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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' SURREPLY IN OPPOSITION TO CITY OF OAKLAND'S TRIAL BRIEFS ON PRIOR FEDERAL LITIGATION

Trial Date: July 10, 2023

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I. INTRODUCTION

The City's position on res judicata in the first half of its reply brief defies common sense. If the City is correct, the doctrine of res judicata would empower the City to intentionally delay OBOT's performance, sue OBOT for that delay, then preclude evidence of the City's complicity—essentially rewarding the City for years of misconduct. It cannot be the law that a party can sue for a breach that it caused but be immunized from argument that they caused the breach. The City's application of res judicata is wrong. Its new reply arguments—that a common injury is enough for res judicata and that Plaintiffs' current breach of Ground Lease claim was somehow ripe more than a year before the City committed the breach (termination)—do not change the result. The cause of action that OBOT pursued in *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*") is not the same cause of action that Plaintiffs pursue here. The City cannot meet its burden to satisfy the same cause of action element of res judicata.

The second half of the City's reply is not a reply at all. Instead, the City presents a new issue: whether California common law implies certain terms in the Ground Lease's Delay Due to Force Majeure[1] provision (Ex. 68 § 16.1). The City's opening brief focuses on excuse—a separate affirmative defense and separate legal doctrine from Plaintiffs' contractual Force Majeure rights. Plaintiffs' response focuses on that issue as well. The City's reply is an attempt to correct its error and introduce new legal arguments about facts Plaintiffs must prove to prevail on their Force Majeure claims. Those arguments have nothing to do with res judicata and they come after the presentation of evidence even though they relate directly to the type of evidence that the City contends OBOT is required to present to prove its claims. As detailed below, the City is also wrong on the merits.

[1] Plaintiffs use the term "Force Majeure" with initial capitalization to refer to the unique provision in the Ground Lease that extends the time for contractual performance (other than the obligation to pay rent), where, as here, such performance had been hindered or delayed by the other party; Plaintiffs use the term without initial capitalization to refer to the separate doctrine of *force majeure* or to the type of boilerplate force majeure provisions analyzed in the cases that the City cites.

II. RES JUDICATA

A. The City's New Res Judicata Arguments Lack Merit.

The res judicata portion of the City's reply brief focuses primarily on reciting black letter law that is not in dispute: that a primary right is the right to be free from a *particular* injury. (*See* City Reply at 2:19-3:9.) Plaintiffs agree. (*See* OBOT Response at 9:6-13.) But the City's attempt to apply that high-level definition of "primary right" to preclude argument that the City's no-coal ordinance and resolution delayed development of the Terminal fails for seven additional reasons.

First, the City's position is based on a single sentence in the prayer for relief in the First Amended Complaint in *OBOT I* ("Federal FAC") that did not amount to a claim and was never litigated or decided. In addition to rebutting the City's arguments, Plaintiffs advanced six independent arguments in its response brief to demonstrate that the reference to the Ground Lease in OBOT's Federal FAC has no res judicata effect here. (OBOT Response at 12:5-16:9.) The City's reply brief addresses only two of them: that there was no claim under the Ground Lease in *OBOT I* and any such claim would have been unripe for litigation. (City Reply at 2:4-10, 3:1-4:2.) Although Plaintiffs won't repeat them here, the four arguments the City has failed to respond to are each independently sufficient to preclude the application of res judicata.

Second, the City argues that the lack of a Ground Lease claim in *OBOT I* is of no moment because the two cases involve the same primary right—*i.e.*, the same particular injury. But as OBOT explained in its response brief, this Court has already found that that the two cases involve distinct primary rights—a point the City ignores. (OBOT Response at 10:18-12:4.)

Third, the City bases its primary rights argument on a new self-serving and inaccurate description of the injury at issue in *OBOT I*. The description of the injury is key because "the scope of the primary right … depends on how the injury is defined." *Federation of Hillside & Canyon Assns. v. City of Los Angeles*, 126 Cal. App. 4th 1180, 1202 (2004). Although not entirely clear, the City appears to define the injury at issue in *OBOT I* as whether there were "any delays allegedly occasioned by the coal Ordinance" or "whether the Ordinance was interfering with OBOT's performance under the Ground Lease." (*See* City Reply at 3:10-21.) In other words, the City thinks that Plaintiffs should be precluded from arguing that the ordinance or resolution delayed

development of the Terminal. But the pleadings and decision in *OBOT I* define the injury at issue in that case—not the City.

The City cherry picks words from isolated paragraphs in the Federal FAC and focuses on the single reference to the Ground Lease in the final sentence of the prayer for relief. But the prayer is not a claim[2] and the City ignores the balance of the 41-page pleading. *OBOT I* was not about the Ground Lease or delay. It was about OBOT's "vested right to develop and use (and/or sublease) the West Gateway property for a bulk commodities terminal subject to regulations existing as of the effective date of the DA, July 16, 2013" subject only to the narrow health and safety exception in Section 3.4.2 of that contract. (Federal FAC ¶¶ 162-163.) The entire pleading is about the City's interference with that right and related constitutional rights by applying a post-2013 regulation (the no-coal ordinance through the resolution) to the Project without satisfying Section 3.4.2:

- The first 20 paragraphs of the Federal FAC include the usual introductory information about the case, parties, jurisdiction, and venue. (*But see* Federal FAC ¶ 2 regarding OBOT's vested right to develop the Terminal.)
- Paragraphs 21-36 provide basic factual background.
- Paragraph 37 introduces the core issue in *OBOT I*: the sham health and safety hearings the City held to justify its no-coal ordinance and resolution.
- Paragraphs 38-121 are about the hearings and the health and safety evidence introduced, including the report prepared by the City's consultant, Environmental Science Associates.
- Paragraphs 122-124 allege facts about the value of the TLS sublease option, which is not at issue in this case.
- Paragraphs 125-134 concern the constitutionality of the no-coal ordinance and

[2] *See, e.g.*, *Jordan v. United States*, 2015 WL 5919945, at *2-3 (S.D. Cal. Oct. 8, 2015) ("A prayer for damages constitutes a remedy, not a claim" within the meaning of Rules 8(a)(2) or 12(b)(6). Thus, [a] prayer for relief does not provide any basis for dismissal under Rule 12." (*quoting Oppenheimer v. Sw. Airlines Co.*, 2013 WL 3149483, at *3-4 (S.D. Cal. June 17, 2013) ("[T]he availability of [a certain type of relief does not] control or even pertain to the sufficiency of any claim.")).

resolution, which is also not at issue in this case.

- Paragraphs 135-160 discuss federal preemption, which again, is not at issue .
- Paragraphs 161-167 address breach of the Development Agreement, and specifically OBOT's vested right to develop the Terminal based on a frozen set of regulations that existed when the parties executed that contract.

That's it. Nothing about delays or extensions. Yet, and just as it did in its opening brief, the City repeatedly represents that OBOT asked the federal court for an extension of the August 14, 2018 deadline, then abandoned that request. (*E.g.*, Reply at 2:8-10.) That request is not in the Federal FAC. Nor are there any factual allegations about delay. The words "milestone," "deadline," and "extension" do not appear in the Federal FAC. (Ex. 120.) The term "delay" appears only once—to explain the City's concern with delaying a vote on banning coal. (Federal FAC ¶ 44.)

Not surprisingly, *OBOT I* is also silent on delays, deadlines, and extensions. From the beginning of the decision, Judge Chhabria makes clear that "the development agreement froze in place the local regulations that existed at the time the agreement was signed"; that the agreement contains an exception that allows application of a new regulation if failure to apply it would pose a substantial danger to the health and safety of people in Oakland; and that OBOT contended that the City breached those provisions by enacting a resolution to apply the no-coal ordinance to OBOT. *OBOT I*, 321 F. Supp 3d at 988. Judge Chhabria defines the primary issue in *OBOT I* as "whether the record before the City Council when it made this decision [to apply a coal ban to OBOT] contained substantial evidence that the proposed coal operations would pose a substantial health or safety danger." *Id.* The lion's share of the decision, like most of the Federal FAC, is about that single issue: health and safety evidence. That's what the case was about—not the Ground Lease, not OBOT's ability to Commence Construction by the Initial Milestone Date, not the Force Majeure notices under Section 16.1 of the Ground Lease, and not the City's breach of the Ground Lease more than a year after the Federal FAC was filed in *OBOT I*.

Fourth, the first element of res judicata is not the existence of a common primary right. The City must demonstrate that both cases involve the same cause of action. "'[C]ause of action' is defined in terms of a primary right *and a breach of the corresponding duty*; the primary right *and*

the breach together constitute the cause of action." *Boeken v. Philip Morris USA, Inc.*, 48 Cal. 4th 788, 792 (2010) (emphasis added); *see also id.* at 797-98. Even if the City were correct that this case involves the same primary right as *OBOT I* (and this Court has already found that it does not), that would be insufficient for res judicata because the City breached that right again when it terminated the Ground Lease in 2018, giving rise to a new cause of action. *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."). (*See also* OBOT Response at 17:1-14.)

Fifth, the City's cited authority does not demonstrate that the type of request for relief in the final sentence of the Federal FAC has res judicata effect. The City relies on *Boeken*, where a widow was not permitted to bring a suit for wrongful death of her husband after voluntarily dismissing with prejudice an earlier loss of consortium claim.[3] (City Reply at 3:3-6.) *Boeken* is readily distinguishable. The *Boeken* court explained that the two claims at issue there—loss of consortium and wrongful death—as a matter of law and as pleaded in *Boeken* permitted a plaintiff to recover damages for the *permanent* loss of companionships. *Boeken*, 48 Cal. 4th at 798, 800-02. There, the plaintiff expressly sought damages in the first lawsuit for the permanent deprivation of her spouse's consortium (*id.* at 800), then sought those same damages for the same injury based on the same breach in the second action (*id.* at 799). Those aren't the facts here. As discussed above, there are no allegations in the Federal FAC about delay or extensions; and Plaintiffs seek a *different* remedy for a *different* breach of a *different* contract: damages and specific performance for the City's termination of the Ground Lease.

Further, the core issue for the *Boeken* court was whether post-death damages were available in a pre-death loss of consortium case. *Boeken*, 48 Cal. 4th at 799-802. In other words, an unavailable remedy in the first case—even if sought—cannot have res judicata effect on a claim in a later lawsuit. Here, the remedy that OBOT allegedly sought in the first case—"relief prohibiting

[3] The City also relies on *Mycogen Corp. v. Monsanto Co.*, 28 Cal. 4th 888 (2002) for the same proposition. (City Reply at 3:6-9.) Plaintiffs address how that case supports their position in their August 17, 2023 response brief at 18:20-19:4.

the City from asserting that OBOT has breached [the Ground Lease] by any failure to perform resulting from the City's own misconduct" (Federal FAC, Prayer ¶ D)—was not available in *OBOT I*. (*See* OBOT Response at 14:8-15.) The claim was not ripe. The City had not alleged a breach by OBOT; and as the City itself has admitted, all extension claims under Section 16.1 of the Ground Lease are premature until the City demands performance or alleges a breach or default. (*See* Ex. 81-2 (the 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 in default of its obligations under the WGW Lease …").)

Sixth, the City disagrees and argues that ripe Ground Lease claims existed in 2017, including whether to enforce the Initial Milestone Date. (City Reply at 19-21.) The City's view apparently is that OBOT was required to predict that the City would demand performance on August 14, 2018, unilaterally reject its Force Majeure claims despite having no contractual right to do so, and terminate the Ground Lease; and to raise those issues more than a year earlier when it amended the federal complaint. There is no law to support that view. And even if the claims were ripe, there is no law (and the City cites none) that a party to two contracts must sue for breach of both of them just because those breaches (material or not) may exist at the same time.

Finally, the request for relief at issue—preventing the City from alleging a breach that was its own fault—is just a statement of the law. A party cannot prevail on a breach claim if it caused the alleged breach; nor can it terminate a contract for a breach that it caused. *See, e.g.*, *Mad River Lumbar Sales, Inc. v. Willburn*, 205 Cal. App. 2d 321, 324 (1962) (the plaintiff could not seek a determination that the defendant breached a contract; nor could she terminate that contract for breach where she prevented the defendant's performance because parties to a contract cannot take advantage of their own wrongs). The City's novel view on res judicata would change the substantive law on contract, permit it to profit from its own misconduct, and ask the Court to ignore the City's complicity in the breach it alleges.

B. The Court Should Decline to Apply Res Judicata in the Interests of Justice.

Even when a party meets its burden of proving all three elements of res judicata—which the City has not done here—courts are empowered to refuse to apply the doctrine to serve the ends

of justice. *Greenfield v. Mather*, 32 Cal. 2d 23, 35 (1948) ("[I]n rare cases a judgment may not be res judicata, when proper consideration is given to the policy underlying the doctrine, and there are rare instances in which it is not applied. In such cases it will not be applied so rigidly as to defeat the ends of justice or important considerations of policy."); *F.E.V. v. City of Anaheim*, 15 Cal. App. 5th 462, 465 (2017) ("In rare circumstances, a final judgment may be denied claim preclusive effect when to do so would result in manifest injustice."); *Hight v. Hight*, 67 Cal. App. 3d 498, 502 (1977) ("The court is empowered to refuse to apply the doctrine, even where these three elements are present, to prevent defeat of the ends of justice."). The City has not shown that *OBOT I* should have res judicata effect on this case. But even if it had, manifest injustice should prevent the application of the doctrine here.

Courts have declined to apply res judicata when parties have not had a fair opportunity to litigate (*Greenfield* and *Hight*) or where a change in law has undermined an earlier decision (*F.E.V.*). But none of those cases hold that those are the only applications of the exception. The Court should apply the exception here for three reasons.

First, this case falls squarely under the *Greenfield* doctrine that res judicata should not be applied where it would result in manifest injustice. In the federal case, Judge Chhabria found that the City (in its regulatory capacity) breached its contractual obligations with the developer to achieve an aim that it was contractually prohibited from obtaining—a ban-compliant terminal.[4] Allowing the City to flout that judgment through a misguided application of res judicata would not serve any principle of justice.

Second, Plaintiffs have not had a full opportunity to litigate an issue on the merits. It is undisputed that the City terminated the Ground Lease based on an alleged failure to Commence Construction of the Minimum Project by the Initial Milestone Date. That happened after *OBOT I*

[4] Judge Chhabria expressly found that the Development Agreement granted OBOT the right to develop a terminal through which coal could be shipped to the extent permitted under Oakland's Municipal Code as it existed when the parties signed the Development Agreement—*i.e.*, before the City enacted its no-coal ordinance and resolution. *Oakland Bulk & Oversized Terminal, LLC v. City of Oakland*, 2017 WL 11528287, at *1 (denying the City's motion to dismiss and describing the City's argument that OBOT did not acquire a right to develop a coal-handling terminal as a "strawman").

and could not have been fully litigated in that case; nor can the issue be fully litigated in this case—or at least not decided on a full record—if the Court adopts the City's view on res judicata. Other than the constitutional and preemption claims that the federal court did not reach, *OBOT I* was a single-issue case, limited to review of the administrative record before the City Council when it conducted its health and safety hearings. Administrative record review does not leave room to litigate external issues, including the impact of the ordinance and resolution on the Ground Lease, a contract that was not even at issue in *OBOT I.*

Third, the prayer for relief in the Federal FAC is unique. OBOT asked for protection from the City against some hypothetical claim by the City for a breach caused by its own misconduct. A finding that the prayer has res judicata effect—even though it is divorced from the balance of the Federal FAC and *OBOT I*—would have the effect of permitting the City to cause a breach, sue for that breach, and benefit from its misconduct. That is the definition of injustice.

III. OBOT'S CONTRACTUAL RIGHT TO PERFORMANCE EXTENSIONS FOR THE CITY'S ACTS THAT HINDERED OR DELAYED DEVELOPMENT OF THE TERMINAL

The crux of City's force majeure argument is that California common law reads certain requirements into every contract in order for an event to qualify as an event of force majeure: (1) the event must be unforeseeable at the time of contract; (2) the party advancing the event as force majeure must demonstrate that it performed with skill and diligence; and (3) the event must make performance either impossible or unreasonably expensive. (City Reply at 2:11-18.)

At the threshold, the City is wrong. It is black letter law that parties are free to contract around common law, including in force majeure provisions. Many of the City's cited cases stand for that very principle. *See, e.g., W. Pueblo Partners, LLC v. Stone Brewing Co., LLC,* 90 Cal. App. 5th 1179, 1187 (2023) ("We begin our analysis with the language of the force majeure provision itself."); *Watson Labs., Inc. v. Rhone-Poulenc Rorer, Inc.*, 178 F. Supp. 2d 1099, 1110 (C.D. Cal. 2001) (express terms of a contractual force majeure provision can supersede common law); *Free Range Content, Inc. v. Google Inc.*, 2016 WL 2902332, at *6 (N.D. Cal. May 13, 2016) (the foreseeability requirement does not apply if parties identify an event as force majeure in their contract). And in this case, the parties did just that: they prepared multiple force majeure provisions,

each with different language, including the one at issue here. (*See, e.g.*, Ex. 3-53 (Cost Sharing Agreement); Ex. 7-35 (Development Agreement); Ex. 68-84 (Ground Lease § 16.1 Force Majeure provision); Ex. 68-132 (Ground Lease definition of "Force Majeure"); Ex. 378-61 (Lease Disposition and Development Agreement).)

The Development Agreement and the Lease contemplate a joint effort by the parties and impose strict requirements of cooperation and good faith to ensure the developer can meet the contractual deadlines. The tolling and extension of deadlines required under Section 16.1 of the Lease were critical to OBOT. OBOT had a history with the City, and having committed to spend millions of dollars to develop the terminal, OBOT could not be at the mercy of changing political regimes and priorities.

The Ground Lease's non-boilerplate Force Majeure provision (Section 16.1) is unique because it expressly grants OBOT an extension the time for OBOT to meet contract deadlines for acts of the City that delay, hinder, or affect OBOT's performance toward such deadlines. Nothing in the contract expressly or impliedly limits OBOT's extension rights under this provision to *events that make performance impossible*. (Ex. 68-84.) The City's arguments to the contrary attempt to ascribe to the provision an interpretation to which it is not reasonably susceptible in violation of basic contract interpretation tenets. *See* Cal. Civ. Code §§ 1638, 1639, 1641; *Wolf v. Super. Court (Walt Disney Pictures and Television)*, 114 Cal. App. 4th 1343, 1351 (2004), *as modified on denial of reh'g* (Feb. 19, 2004). Indeed, the provision presumes that performance *will be possible*, providing only for an extension of time to perform after a Force Majeure event, not a full excuse of performance. (*Id.*) Section 16.1 provides in relevant part that "[f]or all purposes of this Lease, a Party whose performance of its obligations hereunder *is hindered or affected* by events of Force Majeure shall not be considered in breach of or in default in its obligations hereunder *to the extent of any delay* resulting from Force Majeure[.]" (*Id.* (emphasis added).) The provision does not excuse performance based on impossibility; instead it caps the benefit (an extension of time to perform) to the party claiming Force Majeure "to the extent of any [resulting] delay." (*Id.*) The City's suggestion that the provision applies only to extend performance deadlines where performance is impossible defies common sense. An extension of time to accomplish an impossible

performance milestone would be unnecessary and meaningless.

The Ground Lease's definition of "Force Majeure" in Article 40 is also unique. Although it includes the usual parade of horribles outside the parties' control that courts typically agree are events of force majeure (*e.g.*, "fires, floods, earthquakes, tidal waves, terrorist attacks"), it also includes "acts of the government" (*e.g.*, the City as regulator) and "acts of the other Party" (*i.e.*, the City as Landlord under the Ground Lease). (Ex. 68-132.) Article 40 also defines "delay caused by Force Majeure" to include "not only the period of time during which performance of an act is hindered, but also such additional time thereafter as may reasonably be required to complete performance of the hindered act." (*Id.*)

Taken together, Section 16.1 and Article 40 contemplate something uncommon to boilerplate contractual force majeure provisions: Acts of the other party that hinder or affect a party's ability to perform a Ground Lease obligation insulate that party from breach claims, but only to the extent of the delay, and they entitle that party to an extension of time to perform equal to the delay plus reasonable additional time. It is uncontested that Section 16.1 and Article 40 are unique, non-boilerplate Force Majeure provisions that were part of a heavily negotiated agreement. Those provisions should be enforced as written.

Against that backdrop, each common law term the City attempts to read into the Ground Lease is addressed below.

A. Foreseeability

The City argues that the language "due to causes beyond such Party's control" in Section 16.1 is interpreted by courts to mean that the event must be unforeseeable at the time of contract. (City Reply at 4:9-5:15.) That's true. Some of the cases the City cites stand for the principle that a force majeure event must be unforeseeable. But those cases involve boilerplate force majeure provisions. *See Free Range Content, Inc.*, 2016 WL 2902332, at *2; *Watson Labs., Inc.*, 178 F. Supp. 2d at 1113.[5] And they acknowledge that a foreseeable event can be an act of force majeure

[5] The remaining cases the City cites for the proposition that courts impose a foreseeability limit on force majeure provisions either have nothing to do with contract law or involve contracts without force majeure provisions. *See Mitchell v. Ceazan Tires, Limited*, 25 Cal. 2d 45 (1944) (addressing the law of frustration, not a force majeure provision); *London Guarantee & Accident Co. v.*

if the parties contract for it. *Free Range Content, Inc.*, 2016 WL 2902332, at *6; *see also Eastern Air Lines, Inc. v. McDonnell Douglas Corp.*, 532 F.2d 957, 992 (5th Cir. 1976) ("[W]hen the promisor has anticipated a particular event by specifically providing for it in a contract, [they] should be relieved of liability for the occurrence of [that] event regardless of whether it was foreseeable.").

As detailed above, the City and OBOT specifically contemplated in the Ground Lease that acts of the other party that hinder, affect, or delay a party's ability to perform a contract obligation qualify as Force Majeure events that extend that party's time to perform the obligation in proportion to the delay. Both the act and the remedy contemplated by the Ground Lease's Force Majeure framework are precise. The non-boilerplate language in the Ground Lease thus demonstrates that the parties intended to include foreseeable acts of the other party as Force Majeure events.

B. Skill and Diligence

The City also argues that the language "due to causes beyond such Party's control" is interpreted to require a showing that the party acted with skill, diligence, and good faith. (City Reply at 5:16-6:3.) In principle, Plaintiffs agree that both sides have an obligation to prove that they performed their contract obligations as a standard element of their respective breach of contract claims. But the City's interpretation of the language "beyond such Party's control" as it applies to a Force Majeure claim in this case fails for three reasons.

First, the City overstates the law. There is no rule that in order to demonstrate that an event was beyond a party's control, that party must first demonstrate that it acted in any particular manner. The test is analytical: could the event of force majeure "have been prevented by the exercise of prudence[,] diligence and care[?]" *Pac. Vegetable Oil Corp. v. C.S.T., Ltd.*, 29 Cal. 2d 228, 238 (1946). The other cases the City cites are in accord. *See, e.g. Horsemen's Benevolent & Protective*

Industrial Accident Commission, 202 Cal. 239 (1927) (reviewing a workers' compensation award as to whether work place injury was proximately caused by the employment, not a contract); *Aristocrat Highway Displays, Inc. v. Stricklen*, 68 Cal. App. 2d 788 (1945) (addressing the impact of governmental acts that make contract performance difficult or expensive, not a force majeure provision); *Conlin v. Coyne*, 19 Cal. App. 2d 78 (1937) (involving damages where one party's land caved into an excavation on another party's land—not a contract case).

Association v. Valley Racing Association, 4 Cal. App. 4th 1538, 1564 (1992) ("[T]he test is whether under the particular circumstances there was such an insuperable interference occurring without the parties' intervention as could not have been prevented by prudence, diligence and care."). None of the City's cases require an actual affirmative showing of diligence.

Second, requiring OBOT to demonstrate diligence makes no sense for the Force Majeure claims in issue because each is tied to a specific contract obligation of the City, not OBOT. For instance, it is the City (not OBOT) that is prevented under the Development Agreement from applying new regulations to the Terminal (Ex. 7 § 3.4.1); and the City (not OBOT) has a duty to use commercially reasonable efforts to enter the Rail Access Agreement with the Port of Oakland (Ex. 68 § 5.2.3). The contracts set forth the parties' duties and thus which party must demonstrate diligence.

Third, the City's cited cases do not read a "skill, diligence, and good faith" requirement into a force majeure provision like the one in the Ground Lease—*i.e.*, a narrow clause that provides only for an extension of time to perform proportionate to the delay caused by the other party. *Oosten v. Hay Haulers Dairy Employees & Helpers Union*, 45 Cal. 2d 784 (1955) is not a force majeure case at all. It is a contract dispute between a dairy farmer and a creamery regarding the creamery's failure to purchase milk, and a narrow contract provision that protected the parties from liability if a labor dispute made performance "impossible." *Id.* at 786. The court evaluated the creamery's contract defense as an impossibility defense because that was the contract's language. *Id.* at 788-89. The language regarding skill and diligence that the City quotes is dictum from a treatise—not part of the Court's interpretation of the contract at issue, let alone of a clause like Section 16.1 of the Ground Lease. *Id.* at 789.

Butler v. Nepple, 54 Cal. 2d 589 (1960) involves a force majeure defense by a lessee in an action by the lessor to recover rent due under an oil and gas lease. *Id.* at 592, 593. The court noted the force majeure defense, but made clear that its affirmance of the lower court judgment was made on other grounds. *Id.* at 593-94. The section that the City cites says nothing about "skill, diligence, and good faith." *See id.* at 599.

Horsemen's Benevolent & Protective Association v. Valley Racing Association, 4 Cal. App.

4th 1538 (1992)—like nearly every force majeure case the City cites in its opening and reply briefs—involves a party seeking to be completely excused from performance of a contract. *Id.* at 1564. The remedy for force majeure in the contract at issue in that case was contract termination. *Id.* The City cites no case for the proposition that a party asserting a force majeure claim has the burden to prove its own diligence and skill regardless of the contract language, let alone under a narrow provision like the one the parties bargained for here.

C. Impossibility and Unreasonable Expense

The City argues that for an event to qualify as a Force Majeure event it must render performance impossible or unreasonably expensive. (City Reply at 6:6-16.) Aside from the fact that the City asks the Court to rewrite Section 16.1 and Article 40 of the Ground Lease to include language that is not present, the City's argument is wrong for three additional reasons.

First, both main cases on which the City relies are distinguishable. They address whether a force majeure event (the COVID-19 pandemic) excused a tenant's duty to timely pay rent where the lessor fulfilled its contractual duties and the tenant had the ability to pay. *See W. Pueblo Partners, LLC*, 90 Cal. App. 5th at 1188; *SVAP III Poway Crossings, LLC v. Fitness Int'l, LLC*, 87 Cal. App. 5th 882, 892-93 (2023). Here, in contrast to those cases, the provision at issue expressly states that events of Force Majeure *do not apply* to extend or excuse the payment of rent. Moreover, this is not a narrow case about ability to pay for services rendered where a standard like impossibility may make some sense.

Second, the City overstates the law. While both courts use language like impossibility from old common law, their analysis sounds in causation. In *SVAP III*, the force majeure provision provided that "[i]f either party is delayed or hindered in or prevented from the performance of any act" by a force majeure event, performance would be excused for the duration of that event. *Id.* at 892. The court then performed a simple analysis: did government gym closure laws during the pandemic actually delay, hinder, or prevent the defendant from performing? *See id.* at 892-93. *West Pueblo*—which also analyzed a force majeure provision that accounted for "delays"—conducted a similar analysis. *See W. Pueblo Partners, LLC*, 90 Cal. App. 5th at 1188 ("The plain meaning of the *force majeure* provision does not support an interpretation that ties a party's obligation to pay

rent to its profitability or revenue stream instead of a delay or interruption *caused by the force majeure event itself.*" (emphasis added)). Plaintiffs do not contest that they need to demonstrate that each Force Majeure event actually hindered or delayed their performance. And to the extent *West Pueblo* (as an outlier case) actually applies an impossibility standard, that standard is satisfied by something less than actual impossibility. It is sufficient to demonstrate that performance is "made impracticable due to extreme and unreasonable difficulty." *Id.* Here there is substantial evidence that the City not only hindered and delayed OBOT's performance but did so with the specific intent of preventing Plaintiffs from developing a terminal through which coal could be shipped.

Third, the City misrepresents *SVAP III*. That case separately evaluated a force majeure defense and impossibility and impracticability defenses. *See SVAP III Poway Crossings, LLC*, 87 Cal. App. 5th at 892-94. When addressing the force majeure provision, the court stated that there was no argument that the pandemic and resulting government orders "hindered" the tenant's ability to pay rent, and that the force majeure provision expressly excluded "failures to perform resulting from lack of funds or which can be cured by the payment of money." *Id.* at 892-93. The impossibility discussion, including the language the City cites, was limited to the tenant's actual impossibility defense, not force majeure. *Id.* at 893-94. That case has no application where, as here, the parties expressly agreed that events of Force Majeure did not affect or extend the obligation to pay rent.

D. Assumption of Risk

The City argues that OBOT assumed the risk of a "list" of occurrences that it now claims are Force Majeure events. (City Reply at 6:17-7:3.) But the City does not provide the list. Instead, the City provides a single example: "OBOT's express agreement to assume the risk that the City of Oakland might enact regulations applicable to the project and OBOT might need to challenge them in court." (City Reply at 6:18-20.) And, Plaintiffs reserved the right to challenge any regulations that the City enacted. The City does not point to any particular provision of the Ground Lease. Multiple provisions of that contract reference the City as regulator in specific contexts. Plaintiffs cannot respond to vague assertions that it assumed an unidentified list of risks. If the City identifies

that list in its proposed statement of decision after the closure of evidence, Plaintiffs will respond accordingly.[6]

E. The Basis of Design

Lastly, the City attacks a single Force Majeure claim: Plaintiffs' contention that the City's refusal to comment on the Basis of Design delayed the Project. (City Reply at 7:4-15.) The City argues that the Ground Lease provides a specific process for submission of the Basis of Design and for the City to respond, as well as an exclusive remedy for the City's failure to timely respond. The City misses the point of Plaintiffs' Force Majeure claim. The Basis of Design is the foundation on which the Terminal will be constructed. Independent of the City's contractual obligation to review and approve or reject construction documents, the Basis of Design is an inherently iterative process. Plaintiffs needed the City's feedback to move forward, and they asked for it multiple times. The City's silence on the Basis of Design for years was unforeseeable and it made performance impracticable, particularly in conjunction with the City's other Force Majeure events.

IV. CONCLUSION

For each of the reasons discussed above and in Plaintiffs' initial response brief, the Court should reject the City's res judicata arguments and find that *OBOT I* has no res judicata effect on Plaintiffs' claims or defenses. It should also find that the parties negotiated a non-boilerplate Force Majeure provision that does not include the common law terms the City seeks to read into the Ground Lease.

[6] To the extent the City is referring to its arguments about the City as regulator in its opening brief, Plaintiffs addressed those in their response. (*See* OBOT Response at 7:17-8:15 and notes 12-13.) And if the City is correct that there is a difference between the City as a regulator and the City as a Landlord, then the City cannot meet the same parties element of res judicata. *OBOT I* involved the City breach of the Development Agreement in its regulatory capacity; this case involves the City's breach of the Ground Lease as a Landlord.

Date: September 14, 2023

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PROOF OF SERVICE

I, Sovisal Theam, declare as follows:

I am employed in Costa Mesa, California. I am over the age of eighteen years and not a party to this action. My business address is MANATT, PHELPS & PHILLIPS, LLP, 695 Town Center Drive, 14th Floor, Costa Mesa, CA 92626.

On **September 14, 2023**, I served the within:

PLAINTIFFS' SURREPLY IN OPPOSITION TO CITY OF OAKLAND'S TRIAL BRIEFS ON PRIOR FEDERAL LITIGATION

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☒ **VIA ELECTRONIC MAIL:** By transmitting such document(s) electronically from my e-mail address at Manatt, Phelps & Phillips, LLP, Costa Mesa, California, to the person(s) at the electronic mail addresses listed above. The transmission was reported as complete and without error.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on **September 14, 2023**, at Costa Mesa, California.

Sovisal Theam