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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.	Consolidated Case Nos. RG18930929 / RG20062473 Unlimited Civil Case/Assigned to Dept. 514 (Hon. Noël Wise) **CITY OF OAKLAND'S TRIAL BRIEF ON PRIOR FEDERAL LITIGATION** Action Filed: December 4, 2018 Trial Date: July 10, 2022
CITY OF OAKLAND Counter-Plaintiff, v. OAKLAND BULK AND OVERSIZED TERMINAL, LLC, and CALIFORNIA CAPITAL INVESTMENT GROUP, Counter-Defendants.	

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INTRODUCTION

As this Court has recognized, this case is not being litigated against a clean slate, given OBOT's prior federal lawsuit against the City of Oakland. *OBOT v. City of Oakland* (N.D. Cal. 2018) 321 F.Supp.3d 986, *aff'd* (9th Cir. 2020) 960 F.3d 603. The federal decision holding the City's legislative acts in 2016 breached the 2013 Development Agreement ("DA") between OBOT and the City is therefore significant, both for what that decision is and for what it is not.

First, what the federal decision is *not*: the federal court's conclusion that the City breached the DA does not automatically establish breach of or excuse performance under the West Gateway Ground Lease. A breach of one contract does not necessarily breach a second, related contract absent an unambiguous expression of intent to that effect. Here, there is no such unambiguous expression; to the contrary, the plain terms of the contracts make the performance obligations under each contract distinct.

Second, what the federal decision *is*: a bar to the relitigation of claims that were or could have been asserted in the federal litigation and arise from the same set of facts, and of remedies that were or could have been sought. As explained further below, OBOT asked the federal court to bar the City from contending that OBOT's failure to timely perform its obligations under the Ground Lease was a breach of that agreement. OBOT then *abandoned its request for that remedy*; having done so, it is precluded from renewing that same request here. Moreover, OBOT expressly amended its Complaint in this action to make clear that it was not basing its affirmative breach claims on any actions taken by the City prior to May 15, 2018.

What remains? OBOT and OGRE's claims that actions of the City after May 15, 2018 breached the Ground Lease, and claims of excuse of performance predicated on actions of the City after the June 14, 2017 filing of the amended complaint in the federal action.[1]

[1] Nothing in this brief is intended to suggest that OBOT or OGRE's contract claims, including OGRE's assertion of third-party beneficiary status, have any merit. The City will address all of the reasons that OBOT and OGRE's claims and defenses lack merit, beyond the issues addressed herein, at the appropriate time after the close of evidence.

ARGUMENT

I. Breach of the DA Is Not a Breach of the West Gateway Ground Lease

The fact that the enactment of the 2016 Resolution and Ordinance was held to breach the DA does not mean that it also breached the Ground Lease. By the express and unambiguous terms of these contracts, the respective performance obligations at issue here are not dependent, and a prior breach of one covenant does not excuse performance of a different covenant (even when in the same contract) under long-standing California law.

First, the applicable law: California law is clear that the breach of one covenant does not breach or excuse performance under a different covenant between the same parties absent an unambiguous expression of intent to make it so.[2] As the Court of Appeal concisely explained in *Colaco v. Cavotec SA* (2018) 25 Cal.App.5th 1172:

> The obligations of the parties to a contract are either dependent or independent. (*Verdier v. Verdier* (1955) 133 Cal.App.2d 325, 334, 284 P.2d 94 (*Verdier*).) The parties' obligations are dependent when the performance by one party is a condition precedent to the other party's performance. In that event, one party is excused from its obligation to perform if the other party fails to perform. (*Kaupke v. Lemoore Canal & Irr.* (1937) 20 Cal.App.2d 554, 557-558, 67 P.2d 407 (*Kaupke*); *Starr v. Davis* (1930) 105 Cal.App. 632, 635, 288 P. 706 (*Starr*).) If the parties' obligations are independent, the breach by one party does not excuse the other party's performance.

Id. at 1182-83. Indeed, if the covenants are independent, the Court of Appeal explained: "the nonbreaching party *still must perform* and its remedy is to seek damages from the other party based on its breach of the contract." *Id.* (emphasis added) (citing *Fresno Canal & Irr. Co. v. Perrin* (1915) 170 Cal. 411, 416); *Hall v. Dekker* (1941) 45 Cal.App.2d 783, 788; *Starr*, 105 Cal. App. at 632).

Whether specific contractual obligations are independent or dependent turns, like all contract interpretation, on the plain language of the agreements. *Colaco,* 25 Cal.App.5th at 1183. Significantly, interpreting performance obligations as *dependent* covenants is disfavored under

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[2] The 2013 DA and 2016 Ground Lease, while related, are indisputably not the same contract. *See* GL §38.7 (integration clause) (Ex. 68-120); *see also* DA §14.27 ("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), DA Exhibit D-2 §C ("The development of" the West Gateway, including the bulk oversized terminal, "shall be subject to the provisions of the applicable Ground Lease") (Ex. 7-107).

long-standing California law: "Dependent covenants or '[c]onditions precedent are not favored in the law [citations], and courts shall not construe a term of the contract so as to establish a condition precedent absent plain and unambiguous contract language to that effect.'" *Id.* (*quoting Frankel v. Board of Dental Examiners* (1996) 46 Cal.App.4th 534, 550). As the Court of Appeal explained in *Verdier*: "To construe covenants as dependent is to work a forfeiture as to one party." 133 Cal.App.2d at 334; *see also Starr*, 105 Cal.App. at 635 ("Courts are disinclined ... to construe the stipulations of a contract as conditions precedent, unless compelled by the language of the contract plainly expressed").

The contracts at issue, as expressed in the plain language of the agreements, impose distinct obligations. The DA, which is both a legislative act and a contract, was intended to establish the regulatory framework applicable to all of the City's land within the Army Base development.[3] The West Gateway Ground Lease was entered into by the City as a landlord and owner of a portion of the land, and establishes the binding performance obligations and deadlines for the private development of that piece of land, in exchange for rent to the City.

Both contracts expressly state that the Ground Lease contains independent obligations and that the Ground Lease provisions will control over other obligations, including:

- GL §38.7 ("Except as otherwise expressly provided herein, this Lease … constitutes the entire agreement between the parties with respect to the subject matter set forth therein, and supersedes all prior and contemporaneous negotiations or agreements between the Parties with respect to all or any part of the subject matter of the terms and conditions mentioned herein or incidental hereto.") (Ex. 68-120);

- GL §22.1 ("Landlord shall be deemed to be in default hereunder only if Landlord shall fail to perform or comply with *any obligation on its part* ***hereunder*** ….") (emphasis added) (Ex. 68-91);[4]

[3] DA §3.4 (Ex. 7-21-23). Under California law, a Development Agreement is both a contract and "a legislative act that [must] be approved by ordinance and is subject to referendum." Gov. Code §65867.5(a). The 2013 DA provided that, in general, "Existing City Regulations shall govern the development of the Project and all Subsequent Approvals," but allowed the City to apply later-enacted regulations if, among other things, it "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." DA §§3.4, 3.4.2 (Ex. 7-21-23).

[4] By contrast, the DA expressly provides that breach of any subsequently entered lease is automatically a default under the DA, and that a termination of the Ground Lease terminates the DA with respect to that parcel of land. DA §§2.2, 8.1 (Ex. 7-18, 7-37). The absence of such

- DA §14.27 ("except as otherwise expressly set forth in the Ground Lease, 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);

- DA Exhibit D-2 §C ("The development of" the West Gateway, including the bulk oversized terminal, "shall be subject to the provisions of the applicable Ground Lease") (Ex. 7-107); and

- DA §3.3 (DA does not "limit, modify, restrict or alter the rights of 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).

In addition, as pertains to the specific breach of DA section 3.4.2, the plain language of the contracts also makes clear the parties did not intend actions in the City's legislative capacity to excuse OBOT's performance under the Ground Lease, *even if challenged in court*.

First, the Ground Lease is explicit that "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*." GL §5.2.1 (Ex. 68-29) (emphasis added); *see also* GL §5.1 (Ex. 68-28) (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").

And second, because the parties agreed not to touch the City's legislative authority in this contract, in the same Article, the parties agreed that the City's exercise of its regulatory or legislative authority also cannot excuse OBOT's performance: "*No … 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." GL §5.1.1.2 (Ex. 68-29) (emphasis added). And in return for these commitments, the City agreed that OBOT would retain its "right to challenge the

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provisions in the West Gateway Ground Lease show that the parties contracted that a breach of the Ground Lease would automatically breach and terminate the DA, but *not* vice versa.

applicability to the Project of any Laws promulgated by the City during the term." GL §5.2.1 (Ex. 68-30).[5]

Given the plain language of these agreements—both general and specific to the issue of legislative acts—performance under the Ground Lease is not dependent on performance under the DA. If OBOT wanted to make its performance under the Ground Lease dependent on the City's performance under the DA, it could have tried to negotiate a provision expressly making its performance contingent on the result of any challenge to applicable laws (or even making the date of performance contingent on resolution of such a challenge), but it did not. That is conclusive. And, as explained in the next section, regardless of whether the DA and Ground Lease are considered to contain dependent or independent covenants, OBOT's claims predicated on the same issues raised in the federal litigation are barred by res judicata anyway.

II. Res Judicata Bars All Claims or Defenses Predicated on the City's Actions That Could Have Been or Were Addressed in the Federal Litigation, Including Anything Based on the Coal Ordinance and Resolution

As this Court has already recognized, and OBOT has conceded, having already sued the City in federal court, OBOT cannot now seek additional remedies for claims that it pursued or could have pursued in the first action. Demurrer Order (5/16/2019) at 3-4; Motion to Strike Order (5/16/2019). The implications of that ruling and applicable res judicata law for the claims Plaintiffs now assert at trial are two-fold: 1) OBOT and OGRE cannot assert any claim for breach of either the DA or West Gateway Ground Lease prior to May 15, 2018; and 2) OBOT and OGRE

[5] Even without such explicit commands, courts have recognized that the government as landlord does not breach a ground lease when acting pursuant to other governmental powers. *See*, *e.g.*, *City of Glendale v. Superior Ct.* (1993) 18 Cal.App.4th 1768, 1775-78 (city that agreed to lease property for minimum term is not "liable for breach of contract for exercising its power of eminent domain over the leasehold interest prior to the expiration of such term," because city's role as lessor is different from that of condemnor). A "promise made as lessor cannot result in the loss of a proper governmental power," both because such promises "cannot be implied" and because "a governmental entity may not contract away its sovereign authority." *Id.* at 1778; *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).

also cannot now pursue any claim or defense of excuse of performance predicated on acts prior to June 14, 2017.[6]

A. Claims of Breach Prior to May 15, 2018 Are Barred.

In opposing the City's pleadings motions, OBOT conceded that res judicata would apply to claims of breach based on "facts in existence" at the time of the earlier federal litigation and represented that the City's pre-May 2018 actions were included in their complaint only for "background" purposes. Plfs' Opp. to Demurrer (4/4/2019) at 6-7. Based on those representations, this Court held that res judicata prevented OBOT from premising 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). Accordingly, OBOT filed an amended complaint making clear that its affirmative breach claims were based only on post-May 15, 2018 events. 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 ("The above allegations regarding the federal lawsuit and subsequent appeal are not the basis of Plaintiffs' claims here, but rather are included to explain the historical context of this lawsuit.").[7]

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[6] The Court denied the City's demurrer to *all* of OBOT and OGRE's claims on a primary right theory, concluding that Plaintiffs were limited to alleged breaches predicated on actions after the federal litigation. This Court was not required to, nor did it, reach all of the further res judicata implications now raised at trial by Plaintiffs' assertions of myriad breach and excuse claims, as set forth in the statement summarizing Plaintiffs' breach claims requested by the Court during trial (Plfs' Alleged Breaches, submitted 7/11/23).

To the extent that OBOT contends that the City has not raised the second res judicata issue before, two brief responses: 1) the City did raise this issue in its proposed jury instructions, to be resolved prior to the scheduled jury trial; and 2) OBOT could have, but never, served a single interrogatory in this case to understand the City's legal arguments.

[7] OBOT may argue that the cutoff date should be June 14, 2017, when OBOT filed its first amended complaint in the federal action (Ex. 120). *See supra* at 9; *Allied Fire Protection v. Diede Const., Inc.* (2005) 127 Cal.App.4th 150, 155. But Plaintiffs' concessions and First Amended Complaint filed in this case (12/11/2020) establish that the relevant date is May 15, 2018. Judicial and equitable estoppel principles prevent Plaintiffs from contesting this date, because they prevailed in part in defeating the City's demurrer based on these representations and because the City has relied on those representations in litigating this case. *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).

In their July 11, 2023 list of alleged breaches, Plaintiffs ignore this Court's prior orders and assert as breach eleven acts that are identified as taking place in 2015, 2016, or 2017 (including at least one that ended in 2016). These breach claims are all barred by Plaintiffs' own admissions.

B. Claims and Defenses Predicated on City Actions Allegedly Excusing OBOT's Performance Under the Ground Lease That Were or Could Have Been Raised in the Federal Litigation Are Also Barred.

As discussed above, OBOT may only assert breach claims predicated on events that post-date May 15, 2018. OBOT seeks to defend against the City's claim that OBOT breached the Initial Milestone deadline by pointing to City actions beginning in 2015 that it claims constitute excuse of performance or force majeure under the West Gateway Ground Lease, apparently including the 2016 Ordinance and Resolution. In presenting these claims and defenses here, OBOT ignores the remedies it actually sought and then abandoned in the federal litigation, and the implications of those abandoned remedies for this case under governing law.

In the federal case, OBOT *actually sought* declaratory and equitable relief extending the Ground Lease's performance deadlines—relief that tracks its theories of recovery *in this case*. OBOT requested, inter alia, the following relief from the federal court:

> Award such other legal or equitable relief available under the law that may be considered appropriate under the circumstances in light of the City of Oakland's above alleged misconduct, including relief *prohibiting the City from asserting that OBOT has breached* the DA, the LDDA, and *the Ground Lease for West Gateway, dated February 16, 2016, by any failure to perform resulting from the City's misconduct*.

Ex. 120-42 (Prayer for Relief ¶D) (emphasis added). OBOT's July 2017 case management statement reaffirmed that it was seeking this relief. Federal Dkt. 79 (Jul. 5, 2017), at 6 (attached hereto as Ex. A).

In support of this request that its performance under the Ground Lease be excused, OBOT alleged facts that it has again relied on *in this case*: that in November 2014 OBOT had negotiated an exclusive negotiation agreement/sublease option with Terminal Logistics Solutions that would have earned OBOT millions of dollars (Ex. 120-11 ¶¶34-35, 120-31 ¶122), that this sublease option was premised on the absence of any commodity restrictions (Ex. 120-11 ¶35, 120-31

¶122), that the Ordinance and Resolution "caus[ed] TLS not to exercise its option and instead to seek to renegotiate the payment terms of the proposed sublease at substantially less advantageous terms for OBOT" (Ex. 120-32 ¶123), and that it "interfere[d] with OBOT's ability to attract partners and investments for the West Gateway project" (Ex. 120-41 ¶167).

At the case management conference that followed, the federal court warned that res judicata would bar OBOT from seeking remedies that it chose not to pursue in the federal case. Def. RJN Supp. Demurrer (1/14/2019), Ex. E at 9. OBOT responded by acknowledging that *"[t]here will be res judicata impacts*." *Id.* (emphasis added). Nonetheless, OBOT thereafter *abandoned* its requested relief excusing its performance under the Ground Lease deadlines. Instead, OBOT's post-trial brief sought only a declaratory judgment that the Resolution breached the DA and an injunction "enjoining the City from applying or enforcing the Ordinance and Resolution to the Terminal/OBOT …" (as well as attorneys' fees). Federal Dkt. 239 at 20 (Feb. 9, 2018) (excerpts attached hereto as Ex. B). Setting aside the merits of such a request, OBOT could have pursued, but did not pursue, the request that the federal court relieve or extend its performance deadlines.

Having abandoned its request for equitable and declaratory relief excusing their performance, Plaintiffs may not now re-assert that request in this case. Res judicata applies to "not only matters actually determined by a judgment, but also every other matter which the parties might have litigated and have had decided as incident thereto or essentially connected with the subject-matter of the litigation and every matter coming within the legitimate purview of the original action, both in respect to matters of claim and of defense." *Holman v. Holman* (1938) 25 Cal.App.2d 445, 452; *see also Tensor Group v. City of Glendale* (1993) 14 Cal.App.4th 154, 160 (quoting *Sutphin v. Speik* (1940) 15 Cal.2d 195, 202).

It does not matter whether Plaintiffs try to dress this claim up in the garb of a new legal theory. California law is very clear that the primary right doctrine prevents a litigant from asserting new legal theories based on previously litigated facts. "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 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. Thus, res judicata bars not only the reassertion of claims but also remedies and defenses. *See Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 897 (prevailing plaintiff in earlier lawsuit may not seek additional remedies in later lawsuit, even if need for remedies was "speculative" at time of first lawsuit); *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; *Alpha Mechanical, Heating & Air Conditioning v. Travelers Casualty & Surety Co.* (2005) 133 Cal.App.4th 1319, 1332-33; *Torrey Pines Bank v. Superior Ct.* (1989) 216 Cal.App.3d 813, 819-20.

At the time OBOT pursued its claims in the federal lawsuit (by way of an amended complaint on June 14, 2017), a number of the events OBOT is relying on at this trial had already occurred: the March 11, 2016 force majeure letter and City's March 22, 2106 response; the "Cappio memo"; the City's alleged failure to provide comments on the 2015 TLS BOD (at least as of that date), the requests for the DA Binder and response; the March 9, 2016 'kick-off' meeting; the alleged failure to sign an RAA as of that date; the alleged failure to support ACTC grant funding; and the 2016 coal Ordinance and Resolution, among others. OBOT could have asked the federal court to excuse its performance obligations under the Ground Lease in view of those actions and ultimately elected not to do so.

Setting aside the merits for this moment, OBOT is clearly seeking the same relief (excuse of performance deadlines), for the same alleged harm. "[T]here is only a single cause of action for the invasion of one primary right and the harm suffered is the significant factor." *Burdette v. Carrier Corp.* (2008) 158 Cal.App.4th 1668; *see also Boeken v. Philip Morris USA, Inc.* (2010) 48 Cal.4th 788, 814 ("under the primary rights theory, the determinative factor is the harm suffered."). Therefore, any assertion that the Ordinance and Resolution (or any other City act alleged to have occurred prior to OBOT's amended federal complaint, on June 14, 2017) excused OBOT's performance is barred by its prior lawsuit, where it decided to forego its request that the Court order that it be relieved from its performance obligations.

CONCLUSION

For the aforementioned reasons, the federal court's conclusion that the City breached the DA does not establish breach or excuse of performance under the Ground Lease, and Plaintiffs cannot base their breach claims or excuse of performance defense on events that predated the federal litigation.

Dated: August 7, 2023

Respectfully submitted,

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EXHIBIT A

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Oakland Bulk & Oversized Terminal, LLC Plaintiff, vs. City of Oakland Defendant.	Case Number: 3:16-CV-7014-VC JOINT CASE MANAGEMENT STATEMENT
Sierra Club and San Francisco Baykeeper, Defendants-Intervenors.	Date: July 12, 2017 Time: 1:30 p.m. Ctrm.: No. 4, 17th Floor Judge: Honorable Vince Chhabria

Pursuant to Rules 16 and 26 of the FRCP, Civil Local Rule 16-9, and the Standing Order for All Judges of the Northern District of California – Contents of the Joint Case Management Statement, Plaintiff Oakland Bulk & Oversized Terminal, LLC ("OBOT"), Defendant City of Oakland (the "City"), and Defendant-Intervenors Sierra Club and San Francisco Baykeeper ("Defendant-Intervenors") submit this Joint Case Management Statement for the Case Management Conference set for July 12, 2017, at 1:30 P.M.

1. Jurisdiction & Service: Service was effected on the City on December 9, 2016. D.E. 10. By Order dated June 6, 2017 the Court recognized Defendant-Intervenors as permissive intervenors and accepted their Answer for filing. D.E. 71. On June 27, 2017, the City filed its Answer. D.E. 77.

This Court has jurisdiction pursuant to 28 U.S.C. § 1331, 42 U.S.C. § 1983, and 28 U.S.C. § 1367, and venue is proper pursuant to 28 U.S.C. § 1391(b)(1) and 28 U.S.C. § 1391(b)(2).

2. Facts: See Joint CMC Statement for April 20, 2017 CMC. D.E. 60.

3. Legal Issues: OBOT alleges three claims for relief, which raise legal issues as noted:

1. Unconstitutionality under the Commerce Clause (U.S. Const. art. I, § 8, cl. 3): Whether the prohibition on the storage and handling of coal and petcoke by OBOT within the City, imposes burdens on interstate commerce in violation of the Commerce Clause.
2. Preemption under:
    a. The Interstate Commerce Commission Termination Act, 49 U.S.C. § 10501 *et seq.* ("ICCTA")—whether the ICCTA, in particular provisions governing "transportation by rail carriers", preempts the Ordinance and Resolution.
    b. The Hazardous Materials Transportation Act, 49 U.S.C. § 5101 *et seq.* ("HMTA")—whether the challenged regulation of the subject commodities is covered by the HMTA and its implementing regulations and preempted thereunder.
    c. The Shipping Act of 1984, 46 U.S.C. § 40101 *et seq.*—whether the challenged regulation unreasonably discriminates against shippers of coal and petcoke.
3. Breach of the Development Agreement ("DA"): Whether the City's adoption and application of the Ordinance and Resolution to OBOT is a breach of the DA, and whether OBOT's claim is time-barred.

Separate Statement by the City:

Since the last CMC, a legal issue has arisen as to whether OBOT plans to seek damages in this action or will commit to forego any claims for damages, which implicates the City's guaranteed and paramount right to a jury trial on all claims seeking damages *before* trial of any non-jury issues. This issue is addressed in depth at section 11 below (pp. 6-11.)

4. Motions

Joint Statement by the Parties:

On June 6, 2017, the Court denied the City's motion to dismiss the breach of contract claim (third claim for relief), recognized Defendant-Intervenors as permissive intervenors, and denied Defendant-Intervenors' motion to dismiss the dormant Commerce Clause claim (first claim for relief). D.E. 71.

There are no pending motions.

Separate Statement by OBOT: As discussed in Section 16 below, on April 20, 2017, the

Court issued an order setting December 14, 2017 as the last day to hear dispositive motions. OBOT accordingly anticipates filing one or more dispositive motions to be heard by the December 14, 2017 deadline.

Separate Statement by the City: Consistent with the schedule adopted by the Court (discussed in Section 16 below), the City anticipates filing one or more dispositive motions to be heard prior to the December 14, 2017 deadline, *e.g.*, motion(s) for summary judgment and/or adjudication on any or all of the claims and defenses, including without limitation whether the federal claims are precluded by the market participant doctrine.

Separate Statement by the Defendant-Intervenors: Defendant-Intervenors also anticipate a motion for summary judgment and/or adjudication to be heard by the December 14, 2017 deadline.

5. Amendment of Pleadings: On June 14, 2017, OBOT filed a First Amended Complaint ("FAC"). D.E. 74. The FAC revises Section D of the Prayer for Relief from "Award such other legal or equitable relief available under the law that may be considered appropriate under the circumstances in light of the City of Oakland's above alleged misconduct." to "Award such other legal or equitable relief available under the law that may be considered appropriate under the circumstances in light of the City of Oakland's above alleged misconduct, including relief prohibiting the City from asserting that OBOT has breached the DA, the LDDA, and the Ground Lease for West Gateway, dated February 16, 2016, by any failure to perform resulting from the City's misconduct." D.E. 74, p. 41:9-12.

6. Evidence Preservation: The parties have reviewed the Guidelines Relating to the Discovery of Electronically Stored Information and confirm that they have met and conferred pursuant to Federal Rules of Civil Procedure 26(f) regarding reasonable and proportionate steps taken to preserve evidence relevant to the issues reasonably evident in this action.

7. Disclosures: The City and OBOT exchanged their respective initial disclosures on February 28, 2017. Defendant-Intervenors will serve their initial disclosures on July 6, 2017.

8. Discovery

At the April 20, 2017, CMC, the Court set the following discovery deadlines:

1. Close of Fact Discovery: 9/29/2017.
2. Opening Expert Reports due by 9/15/2017.
3. Rebuttal Expert Reports due by 10/2/2017.
4. Close of Expert Discovery: 11/1/2017.

OBOT has served a request for production of documents on the City, subpoenas to third parties for production of records, and a FRCP Rule 30(b)(6) deposition notice on the City regarding 23 topics. In response, the City has produced tens of thousands of pages of documents and three witnesses in response to OBOT's notice of Rule 30(b)(6) deposition (regarding 9 of the 23 topics).

The City has served on OBOT a request for production of documents and subpoenas on third parties for production of records. OBOT served its objections and responses to the City's first request for production of documents on June 21, 2017. On June 28, 2017, OBOT offered to make certain hard copy documents available for inspection.

Defendant-Intervenors have not served any discovery requests to date but will do so shortly.

The City and OBOT stipulated to a proposed protective order, which OBOT filed on June 14, 2017. D.E. 75. The Court adopted the stipulated protective order on July 5, 2017. D.E. 78.

Separate Statement by the Defendant-Intervenors: Defendant-Intervenors did not sign the OBOT-City stipulation, which was filed without their review or involvement,

even though it was lodged after the Court granted Defendant-Intervenors' motion to intervene.

Defendant-Intervenors object to the protective order's two-tiered system of confidentiality, which states that only "Outside Counsel of Record" may review "HIGHLY CONFIDENTIAL" information or items—thereby denying disclosure to Defendant-Intervenors' counsel of record who are also employees of Defendant-Intervenors (*i.e.*, "House Counsel," as defined by the order). This two-tiered designation system is inconsistent with the Northern District of California's model order; creates additional administrative burdens for handling and review of information; would deprive Defendant-Intervenors of full representation by their counsel of choice (including potentially barring some of Defendant Intervenors' counsel of record from participating in document review and depositions in which they had planned to participate); and may interfere with Defendant-Intervenors' ability to provide meaningful input to their counsel. To the extent a "HIGHLY CONFIDENTIAL" designation is necessary owing to ongoing, sensitive business negotiations between OBOT and the City, the protective order should be amended to specify that any associated disclosure limitations should apply to the City's "House Counsel" exclusively.

Defendant-Intervenors also believe the protective order should be amended to specify that injunctive relief is the only available remedy for a breach of the order, and that no party shall be subject to any claim for damages as a result of a breach. Because a breach of the confidentiality protections would cause irreparable harm, the order should specify that injunctive relief, and injunctive relief alone, is the appropriate means of enforcement.

Separate Statement by the City: The City is not opposed to such modifications to the protective order.

9. Class Actions: This is not a class action.

10. Related Cases: There are no related cases.

11. Relief:

Separate Statement by OBOT:

As noted in Section 5 above, OBOT filed a First Amended Complaint that revised Section D of its Prayer for Relief from "Award such other legal or equitable relief available under the law that may be considered appropriate under the circumstances in light of the City of Oakland's above alleged misconduct." to "Award such other legal or equitable relief available under the law that may be considered appropriate under the circumstances in light of the City of Oakland's above alleged misconduct, including relief prohibiting the City from asserting that OBOT has breached the DA, the LDDA, and the Ground Lease for West Gateway, dated February 16, 2016, by any failure to perform resulting from the City's misconduct."

OBOT, without coyness or equivocation (*see* Section 11 Separate Statement by the City below), stands by its statements regarding the relief it is seeking in the two prior CMC Statements. Like any party to litigation, however, OBOT cannot foreclose the possibility of seeking damages at any point in the future.

Given the above, OBOT respectfully requests that the Court order that no appearance, or, in the alternative, only telephonic appearances, are necessary for the July 12, 2017 case management conference.

Separate Statement by the City:

First, the City does not concur that the Court should order that there not be appearances at the CMC. Second, the City believes there are significant issues, including as discussed below.

A. OBOT'S STATEMENTS THAT IT WAS NOT SEEKING DAMAGES AND ASSOCIATED REQUEST FOR AN EXPEDITED COURT TRIAL.

OBOT expressly stated in the two prior CMC Statements that it was not seeking damages and instead was seeking an expedited trial by the Court. Specifically:

The Joint CMC Statement for the for the April 20, 2017 CMC states:

5. Amendment of Pleadings: OBOT does not currently anticipate amending its complaint. Instead, as discussed in Section 16 below, OBOT is seeking an expedited trial procedure because of alleged monetary harm any continued delay in the development, use, and operation of the Terminal will have upon OBOT, among other reasons. To the extent that it incurs additional damages due to prolonged delays, or other good cause arises, OBOT may seek to amend the complaint in the future.

* * *

16. Expedited Trial Procedure

Separate Statement by OBOT

OBOT's position is that this case can be tried to an efficient conclusion by the end of 2017 using expedited trial procedures. While recognizing that this is an ambitious schedule, OBOT submits that proceeding on such a schedule is in the interests of justice in light of several particular characteristics of the parties' dispute, including:

1. No jury is required, as the dispute will be tried as a bench trial.

2. As noted above, OBOT has elected to seek only declaratory relief at present, foregoing monetary damages in the hopes of achieving an early and efficient resolution of its claims (notwithstanding OBOT's position that the ongoing delay in its development of the Terminal has and continues to cause OBOT increasing monetary harm).

D.E. 60, pp. 4-5, 15.

The Joint CMC statement for the March 7, 2017 CMC states:

5. Amendment of Pleadings: OBOT does [not] currently anticipate amending its complaint. Instead as discussed in Section 16 below, OBOT is seeking an expedited trial procedure because of alleged monetary harm any continued delay in the development, use, and operation of the Terminal will have upon OBOT, among other reasons. To the extent that it incurs additional damages due to prolonged delays, or other good cause arises, OBOT may seek to amend the complaint in the future.

* * *

11. Relief: As present, OBOT seeks the relief listed below. As discussed in Section 16, OBOT may seek to amend its complaint and pursue monetary damages if the continued application of the Ordinance and Resolution causes such harm prior to declaratory relief being granted.

* * *

16. Expedited Trial Procedure

Separate Statement by OBOT: OBOT's position is that this case can be tried to an efficient conclusion by the fall of 2017 using expedited trial procedures.

* * *

> 2. As noted above, OBOT has elected to seek only declaratory relief at present, foregoing monetary damages in the hopes of achieving an early and efficient resolution of its claims (notwithstanding OBOT' s position that the ongoing delay in its development of the Terminal has and continues to cause OBOT increasing monetary harm).
>
> * * *
>
> 6. …. In addition given certain positions taken by the City regarding OBOT's obligation to perform under the parties' various agreements, significant delays in the resolution of the case increase the likelihood of further disputes, including the potential for a substantial damage claim against the City.

D.E. 36, pp. 4, 7, 8. However, upon inquiry by the City after OBOT filed its First Amended Complaint regarding whether OBOT stood by its statements that it was seeking to resolve this matter by court trial and without seeking damages, OBOT equivocated. Accordingly, the City has filed a demand for jury trial with its Answer (D.E. 71) and seeks clarity regarding whether OBOT may or may not advance any claim for damages.

B. THE CITY SEEKS CLARITY AND AN ENFORCEABLE COMMITMENT FROM OBOT CONCERNING OBOT'S POTENTIAL DAMAGES CLAIM, SO THAT THE CITY'S SEVENTH AMENDMENT RIGHT TO JURY IS NOT IMPROPERLY CIRCUMVENTED BY OBOT'S POTENTIAL CLAIM FOR DAMAGES AND EQUIVOCATION IN CONNECTION THEREWITH.

OBOT's First Amended Complaint prays that the Court "[a]ward such other **legal or** equitable relief available under the law that may be considered appropriate under the circumstances …". [Emphasis added.] Based thereon, OBOT might seek to recover damages as "further relief" after obtaining a declaration of rights. 28 U.S.C.A. § 2202 ("Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment"); *see, e.g., Cedar Hill Hardware and Const. Supply, Inc. v. Ins. Corp. of Hannover*, 563 F.3d 329, 356–57 (8th Cir. 2009) ("district courts have broad power under 28 U.S.C. § 2202 to craft damages awards in declaratory judgment actions to effectuate their judgment"); *Beacon Const. Co., Inc. v. Matco Elec. Co., Inc.*, 521 F.2d 392, 400 (2d Cir. 1975) ("It is well settled that 'further relief' may

include an award for damages"); 10B Fed. Prac. & Proc. Civ. § 2771 (4th ed.), fn. 9 (collecting cases).

Following OBOT's filing of its First Amended Complaint, the City made an effort to seek clarity from OBOT regarding the "other legal relief" OBOT may seek, but was unable to obtain a firm commitment from OBOT that it would not seek damages at some point, much less an enforceable commitment on the subject.

C. THE CITY HAS A RIGHT TO JURY TRIAL, WHICH MUST PRECEDE RESOLUTION OF COURT TRIAL ISSUES.

"'Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.'" *Beacon Theatres v. Westover*, 359 U.S. 500, 501 (1959), quoting *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935).

The City has a Seventh Amendment right to jury trial on any damage claims, including any damage claims based on OBOT's breach of contract and Section 1983 counts. *See, e.g.*, *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 707–22 (1999); *Perez-Serrano v. Deleon-Velez*, 868 F.2d 30 (1st Cir. 1989); *Santiago-Negron v. Castro-Davila*, 865 F.2d 431 (1st Cir. 1989); *Dolence v. Flynn*, 628 F.2d 1280 (10th Cir. 1980) ("trials by juries in such [Section 1983] actions are common and of long standing in this circuit"); 1B Martin A. Schwartz, *Section 1983 Litigation: Claims and Defenses* § 16.02 (4th ed. 2014).

Regarding OBOT's breach of contract claim (Third Claim for Relief), the right to declaratory relief is determined under California law. *St. Paul Fire & Marine Ins. Co. v. Weine*r, 606 F.2d 864 (9th Cir. 1979) (in diversity case, federal law determines whether there is a controversy under Declaratory Judgment Act, but state law "creates and determines the substantive rights and duties that may [be] vindicated through declaratory relief."); *Century Surety Co. v. Saidian*, 2016 WL 6440140 (C.D. Cal. 2016). California courts "will not permit the declaratory action to be used as a device to circumvent the

right to a jury trial in cases where such right would be guaranteed if the proceeding were coercive rather than declaratory in nature." *State Farm Mut. Auto Ins. Co. v. Superior Court*, 47 Cal. 2d 428, 432 (1956). In a mixed action that involves claims for legal relief to be tried to a jury and matters to be tried to the court, the claim for legal relief must, whenever possible, be tried **first**. *See Dairy Queen v. Wood*, 369 U.S. 469, 472–73 (1962) (jury trial before court trial rule "applies whether the trial judge chooses to characterize the legal issues presented as 'incidental' to equitable issues or not"); *Beacon Theatres v. Westover*, *supra,* 359 U.S. at 510–11 ("only under the most imperative circumstances, circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims"); *Acosta v. City of Costa Mesa,* 718 F.3d 800, 828-829 (when legal claims are tried by a jury and equitable claims are tried by a judge, and the claims are based on the same facts, in deciding the equitable claims the Seventh Amendment requires the trial judge to follow the jury's implicit or explicit factual determinations).

D. OBOT SHOULD BE REQUIRED TO COMMIT ON WHETHER IT WILL SEEK DAMAGES.

The City's Seventh Amendment right to jury trial on any damages issues must not be circumvented by OBOT playing coy as to its potential follow-on damages claim ("such other legal relief," as pleaded) should OBOT obtain favorable declaratory relief. The Restatement (Second) of Judgments provides an appropriate procedure for smoking out a plaintiff's intentions in this regard: "[A]s an aid in the sound exercise of discretion [in addressing claims for declaratory relief], the court may appropriately require the plaintiff to indicate the nature of the issues or claims, related to the subject of the action, that could be presented for adjudication but are not incorporated in the complaint." Restatement (Second) of Judgments § 33, comment c.

The City respectfully requests that the Court order OBOT to commit—one way or the other—on whether it will pursue damages in this action. If OBOT intends to seek

damages, then all issues from which the damage claims arise **must** be first tried to a jury, and the factual finding of the jury must be followed by the Court in determining any remaining non-jury issues.

12. Settlement and ADR: On April 17, 2017, pursuant to a stipulation and proposed order agreeing to mediation pursuant to ADR Local Rule 6, OBOT and the City engaged in mediation with the Hon. Steven A. Brick (Ret.) of JAMS, who has since tragically passed away. ADR Program Attorney for the United States District Court for the Northern District of California Tamara Lange has scheduled a call with OBOT and the City for August 2, 2017 to discuss status and next steps of the parties' mediation efforts.

13. Consent to Magistrate Judge: On December 14, 2016, OBOT filed a declination to Magistrate Judge Jurisdiction. D.E. 11.

14. Other References: The parties do not believe that the case is suitable for reference to binding arbitration, a special master, or the Judicial Panel on Multidistrict Litigation.

15. Narrowing of Issues: *See* Section 16.

16. Expedited Trial Procedure

On April 20, 2017, this Court set the following schedule, concluding with a Court trial on January 16, 2018:

1. Last day to amend pleadings: 6/19/2017.
2. Close of Fact Discovery: 9/29/2017.
3. Opening Expert Reports due by 9/15/2017.
4. Rebuttal Expert Reports due by 10/2/2017.
5. Close of Expert Discovery: 11/1/2017.
6. Last day to hear Dispositive Motion: 12/14/2017 10:00 AM in Courtroom 4, 17th Floor, San Francisco before Hon. Vince Chhabria.
7. Final Pretrial Conference set for 1/10/2018 10:00 AM in Courtroom 4, 17th Floor, San Francisco.
8. Bench Trial: 1/16/2018 08:30 AM before Hon. Vince Chhabria.

17. Scheduling: *See* Section 16.

18. Trial: *See* Section 16.

19. Disclosure of Non-party Interested Entities or Persons: OBOT filed its Certificate of Interested Entities on December 7, 2016. D.E. 5. As a governmental entity, the City is not required to file this Certificate. *See* Local Rule 3-15(a). Defendant-Intervenors filed their Certificate of Interested Entities contemporaneously with their motion for leave to intervene on February 16, 2017. D.E. 29.

20. Professional Conduct: The parties have reviewed the Guidelines for Professional Conduct for the Northern District of California.

21. Other: The parties are not currently aware of any other matters for the Court's consideration.

Dated: July 5, 2017

/s/ Robert P. Feldman

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Dated: July 5, 2017

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L.R. 5-1(i) ATTESTATION

I, Robert P. Feldman, am the ECF user whose ID and password are being used to file the parties' JOINT CASE MANAGEMENT STATEMENT. In compliance with Local Rule 5-1(i), I hereby attest that Kevin D. Siegel, counsel for Defendant City of Oakland, and Colin C. O'Brien, attorney for Defendant-Intervenors Sierra Club and San Francisco Baykeeper have concurred in this filing.

/s/ Robert P. Feldman

CASE MANAGEMENT ORDER

The above JOINT CASE MANAGEMENT STATEMENT is approved as the Case Management Order for this case and all parties shall comply with its provisions. [In addition, the Court makes the further orders stated below:]

IT IS SO ORDERED.

Dated: July ___, 2017

The Honorable Vince Chhabria
Judge, United States District Court
for the Northern District of California

EXHIBIT B

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

OAKLAND BULK & OVERSIZED TERMINAL, LLC

Plaintiff,

vs.

CITY OF OAKLAND,

Defendant.

Case No. 3:16-cv-07014-VC

PLAINTIFF OAKLAND BULK & OVERSIZED TERMINAL, LLC'S POST-TRIAL BRIEF

Hearing Date: March 28, 2018
Time: 10:00 a.m.
Honorable Vince Chhabria

Trial Date: January 16, 2018

the City Council (or their staff) ever accessed that linked web site or the documents posted on it.

June 24, 2016 was the first time that the City Council was given access to the 154-page ESA Report or any of the other materials in the Agenda Report. PFF 139. ESA employee Crescentia Brown wrote that giving three days notice of the ESA Report (over a weekend no less) was "crazy to do, but the opponents and Council are MORE interested in getting the report done so the Council can ACT/VOTE (BAN)." PFF 136. There is no evidence in the trial record that the City Council ***based*** its decision to apply the Ordinance to OBOT on any of the evidence provided to it concerning potential impacts of the shipment of coal and pet coke through the Terminal at the West Gateway (on the Friday before its Monday vote).[23] The City thus cannot invoke the exception of Section 3.4.2—and breached the DA—for this additional reason.

CONCLUSION

The evidence at trial shows that the City breached the DA by applying the Ordinance to the Terminal. OBOT thus respectfully requests that the Court:[24]

1) Issue a declaratory judgment:
   a. that the City breached the DA through its application of the Ordinance to the Terminal/OBOT through the Resolution;
   b. that pre-existing (pre-DA) regulations and contractual agreements will prevent the shipment of coal and petcoke through the Terminal from placing "existing or future occupants or users of the Project, adjacent neighbors, or any portion thereof, or all of them, in a condition substantially dangerous to their health or safety" as stated in Section 3.4.2 of the DA;
   c. that the City did not determine based on substantial evidence that a failure to apply the Ordinance to the Terminal "would place existing or future occupants or users of the Project, adjacent neighbors, or any portion thereof, or all of them, in a condition substantially dangerous to their health or safety" as stated in DA Section 3.4.2;
2) Issue a permanent injunction enjoining the City from applying or enforcing the Ordinance and Resolution to the Terminal/OBOT; and
3) Award reasonable attorneys' fees and costs to OBOT.

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[23] In fact, the evidence demonstrates that the City Council did not ask any questions about Table 5-7 of ESA Report, or its facially apparent mathematical errors. PFF 142, 232.

[24] Section 8.7 of the DA provides that "each Party shall have the right, in addition to all other rights and remedies available under this Agreement, to (a) bring any proceeding in the nature of specific performance, injunctive relief or mandamus, and/or (b) bring any action at law or in equity as may be permitted by Laws or this Agreement." DA § 8.7.

Dated: February 9, 2018

Respectfully submitted,

QUINN EMANUEL URQUHART & SULLIVAN, LLP

By: */s/ Robert Feldman*
Robert P. Feldman

Attorneys for Plaintiff