ELECTRONICALLY FILED
Superior Court of California,
County of Alameda
08/17/2023 at 10:51:10 AM
By: Steven Ashby-Anderson,
Deputy Clerk

MANATT, PHELPS & PHILLIPS, LLP
BARRY W. LEE (Bar No. 088685)
Email: bwlee@manatt.com
CHRISTOPHER L. WANGER (Bar No. 164751)
Email: cwanger@manatt.com
JUSTIN JONES RODRIGUEZ (Bar No. 279080)
Email: jjrodriguez@manatt.com
MISA EIRITZ (Bar No. 307513)
Email: meiritz@manatt.com
One Embarcadero Center, 30th Floor
San Francisco, California 94111
Telephone: (415) 291-7400
Facsimile: (415) 291-7474

DOUGLAS J. SMITH (*Pro Hac Vice*)
Email: djasmith@manatt.com
1050 Connecticut Ave. NW, Suite 600
Washington, DC 20036
Telephone: (202) 585-6508
Facsimile: (202) 585-6600

Attorneys for Plaintiff and Counter-Defendant
OAKLAND BULK AND OVERSIZED TERMINAL, *Plaintiff*
OAKLAND GLOBAL RAIL ENTERPRISE, LLC, *and Counter-Defendant* CALIFORNIA CAPITAL & INVESTMENT GROUP

SUPERIOR COURT OF CALIFORNIA

IN AND FOR THE 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, INC.

Counter-Defendants.

Consolidated Case Nos. RG18930929 / RG20062473

Unlimited Civil Case / Assigned to Judge Noël Wise, Dept. 514

PLAINTIFFS' RESPONSE TO CITY OF OAKLAND'S TRIAL BRIEF ON PRIOR FEDERAL LITIGATION

Trial Date: July 10, 2023

TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. RES JUDICATA DOES NOT BAR ANY CLAIM OR DEFENSE 3

A. The City's argument that breach of the Development Agreement does not establish breach or excuse under the Ground Lease is without merit. 3

B. The City's second and third arguments that Plaintiffs cannot base their breach claims or excuse defense on events that predate *OBOT I* are without merit. 9

1. The City has not met its burden on the first element of res judicata that the two cases involve the same cause of action. 9

a. The two cases involve distinct primary rights 9

b. The Court's Demurrer Order and Motion to Strike Order correctly determined that this case involves different causes of action than *OBOT I*. 10

c. The City's new theory regarding OBOT's request for injunctive relief in *OBOT I* does not change the result. 12

2. Claims of breach and defenses based on events prior to May 15, 2018 are not categorically barred. 16

III. CONCLUSION 19

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES

Page

CASES

Abbott v. 76 Land & Water Co.,
161 Cal. 42 (1911) 18

Allied Fire Prot. v. Diede Constr., Inc.,
127 Cal. App. 4th 150 (2005) 16, 17

Alpha Mech., Heating & Air Conditioning, Inc. v. Travelers Cas. & Surety Co. of Am.,
133 Cal. App. 4th 1319 (2005) 14

Ass'n of Irritated Residents v. Dep't of Conserv.,
11 Cal. App. 5th 1202 (2017) 14

Brenelli Amedeo, S.P.A. v. Bakara Furniture, Inc.,
29 Cal. App. 4th 1828 (1994) 19

Cal. Sierra Dev. Inc. v. George Reed, Inc.,
14 Cal. App. 5th 663 (2017) 14

Calaco v. Cavotec SA,
25 Cal. App. 5th 1172 (2018) 6, 7

City of Glendale v. Superior Court,
18 Cal. App. 4th 1768 (1993) 9

City of Hollister v. Monterey Ins. Co.,
165 Cal. App. 4th 455 (2008) 7

Discovery Builders, Inc. v. City of Oakland,
92 Cal. App. 5th 799 (2023) 9

DKN Holdings LLC v. Faerber,
61 Cal. 4th 813 (2015) 15

DRG/Beverly Hills, Ltd. v. Chopstix Dim Sum Cafe & Takeout III, Ltd.,
30 Cal. App. 4th 54 (1994) 17

Federation of Hillside & Canyon Assns. v. City of Los Angeles,
126 Cal. App. 4th 1180 (2004) 9

French v. Rishell,
40 Cal. 2d 477 (1953) 2, 19

Gamble v. Gen. Foods Corp.,
229 Cal. App. 3d 893 (1991), *reh'g denied and opinion modified* (May 28, 1991) 19

Hall v. Dekker,
45 Cal. App. 2d 783 (1941) 7

Holman v. Holman,
25 Cal. App. 2d 445 (1938) 15

TABLE OF AUTHORITIES
(continued)

Page

Hong Sang Mkt., Inc. v. Peng,
20 Cal. App. 5th 474 (2018)........ 9

Karlsson Group, Inc. v. Langley Farm Investments, LLC,
2008 WL 4183025 (D. Ariz. Sept. 8, 2008)........ 17

Legg v. United Benefit Life Ins. Co. of Omaha,
182 Cal. App. 2d 573 (1960)........ 18

Mycogen Corp. v. Monsanto Co.,
28 Cal. 4th 888 (2002)........ 9, 14, 18, 19

Oakland Bulk & Oversized Terminal, LLC v. City of Oakland,
321 F. Supp. 3d 986 (N.D. Cal. 2018), *aff'd*, 960 F.3d 603 (9th Cir. 2020)........ passim

Planning & Conserv. League v. Castaic Lake Water Agency,
180 Cal. App. 4th 210 (2009)........ 17

Richeson v. Helal,
158 Cal. App. 4th 268 (2007)........ 9

Samara v. Matar,
5 Cal. 5th 322 (2018)........ 2

Sawyer v. First City Fin. Corp.,
124 Cal. App. 3d 390 (1981)........ 17, 19

Starr v. Davis,
105 Cal. App. 632 (1930)........ 7

State Bd. Of Equal. v. Super. Court,
39 Cal. 3d 633 (1985)........ 14

Stonehouse Homes LLC v. City of Sierra Madre,
167 Cal. App. 4th 531 (2008)........ 14

Sutphin v. Speik,
15 Cal. 2d 195 (1940)........ 14

Teachers' Retirement Bd. v. Genest,
154 Cal. App. 4th 1012 (2007)........ 14

Torrey Pines Bank. v. Super. Court (White),
216 Cal. App. 3d 813 (1989)........ 15

Yager v. Yager,
7 Cal. 2d 213 (1936)........ 16

Zingheim v. Marshall,
249 Cal. App. 2d 736 (1967)........ 17

STATUTES

Cal. Civ. Code § 1511........ 7

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES
(continued)

Page

Cal. Code Civ. Proc. § 1047 .... 17, 18

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

I. INTRODUCTION

Since the arrival of a new mayor in 2015, the City[1] has engaged in a transparent attempt to deprive Plaintiffs of a key and lucrative benefit of their Development Agreement[2] with the City: the right to develop a Bulk and Oversized Terminal at the Port of Oakland to transport bulk commodities, including coal. After the City attempted to pass an illegal resolution to accomplish its political goal of a coal-free terminal—one precluded by its contract with Plaintiffs—Plaintiffs were forced to seek and obtain a judgment that confirmed their rights under the Development Agreement and invalidated the resolution applying the City's coal ban to the Terminal. *See Oakland Bulk & Oversized Terminal, LLC v. City of Oakland*, 321 F. Supp. 3d 986 (N.D. Cal. 2018), *aff'd*, 960 F.3d 603 (9th Cir. 2020) ("*OBOT I*"). That judgment should have ended the issue and enabled construction of a terminal that would create much needed revenue and jobs for the City. Instead, the City engaged in self-help to obtain its admitted political goal of either a coal-free and "ban-compliant terminal" or no terminal at all. Its Third Trial Brief[3] (effectively, a res judicata motion) represents the City's latest attempt to ignore the force and effect of the federal judgment and its contractual obligations to Plaintiffs.

The City makes three main contentions: (1) OBOT's prior win against the City in federal

---

[1] "The City" refers to Defendant/Counter-Plaintiff City of Oakland. "OBOT" refers to Plaintiff/Counter-Defendant Oakland Bulk and Oversized Terminal, LLC. "OGRE" refers to Plaintiff Oakland Global Rail Enterprise, LLC. "CCIG" refers to Counter-Defendant California Capital Investment Group. "Plaintiffs" refers collectively to OBOT, OGRE, and CCIG.

[2] "Development Agreement" and "DA" refer to Exhibit 7, the Development Agreement By and Between City of Oakland and Prologis CCIG Oakland Global, LLC Regarding the Property and Project Known as "Gateway Development/Oakland Global" dated July 16, 2013.

[3] "City's Third Trial Brief" and "City's 3d Tr. Br." refer to City of Oakland's Trial Brief on Prior Federal Litigation, filed August 7, 2023. The brief is a rehash of the City's Motion in Limine No. 2 Re: Prior Federal Lawsuit, filed June 16, 2023 ("MIL No. 2") and portions of its first and second trial briefs. Contrary to the City's in-court explanation for the late timing of its Third Trial Brief (*see* Reporter's Transcript at 1295:21-1296:16), if the City sought to preclude any evidence on res judicata or collateral estoppel grounds, it could and should have done so earlier. It appears the City requested a new brief only because it neglected to include in its MIL No. 2 an argument based on the second half of the final sentence of OBOT's operative federal complaint, which includes the Ground Lease in a list of contracts. (*See* Ex. 120, Prayer ¶ D.) The City has known about that sentence since OBOT filed that pleading on June 14, 2017. As detailed below in Section II.B.1.c, the City's new argument—like its entire res judicata position—is without merit.

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[4]; (2) Plaintiffs cannot base their current breach claims on events that predate *OBOT I*; and (3) Plaintiffs cannot base their twelfth affirmative defense for excuse on events that predate *OBOT I*. (City's 3d Tr. Br. at 14:2-5.) All three contentions are without merit and should be denied.[5]

The City's first contention concerns a claim that does not exist. The City has constructed a strawman in a midtrial effort to divert attention from the evidence that Plaintiffs have thus far presented to demonstrate the City's breaches of the Ground Lease and Development Agreement that continued or occurred in the first instance after *OBOT I*. As Plaintiffs have explained in the operative pleading, in pretrial briefing, and directly to the City's counsel, they do not contend that the federal court's breach determination establishes breach in this case.

The City's second contention is that "Plaintiffs cannot base their breach claims … on events that predated the federal litigation." (City's 3d Tr. Br. at 14:3-5.) But res judicata is not a bar to all claims or defenses based on facts that merely existed during a prior case. *See French v. Rishell*, 40 Cal. 2d 477, 479-80 (1953) (the same set of facts does not preclude separate lawsuits but a determination of specific facts previously *decided* cannot be re-litigated in a subsequent proceeding). "Res judicata applies [to bar a claim] only when a second suit involves (1) the same cause of action (2) between the same parties or their privies (3) after a final judgment on the merits in the first suit." *Samara v. Matar*, 5 Cal. 5th 322, 327 (2018) (citations and marks omitted). This Court has already determined that the City's res judicata theory fails on the first element because this case implicates different primary rights—and thus different causes of action—than the first case. (*See* May 16, 2019 Order Re Demurrer ("Demurrer Order"), p. 4.)[6]

At its core, this case is about the City's unlawful termination of the Ground Lease on November 22, 2018—23 months *after* the federal litigation commenced, 16 months *after* OBOT

[4] "Ground Lease," "Lease" and "GL" refer to Exhibit 68, the Army Base Gateway Redevelopment Project Ground Lease for West Gateway dated February 16, 2016.

[5] The City does not appear to request any particular relief. It has not identified any particular claim, defense, or part of any claim or defense to be precluded.

[6] A copy of the Court's May 16, 2023 Order Re Demurrer is attached as **Exhibit A**.

filed the operative complaint in that case, and 6 months *after* final judgment in *OBOT I*. The City is correct that Plaintiffs allege additional breach claims, and that *some* of those claims involve *some* events that predate *OBOT I.* But the crux of those claims is that the City delayed and obstructed development of the Bulk and Oversized Terminal[7] to prevent OBOT from Commencing Construction of the Minimum Project by the Initial Milestone Date so that the City could later justify termination of the Ground Lease—all to advance political opposition to coal. Plaintiffs' claims and defenses accrued after *OBOT I* when the City attempted to capitalize on its own obstruction of the development to assert that the Ground Lease was terminated in late 2018.

The City's third contention—that Plaintiffs are precluded from basing their twelfth affirmative defense for excuse on events that predate the federal litigation (City's 3d Tr. Br. at 14:3-5.)—fails for the same reasons as the City's contention regarding Plaintiffs' breach claims.[8]

Finally, the City bases portions of its second and third arguments on the fact that OBOT referred to the Ground Lease in the final sentence of the operative complaint in *OBOT I.* (Ex. 120, Prayer ¶ D.) But OBOT asserted no cause of action for breach of the Ground Lease, (since the City had not attempted to terminate it at that time), and no claim under the Ground Lease was litigated in *OBOT I*. The City cites no authority for the proposition that an unasserted and unlitigated claim in an earlier action provides the basis for res judicata to an affirmative defense in a later action.

For each of these reasons and the additional reasons discussed below, the Court should reject the City's res judicata arguments.

II. RES JUDICATA DOES NOT BAR ANY CLAIM OR DEFENSE

A. The City's argument that breach of the Development Agreement does not establish breach or excuse under the Ground Lease is without merit.

The City argues that a breach of the Development Agreement is not a breach of the Ground

[7] Unless otherwise indicated, capitalized terms reflect terms that are defined in the Ground Lease.

[8] The City's contention is not entirely clear. It raises arguments about excuse throughout the brief and briefly mentions Force Majeure—a different defense. To the extent the City intends their res judicata arguments to apply to Plaintiffs' fourteenth affirmative defense for Force Majeure, it has not made that argument. Nevertheless, Plaintiffs' arguments throughout this response are also reasons that *OBOT I* is not res judicata as to the Force Majeure defense and breach claims.

Lease. (City's 3d Tr. Br. at 6:2-9:11.) That argument fails for five reasons.

First, the argument is a strawman. Plaintiffs do not base their current breach claims on the federal court's determination that the City breached the Development Agreement through the resolution (Ex. 499) that applied the City's no-coal ordinance (Ex. 87) to OBOT; nor do Plaintiffs seek any remedy for that breach. Plaintiffs contend that the City breached the Ground Lease's quiet enjoyment provision (GL § 18.1.7), among others, by unlawfully claiming the Lease was terminated on November 22, 2018. Plaintiffs also contend that the City committed nine additional breaches of specific Ground Lease provisions that each facilitated the City's improper termination.[9] Separately, OBOT alleges that the City breached the Development Agreement by (1) failing to certify a list of then-existing regulations that would apply to the Project[10] (DA § 3.4.3); (2) 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 (DA § 3.5.1); and (3) refusing to meet and confer about those breaches (DA § 8.4). All thirteen breach claims—the ten Ground Lease claims and three Development Agreement claims—center on the City's conduct to delay and obstruct development of the Bulk and Oversized Terminal to facilitate the City's termination of the Ground Lease. (*See, e.g.*, First Amended Complaint ("FAC") ¶ 6 (listing breaching conduct that post-dates *OBOT I*).) Plaintiffs do not contend that *OBOT I* is dispositive of the current claims.

Second, OBOT's current breach of Development Agreement claims overlap with OBOT's

---

[9] Plaintiffs allege that the City, in addition to its improper termination, also breached the Ground Lease by failing to (1) turn over possession of portions of the Premises such as the Railroad R/O/W Property (GL §§ 1.1.1, 1.1.2, 1.5.1, 1.5.2); (2) use commercially reasonable efforts to enter the Rail Access Agreement with the Port of Oakland (GL § 5.2.3); (3) consider and comment on the Basis of Design (GL § 6.2.1); (4) issue non-disturbance agreements (GL § 12.5.1); (5) cooperate to secure third-party funding (GL § 6.3.1); (6) cooperate with OBOT's efforts to obtain regulatory approvals (GL § 5.2.2.2); (7) issue estoppel certificates (GL § 26.1); (8) re-survey the Premises (GL § 1.1.1); and (9) acknowledge Force Majeure claims and requests for extension of the Initial Milestone Date (GL § 16.1 and Art. 40).

[10] "Project" is defined in the Development Agreement (DA, p. 12), and includes the private improvements in the West Gateway, including the Bulk and Oversized Terminal.

and OGRE's current breach of Ground Lease claims in just one critical way: the City's failure to perform under the Development Agreement hindered and delayed Plaintiffs' ability to perform under the Ground Lease, entitling OBOT to extensions of milestone deadlines under Section 16.1 of the Ground Lease. The City's breaches of the Development Agreement by failure to identify the regulations that applied to the Project; employment of a permit approval process that would require discretionary CEQA review; and refusal to meet and confer all delayed and hindered OBOT's and OGRE's performance under the Ground Lease. That delay—together with other City delays and hinderances, and the City's failure to honor OBOT's contractual Force Majeure rights and recognize the automatic milestone extensions that resulted—made the City's termination of the Ground Lease invalid and a breach of the Ground Lease's quiet enjoyment covenant, among others. Plaintiffs do not contend that the City's Development Agreement breaches constitute Ground Lease breaches. The conduct that breached the Development Agreement does support Plaintiffs' Force Majeure claims and provide context for the City's invalid termination of the Ground Lease, and it supports OBOT's and CCIG's defenses to the City's breach claim, including their twelfth affirmative defense for excuse and fourteenth affirmative defense for Force Majeure.

Third, the City's argument that the Development Agreement and Ground Lease are independent relies on a self-serving recitation of contract terms that omits key provisions. For instance, the City cites the Ground Lease's merger clause (GL § 38.7) and other provisions of both contracts as evidence that the contracts are independent. (City's 3d Tr. Br. at 7:9-8:11.) But the merger clause includes an important antecedent: "Except as otherwise expressly provided herein …" And the Ground Lease repeatedly and expressly incorporates the Development Agreement. (*E.g.*, GL §§ 1.4 (entry of the Ground Lease cannot be used as a defense to a claim for breach of the Development Agreement), 5.2 (nothing in the Lease limits or amends the City's obligations under the Development Agreement).) The Development Agreement also incorporates the Ground Lease. (*E.g.*, DA §§ 8.1 (an Event of Default under the Ground Lease is also an Event of Default under the Ground Lease), 14.27 (*when in conflict*, the Ground Lease controls).) The Ground Lease also includes a Force Majeure provision that extends OBOT's time to perform based on "acts of the other party" and "acts of government" (GL § 16.1 and Art. 40); and the Development

Agreement adopts the Ground Lease's definition of Force Majeure (DA §§ 1.1, 7.1). In other words, the relationship between OBOT's breach of Development Agreement claims and OBOT's and OGRE's breach of Ground Lease claims is expressly supported by both contracts.

Fourth, the City's argument that the Development Agreement and Ground Lease are independent concedes that those contracts, and thus these cases, concern distinct primary rights. As detailed further below, res judicata applies only to litigation of the *same cause of action* between the same parties in seriatim lawsuits; and the *same cause of action* element is determined under the primary rights doctrine. (City's 3d Tr. Br. at 12:16-13:1.) Here, the earlier case involved OBOT's right to develop the Project based on regulations that existed when the parties executed the Development Agreement unless the City passed a new law that satisfied a narrow health and safety exception. This case involves distinct rights under the Development Agreement, and rights under the Ground Lease, most notably the right to quiet enjoyment of the Premises.

Fifth, the City's argument that breach of one contract cannot excuse performance under another does not address the situation presented here: a complex project with multiple interrelated contracts under which both sides are required to cooperate so that the other can perform. For instance, the Ground Lease requires the City's approval of Schematic Drawings in its Landlord capacity before OBOT could seek approval from the City in its regulatory capacity (Development Agreement) to construct the Initial Improvements, which also requires the City to comment on the Basis of Design. (*See* GL §§ 6.2.1, 6.2.6.1.) The contracts also require the City to issue permits and to cooperate with OBOT's efforts to obtain third-party approvals so that OBOT can Commence Construction. (*See* GL §§ 6.2.4, 6.2.6.2; DA § 3.5.1.) OBOT could not practically, legally, or contractually meet certain deadlines or complete the Project without the City's cooperation. (*See* GL § 5.2.2.2.) The City's conduct that breached the Development Agreement demonstrates that, instead of cooperating, the City prevented OBOT from performing conditions in the Ground Lease, which provides context and support for Plaintiffs claims and defenses.[11]

[11] The case law the City cites for the proposition that breach of one contract cannot excuse performance under another also does not address the situation presented here. For instance, *Calaco v. Cavotec SA*, 25 Cal. App. 5th 1172 (2018) addresses promises by two parties to pay each other—one party owed a performance-based earn-out payment to the other; and the other separately owed

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Plaintiffs' excuse affirmative defense is not only consistent with the Ground Lease but it also falls squarely within the law on excuse. The rule is that when one contracting party prevents the other's performance of a condition precedent, the party burdened by the condition is excused from performing it. Cal. Civ. Code § 1511; *City of Hollister v. Monterey Ins. Co.*, 165 Cal. App. 4th 455, 490 (2008) ("It is hornbook law that where one contracting party prevents the other's performance of a condition precedent, the party burdened by the condition is excused from performing it, and the benefited party's duty of performance becomes unconditional.").

Plaintiffs also do not seek a full excuse of performance of Ground Lease obligations based on *OBOT I*. OBOT and OGRE seek only extensions of the time to perform based on City-caused delays and hinderances. As noted above, the bargained-for Force Majeure provision in the Ground Lease expressly extends OBOT's time to perform based on "acts of the other party" (*i.e.*, the City as Landlord) and "acts of government" (*e.g.*, the City as regulator) (GL § 16.1 and Art. 40). The City's core breaches were its premature termination of the Ground Lease and failure to acknowledge Plaintiffs' Force Majeure extensions—both actions by the City as Landlord. The fact that *one* of several Force Majeure claims relates to the City's enactment of the ordinance and resolution is of no moment because the City as Landlord breached the Ground Lease.

Sixth, the City's argument about the City acting in its governmental or regulatory powers rather than as OBOT's landlord is a red herring. (*See* City's 3d Tr. Br. at 8:12-9:2 and n.5.) Plaintiffs do not seek to limit the City's regulatory powers. *OBOT I* already decided that the City's prior application of the no-coal ordinance to the Terminal was an improper application of those powers

---

the first party certain post-closing payments under an asset purchase agreement. *See id.* at 1184-85. Independent promises to pay money are fundamentally different than the interrelated and expressly contingent obligations at issue here. (*See, e.g.*, GL § 6.2.6 (express conditions on commencement of construction).) *Hall v. Dekker*, 45 Cal. App. 2d 783, 788 (1941) and *Starr v. Davis*, 105 Cal. App. 632, 635 (1930) state only the general rule that when two covenants are to be performed at separate times they are independent. Neither case analyzes the type of concurrent or continuing duties or conditions precedent in the Development Agreement and Ground Lease where certain events inherently rely on the occurrence of others. As the City acknowledges, the Development Agreement established, among other things, the regulatory framework for the Project. (City's 3d Tr. Br. at 7:9-12.) The private development enumerated in the Ground Lease relies on the regulatory framework set forth in the Development Agreement; the City's unlawful conduct at issue in *OBOT I* upset that framework, required litigation, and delayed performance under the Ground Lease.

that breached the Development Agreement; the court also noted that the City remains free to hold new health and safety hearings about the shipment of coal if it would like to attempt a proper exercise of its power. But the City has not done that. The City's decision to not move forward with a new health and safety hearing for the Terminal (which would require finding substantial evidence of a significant health and safety danger under the terms of the Development Agreement) was the City's choice, not because of any effort by OBOT or OGRE to limit the City's authority to enact new Law or regulate the West Gateway. In short, the City cannot rely on its own actions in passing an illegal resolution that had the intent and effect of preventing Plaintiffs from meeting milestone deadlines and otherwise developing a terminal to justify its invalid Lease termination.[12]

Plaintiffs also do not seek to impose liability on the City as Landlord for its conduct as regulator. Plaintiffs' Development Agreement and Ground Lease claims are separate other than the narrow relationship discussed above. The Ground Lease claims are each for breach of specific Ground Lease provisions that enumerate the City's obligations as Landlord. (*See* note 9, *supra*.) Most significantly, Plaintiffs allege that the City as Landlord breached the Lease by improperly terminating it. It is undisputed that the termination was a Landlord act, not a regulatory one.[13]

---

[12] The City also relies on Ground Lease, Section 5.1.1.2, which states that no "present or future Law … shall relieve Tenant of its obligations" under the Ground Lease "or to otherwise seek redress against Landlord." (City's 3d. Tr. Br. at 8:19-9:2.) Ground Lease, Article 5 and Section 5.1 (which section 5.1.1.2 is under) are about OBOT's obligation to follow Laws, which the Ground Lease defines as "any one or more present and future laws … *to the extent applicable to the Parties or to the Premises* …" (GL, Art. 40, p. 126 (emphasis added).) In other words, "Laws" do not include any law, ordinance, or resolution that is inapplicable to OBOT, the Premises, or the Terminal. That interpretation comports with the balance of Article 5. (*See, e.g.*, GL §§ 5.2.1 (OBOT retains the ability to challenge the *applicability* of City-promulgated Laws), 5.1 (OBOT cannot be found in default for failure to comply with Laws if challenging their applicability).) The ordinance and resolution at issue in *OBOT I* are inapplicable to Plaintiffs as a matter of law. *See OBOT I*, 321 F. Supp. 3d at 1010 ("The City is therefore enjoined from relying on the resolution either to apply the ordinance to OBOT or to restrict future coal operations at the facility."). Of course OBOT has the right to challenge the City's improper exercise of its regulatory power; and of course it should not be penalized for delays caused by that improper exercise. If the opposite were true, the City could simply put on its regulatory hat whenever it needed to justify breaching a contract it entered when wearing its Landlord hat, which is exactly what the City attempts to do here.

[13] The City cites several cases for the proposition that "the government as landlord does not breach a ground lease when acting pursuant to other governmental powers." (City's 3d Tr. Br., p.9, n.5.) None of them involve a government body acting in its governmental capacity to delay a tenant's performance, then suing the tenant for that delay; nor do they address a governmental act declared

B. The City's second and third arguments that Plaintiffs cannot base their breach claims or excuse defense on events that predate *OBOT I* are without merit.

1. The City has not met its burden on the first element of res judicata that the two cases involve the same cause of action.

a. The two cases involve distinct primary rights.

As noted, California courts apply the primary rights theory to assess whether two proceedings involve identical causes of action. *Mycogen Corp. v. Monsanto Co.*, 28 Cal. 4th 888, 904 (2002); *Hong Sang Mkt., Inc. v. Peng*, 20 Cal. App. 5th 474, 490 (2018). "The plaintiff's primary right is the right to be free from a particular injury, regardless of the legal theory on which liability for the injury is based. The scope of the primary right therefore depends on how the injury is defined. A cause of action comprises the plaintiff's primary right, the defendant's corresponding primary duty, and the defendant's wrongful act in breach of that duty." *Federation of Hillside & Canyon Assns. v. City of Los Angeles*, 126 Cal. App. 4th 1180, 1202 (2004).

This case involves distinct injuries (the City's 2018 termination of the Ground Lease and multiple other breaches that delayed or obstructed development of the Project, including the Bulk and Oversized Terminal) from the one at issue in *OBOT I* (the City's 2016 resolution that applied a new law to the Project even though the Development Agreement guaranteed that only regulations that existed when that contract was executed would apply). *OBOT I* was narrow. It held that the City's 2016 passage of a resolution that applied the no-coal ordinance to the Bulk and Oversized Terminal did not meet the standard set forth in section 3.4.2 of the Development Agreement for applying a regulation to Terminal operations that did not exist when that contract was executed. *OBOT I*, 321 F. Supp. 3d at 1010-11. Neither section 3.4.2 nor the legality of the City's invalidated resolution are at issue here.

Instead, and as explained above, Plaintiffs seek recovery for the City's 2018 termination of

---

invalid in a prior suit. *Discovery Builders, Inc. v. City of Oakland*, 92 Cal. App. 5th 799, 803 (2023) addresses only the City's ability to impose new impact fees on an existing project, not the City's ability to delay a project by targeting it with a unique, invalid law, then suing for that delay. *Richeson v. Helal*, 158 Cal. App. 4th 268, 280 (2007) states that cities cannot contract away their police powers, but no party in this case contends that the City has done that. And *City of Glendale v. Superior Court*, 18 Cal. App. 4th 1768 (1993) is an eminent domain case. All inapposite.

the Ground Lease and for other breaches that led up to that termination. The City's breach claims, including the Force Majeure claims, did not accrue until late 2018 when the City demanded performance and terminated the Ground Lease after the federal litigation. (*See* Ex. 185 (the City's August 20, 2018 noting passage of the Initial Milestone Date and deferring a substantive response to Plaintiffs' Force Majeure claims), Ex. 217 (City's September 21, 2018 notice to cure, rejecting Plaintiffs Force Majeure claims), Ex. 250 (City's October 23, 2018 notice of default stating that the Ground Lease would terminate on November 22, 2018).) Section 16.1, the Force Majeure provision, states that a party "shall not be considered in breach of or in default of its obligations … to the extent of any delay resulting from Force Majeure."[14] The City breached that provision by considering Plaintiffs in breach and default, then terminating the Ground Lease notwithstanding the automatic Force Majeure extension. The City understands that Ground Lease claims based on contractual Force Majeure do not accrue until the other party declares a breach or default. Indeed, the City attempted to reject Plaintiffs' 2016 Force Majeure claim on the basis that it was not ripe, notwithstanding the fact that the Ground Lease does not allow either party to reject Force Majeure claims. (*See* Ex. 81, p. 2 (City's March 22, 2016 response to OBOT's first Force Majeure letter, stating that the claim was premature because "Landlord has not provided any notification to Tenant that Tenant is in breach of or default in its obligations under the WGW Lease …").)

b. The Court's Demurrer Order and Motion to Strike Order[15] correctly determined that this case involves different causes of action than *OBOT I*.

The City bases its res judicata theory primarily on a selective and inaccurate reading of this Court's Demurrer Order and Motion to Strike Order. (*See* City's 3d Tr. Br. at 9:14-11:4.) The Court did not hold—as the City suggests—that res judicata broadly bars claims and defenses in this action. Exactly the opposite is true. As the Court wrote in its Demurrer Order:

Plaintiffs argue that res judicata should not apply here because this

---

[14] Article 40 furthers that the "delay caused by Force Majeure" also includes "additional time … as may reasonably be required to complete performance of the hindered act." The extension is automatic and mandatory.

[15] "Motion to Strike Order" refers to this Court's May 16, 2023 Order Re Motion to Strike. A copy is attached as **Exhibit B**.

> *action does not involve the same agreement or claims as in the federal action. This court agrees.* As noted above, the federal action was limited to enjoining Defendant from applying a coal ban ordinance to Plaintiffs' work at the site because it was a breach of the Development Agreement. Here, Plaintiffs contend that even after they succeeded in the federal action to enjoin Defendant's reliance on the ordinance, Defendant has continued to ignore its obligations under the Development Agreement and has otherwise engaged in conduct to intentionally delay and obstruct Plaintiffs' development efforts. The discussion of the 2016 Ordinance and Resolution in the Complaint simply places in context the alleged injuries currently in contention. Further, it appears that this action involves other contracts than the Development Agreement that was the subject of the federal action …

(Demurrer Order, p. 4 (emphasis added).)

The Court also found that the two cases implicate distinct primary rights, and thus distinct causes of action, defeating the first element for res judicata to apply:

> While arguably correct that both the Development Agreement and the Lease address the right of Plaintiffs to develop the Project and the terms thereof, the Court does not agree that the claims in this lawsuit are simply different theories based on the same "primary right" addressed by the federal action which concerned the validity of 2016 Resolution and enjoined the City from relying upon it in connection with the Development Agreement. . . . *the Court finds that the allegations in this Complaint concern distinct wrongs from those that pre-dated the federal action, and therefore are not barred by res judicata*.

(*Id.* (emphasis added).)

The Court's Motion to Strike Order is also not the broad res judicata ruling that the City contends it is. The Court narrowly struck only small portions of the original complaint that (1) arose *before commencement* of the federal case, (2) were asserted as a basis for Plaintiffs' current claims, and (3) were not pleaded as background or context:

> In ruling on Defendant's demurrer, the Court found that not all of the allegations were barred by res judicata because they concerned conduct that occurred after the commencement of the federal action, and involve different claims arising from a different agreement from those at issue in the federal action. Further, Plaintiffs state that their discussion of the conduct that was at issue in the federal action serve as background facts to this action. Thus, the Court finds that the only portions that should be stricken are those that on their face arose before the commencement of the federal action and are asserted as the basis for Plaintiffs' causes of action, and not pled as background facts.

(Motion to Strike Order, p. 2.)

The Court's prior orders make sense. This case concerns distinct primary rights (and largely distinct contracts) from those at issue in *OBOT I*. As a matter of law, the City cannot meet the first element (same cause of action) for res judicata to apply.

c. The City's new theory regarding OBOT's request for injunctive relief in *OBOT I* does not change the result.

Although the City has briefed the res judicata issue multiple times in this case, it now contends for the first time that OBOT previously sought injunctive relief regarding Ground Lease performance deadlines; and that the requested relief bars any claim or defense predicated on excused performance because it implicates the same primary right at issue in *OBOT I.* (City's 3d Tr. Br. at 11:5-13:27.) The City's argument hinges on OBOT's amendment of its complaint in the federal case to add the following new language to the end of the final sentence in its prayer for relief: "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." (*Compare* Ex. 120 (federal FAC), Prayer ¶ D, *with* the same paragraph in Ex. 120A (initial federal complaint).) The argument fails for six reasons.

First, the argument is nonsensical. If the City were correct, a breach of contract defendant in an earlier lawsuit could file its own later breach suit and be insulated from all defenses based on prior misconduct no matter how related that misconduct is to the new claim. That is not the law. Seriatim lawsuits either involve the same cause of action or they do not.

As discussed above, the two cases concern different causes of action. Additionally, the City's own breach claim focuses on their contractual right under the Ground Lease to have construction commenced on the Minimum Project by the Initial Milestone Date—a contractual and primary right not at issue in *OBOT I.* If it were at issue, the City's breach claim would be precluded. Similarly, Plaintiffs' breach claims focus primarily on their contractual rights under the Ground Lease to quiet enjoyment of the Premises, and to reasonable extensions of the Initial Milestone Date based on Force Majeure events. Both sides' claims center on the Initial Milestone Date, which even

under the City's view, did not occur until August 14, 2018, months after *OBOT I.* Plaintiffs should be permitted to present all evidence that bears on the validity of the City's alleged Initial Milestone Date and the reasons they could not perform certain construction by that date.

Second, the City overstates the requested injunction that OBOT added in the federal case. OBOT did *not* ask to be excused of any Ground Lease performance deadline as the City incorrectly repeats throughout its argument. OBOT asserted three claims in *OBOT I*: (1) declaratory and injunctive relief that the ordinance and resolution were unconstitutional under the Commerce Clause of the U.S. Constitution; (2) declaratory and injunctive relief that the ordinance and resolution, as applied to the Terminal, were preempted by federal law; and (3) breach of the Development Agreement. (Ex. 120.) There was no claim under the Ground Lease. The original complaint did not even mention the Ground Lease. (Ex. 120A.) The operative complaint mentioned it only once—in the final sentence—and without asserting any claim under the Ground Lease. (Ex. 120, Prayer ¶ D.) The federal court also did not resolve any claim under the Ground Lease. *See generally OBOT I*, 321 F. Supp. 3d. Nothing in the findings of fact and conclusions of law or the judgment in *OBOT I* affects OBOT's claims or defenses in this case.

Third, the City invents procedural history in the federal case about the narrow language that OBOT added to its complaint. For instance, the City contends that Plaintiffs' made new allegations to support the new injunctive relief request. (City's 3d Tr. Br. at 11:23-12:4.) Not true. Every paragraph that the City cites from the purported amendment was made verbatim in the original complaint. (*Compare* Ex. 120 (federal FAC) ¶¶ 34-35, 122-123, 167, *with* the same paragraphs in Ex. 120A (initial federal complaint).) In fact, the two pleadings are identical except that OBOT tacked on the new "Ground Lease" language to the final sentence of the prayer.

Relatedly, the City implies that the new language was discussed at the July 12, 2017 "case management conference that followed" the amendment, and that the federal court warned OBOT about the res judicata impacts. (City's 3d Tr. Br. at 12:5-15.) Again, not true. The entire context of the res judicata discussion at the 2017 CMC was about OBOT's decision not to pursue damages in

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

the amended pleading. (*See* CMC transcript at 9:4-22.)[16]

Fourth, none of the City's cited authority addresses the type of amendment to a prayer for relief at issue here. The City recites only the general law on res judicata, then asserts that this case involves the same primary right as *OBOT I* by misrepresenting that lawsuit as being about OBOT's performance deadlines under the Ground Lease. (City's 3d Tr. Br. at 12:16-13:27.)[17] As discussed, that case was not about performance deadlines in the Ground Lease; it was about the City's breach of the Development Agreement through the no-coal ordinance and resolution.

Fifth, no ripe controversy with respect to the Ground Lease existed at the time of *OBOT I*; thus, OBOT could not have brought a cause of action for breach of the Ground Lease in the federal case. The requested relief involved only a hypothetical lawsuit in the future, not a live controversy. *See Stonehouse Homes LLC v. City of Sierra Madre*, 167 Cal. App. 4th 531, 542 (2008) ("Courts may not render advisory opinions on disputes which the parties anticipate might arise but which do not presently exist." (citing *Teachers' Retirement Bd. v. Genest*, 154 Cal. App. 4th 1012, 1043-44 (2007))). Unripe claims in an earlier action do not preclude claims in a later action. *Cf. Ass'n of Irritated Residents v. Dep't of Conserv.*, 11 Cal. App. 5th 1202, 1219-20 (2017).

Sixth, the City applies the incorrect preclusion doctrine. OBOT's requested relief in *OBOT I* should be analyzed, if at all, under the issue preclusion (collateral estoppel) aspect of res judicata, and not the claim preclusion aspect as the City has done. At best for the City, OBOT's reference to the Ground Lease in its federal prayer raises only the issue of whether OBOT was entitled to an

[16] A copy of the Transcript of Proceedings for the July 12, 2017 Case Management Conference is attached as **Exhibit C**. The entire transcript demonstrates that there was no res judicata discussion about the request for relief that the City discusses in its Third Trial Brief.

[17] Every successful res judicata case the City cites involves two cases with the same cause of action—not a tacked on request for injunctive relief about a potential future lawsuit on a different contract, and not a remedy that was never litigated or decided. *See Mycogen Corp.*, 28 Cal. 4th at 897-98 (consecutive actions challenging the same failure by Monsanto to negotiate licenses for gene technology that it had a duty to tender); *State Bd. Of Equal. v. Super. Court*, 39 Cal. 3d 633, 640-41 (1985) (consecutive actions about the same unpaid taxes); *Sutphin v. Speik*, 15 Cal. 2d 195, 197-98 (1940) (consecutive actions to recover royalties under the same assignment of interest in a lease); *Cal. Sierra Dev. Inc. v. George Reed, Inc.*, 14 Cal. App. 5th 663, 676-77 (2017) (both lawsuits asserted claims for the same alleged interference by installation and operation of an asphalt plant); *Alpha Mech., Heating & Air Conditioning, Inc. v. Travelers Cas. & Surety Co. of Am.*, 133 Cal. App. 4th 1319, 1332 (2005) (consecutive actions seeking redress for the same performance).

injunction regarding a hypothetical lawsuit that the City might bring for some future breach of the Ground Lease.[18] Breach of the Ground Lease was not an asserted caused of action. The distinction between issue and claim preclusion is critical. The former applies only to issues actually argued *and* decided. *DKN Holdings LLC v. Faerber*, 61 Cal. 4th 813, 824 (2015). It is undisputed that injunctive relief regarding the Ground Lease was never argued or decided in *OBOT I*.

Lastly, the City notes that by June 14, 2017 when OBOT filed the First Amended Complaint in federal court, some events that Plaintiffs have relied on had already occurred, including: (1) the 2016 no-coal ordinance and resolution, (2) the March 9, 2016 kick-off meeting, (3) the March 11, 2016 Force Majeure letter and March 22, 2016 response[19], (4) the Cappio memo, (5) the City's failure to comment on the 2015 Basis of Design, (5) the City's failure to identify the regulations that applied to the Project, (6) the City's failure to support efforts to secure third-party funding, and (7) the City's failure to use commercially reasonable efforts to enter the Rail Access Agreement. (City's 3d Tr. Br. at 13:10-18.) In the City's view, OBOT should have asked the federal court to excuse its performance under the Ground Lease based on those events. The City misses the point. These events, as noted, are all part of Plaintiffs' Force Majeure claims, which did not accrue until the City declared Plaintiffs in default and terminated the Ground Lease. On June 14, 2017, the Ground Lease was in its infancy, the milestone deadlines had not passed, OBOT's performance had not been demanded, and thus no cause of action for breach of the Ground Lease based on the City's unlawful termination had accrued.

The City's argument also fails when applied to each listed event as an individual breach claim. The City does not explain why any event on its own would cause the same harm and implicate the same primary right as the City's enactment of the no-coal ordinance and resolution in

[18] Indeed, some of the City's cited cases are issue preclusion/collateral estoppel cases, including two of the cases that the City cites for the proposition that res judicata bars certain remedies and affirmative defenses. *See Torrey Pines Bank. v. Super. Court (White)*, 216 Cal. App. 3d 813, 824 (1989) (analyzing the issue under collateral estoppel); *Holman v. Holman*, 25 Cal. App. 2d 445, 453 (1938) (same two issues raised in both suits although decided in the first).

[19] The City cannot have it both ways. If the City's res judicata position were correct—and it is not—the City would have also lost its right to challenge OBOT's earlier conduct and claims, including the 2016 Force Majeure claim. As noted, the extension under Ground Lease, Section 16.1 is mandatory and automatic. (GL § 16.1 and Art. 40.)

breach of section 3.4.2 of the Development Agreement—a provision not at issue in this case. In fact, each event that the City has identified corresponds to a continuing duty and breach of that duty by the City. The kick-off meeting and Cappio memo for instance, represent the City's adoption of a permit-approval approach that violates section 3.5.1 of the Development Agreement and the City's continuing duty to rely on the existing EIR for the Project rather than reopening CEQA and requiring discretionary reviews of ordinarily ministerial determinations. That approach persisted after *OBOT I* and became ripe for suit when the City injured Plaintiffs by demanding performance, then terminating the Ground Lease based on delay that the City caused. The law on subsequent and continuing breaches is discussed in more detail below.

2. Claims of breach and defenses based on events prior to May 15, 2018 are not categorically barred.

The City argues that Plaintiffs are categorically precluded from litigating breach claims or defenses based on events prior to May 15, 2018. (City's 3d Tr. Br. at 10:3-11:4.) That argument fails for all of the reasons discussed above. This case and *OBOT I*, as this Court has already determined, involve distinct causes of action. The City is also wrong for seven additional reasons.

First, the City is wrong on the law regarding the operative date for res judicata analysis. May 15, 2018 is the date of final judgment in *OBOT I* but the key date is when the operative pleading was filed—here, June 14, 2017. *See Yager v. Yager*, 7 Cal. 2d 213, 217 (1936) ("It is a general rule that a party cannot put in issue rights acquired pendente lite unless a supplemental pleading is filed, and, if such a pleading is not filed, he is not foreclosed from asserting such rights in a subsequent action."); *Allied Fire Prot. v. Diede Constr., Inc.*, 127 Cal. App. 4th 150, 155 (2005) ("Res judicata is not a bar to claims that arise after the initial complaint is filed. These rights may be asserted in a supplemental pleading, but if such a pleading is not filed a plaintiff is not foreclosed from asserting the rights in a subsequent action."). Thus, even if the City's res judicata argument were correct—and it is not—the law would permit Plaintiffs to base their current claims and defenses on events that occurred after June 14, 2017.[20]

[20] The City acknowledges that June 14, 2017 is the operative date for res judicata purposes (City's 3rd Tr. Br. at 13:24-27), but in a footnote argues that the Court should enforce a May 15, 2018

Second, as to events that purportedly occurred prior to June 14, 2017 (or even May 15, 2018), the City has engaged in subsequent breaches. Res judicata does not bar suits for successive breaches (*i.e.*, distinct, seriatim breaches of the same duty or of different duties under the same contract), including those that accrued after OBOT filed the operative complaint and before final judgment in *OBOT I*. *See* Cal. Code Civ. Proc. § 1047 ("Successive actions may be maintained upon the same contract or transaction, whenever, after the former action, a new cause of action arises therefrom."); *Allied Fire Protection v. Diede Constr., Inc.*, 127 Cal. App. 4th 150, 155 (2005) ("The general rule that a judgment is conclusive as to matters that could have been litigated does not apply to new rights acquired pending the action which might have been, but which were not, required to be litigated." (Internal quotation marks omitted)); *Zingheim v. Marshall*, 249 Cal. App. 2d 736, 744-45 (1967) (seriatim lawsuits permissible for each missed payment due under an installment contract); *accord Karlsson Group, Inc. v. Langley Farm Investments, LLC*, 2008 WL 4183025, at *5 (D. Ariz. Sept. 8, 2008) (subsequent actions are permissible on the same contract when new facts arise during the pendency of the first action).

Before, during, and after *OBOT I*, the City continued to string Plaintiffs along, promising that it would perform certain contractual obligations. For instance, on October 13, 2016—two

---

cutoff based on its prior orders, the First Amended Complaint, and estoppel principles (*id.* p. 10, n.7). The City is wrong. First, this Court recognized that the complaint filing date controls in its prior order. (Demurrer Order, p. 4 ("'As a cause of action is framed by the facts *in existence when the underlying complaint is filed*, res judicata is not a bar to claims that arise after the initial complaint is filed.'" (quoting *Planning & Conserv. League v. Castaic Lake Water Agency*, 180 Cal. App. 4th 210, 227 (2009)) (emphasis added)); Motion to Strike Order, p. 2 (narrowly striking only portions of the complaint "that on their face arose *before the commencement* of the federal action and are asserted as the basis for Plaintiffs' causes of action, and not pleaded as background facts." (emphasis added)).) Second, the First Amended Complaint states that the City breached the contracts after *OBOT I* because Plaintiffs' theory of the case is that even in the face of a federal court judgment, the City continued its misconduct by finding other ways to effectively ban coal. That does not excuse the City's prior misconduct. The First Amended Complaint, discovery record, and trial record are replete with information about the parties' conduct long before May 15, 2018. (*See, e.g.*, FAC §§ 2, 15-36, 46, 91-93, 102, 114, 129-130.) Third, the City asserts that judicial and equitable estoppel apply but does not conduct an analysis of either theory under the elements. It has not met its burden. Fourth, there is no prejudice to the City. Indeed, the City devoted much of its opening statement to, and has spent hours asking trial witnesses about, events that occurred years before *OBOT I* concluded. *See, e.g. DRG/Beverly Hills, Ltd. v. Chopstix Dim Sum Cafe & Takeout III, Ltd.*, 30 Cal. App. 4th 54, 59 (1994) (estoppel requires a showing of prejudice or harm).

months before OBOT filed its federal case, Assistant City Administrator Claudia Cappio wrote to Phil Tagami and Mark McClure regarding the schedule for the City to enter the rail agreements required under the Ground Lease. (Ex. 95.) Ms. Cappio's letter set forth the sequence of rail-related agreements, identified the Rail Access Agreement as part of Milestone 3, and scheduling discussion of the draft Rail Access Agreement with the Port of Oakland by November 2017 (five months after OBOT filed its First Amended Complaint in *OBOT I*). (Ex. 95, pp. 1, 3; *see also* Ex. 121, p. 2 (July 10, 2017 Claudia Cappio email to Mark McClure promising to follow-up in the coming weeks on OBOT's participation in meetings with the Port).) The City's failure to use commercially reasonable efforts to enter the Rail Access Agreement, including by failing to schedule promised meetings, are subsequent breaches that Plaintiffs are entitled to litigate in this case.

Third, res judicata is a not a bar to suits for a continuing breach. A continuing breach involves a continuing duty and an ongoing breach of that duty that a party fails to cure over time. *See, e.g.*, *Abbott v. 76 Land & Water Co.*, 161 Cal. 42, 48-49 (1911) (a contracting party may sue for damages from an ongoing breach of a continuing duty (*e.g.*, the duty to deliver a deed) in successive actions until the contract is repudiated, at which time there is but a single breach and a single cause of action); *Legg v. United Benefit Life Ins. Co. of Omaha*, 182 Cal. App. 2d 573, 580 (1960) ("Although it is true that section 1047 recognizes the right to maintain a new action for a continuing breach of a continuing obligation, it is also well established that the continuing breach necessarily implies a continuing duty." (citations omitted)).

Mycogen is illustrative. The California Supreme Court held that a second lawsuit by Mycogen Corporation against Monsanto was barred by res judicata. Both lawsuits involved Monsanto's duty to tender licenses for gene technology and its refusal to negotiate the licenses. In Mycogen's first case, it successfully sought declaratory relief and specific performance; in the second, it sued for breach of contract and damages. *Mycogen*, 28 Cal. 4th at 897-98. Mycogen argued that res judicata did not apply because Monsanto's duty was continuing. *Id.* at 896. The court rejected that argument, but on grounds not present here. The breach that gave rise to *Mycogen I* was a full repudiation of the contract at issue. *Id.* at 895-96, 905. Here, the repudiation came in 2018—more than a year after OBOT filed the First Amended Complaint in the federal case. Thus,

under the logic of *Mycogen*, the City's obligations (for instance, to use commercially reasonable efforts to enter the Rail Access Agreement and turnover the Railroad R/O/W Property) were continuing, and subsequent litigation should be permitted to recover damages and other remedies that accrued after June 14, 2017, when OBOT filed its First Amended Complaint in *OBOT I*.

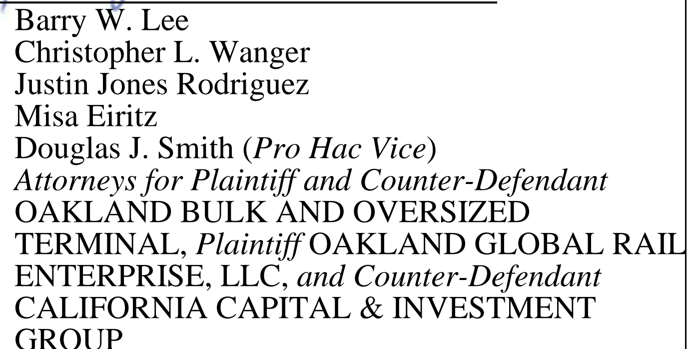
Fifth, a subsequent lawsuit can be based on facts that were also relevant to an earlier lawsuit without implicating res judicata. *See Sawyer v. First City Fin. Corp.*, 124 Cal. App. 3d 390, 402-03 (1981) (plaintiff permitted to bring seriatim suits that "might have been joined in one lawsuit" where the "same 'harm' ha[d] been done in both cases" but each involved a separate primary right); *accord French*, 40 Cal. 2d at 479-80; *Brenelli Amedeo, S.P.A. v. Bakara Furniture, Inc.*, 29 Cal. App. 4th 1828, 1836-39 (1994). To establish that an earlier judgment involved the same cause of action as the present claim, it is not sufficient merely to show that both cases arose out of a common set of facts. For the second action to be barred, it must seek redress for invasion of the same primary right that was the subject of the first case, which as detailed above, the City has not shown. *See Gamble v. Gen. Foods Corp.*, 229 Cal. App. 3d 893, 898 (1991), *reh'g denied and opinion modified* (May 28, 1991). Here, the City has failed to prove that the same primary rights are at issue, making its recitation of dates irrelevant.

III. CONCLUSION

For each of the reasons discussed above, the Court should reject the City's res judicata arguments.

Dated: August 17, 2023

MANATT, PHELPS & PHILLIPS, LLP



By: ______________________________

Barry W. Lee
Christopher L. Wanger
Justin Jones Rodriguez
Misa Eiritz
Douglas J. Smith (*Pro Hac Vice*)
Attorneys for Plaintiff and Counter-Defendant
OAKLAND BULK AND OVERSIZED TERMINAL, *Plaintiff* OAKLAND GLOBAL RAIL ENTERPRISE, LLC, *and Counter-Defendant* CALIFORNIA CAPITAL & INVESTMENT GROUP

Exhibit A

Mnatt, Phelps & Phillips, LLP
Attn: Lee, Barry W.
One Embarcadero Center
30th Floor
San Francisco, CA 94111____

Altshuler Berzon LLp.
Attn: Finberg, James
177 Post Street, Ste. 300
San Francisco, CA 94108

Superior Court of California, County of Alameda
Rene C. Davidson Alameda County Courthouse

Oakland Bulk And Oversized Terminal, LLC Plaintiff/Petitioner(s) VS. City of Oakland Defendant/Respondent(s) (Abbreviated Title)	No. RG18930929 Order Demurrer to Complaint Sustained

The Demurrer to Complaint filed for City of Oakland was set for hearing on 04/25/2019 at 03:00 PM in Department 18 before the Honorable Jo-Lynne Q. Lee. The Tentative Ruling was published and was contested.

The matter was argued and submitted, and good cause appearing therefore,

IT IS HEREBY ORDERED THAT:

Defendant City of Oakland's ("Defendant" or "City") Demurrer to Plaintiffs Oakland Bulk and Oversized Terminal, LLC ("OBOT") and Oakland Global Rail Enterprise, LLC's ("OGRE") (collectively, "Plaintiffs") Complaint is SUSTAINED WITH LEAVE TO AMEND IN PART AND OVERRULED IN PART. Plaintiffs shall file an amended complaint no later than June 12, 2019.

STANDARD OF LAW

"A demurrer tests the legal sufficiency of the factual allegations in a complaint." (Redfearn v. Trader Joe's Co. (2018) 20 Cal. App. 5th 989, 996.) The Court must determine "whether the complaint alleges facts sufficient to state a cause of action or discloses a complete defense." (Id.) The Court assumes "the truth of the properly pleaded factual allegations, facts that reasonably can be inferred from those expressly pleaded and matters of which judicial notice has been taken." (Id.) "As a general rule in testing a pleading against a demurrer the facts alleged in the pleading are deemed to be true, however improbable they may be," unless the "complaint contains allegations of fact inconsistent with attached documents, or allegations contrary to facts which are judicially noticed." (Del E. Webb Corp. v. Structural Materials Co. (1981) 123 Cal. App. 3d 593, 604.) "The court does not, however, assume the truth of contentions, deductions or conclusions of law." (Aubry v. Tri-City Hosp. Dist. (1992) 2 Cal. 4th 962, 967.) Courts "give the complaint a reasonable interpretation, reading it as a whole and its parts in their context." (Goncharov v. Uber Techs., Inc. (2018) 19 Cal. App. 5th 1157, 1165.) Courts "construe the complaint 'liberally ... with a view to substantial justice between the parties[.]'" (Id.)

"[I]f a plaintiff pleads a claim that fails to state a cause of action, a demurrer is properly sustained[.]" (Boxer v. City of Beverly Hills (2016) 246 Cal. App. 4th 1212, 1225.) "Where the complaint is defective, '[i]n the furtherance of justice great liberality should be exercised in permitting a plaintiff to amend his [or her] complaint.'" (Redfearn, 20 Cal. App. 5th at 996.) "[L]eave to amend should not be granted where ... amendment would be futile." (Id. at 997.)

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs (or predecessors in interest) and the City entered into negotiations and agreements for the development of a rail-to-ship bulk commodity terminal ("Terminal") at the former Oakland Army Base beginning in or about 2010 through 2013. A Development Agreement was entered into in or about 2013. Apparently in response to community concerns about potential transport of coal through the Terminal, in 2016 the Oakland City Council adopted an ordinance banning coal operations at "bulk material facilities" in Oakland and passed a resolution applying this ordinance to the Terminal, finding that coal operations at the Terminal would pose a substantial danger to the health and safety of people in Oakland.

Plaintiff OBOT responded by filing a lawsuit in the United States District Court, Northern District of California captioned Oakland Bulk & Oversized Terminal, LLC v. City of Oakland, Case No. 16-cv-07014-VC (hereinafter, the "federal action.") challenging these acts and asserting the City breached the Development Agreement it had signed in July, 2013 by applying the coal ban to the Terminal. On May 15, 2018 Judge Chhabria issued Findings of Fact and Conclusion (hereinafter "Chhabria Order.") framing the question at issue in the federal action as "...whether the record before the City Council when it made its decision [adopting the Resolution] contained substantial evidence that the proposed coal operations would pose a substantial health or safety danger." Judge Chhabria held: "Even under the deferential standard of review in the development agreement, the record before the City Council does not contain enough evidence to support the City Council's conclusion that the proposed coal operations would pose a substantial danger to the people in Oakland. In fact, the record is riddled with inaccuracies, major evidentiary gaps, erroneous assumptions, and faulty analysis, to the point that no reliable conclusion about health or safety dangers could be drawn from it. Perhaps a more thorough investigation could result in a lawful determination that coal operations may be restricted at the facility, but in this case, the record was inadequate. Because the resolution adopted by the City Council applying the coal ordinance to this shipping facility constitutes a breach of the development agreement, it is invalid and the City may not rely upon it to restrict operations there." (Chhabria Order, pp. 2-3.). In light of this finding, Judge Chhabria concluded: "The City is therefore enjoined from relying on the resolution either to apply the ordinance to OBOT or to restrict future coal operations at the facility. As a practical matter, this renders the coal ordinance a nullity, because the only reason the City adopted it was to restrict OBOT's operations, and OBOT is the only facility in Oakland to which it could conceivably apply. But as a strictly technical matter, there's no reason to strike down the ordinance once it has been determined that Oakland may not presently apply it to OBOT. The City remains free, of course, to pursue future regulation of the project so long as it complies with its legal obligations, including any legitimate contractual obligations to the project developers. Because OBOT prevails on its breach of contract claim, the Court enters judgment for OBOT without reaching the constitutional and statutory claims raised at summary judgment. (Chhabria Order, p. 37.) Judgment was entered on May 23, 2018 in favor of Plaintiff OBOT.

The instant Complaint was filed on December 4, 2018. In its Complaint, Plaintiffs assert twelve (12) causes of action including claims involving alleged breaches of contract (First through Third Causes of Action), fraud (Fourth Cause of Action), and intentional and negligent interferences with contract and prospective economic relations (Fifth through Tenth Causes of Action) and they seek declaratory relief (Eleventh Cause of Action), specific performance (Twelfth Cause of Action), compensatory damages, preliminary and permanent injunction, and attorneys' fees and costs of suit.

In this litigation Plaintiffs reference the 2103 Development Agreement and a 2016 ground lease (the "Army Base Gateway Development Project Ground Lease for West Gateway, dated February 16, 2016) pursuant to which, they claim, they "set out to redevelop a significant portion of the former Oakland Army Base, which included reestablishing certain rail improvements (the "Shoreline Rail") and developing the Terminal." (Complaint, ¶4.) The Shoreline Rail and the Terminal are collectively referred to as the "Project." (Id.). Plaintiffs complain that over the last several years, "the City has engaged in an uninterrupted pattern of delay and interference, all with the objective of preventing OBOT from completing this project" including "the City's latest tactic - falsely asserting that its Lease with OBOT has automatically terminated as the result of a claimed default that did not occur." (Complaint, ¶1.).

The Complaint alleges various acts of delay and interference, apparently occurring from approximately 2014 forward. Specifically mentioned is the Ordinance and Resolution adopted in 2014 that was the subject of the federal action. Plaintiffs contend that the City's appeal and continued prosecution of the federal action "continues to interfere with OBOT's ability to perform timely under the Lease."

(Complaint, Section IV and par. 67.). Other acts of alleged delay and interference complained of in this action include (1) a memorandum issued in 2015 by Assistant Oakland City Administrator Claudia Cappio ("Cappio Memo") that has allegedly caused delay and confusion for the permitting of the Project (Complaint , ¶¶ 74-77); (2) the requirement in 2016 that OBOT Project permit applications are subject to discretionary approvals in violation of the Development Agreement (Id., ¶¶ 78-86); (3) the City's refusal to advance and interference with completing the Shoreline Rail project for over six years and as recently as 2018 (Id., ¶¶ 87-103); the City's active interference with OGRE's efforts to obtain approvals from the Surface Transportation Board ("STB" since 2015 and specifically in 2018(Id., ¶¶ 104-108); (4) the City's alleged failures to obtain easements needed by OBOT and its subtenants to enter upon Port of Oakland property to construct and use relevant segments of track per the Lease (, (Id., ¶¶ 109-111); (5) the City's alleged "illegitimate" claim of an unmatured Event of Default under the Lease in or about August, 2018 (Id., ¶¶ 112 - 128) and (6) various other alleged improper delaying tactics and interferences with the Project in 2018, including false statements to the press in November, 2018, insistence by the City that Plaintiffs agree to construct a "ban compliant" terminal and the service of a 3-Day Notice to Quit or Cure in December, (Id., ¶¶ 129 - 153).

THE DEMURRER

Defendant demurs to the Complaint on the grounds that the claims are barred by res judicata, are barred by the applicable statute of limitations, are barred by the Government Claims Act, and/or fail to state facts sufficient to constitute a cause of action. The Court will address each of these arguments in turn.

RES JUDICATA

Defendant argues that this action arises between the same parties, same agreements, same development, same type of alleged wrongdoing, and same injury that was adjudicated in a prior federal action concerning this purported campaign. Defendant points out that the campaign of delay and interference alleged in this action include many of the same activities alleged in the federal action including the adoption of the 2014 Resolution, Defendant's statements in opposition to coal from 2014 to 2016, the 2016 Ordinance and Resolution, and allegedly improper work done by Environmental Science Associates ("ESA") to support the 2016 Ordinance. As in this action, the federal action included allegations that the campaign was a breach of contract and caused a diminution of value to Plaintiffs' investment of the Project, out-of-pocket costs, and loss of a sublease. (Mot. at p. 9.)

Defendant contends that Plaintiffs have brought this action now because they voluntarily waived damages in the federal action. Defendant points out that the federal court warned OBOT that "res judicata would bar [it] from seeking damages on the same claims or claims that could have been brought in th[e] [federal] case," OBOT conceded that the federal court was "100 percent right that there . . . will be res judicata impacts" but it was "not seeking damages in the trial . . and if [it] win[s], [it] do[es] not intend to seek further relief." (RJN, Ex. E at 9:9-22.)

"Res judicata, also known as claim preclusion, bars litigation in a subsequent action of any claims that were raised or could have been raised in the prior action." (Owens v. Kaiser Found. Health Plan, Inc. (9th Cir. 2001) 244 F.3d 708, 713.) The doctrine is applicable whenever there is "(1) an identity of claims, (2) a final judgment on the merits, and (3) identity or privity between parties." (Id.) The same principles apply under California law. (Mycogen Corp. v. Monsanto Co. (2002) 28 Cal. 4th 888, 896 ["Res judicata, or claim preclusion, prevents relitigation of the same cause of action in a second suit between the same parties or parties in privity with them."].) "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." (Id. at 897.) "A predictable doctrine of res judicata benefits both the parties and the courts because it 'seeks to curtail multiple litigation causing vexation and expense to the parties and wasted effort and expense in judicial administration.'" (Id.) "Res judicata bars not only issues that were raised in the prior suit but related issues that could have been raised." (Villacres v. ABM Indus. Inc. (2010) 189 Cal. App. 4th 562, 569.)

"The federal rule is that 'a judgment or order, once rendered, is final for purposes of res judicata until reversed on appeal or modified or set aside in the court of rendition.'" (Calhoun v. Franchise Tax Bd. (1978) 20 Cal. 3d 881, 887.) Defendant contends that the parties are the same as in the federal action, with OGRE being in privity with OBOT in the federal action. Further, Defendant argues that there is an identity of claims as they involve the same primary right for OBOT to pursue development of a coal terminal at the Project and arise from the same transaction or series of transactions. (Cal Sierra Dev.,

Inc. v. George Reed, Inc. (2017) 14 Cal. App. 5th 663, 675 ["[I]f two actions involve the same injury to the plaintiff and the same wrong by the defendant then the same primary right is at stake even if in the second suit the plaintiff pleads different theories of recovery, seeks different forms of relief and/or adds new facts supporting recovery."]; W. Sys., Inc. v. Ulloa (9th Cir. 1992) 958 F.2d 864, 871 ["The test for whether a subsequent action is barred is whether it arises from the same 'transaction, or series of transactions' as the original action.].) In this case, there has been a final judgment in the federal action holding that the Resolution passed in 2016 is not valid and cannot be relied upon by the City in connection with the Development Agreement and Project at issue herein and that the City breached, or would be in breach, of the Development Agreement by disallowing the transport of coal at the Terminal on the basis of that Resolution. (RJN, Exs. F-G.)

Plaintiffs argue that res judicata should not apply here because this action does not involve the same agreement or claims as in the federal action. This court agrees. As noted above, the federal action was limited to enjoining Defendant from applying a coal ban ordinance to Plaintiffs' work at the site because it was a breach of the Development Agreement Here, Plaintiffs contend that even after they succeeded in the federal action to enjoin Defendant's reliance on the ordinance, Defendant has continued to ignore its obligations under the Development Agreement and has otherwise engaged in conduct to intentionally delay and obstruct Plaintiffs' development efforts. The discussion of the 2016 Ordinance and Resolution in the Complaint simply places in context the alleged injuries currently in contention. Further, it appears that this action involves other contracts than the Development Agreement that was the subject of the federal action, and the tort claims were not at issue in the federal action.

"As a cause of action is framed by the facts in existence when the underlying complaint is filed, res judicata 'is not a bar to claims that arise after the initial complaint is filed.'" (Planning & Conservation League v. Castaic Lake Water Agency (2009) 180 Cal. App. 4th 210, 227.) "For this reason, the doctrine may not apply when 'there are changed conditions and new facts which were not in existence at the time the action was filed upon which the prior judgment is based.'" (Id.) "This exception to the doctrine encompasses claims based on rights that arise after the filing of the complaint in the first action, but before judgment is entered." (Id.) In other words, "distinct episodes of purported noncompliance regarding 'the same general subject matter'" may give rise to separate suits, and the latter is not barred by res judicata. (Id.) Indeed, in the absence of "a continuing breach," it is permissible for there to be "successive causes of action arising out of the same general subject matter," even if based "on the same contract or transaction." (Yates v. Kuhl (1955) 130 Cal. App. 2d 536, 540.)

While arguably correct that both the Development Agreement and the Lease address the right of Plaintiffs to develop the Project and the terms thereof, the Court does not agree that the claims in this lawsuit are simply different theories based on the same "primary right" addressed by the federal action which concerned the validity of 2016 Resolution and enjoined the City from relying upon it in connection with the Development Agreement.

As discussed in further detail below with respect to statutes of limitations, the Court finds that the allegations in this Complaint concern distinct wrongs from those that pre-dated the federal action, and therefore are not barred by res judicata. Even if some part of the claims based on pre-federal action conduct may be barred by res judicata, this demurrer should not be sustained if there are post-federal action conduct that exist as a valid basis for the claims. "A demurrer must dispose of an entire cause of action to be sustained." (Fremont Indem. Co. v. Fremont Gen. Corp. (2007) 148 Cal. App. 4th 97, 119.) Thus, the Court OVERRULES Defendant's demurrer to all causes of action on the ground of res judicata.

STATUTES OF LIMITATIONS - GENERALLY

Alternatively, Defendants contend that the tort claims are barred by applicable statutes of limitations. In opposition, Plaintiffs argue that due to the ongoing nature of Defendant's conduct, the statute of limitations does not begin to run until the date of the last injury or when the tortious acts cease. "Generally, a limitations period begins to run upon the occurrence of the last fact essential to the cause of action." (Pugliese v. Superior Court (2007) 146 Cal. App. 4th 1444, 1452.) "However, where a tort involves a continuing wrong, the statute of limitations does not begin to run until the date of the last injury or when the tortious acts cease." (Id.) Here, Plaintiffs have not demonstrated that the continuing tort doctrine should apply to their claims for interference with contractual relations or prospective economic relations, or fraudulent inducement. (See Boon Rawd Trading Int'l Co. v. Paleewong Trading Co. (N.D. Cal. 2010) 688 F. Supp. 2d 940, 952 [applying California law, and finding that there is no

authority in California cases applying the continuing tort doctrine to the tort of intentional interference with prospective economic advantage].) Nevertheless, to the extent that discrete wrongs are alleged to have occurred within the statute of limitations for each claim, those claims may not be barred by the statute of limitations.

STATUTE OF LIMITATIONS - FRAUDULENT INDUCEMENT (FOURTH CAUSE OF ACTION)

"The elements of fraud . . . are: a representation, usually of fact, which is false, knowledge of its falsity, intent to defraud, justifiable reliance upon the misrepresentation, and damage resulting from that justifiable reliance." (Stansfield v. Starkey (1990) 220 Cal. App. 3d 59, 72-73.) "An action for relief on the ground of fraud or mistake" is governed by a three-year statute of limitations, and "is not deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake." (Cal. Civ. Proc. Code § 338(d).)

Plaintiffs argue that the fraud inducement claim accrued on August 20, 2018, when Defendant allegedly falsely asserted that OBOT committed an unmatured Event of Default under the Lease and it became apparent that Defendant did not intend to perform under the Lease. (Opp. at p. 11.) Plaintiffs argue that Defendant engaged in other fraudulent acts after the passing of the 2016 Ordinance through 2018, including interfering with Plaintiffs' permit applications to the present date, rejecting Plaintiffs' force majeure extension claims in 2018, and withholding estoppel certificates and NDA's in 2018, among other acts. Thus, Plaintiffs contend that its fraud claim is within the statute of limitations.

Defendant counters that Plaintiffs already knew that Defendant was not going to comply with its promises under their agreements when Defendant adopted a resolution opposing the coal transportation on June 17, 2014. In essence, Defendant is arguing that there could be no justifiable reliance on its representations in the agreements because it had already purportedly breached the agreements. However, it is not clear that the fraudulent acts alleged in this action are based on the same representations in the parties' agreements that were at issue with respect to coal ban in the federal action. Further, whether Plaintiffs' reliance on the agreements is justifiable is a question of fact that should not be decided on demurrer.

Accordingly, the Court OVERRULES Defendant's demurrer to the Fourth Cause of Action on this ground.

STATUTE OF LIMITATIONS - INTERFERENCE WITH CONTRACTUAL RELATIONS AND PROSPECTIVE ECONOMIC RELATIONS CLAIMS

"The elements which a plaintiff must plead to state the cause of action for intentional interference with contractual relations are (1) a valid contract between plaintiff and a third party; (2) defendant's knowledge of this contract; (3) defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage." (Pac. Gas & Elec. Co. v. Bear Stearns & Co. (1990) 50 Cal. 3d 1118, 1126.) The elements of a claim for tortious interference with prospective economic relations are "(1) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the acts of the defendant." (Korea Supply Co. v. Lockheed Martin Corp. (2003) 29 Cal. 4th 1134, 1153.) A two-year statute of limitations applies to claims for interference with contractual relations and prospective economic relations. (CCP § 339 [governing "[a]n action upon a contract, obligation or liability not founded upon an instrument of writing"].)

Defendant contends that these claims are time-barred because under the Complaint. Plaintiffs allege that since 2012 Defendant has interfered with their economic relationships with two potential subtenants, and Plaintiff OBOT previously stated in the federal action that the sublease option was diminished by the passing of the 2016 Ordinance. Further, Defendant argues that OGRE's tortious interference claims are based on Defendant's purported interference with Plaintiffs' efforts to complete the Shoreline Rail portion of the Project over the course of six years.

Plaintiffs contend that their tortious interference claims are not time-barred, arguing simply that TLS, one of their subtenants, did not abandon its sublease option until 2018. While the Complaint alleges

that Defendant's conduct at unspecified times "[s]nice 2012" has "interfered with Plaintiffs' prospective economic relationships," it fails to specify discrete wrongful conduct or resulting damage that occurred within the statute of limitations. (Compl. ¶¶ 185, 189, 196, 209, 213, 219.) Accordingly, the Court SUSTAINS WITH LEAVE TO AMEND Defendants' demurrer to the Fifth through Tenth Causes of Action on this ground.

GOVERNMENT TORT CLAIMS ACT

Alternatively, Defendant contends that the seven tort claims (fraudulent inducement, intentional interference with contractual relations, and intentional/negligent interference with prospective economic relations) are barred by the Government Tort Claims Act. "Except as otherwise provided by statute . . . [a] public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person." (Cal. Gov't Code § 815(a).) To the extent Plaintiff's alleged facts support a claim for negligence or other tort, Plaintiff must provide a statutory basis for his claim. (Eastburn v. Reg'l Fire Prot. Auth. (2003) 31 Cal. 4th 1175, 1183 [holding that "direct tort liability of public entities must be based on a specific statute declaring them to be liable, or at least creating some specific duty of care"].) In addition, since "under the Tort Claims Act all governmental tort liability is based on statute, the general rule that statutory causes of action must be pleaded with particularity is applicable." (Lopez v. S. Cal. Rapid Transit Dist. (1985) 40 Cal. 3d 780, 795.) "[T]o state a cause of action against a public entity, every fact material to the existence of its statutory liability must be pleaded with particularity." (Id.)

Plaintiffs argue that Defendant is not immune from tort liability arising out of the tortious acts and omissions of its employees. Plaintiffs note that "[a] public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would . . . have given rise to a cause of action against that employee or his personal representative." (Cal. Gov't Code § 815.2(a).) Courts have noted that it is "possible for a public entity and its employees to be held liable for intentional interference with prospective economic advantage and trade libel." (City of Costa Mesa v. D'Alessio Investments, LLC (2013) 214 Cal. App. 4th 358, 378.)

Defendant argues that Plaintiffs have failed to articulate a statutory basis for its tort claims. Further, Defendant asserts immunity on any claims based on any purported misrepresentations by its employees since "[a] public entity is not liable for an injury caused by misrepresentation by an employee of the public entity, whether or not such misrepresentation be negligent or intentional." (Cal. Gov't Code § 818.8.)

Based on the foregoing, the Court finds that Plaintiffs have failed to allege sufficient facts to overcome Defendant's immunity under the Government Tort Claims Act. Thus, the Court SUSTAINS WITH LEAVE TO AMEND Defendant's demurrer to the Fourth through Tenth Causes of Action on this additional ground.

FAILURE TO STATE A CLAIM - FRAUDULENT INDUCEMENT (FOURTH CAUSE OF ACTION)

Defendant then argues that the Fourth Cause of Action for fraudulent inducement fails to satisfy the particularity requirement for pleading a fraud claim. "Every element of the cause of action for fraud must be alleged in the proper manner and the facts constituting the fraud must be alleged with sufficient specificity to allow defendant to understand fully the nature of the charge made." (Stansfield, 220 Cal. App. 3d at 73.) This "'strict requirement" of pleading "necessitates pleading facts which 'show how, when, where, to whom, and by what means the representations were tendered.'" (Id.) "The requirement of specificity in a fraud action against a corporation requires the plaintiff to allege the names of the persons who made the allegedly fraudulent representations, their authority to speak, to whom they spoke, what they said or wrote, and when it was said or written." Tarmann v. State Farm Mut. Auto. Ins. Co. (1991) 2 Cal. App. 4th 153, 157.) However, "the requirement of specificity is relaxed when the allegations indicate that 'the defendant must necessarily possess full information concerning the facts of the controversy' . . . or when the facts lie more in the knowledge of the opposite party." (Id. at 158.)

Defendant contends that Plaintiffs fail to plead any intent by Defendant to defraud Plaintiffs. Plaintiffs allege that Defendant "did not intend to perform its promises at the time it entered into the Lease to the extent Plaintiffs subleased the Terminal to a bulk commodity provider that shipped coal." (Compl. ¶ 174.) Defendant argues that there is no allegation that Defendant made any promises with respect to

Plaintiffs subleasing to a provider that shipped coal, and in fact the immediate commodity focus was on iron ore and copper concentrate, not coal. (Compl. ¶ 37.) Plaintiffs argue that they have pled that the City was aware that OBOT intended to sublease the terminal to a bulk commodity provider, and that coal was a potential commodity that would be transported through the terminal. (Compl. ¶¶ 23, 174.) The Court finds that these allegations are sufficient to plead fraudulent intent.

Defendant also reiterates that there is no allegations supporting justifiable reliance by Plaintiffs on those promises in light of its public opposition to the shipment of coal. However, as stated previously, the Court is not persuaded that the fraudulent actions asserted that took place after the federal action are centered on the same promises that were broken when Defendant attempted to apply a coal ban to the Project. The question of justifiable reliance is thus a question of fact for the factfinder, not an issue for demurrer.

Based on the foregoing, the Court OVERRULES Defendant's demurrer to the Fourth Cause of Action on this ground.

FAILURE TO STATE A CLAIM - INTERFERENCE WITH PROSPECTIVE ECONOMIC RELATIONS (SIXTH, SEVENTH, NINTH, AND TENTH CAUSES OF ACTION)

"[W]hile intentionally interfering with an existing contract is 'a wrong in and of itself' . . . intentionally interfering with a plaintiff's prospective economic advantage is not." (Korea Supply Co., 29 Cal. 4th at 1158.) "To establish a claim for interference with prospective economic advantage, therefore, a plaintiff must plead that the defendant engaged in an independently wrongful act." (Id.) "An act is not independently wrongful merely because defendant acted with an improper motive." (Id.) "The tort of intentional interference with prospective economic advantage is not intended to punish individuals or commercial entities for their choice of commercial relationships or their pursuit of commercial objectives, unless their interference amounts to independently actionable conduct." (Id. at 1158-59.) "[A]n act is independently wrongful if it is unlawful, that is, if it is proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard." (Id. at 1159.)

Defendant argues that Plaintiffs have not alleged facts demonstrating that Defendant's conduct that purportedly interfered with their prospective economic relations were independently wrongful. Plaintiffs contend that the acts were independently wrongful as breaches of the duty of good faith and fair dealing. Defendant counters that a breach of contract cannot be the independently wrongful act because that would improperly transform a breach of contract claim into a tort claim. As one case points out, "[a] contracting party's unjustified failure or refusal to perform is a breach of contract, and cannot be transmuted into tort liability by claiming that the breach detrimentally affected the promisee's business." (JRS Prod., Inc. v. Matsushita Elec. Corp. of Am. (2004) 115 Cal. App. 4th 168, 181-82.) Thus, as Plaintiffs does not identify any other independently wrongful act, the Court SUSTAINS WITH LEAVE TO AMEND Defendant's demurrer to the Sixth, Seventh, Ninth and Tenth Causes of Action on this additional ground.

FAILURE TO STATE A CLAIM - NEGLIGENT INTERFERENCE WITH ECONOMIC RELATIONS (SEVENTH AND TENTH CAUSES OF ACTION)

With respect to the claims for negligent interference with economic relationships, Defendant argues that Plaintiffs have not established any duty owed by Defendant to Plaintiffs. "The tort of negligent interference with economic relationship arises only when the defendant owes the plaintiff a duty of care." (LiMandri v. Judkins (1997) 52 Cal. App. 4th 326, 348.) Notably, "a plaintiff who is not a party to a contract between a defendant and a third party generally may not recover for loss of expected economic advantage resulting from the defendant's negligent performance of the contract unless there is a special relationship between the parties." (Id. at 348-49.) "The key component in determining whether the relationship between plaintiff and defendant in such cases gives rise to a duty of care is the foreseeability of the harm suffered by the plaintiff." (Id. at 349.) "Foreseeability is generally measured by the closeness of the connection or nexus between the defendant's conduct and risk of injury to the plaintiff-that is, whether the defendant had 'entered into any relationship or undertaken any activity where negligence on his part was reasonably likely to affect plaintiff adversely.'" (Id.)

Plaintiffs argue that a duty arose based on the parties' lease agreement, and contend that Defendant was aware of its contractual relationships with OGRE, TLS and later ITS, so the harm was foreseeable. The Court finds that these allegations are sufficient to support a claim of duty for purposes of demurrer.

Thus, the Court OVERRULES Defendant's demurrer to the Seventh and Tenth Causes of Action on this ground.

FAILURE TO STATE A CLAIM - INTENTIONAL AND NEGLIGENT INTERFERENCE WITH ECONOMIC RELATIONS (NINTH AND TENTH CAUSES OF ACTION)

Defendant argues that the Ninth and Tenth Causes of Action improperly allege intentional and negligent interference with prospective economic relations based on relationships with potential customers, and not current customers. Courts have held that "the interference tort applies to interference with existing noncontractual relations which hold the promise of future economic advantage," not to potential relations which are too speculative. (Westside Ctr. Assocs. v. Safeway Stores 23, Inc. (1996) 42 Cal. App. 4th 507, 524.) Such an "interference with the market" theory of liability "is insufficient as a matter of law to show [that a plaintiff] had an economic relationship with a prospective [client] which was reasonably likely to produce a future beneficial [relationship]." (Id. at 528.) As these causes of action allege interference of relationships with potential and not existing customers, the Court SUSTAINS WITH LEAVE TO AMEND Defendant's demurrer to the Ninth and Tenth Causes of Action on this additional ground.

FAILURE TO STATE A CLAIM - NEGLIGENT INTERFERENCE WITH PROSPECTIVE ECONOMIC RELATIONS (TLS AND ITS) - (SEVENTH CAUSE OF ACTION)

Defendant argues that the Seventh Cause of Action, which alleges that Defendant interfered with OBOT's sublease with TLS and ITS, is actually a claim for negligent interference with contractual relationships since it concerns existing contracts and not potential contracts or economic relationships. Defendant contends that such a claim is invalid under California law. "In California there is no cause of action for negligent interference with contractual relations." (Davis v. Nadrich (2009) 174 Cal. App. 4th 1, 9.) "While there exists a cause of action for negligent interference with prospective economic advantage . . . the California Supreme Court . . . has rejected a cause of action for negligent interference with contract." (Id.)

However, the Complaint alleges interference with a "proposed sublease between OBOT and TLS," not an existing lease. Thus, the Court Defendant's demurrer to the Seventh Cause of Action on this ground.

FAILURE TO STATE A CLAIM - SPECIFIC PERFORMANCE OF CONTRACT (TWELFTH CAUSE OF ACTION)

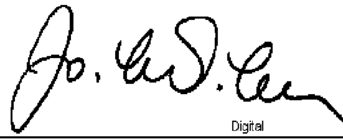
"An agreement, the terms of which are not sufficiently certain to make the precise act which is to be done clearly ascertainable," is not specifically enforceable under California law. (Cal. Civ. Code § 3390(e).) Defendant argues that Plaintiffs' claim for specific performance fails to specify the precise act to be done, as the request for relief simply asks for "[s]pecific performance of all of [the City's] contractual obligations set forth in the DA and Lease." (Compl. Prayer for Relief ¶ 3.) The Complaint simply states that "[t]he Lease and DA are sufficiently certain in their terms to be specifically enforced" (Compl. ¶ 232), but fails to identify which terms they seek to enforce.

Thus, the Court SUSTAINS WITH LEAVE TO AMEND Defendant's demurrer to the Twelfth Cause of Action on this additional ground.

REQUEST FOR JUDICIAL NOTICE

The Court GRANTS Defendants' request for judicial notice of filings and orders in the federal action in the United States District Court for the Northern District of California captioned Oakland Bulk & Oversized Terminal, LLC v. City of Oakland, Case No. 3:16-CV-07014. (Request for Judicial Notice, Exs. A-J; Cal. Evid. Code § 452(d).) The Court OVERRULES Plaintiffs' objection to the request for judicial notice of the court transcript in Exhibit E, as a court may take judicial notice of a transcript without taking judicial notice of the truth of the testimony. (Kumaraperu v. Feldsted (2015) 237 Cal. App. 4th 60, 65 ["We also grant judicial notice of the preliminary hearing transcript, but only to the extent it sheds light on the various actors' claims, not for the truth of statements made during the hearing."].) The Court considers this evidence not for the truth of the statements made by the federal court or by OBOT that the claims in this action are in fact barred by res judicata, but for the limited ground that OBOT was made aware that certain future claims could be barred by res judicata.

Dated: 05/16/2019



Judge Jo-Lynne Q. Lee

Exhibit B

Mnatt, Phelps & Phillips, LLP
Attn: Lee, Barry W.
One Embarcadero Center
30th Floor
San Francisco, CA 94111____

Altshuler Berzon LLp.
Attn: Finberg, James
177 Post Street, Ste. 300
San Francisco, CA 94108

Superior Court of California, County of Alameda
Rene C. Davidson Alameda County Courthouse

Oakland Bulk And Oversized Terminal, LLC Plaintiff/Petitioner(s) VS. City of Oakland Defendant/Respondent(s) (Abbreviated Title)	No. RG18930929 Order Motion to Strike Complaint

The Motion to Strike Complaint filed for City of Oakland was set for hearing on 04/25/2019 at 03:00 PM in Department 18 before the Honorable Jo-Lynne Q. Lee. The Tentative Ruling was published and was contested.

The matter was argued and submitted, and good cause appearing therefore,

IT IS HEREBY ORDERED THAT:

The tentative ruling is affirmed as follows: Defendant City of Oakland's ("Defendant") Motion to Strike Portions of Plaintiffs Oakland Bulk and Oversized Terminal, LLC and Oakland Global Rail Enterprise, LLC's (collectively, "Plaintiffs") Complaint is GRANTED IN PART AND DENIED IN PART.

STANDARD OF LAW

"The court may, upon a motion . . . or at any time in its discretion, and upon terms it deems proper: (a) [s]trike out any irrelevant, false, or improper matter inserted in any pleading[;] . . . [and/or] (b) [s]trike out all or any part of any pleading not drawn or filed in conformity with the laws of this state, a court rule, or an order of the court." (CCP § 436.) An "irrelevant matter," or "immaterial allegation," means: (1) an allegation that is not essential to the statement of a claim or defense; (2) an allegation that is neither pertinent to nor supported by an otherwise sufficient claim or defense; or (3) a demand for judgment requesting relief not supported by the allegations of the complaint or cross-complaint. (CCP § 431.10(b).)

"[I]n some cases a portion of a cause of action will be substantively defective on the face of the complaint." (PH II, Inc. v. Superior Court (1995) 33 Cal. App. 4th 1680, 1682.) "Although a defendant may not demur to that portion, in such cases, the defendant should not have to suffer discovery and navigate the often dense thicket of proceedings in summary adjudication." (Id.) "[W]hen a substantive defect is clear from the face of a complaint, such as a violation of the applicable statute of limitations or a purported claim of right which is legally invalid, a defendant may attack that portion of the cause of action by filing a motion to strike." (Id. at 1682-83.)

MOTION TO STRIKE

Defendant seeks to strike portions of the Complaint that it contends are barred by res judicata. Specifically, Defendant argues that some of the allegations in the Complaint are barred by the final judgment in the federal action in the United States District Court for the Northern District of California

captioned Oakland Bulk & Oversized Terminal, LLC v. City of Oakland, Case No. 3:16-CV-07014 (hereinafter, the "federal action"). (Request for Judicial Notice ["RJN"], Ex. A.) For further discussion of the federal action, see the Court's ruling on the Demurrer to the Complaint.

In ruling on Defendant's demurrer, the Court found that not all of the allegations were barred by res judicata because they concerned conduct that occurred after the commencement of the federal action, and involve different claims arising from a different agreement from those at issue in the federal action. Further, Plaintiffs state that their discussion of the conduct that was at issue in the federal action serve as background facts to this action. Thus, the Court finds that the only portions that should be stricken are those that on their face arose before the commencement of the federal action and are asserted as the basis for Plaintiffs' causes of action, and not pled as background facts.

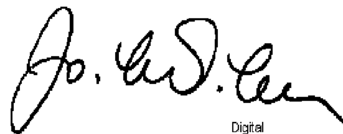
Upon review of the Complaint, the Court GRANTS Defendant's Motion to Strike Paragraphs 87, 156 and 168 to the extent those paragraphs include allegations that the enactment of the invalidated Ordinance and Resolution form a basis for claims of breach of contract or other damage in connection and, for the same reason, paragraphs 66 and 67 The Court DENIES all other requests to strike portions of the Complaint.

To the extent that Defendant seeks to strike portions of the Complaint on the grounds of applicable statutes of limitations, the Court finds that the ruling on the Demurrer adequately addresses any deficiencies on these grounds.

REQUEST FOR JUDICIAL NOTICE

The Court GRANTS Defendants' request for judicial notice of filings and orders in the federal action in the United States District Court for the Northern District of California captioned Oakland Bulk & Oversized Terminal, LLC v. City of Oakland, Case No. 3:16-CV-07014. (Request for Judicial Notice, Exs. A-J; Cal. Evid. Code § 452(d).) The Court OVERRULES Plaintiffs' objection to the request for judicial notice of the court transcript in Exhibit E, as a court may take judicial notice of a transcript without taking judicial notice of the truth of the testimony. (Kumaraperu v. Feldsted (2015) 237 Cal. App. 4th 60, 65 ["We also grant judicial notice of the preliminary hearing transcript, but only to the extent it sheds light on the various actors' claims, not for the truth of statements made during the hearing."].) The Court considers this evidence not for the truth of the statements made by the federal court or by OBOT that the claims in this action are in fact barred by res judicata, but for the limited ground that OBOT was made aware that certain future claims could be barred by res judicata.

Dated: 05/16/2019



Judge Jo-Lynne Q. Lee

Exhibit C

1 UNITED STATES DISTRICT COURT

2 NORTHERN DISTRICT OF CALIFORNIA

3 Before The Honorable Vince Chhabria, Judge

4

5 OAKLAND BULK & OVERSIZED TERMINAL, LLC,)
6)
Plaintiff,)
7)
vs.) No. C 16-07014-VC
8)
CITY OF OAKLAND,)
9)
Defendant.)
10 ________________________________)

11 San Francisco, California
Wednesday, July 12, 2017
12

13 TRANSCRIPT OF PROCEEDINGS OF THE OFFICIAL ELECTRONIC SOUND RECORDING 2:06 - 2:29 = 23 MINUTES
14

APPEARANCES:
15

For Plaintiff:
16 Quinn Emanuel Urquhart & Sullivan, LLP
17 555 Twin Dolphin Drive
5th Floor
18 Redwood Shores, California 94065
19 BY: ROBERT P. FELDMAN, ESQ.

20 For City of Oakland:
Burke, Williams & Sorenson, LLP
21
1901 Harrison Street
22 Suite 900
Oakland, California 94612
23 BY: KEVIN D. SIEGEL, ESQ.
TIMOTHY A. COLVIG, ESQ.
24

25 (APPEARANCES CONTINUED ON FOLLOWING PAGE)

1 APPEARANCES: (Cont'd.)

2 For Intervenor Defendants:
Earthjustice
3 50 California Street
Suite 500
4 Oakland, California 94612
BY: COLIN C. O'BRIEN, ESQ.
5
For the Sierra Club:
6 Sierra Club
2101 Webster Street
7 Suite 1300
Oakland, California 94612
8 BY: JESSICA L. YARNALL LOARIE, ESQ.
9
Transcribed by: Echo Reporting, Inc.
10 Contracted Court Reporter/Transcriber
11 echoreporting@yahoo.com

12
13
14
15
16
17
18
19
20
21
22
23
24
25

1 Wednesday, July 12, 2017 2:06 p.m.
2 P-R-O-C-E-E-D-I-N-G-S
3 --oOo--
4 THE CLERK: Calling Case Number 16-CV-7014,
5 Oakland Bulk and Oversized Terminal, LLC, versus City of
6 Oakland.
7 Counsel please step forward and state your appearances.
8 MR. FELDMAN: Robert Feldman for the Plaintiff.
9 Good afternoon, your Honor.
10 THE COURT: Good afternoon.
11 MR. SIEGEL: Good afternoon, your Honor. Kevin
12 Siegel for the City of Oakland. I'm with my colleague.
13 MR. COLVIG: Timothy Colvig, also for the City.
14 THE COURT: Good afternoon.
15 MR. O'BRIEN: Colin O'Brien on behalf of Defendant
16 Intervenors, Sierra Club and San Francisco Baykeeper.
17 THE COURT: Good afternoon.
18 MS. LOARIE: Jessica Yarnall Loarie for Defendant
19 Intervenor Sierra Club.
20 THE COURT: Good afternoon.
21 So one small matter I had for the intervenors was I --
22 there was an -- there was an ADR phone conference recently,
23 and I heard from the ADR person in our court that you all
24 tried to participate in that. Is that correct?
25 MS. LOARIE: Well, your Honor, the letter that was

1 issued by the Court was issued to all parties, and so it was
2 ambiguous whether we were intended to participate or not.
3 And so we did call on -- we did call, but we did not stay
4 for the entire length at the request of the other parties.
5 THE COURT: Okay. Okay. Good. Because I was --
6 I was very surprised to hear that. I mean, I understand if
7 the order was ambiguous or whatever, but I was very
8 surprised to hear that after everything we went through in
9 the hearing on the motion to intervene. I would have
10 thought that it would have been very obvious that you
11 wouldn't have participated in that call.
12 MS. LOARIE: Well, I -- I think that this
13 clarification that you're offering now is clearer than the
14 order which spoke specifically to no right to veto an
15 ultimate settlement, but we had --
16 THE COURT: No, no, no, no. It was very clear in
17 the hearing that we had that you had no seat at the table at
18 -- at settlement discussions. That was -- that was very
19 clear that it was not limited to not having a right to veto
20 anything.
21 MS. LOARIE: Well, it is -- if it wasn't clear to
22 us before, it seems like it is clear now. So thank you.
23 THE COURT: Okay. I mean, I always -- I can
24 always like revisit a motion to intervene, right? Do I have
25 discretion to revisit a motion to intervene if necessary?

1 UNIDENTIFIED SPEAKER: You have permission to do
2 anything that you want with respect to that.
3 THE COURT: I sort of doubt that, but --
4 UNIDENTIFIED SPEAKER: Pretty close.
5 THE COURT: Okay. There was some back and forth
6 about a protective order. Is that all resolved now?
7 UNIDENTIFIED SPEAKER: Yes.
8 THE COURT: Okay. And then -- then this last --
9 this last issue I'm not really sure what to do with. I
10 haven't quite had anything like it before. So maybe --
11 maybe I could hear from the City on, you know, what -- just
12 what your concern is and what you would like me to do to
13 address your concern.
14 MR. COLVIG: Sure. Again, I'm Timothy Colvig,
15 your Honor.
16 There have been several representations from OBOT along
17 the way in their CMC statements that they wanted an
18 accelerated procedure here because they were only asking for
19 declaratory relief and injunctive relief, and they said --
20 THE COURT: Well, I don't know if necessarily that
21 was the reason or the only reason they were asking for an
22 accelerated process. I sort of took them to be saying that
23 they wanted an accelerated process because it was -- you
24 know, Oakland's actions have seriously affected their
25 pocketbooks, but I don't know. Anyway, go on.

1 MR. COLVIG: Well, but that's an interesting point
2 because they -- on the one hand, they say things like "We're
3 not planning to ask for damages." On the other hand they
4 say "We're harmed." And so the Court gave until a date in
5 June to amend --
6 THE COURT: But those two things aren't
7 necessarily exclusive, right?
8 MR. COLVIG: Of course not. They can be standing
9 issues and so on. We get that.
10 THE COURT: Okay.
11 MR. COLVIG: And so -- but these statements were
12 there, and we've laid them out in this CMC statement, and
13 you can kind of look at the history, and there was a cutoff
14 for amending the complaint, and they did amend, but they did
15 not explicitly say they want you to pay millions of dollars,
16 but they do have a prayer that says other legal relief the
17 Court may provide, and we have pointed out to the Court in
18 our CMC statement that when you ask for dec relief under the
19 statute, the Court is allowed to then award damages based on
20 the relief given, and the cases they even say that you don't
21 need to ask for anything more than other and further relief
22 and there may be even a case out there that says you don't
23 even ask for that. It's just part of the statute.
24 And so we tried to seek clarity on this issue because
25 it definitely --

1 THE COURT: But your concern is -- your concern is
2 that there would be a bench trial in January and there would
3 be a ruling from me in January, and then they would come
4 back and seek a jury trial thereafter on damages or --
5 MR. COLVIG: Yes.
6 THE COURT: -- is that -- is that what you're
7 concerned about?
8 MR. COLVIG: Well, they would seek damages, and
9 then, of course, we would say that should be a jury trial,
10 but the issue is then if it's going to be a jury trial, then
11 liability issues, at least those related to an issue of fact
12 and not one of law would be within the province of the jury,
13 and that's, you know, what the --
14 THE COURT: So your concern -- so I -- maybe I
15 misstated your concern. Your concern is that when we get to
16 trial in January, they are going to ask not only for a
17 declaration that Oakland violated the contract or that the
18 ordinance is unconstitutional or whatever, whatever
19 declarations they're asking for, they're also going to ask
20 for an award of damages, and if they were going to seek an
21 award of damages, you would want a jury to be -- you'd want
22 a jury to decide that question?
23 MR. COLVIG: To decide both liability and damages,
24 and the concern is a little bit more than that, which is
25 they could come in and say "Here we are for dec relief in an

1 injunction," your Honor, and you award dec relief. Let's
2 say you do provide something that's favorable to OBOT and
3 then they say, "Okay. Now under the statute, we would now
4 like a hearing on damages. There's other and further relief
5 which is in our prayer," and they have never said they
6 won't. They have always said "We don't plan to." And so we
7 have a Seventh Amendment jury trial, and it's time to smoke
8 it out. We cited to the restatement comment that says
9 that's what courts can do. And it also informs discovery.
10 There's a difference between our taking discovery on harm
11 for standing or millions of dollars of damages, and so this
12 informs both a jury trial right and the discovery issue.
13 THE COURT: Okay. Mr. Feldman?
14 MR. FELDMAN: Yes, your Honor. We do not intend
15 to seek damages in the trial that you have scheduled for
16 January. And if we win, which I hope we do, I don't intend
17 to on the basis of your order in that proceeding seek
18 damages. That's as clear as I can be.
19 THE COURT: Are you sure it's as clear as you can
20 be? I mean, what is that -- what is that leaving open?
21 MR. FELDMAN: Nothing, except that I'm not giving
22 a general release. I don't know what more I can say. There
23 may be -- we may have damage claims that are not asserted in
24 this action before you, but which I -- I'm not authorized to
25 nor would I presume to waive.

1 THE COURT: Okay. But it sounds like --
2 MR. FELDMAN: As clearly -- excuse me, if I may?
3 THE COURT: No, please.
4 MR. FELDMAN: I 100 percent stick by the comments
5 we made in the prior CMCs. We are not seeking damages in
6 the trial that is currently scheduled before you in January.
7 And if we win, we do not intend to seek damages in this
8 action on the basis of -- of favorable judgment to us.
9 THE COURT: And -- and so you would not be -- and
10 you also wouldn't be -- I mean, I assume then that, you
11 know, you -- res judicata would bar you from seeking damages
12 on the same claims or claims that could have been brought in
13 this case.
14 MR. FELDMAN: You're 100 percent right that there
15 may be -- not that there may be. There will be res judicata
16 impacts and I'm very clear that I don't know what they are.
17 I haven't analyzed them, and I'm not prepared to waive any
18 such claims.
19 You know, this is as clear as I can be. We're not
20 seeking damages in the trial before you, and if we win, we
21 do not intend to seek further relief once you issue an order
22 in our favor after that January trial.
23 THE COURT: Right. And then I --
24 MR. FELDMAN: And then, if I may, the regular
25 rules of law will apply to any damage claims that we have or

1 may have in the future.
2 THE COURT: And I assume what the -- the other
3 practical impact of that would be is that you would be
4 reserving, as would be the case in any normal litigation.
5 If something happens after the trial and after judgment is
6 entered, assuming judgment is entered in your favor, which
7 we don't know yet, but if after judgment is entered in your
8 favor, any conduct by the Defendant thereafter could give
9 rise to further claim.
10 MR. FELDMAN: Or perhaps something they did within
11 the statute of limitations that's not part of this case, and
12 the rules of res judicata and collateral estoppel bar and
13 merger would apply to whatever future action we might bring
14 for damages that are not implicated in this case. That's
15 absolutely correct. As you said, if this was normal, that
16 would be evident to all.
17 THE COURT: So what -- I mean, what more can you
18 ask for than that? I mean, it sounds like what you are
19 being told is they might do something to us between now and
20 the time of trial that would cause us to, you know, sue them
21 in a later action for damages. They might do something to
22 us after the trial that might cause us to sue them for
23 damages. The -- you know, the rules of res judicata,
24 collateral estoppel will apply, and the -- you know, if
25 we're allowed to do it, we're allowed to do it, and if we're

1 not allowed to do it, we're not allowed to do it, but we're
2 not doing it in this case.
3 What -- I mean, what -- what more could you ask for
4 than that?
5 MR. FELDMAN: I think what -- if -- whatever the
6 Court's order --
7 THE COURT: Hold on a second. Did I accurately
8 restate what you said?
9 MR. FELDMAN: One hundred percent.
10 THE COURT: Okay.
11 MR. FELDMAN: Okay. I keep hearing the word
12 "intent".
13 THE COURT: And, by the way, this is -- this will
14 be on the -- this case management conference will be on the
15 record.
16 MR. FELDMAN: Okay.
17 THE COURT: Sorry. Go ahead.
18 MR. FELDMAN: I've heard the word "intent" many
19 times. I have not heard the word "won't", and I think that
20 can be cured simply with whatever the judge -- the Court
21 orders, which --
22 THE COURT: I think --
23 MR. FELDMAN: -- it says --
24 THE COURT: I think he said --
25 MR. FELDMAN: -- based on the representation.

1 THE COURT: -- in -- I think he said we will not
2 do it in this case. I mean, I think maybe what he's trying
3 to preserve is if some totally unforeseen thing happens, you
4 know, you know, he's not waiving the right to seek, you
5 know, to bring a claim against, you know, the Defendants in
6 a different case. But he's not doing it in this case.
7 Again, have I restated it or did I get it slightly
8 wrong there?
9 MR. FELDMAN: That one you got slightly wrong.
10 THE COURT: Okay.
11 MR. FELDMAN: There could be something now in the
12 past or today that would give rise to a cause of action, and
13 we might or might not be barred by the regular rules of law.
14 THE COURT: Uh-huh.
15 MR. FELDMAN: But those events, whatever they may
16 be, are not going to be part of this trial or this action.
17 THE COURT: Uh-huh.
18 MR. FELDMAN: Excuse me, this trial, and we will
19 not seek damages based on the result of the trial that is
20 conducted. I have to say it that way because, for example,
21 there are references in the affirmative defenses to breaches
22 by us and unclean hands and other things like that. I don't
23 actually yet know what those things are. It could be that
24 they relate to activities that will be discovered at a
25 future case, and I'm not waiving on behalf of my client

1 their right to damages with respect to, for example, an
2 impermissible statement that was made by the City to a
3 business partner of ours or the wrongful denial of a permit.
4 But those are not in this case. They are not being
5 litigated now. They are not going to be before you in
6 January. We are not seeking damages for that in January,
7 and we are not going to seek damages based on what I hope is
8 a favorable judgment in January.
9 THE COURT: Okay.
10 MR. FELDMAN: Beyond that --
11 THE COURT: But you -- but you -- you agree that
12 the thing for me to do, the thing for me to do after the
13 trial in January is to enter judgment?
14 MR. FELDMAN: Correct.
15 THE COURT: One way or another.
16 MR. FELDMAN: Please.
17 THE COURT: There are not -- there are not going
18 to be further proceedings in this case after the trial in
19 January?
20 MR. FELDMAN: None other than might relate to
21 costs and attorneys' fees.
22 THE COURT: Right. Okay.
23 MR. FELDMAN: I heard the words "will not" this
24 time, and I'm much more comfortable, your Honor.
25 THE COURT: Okay. So -- all right. So it seems

1 like we have all of that clarified and straightened out, and
2 is there -- is there anything else that I can do for you all
3 right now?
4 MR. FELDMAN: Yes, your Honor, if I might, since
5 we're here. Maybe I'll get my money's worth.
6 The -- we saw the document request on April 28th.
7 Response was served on May 26th. We then got the public
8 record that you had suggested a long time ago that we be
9 given, and we've gotten one email that was not in the public
10 record. So we've agreed on custodians, 24. We've agreed on
11 search terms, and we've thus far gotten nothing.
12 Now I found out today that ESA, the so-called expert
13 that was guiding the City Council, gave to the City its
14 production to us. I'm not sure why that happened, but my
15 colleagues agreed to that, and the City's for some reason
16 going through that, those -- the ESA emails -- I don't know
17 how -- to see -- I'm told to screen for privilege. I don't
18 know how that can be since they're a third party, but so be
19 it. We have not received any of that yet either, and I
20 would request that the City be ordered to produce all that
21 material forthwith.
22 THE COURT: Well, I -- based on what you just
23 said, I'm not sure I have a good grip on what has been
24 produced and what hasn't been produced.
25 Can you tell me what the document request was that

1 you're -- or is it multiple document requests?
2 MR. FELDMAN: Multiple document requests, but the
3 point is the City has 24 custodians agreed upon search
4 terms, and we've received in response to that, other than
5 the public record, one email.
6 THE COURT: Okay. And -- but I -- I assume from
7 what you're saying that you've received a lot of emails as
8 part of the public record?
9 MR. FELDMAN: I wouldn't say a lot of emails but a
10 number of emails.
11 THE COURT: Okay. And so your concern is that
12 this public record that we created that we were talking
13 about a while back, that they called the legislative record,
14 that there -- all emails relating to this affair must not be
15 in the public -- in the legislative record?
16 MR. FELDMAN: Well, by definition the emails with
17 ESA are -- the ESA's emails are plainly not in --
18 THE COURT: Who's ESA? Sorry.
19 MR. FELDMAN: They're the purported expert
20 consultant that the City used in connection with the
21 purported legislative process.
22 THE COURT: Uh-huh.
23 MR. FELDMAN: And they're a third party, and for
24 some reason the City is reviewing that third party's
25 information for privilege.

1 THE COURT: Uh-huh.
2 MR. FELDMAN: We haven't gotten any of ESA's
3 emails, and we've gotten zero emails other than one from any
4 City official, and, you know, I'm not saying that it all
5 needs to be -- needed to have been done weeks ago, but this
6 is silly. I mean, we're getting nothing, absolutely
7 nothing. Having spent the time to agree on a list of
8 custodians and a list of search terms, we've gotten
9 effectively nothing other than the public record.
10 MR. COLVIG: Your Honor, I wish this had been
11 addressed in the joint case management conference statement
12 because I'd be more prepared to address the particulars
13 here, but I can speak generally to --
14 THE COURT: But if I can -- if I can spend a few
15 minutes --
16 MR. COLVIG: Yes.
17 THE COURT: If we can spend a few minutes now,
18 short of short-circuiting a potentially, you know,
19 mushrooming discovery dispute, I'm happy to do that now.
20 MR. COLVIG: Absolutely. And we -- and so there's
21 been no meet and confer prior to this, but, of course, I'm
22 happy to --
23 THE COURT: And if there needs to be, that's fine,
24 but why don't we --
25 MR. COLVIG: Yes.

1 THE COURT: -- have a little chat right now.
2 MR. COLVIG: So -- so, first of all, there were --
3 the subpoenas to ESA and Patrick Chapman (phonetic) who was
4 -- I mean Cashman (phonetic), who was a City employee and
5 now a contractor, the parties agreed -- we agreed with Mr.
6 Feldman's colleagues that the subpoenas would be -- those
7 documents would be collected by the City because ESA was the
8 City's contractor, and reviewed, and we've produced those
9 documents. We've also produced the legislative record. All
10 tolled, it's tens of thousands of pages of documents. I
11 don't have the number in front of me. I think it might be
12 100,000. So there's been a lot produced.
13 We did not agree to -- we went very carefully and
14 deliberately with a long meet and confer process to identify
15 the 24 custodians for the electronic searches and specified
16 search terms, and it was, as I recall, early June when that
17 was finally resolved, and then those searches were done, and
18 we're now processing those searches and we're very well into
19 doing that for a privilege review and whatnot, and we -- I
20 don't know the target time right now for producing, but it's
21 not far off because we did the subpoenas because those came
22 first, and then the request for documents came, and we're
23 doing that. And so I expect that to be done within a couple
24 of weeks most likely, and in the meantime, we've served a
25 request for production of documents on OBOT. They've sent

1 their responses. They've not produced any electronic -- the
2 written responses within 30 days after that. They've not
3 produced any electronic records. Tomorrow they've invited
4 us to come to their office to view binders that they have of
5 paper documents, but both parties are engaged in this
6 process in around the same time and very much the same
7 fashion, and I really don't believe that there's any grounds
8 to accuse the City of dragging its feet because we've been
9 cooperating with them all along, and there've been no
10 complaints prior to this point right now at this hearing
11 that we have not been sufficiently responsive to their
12 request.
13 MR. FELDMAN: I have a suggestion, your Honor.
14 Would you order us, my side, to produce our -- their
15 document request to us came one month after ours to them.
16 I'd be delighted to be ordered to produce our electronic
17 production in a month, and they should be ordered to
18 produced theirs in two weeks. That would be fine with me.
19 MR. COLVIG: I expect that we can do that in two
20 weeks, but I don't think that it is the appropriate time
21 right now for an order. I think we should be, you know,
22 meeting and conferring on this issue and not dealing with it
23 at a case management conference like this.
24 THE COURT: It does sound like what Mr. Feldman is
25 proposing is reasonable. It also -- I suspect Mr. Feldman

1 came in with a plan to sort of spring this on us without
2 having talked to you about it in advance, which makes it,
3 you know, maybe a little bit -- puts you on your heels a
4 little bit. But what -- here's -- so here's what I will do.
5 I will tell you that Mr. Feldman's proposal sounds
6 reasonable. I'm going to order you to meet and confer on
7 the proposal and to either -- by Friday either submit a
8 stipulation with deadlines for the productions or submit a
9 discovery letter setting forth your disagreement about all
10 this, and I will rule on the discovery letter.
11 But on the surface, Mr. Feldman's proposal sounds
12 reasonable.
13 MR. COLVIG: All right. The -- the -- understood.
14 Could we make that Monday for the submission of the letter,
15 because tomorrow there'll be time reviewing documents, and I
16 think that maybe just going -- pushing that until Monday
17 would facilitate the process a bit more.
18 THE COURT: Okay.
19 MR. FELDMAN: No objection.
20 THE COURT: Monday.
21 MR. FELDMAN: And, your Honor, just to be clear,
22 I'm referring to the -- the third party ESA documents,
23 because I have no idea how the City could claim a privilege
24 with respect to those.
25 THE COURT: Well, but I thought you were also

1 referring to emails that they were --
2 MR. FELDMAN: Oh, yes.
3 THE COURT: -- in the process of reviewing.
4 MR. FELDMAN: Right. There are two bodies -- at
5 least two bodies of emails. One is the -- excuse me -- the
6 City's own. I'm -- I'm asking for them to be produced in
7 two weeks. With respect to the ESA documents, ESA is as
8 third party. There's no basis for the City to be reviewing
9 ESA's documents for privilege.
10 THE COURT: I mean, it seems to me that that
11 depends on the relationship between ESA and the City.
12 MR. FELDMAN: Right.
13 THE COURT: And I don't know anything about that,
14 and so I'm -- that's why I will have you all, you know,
15 either on Monday submit either a stipulation with deadlines
16 or a discovery letter setting forth any disagreements that
17 you continue to have.
18 MR. FELDMAN: Thank you very much, your Honor.
19 THE COURT: Okay.
20 MR. FELDMAN: That's fair.
21 THE COURT: All right.
22 ALL: Thank you, your Honor.
23 THE COURT: Thank you.
24 (Proceedings adjourned at 2:29 p.m.)
25

1 CERTIFICATE OF TRANSCRIBER

2

3 I certify that the foregoing is a true and correct
4 transcript, to the best of my ability, of the above pages of
5 the official electronic sound recording provided to me by
6 the U.S. District Court, Northern District of California, of
7 the proceedings taken on the date and time previously stated
8 in the above matter.
9 I further certify that I am neither counsel for,
10 related to, nor employed by any of the parties to the action
11 in which this hearing was taken; and, further, that I am not
12 financially nor otherwise interested in the outcome of the
13 action.

14
15
16 Echo Reporting, Inc., Transcriber
17 Thursday, July 27, 2017
18
19
20
21
22
23
24
25