tenant pursuant to this Lease.")
FM #10: ACTC Funding "Failing to cooperate with Plaintiffs to secure third-party funding, such as the ACTC funding (GL § 6.2.1)"	*But see:* **§6.3.1** Pursuit of Additional Funds (special force majeure and remedy provision for third party public funding)
Additional Post-Default Allegations:	
"Failing to issue non-disturbance agreements (GL § 12.5.1)"	*But see:* **§12.5.1** (Conditions requiring OBOT to respond to inquiries regarding financial information); **§12.5.2** ("Each Non Disturbance Agreement shall be in form and substance reasonably satisfactory to Landlord");

	§19.3.4 (No Rights to Assign or Sublet when in default)
"Failing to issue estoppel certificates (GL § 26.1)"	*But see:* **§26.1** <u>Estoppel Certificate by Landlord</u> (requiring certificate to include "whether or not, to the knowledge of Landlord, there are then existing any defaults under this Lease (and if so, specifying the same)"); **§19.3.4** (No Rights to Assign or Sublet when in default)
" Failing to re-survey the property as required by the lease (GL § 1.1.1)"* *On OBOT's July 11, 2023 list but not included in any force majeure claim	*But see:* **§1.1.1.** (…"The Parties' rights and obligations under this Lease shall continue unabated with respect to the original Premises until the Parties' agreement upon the adjustments to the Premises set forth in the certification (or the final resolution or determination of any such disagreement)."

OBOT, having agreed to these specific terms, cannot invoke force majeure to achieve what it could not in the terms of the bargain. *Cf. Carma Developers*, 2 Cal.4th at 363 ("'[I]f there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contract, and that their contracts when entered into freely and voluntarily shall be held sacred, and *shall be enforced* by courts of justice.'") (*quoting In re Garcelon* (1894) 104 Cal. 570, 591, *quoting from the Opinion of Sir G. Jessell, M.R., in Printing Numerical Registering Co. v. Sampson*, L.R.19 Eq. 465).

The rule that a force majeure provision should respect the more specific bargains reached by the parties complements the rule that a party cannot claim force majeure for an *anticipated* event: if the event was anticipated or foreseeable at the time of contract, it was within that party's control to try and negotiate terms. The City and OBOT each had their own calculuses for negotiating the Ground Lease Initial Milestone deadline, assessing all of the known and foreseeable risks that warranted their position about the length of time for that deadline. Allowing OBOT to invoke anticipated events as Force Majeure, already addressed by negotiated contract terms would permit the unilateral revision of the contract to achieve an outcome OBOT

could not achieve through negotiation. That this Court cannot do, *regardless of whether these events actually had a later impact on performance or not*.

In sum, nothing in language used in this provision alters the baseline plain meaning of this force majeure provision under California law to permit parties to invoke foreseen events, or to waive the requirement of pursuing performance with diligence and skill, or to lower the high hurdle of proving impossibility or impracticability. This Court will therefore apply the usual standards to determine whether any action of the City invoked by OBOT was in fact an event of force majeure.

C. *Res Judicata and Impact of Prior Federal Litigation on the Claims and Defenses in this Case*

1. Impact of Federal Court Finding of Breach of the DA

In response to this Court's request for briefing on the impact of the federal litigation, the City explained why a breach of the DA does not excuse performance under the subsequently entered into Ground Lease. City's Trial Brief on Prior Federal Litigation (filed 8/7/2023) at 6-9. In response, Plaintiffs have expressly disclaimed any argument that the City's prior breach of the DA, as found by the federal court, excused its performance under the Ground Lease. *See* Plaintiffs' Response to City's Trial Brief on Prior Federal Litigation (filed 8/17/2023) at 1-2 ("The City makes three main contentions: (1) OBOT's prior win against the City in federal court for breach of the Development Agreement does not establish in this case a breach of contract *or excuse of performance under the Ground Lease* ...The City's first contention concerns *a claim that does not exist*.") (emphasis added); *id.* at 5 ("Plaintiffs do not contend that the City's Development Agreement breaches constitute Ground Lease breaches."); *id.* at 7 ("Plaintiffs also do not seek a full excuse of performance of Ground Lease obligations based on *OBOT I*.").

Even if the Court were to reach this issue, the City's position that the prior breach of the DA does not excuse performance under the Ground Lease is grounded in both applicable law and the plain terms of the separately negotiated contracts at issue. California law is clear that a party's breach of one covenant in an agreement does not excuse its counterparty's performance of another, absent unambiguous contract language making the covenants dependent. *See Colaco v.*

Cavotec SA (2018) 25 Cal.App.5th 1172, 1176, 1185. The parties here included no such unambiguous contract language. In fact, the opposite is true, for several reasons, including: the provisions of both the Ground Lease and the DA that state that the Ground Lease contains independent obligations that control performance with respect to the West Gateway (*See* Ex. 68-91, 68-120 §§22.1, 38.7; Ex. 7-18, 7-21, 7-37, 7-56, 7-107 §§2.2, 3.3, 8.1, 14.27, Ex. D-2); the Ground Lease provision in which OBOT agreed the City's exercise of regulatory or legislative authority cannot excuse OBOT's performance (Ex. 68-29 §5.1.1.2); and the provision in which OBOT agreed it would have no remedy of self-help (Ex. 68-91 §22.1 (iii)). Knowing that the City was engaged in legislative proceedings considering the regulation of coal under DA Section 3.4.2, OBOT would have needed to expressly make its Ground Lease performance contingent on the City's compliance with the DA; but it did not, because that is not the deal the parties reached. Instead, they agreed to move forward regardless of the outcome of any challenge.

Finally, even if Plaintiffs had not conceded the point, as explained in the next section, any contention that the federal court's decision results in any claim or remedy in this case is clearly barred by res judicata.

2. Res Judicata

Res judicata doctrine prevents parties from asserting claims that they could have brought, or seeking remedies that they could have sought, in a prior lawsuit. The doctrine applies even if (as Plaintiffs argue here) certain future injuries are "speculative" at the time of the first lawsuit, *Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 897, because "one injury gives rise to only one claim for relief," *Boeken v. Philip Morris USA, Inc.* (2010) 48 Cal.4th 788, 814.

As Plaintiffs point out, the doctrine applies only when the second suit involves the same "cause of action" as the first. But as the California Supreme Court has explained, "for purposes of applying the doctrine of res judicata, the phrase 'cause of action' has a more precise meaning" than its common legal usage (where it is synonymous with "count" or "claim"). *Id.* at 813-14. In the res judicata context, "[t]he cause of action is the right to obtain redress for a harm suffered, regardless of the specific remedy sought or the legal theory (common law or statutory) advanced." *Id.* at 814.

Res judicata doctrine as applied here limits both Plaintiffs' breach and excuse/force majeure contentions (whether they arise in the context of proving one of the elements of Plaintiffs' breach claim, or as a defense to the City's claim) to acts of the City after June 14, 2017. Plaintiffs' affirmative breach claims are further limited by estoppel, grounded in their affirmative representations to the Court at the pleadings stage, and in their Amended Complaint, that they are seeking relief only for City's alleged breaches that post-date the federal court's decision on May 15, 2018. *Supra* at 64.[56]

OBOT's prior federal lawsuit sought declaratory and injunctive relief for the injuries caused by the City's enactment of the 2016 Ordinance and Resolution, including, as OBOT alleged, that law's interference with OBOT's ability to secure a sublease with TLS and "to attract partners and investments for the West Gateway Project. Federal First Amended Complaint, *supra* at 37, at ¶¶34-35, ¶122, ¶123, ¶167. OBOT specifically and repeatedly highlighted the injury from alleged delays in the development project. Fed. Dkt. 79 (Jul. 5, 2017) at 6; Fed. Dkt. 60 (Apr. 13, 2017) at 4-5, 15; Fed. Dkt. 36 (Feb. 28, 2017) at 4-5, 7, 8. OBOT did seek as a remedy, and then abandoned, a request the federal court extend its Ground Lease performance deadlines based on the City's acts: it prayed for "equitable relief … prohibiting the City from asserting that OBOT has breached the … Ground Lease for West Gateway, dated February 16, 2016, by any failure to perform resulting from the City's misconduct." First Amended Complaint at Prayer ¶D; Fed. Dkt. 239 at 20 (Feb. 9, 2018). And OBOT expressly informed the Court it was seeking to hold open its option to pursue damages for *delays in performance* until the federal court required OBOT to expressly disavow a damages remedy, while acknowledging the "res judicata impacts" of failing to pursue such remedies in the federal case. *Id.*; Fed. Dkt. 79 (Jul. 5, 2017), at 6-13; Fed. CMC Transcript, Fed. Dkt. 90 (Jul. 27, 2017) at 8-14.[57]

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[56] This Court previously reached a similar conclusion, ruling that Plaintiffs could base their claims in this case on acts that post-dated the federal litigation, because such acts would comprise a different primary right. Demurrer Order (5/16/2019) at 3-4; Motion to Strike Order (5/16/2019).

[57] OBOT's July 5, 2017 case management statement, Fed. Dkt. 79, is Exhibit A to the City's Trial Brief on Prior Federal Litigation (filed 8/7/2023). OBOT's post-trial brief, Fed. Dkt. 239, is Exhibit B to that brief. The transcript of the July 12, 2017 case management conference in the

The primary right litigated in the federal case was the injury to OBOT—including alleged interference with its ability to timely perform and alleged delays in the development project — that it claimed resulted from the City's anti-coal campaign, including the 2016 Ordinance and Resolution. By OBOT's own statements to that court, the injury was not limited to the right to be free from an improperly applied regulation, but included the *impact* that OBOT contended that regulation had on its ability to move forward with the development of the terminal. If Plaintiffs were permitted to pursue breach claims based on those same City actions, or to seek as a remedy for those City actions the extension of OBOT's performance deadlines, they would be relitigating the same primary right as in the federal case. "A primary right is the right to be free of a particular injury," and the "cause of action is the right to obtain redress for a harm suffered, regardless of the specific remedy sought or the legal theory … advanced." *Cal Sierra Dev., Inc. v. George Reed, Inc.* (2017) 14 Cal.App.5th 663, 675-76 (also noting "there is only a single cause of action for the invasion of one primary right and the harm suffered is the significant factor"); *Boeken*, 48 Cal.4th at 814 ("under the primary rights theory, the determinative factor is the harm suffered."); *Mycogen Corp.*, 28 Cal.4th at 897 ("Res judicata precludes piecemeal litigation by splitting a single cause of action or relitigation of the same cause of action on a different legal theory or for different relief.").

Having previously sued for the injuries it believed were or would be caused by the City's 2016 Ordinance and Resolution, OBOT may not now assert any legal theory seeking to remedy those same injuries now, in this case. And, in particular, as the California Supreme Court explained in *Mycogen*, where a party seeks specific performance remedy in one case, it cannot return and claim delay in performance damages in a later case arising from the same injury, *even where those damages would have been completely speculative at the time*. 28 Cal.4th at 897, 905-907 ("a plaintiff requesting both specific performance and delay damages must request both remedies in the initial proceeding… Delay damages must be requested in the initial action for breach of contract, even if they are still speculative at the time of the suit.").

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federal case, Fed. Dkt. 90, is Exhibit E to the City's Request for Judicial Notice in Support of Demurrer (filed 1/14/2019).

That is precisely what OBOT has attempted to do in this case, by bringing claims against the City arising from a termination caused by the same alleged delays in performance that OBOT claimed as an injury in the first litigation. It matters not that OBOT has formulated those claims into a different legal theory here (either excuse of performance as an element of its breach claim, or force majeure or excuse defense to the City's claim). Having pled and then foregone remedies for this delay in development injury in the federal case, OBOT cannot pursue those remedies here.

Until trial, Plaintiffs' claims for breach were predicated on the City's 2018 termination of contract.[58] At trial, despite their previous concessions, Plaintiffs attempted to assert breach claims based on City actions that go back as far as 2015. Pltfs' Response to City's Trial Br. re: Federal Litigation (submitted 8/17/2023) at 4 & n.9 (claiming 13 breaches of contract). Their position now is that res judicata precludes only breach claims predicated on the Ordinance and Resolution, and seek to assert other breach claims that "predate *OBOT I*." *Id*. at 3; *see also id.* at 10-12. But California law is straightforward: "[I]f the matter was within the scope of the action, related to the subject matter and relevant to the issues, so that it *could* have been raised, the judgment is conclusive on it despite the fact that it was not in fact expressly pleaded or otherwise urged…. The reason for this is manifest. A party cannot by negligence or design withhold issues and litigate them in consecutive actions. Hence the rule is that the prior judgment is res judicata on matters which were raised or could have been raised, on matters litigated or litigable." *Tensor Group v. City of Glendale* (1993) 14 Cal.App.4th 154, 160 (quoting *Sutphin v. Speik* (1940) 15 Cal.2d 195, 202) (emphasis in original).

Plaintiffs argue that because they did not assert a claim for breach of the Ground Lease in the earlier case, they are not now foreclosed from claiming that earlier acts of the City breached the Lease. Plfs' Response to City's Trial Brief re: Federal Litigation at 3. But it does not matter whether Plaintiffs assert a different cause of action based on a different legal theory—what matters is Plaintiffs seek relief from the same injury as was previously at issue. The primary right

[58] Plfs' Opp. to Demurrer (4/4/2019) at 6-7; Demurrer Order (5/16/2019) at 3-4; Motion to Strike Order (5/16/2019) at 2; First Amended Complaint (12/11/2020) ¶¶6 ("Since the issuance of the federal ruling in May 2018 …"), 7 ("after the issuance of the Federal Ruling"), 41, 50, 56, 60, 69, 76, 80, 83, 95; *see also id*. ¶1.

doctrine prevents a litigant from asserting new legal theories based on previously litigated facts. And Plaintiffs have never explained why alleged interference with their rights to develop a bulk commodity terminal at the West Gateway under the DA and the Ground Lease through means other than the Ordinance and Resolution would constitute a different primary right than interference with that asserted right through the Ordinance and Resolution. As the California Supreme Court has explained, "the primary right is simply the plaintiff's right to be free from the particular injury suffered," regardless of the legal theory asserted. *Mycogen Corp.*, 28 Cal.4th at 904. Thus, in *Boeken*, the California Supreme Court held that the death of the plaintiff's husband was the "wrong suffered," so she could not assert a statutory wrongful death claim after having voluntarily dismissed an earlier loss of consortium claim. 48 Cal.4th at 813-14.

Moreover, res judicata bars not only the reassertion of claims, but also the pursuit of remedies and defenses that are based on invasion of the same primary right. Parties must pursue all available remedies, not reserve some for a subsequent lawsuit. *See Mycogen Corp.*, 28 Cal.4th at 906 ("A plaintiff is 'bound to obtain all his relief on account of the breach in one action, and could not recover part in one and part in another.'") (quoting *Abbott v. 76 Land & Water Co.* (1911) 161 Cal. 42, 47).[59] Here, the remedies that could have been – and actually *were* -- asserted in the earlier federal case included relief from Plaintiffs' performance deadlines as set forth in the Ground Lease. Federal First Amended Complaint at Prayer ¶D.

Plaintiffs contend that their force majeure claims based on these acts were not "ripe," and "did not accrue until the City declared Plaintiffs in default and terminated the Ground Lease," so that their assertion in a subsequent lawsuit was not barred by res judicata. Plfs' Response to

[59] *See also Cal Sierra,* 14 Cal.App.5th at 675 (plaintiffs may not subsequently "plead[] different theories of recovery, seek[] different forms of relief and/or add[] new facts supporting recovery"); *State Bd. Of Equalization v. Superior Ct.* (1985) 39 Cal.3d 633, 641 ("Res judicata prevents litigation of all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding.") (internal quotations omitted); *Alpha Mechanical, Heating & Air Conditioning, Inc. v. Travelers Casualty & Surety Co.* (2005) 133 Cal.App.4th 1319, 1332-33 (party that dismissed cross-complaint based on breach of contract and negligence theories could not assert affirmative defenses that arose from same primary right); *Torrey Pines Bank v. Superior Ct.* (1989) 216 Cal.App.3d 813, 819-20 (party that dismissed earlier lawsuit with prejudice could not assert defenses that "assert the same nucleus of operative facts and raise the same legal issues as those alleged in [the party's] first amended complaint").

City's Trial Brief re: Federal Litigation at 14-15. But this contention defies California Supreme Court precedent. *Mycogen* and *Boeken* instruct that all possible relief for injury to a primary right must be sought in the first lawsuit, even if the need for some of that relief may not yet be clear. And a party may not wait to see whether its claim is meritorious before seeking a potentially available remedy. *See Boeken*, 48 Cal.4th at 814 ("It does not matter what weakness, if any, in plaintiff's previous lawsuit might have led her to dismiss it with prejudice…. [T]he relevant point for our purposes is what plaintiff there alleged[.]"); *Abbott*, 161 Cal. at 48 ("it is no warrant for a second action that the party may not be able to actually prove in the first action all the items of the demand, or that all the damage may not then have been actually suffered"). Plaintiffs were not entitled to see whether their challenge to the Ordinance and Resolution succeeded and then decide to seek relief for their delays in performance caused by those enactments and other related actions of the City.

Moreover, here, the need *was* not just foreseeable: it was based on the plain and unambiguous language of the contract, which imposed a clock for performance that was running down throughout the federal litigation, *and* expressly stated that OBOT would have no remedy of "self-help." Ex. 68-91-92 §22.1. Moreover, OBOT's contention is belied by its own actions: OBOT submitted force majeure claims to the City long before the City declared default, as early as March 11, 2016. *See*, *e.g.*, Ex. 76. Further, OBOT actually did seek relief from the Ground Lease deadlines in the federal case before deciding to drop that request. It does not matter that OBOT did not assert a "claim under the Ground Lease." Plfs' Response to City's Trial Brief re: Federal Litigation at 13. OBOT sought excuse of its Ground Lease performance obligations as a *remedy* for the City's breach of the DA through the enactment of the Ordinance and Resolution. Just as the widowed plaintiff could not voluntarily dismiss her loss of consortium claim while her husband was alive and then later sue for wrongful death after he died, Plaintiffs were not entitled to let the clock run out on their performance deadline and then seek extension of that deadline as a remedy for the Ordinance and Resolution—regardless of which legal theories they asserted in their earlier case.

Thus, California's res judicata precedent makes clear that OBOT, having sought and abandoned a remedy in the federal litigation that included relief from the Ground Lease deadlines, cannot now claim excuse of performance or force majeure in this case to extend those same deadlines (or seek performance "delay" damages) based on the Ordinance and Resolution.

In addition, res judicata conclusively forecloses OBOT from seeking the same relief (extension of its deadlines or "delay" damages) based on the following City actions prior to June 14, 2017 (whether asserted as a stand-alone breach of contract, the basis for a force majeure extension, claim of excuse, or in support of any other claim):

- All three new claims for breach of the DA, including: "failing to certify a list of then-existing regulations that would apply to the Project" (*see also* FM #1 Binder); "adopting a novel process that would evaluate permits on a commodity-by-commodity basis, require discretionary reviews, and reopen California Environmental Quality Act ("CEQA") for ordinarily ministerial approvals instead of relying on the existing environmental impact report ("EIR") to the maximum extent possible (the March 9, 2016 meeting, as alleged by Plaintiffs) (see also FM #4 Cappio Memo and FM #5 Permitting and Environmental Review); "refusing to meet and confer about those breaches."
- The following alleged breaches of the Ground Lease/Force Majeure claims, based on actions by the City prior to June 14, 2017: Plaintiffs' force majeure claim based on the 2016 Ordinance (FM #2); failure to "Turn Over" the Railroad R/O/W Property (see also FM# 6 Completion of Public Improvements); failure to use commercially reasonable efforts to enter the RAA (*see also* FM #7 RAA); failure to "consider and comment" on the Basis of Design (*see also* FM #3 TLS BOD); failure to "cooperate to secure third-party funding" (*see also* FM #10 ACTC Funding); failure to "cooperate with OBOT's efforts to obtain regulatory approvals" (*see also* FM #8 City's Position at the STB and FM #9 Fence Permit).

Moreover, estoppel further precludes OBOT from asserting any affirmative breach claim based on City action prior to May 15, 2018, which further precludes the following claims based on "continuing" action or inaction between June 14, 2017 and May 15, 2018 including: "adopting

a novel process that would evaluate permits on a commodity-by-commodity basis, require discretionary reviews, and reopen California Environmental Quality Act ("CEQA") for ordinarily ministerial approvals instead of relying on the existing environmental impact report ("EIR") to the maximum extent possible; failure to "Turn Over" the Railroad R/O/W Property; failure to use commercially reasonable efforts to enter the RAA; failure to "consider and comment" on the Basis of Design; failure to "cooperate to secure third-party funding"; failure to "cooperate with OBOT's efforts to obtain regulatory approvals."[60]

II. OBOT Breached the WGW Ground Lease

A. *OBOT Failed to Meet the Initial Milestone*

The City granted OBOT two years of tolling, and therefore the latest date for the Initial Milestone deadline was August 14, 2018. Ex. 68-17 §1.7.2, 68-33 §6.1.1.1; Trial Tr. 1218:14-16, 1991:15-17.[61] As Mr. McClure acknowledged, OBOT wanted a further tolling agreement, but did not obtain any such agreement to further tolling from the City. Trial Tr. 2614:23-2615:7, 2616:21-25, 2618:4-15, 3564:6-7, 3689:13-16. Failure to meet the Initial Milestone by August 14, 2018 is undeniably a Tenant Default under the Ground Lease. *See* Ex. 68-33 §6.1.2; Ex. 68-86-87 §18.1.7.

The evidence at trial established that as of August 14, 2018, OBOT had not Commenced Construction of either the Bulk and Oversized Terminal or one of the five Minimum Project Rail Improvements. Ex. 68-33 §6.1.1.1; Ex. 68-129, Art. 40; *supra* at 56-58. Either of these would be a Default under the plain terms of the Ground Lease, which requires *both* to have commenced to

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[60] *See MW Erectors, Inc. v. Niederhauser Ornamental & Metal Works Co., Inc.* (2005) 36 Cal.4th 412, 422 (judicial estoppel); *Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 183 (equitable estoppel). Further, OBOT never noticed any default pursuant to the procedures required for Landlord defaults under the Ground Lease (or any of these new "claims" under the DA default provisions either), which precludes any of the pre-termination claims as well. Ex. 68-91 (§22.1).

[61] The City granted the two years of tolling notwithstanding OBOT's failure to diligently pursue completion of the OBOT wharf and rail improvements, which the record evidence established OBOT did not do by February 15, 2018, the end of the tolling period. Trial Tr. 3234:19-3235:20 (Lake). Plaintiffs ignore this fact when arguing that the City tried to block this project. Likewise, even when OBOT did not pay rent, the City did not immediately call default, providing OBOT several months to become current before eventually issuing the default notice Trial Tr. 3727:1-8 (Lake); Ex. 169.

satisfy the deadline. Ex. 68-33 §6.1.1.1.

With respect to the terminal, the evidence demonstrated that OBOT and TLS went "pencils down" on the prerequisite design work that precedes all of the preconstruction steps in July 2015, even before signing the Ground Lease, and did not pick those pencils back up until sometime after the ITS sublease was signed, after the performance deadline. *Supra* at 38-39. OBOT's witnesses confirmed that OBOT's plan was to have its sublessee complete that design work, and apply for permits and regulatory approvals, and be responsible for construction of the terminal. *Supra* at 38. The evidence was undisputed that OBOT told the City in May of 2016 that it would not continue design work until it had a sublease in place. *Supra* at 36-37. Finally, the evidence was undisputed that OBOT submitted no sublease it considered valid (having previously invalidated the IES sublease) to the City until September 28, 2018. *Supra* at 46. And, when OBOT did submit that sublease, it was accompanied by a new ITS Basis of Design Conceptual Schedule that confirmed that the further design work had not yet begun. *Supra* at 58-59.

The trial evidence was also undisputed that OBOT had not taken any of the preconstruction steps necessary to be able to Commence Construction (no construction documents, no permits, no construction contracts). *Supra* at 56-58. The evidence at trial also established that as of August 14, 2018, OBOT had not Commenced Construction of any of the Minimum Project Rail Improvements. *Supra* at 57-58. While OBOT and OGRE had access to the land (*supra* at 48-52) and began constructing some track (*supra* at 49, 50, 52), it was undisputed that OBOT and OGRE halted construction in 2018 and were not engaged in the "active and ongoing" construction required by the contract. *Supra* at 52, 57-58.

Therefore, to establish its own breach claim, and to defeat the City's breach of contract claim, OBOT must meet its burden to establish that its performance was excused, either by way of a force majeure extension of the contract deadline, or otherwise. As discussed in the next sections, OBOT has not met that burden.

B. *No Event of Force Majeure Extended the Initial Milestone Deadline*

1. <u>Most of OBOT's Claims Were Known or Foreseeable at the Time of Contract</u>

All of the following issues were known and/or foreseeable at the time the West Gateway Ground Lease was signed, and therefore do not qualify as events of Force Majeure for purposes of this contract. OBOT could have raised these issues in the contract negotiation, and either did not, or, as discussed *supra* at 21-29, 77-82, actually did negotiate contract terms that directly contradict these claims:[62]

(a) *The DA Binder (FM #1).* There is no question that OBOT was aware of the issue of the outstanding set of regulations prior to signing the contract. Ex. 65-1 (Jan. 2016 letter); Trial Tr. 683:11-14 (Mr. Tagami's admission that he knew about the binder issue "well before the execution of the Ground Lease"). In fact, Mr. Tagami acknowledged that he could have included, *but did not include*, any contingency in the Ground Lease regarding provision of the binder. Trial Tr. 683:19-684:2 (binder was among "a number of … things that I guess I could have made contingent"). *See also supra* at 33-34 (discussion of DA binder).

(b) *The City's Ordinance (FM #2).* Trial evidence was conclusive that OBOT was aware that the City had commenced legislative proceedings to investigate and consider the regulation of coal and understood that the City would likely enact legislation on coal. Mr. Tagami flatly admitted at trial that he was aware in 2015 that "the city may consider passing a ban on coal and certain fossil fuels in Oakland." Trial Tr. 635:16-636:1; *accord* 638:21-639:3. Mr. McClure similarly admitted that in January 2016, he knew "[t]here was a brewing fight over coal." Trial Tr. 2606:22; *see also* Trial Tr. 2676:18-20 (acknowledging awareness of "overburden" issue before executing Ground Lease).[63] Before entering into the Ground Lease, as

[62] Many of these contentions excusing OBOT's performance are also barred by res judicata, *see supra* at 82-90, including but not limited to OBOT's force majeure claims predicated on: (1) the DA binder of regulations provided in June 2016, (2) the Ordinance and Resolution regarding coal passed in July 2016, (3) the November 2015 "Cappio Memo" which Plaintiffs learned about in April 2016, Trial Tr. 2962:18-22, (4) statements made at the March 9, 2016 pre-application meeting regarding potential discretionary permits or further environmental review, (5) the absence of feedback on the July 2015 TLS Basis of Design, and (6) actions taken by the City regarding ACTC funding in 2015.

[63] By the end of 2015, Mr. Tagami and Mr. McClure had interacted and corresponded extensively with City leaders regarding the issue of coal, *see, e.g.*, Exs. 28, 29, 59A , 525, 534; CCIG was aware of and sent representatives to the September 21, 2015 public hearing regarding potential coal regulation, *see* Trial Tr. 357:22-358:2; and CCIG submitted extensive information

of 2015, OBOT already disputed the validity of any application of a no coal ordinance to this project, in the context of the City's health and safety hearings. Ex. 57-1; *see also* Ex. 28 (Letter to Mayor Schaaf); Ex. 43 (draft "City Staff" letter drafted by CCIG arguing the lack of health and safety justification for any coal ordinance); Ex. 534 (CCIG letter to City Councilmember Kalb); Ex. 557 (McClure strategy notes).

The parties expressly memorialized the anticipation of this issue in the Third Amendment to the LDDA, signed the very same day as the Ground Lease, acknowledging that the City reserved the right to legislate with respect to coal, *see* Ex. 561-40 §13, and OBOT correspondingly reserved the right in the Ground Lease to challenge that law, *see* Ex. 68-29-30 §5.2.1.[64] Mr. Tagami acknowledged that this Ground Lease language was added because OBOT was "concerned about the possibility of a coal ordinance that would be applied to the project." Trial Tr. 673:1-8; Ex. 68-30 §5.2.1. Finally, the parties expressly agreed that OBOT would not be held in default for failing to comply with such a law while a challenge was pending. Ex. 68-28 (§5.1).

If OBOT, at the time of contract, wanted to wait to build the terminal until any challenge to potential coal legislation was resolved, it had options it did not take, including to wait to enter into the Ground Lease, or to negotiate language to that effect. Instead, despite these foreseeable issues, the parties negotiated no contingency or tolling arrangement with respect to the performance deadlines in the event that OBOT filed or *succeeded* in such a challenge. Instead, they agreed to strict and unconditional deadlines that were not made contingent on the outcome of any proceedings challenging future legislation. *See supra* at 21-25; Ex. 68-31-33 §§6.1, 6.1.1, 6.1.2, Ex. 68-29-30 §5.2.1; Ex. 561-40 §13. They negotiated no language stating that OBOT's obligation to perform would be stayed while such a challenge was pending or if OBOT prevailed, and instead agreed to the exact opposite: "*No … present or future Law, whether foreseen or*

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to the City in 2015 as part of the City Council's legislative process, *see* Exs. 57, 548.

[64] The Court need not reach the question of whether this related contract, entered into on the same day as the Ground Lease, is extrinsic evidence relevant to interpreting the Ground Lease. The language memorializing the parties' agreement is relevant evidence to prove anticipation and foreseeability of the City's 2016 legislative acts for purposes of applying the force majeure standard.

unforeseen, and however extraordinary, shall relieve Tenant of its obligations hereunder, nor give Tenant any right to terminate this Lease in whole or in part or to otherwise seek redress against Landlord." Ex. 68-29 §5.1.1.2 (emphasis added).

Indeed, in the Ground Lease, the parties agreed that the City could legislate with respect to coal, OBOT could challenge that legislation, OBOT could not be held in default for failing to comply with that law while its challenge was pending, and construction would move forward in the meantime. Each side agreed to bear the risk of what the outcome of any such challenge would be: The City bore the risk that OBOT would ultimately prevail on its challenge to the legislation, and OBOT bore the risk that it would not prevail, so the legislation would stand and it would not be able to do business with coal. Either way, OBOT and the City agreed that the terminal would be built. But even if section 5.1.1.2 were to be construed not to encompass laws eventually ruled to be invalid, the contract as written and agreed by the parties did not exempt OBOT from complying with the mandatory performance obligations while such a challenge was pending. The parties agreed to no language providing for such an exemption, and the force majeure provision cannot be read, consistent with California law, to apply to such an anticipated event.

Thus, the Ordinance, including the legal dispute over its applicability to the West Gateway, was anticipated and foreseeable at the time of contract, and cannot be an event of Force Majeure.[65]

(c) *Lack of "Feedback" or "comments" on the 2015 TLS BOD (FM #3).* There is no dispute that OBOT was aware, prior to the Ground Lease, that the City had not provided any

[65] This Court is not opining on whether the arrangement entered into between the City and OBOT in February 2016 was fair or unfair with respect to either party. California law does not ask (or allow) this Court to decide whether an outcome is fair. This issue was clearly anticipated at the time of contract, and it was for the parties to negotiate, in light of that concern, the provisions that *they believed* were fair. This Court's role is to enforce the language as written. *Coral Farms, L.P. v. Mahony* (2021) 63 Cal.App.5th 719, 731 ("The courts cannot make better agreements for parties than they themselves have been satisfied to enter into or rewrite contracts because they operate harshly or inequitably."); *Series AGI W. Linn of Appian Grp. Invs. DE, LLC v. Eves* (2013) 217 Cal.App.4th 156, 164 ("[C]ourts will not rewrite contracts to relieve parties from bad deals nor make better deals for parties than they negotiated for themselves."); *see also Klein v. Chevron U.S.A., Inc.* (2012) 202 Cal.App.4th 1342, 1385 ("The fundamental goal of contract interpretation is to give effect to the mutual intention of the parties as it existed at the time they entered into the contract.").

"feedback" or "comments" on the 2015 BOD that OBOT and TLS provided to the City in 2015. *E.g.*, Ex. 540; Ex. 75; Trial Tr. 440:18-25. Knowing full well that OBOT and TLS had provided this document to the City in 2015, OBOT did not negotiate any provision stating that OBOT needed feedback or comments prior to moving forward. Ex. 68-35 §6.2.1; *see generally supra* at 34-37, 39.

(d) *Discretionary Permits/Environmental Review (FM #5).* There is no dispute that prior to the Ground Lease, the City had explained to CCIG and OBOT its position that when OBOT proposed specific plans for the West Gateway terminal project and brought those plans forward for regulatory review, additional discretionary permits or additional environmental review might be required. Ex. 555 (Flynn December 2015 letter); Ex. 66 (Landreth February 11, 2016 letter); *see supra* at 17-18, 30 (discussing these letters). Mr. Tagami admitted that CCIG understood the City's position regarding discretionary decisions, permits, and further environmental review at the time that these letters were received. Trial Tr. 400:18-22, 676:18-677:5; *see supra* at 18, 30 (more detailed discussion). Indeed, subsequent discretionary approvals (such as grading permits) and additional environmental review had been expressly contemplated in the parties' 2013 Development Agreement, consistent with applicable law, including CEQA. Ex. 7-16-17; 7-25-26 §3.5; Trial Tr. 2368:5-13; *see supra* at 11-12, 17, 30. And, again, the parties acknowledged in the language of the Ground Lease itself the potential need for additional CEQA review and for other regulatory approvals. Ex. 68-29 §5.2.1.

While Mr. Tagami and other CCIG witnesses claimed to have been "blindsided" or "surprised" by Ms. Cappio's comments at the March 9, 2016 kick-off meeting regarding CEQA, discretionary permits, and "commodity-by-commodity" review, Trial Tr. 474:6-14, 2624:9-24, Mr. Tagami later admitted that Ms. Cappio's comments at the meeting were in line with Rachel Flynn's December 2015 letter. Trial Tr. 1436:5-9. Skyler Sanders similarly testified that he understood Ms. Landreth's February 11, 2016 letter to contemplate commodity-by-commodity review. Trial Tr. 2905:1-20, 2919:4-8; *see generally supra* at 17-18, 30.[66]

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[66] Megan Morodomi, CCIG's project manager, originally testified that she thought that Ms.

(e) *Completion of the Public Improvements/Rail R/O/W (FM #6)*. There is no dispute that OBOT was aware at the time of the Ground Lease that the City's public improvements were ongoing, and expressly agreed in the Ground Lease that it was taking the land subject to interference with use and utility. Ex. 68-11 §1.1.1 (Ground Lease); Ex. 561-25 §5.3.1(a) (LDDA Third Amendment); Trial Tr. 1171:9-13. OBOT did not negotiate a deadline for completion, and agreed to a sole and exclusive remedy—the ability to terminate the contract—if the improvements were not completed. Ex. 68-117 (§37.9.2(b)). The plain terms of the Ground Lease thus contemplated that public improvements would be ongoing, and the force majeure clause cannot implicitly override this knowing and express assumption of this risk. Moreover, CCIG was the City's manager for those public improvements at the time of contract, and was responsible for the schedule for those improvements. *See supra* at 10, 50. Plaintiffs thus cannot credibly claim that they could not have foreseen that any improvements would continue after the Ground Lease was signed.

(f) *Execution of the RAA (FM #7)*. There is likewise no dispute that at the time the Ground Lease was signed, all parties were aware the City and the Port had not yet entered into the RAA. OBOT waived this condition precedent to enter into this contract. Ex. 68-10 (Recital D); Trial Tr. 1181:3-17 (Tagami); Trial Tr. 1038:10-14 (Tagami). OBOT did not negotiate a deadline, and again agreed to a sole and exclusive remedy (the right to terminate the contract) for the failure to sign an RAA. Ex. 68-31 (Ground Lease §5.2.3(a)). The plain terms of this contract establish that it was foreseeable that the City and the Port would continue to negotiate the RAA.

(g) *ACTC Funding for Wharf Improvements (FM#10)*. Mr. Tagami complained at trial about a letter from Mayor Schaaf to ACTC, as well as comments by Councilmember Rebecca Kaplan at an ACTC meeting. Trial Tr. 260:1-10; 261:13-262:15. While no evidence supports the

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Cappio's statements about CEQA at the March 9 meeting was "new information" for CCIG, which was the source of CCIG's "surprise and frustration.". Trial Tr. 1962:8-12, 1892:14-21. But upon being shown Exhibit 66, she testified that she had not been informed that the City had previously indicated to CCIG that additional discretionary permits or environmental review might be required. Trial Tr. 1962:13-1964:9. Mr. McClure likewise testified he was "surprised" by the City's statements, but also admitted that CCIG was aware of the City's position prior to the contract. Trial Tr. 2620:19-24, 2624:16-24.

contention that the City sought to block ACTC funding, *see infra* at 111-112, the conduct Mr. Tagami complained about took place in 2015, long before the Ground Lease. Ex. 42; Trial Tr. 262:4-15. OBOT also expressly waived the LDDA condition precedent associated with that funding. Ex. 561-25 §5.3.1(b); Ex. 68-10 (Recital D); Trial Tr. 1173:10-1177:11.

2. Evidence Conclusively Proved that OBOT's Performance with Respect to the Terminal and Rail Was Within its Control and that OBOT Chose to Delay

The trial evidence showed that performance with respect to terminal and rail construction was always within OBOT's control, and that OBOT chose to delay. *Supra* at 38-46, 52-54. The evidence therefore conclusively established that OBOT did not act with diligence and skill with respect to performance that was within its control, and that is fatal to *all* its force majeure claims.

(a) *Terminal*. The evidence at trial conclusively established that the reason OBOT did not perform is that it made a series of commitments to a potential sublessee that continued to pay OBOT lucrative sums but was unwilling to sign a sublease and commence performance until well after it was too late to do so. *Supra* at 38-46. And although it appears that after it signed the Ground Lease OBOT was exploring a phased approach to construction beginning with a commodity other than coal, and that this path was viable, OBOT and its sublessee ultimately declined to pursue it. *Supra* at 39-42.

Because OBOT never intended to finance the construction of the terminal itself (though Mr. Tagami admits it could have done so), declined to pursue financing for commodities that promised a less lucrative revenue stream, and instead stuck with a sublessee interested only in pursuing a coal terminal, the sublessee's continued unwillingness to "take down" (sign) a sublease for the terminal meant that OBOT effectively did nothing. During the period that OBOT went through ten option extensions with TLS (in Mr. Tagami's terms: the "Siegel shuffle"), then the new IES sublease (soon declared "null and void"), and then finally the ITS sublease negotiated from May to September 2018 (held up by payments to OBOT), OBOT did not take steps to perform. *Supra* at 39-46. By the time the sublessee was ready to commit, it was too late.

OBOT failed to move forward despite the fact that it was within OBOT's control to perform. Mr. Tagami admitted that OBOT "could have" funded the entire Minimum Project

itself, but chose not to. *Supra* at 43; Trial Tr. 1268:19-1269:16. OBOT made a business decision to instead stick with Bowie and Mr. Siegel. OBOT chose to wait for any further design work, and never applied for a single permit. *Supra* at 38-39, 56, 58-59. Even after OBOT prevailed in the federal litigation on May 15, 2018, it still did not present a project to the City, but rather chose to spend the summer of 2018 negotiating for payments to itself. *Supra* at 45-46.

Finally, the Ground Lease required OBOT (not its sublessee) to obtain all regulatory approvals, including permits from the City of Oakland and from third-party regulators. Ex. 68-29 §5.2.1; Ex. 68-30 §5.2.2; Ex. 68-35 §6.2.1; Ex. 68-36 §6.2.4; Ex. 68-40 §6.2.13. OBOT admitted it did not apply for a single permit for this project, from the City or anyone else. *Supra* at 56.

Thus, even if any of the claimed events had impacted OBOT's ability to proceed, it would not matter, because OBOT did not act with diligence in pursuing performance as required by the Force Majeure clause. *See supra* at 75-76; *compare Pacific Venture Corp. v. Huey* (1940) 15 Cal.2d 711, 717 ("It appears to be well settled that a person cannot avoid liability for the nonperformance of an obligation by placing such performance beyond his control by his own voluntary act."). OBOT did not demonstrate diligent pursuit of performance from the time Mr. Tagami walked out of the March 9, 2016 meeting through August 14, 2018.[67]

(b) *Rail*. As an initial matter, the trial record established that any delays of the rail construction were unrelated to terminal construction. *Supra* at 47-48. Moreover, the evidence established that construction of the rail improvements required to meet the Initial Milestone was within OBOT's control, and OBOT's decision to halt rail construction in May 2018 forecloses it from showing that it acted diligently to perform. *Supra* at 52-54. Significantly, at trial, OBOT and OGRE had no explanation at all for the language of the June 2018 OGRE sublease which by

[67] Witness testimony that OBOT attempted to move the project forward by making oral requests for meetings was not credible. The record evidence was replete with testimony regarding the biweekly meetings between Mr. Tagami and Claudia Cappio, and other regular meetings with the City regarding the project. *Supra* at 33 n.20. And despite Mr. Tagami's penchant for documentation, and Mr. Tagami's admission that when OBOT wanted something from the City, it knew how to ask in writing, Trial Tr. 1208:5-7, Plaintiffs did not introduce a single document evidencing such a request. *Supra* at 33. Further, internal OBOT documents introduced by the City reflected OBOT's recognition that it would need to return to the City to request such a meeting. *E.g.*, Exs. 601-3, 661.

express agreement delayed OGRE's assumption of the rail obligations for *years*, until after OGRE obtained common carrier status. Ex. 162-7. Nothing in the Ground Lease addressed, let alone required, OGRE to have such status to construct track. *Supra* at 52-53.

The record evidence also demonstrated that while landlord approval pursuant to Section 6.2.1 was required for rail drawings, OBOT never submitted any drawings until 2019.[68] OBOT did not act with diligence to advance the drawings through the *required* steps with respect to rail.

3. No Event Rendered Timely Performance Impossible or Unduly Expensive[69]

Even if any of the following force majeure contentions were not barred by res judicata, *supra* at 82-90, or did not involve a plainly anticipated and foreseeable event, *supra* at 91-96, and even if OBOT had acted with diligence to perform, *supra* at 97-99, the following events did not render OBOT's performance impossible. Because OBOT did not submit any evidence at trial to establish that any claimed force majeure event rendered its performance "unreasonably expensive" the Court's analysis is limited to impossibility of timely performance.

(a) *FM #1: The DA Binder*. The earliest request in the record for the binder that was overdue under the DA is dated January 21, 2016. Ex. 65. The City ultimately provided the binder to OBOT on June 15, 2016. *Supra* at 33.[70] OBOT submitted no evidence demonstrating that the lack of this binder of regulations actually impacted any aspect of the project during those few months, or that without the binder OBOT's engineering consultants could not have moved forward with design work.

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[68] OGRE's submission of drawings for the *public* improvements did not meet this requirement.

[69] As discussed above, the plain meaning of the force majeure provision requires application of the usual force majeure standard under California law, as nothing in the parties' agreement altered this standard. Even if Plaintiffs were correct that the standard is "hinder," meaning something less than render impossible or unreasonably expensive, the Court still concludes that OBOT has not met its burden in light of the evidence described in this section and the conclusive evidence that the City's actions were not the reasons for OBOT's delay in performance discussed in this decision.

[70] As discussed *supra* at 33-34, Mr. Tagami initially testified that he did not approve receiving an electronic version, and never received a signed version, but later admitted he did. Mr. Tagami also claimed to have provided the City a corrected version, but no evidence was introduced that any such correction was given to the City. *Supra* at 34.

Plaintiffs' witnesses Mr. Tagami and Mr. McClure generally made assertions that the delay prevented OBOT from moving forward with the terminal. Trial Tr. 326:12-327:5; 2678:16-2679:25; *see also* Trial Tr. 560:6-12 (Mr. Tagami testifying that it would be a "waste of time, energy, and money" to prepare schematic drawings prior to receiving the binder of regulations). But the record evidence did not support those bare assertions. Far from supporting Mr. Tagami's assertion that OBOT was "flying blind" without the binder, Trial Tr. 327:4, the evidence showed that even before receiving the binder, OBOT was already aware of the regulations that applied to the project. Mr. Tagami and Project manager Ms. Morodomi confirmed that CCIG had compiled its own version of the binder of existing regulations, and had identified the 76 permits needed for the project, as corroborated by OBOT's list of potentially required permits. *Supra* at 34. Mr. Tagami confirmed that even without the binder he knew how to (and did) determine how many permits would be required for the terminal project. *Id.*[71]

Relatedly, there was no evidence that upon receiving the binder from the City, OBOT did anything to utilize those regulations or more generally to move the design of the terminal forward. To the contrary, uncontroverted evidence showed that Mr. Tagami and Mr. Siegel had already decided to go "pencils down" on the design work in July 2015 (and never picked those pencils up again until September 2018), *supra* at 38-39, and informed the City that they would return with "further refined design parameters" only after a sublease was signed, *supra* at 35-36. When OBOT did submit the new ITS BOD to the City in September 2018 for landlord review (reflecting *no* progress since the July 2015 version, *supra* at 58-59), OBOT had no more additional information regarding the City's compilation of regulations than it had had in June 2016, just a few months after the Ground Lease was signed. *Supra* at 33. This shows that the few-month absence of the binders was not the factor that prevented OBOT from fulfilling its Ground Lease obligations.

[71] Other than the "handful" of extraneous regulations in the City's binder Ms. Morodomi claimed to have identified (but which no witness could recall specifically at trial, and of which there is no written record of any kind, *supra* at 34), OBOT's witnesses offered no testimony that the City's compilation of regulations differed in any way from the applicable regulations OBOT itself identified.

(b) *FM #2: The 2016 Ordinance and Resolution*. The evidence at trial established that the Ordinance and Resolution did not make it impossible or unreasonably expensive for OBOT to commence construction of a terminal capable of exporting at least one commodity by the contract deadline. Ex. 68-31-33 §§6.1, 6.1.1, 6.1.2.

First, Mr. Tagami admitted that he could have self-financed the Minimum Project notwithstanding the City's actions about which OBOT now complains. *See supra* at 43-44. He also admitted that he had opportunities for financing from non-coal interests that he declined to pursue. *See supra* at 43-44. In fact, such a terminal would have been *less*, not *more*, expensive. *Supra* at 43. These admissions alone would defeat this force majeure claim.

Second, the parties agreed that OBOT could challenge the application of the City's coal legislation to the project, and that during the pendency of that challenge, OBOT *could not be called in default* for failure to comply with that legislation. Ex. 68-28 §5.1. OBOT ignores this provision entirely, but it means that OBOT could have presented its desired plans for approval and the City would have been bound to apply otherwise existing law notwithstanding the coal Ordinance.[72] Indeed, the contract required OBOT to move forward through those design and preconstruction steps, and gave OBOT the safety valve it needed to proceed whether it was going to win or lose its eventual challenge to the law. OBOT instead chose to hedge its bets, and to await the outcome of the federal litigation. But the contract did not permit OBOT to unilaterally extend its construction deadlines in this manner, but instead provided the means for OBOT to perform notwithstanding any challenge to the City's actions.

Third, Mr. Siegel's business decision that coal would be "more profitable" than soda ash, *supra* at 41, also did not entitle OBOT to cease performance of its contractual obligations. "[A]cts that merely make performance *unprofitable* or more difficult or expensive do not suffice to excuse a contractual obligation." *SVAP III Poway Crossings*, 87 Cal.App.5th at 895 (emphasis added). In any event, OBOT did not even attempt to prove, and the trial evidence did not establish, that OBOT's available options would have been unprofitable. Extensive evidence of

[72] The Ordinance and Resolution barred the eventual storage and handling of coal once any terminal became operational, and said nothing about construction. Ex. 87.

third-party as well as internal assessments during the performance period showed that a multi-commodity terminal that did not depend on coal was commercially viable. *Supra* at 41, 43-44. For example, in August 2016, after the Ordinance was adopted, investment firm Brookhaven Capital Partners expressed confidence in the "compelling economics" of the project based on non-coal commodities, and expressed interest in moving forward. *Supra* at 43-44. Macquarie, a financial consultant that OBOT retained to provide an assessment of the viability of the terminal project and the market for bulk commodities, communicated that the terminal could be an attractive opportunity with soda ash, *supra* at 43. Another OBOT-retained consultant, Black Quay, advised that the terminal could market itself for commodities such as soda ash. *Supra* at 44. And TLS executive Jim Wolff similarly testified that he created a financial model predicated on a soda ash terminal, and that model predicted the terminal would generate over $300 million in net present value. *Supra* at 41, 44.

Relatedly, contemporaneous actions and communications during the lease period undermine any claim that OBOT itself believed the Ordinance prevented it from meeting the initial milestone deadline. *Supra* at 44. Although the Ordinance was adopted in July 2016, OBOT failed to send any force majeure notice pertaining to the Ordinance for over two years—until July 30, 2018, when Mr. Sanders sent a letter purporting to "reiterate" such a force majeure claim. *Supra* at 60. During that time, Mr. Tagami continued to press Mr. Siegel to move forward and finance the terminal, including by having Mr. Siegel contractually commit to meet the Ground Lease deadlines. *Supra* at 39-41.

The record contains documents throughout the performance window when OBOT repeatedly acknowledges the existing deadlines. *Supra* at 39-41. For example, in July 2016, Mr. Tagami sent Mr. Siegel a schedule showing the Initial Milestone deadline as August 14, 2018. *Supra* at 40; Ex. 604. In July 2017, OBOT provided the City a letter stating that its performance of the minimum project was not yet due, acknowledging the February 15, 2018 minimum project commencement date set forth in the Ground Lease, and making no claim that the Ordinance had extended its performance obligation deadline. *Supra* at 40; Ex. 633. And in the January 8, 2018 IES sublease abstract, OBOT again acknowledged that construction of the minimum project had

to commence by August 14, 2018. *Supra* at 40. In fact, OBOT included a liquidated damages provision in Section 6.1.2.1 of the IES sublease should IES fail to meet that minimum project deadline, further underlining OBOT's belief that the August 14, 2018 deadline had not moved. *Supra* at 40.

Further, the evidence at trial was undisputed that OBOT understood—and indeed, had communicated to the City—that it would be possible to proceed with the terminal project in phases and to build a smaller terminal to get the project "up and running" prior to final resolution of the coal issue. *Supra* at 19; *see, e.g.*, Ex. 64 ("To mitigate any number of issues, an initial operation may be a smaller 'multi commodity bulk terminal operation' that will still meet and exceed the minimum project requirements by way of cost/spend, but would handle fewer products and require less storage initially."). OBOT frequently asserted that it was possible to plan and build a multi-commodity terminal capable of shipping *any* legal commodity without planning to rely on coal. *Supra* at 12-13, 19.

For similar reasons, the testimony by Plaintiffs' witnesses that the "overburden" caused by the threat of City regulation interfered with their ability to move the project forward, Trial Tr. 486:20-22, 2676:1-16, finds no support in the documentary evidence. To the contrary, CCIG and TLS's internal and external communications between 2016 and 2018 demonstrate their contemporaneous understanding that it was possible for them to move forward with the terminal project. *See, e.g.*, *supra* at 42-44. OBOT introduced no evidence that the Ordinance caused it to be unable to obtain financing for design and construction of the terminal. The evidence at trial in fact demonstrated that OBOT could have financed a terminal notwithstanding the City's legislative action with respect to coal. In any event, the Ground Lease expressly provides that "Force Majeure does not include failure to obtain financing or have adequate funds," Ex. 68-132 (Art. 40), and places on OBOT the risk of financing the project, *see, e.g.*, Ex. 68-29 §5.2.1, 68-36 §6.2.4.[73]

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[73] The West Gateway Ground Lease force majeure provision contains no limitation qualifying the statement that lack of financing or funding is not force majeure to permit force majeure claims when other events interfere with funding. Compare the far more specific force majeure provision

In sum, the record evidence demonstrates that the City's Ordinance and Resolution did not prevent OBOT from complying with its performance obligations.

(c) *FM #3: "Feedback" on the 2015 TLS BOD.* Plaintiffs' witnesses testified that the reason that OBOT failed to apply for any permits for the project or otherwise to take steps toward commencement of construction is because the City never provided "feedback" on the 2015 TLS Basis of Design. Trial Tr. 1143:9-12, 1604:6-23. This testimony was not credible. There is not a single document in the record requesting the City to give "feedback" on the 2015 TLS BOD, or submitting the 2015 TLS BOD under the Ground Lease as Schematic Drawings for City approval. *Supra* at 35.

The evidence is to the contrary. In May 2016, OBOT specifically informed the City that it would revise and resubmit the BOD once it had a sublease in place, and instructed the City *not* to review the TLS Basis of Design but to await a subsequent version. *Supra* at 35-37; Exs. 589, 598. OBOT never revoked this instruction or submitted a new BOD until September 2018, when it was too late.

Further, once OBOT finally did have the ITS sublease in place in 2018, it submitted the ITS BOD for approval without ever having received the "feedback" it contends prevented it from moving forward. There is no credible record evidence that the alleged lack of detailed "feedback" on the 2015 Basis of Design made it impossible for OBOT to move forward with the project.

This claim also ignores the plain language of the Ground Lease. While OBOT may have believed that "feedback" or "comments" from the City would be useful, OBOT did not negotiate language requiring such "feedback" or "comments." Ex. 68-35 §6.2.1. In fact, even assuming (contrary to the record) that OBOT had submitted the 2015 BOD for landlord approval, the Ground Lease contemplates that the City might fail to approve or disapprove the submission of drawings, and provides an express remedy: the drawings "shall be deemed approved" after OBOT

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negotiated by CCIG in the LDDA, which specifically stated: "…the condition of the market, lack of credit or financing (unless such lack is itself a result of some other event of Force Majeure) shall not be considered to be a matter beyond the Developer's control and therefore no event caused by a lack of such financing or credit in and of itself shall be considered to be an event of Force Majeure for purposes of this Agreement." Ex. 378-62, §10.1.2).

provides notice, and OBOT can continue to the next design stage. Ex. 68-35 §6.2.1. In other words, the plain language of the contract does *not* grant OBOT an indefinite Force Majeure extension of all contract deadlines *until* the City responds to the schematic drawings—to the contrary, the contract contemplates that OBOT can and must move forward. Ex. 68-35 §6.2.1.

Finally, Plaintiffs' unsupported generalizations cannot overcome the evidence that OBOT was in fact waiting on its sublessee, which was delayed for financial reasons, before submitting further design work to the City, not by any lack of (voluntary) feedback from the City.[74]

(d) *FM #4: Cappio Memo and Permitting.* Plaintiffs contend that the City imposed an unusual review process for OBOT permits through what they called the "Cappio Memo," a November 2015 memorandum from Ms. Cappio to the Planning and Building Department staff regarding the review process for OBOT permits, and that this review process delayed the project. Ex. 61-3. But as Plaintiffs' witnesses admitted at trial, OBOT never submitted a single construction permit application for the West Gateway terminal project to which this memo could have applied. Trial Tr. 1997:4-20, 1999:13-19, 3561:18-22, 3564:9-15. The City's internal review processes therefore could not possibly have been the reason why (non-existent) permit applications were not granted. The City's *intent* is irrelevant; OBOT submitted no evidence of the City's *actions* with respect to any permits or the permitting process because OBOT never applied for a single permit.

The Ground Lease placed the responsibility to apply for construction permits upon OBOT. Ex. 68-36 §6.2.4. If OBOT had submitted a permit application, and the City had denied the permit, then it would be possible to evaluate whether the denial was lawful, or somehow rendered performance impossible. But this memorandum did not delay anything in the absence of any permit application to review.

Nor did Plaintiffs introduce any record evidence to support their apparent theory that the City intended not to issue permits for the project, which is *not* what the memo says. Rather, the

[74] The record evidence also established that Mr. Tagami and Mr. Siegel decided to go pencils down on July 21, 2015, the very day that OBOT first provided the TLS BOD to the City in conjunction with the health and safety hearings. *Supra* at 38-39. That decision could not have been made because of any lack of "feedback" on a design that had not yet been shared.

memo instructs that that the City Council would be notified "[a]t least 15 working days prior to the *issuance* of any building or construction-related permit." Ex. 61-2 (emphasis added).

Mr. Tagami testified that he viewed the "Cappio Memo" "as something that was hindering, delaying, would be delaying the project." Trial Tr. 432:16-19. But no evidence supports Mr. Tagami's conclusion. And the testimony of all witnesses with first-hand knowledge of Ms. Cappio's memo established that its purpose was to ensure that permits were processed accurately and to keep the City Council apprised of a high profile project. *Supra* at 17. Plaintiffs' speculation that City officials planned to veto permit applications when notified that they had been filed, or that the City Council intended to take legislative action to thwart the issuance of such permits, is unsupported by any trial evidence and is directly contrary to the witnesses' testimony.[75] Trial Tr. 2253:13-16 (Cappio), 3145:16-24 (Ranelletti), 3258:12-17 (Landreth).

Nor was there any evidence that the City refused to take any meeting that OBOT requested regarding permitting; in fact City witnesses credibly testified that they met regularly with Mr. Tagami. *Supra* at 33.

Finally, as with several of Plaintiffs' claims, prior to the Initial Milestone deadline OBOT never submitted any force majeure notice to the City about the Cappio Memo or the failure to meet and confer, nor *any* written complaint in the record on these topics prior to the performance deadline. Trial Tr. 2962:22-25. This fact casts further doubt on Plaintiffs' claim that they felt the Cappio Memo was preventing them from submitting permit applications or otherwise hindering their ability to move forward with the project.

(e) *FM #5: The City's Position Regarding Discretionary Permitting and Environmental Review.* As previously discussed, there is no dispute that the parties coordinated on a "pre-application" meeting between various departments of the City, including the City Administrators' Office and the Planning and Building Department, and representatives of CCIG,

[75] It is of no relevance that City officials were unaware of similar memoranda. Credible witness testimony established that the practices set forth in the memorandum were not unusual. Trial Tr. 2509:6-2510:1, 3139:15-3140:2, 3209:9-18, 3143:7–18. Nor is it surprising (or concerning) that City Council members requested updates regarding permitting for such a high-profile development project. Trial Tr. 2257:3-7.

OBOT and OGRE on March 9, 2016. *Supra* at 29. The testimony from Plaintiffs' witnesses that they were "surprised" by statements from the City at that meeting regarding potential discretionary reviews and additional CEQA analysis was not credible. The City's communications at the March 9 meeting were consistent with the applicable law, with the parties' contracts, and with the City's communications to Plaintiffs prior to that meeting—indeed, prior to the parties' entry into the Ground Lease. *Supra* at 30.[76] As Mr. McClure admitted, this was just a dispute regarding the parties' respective understanding of the law (which is not an event of force majeure). Trial Tr. 2626:2-2627:8. Plaintiffs presented no evidence supporting the conclusion that the City's statements at this meeting interfered in any way with Plaintiffs' ability to move forward towards commencing construction of the Terminal.

As discussed, OBOT never submitted any plans or permit applications for the project prior to the August 2018 deadline. *Supra* at 56-58. So any plans for discretionary permits or further environmental analysis could not possibly have prevented OBOT from commencing construction of the terminal by the Initial Milestone deadline. To the contrary, City officials testified that they were eager to move the project forward expeditiously.[77] In fact, testimony showed that OBOT *knew* that the City wanted the project to move forward. ITS's investment banker Adam Rosen explained that during his involvement with the terminal project beginning in May 2018, contrary to Mr. Tagami's assertions here that the City was trying to "block" the project, Mr. Tagami repeatedly told him that "the city wanted the project to move forward for non-coal commodities." Ex. 957 at 200:11-16, 200:25-201:11, 203:8-19, 205:2-5, 206:3-21, 207:10-15.

[76] The City's witnesses credibly explained why Section 15162 of CEQA requires the City to conduct a comparative analysis between an existing EIR and new project proposals to determine whether subsequent review is needed. *Supra* at 32; Trial Tr. 2315:11-18, 2422:10-13, 2423:22-2424:10, 2428:16-2429:13, 3106:25–3107:3, 3124:8–3125:8. Ms. Cappio explained that had she declared CEQA "closed" as Mr. Tagami requested, the City "would have been vulnerable to subsequent litigation or challenge that we did not follow the prescribed process under state law." Trial Tr. 2371:16-25. This is not ground-breaking nor should it be surprising to an experienced developer. Indeed, the City introduced OBOT's internal documents and communications with the Port in which they discussed additional environmental review. *Supra* at 32. Likewise, the planning code includes categories of discretionary permits, some of which are listed in the DA (grading permits) as Subsequent Approvals. *Supra* at 12, 31. There should have been no "surprise" about the City's position, consistent with applicable law.

[77] *See, e.g.*, Trial Tr. 2271:14-15, 2291:21-25, 2372:5-12, 2409:22-2410:8, 3145:21–3146:11, 3149:14-25.

Plaintiffs also complained that the City never gave them a "list" of approved commodities. *E.g.*, Trial Tr. 419:10-17. But as Mr. McClure admitted, no contract provision required the City to provide such a list. Trial Tr. 2675:10-25. Nor was there any documentation that OBOT or its business partners had requested one. Trial Tr. 2082:3-8, 2083:7-15 (Cappio); Trial Tr. 2682:14-21 (McClure admitting OBOT never told the City in writing that it could not move forward without an approved list of commodities). Further, the trial testimony established that OBOT did not need approval of particular commodities in order to design the promised multi-commodity terminal. Trial Tr. 1103:18-1104:1 (Wolff). Nor did the design of rail depend in any way on which commodities were transported over the rail. Trial Tr. 794:22-795:11 (Stotka). Mr. McClure and Mr. Wolff admitted that OBOT submitted the ITS drawings for landlord approval in 2018, and *ITS instructed its consultants to re-start the design process*, notwithstanding that OBOT and ITS had not received a list of preapproved commodities from the City. Trial Tr. 1103:18-1104:1, 2731:11-15. There was therefore no evidence that the failure to provide such a list had any impact on OBOT's ability to perform.

With respect to Mr. Tagami's requested "soda ash letter," Plaintiffs similarly failed to show that the City's conduct prevented design or construction of the terminal. As Mr. McClure conceded, no provision of the Ground Lease or other applicable law required the City to affirm, in advance, that certain commodities would be "approved" or acceptable to the City. *See* Trial Tr. 2675:10-25.

And the City's acts in relation to OBOT's request for such a letter were aimed at helping OBOT, not preventing performance: Ms. Cappio drafted a letter for Mr. Tagami that was broadly supportive of soda ash, with caveats given the preliminary nature of the City's analysis (and the legal requirements that would bind the City in any future review, including under CEQA). Ex. 91; Trial Tr. 2498:3-10. Ms. Cappio explained that upon review, the City Attorney instructed her that it should not be issued. Trial Tr. 2089:3-12. The City had recently been sued under CEQA in relation to the project, and Ms. Cappio acknowledged that the letter she had drafted was not part of the standard CEQA review process, and that she had never previously issued a similar letter. Trial Tr. 2498:11-19. In Ms. Cappio's view, "we could have reached the point where we

were ready to issue that letter," but it was "premature" in the absence of "any further detail on the design and operational characteristics of the terminal itself." Trial Tr. 2271:7-14, 2271:24-2272:1. Nonetheless, Ms. Cappio told Mr. Tagami that she "was still willing to make efforts to make sure that he could get the financing he needed." Trial Tr. 2499:5-10. And there is no record evidence of any communication by OBOT to the City, internal communication, or communication with any third party prior to the performance deadline suggesting that without such a letter that OBOT could not perform. Indeed, OBOT did not have such a letter when it signed the ITS sublease and (re)submitted the BOD in late September 2018—undermining any claim that such a letter was necessary.

The evidence was undisputed that OBOT did not move the project forward following the March 9, 2016 meeting through the performance deadline. Even if OBOT held a subjective belief that the City was not going to allow OBOT to move forward (which is not supported by this record, given OBOT's internal comments and communications with its business partners about moving the project forward), California law does not allow parties to decline to perform simply because they suspect another party (who has not repudiated the contract) will not do so, and regardless, this contract specifically barred OBOT from engaging in such "self-help." Ex. 68-92 §22.1. OBOT cannot contend it was "impossible" to perform even if it *believed* it was impossible to perform; OBOT must submit actual objective proof, which it did not.[78]

(f) *FM #6: Completion of Public Improvements/Rail R/O/W.* Plaintiffs' witnesses uniformly testified that OBOT and OGRE were prevented from constructing track by the City's delays in "turning over" the rail right-of-way land following the completion of the public

[78] Although Plaintiffs contend that City political leaders interfered with the project, all of the evidence relied on—most notably, the November 2015 Cappio Memo and Mark McClure's October 2015 phone call with Mayor Schaaf—pertain to events that took place prior to the parties agreeing to move forward by executing the Ground Lease. Exs. 59A, 61. And notwithstanding the City's opposition to coal, it executed the Ground Lease on February 16, 2016 to permit the project to move forward. Plaintiffs submitted no evidence establishing any causal connection between any elected official's statements and any City actions with respect to the project, other than the 2016 Ordinance itself. To the contrary, the City introduced uncontroverted evidence demonstrating that none of the elected officials including the Mayor and City Council had any role in the administrative oversight and decisions with respect to the regulatory approvals for the project. Trial Tr. 3257:24-3258:3 (Landreth).

improvements. Trial Tr. 2724:22–2725:1 (McClure); Trial Tr. 540:21-541:3 (Tagami); Trial Tr. 834:2-10 (Stotka). Plaintiffs' witnesses also testified that they were denied access to the Port property located for building track because the City did not provide them with that access prior to August 14, 2018. Trial Tr. 1656:23-1658:2 (McClure).

The evidence showed otherwise as to both issues. *Supra* at 48-52. The City demonstrated that OGRE had access to and began building track within the land in question. *Supra* at 49-50. The City's evidence established that public improvements were in fact complete in the rail corridor by Spring of 2018. *Id*. The City also demonstrated that OGRE would have had access to Port land under the temporary construction easements (and indeed, in 2016 was constructing "private rail" via those easements), but never asked for further access or extensions to construct rail on that land. *Supra* at 50-51. Mr. McClure's general statements, which avoided any specific discussion of the timing or location of public improvements, do not refute this evidence.

The City's evidence was also uncontroverted that in 2018 OGRE did two significant things to delay rail construction: (1) Mr. McClure ordered Mr. Stotka to stop building track in May 2018, and (2) OBOT and OGRE entered into a June 2018 sublease that delayed OGRE's responsibility for rail for years. *Supra* at 52-53.

In sum, while the rail evidence was complex and at times conflicting, the trial evidence made clear that OBOT and OGRE did have access to the relevant pieces of land, chose not to move forward with the rail improvements on that land for their own reasons, and were not prevented by the City from building track.

(g) *FM #7: Execution of RAA*. The evidence established that the absence of a final terms on a Rail Access Agreement ("RAA") between the City and the Port did not prevent Plaintiffs from being able to construct either the terminal or rail. *Supra* at 54-55. As reflected in the Ground Lease itself, the RAA was concerned with operations, not construction, and thus Plaintiffs could have constructed Minimum Project Rail Improvements on Port land without it. Ex. 68-31 §5.2.3. Finally, as discussed above, OBOT submitted no evidence that the City failed to use commercially reasonable efforts to negotiate the RAA beyond the amount of time it was taking to reach resolution. *Supra* at 55. The City's evidence established that the parties had a

significant number of substantive issues in dispute, negotiated and exchanged drafts in 2016, 2017, and 2018, and included OGRE and its counsel in those negotiations. *Id*. The Director of the Port, Danny Wan, credibly testified that the issues with respect to OGRE's desired ROA complicated the RAA discussions. *Id*. After having asked the City to take positions that made agreement with the Port on the RAA more difficult, and having created additional barriers to agreement through its own, separate ROA negotiations, OGRE cannot reasonably claim that the failure to consummate the RAA was a force majeure event excusing its performance.

(h) *FM #8: City's Position at the STB*. Plaintiffs presented no evidence that the City's action actually caused any delay in the authorization from the STB that OGRE sought on May 2018, let alone any evidence demonstrating a causal connection between the City's STB position and OBOT's failure to perform. *Supra* at 52-53; 57-58. OGRE's decision to wait until late May 2018 to file its STB application by itself rendered it highly unlikely that OGRE could have obtained approval in time to commence construction of one of the rail improvements before August 14, 2018. *Supra* at 53. OGRE cannot plausibly blame the City for its failure to obtain STB approval by August 2018 when OGRE waited for *three years* after withdrawing its 2015 notice of exemption, and waited until less than three months before the Initial Milestone deadline to resume its efforts.

Further, the City cannot be faulted for responding to OGRE's petition on the question of whether the STB has jurisdiction over track on City-owned land by raising questions about the historical record. Ex. 163. OGRE was pursuing a completely different process than it had when it filed notices of exemption in 2014 and 2015. The STB also raised its own questions about OGRE's shifting positions and the historical record. Ex. 752. The Port of Oakland also raised concerns about OGRE's 2018 submission, which OGRE should have anticipated, as the Port's opposition had forced OGRE to withdraw its 2015 STB submission. Ex. 214; Ex. 48; Ex. 52; Trial Tr. 2715:12-15. It is no surprise that a local entity would be concerned about losing authority over track on its land due to federal preemption (or about assuming additional responsibilities that come with federal jurisdiction). In fact, OGRE materials suggest that gaining an advantage in OBOT's federal lawsuit, in which OBOT was asserting rail preemption based on

STB jurisdiction, was part of the impetus for this petition.[79] Trial Tr. 3373:15-3374:11 (McClure).

Thus, even if OBOT had submitted any evidence that the STB proceeding could have impacted construction of either the terminal or rail (which it did not), OBOT did not establish that the City's actions with respect to those STB proceedings had any impact at all.

(i) *FM #9: Fence Permit.* The only permit that Plaintiffs ever sought during the entire performance period was not a construction permit, but a permit for a fence in the rail right-of-way along Burma Road. *Supra* at 56. Plaintiffs claim that the City's handling of this permit application interfered with their performance, but the record demonstrates otherwise.

First, Plaintiffs' witnesses admitted the fence was not necessary for construction of the terminal or rail, and therefore is irrelevant to performance of the Initial Milestone. *Id.* This permit was not applied for until 2018 (*id.*), was *granted by the City* (*id.*) and then not completed by OGRE until 2019 (*id.*). The City's actions caused no interference or delay at all.

(j) *FM #10: ACTC Funding.* In 2015, the City applied for tens of millions of dollars of infrastructure funding from ACTC for public improvements on the OAB. Ex. 42. ACTC ultimately allocated more than $40 million for public improvements at the Oakland Army Base. Ex. 854-26 at 104:21-22 (Cole designations). But ACTC declined to award the City $22 million that would have funded certain public wharf improvements on the West Gateway at that time. Trial Tr. 256:7-13, 258:9-15. Mr. Tagami's testimony suggested that ACTC's 2015 decision to hold back funding of $22 million was evidence of City interference with the terminal project, Trial Tr. 1423:10-14, but the uncontroverted record showed that the City did everything in its power to secure that $22 million in funding. The City had applied for those funds (including $22 million for public wharf improvements) in 2015, Ex. 42, and then *reapplied* for the $22 million in wharf improvement funding in 2016, after ACTC had denied its initial 2015 request, Exs. 711, 716. *See* Trial Tr. 1801:6-8, 2514:14-25, 3477:21-3478:25, 3481:23-3484:6; *see also* Ex. 561-20

[79] To the extent OBOT contends that OGRE needed common carrier status in order to operate the rail, that is not supported by the record (OGRE's affiliate WOPR currently performs switching services at the Port without such status). Trial Tr. 786:21-788:9.

§5.1.2 (making clear that the $22 million was for "Public Wharf Improvements").[80] And the record was undisputed that the City does not control ACTC. Trial Tr. 2514:12-13.

Finally, Plaintiffs presented no evidence drawing any connection between ACTC's decision not to award the $22 million in wharf improvements and Plaintiffs' failure to meet their performance requirements for the terminal and rail improvements under the Ground Lease.

(k) *FM #11 (NDA) and #12 (Estoppel).* Both of these contentions pertain to contract provisions applicable to OBOT's proposed subleases. Plaintiffs' force majeure contentions regarding the "failure" to provide Non-Disturbance Agreements and Estoppel Certificates regarding OBOT's sublessees are both based on communications with the City after the performance deadline, and not supported by the record, which shows that the City complied with the applicable contract provisions (Ex. 68-74-75 §12.5, 68-94 §26.1) in these communications, including by issuing the estoppel certificates with respect to both ITS and OGRE, and telling OBOT it could request an NDA if and when it cured the default. *Supra* at 59.

C. *OBOT Was Not Otherwise Excused From Performing*

At times, OBOT has contended that in addition to excuse by way of a Force Majeure extension of the Initial Milestone deadline, it is also arguing that the City prevented its performance and therefore performance was excused.[81] OBOT does not appear to seriously contend that performance was *fully* excused given its desire to extend the contract deadlines and keep the Ground Lease in place (which is relief that is only possible by way of the Force Majeure provision). Regardless, even if OBOT is making a prevention of performance claim/defense (*e.g.*, *Ray Thomas Inc. v. Cowan* (1929) 99 Cal.App. 140, 145) for all the reasons discussed above,

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[80] Mr. Tagami initially suggested that Oakland City Councilmember Rebecca Kaplan had stated at an ACTC meeting in 2015 that the City would not apply for funding for the wharf improvements. Trial Tr. 261:14-18, 262:11-14. But Mr. Tagami admitted that Councilmember Kaplan only repeated the same comments made in Mayor Schaaf's 2015 letter—which *did* request wharf improvement funding. Trial Tr. 262:7-9. And Mr. McClure confirmed that he had acknowledged in a May 2017 letter that "Councilmember Kaplan has been very supportive of the project in all of her unique roles," including as "chair of the ACTC," and he testified that she "was instrumental in getting additional ACTC funds for the public improvements." Trial Tr. 3479:24-3480:11.

[81] As discussed *supra* at 82, Plaintiffs have expressly disclaimed any argument that the City's prior breach of the DA, as found by the federal court, excused its performance under the Ground Lease.

OBOT has not met its burden here of proving that any of the City's above-named actions *prevented* it from performing (if the City did not prevent timely performance, as discussed above, it did not prevent full performance). The evidence was conclusive that OBOT's failure to perform resulted from its own choices and decisions.

D. *The City Was Within its Discretion to Conclude OBOT Failed to Cure its Violation of the Contract*

As discussed *supra* at 56-59, the evidence showed that the City was justified in determining that OBOT had not cured its default. During the 30-day cure period, OBOT did not commence construction to cure the default, or "prosecute such cure with diligence and dispatch within a reasonable time thereafter," Ex. 68-86-87 §18.1.7. The City was within its discretion to conclude that OBOT's submission of the ITS sublease (which is not a required step towards construction) or the ITS BOD (which the City rejected as incomplete) were inadequate to cure, particularly given OBOT's own schedules and Plaintiffs' witness testimony that even diligent efforts would not result in the commencement of construction within a reasonable time period, *supra* at 58-59.

E. *The City Has Proven the Elements of Its Breach Claim*

The Court therefore concludes, based on the above findings of fact and conclusions of law, that the City has met its burden to establish the elements of its claim of breach of contract by OBOT: 1) there is no dispute that the contract existed; 2) the City met its performance obligations by leasing OBOT the land in question on February 16, 2018 (and any allegation that the City failed to perform is either contrary to the plain terms of the contract or lacks any credible evidentiary support, as discussed above); 3) OBOT breached the Initial Milestone deadline; and 4) the City was harmed by OBOT's failure to perform, because it did not get the project it was promised. The Court reserves further judgement on harm and remedy for the next phase.

III. OBOT and OGRE's Contract Claims Are Foreclosed by OBOT's Breach of the Ground Lease

A. *OBOT and OGRE's Claims for Breach of the Ground Lease*

Because the Court concludes that OBOT has breached the Ground Lease, OBOT and OGRE do not prevail on their claim that the City breached the Ground Lease. The City properly terminated the contract in accordance with its terms.

Similarly, because OBOT and OGRE must prove excuse of performance to state any claim for breach of the implied covenant, those claims are foreclosed by the Court's finding that OBOT's performance was not excused. Further, in light of the factual findings explained above, OBOT did not prove that the City took objectively unreasonable action, or action that it subjectively believed invalid, which the contract did not give it the right to take, and which deprived OBOT of the benefit of its bargain, under the applicable legal standards. For these reasons as well, Plaintiffs cannot establish breach of the implied covenant. *See supra* at 67-69.

Finally, in light of the factual findings explained above, Plaintiffs did not prove any repudiation of the contract, either express or implied, by the City. Plaintiffs submitted no evidence of any express statement of repudiation of the contract by the City, nor any act of the City that rendered the City's own performance impossible. Further, OBOT elected to wait and sue for actual breach rather than sue for anticipatory breach prior to its performance deadline. And OBOT did not attempt to prove that it would have been able to fully perform notwithstanding the City's actions. *See supra* at 66-67.

B. *OBOT and OGRE's Claims for Breach of the DA*

OBOT and OGRE have alleged during trial that the City has also breached the DA in three ways, none of which has merit, for reasons previously explained in the preceding sections. *See* Plfs' July 11, 2023 Alleged Breaches of Contract by City of Oakland (alleging three additional breaches of the DA in 2016 in conjunction with the March 9 meeting). These allegations are barred both by res judicata, *supra* at 83-90, and by OBOT's failure to ever notice any City default, which is preclusive. *See* Ex.68-91-92 §22.1. These claims are barred by res judicata, by OBOT's failure to notice any default, and for all the reasons stated above. Moreover, as a factual

matter, these allegations simply do not withstand scrutiny. The City did not "reopen CEQA" by discussing the potential application of this law to OBOT's proposed project or "fail to process" OBOT's never-filed permits. *Supra* at 30-32, 56, 95, 105-107 & n.76.

C. *OGRE's Third-Party Claims*

OGRE's claims fail with OBOT's. But even if OBOT had prevailed on any of its claims, OGRE would not be entitled to any relief. Both the Ground Lease and the DA expressly state that the parties do not intend to have any third-party beneficiaries. Pursuant to the standards discussed above, *supra* at 70-71, OGRE did not meet its burden of demonstrating the existence of an unambiguous and more specific expression of the parties' intent to benefit OGRE in either contract, sufficient to overcome the unambiguous no beneficiaries provision. While there is one reference to OGRE in the Ground Lease, that reference in a provision regarding the City's Rail Operating Agreement (§37.8.1, Ex. 68-114) that expressly discusses the terms that apply if an affiliate of OBOT is *not* the Port or City's rail operator. *Id.* The provision then goes on to discuss transfers of the rail property *other* than by way of a "Sublease to OGRE"—that is it. *Id*. There is nothing here that states that the parties agreed OGRE would be the rail operator, subleasee, or play any other role. This incidental reference is not the unambiguous statement of a right to benefit needed for OGRE to be able to enforce this agreement.

CONCLUSION

For the foregoing reasons, this Court concludes that the City has established that OBOT has breached the Ground Lease by failing to move this project forward. The Court will proceed to the next phase promptly to determine the City's remedies for this breach.

Dated: September 25, 2023

Respectfully submitted,

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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/	City of Oakland Ordinance No. 13385 and Resolution No. 886234
July 19, 2016	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)