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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' RESPONSE TO CITY OF OAKLAND'S [PROPOSED] STATEMENT OF DECISION

Trial Date: July 10, 2023

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I. INTRODUCTION

Despite the complexities of this case (primarily related to the amount of information presented), the primary issue before the Court is simple: Did the City,[1] as Landlord, improperly terminate its Tenant's (OBOT) Ground Lease on November 22, 2018, based on the City's position (again, as Landlord) that OBOT had no right to Commence Construction of the Minimum Project after August 14, 2018—the date the City wrongly contends was the final Initial Milestone Date. Plaintiffs and CCIG have demonstrated by a preponderance of the evidence that the Initial Milestone Date was extended by City acts, both as a party-Landlord and as regulator, that delayed and hindered their performance.

The Ground Lease includes a negotiated Delay Due to Force Majeure Provision (Section 16.1) that extends the Initial Milestone Date when one party's acts delay or hinder the other party's ability to perform its contract obligations. Section 16.1 does not fully excuse performance. It simply prevents a party from being held in default or breach based on delays caused by acts of the other party or acts of government, and it extends deadlines based on those delays, but notably does not excuse performance permanently. (GL § 16.1, Art. 40.)

This case is not about coal. The federal court determined on May 15, 2018, that the City's attempt to prohibit the handling of coal at the ship-to-rail Terminal was invalid and constituted a breach of the DA. The federal court enjoined the City from applying and enforcing its no-coal ordinance on Plaintiffs' ship-to-rail Terminal. But the evidentiary record establishes that the City purposefully continued to hinder and delay Plaintiffs' performance, wrongfully terminated the Ground Lease to ensure that the Terminal would not be built, and thus, accomplished what the federal court ruled the City could not do—preclude the handling of coal.

The City's [Proposed] Statement of Decision ("City SOD" or "City's [Proposed] SOD") includes several narratives and themes aimed to block and confuse Plaintiffs' claims and defenses. For efficiency, Plaintiffs address each below before turning to the City's proposed findings and

[1] Unless otherwise indicated, this response uses the same abbreviations, shortened names, and other naming conventions as in Plaintiffs' [Proposed] Statement of Decision ("OBOT SOD" or "Plaintiffs' [Proposed] SOD").

analysis of the parties' "mirror image" breach of contract claims, Plaintiffs' claims that the termination also breached the Ground Lease because OBOT commenced construction and a cure, and finally, Plaintiffs' other causes of action: anticipatory repudiation, breach of the implied covenant of good faith and fair dealing, and declaratory relief.

II. THEMES IN THE CITY'S [PROPOSED] SOD

A. Foreseeability and the City's Unprecedented Treatment of OBOT

The City hinges its defense to Plaintiffs' breach of contract claim, and thus its own breach claim against OBOT, on its argument that nearly every City act that Plaintiffs say delayed or hindered development was known or foreseeable to OBOT when it executed the Ground Lease. Under the City's view, OBOT was obligated to predict and allocate risk for not only specific foreseeable events that could delay development, but also for the City's acts that would cause those events to occur, the City's decision to continue its misconduct for years without cure, and its concerted effort to delay development in multiple ways until it could terminate the Ground Lease for that delay.

The City asks this Court to go further than any court in the foreseeability cases the City cites. None of those cases require a party to foresee the other side's bad faith, obstruction, or interference; and none hold that the type of conduct at issue here is foreseeable. *See, e.g.*, *Watson Lab'ys, Inc. v. Rhone-Poulenc Rorer, Inc.*, 178 F. Supp. 2d 1099, 1111, 1113 (C.D. Cal. 2001) (FDA shutdown of a pharmaceutical plant was foreseeable because of the plant's history of FDA violations and a consent decree that permitted immediate FDA shutdown for future violations).[2] The focus in this case is City action. The focus in the City's cited cases are events caused by someone or something other than a contract party. The equivalent in *Watson* would be the plaintiff causing the violation that led to the FDA shutdown. The FDA shutdown was foreseeable; the plaintiff causing the shutdown to exploit the consent decree provision that permitted the FDA shutdown and get out of the contract would not be. But those aren't the facts of *Watson* or any of

[2] Most cases the City cites on foreseeability are not contract cases or involve contracts without force majeure provisions. (*See* Plaintiffs' Surreply In Opposition to City of Oakland's Trial Brief on Prior Federal Litigation ("OBOT Surreply Re Fed. Litig."), pp.10-11, n.5 (Sept. 14, 2023).)

the City's other cited cases; or of any cases that Plaintiffs could locate, demonstrating the uniqueness of the facts in this case and the Parties' negotiated Delay Due to Force Majeure provision.

OBOT could not have predicted the City's conduct. OBOT prevailed in federal litigation that conclusively determined that the City's coal ban could not be applied to OBOT, and that OBOT had a vested right to develop a terminal that handles any commodity, including coal, consistent with Oakland's laws as they existed when the DA was approved in 2013. *Oakland Bulk & Oversized Terminal, LLC v. City of Oakland*, 321 F. Supp. 3d 986, 1010 (N.D. Cal. 2018), *aff'd*, 960 F.3d 603 (9th Cir. 2020) (findings of facts and conclusions of law) ("*OBOT I*"); *Oakland Bulk & Oversized Terminal, LLC v. City of Oakland*, No. 16-cv-07014-VC, 2017 WL 11528287, at *1 (N.D. Cal. 2017) (order denying the City's motion to dismiss). (*See also* OBOT SOD 2:14-27.) Plaintiffs could not have foreseen that despite the *OBOT I* judgment, the City would aggressively pursue a ban-compliant terminal and stall development of the Bulk and Oversized Terminal until it could achieve that goal or remove OBOT from the Project altogether by terminating the Ground Lease. However, Plaintiffs did include a Force Majeure provision specifically to deal with acts of delay caused by the other party or government agencies, so despite not contracting for each unique event with a separate deadline, the contract did include a provision to deal with hinderance and delay. The City's view that the Plaintiffs should have contracted distinct deadlines for each City deliverable completely ignores the parties' bargain.

B. The City's Lopsided View on Diligence and Deadlines

The City repeatedly argues that the Ground Lease requires OBOT to perform diligently and expeditiously without imposing any corresponding duties or deadlines on the City. For instance, the City asks the Court to find that "time is of the essence" as to all of OBOT's "construction" obligations. (City SOD 3:10-12, 24:7-12.) In contrast, the City argues that OBOT did not negotiate a deadline for the City to perform certain acts or a contingency for the City's nonperformance. (*See, e.g.*, City SOD 7:9-11 (no contingency for the City's enactment of anti-coal legislation), 21:23-27 (no deadline for the City to complete public improvements and no contingency for nonperformance), 22:6-9 (no deadline or contingency for the RAA), 54:10-16 (same), 92:9-12 (no

contingency for regulation binder), 93:17-19 (no negotiated contingency or tolling of deadlines for OBOT's successful challenge to the City's application of the coal ban to OBOT).) In the City's view, OBOT is required to expeditiously perform its contract obligations, but the City can delay performance at will (then terminate the Ground Lease for that delay) because OBOT did not negotiate deadlines for the City or contingencies for the City's nonperformance. The City is wrong—this type of logic typifies the City's breach of the covenant of good faith and fair dealing.

Putting aside contractual text and OBOT's Force Majeure claims for the moment, it is black letter law that a party to a contract cannot benefit from (1) its own breaches; (2) the other party's breaches that it causes; or (3) the other party's failure to cure a breach when it obstructs the cure. Regardless of whether a party has a deadline or an express duty to diligently perform, a party cannot cause a breach or obstruct a cure, then recover for the uncured breach in court. *Mad River Lumber Sales, Inc. v. Willburn*, 205 Cal. App. 2d 321 (1962) is squarely on point.

In *Mad River Lumber Sales*, the Defendant (Mrs. Hazel Willburn) agreed to sell timber to the predecessor of Mad River Lumber Sales, Inc. *Id.* at 322. Mrs. Willburn had previously optioned the rights to the timber to another lumber company. *Id.*at 322-23. That company failed to follow good logging practices, apparently leaving the Willburn property in poor shape, and Mrs. Willburn asked Mad River to clean it up. *Id.* at 323. When Mad River abandoned the task to commence its own logging operations, Mrs. Willburn said she would cancel the contract. *Id.* She then placed a chain across the access road that Mad River needed to enter the property, and sent a notice of default to Mad River that requested a cure within 15 days. *Id.*

Mad River sued to enjoin Mrs. Willburn from interfering with its rights; Mrs. Willburn countersued for breach of contract. *Id.* The trial court found for Mrs. Willburn, Mad River appealed, and the California Court of Appeal reversed, holding that the notice of default "was ineffectual to terminate the contract since Mrs. Willburn had prior thereto prevented access to the logging area." *Id.* at 324. Mrs. Willburn prevented Mad River's performance and cure. The court reasoned that every contract has an implicit promise by each party that they "w[ill] not hinder or prevent [the other party] from correcting or remedying its breach." *Id.* (citing Corbin on Contracts § 1266 ("If the performance or results so specified cannot be brought about without the co-operation of the first

party, a promise to cooperate will usually be implied on his part. He will be deprived of the power to terminate if he is himself a wrongful cause of the other's failure to perform or to produce the results. His power to terminate will be held to be constructively conditional on his own cooperation. His failure to co-operate is wrongful; and he cannot take advantage of his own wrong.").

Here, it is undisputed that OBOT could not perform certain obligations without the City's cooperation. As explained below, looking at the whole of the Ground Lease and its general purpose, the City's cooperation was a constructive condition (and often an express one) of OBOT's performance. Instead of cooperating, the City, like Mrs. Willburn, placed a chain across the road that OBOT needed to cross in order to perform, meet the Initial Milestone Date, and ultimately, respond to the City's notice of default. The City then blocked OBOT's commenced cure.

Returning to the Ground Lease's language, the lack of an express deadline or specific contingency does not excuse the City of its duty to perform obligations that are conditions precedent for OBOT's performance. As the City points out, the Ground Lease does not allow OBOT to Commence Construction until the City approves Final Construction Documents (GL § 6.2.6.1) and OBOT obtains all Construction Permits (GL § 6.2.6.2). (*See* City SOD 24:13-25:7.) Satisfying those conditions requires the City to actually approve the Final Construction Documents—which is the end of a long iterative process that requires City cooperation at every level (GL § 6.2.1)—and to issue permits. Similarly, OBOT and OGRE could not access areas of the rail corridor to perform work, including the Railroad R/O/W Property, unless the City performed multiple conditions precedent, including entering the RAA, completing *and accepting* public improvements, and cooperating with OBOT to obtain regulatory approvals, among other preconditions. (*See* GL §§ 1.1.1 (public improvements), 5.2.2.2 (regulatory approvals), 5.2.3 (RAA); RT 1641:21-1642:6 (requirement of STB approval to rehabilitate track).)

The City also ignores the plain text of the Ground Lease's Time of the Essence provision (GL § 38.14). *See* Cal. Civ. Code §§ 1638, 1639. The City borrows language from Section 38.14 ("time is of the essence") but does not cite that section. (*See* City SOD at 24:7-12.) Instead, the City relies on Section 6.2.5 for its time-is-of-the-essence argument. (*Id.*) That section does not include the language "time is of the essence." It also applies to *all* Project construction, not only

construction by OBOT as the City implies. Section 6.2.5 states: "*All construction* with respect to the Project shall be accomplished expeditiously, diligently, and within the timeframes set forth within Section 6.1." (GL § 6.2.5 (underling original;[3] other emphasis added).) That makes sense. "All construction"—including the City's obligation to commence construction of the public improvements and diligently prosecute them to completion—is geared towards reaching the milestone dates in Section 6.1. The Ground Lease thus requires the City to act "expeditiously" and "diligently" and before the milestone deadlines because OBOT could not meet those deadlines unless the City first did its part. *Alki Partners, LP v. DB Fun Servs., LLC*, 4 Cal. App. 5th 574, 592 (2016) ("Where one party's obligation is dependent on the prior proper performance of the other party, and that other party does not perform, the obligation is excused.").

The Ground Lease's actual Time of the Essence provision (GL § 38.14) supports this view. It states: "Time is of the essence with respect to *each provision of this Lease*, including, but not limited to, the provisions for the payment of Rent and any other sums due hereunder, subject to the provisions of Section 16.1 relating to Force Majeure." (GL § 38.1.4 (emphasis added).) The provision expressly applies to *each provision* of the Ground Lease, including provisions that obligate the City to perform. The City incorrectly describes the Ground Lease's time-is-of-the-essence obligation as applying only to OBOT's construction, and it supports that incorrect description by citing the wrong provision, then quoting only part of that provision's text.

Even if the City were correct that time is of the essence only as to OBOT's obligations, the Ground Lease's Time of the Essence provision is expressly subject to the Delay Due to Force Majeure provision. (GL § 38.14 ("Time is of the essence with respect to each provision of this Lease … subject to the provisions of Section 16.1 relating to Force Majeure.").) So time was not of the essence when the City purported to terminate the Ground Lease because OBOT had sent multiple, valid Force Majeure notices to the City between the City's September 21, 2018 cure notice (Ex. 217) and October 23, 2018 notice of default (Ex. 250). (*See* Ex. 222 (Sept. 24, 2018); Ex. 670 (Sept. 28, 2018); Ex. 243 (Oct. 4, 2018); Ex. 248 (Oct. 19, 2018).)

[3] The Ground Lease underlines references to its own provisions. Plaintiffs note that the underlining is original for this first citation but do not make the same note for similar references going forward.

The whole of the Ground Lease must be taken together when interpreting each provision. Cal. Civ. Code § 1641. Taking the Ground Lease as a whole, the City was obligated to perform its obligations before the milestone deadlines in Section 6.1, including the Initial Milestone Date; and the City's failures hindered and delayed Plaintiffs' performance, triggering the Delay Due to Force Majeure provision (GL § 16.1) or otherwise extended OBOT's deadlines. The Ground Lease is designed to foster cooperation between the parties in order to meet the milestone deadlines or extend them if they cannot be met. The parties' agreed to deadlines for construction (GL § 6.1), promises to perform every Ground Lease obligation with diligence and speed (GL §§ 6.2.1, 6.2.5, 37.9.2(b), 38.14), covenants to cooperate to accomplish preconditions to construction (GL §§ 5.2.2.2, 6.3.1), and a Delay Due to Force Majeure provision that extends each party's deadlines in proportion to delay and hinderances caused by the other party (GL § 16.1). These provisions are unambiguous.[4]

Relatedly, particular Ground Lease provisions must give way to the contract's general intent. Cal. Civ. Code § 1650. It is undisputed that the general intent of the Ground Lease is to facilitate the Project's development of the ship-to-rail Terminal. The City self-servingly interprets contract provisions about its own obligations in a vacuum, circumventing the Ground Lease's general intent.

Finally, the City's interpretation is absurd. *See* Cal. Civ. Code § 1638 (The language of a contract is to govern its interpretation, if the language is clear and explicit, and *does not involve an absurdity*." (emphasis added)). It is absurd to interpret a contract to: (1) require one party to perform by a date certain; (2) condition that performance on another party's performance or the occurrence of an event; and (3) enforce the first party's deadline even though the condition did not occur.

C. Soda Ash, Commodity Approval, and the City's Argument that OBOT Could Have Built a Coal-Free Terminal

The City argues that OBOT is at fault for missing the Initial Milestone Date because

[4] Several contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction must also be taken together. Cal. Civ Code § 1642. Like the Ground Lease, the DA includes covenants to work together to accomplish preconditions for construction. (DA §§ 834, 14.10.)

OBOT's own business decisions caused the delay. The City's theory of the case is that OBOT delayed work on the Terminal until it had a sublease with TLS or one of its successors (IES, then ITS) to develop and operate the Terminal. (*See* CITY SOD 38:11-46:20.) The City dresses the argument up in various ways—for instance, the City argues that OBOT: (1) went pencils down in 2015 instead of building a non-coal terminal (*id.* 38:26-39:7); (2) could have funded a non-coal terminal with TLS (*id.* 19:12-25, 39:8-42:1); (3) extended Mr. Siegel's option agreements multiple times instead of finding a subtenant to operate a non-coal terminal—i.e., "the Siegel Shuffle" (*id.* 42:2-25); (4) could have financed a soda ash terminal (*id.* 42:26-44:18); (5) abandoned the IES sublease—a redux of the City's irrelevant Siegel Shuffle argument (*id.* 44:19-45:15); and (6) negotiated payments from Mr. Siegel instead of moving forward with a non-coal terminal—another Siegel Shuffle redux (*id.* 45:21-46:20).[5] Each argument says the same thing: OBOT could have financed and built a non-coal terminal (specifically, soda ash) but chose to continue its relationship with John Siegel instead.[6]

As a threshold matter, the City's arguments miss the mark—as the federal court found, OBOT had every right to develop a ship-to-rail terminal that handled any lawful commodity, including coal. Moreover, the City ignores the weight of evidence. The City, not OBOT, created the conditions that both required *and* prevented City approval of each commodity (including soda ash) to be shipped through the Terminal. It is undisputed that the City told OBOT that it would approve permits (and grant other approvals) on a commodity-by-commodity and discretionary basis (RT 542:15-21, 2678:12-2679:1, 2679:15-25); that the City did not provide a process to approve commodities or apply for permits (RT 541:18-543:4, 2080:4-11, 2081:1-16, 3178:3-22); and that the City did not identify a single commodity (soda ash included) that it was willing to approve (RT

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[5] The City characterizes these same delay arguments as reasons that "OBOT did not act with diligence in pursuing performance as required by the Force Majeure clause." (City SOD 98:10-16; *see also generally id.* 97:5-99:6.) Thus, Plaintiffs' responses in this section (II.C) and the next one (II.D) are also reasons Plaintiffs have satisfied the common law diligence requirement for Force Majeure in the event that the Court finds that Section 16.1 includes that requirement.

[6] The City also argues that a rent default between February and July 2018 delayed the Project. (City SOD 45:16-20) The City does not attempt to explain how a six-month rent default that OBOT promptly cured delayed development of the Terminal. (*See id.*) The argument is a red herring.

422:6-17, 1076:2-5, 2082:19-22, 2272:10-14, 2556:3-12, 2082:19-22).

In the meantime, Plaintiffs repeatedly requested that the City clarify the process to have a commodity approved and permits issued (RT 287:22-288:4, 383:25-384:8, 390:24-391:16, 417:5-418:5, 419:2-420:1, 477:2-478:9, 541:18-543:14, 2080:4-11, 2081:1-16), and to identify specific commodities it would approve (RT 1075:17-1076:05, 1135:22-1136:08, 2084:8-11). As the City knew, OBOT needed commodity information (whether coal, soda ash, or something else) to advance Terminal design. (RT 220:4-18, 292:8-17, 543:1-15, 1602:21-1603:2, 1604:24-1605:5, 2275:7-10, 2276:3-8, 2336:10-17; Ex. 64; Ex. 598.) Yet, the City never provided that information, hindering and delaying development of the Terminal. (RT 419:2-17, 422:6-17, 1894:22-1895:12, 3178:3-22, 1076:2-5, 2082:19-22, 2272:10-14, 2556:3-12.) Plaintiffs explained the delay to the City in multiple Force Majeure notices. (*E.g.*, Ex. 191, p. 8; Ex. 248, p. 13-14, 20-22, 39, 46; Ex. 856, pp. 7-18.) But the City called default and terminated the Ground Lease, without substantively reviewing those notices. (RT 3266:21-3267:24, 3281:15-3282:16, 3283:3-3284:19 (Landreth).) In fact, the City expressly delayed a substantive response until it called default. (*See, e.g.*, Ex. 185 (Aug. 20, 2018 letter from Sabrina Landreth to Phil Tagami deferring a "substantive response").)

OBOT's consideration of soda ash as a potential commodity and the City's responses to OBOT's work prove the point. OBOT, although not required to, pursued soda ash as a commodity for the Terminal. (RT 267:9-15, 415:10-12, 483:7-19.) OBOT worked with multiple beneficial cargo owners, hoping to clear a path for soda ash in the West Gateway.[7] (*See, e.g.*, RT 500:11-502:13 (In 2017, OBOT had discussions with Ciner, a Turkish soda ash company, about soda ash as a commodity for the Terminal), 500:4-501:16 (In 2018, OBOT's conversations with Ciner became more technical), 506:22-507:16 (Also in 2018, Mr. Tagami continued talking with Ciner and visited their facilities in Turkey); *see also* RT 208:20-209:11 (Sisecam is the world's largest glass manufacturer and acquires its soda ash from Wyoming), 507:17-508:22 (In 2017 and 2018, OBOT had face-to-face meetings with Sisecam in Oakland, New York, and Italy), 509:10-22 (Sisecam did not believe the Terminal project was ready to proceed because of uncertainty

[7] OBOT also had conversations with other beneficial cargo owners during the same period. (*See, e.g.*, RT 523:2-524:24 (in 2017-2018, OBOT had discussions with Nevada Iron).)

regarding rail access), 511:19-514:16 (In 2018, OBOT had meetings with the Port and Sisecam to address rail access, but Sisecam remained concerned that it would not have the access it needed to store soda ash at the OAB); *see also* RT 519:6-522:22 (In 2016 through 2018, OBOT held conversations with ANSAC (American Natural Soda Ash Corporation), a consortium of three soda ash companies, that focused on the possibility of a high volume, long-term commodity contract).)[8]

Unfortunately, the City's political position on coal chilled the market, including on soda ash. (RT 389:7-19, 503:4-22, 504:23-505:25.) In OBOT's view, after the City announced that it would provide approvals on a commodity-by-commodity and discretionary basis, nothing prevented the City from unilaterally declaring other commodities prohibited. (RT 277:6-278:1, 389:7-19.) That view is corroborated by the City telling OBOT that it would need City approval for each commodity. (RT 542:15-21)

In 2016, OBOT invited Claudia Cappio to participate in a meeting between OBOT, TLS, railroad representatives, and ANSAC to discuss soda ash. (RT 416:18-25; *see also* City SOD 39:8-14.) The railroads, ANSAC, and TLS requested a letter from the City identifying a commodity it

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[8] TLS also pursued soda ash as a commodity and requested approval from the City. (RT 1071:15-1072:8 (Bowie's third largest customer, Searles Valley Mineral, produced soda ash), 1095:6-16 (in 2015-2017, TLS had discussions with multiple beneficial cargo owners, involving iron ore, wood pellets, potash, alumina, borax, and soda ash).) TLS asked the City to approve soda ash as a commodity, but never received approval. (RT 1135:22-1136:08.) In its [Proposed] SOD, the City acknowledges TLS's work, including development of a financial model on soda ash and pursuit of a contract with Ciner. (City SOD 41:7-10, 44:5-7, 102:10-12.) But the City gives that work short shrift, contending that Mr. Siegel made a business decision to not go forward with any of the potential soda ash deals because coal would have been more profitable. (City SOD 41:7-19.) As evidence, the City cites two short testimony excerpts. First, the City relies on a single answer to a single question about a single soda ash deal from one of Mr. Tagami's many depositions that the City's counsel read into the record, purportedly as impeachment. (*Id.* (citing RT 1325:9-23).) That testimony is about the ANSAC deal only, and did not impeach Mr. Tagami's testimony. (*Id.*) And the City ignores that ANSAC, with TLS and the railroads, requested a letter from the City stating that it was willing to approve soda ash. (RT 417:5-418:5.) It is undisputed that at the direction of the City Attorney's office, the City never provided a final, signed copy of the letter. (RT 420:10-41:14, 2086:19-21, 2089:7-10, 2122:5-16.) Even if Mr. Siegel made a business decision to move away from ANSAC, and there is scant evidence to support that conclusion, the decision would have been against the backdrop of the City's refusal to approve soda ash. Second, the City relies on Mr. Tagami's testimony that Mr. Siegel "made a set of business decisions." (City SOD 41:7-19 (citing RT 1266:4-9).) The questions and answers just before and after the lines the City cites show that the testimony was about OBOT's option agreements with Mr. Siegel, not a soda ash deal. (*See* RT 1265:12-1266:17.)

1 would approve and a process for approval. (RT 417:5-418:5.) Mr. Tagami asked Ms. Cappio if she
2 would prepare the letter. (*Id.*; RT 2084:8-14, 2085:13-19.)
3 In September 2016, Ms. Cappio prepared a draft letter, and sent it to OBOT. (Ex. 91; RT
4 418:6-9.) The letter stated: "From our preliminary review of the BOD and other documents and
5 analysis, soda ash will not trigger further review under the California Environmental Quality Act
6 (CEQA) and you may proceed with the ministerial permitting process identified above." (Ex. 91,
7 p. 2.) But Ms. Cappio marked the letter "DRAFT – ADMINISTRATIVE WORK PRODUCT" and
8 wrote that she lacked "sufficient authority, information, [and] analysis to make a definitive
9 determination." (Ex. 91, p. 1; *see also* RT 420:10-421:13.) Mark Wald in the Oakland City
10 Attorneys' office then intervened and prohibited Ms. Cappio from issuing the final letter. (RT
11 2086:19-21, 2089:7-10, 2122:5-16.)[9]
12 As of November 22, 2018, there was no soda ash terminal (or any other type of terminal) in
13 Oakland because the City (now arguing it had a right to conduct a commodity-by-commodity
14 review) refused to review and approve any commodity. The delay has nothing to do with OBOT's
15 business decisions or financing as the City argues. Indeed, the parties agree that OBOT could have
16 funded the Terminal on its own. (City SOD 43:1-8.) The City repeatedly asserts that OBOT and
17 Mr. Siegel decided not to proceed with soda ash or another commodity, ignoring that OBOT spent
18 years meeting with several soda ash companies through 2018, but could not design or develop a
19 terminal capable of handling soda ash without the City's approval of the commodity.
20 **D. The City's Other Attempts to Blame Plaintiffs for the Delay**
21 The City's arguments on delay and diligence treat the Terminal and rail as distinct parts of
22
23 [9] The City suggests that it declined to provide written confirmation of any approved commodity
24 because it "had recently been sued under CEQA in relation to the project" and such confirmation
"was not part of the standard CEQA review process." (City SOD 105:25-28.) That explanation
25 defies common sense. If as the City contends, it wanted Plaintiffs to develop the Terminal, there
is no valid reason why it could not have provided written confirmation of approved commodities,
26 including soda ash. After all, the City had an approved EIR for the Terminal and the Terminal
was zoned for the transport of the full range of commodities. The more plausible explanation for
27 the City's refusal to confirm any approved commodity is that such confirmation would have
enabled Plaintiffs to advance development of the Terminal, which raised the unacceptable risk to
28 the City that Plaintiffs would develop the Terminal and potentially ship coal through it.

1 the Project, arguing that certain conduct delayed the Terminal, while other separate conduct delayed
2 rail. (*See, e.g.*, City SOD 98:17-18 ("As an initial matter, the trial record established that any delays
3 of the rail construction were unrelated terminal construction.").) The DA contemplated a ship-to-
4 rail terminal; without rail, there is no Terminal, and without a Terminal, rail would not be
5 constructed. But, for ease of reference only, Plaintiffs follow the City's structure here.

6 **1. The City's Terminal-Specific Delay and Diligence Arguments**

7 The City's Terminal-specific arguments are summarized above and addressed by evidence
8 on the parties' respective treatment of soda ash as a potential commodity. As noted, the City's
9 arguments have a common thread: the idea that OBOT could have financed and built a non-coal
10 terminal but chose instead to continue its relationship with John Siegel. In addition to the reasons
11 discussed above, the City's arguments fail for reasons that have nothing to do with soda ash.

12 First, the City's position assumes that OBOT has a legal obligation to comply with the
13 City's extracontractual demands and build a ban-compliant Terminal even though *OBOT I* enjoined
14 the City from applying the coal ban to the Terminal. Importantly, the City's proposed findings of
15 fact regarding OBOT's purported delay do not include a single finding that any contract requires
16 OBOT to build a ban-compliant Terminal or obtain funding for one even though that is the lynchpin
17 of the City's entire argument. (*See generally* City SOD 38:26-46:20.) In fact, the City concedes
18 that the Ground Lease, DA, and LDDA do not prohibit coal or any other commodity. (City SOD
19 3:1-4 ("The Ground Lease d[oes] not address which commodities would be shipped, beyond
20 requiring OBOT to construct a Bulk and Oversized Terminal, capable of exporting at least one
21 commodity by specific deadlines, that complied with applicable laws."), 12:11-14 ("In both the
22 LDDA and DA, as previously discussed, the parties contemplated the construction of a multi-
23 commodity bulk terminal on the West Gateway property. Ex. 378, p. 74, Ex. 7, p. 107. Neither of
24 these contracts discussed any specific commodities to be shipped. *See generally* Ex. 7, 378.").) It
25 is undisputed that the Ground Lease does not require OBOT to build a smaller non-coal terminal
26 or a multi-phased terminal that begins with commodities other than coal. The City's arguments to
27 the contrary further evidence the City's consistent attempt to deprive OBOT of a primary benefit
28 of its bargain with the City.

Second, the City ignores that none of OBOT's and Mr. Tagami's efforts to build an "alternative" terminal or handle an "alternative" commodity (*see* City SOD 19:12-25, 39:8-42:1) would have been necessary had the City not illegally prohibited coal at the Terminal, insisted on a ban-compliant terminal after it lost in *OBOT I*, and required separate approvals of each commodity after the March 9, 2016 kickoff meeting. The fact that Mr. Tagami discussed extracontractual alternate approaches at all is evidence of Plaintiffs' good faith and willingness to go above and beyond what the Ground Lease requires in order to move the Terminal forward. The City appears to endorse the idea that a contract party may simply hinder and delay performance in order to circumvent an unfavorable federal court ruling.

2. The City's Rail-Specific Delay and Diligence Arguments

The City asks the Court to find that Plaintiffs delayed the Minimum Project Rail Improvements (and for Force Majeure purposes, did not act diligently) because: (1) OBOT had access to build track for the Minimum Project (City SOD 48:12-52:8); (2) OBOT and OGRE halted track construction in 2018 (*id.* 52:9-24); (3) OBOT and OGRE's sublease agreement delayed OGRE's "assumption of responsibility" until certain conditions were met (*id.* 53:13-54:1); and (4) OBOT did not submit rail drawings until 2019 (*id.* 54:2-5).[10] (*See also* City SOD 98:17-99:6 (the City makes the same arguments and no others under the *skill, diligence, and good faith* portion of its Force Majeure argument as to rail); OBOT SOD 74:24-75:25 (OGRE's diligence and readiness to perform the Rail Improvements).)

a. Access to the Rail Corridor

The City asks the Court to find that Plaintiffs had access to the portions of the rail corridor where the Minimum Project Rail Improvements were to be built during the life of the Ground

[10] The City also asks the Court to find that "rail and terminal construction were independent Ground Lease requirements" (City SOD 47:2-48:11); and make various factual findings about the RAA, including that OBOT and OGRE did not need it to access Port land (*id.* 54:5-55:26). Plaintiffs address the City's arguments on the relationship between Terminal and Rail Improvements below in Section VI.B because they relate to Plaintiffs' breach of contract theory that the City's termination was unlawful because OBOT Commenced Construction of the Minimum Project by the Initial Milestone Date. Plaintiffs address the City's RAA arguments below in Section IV.H where Plaintiffs also address their Force Majeure claim related to the RAA.

Lease. (City SOD 48:12-52:8; *see also* OBOT SOD 69:14-70:27 (summarizing each Rail Improvement).) Specifically, the City argues that: (1) the Ground Lease granted legal possession of the Premises to OBOT; (2) Plaintiffs could physically walk on the land; (3) OGRE built some track on land in the BNSF Rail Easement and the Outer Claw; (4) the public improvements were complete; and (5) OGRE could have used temporary construction easements that the Port granted in favor of the City. (City SOD 48:12-51:18.)[11] The weight of the evidence establishes that each of the City's arguments fails.

(1) Legal Possession

The City's argument that the Ground Lease grants legal possession to OBOT is intentionally obtuse. The City can only grant what it owns. Only the first two of the Minimum Project Rail Improvements are on City-owned land and both are subject to easements in favor of entities other than OBOT and OGRE.

The first Rail Improvement (the BNSF Rail Improvements) is on City-owned land (GL § 6.1(b)(i); RT 3925:10-3926:4).). But the portion of Lead Track No. 1 where the improvement is to be built is subject to the BNSF Rail Easement. (RT 3926:12-16.) Although the City negotiated the easement with BNSF, it did not include access rights for OBOT or OGRE. (*See* OBOT SOD 69:17-70:5.) As the City points out, Betsy Lake testified that her "understanding was that [the] BNSF rail easement did provide access" to OBOT and OGRE. (RT 3926:25-3927:9.) But Ms. Lake did not explain her conclusion other than to vaguely assert that her understanding was based on "[r]eview of the BNSF easement documents." (RT 3927:4-5.) When pressed on cross-examination, Ms. Lake acknowledged that the City granted BNSF the exclusive right to use the track, and BNSF had reserved the sole right to control operation of the track, including the exclusive right to

[11] The City also asks the Court to find that OBOT released preexisting claims and took the land as is, including by waiving California Civil Code, section 1542. (City SOD 22:10-11 (citing Ex. 68, pp. 12-14 (GL § 1.1.3)).) That's a red herring. Plaintiffs do not pursue any claims in this case that existed when OBOT entered the Ground Lease. This case is about termination of the Ground Lease. To the extent Plaintiffs' Force Majeure claims involve certain events that occurred before the Ground Lease, Section 16.1 permits Force Majeure events to include events that occurred in the first instance prior to February 16, 2016. (*See* Section III.D.2, *infra*.) And Plaintiffs Force Majeure claims did not accrue until the City demanded performance and called default. (*See* Section III.C, *infra*.) Section 1542 has no application to these later accrued claims.

construct track. (RT 3965:22-3966:8, 3966:23-3967:1, 3967:24-3968:18). As of November 22, 2018, the City had failed to turn over that portion of the corridor to OBOT or OGRE to construct the BNSF Rail Improvements. (RT 1715:5-9.)

The second Rail Improvement (the East of Wake Rail Improvements) is the portion of Lead Track No. 2 located within City-owned land but subject to the Port Rail Easement. (GL § 6.1(b)(i).) Danny Wan, the Port's current Executive Director and former General Counsel, acknowledged that the Port took the position that OGRE had had no rights to access that portion of Lead Track No. 2. (RT 3838:11-21.) As of November 22, 2018, this portion of the corridor had not been turned over to OBOT or OGRE. (RT 1715:23-1716:3.)

The plain language of the Ground Lease supports Plaintiffs' view that the City's grant of a leasehold interest through the Ground Lease was not enough to permit OBOT or OGRE to start construction. Although Section 1.1.1 grants a leasehold interest to OBOT, Section 1.1.2 makes that interest expressly subject to the BNSF Rail Easement (the first Rail Improvement), the Port Rail Easement (the second Rail Improvement), and other exceptions. (GL § 1.1.2.)

As to the third through fifth Rail Improvements, they are all on Port-owned or controlled land. (GL § 6.1(b)(iii)-(v).) While Section 1.5.1 of the Ground Lease grants OBOT the ability to exercise certain of the City's rights to access Port property, it also requires that those rights be "in accordance with the terms and conditions of the Rail Access Agreement and [Ground] Lease" and *only* "as granted to the City by the Port under the Rail Access Agreement." (GL § 1.5.1.)

The City's grant of legal possession was subject to easements that were in favor of BNSF (first Rail Improvement) and the Port (second Rail Improvement) and not OBOT; or subject to the Port's ownership and contingent on the Port granting access to OBOT through the City and the RAA (third, fourth, and fifth Rail Improvements). The Port confirmed its view that OGRE had no right of access to construct track on Port land when it opposed OGRE's application to the STB in September 2018. (Ex. 214, p. 3 ("OGRE has not yet obtained the property rights it would need from the Port to construct any track on Port property"), p. 5 ("OGRE has not yet obtained the necessary property or contract rights from the Port"), p. 6 ("OGRE has not yet obtained the property rights that it needs from the Port to build any track on Port property"), p. 11, n.15 ("OGRE does not yet

have rights to construct any track on Port property"), p. 13 ("OGRE has not yet obtained the property rights that it needs from the Port to build any track on Port property"), p. 16 ("OGRE has not yet secured the property and/or contractual rights necessary to construct and operate over the track that it is planning to build on Port property").) The City offers no competent evidence, through an expert witness or otherwise, that it provided the necessary access to the relevant property sites to allow OBOT or OGRE to complete their work.

(2) Physical Access

The City's argument that OGRE had physical access to walk and store materials on the land does not demonstrate that Plaintiffs could build rail. The City relies on testimony from Mark McClure and Betsy Lake. (City SOD 48:25-26 (citing RT 1853:13-23 (McClure), 4030:7-16 (Lake).) Mr. McClure did not testify that OBOT or OGRE had the right to access and construct rail on the parts of the rail corridor where the Minimum Project Rail Improvements are or will be located. He stated only that he "could walk on" the land. (RT 1853:13-15.) He then explained the distinction between being physically able to walk on land and being able to mobilize contractors. (RT 1856:14-1857:11.) Mr. McClure also testified that OGRE stored materials throughout the rail corridor. (RT 1854:9-11.) But he did not testify—nor did any other witness—that the ability to store materials scattered throughout the corridor gave rise to a right of access sufficient to construct rail in the City-owned areas, which were already occupied by the City's joint venture contractor ("JV"). Moreover, construction of the Minimum Project Rail Improvements could not proceed until the City's JV contractor had completed its work and vacated the property and the City accepted that work. It is undisputed that those events did not occur until Summer 2019, well after the City terminated the Ground Lease. (*See* OBOT SOD 68:20-76:21, 1859:9-1861:24.)

(3) Limited Construction in the BNSF Rail Easement and Outer Claw

The City's argument that OGRE constructed rail in the BNSF Rail Easement (first Rail Improvement) and Outer Claw (third Rail Improvement) assumes that *some* access equals *full* access, ignores the context of the construction, and concedes that Plaintiffs Commenced Construction of at least one Minimum Project Rail Improvement before the City's notice of default.

The limited construction in the BNSF Rail Easement was in connection with the Wake Avenue railroad crossing. (RT 755:17-757:1.) OGRE's rail contractor, IRC (Chris Stotka's company) constructed some track west of the crossing until Mr. McClure told him to stop. (*Id.*) Although the City now blames Mr. McClure, and cites Mr. Stotka's testimony as proof, Mr. Stotka testified that he did not know why Mr. McClure told him to stop and he didn't ask. (RT 757:19-758:5.) Mr. McClure explained that IRC needed to construct just enough track east of the crossing to secure it in place and ensure that the crossing would not be compromised by cars passing over it. (RT 1633:4-1634:6.) IRC also constructed track west of the crossing—the track the City argues proves OGRE had access to the BNSF Rail Easement—but only an amount sufficient to test the crossing signaling. (RT 1634:13-1635:10.) Mr. McClure explained that OGRE and IRC were able to do the work in cooperation with the City's infrastructure project; the City had granted *limited access* to the area because it was the only way to open Wake Avenue so that East Bay MUD could access its property. (RT 1630:3-1631:16.) In other words, the City permitted access in special circumstances that benefitted the City but not for OGRE to perform additional work in satisfaction of OBOT's Ground Lease obligations.

IRC also installed some track in the Outer Claw, including a portion of Lead Track No. 2, through another narrow contract with the City that OGRE funded. (RT 1737:8-16, 1858:24-1859:17, 3324:17-3425:7, 3325:13-22.) The access granted under that agreement was limited, and construction had to stop because OGRE did not receive further access. (RT 1861:16-24, 3595:13-23; *see also* RT 3904:17-3905:9; Ex. 799, p. 8.)

The City points to the construction that occurred but offers no evidence to contradict Mr. Stotka's or Mr. McClure's credible testimony about the narrow scope of that work, and the City's failure to grant additional access to the same land so that additional work could occur.

(4) Public Improvements

It is undisputed that the City was required to accept completion of the public improvements before the rail corridor would be turned over to OBOT (and thus, OGRE) to perform the private improvements. The City asks the Court to find that the City had completed public improvements in the portions of the corridor where the Rail Improvements were to be constructed by Spring 2018,

implying, but not directly stating, that OBOT must have had access once the public improvements were complete. (City SOD 49:19-50:18.) As detailed in Plaintiffs' [Proposed] SOD, as of November 22, 2018, the City had not turned over the rail corridor to OBOT, delaying development of the Minimum Project Rail Improvements. (*See* OBOT SOD 68:20-76:21.)

The City's argument and cited evidence does not say otherwise. The City cites evidence that certain public improvements had been completed on certain portions of the corridor at certain times. (*See generally* City SOD 49:19-50:18.) The Ground Lease defines "Completion" of public improvements as more than the end of construction; it also includes City inspection and acceptance, and where a portion of the improvements are not accepted, an engineer's written certification to OBOT that the improvement had been constructed consistent with the approved drawings. (GL § 37.9.2(b).) The City offers no evidence that the public improvements were completed as a whole by Spring 2018; that the City accepted them as complete or provided a certificate to OBOT; or that the City gave OBOT possession of the corridor. That evidence does not exist.

Betsy Lake admitted in an internal City email on September 26, 2018 (during the cure period), that the City had not yet accepted completion of the public improvements or turned over the rail corridor to OBOT. (Ex. 227, p. 4.) That email thread included four other City staff—John Monetta, Frank Kennedy, Isabel Brown, and Bijal Patel—and a message from Ms. Lake in which she highlighted the portions of Section 37.9.2(b) that she believed the City had satisfied, permitting the City to turn the corridor over to OBOT. (*Id.*, pp. 1-2.) Ms. Lake concluded that "we can turn over the site improvements on the lease area on Monday at the same time we accept the public improvements." (*Id.*, p. 1.) More importantly, Ms. Lake sent her emails in response to a request from Mark McClure asking Ms. Lake to "confirm the date of the formal turn-over of the rail corridor" in response to the City's cure notice sent a few days earlier. (*Id.*, p. 5.) In other words, on September 26, 2018, both sides agreed that the corridor had not been turned over. And even though Mr. McClure asked about the corridor as part of OBOT's cure efforts, and Ms. Lake believed the conditions to turn over the corridor had been satisfied, the City maintained possession, breaching the Ground Lease and obstructing Plaintiffs' cure efforts.

(5) Temporary Construction Easements

Finally, the City asks the Court to find that OBOT or OGRE could have used the City's temporary construction easements to construct the three Rail Improvements on Port-owned land. Plaintiffs address that issue in their [Proposed] SOD. (*See* OBOT SOD 73:19-74:11.) In addition, the easements are limited to specifically defined rail work and "reasonable activities directly associated with the work." (Ex. 780, p. 2 (P-18 easement ¶ 2(a)).) None of the defined work references any Minimum Project Rail Improvement. (*See* Ex. 780, p. 20 (P-18 easement, Ex. B).) And, that makes sense because the P-18 easement was signed before the Ground Lease existed and expired on December 31, 2016. (Ex. 780, p. 2, ¶ 3 (a).)

b. Rail Construction in May 2018

The City blames Mr. McClure for its failure to give OBOT and OGRE access to the rail corridor. The City argues that rail construction had commenced but stopped in May 2018 on Mr. McClure's order. In the City's current view, "only Mr. McClure was the barrier" to rail construction simply because Mr. McClure communicated the instruction to Mr. Stotka. (*See* City SOD 52:9-53:12.) Nonsense. The track that had been constructed in the Minimum Project Rail Improvements areas and the reasons that construction stopped are discussed above. OGRE and IRC had narrow rights to build track that the City did not extend. The issue was access.

The City notes that Mr. McClure sent an email to Mr. Stotka listing conditions for resuming construction in the corridor. That email (Ex. 773) is not in evidence. But based on the City's representations of the email in its SOD, access was the issue. The City states in one paragraph of its SOD that Mr. McClure sent an email to Mr. Stotka listing various conditions for resuming construction, including the RAA (City SOD 52:15-18); then asserts in the next paragraph that the email states nothing on "lack of access" (City SOD 52:24-28). Only one of those statements can be true. When asked about the email on cross-examination, Mr. McClure correctly testified that OBOT needed the RAA because it facilitated the transfer of property rights needed to build track. (RT 1865:7-11.) And as noted above, the Port shared that view.

Lastly, the City acknowledges and appears to endorse Mr. Stotka's testimony that IRC was prepared to complete the Rail Improvements. (City SOD 52:13-15 (citing RT 759:17-760:2, 761:2-

9, 767:5-10, 789:19-25).) The City weaponizes that testimony to blame Mr. McClure for the delay in development, but ignores Mr. Stotka's credible testimony that IRC had completed all of OGRE's work that could be completed without access to the corridor. (RT 737:7-19, 756:17-757:1, 758:18-759:12, 761:21-762:9, 762:22-25, 764:3-765:19, 766:8-22, 767:1-10, 777:4-16.)

c. The OGRE Sublease Agreement (Ex. 162)

The City argues that OBOT and OGRE delayed rail construction because their sublease agreement delayed OGRE's "assumption of responsibility" until after OGRE is granted common carrier status and other conditions were met. (City SOD 53:13-54:1.) The sublease agreement has a conditions precedent provision that provides that OBOT will not deliver possession of the subleased premises to OGRE, the sublease's commencement date will not occur, and OGRE will not be required to perform until certain conditions precedent, including STB confirmation, are met. (Ex. 162 § 2.2(a).) But the sublease governs only the sublandlord-subtenant relationship between OBOT and OGRE. The City cites no evidence that the either OBOT or OGRE used the conditions precedent provision in their sublease to delay work. The City just points out that the language exists. So what? The undisputed evidence proves that OGRE built rail before the sublease took effect. The City concedes that OGRE (through IRC) constructed rail in the BNSF Rail Easement and Outer Claw—all work that OGRE was able to complete notwithstanding the conditions precedent in its sublease. Another red herring argument.

d. Rail Drawings

The City contends that OBOT did not submit Schematic Drawings for the Minimum Project Rail Improvements for Landlord approval until 2019. (City SOD 54:2-5.) But it is undisputed that on August 28, 2017, OGRE submitted construction drawings for the railroad plans to the City, which included specifications for the track, crossings, and other Rail Improvements. (RT 1659:6-18, 1720:2-7, 2731:16-2732:14.) It is also undisputed that the City received and approved the drawings, and as detailed above, track was in fact constructed. (RT 2745:4-10, 2746:18-2747:6.)

The City's argument appears to be that OBOT and OGRE needed to submit the documents again so that the City could put on its Landlord hat and approve them again. That doesn't square with the City's position that Mr. Stotka and IRC would have continued construction after May 2018

but for Mr. McClure's instructions; or with the City's argument that OGRE had access to the corridor and was building rail in the Outer Claw. The City provided no evidence that its practice is to approve the same documents twice—once as regulator and once as Landlord.

E. The City's Attempt to Rewrite the Mid-Project Budget Revise as a Waiver of OBOT's Rights

The City's narrative that a lack of funding prevented Plaintiffs from meeting the Initial Milestone Date falls apart for another reason. It was not a lack of funding on Plaintiffs' side that delayed the Project, but instead a lack of funding from the City. In April 2014, the City acknowledged that it had a significant "funding shortfall" that prevented the City from completing many of the public improvements for the Project, including, but not limited to environmental remediation at the Project site. (*See* Ex. 10, p. 4.) Under the City's TCIF grant, the City was required to spend matching funds on the Project prior to April 2019. (Ex. 15, p. 1.) But the City lacked the funds to comply with the grant terms. (*Id.*) In order to accommodate the City's lack of funds, Plaintiffs agreed in November 2014 through the Mid-Project Budget Revise ("MPBR") to re-sequence certain portions of the public improvements. (*Id.*; RT 293:8-15 (Tagami).) The MPBR and the Third Amendment to the LDDA allowed for accelerated delivery and development of the East, North and West Gateways, and enabled the City to meet TCIF match obligations within the City's existing project budget. (Ex. 820; Ex. 561, pp. 1-2, Recital E.) The MPBR was OBOT's effort to help the City and move the Project forward, often at its own expense.

The City contends that, in connection with the MPBR and subsequent Third Amendment to the LDDA, Plaintiffs waived previous conditions precedent to entry into the Ground Lease: execution of the RAA, securing $22 million in funding for certain publicly-funded wharf improvements from the Alameda County Transportation Commission ("ACTC"), and completion of the City's public infrastructure improvements. (City SOD 20:5-9.) But nothing in either the MPBR or the Third Amendment to the LDDA helps the City in this case.

OBOT did not simply waive certain conditions precedent. The MPBR evidences that Plaintiffs were working to move the ship-to-rail Terminal forward as quickly as possible and were willing to assume additional financial obligations to compensate for the City's funding shortfall. In

exchange, and to prevent the waiver of conditions precedent from delaying the Terminal, the City agreed through additional Ground Lease covenants to cooperate to accomplish the same objectives of the prior conditions precedent. For instance, in Section 37.9.1, the City is required to cooperate with Plaintiffs' efforts to obtain approvals related to the improvements to be constructed by Plaintiffs. That provision requires the City to cooperate in executing the RAA. The City also is required to: (1) use commercially reasonable efforts to obtain third party permits and approvals necessary to construct the Public Improvements in accordance with a specified schedule; and (2) commence construction of the Funded Public Improvements and diligently prosecute the same to Completion. (GL §§ 37.9.1, 37.9.2(b).) The City did not keep those promises.

Nothing in the Third Amendment to the LDDA could (or did) waive Plaintiffs' rights under the subsequently executed and fully integrated Ground Lease, including Plaintiffs' extension rights under Section 16.1. Section 13 of the Third Amendment to the LDDA agreement makes clear that Plaintiffs reserved and were not waiving any of their rights under the DA and that the City "may not use the fact of entering into this Third Amendment and/or any of the Ground Leases … as a defense to a claim against another Party hereto, whether under the LDDA, the Development Agreement or otherwise." (Ex. 561, pp. 40-41.) In short, the express terms of the Third Amendment to the LDDA confirm that it provides no defense to Plaintiffs' claims here. Moreover, under the express terms of the Fourth Amendment to the LDDA, effective June 22, 2017, Plaintiffs ceased to be parties to the LDDA. (Ex. 819, p. 1.)

F. The City's Attempt to Rewrite the Termination as a Regulatory Act Instead of a Landlord Act

This case is about the City's termination of the Ground Lease in its proprietary (Landlord) capacity. The City asks the Court to find that the Ground Lease's terms insulate the City from liability for its conduct as a government entity or regulator. (*See* City SOD 2:14-17, 25:8-27:8.) For support, the City highlights several Ground Lease provisions, providing that: (1) the Ground Lease does not limit or restrict the City's exercise of its governmental regulatory powers (GL § 5.2.1); (2) nothing in the Ground Lease can render the City as Landlord liable or obligated for the City's regulatory acts (*id.*); (3) the City's regulatory acts cannot excuse OBOT's performance

(GL §§ 5.1.1.2, 5.2.2.1); (4) OBOT would comply with all applicable Laws" (GL § 5.1); (5) OBOT assumed full responsibility for obtaining regulatory approvals (GL §§ 6.2.4, 6.2.13); and (6) OBOT maintains the right to challenge the City's exercise of its regulatory authority when applied to the Project and OBOT cannot be found in default for such a challenge (GL §§ 5.1, 5.2.1).

The City applies these Ground Lease provisions to three alleged sets of Force Majeure events, arguing that each event or category of events was the City acting as regulator, not Landlord: (1) the health and safety hearings, no-coal ordinance, and resolution (City SOD 78:14-79:5); (2) requiring additional discretionary approvals on a commodity-by-commodity basis and changing the permit application and approval process (*id.* 79:8-27); and (3) the failure to cooperate with OBOT to obtain regulatory approvals (*id.* 80:50-20, 98:6-9). The City relies on the same Ground Lease provisions and makes the same arguments in the first section of its proposed findings on res judicata and the impact of the federal litigation on this case. (City SOD 82:11-83:15.) For efficiency, Plaintiffs address these arguments here rather than in four separate sections below.

The City is wrong for several reasons.

First, this Court already decided a similar issue when it denied the City's motion for summary judgment. Although OBOT does not now contend that the ordinance and resolution breached the Ground Lease, this Court determined that OBOT could bring such a claim: "OBOT is not barred from claiming that the City breached the Lease by exercising its legislative power in this case … OBOT did not have reason to anticipate that the City would enact an invalid ordinance prohibiting transportation of coal at the Terminal." (Order Denying City's Motion for Summary Judgment, p. 21 (Jan. 6, 2022).) The Court also noted that an agreement to relief government entities of liability for invalid enactments is contrary to public policy. (*Id.*) In other words, the regulator/Landlord distinction does not apply to invalid enactments like the ordinance and resolution. The Court's summary judgment order is also a basis to reject the City's argument that the federal litigation, ordinance, and resolution cannot excuse OBOT's performance. *See* Section III.B.1, *infra.*

First, Plaintiffs address these same arguments in their Response to City of Oakland's Trial Brief on Prior Federal Litigation, filed August 17, 2023 ("OBOT Response Re Fed. Litig."). Rather

than repeating their responses in full here, Plaintiffs incorporate their prior briefing by reference. (*See* OBOT Response Re Fed. Litig. 7:17-8:15, n.12, n.13; *see also id.* 3:23-6:25, n.11 (analyzing the same contract provisions the City cites in its SOD but in the context of its prior argument that a breach of the DA is not per se a breach of the Ground Lease).)

Second, the City's reliance on Ground Lease Sections 5.1, 5.1.1.2, 5.2.1, and 5.2.2.1 is misplaced because those sections are about "applicable Laws," and the no-coal ordinance and resolution are inapplicable to OBOT as a matter of law. All four provisions are under Article 5, addressing the parties' compliance with "Laws." Sections 5.1 and 5.1.1.2 focus respectively on "applicable Laws" and Law that purports to release Tenant of Ground Lease obligations or confer on Tenant a right to terminate the Ground lease. By its express terms, Section 5.1 (and thus Section 5.1.1.2, which is under 5.1) applies only to applicable Laws. The Ground Lease also defines "Law" and "Laws" 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 §§ 5.1 (OBOT cannot be found in default for failure to comply with Laws if challenging their *applicability*), 5.2.1 (OBOT retains the ability to challenge the *applicability* of City-promulgated Laws).) The ordinance and resolution at issue in *OBOT I* are inapplicable to Plaintiffs as a matter of law, including because the court enjoined the City from applying the coal ban to OBOT and the Terminal. *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.").

As to Section 5.1.1.2 (like Section 5.1.1.3, which the City does not cite), it applies to Laws that purport to confer rights on OBOT that would relieve it of its obligations or permit it to terminate the Ground Lease. There are no such laws at issue in this case. The no-coal ordinance and resolution, for instance, purported to strip OBOT of vested rights, not grant new rights to OBOT.

Third, the City argues that under Section 5.2.1, nothing in the Ground Lease can render the City as Landlord liable for the City's conduct as regulator. Plaintiffs do not seek to impose liability on the City for its conduct as regulator. Plaintiffs allege that the City as Landlord breached the

Ground Lease by improperly terminating it even though OBOT had a right to extensions of the Initial Milestone Date, had commenced a cure, and had Commenced Construction. It is undisputed that the termination was a Landlord act, not a regulatory one. (*See* OBOT Response Re Fed. Litig. 8:10-15.)

Fourth, the City cites Sections 5.2.2.1, 6.2.4, and 6.2.13 for the proposition that OBOT was solely responsible for obtaining regulatory approvals and permits. Those provisions are tempered by Section 5.2.2.2, which requires the City to "communicate regularly and to cooperate in good faith regarding Tenant's efforts to obtain Regulatory Approvals for the Project from any regulatory agency other than the City." Plaintiffs' Force Majeure claim regarding regulatory approvals alleges that the City failed to cooperate notwithstanding its contractual cooperation obligations. And Section 6.2.4, which applies to OBOT's responsibility to "apply[] for and diligently pursue[] the issuance of … permits and other Regulatory Approvals" does not include language like "solely" even though the parties used that language elsewhere to indicate when only one party has responsibility. (*Compare* GL § 5.2.2.1, *with* GL § 6.2.4.)

At bottom, the contracts require the City to issue permits and 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 with respect to its obligations under the DA demonstrates that, instead of cooperating, the City prevented OBOT from performing conditions in the Ground Lease.

III. THRESHOLD LEGAL ISSUES

The City has identified three threshold legal issues: (1) whether OGRE standing to sue under the Ground Lease; (2) whether *OBOT I* is res judicata as to any facts the parties rely on to support their mirror image breach claims; and (3) whether the Court is required to read common law force majeure requirements into Section 16.1.

A. OGRE's Standing

The City argues that OGRE does not have standing to sue under the Ground Lease. (City SOD 70:1-71:2, n.51, 119:4-17.) The City repeats the same arguments that Plaintiffs preemptively

addressed in their [Proposed] SOD. Rather than addressing those same arguments here, Plaintiffs incorporate relevant portions of their [Proposed] SOD by reference. (*See* OBOT SOD 22:22-25:14.)

The Court has also already resolved this issue in OGRE's favor. The City made the same arguments in its October 1, 2021, motion for summary judgment. The Court denied that motion and determined that OGRE has standing to sue the City under the Ground Lease as an express subtenant. (*See* Order Denying City's Motion for Summary Judgment, p. 23 (Jan. 6, 2022).)[12] The City has not explained why the Court should change its prior decision; nor has it offered any evidence to warrant reconsideration, let alone a different result. *See* Cal. Code Civ. Proc. § 1008 (requiring motion for reconsideration to be timely and based on "new or different facts, circumstances, or law"); *Kerns v. CSE Ins. Group*, 106 Cal. App. 4th 368, 383 (2003) (an application must be on new or different facts, circumstances, or law, and the moving party must give a satisfactory explanation for the previous failure to present the allegedly new or different evidence or legal authority offered in the second application).

B. Res Judicata and the Impact of *OBOT I*

The parties have briefed their respective positions on the impact of *OBOT I* on this case. Rather than repeating the same arguments here, Plaintiffs incorporate by reference their prior briefing as responses to the City's corresponding requested findings of fact and conclusions of law. Plaintiffs also raise new arguments where appropriate and respond to the City's new arguments.

1. Impact of *OBOT I*'s Holding that the City Breached the DA

The City asks the Court to find that the holding in *OBOT I* that the City breached the DA does not excuse OBOT's performance under the Ground Lease. For the most part, the City repeats as proposed conclusions of law the same arguments it raises in its Trial Brief on Prior Federal Litigation filed August 7, 2023. Plaintiffs incorporate by reference their prior briefing responding to those arguments into this response. (*See* OBOT Response Re Fed. Litig. 2:6-11, 3:21-8:28.)

The City's argument has slightly changed. In its opening trial brief on the federal litigation, the City argued that a breach of the DA does not establish a breach of the Ground Lease or excuse

[12] The order inadvertently refers to OGRE as "OBOT."

performance due under the Ground Lease. In response, Plaintiffs argued that the portion of the argument about breach was a strawman because Plaintiffs do not claim that the federal court's DA breach determination establishes a Ground Lease breach in this case. (OBOT Response Re Fed. Litig. 2:9-11, 4:2-5.) On excuse, Plaintiffs explained that they "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." (*Id.* 7:8-10 (emphasis added.) Plaintiffs' also defended their excuse affirmative defense. (*Id.* 7:1-7.) That's the same approach Plaintiffs take in their [Proposed] SOD and this response.

The City now claims that "Plaintiffs have expressly disclaimed any argument that the City's prior breach of the DA, as found by the federal court, excused its performance under the Ground Lease." (City SOD 82:15-23.) The City carefully quotes snippets of language in which Plaintiffs discuss *breach* to argue that Plaintiffs disclaimed *excuse* as a defense. (*See* City SOD 82:16-23.) The City emphasizes certain words, omits others, and even jams the first sentence of one paragraph together with the first sentence of another paragraph to create meaning that isn't there. (*See id.*) When reading Plaintiffs' full response—or just the full paragraphs cited above—it's not difficult to see the tactic for what it is.

Plaintiffs also address the substance of the City's argument that a breach of the DA cannot excuse performance under the Ground Lease above in Section II.F.

2. Res Judicata

The City also repeats the same res judicata arguments the parties have already briefed, including the same misrepresentations of the trial court records in this case and in *OBOT I* that Plaintiffs corrected in their briefing. Rather than repeating their full responses here, Plaintiffs incorporate them by reference into this response. (*See* OBOT Response Re Fed. Litig. 1:1-15, 2:12-3:19, 9:1-19:19; OBOT Surreply Re Fed. Litig 1:1-13, 2:1-8:12; OBOT SOD 28:1-38:19.)

The City continues to mischaracterize Plaintiffs' breach claims for res judicata purposes. When arguing res judicata, the City characterizes Plaintiffs claims as many small claims, each with a different genesis and accrual date. That's the wrong approach. In its summary of alleged breaches submitted to the Court on July 10, 2023, Plaintiffs listed several City acts and omissions, but

couched each of them as "acts to hinder, delay and adversely affect Plaintiffs' performance of its obligations"—i.e., as Force Majeure claims.

As Plaintiffs have consistently argued, their core breach of contract claim is that the City's termination, as Landlord, was unlawful, in breach of the covenant of quiet enjoyment, in breach of the implied covenant of good faith and fair dealing, and in breach of Section 16.1 because the termination was on timeliness grounds based on a deadline that had been extended by events of Force Majeure. Every other "breach" claim is more accurately characterized as a Force Majeure claim, which as detailed in prior briefing and below, accrues, if at all, only when the other party demands performance and declares a breach or default.

The law is clear: a party can sue on the same contracts in seriatim lawsuits so long as the cause of action litigated in the later suit accrued during or after the first. Cal. Code Civ. Proc. § 1047. (*See* OBOT SOD 32:7-35:9.) A cause of action can accrue later because of a subsequent breach (a breach after the operative pleading was filed in the earlier case) or a continuing breach (an ongoing breach where the breaching party has a continuing duty after the operative pleading was filed in the earlier case). As Plaintiffs have already briefed, their breach claims accrued on November 22, 2023 when the City terminated the Ground Lease.

The City understands what this case is about. It refers to the parties' breach claims as "mirror images of one another" and "competing breach of contract claims." (City SOD 65:4-6.) In other words, both sides focus on the November 22, 2018 termination—that's when the claims accrued. The same is true for the Force Majeure claims—whether asserted defensively against the City's breach claim or affirmatively to support Plaintiffs' breach claim. They accrued when the City called default. Section 16.1 provides: "For 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*** …" (GL § 16.1 (Ex. 68, pp. 84-85) (emphasis added).)

The plain language of Section 16.1 protects the party delayed from being "considered in breach" or "default" to the extent of the delay. Section 16.1 is thus violated when one party considers the other in breach or default based on untimely performance that was caused by a Force

Majeure delay. That's the exact position the City adopted when it purported to reject OBOT's first Force Majeure claim. (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").) *See Allied Fire Prot. v. Diede Constr., Inc.*, 127 Cal. App. 4th 150, 155 (2005) (res judicata does not apply to new rights acquired during the earlier action); *Brenelli Amedeo, S.P.A. v. Bakara Furniture, Inc.*, 29 Cal. App. 4th 1828, 1836-39 (1994) (subsequent lawsuit with same factual basis permissible where cases involved distinct primary rights); *Sawyer v. First City Fin. Corp.*, 124 Cal. App. 3d 390, 402-03 (1981) (same).[13]

3. Force Majeure

The City also repeats the same Force Majeure arguments the parties have already briefed. Rather than repeating their full responses here, Plaintiffs incorporate them by reference into this response. (*See* OBOT Surreply Re Fed. Litig 1:14-23, 8:13-14:19; OBOT SOD 38:20-47:3.) Two new arguments are addressed below—one on procedure and one on the common law.

a. Section 16.1 Procedure and Burden of Proof

The City argues that the extension under Section 16.1 and Article 40 is not automatic on OBOT's satisfaction of the notice requirements in Section 16.1. (City SOD 72:10-25.) The City over-simplifies and misrepresents Plaintiffs' position. As stated in Plaintiffs' [Proposed] SOD:

> Section 16.1 gives each party a right to an extension of time to perform its obligation under the Ground Lease when an event of Force Majeure hinders or affects its ability to perform those obligations. It also provides a notice procedure to obtain an extension of time. It provides no procedure for rejecting a Force Majeure claim. If an event of Force Majeure occurs, the impacted party gives notice

[13] As Plaintiffs noted in their prior briefing, the City cannot have it both ways. It too was a party to *OBOT I*. If facts prior to June 14, 2017 are out—which should not be the case for OBOT's Force Majeure claims, which did not accrue until late 2018—neither side can base their claims or defenses on those facts. Just as the City filed a counter-complaint in this case that it describes as the "mirror image" of OBOT's claim, it could have done the same in *OBOT I.* If OBOT's claim was ripe in 2017, so was the City's potential cross-claim, which would have been compulsory under the Federal Rules. *See* Fed. R. Civ. P. 13(a). (*See also* Plaintiffs' second affirmative defense). Thus, if the Court adopts the City's position on res judicata, most of the City's cited evidence on John Siegel, alternative models for the Terminal, an alleged "pencils down" order, soda ash, and more should also be precluded.

and its time to perform is automatically extended.

(OBOT SOD 39:9-13.)

The parties appear to agree that if an event of Force Majeure occurs (e.g., an act of the other party or the government that hinders or delays OBOT's performance of a Ground Lease obligation), and OBOT satisfies the Section 16.1 notice requirements, its time to perform is extended in proportion to the delay plus "such additional time thereafter as may reasonably be required to complete performance of the hindered act." (GL, Art. 40.) The parties disagree on whether the extension is automatic, or put another way, whether the Force Majeure claim is presumptively valid on satisfaction of Section 16.1, leaving the burden of proof with the City.

The City has the burden of proof on the issue of whether its conduct hindered or delayed OBOT's ability to perform its Ground Lease obligations for three reasons.

First, placing the burden on the City is consistent with the Ground Lease's plain language. The extension of time to perform is mandatory, not discretionary. (GL § 16.1 ("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" (emphasis added)), Art. 40 ("The delay caused by Force Majeure includes 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").)

Not every Force Majeure provision in the Ground Lease has "shall" language. For instance, Section 6.3.1 sunsets the parties obligation to identify and pursue third-party funds on the earlier of the date Unfunded Improvements become fully funded and "April 16, 2019, as such date *may* be extended pursuant to Force Majeure events, but only to the extent such event occurs after February 16, 2016" and only if certain notice requirements are met. (GL § 6.3.1.) Section 6.3.1 gives parties the discretion to push back the termination date for their obligation to identify and pursue third-party funds based on Force Majeure events. 6.3.1 uses the Ground Lease's definition of "Force Majeure" but does not rely on Section 16.1, which is non-discretionary. (*Id.*) When one part of a contract contains a term, the omission of that term from another provision indicates an intent to convey a different meaning. *See Christian v. Flora*, 164 Cal. App. 4th 539, 551 (2008) (courts must

construe contracts in accordance with canons of statutory interpretation); *McNair v. Super. Court (Nat'l Collegiate Athletic Ass'n.)*, 6 Cal. App. 5th 1227, 1234 (2016) ("When one part of a statute contains a term or provision , the omission of that term or provision from another part of the statute indicates the Legislature intended to convey a different meaning.").

Second, and relatedly, the Ground Lease includes no provision for the City to reject a Force Majeure claim even though it includes a detailed procedure for OBOT to notice a claim. (GL § 16.1 (Ex. 68, pp. 84-85).) It follows that a notice—particularly in light of the requirement to describe the claim with "reasonable particularity"—meets the prima facie requirements for a Force Majeure extension, shifting the burden to the City.

Third, the City purports to have terminated the Ground Lease. It has the burden of defending its termination, including the Initial Milestone Date that was the basis of the termination.

b. Common Law Requirements

As noted, the parties previously briefed the common law requirements that the City asks the Court to read into Section 16.1, and Plaintiffs have incorporated that briefing by reference into this response. The City, however, relies on a new Ground Lease provision in its [Proposed] SOD. The City notes that the Ground Lease contains a "special force majeure and remedy provision for third party public funding"—the same provision discussed above. (City SOD 80:21-23 (citing GL § 6.3.1).) Putting aside third-party funding for the moment (*see* Section IV.E, *infra*), Section 6.3.1 expressly limits Force Majeure to events that "first occur[] after February 16, 2016—i.e., the date the parties entered the Ground Lease. It also uses the Ground Lease's defined term "Force Majeure." If "Force Majeure" as defined in Article 40 were limited to events that occur after the Ground Lease was executed, the date limitation in Section 6.3.1 would be superfluous. *See* Cal. Civ. Code § 1643 (contract must receive interpretation that will make it operative and capable of being carried into effect); *Wells v. One2One Learning Foundation*, 39 Cal. 4th 1164, 1207 (2006) (acknowledging "the principle of statutory construction that interpretations which render any part of a statute superfluous are to be avoided"); *Christian*, 164 Cal. App. 4th 539, at 551 (courts must construe contracts in accordance with canons of statutory interpretation).

Section 16.1, the Delay Due to Force Majeure provision, contains no date limitation. Nor

do the Ground Lease's other provisions that reference Force Majeure or Section 16.1 tolling include a timing restriction. (*See* GL §§ 6.11, 6.4.4.1, 9.4.1, 10.9.1, 15.5.5, 15.5.6.7, 15.5.7.3, 17.2, 37.9.2(b), 38.1.4). When interpreting the Ground Lease, the Court must presume that the parties' inclusion of a date limitation in Section 6.3.1 and exclusion of that same limitation in Section 16.1 was intentional and had meaning. *See Christian*, 164 Cal. App. 4th at 551; *McNair*, 6 Cal. App. 5th at 1234. The parties chose to limit Section 6.3.1 Force Majeure claims to events that occur in the first instance after February 16, 2016. They chose a more expansive approach in Section 16.1, sweeping in events that occurred in the first instance before the Ground Lease existed. That makes sense. The parties contemplated the Ground Lease years earlier in the LDDA and the DA, and they began their respective performances under the Ground Lease, including preparation of construction documents like the BOD, long before February 16, 2016. The parties' use of the date in Section 6.3.1 and omission of it in Section 16.1 is also strong evidence that the parties intended to include even foreseeable events under Section 16.1.

The parties' different treatment of different Force Majeure provisions in the Ground Lease is also strong evidence that they intended to contract around common law principles like foreseeability, diligence, impossibility, and unreasonable expense. As noted above, Section 38.1.4 reflects the parties' intention that Section 16.1 and its "delay" or "hinder" standard apply to every provision of the Ground lease. (*See* GL § 38.1.4 ("Time is of the essence with respect to each provision of this Lease … subject to the provisions of Section 16.1 relating to Force Majeure."). The parties understood how to carve out a provision with a different standard. They agreed to the term "may" in Section 6.3.1, making Force Majeure extensions under that provision discretionary. The Ground Lease includes at least ten other provisions that reference Force Majeure or Section 16.1 tolling. None includes the City's proposed foreseeability, diligence, impossibility, or unreasonable expense language standards. (*See* GL §§ 6.3.1, 6.4.4.1, 6.11, 9.4.1, 10.9.1, 15.5.5, 15.5.6.7, 15.5.7.3, 17.2, 37.9.2(b), 38.1.4). In contrast, Section 15.5.5 provides that in the context of certain contaminations, the parties agreed that the contamination would be a Force Majeure event requiring Section 16.1 tolling if it "materially affects Developer's ability to develop the Premises." Sections 15.5.6.7 and 15.5.7.3 repeat the "materially affects" standard. The parties understood how

to raise the standard ("materially affects") and lower it ("may"). Taking the Ground Lease as a whole, Section 16.1 and the definition of Article 40 mean exactly what they say and nothing more.

IV. THE COMPETING BREACH OF CONTRACT CLAIMS

A. Summary of the Parties' Competing Breach Claims

The City refers to the parties' breach of contract claims as "mirror images" of each other. (*See* City SOD 65:6-11.) Plaintiffs' agree. The core dispute in this case is whether the City's termination breached the Ground Lease because the Initial Milestone Date was extended or excused by City acts that delayed OBOT's performance; or whether the termination complied with the Ground Lease because the Initial Milestone Date was August 14, 2018, and Plaintiffs had not Commenced Construction of the Minimum Project by that date.[14]

Plaintiffs have focused their argument on multiple City acts that constitute events of Force Majeure: (1) the City's failure to confirm the regulations that would apply to development of the Terminal (Ex. 76; Ex. 148; Ex. 174; Ex. 176; Ex. 248; Ex. 856); (2) the City's refusal to meaningfully engage with OBOT on the Basis of Design (Ex. 191; Ex. 248; Ex. 856); (3) the City's holding of health and safety hearings and enactment of its no-coal ordinance and resolution, resulting in the federal litigation (Ex. 174; Ex. 176; Ex. 191; Ex. 248; Ex. 856); (4) the City's failure to cooperate with OBOT to secure third-party funding for the Project (Ex. 191; Ex. 856); (5) the City's decision to approve permits on a discretionary and commodity-by-commodity basis, potentially reopen CEQA, upend zoning, and adopt the protocol in the Cappio Memo (Ex. 191; Ex. 248; Ex. 856); (6) the City's refusal to turn over possession of the Railroad R/O/W Property, including by failing to complete a survey of the property after public improvements were complete (Ex. 191; Ex. 248; Ex. 856); (7) the City's failure to enter the Rail Access Agreement with the Port

[14] The City notes that that OBOT agreed to obtain remedies only for City defaults that "substantially and materially interfere [] with the ability of [OBOT] to conduct its Permitted Uses of the Premises provided for hereunder." (City SOD 28:15-17 (alterations original); GL § 22.1.) The parties agree that this breach dispute centers on termination. Plaintiffs allege that the City's termination breached the Ground Lease. Each of Plaintiffs' other "claims" is presented as a reason that the termination was unlawful. (*See* OBOT SOD 25:18-26:21, 27:1-16, 48:1-84:18.) A wrongful termination is the quintessential material breach. *See Fox v. Dehn*, 42 Cal. App. 3d 165, 169-73 (1974) (willful and wrongful termination of a contract constitutes a total, material breach of that contract).

1 (Ex. 191; Ex. 248; Ex. 856); and (8) the City's interference and failure to cooperate with regulatory
2 approvals (Ex. 191; Ex. 248; Ex. 856). Plaintiffs also identified the City's failure to issue non-
3 disturbance agreements and estoppel certificates as Force Majeure events. (Ex. 248; Ex. 856.)
4 Although many of these events also constitute independent contract breaches, Plaintiffs raise each
5 claim as an independent reason that the Initial Milestone Date was extended, making the City's
6 termination of the Ground Lease ineffective and a breach of the Ground Lease.

7 The City organizes its attacks on Plaintiffs' Force Majeure claims around the three common
8 law principles discussed above: foreseeability, diligence, and impossibility. Plaintiffs address
9 several of the City's foreseeability arguments above. (*See* Section II.A, *supra*.)

10 When applying its proposed common law skill, diligence, and good faith requirement to the
11 Force Majeure claims, the City collapses them into just "diligence." The City also makes very few
12 diligence arguments that apply uniquely to any one Force Majeure claim. The City's main diligence
13 argument—which corresponds to its argument that Plaintiffs delayed its performance for their own
14 business reasons—are presented as a generic argument that applies to every Force Majeure claim
15 or to categories of claims. (*See* City SOD 38:11-46:20, 97:5-99:6.) Plaintiffs respond to those
16 arguments above. (*See* Sections II.C and II.D, *supra*.)

17 Notwithstanding the City's extensive briefing on impossibility and unreasonable expense,
18 its analysis of each Force Majeure claim under those standards sounds in causation. The City
19 occasionally uses the terms "impossible" and "expensive," but mostly focuses on whether each City
20 act delayed or hindered performance. (*See generally* City SOD 99:7-113:13.)

21 Plaintiffs do not repeat the proposed findings on each Force Majeure claim detailed in their
22 [Proposed] SOD. Instead, each section below focuses on whether each Force Majeure event was
23 foreseeable and whether it delayed or hindered OBOT's performance because those are the two
24 arguments the City makes on a claim-by-claim level. To the extent, the City makes other claim-
25 specific arguments, those are addressed below as well.

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B. OBOT's Force Majeure Claim Regarding the Regulations Binder (City FM 1[15])

Plaintiffs contend that the City failed to deliver a binder of regulations that applied to the Project, and that its failure constitutes a City act that delayed or hindered OBOT's performance. (OBOT SOD 50:1-53:5.) The City does not contest that it provided the binders more than two-and-a-half years late, or that the digital version they eventually provided did not comply with the DA. Nor do they contest the importance of the regulations to Terminal design.

On foreseeability, the City argues that OBOT was aware of the City's failure to timely provide the binders before the Ground Lease, yet did not negotiate a contingency for the binders in the contract. (City SOD 92:6-12.) Not true. The parties negotiated a specific Force Majeure provision that applies to both acts of the other party (the City as Landlord) and acts of government (the City as regulator). And as explained above, that provision applies to events that occurred in the first instance before the Ground Lease existed. (*See* Section III.D.2, *supra*.) Further, the DA and Ground Lease are organized to expressly and impliedly condition certain performances on others. (*See* Section II.B, *supra*.) The City does not contest the necessity of knowing the regulations that apply to the Project before completing Terminal design. To the contrary, Claudia Cappio admitted at trial that Plaintiffs' accurate knowledge of the regulations was an important step to preparing detailed construction drawings. (RT 2293:15-20.) The City was required to take this first step before OBOT's performance could become due.

On diligence, the City argues that there is no evidence of a "red letter" version. (City SOD 33:9-34:20.) Again, not true. Mr. Tagami credibly testified that he provided the city with a "red-letter version … of what did not comport with the ordinances and rules at the time the DA was adopted," and the City never responded. (RT 325:5-326:11.)

On the issue of delay and hinderance, the City argues only that OBOT's compilation of the binder demonstrates that the City did not hinder or delay OBOT's ability to perform. (City SOD 33:9-34:20, 100:1-12.) In other words, no good deed goes unpunished. The City misses the point.

[15] In its Proposed SOD, the City adopts its own characterizations of Plaintiffs' Force Majeure claims and assigns numbers to each. For ease of reference, Plaintiffs identify the City's numbered claims in parentheticals next to headings that identify Plaintiffs' corresponding claims.

OBOT compiled the binder so that the City could certify it, which never occurred. (RT 559:3-20.) OBOT's statements that certain regulations do or do not apply to the Project, without the City's certification, are not binding because OBOT has no governmental or regulatory authority. OBOT needs that assurance from the City. *See OBOT I*, 321 F. Supp. 3d at 992 ("As a general matter, development agreements are contracts between local governments and developers that freeze existing zoning and land use regulations into place. These agreements are intended to provide developers with a measure of certainty that new and unexpected government regulations will not stymie their projects.").

The delay was two-fold. First, OBOT needed to know the rules that apply to the Project so that it could finish the BOD. (RT 326:21-25, 327:4-5, 327:16-23, 329:7-20, 397:1-13, 560:6-21.) Although OBOT informed the City about the delay it caused, the City elected not to substantively follow up with OBOT. (RT 2562:22-2564:4.)

Second, OBOT needed assurance that its work would not later be stymied by new regulations. As Mark McClure explained, the regulations binder became even more important after the City unilaterally introduced new procedures that did not exist when the DA was executed, including through the Cappio Memo and at the kickoff meeting when the City announced that it would require additional discretionary approvals on a commodity-by-commodity basis. (RT 2678:12-2679:1, 2679:15-25.)

The City also argues that once OBOT received the binders, it did not develop a more detailed BOD, as evidenced by the similarities between the 2015 and 2018 versions. (City SOD 100:13-24.) That proves the point. The City never provided a compliant regulations binder. And, as multiple witnesses testified, other City acts prevented submission of a more detailed BOD. (*See* RT 1602:21-1603:2 (identifying main commodities to be transported is key to the design process); *accord* RT 1604:24-1605:5, 2336:10-17; Ex. 598; Ex. 854, pp. 8, 12, 13; *see also* RT 2241:9-16 (Cappio testimony that she wanted more information in the BOD but never asked Plaintiffs for it), 2294:14-19 (the BOD is an iterative process that requires back and forth), 2350:23-2351:3 (the City lacked staff with the necessary experience to review the BOD).)

C. Plaintiffs' Force Majeure Claim Regarding the Basis of Design (City FM 3)

Plaintiffs argue that the City's failure to review and comment on the BOD was a Force Majeure event that extended the Initial Milestone Date. (OBOT SOD 53:6-56:22.) The City does not contest that it (1) did not substantively review or provide feedback on the BOD between the TLS submission in 2015 and the ITS resubmission in 2018; (2) did not provide an approval, denial, or notice of incomplete documents as the Ground Lease requires; (3) was unqualified to review the BOD and failed to hire a qualified consultant to conduct the review even though OBOT had agreed to pay for the review; and (4) withheld its criticism of the BOD from OBOT even though Ms. Cappio had internally identified specific areas that she believed needed development. The only evidence of any review by the City (other than City reviews that Ms. Cappio kept secret) are the narrow reviews in connection with the health and safety hearings and Ms. Cappio's preparation of the draft letter on soda ash. There is no evidence that either of those reviews included substantive feedback that OBOT needed to complete the next iteration of the BOD, and ultimately, Final Construction Documents.

1. Foreseeability

On foreseeability, the City argues that OBOT was aware of the City's response (or lack of response) when it executed the Ground Lease, yet OBOT did not negotiate a provision stating that it needed comments before it could move forward. (City SOD 94:19-95:5.) Not true. As explained above, OBOT negotiated a Force Majeure provision that applies to City acts, including acts before the Ground Lease was executed. (*See* Section III.D.2, *supra*.) The Ground Lease also expressly provides for an iterative process in which Construction Documents are submitted and approved in a certain order, and construction commences after approval of Final Construction Documents. (GL §§ 6.2.1, 6.2.6.1.) The ordered nature of that process—independent of the Force Majeure claim—makes OBOT's obligation to perform contingent on the City's performance. (*See* Section II.B, *supra*.)

Instead, the City relies on the first submission's timing. The City acknowledges that OBOT and TLS submitted the BOD in July 2015 (City SOD 34:21-28) but asks the Court to find that the BOD could not have been submitted under the Ground Lease because that contract was executed

several months after the submission (City SOD 35:1-7). According to the City, OBOT's first request that the City review the BOD in its proprietary and Landlord capacity was on September 28, 2018. (City SOD 37:12-15; Ex. 239.) That argument ignores uncontested evidence that Plaintiffs sought City review of the BOD at the March 9, 2016 kick off meeting after execution of the Ground Lease. (RT 433:2-435:17, 436:1-5, 456:7-25; Ex. 72; Ex. 750.)

The City appears to concede the point, asking the Court to find that the City was prepared to discuss the BOD at the March 9, 2016 meeting. (City SOD 35:8-15.) It is undisputed that the kickoff meeting was a preapplication meeting under the Ground Lease. The City's description of the kickoff meeting and the role of the BOD at that meeting corroborates Plaintiffs' and Megan Morodomi's credible testimony that they arrived at the kickoff meeting with copies of the BOD to discuss with the City. (RT 438:14-439:7, 473:6-14, 1891:23-1892:4, 1892:22-25; *see also* Ex. 72.) They left those copies with the City but never received any feedback. (RT 1893:10-1894:3.) Ms. Cappio testified that she devoted an hour to reviewing the BOD prior to the kickoff meeting. (RT 2338:19-25.)

On foreseeability, the City also argues that OBOT's only recourse on the BOD was to deem the document approved under Ground Lease Section 6.2.1. (City SOD 79:5-7.) 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.

Finally, the City argues that Section 6.2.1 has an exclusive remedy provision. Not true. Section 6.2.1 requires the City to promptly approve or disapprove certain construction documents; it does not purport to provide an exclusive remedy. The contract states:

> If Landlord fails to approve or disapprove Construction Documents (including Construction Documents which have been revised or supplemented and resubmitted) within the times specified within this Section 6.2.1, such failure shall not constitute an Event of Default under this Lease on the part of Landlord, but such Construction

> Documents shall be deemed approved by the Landlord in its proprietary capacity, provided that Tenant first provides Landlord with at least ten (10) days prior written notice that Tenant intends to deem said Construction Documents so approved.

(GL § 6.1.) By its plain terms, Section 6.2.1 prevents OBOT from declaring a default based on the City's failure to timely review Construction Documents, but deems the Construction Documents approved on OBOT's notice of intent. That's it. The words "sole," "exclusive," and "remedy" do not appear in Section 6.2.1. The parties use those words throughout the Ground Lease to identify exclusive remedies, most notably in the actual exclusive remedies provision, Section 22.1. *See Christian*, 164 Cal. App. 4th at 551 (courts must construe contracts in accordance with canons of statutory interpretation); *McNair*, 6 Cal. App. 5th at 1234 ("When one part of a statute contains a term or provision , the omission of that term or provision from another part of the statute indicates the Legislature intended to convey a different meaning."). Section 6.2.1 simply gives OBOT an option if it "intends"—i.e., chooses as a purpose[16]—to deem Construction Documents approved. OBOT did not intend to deem the BOD approved because it actually needed the City's feedback to move forward. Further, OBOT does not contend that the City's failure to provide feedback on the BOD was an Event of Default; it was an event of Force Majeure. While Section 6.2.1 states that failure to approve or disapprove of documents like the BOD "shall not constitute an Event of Default," it contains no such preclusion for "events of Force Majeure." The inclusion of one type of event and exclusion of the other reinforces that the City's failure to respond to the BOD can be a Force majeure event that caused delay.

2. Delay and Hinderance

On delay and hinderance, the City argues that in 2016, Mr. Tagami and his counsel sent a letter to the City instructing the City not to review the BOD until after OBOT and TLS submit a new version. (City SOD 35:16-37:3; Ex. 598.) But the City acknowledges that the correspondence

[16] The Oxford English Dictionary defines "intends" as "To have in the mind as a fixed purpose; to purpose, design." *Intends*, OXFORD ENGLISH DICTIONARY (2023), *available at* https://www.oed.com/search/dictionary/?scope=Entries&q=intends (accessed Oct. 5, 2023). Merriam-Webster defines "intend" as "to have in mind as a purpose or goal." *Intend*, MERRIAM-WEBSTER (2023), *available at* https://www.merriam-webster.com/dictionary/intend (accessed Oct. 5, 2023).

was in the narrow "context of collecting information for the health and safety investigation" and in response to the City's environmental consultant asking questions about the BOD. (City SOD 35:18; Ex. 594.) The letter also came two months after the kickoff meeting where OBOT learned that the City intended to impose new discretionary approval requirements for the Terminal on a commodity-by-commodity basis. (*See* Ex. 598.) Jim Wolff testified that the City's position on commodities and refusal to give clarity made the BOD speculative. (RT 1107:1-6.)

Plaintiffs also presented uncontested evidence that they sought clarity from the City on approved commodities and other information necessary to move the BOD forward (RT 2275:7-10, 2336:10-17; Ex. 598), but the City never provided that information to OBOT (RT 1894:22-1895:12, 3178:3-22, 1076:2-5, 2082:19-22, 2272:10-14, 2556:3-12). The City provides no explanation for why it chose to rely on a letter in 2016 that Mr. Tagami provided in connection with the health and safety hearings, and not on the numerous other requests from OBOT and others for clarification of commodities and processes so that OBOT and its subtenant could further develop the BOD; none exists.

D. Plaintiffs' Force Majeure Claim Regarding the City's Health and Safety Hearings, No-Coal Ordinance, and Resolution (City FM 2)

Plaintiffs argue that the City's health and safety hearings and the no-coal ordinance and resolution that followed are Force Majeure events that delayed and hindered OBOT's ability to perform and extended the milestone deadlines. (OBOT SOD 56:23-58:25.) The City does not contest that its conduct delayed and hindered OBOT's performance. The City argues only that its legislative acts were foreseeable, they were permitted under the Ground Lease, and OBOT's business decisions caused the delay. Those arguments rehash the same foreseeability, regulator/Landlord, and delay/diligence arguments that Plaintiffs address above in their discussion of themes that the City argues throughout its SOD. Plaintiffs' same responses apply here. (*See* Sections II.A, II.C, II.D.1, and II.F *supra*.)

The City makes two new arguments: that the parties agreed to set aside the coal dispute and that OBOT's Force Majeure notice was late. On the first, the City asks the Court to find that the parties entered the Ground Lease aware that the City was likely to regulate coal because in the

Third Amendment to the LDDA, the parties set aside the coal dispute, decided how they would proceed, and agreed to assume the risk that they would win or lose a challenge by OBOT to the resolution that applied the no-coal ordinance to the Terminal. (City SOD 2:4-3:18, 93:6-14.) The City is wrong.

First, the City's interpretation of the Third Amendment revises history and the amendment itself. The City relies on Section 13 of the Third Amendment but that section acknowledges OBOT's "vested development rights pursuant to applicable provisions of the Development Agreement." (Ex. 561, pp. 40-41.) And as noted, the federal court recognized that those rights include the right to build a terminal that could handle coal consistent with the City's laws as they existed when the DA was adopted. *OBOT I*, 321 F. Supp. 3d at 1010; *Oakland Bulk & Oversized Terminal, LLC*, 2017 WL 11528287, at *1. The LDDA thus recognizes OBOT's rights and the City's inability to interfere with those rights.

Second, Section 13 also recognizes the City's right to adopt future regulations "pursuant to applicable provisions of the Development Agreement," including regulations pertaining to coal. (*Id.*) But that does not apply here. *OBOT I* already concluded that the City breached the applicable DA provision when it applied its coal ban (the ordinance) to OBOT (the resolution). *OBOT I*, 321 F. Supp. 3d at 1010. The City was not acting within the scope of its permitted regulatory powers when it enacted the resolution, which the Court deemed void. And it is undisputed that the City did not attempt to adopt any other regulations on coal following the *OBOT I* ruling.

Third, the City lost in the federal litigation. Even if the City were correct on the parties' respective assumptions of risk, *OBOT I* resolved the coal issue, yet the City acted as if it had assumed no risk. Rather than accepting the federal judgment, the City pursued a ban-compliant Terminal regardless of how that pursuit impacted the Project.

Fourth, and as detailed above in Section II.D.1, the City concedes that none of the contracts governing the Project bar any commodity, including coal, at the Terminal. (City SOD 3:1-4, 12:11-14.) In other words, OBOT negotiated a Ground Lease that permitted it to build a Terminal that would handle any bulk commodities, including coal. The City sought OBOT's *voluntary* agreement to keep coal out of the Terminal, and hindered and delayed the Project as leverage to obtain that

agreement.

The City also argues that OBOT did not send a Force Majeure notice for more than two years after the City adopted the ordinance. (City SOD 102:13-20.) That is not the position the City took in 2016. On March 22, 2016, the City purported to reject OBOT's Force Majeure claim regarding the regulations binder, because the City had not yet called default. (*See* Ex. 81, p. 2.) The City's reasoning, which Plaintiffs agree with, was that Section 16.1 prevents a party from being "considered in breach of or default in its obligations [under the Ground Lease] to the extent of any delay resulting from Force Majeure." (*Id.*; GL § 16.1.) Based on the plain language of Section 16.1, a claim for breach of Section 16.1 based on failure to recognize Force Majeure extension rights accrues, if at all, only when a party calls default or alleges breach based on untimely performance. Further, Section 16.1 permits a party to wait to give notice of a Force Majeure claim until the other party demands performance. (*Id.*)

The City enacted the ordinance and resolution months after the City's March 2016 letter purporting to reject OBOT's first Force Majeure claim. The City cannot now change course and argue that notice had to be earlier. *Tresway Aero, Inc. v. Super. Court*, 5 Cal. 3d 431, 437-38 (1971) (holding that the doctrine of equitable estoppel provides that "a person may not lull another into a false sense of security by conduct causing the latter to forebear to do some things which he otherwise would have done and then take advantage of the inaction caused by his own conduct").

Finally, Section 16.1's notice requirement does not apply if a later notice does not prejudice the City. (GL § 16.1.) There is no prejudice here. The City has devoted significant space in multiple briefs arguing that it believed *OBOT I* was about the delay it caused by attempting to apply a coal ban to the Terminal. While the record belies the City's views on *OBOT I*, it is uncontested that both parties understood early in their relationship under the Ground Lease that the City wanted a terminal without coal and OBOT believed that the City's political opposition to coal delayed the Project.

E. Plaintiffs' Force Majeure Claim Regarding Third-Party Funding (City FM 10)

Plaintiffs contend that the City's failure to cooperate with OBOT to identify and pursue third-party funding for Unfunded Improvements, including the City Funded Wharf Improvements, is a Force Majeure event that delayed their performance, extended the Initial Milestone Date, and

breached Section 6.3.1 of the Ground Lease. (OBOT SOD 59:1-60:9.)

At the threshold, the City implies that Section 16.1 does not apply to third-party funding because Section 6.3.1 contains a "special force majeure and remedy provision for third party public funding."[17] (City SOD 80:21-23.) That provision does not apply to deadlines impacted by funding delays. It expressly applies only to the date when the parties' obligation to identify and pursue funds sunsets: April 16, 2019, which "may be extended pursuant to Force Majeure events." (GL § 16.1.) The City does not attempt to explain how the narrow Force Majeure provision in Section 6.3.1 impacts Plaintiffs' claim regarding third-party funding.

On foreseeability, the City argues that the City's letters to the ACTC were in 2015 and OBOT waived the LDDA condition precedent regarding ACTC funding. (City SOD 96:21-97:4.) Plaintiffs address the waiver argument above in Section II.E. In addition, the City does not explain how waiver of a condition precedent for *entry* of the Ground Lease removes the City's obligation under the Ground Lease to "cooperate in the identification and pursuit of third party funds" for the City Funded Wharf Improvements. (GL § 6.3.1.) The City also provides no evidence that, between the execution of the Ground Lease and November 22, 2018, the City attempted to obtain third-party funds for the City Funded Wharf Improvements. (*See* Ex. 854, pp. 17-19 (78:25-82:3).)

On delay and hinderance, the City argues that it did everything in its power to secure the funding, including reapplying for the $22M in wharf improvement funding in 2016 (City SOD 112:14-113:2); and that Plaintiffs have not shown a causal link between the lost ACTC funding and their ability to Commence Construction of the Minimum Project by the Initial Milestone Date (City SOD 113:3-5.) The 2015 communications by the City to ACTC asking that ACTC not provide financing for the Terminal are self-inflicted wounds. The City provides no authority for the proposition that its breach by actively working against funding for the Terminal can be cured by the City unsuccessfully reapplying to ACTC for the funds the City had earlier blocked, and not

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[17] The City does not analyze or argue Section 6.3.1. Instead, the City identifies it in a chart of Plaintiffs' Force Majeure claims vis-à-vis Ground Lease provisions on the same or similar subject matter. Although not entirely clear, the City appears to be asking the Court to find that the contract provisions it cites, including Section 6.3.1, operates to preclude each Force Majeure claim listed in the chart. (*See* City SOD 78:14-81:12.)

taking any further steps to apply for any other third-party financing. The City breached the Ground Lease.

F. Plaintiffs' Force Majeure Claim Regarding Discretionary Approvals: CEQA, Permits, and Zoning (City FM 4-5, 9)

The evidence presented at trial demonstrates that the City announced at the March 9, 2016 kickoff meeting that it would require additional discretionary approvals for OBOT, including through subsequent CEQA environmental reviews, for construction permits, and by lifting the zoning in place for the Terminal—all on a commodity-by-commodity basis. Plaintiffs argue that these acts are Force Majeure events that extended the milestone deadlines. (OBOT SOD 60:10-68:19.) There is no credible dispute that the City planned to use discretionary reviews to prevent coal at the Terminal; or that the Cappio Memo was part of the City's opposition to coal, and implemented for the purpose of buying time for the City to enact an anti-coal ordinance. When that ordinance failed, the City continued to implement its plan to secure a ban-compliant terminal.

1. CEQA and Subsequent Reviews (City FM 5)

a. Foreseeability

The City states that there is no dispute that the City explained its position on CEQA, additional discretionary permits, and additional environmental reviews to OBOT before the parties entered the Ground Lease. (City SOD 95:6-10.) The City is mistaken. Plaintiffs dispute that the City's pre-Ground Lease explanations encompassed the type of discretionary review that the City announced at the March 9, 2016 kickoff meeting. The City focuses on OBOT's purported knowledge that future environmental review was a possibility prior to the kickoff meeting. (*See, e.g.*, City SOD 30:3-21.) But that misstates the issue.

At the kickoff meeting the City announced (for the first time) that it would require additional reviews on a discretionary *and commodity-by-commodity basis*. (RT 287:22-288:4, 474:6-20, 474:21-475:13.) The City's cited evidence speaks broadly of discretionary review, not the commodity-by-commodity approach the City later announced and had been planning internally for months if not longer. For instance, the City points to Rachel Flynn's December 2015 letter (Ex. 555) and Sabrina Landreth's February 2016 letter (Ex. 66). (City SOD 95:6-14, 95:20-26.) Ms.

Flynn's letter states only that the City was "evaluating discretionary decisions it may take in the future with respect to OBOT (e.g., additional permit requirements) and the scope of additional environmental review, if any, that it may require in connection with any such decision(s), consistent with its existing contractual obligations." (Ex. 555.) Ms. Landreth's letter includes a near-identical sentence. (Ex. 66, p. 2.) Neither letter suggests a commodity-by-commodity review; and both limit such review to "existing contractual obligations." (Ex. 66, p. 2; Ex. 555, p. 1.) Claudia Cappio confirmed that the City did not give notice to OBOT of its commodity-by-commodity position before the parties executed the Ground Lease. (RT 2080:15-22, 2079:23-2080:3.)

The City also asks the Court to find that Plaintiffs could not have been surprised because the DA includes a subsequent CEQA review provision (DA § 3.5.2). (City SOD 12:7-9.[18]) But the City presented no evidence at trial that it satisfied Section 3.5.2. Ms. Cappio testified that the City was also required to meet the CEQA requirements in California Code of Regulations, title 14, section 15162 in order to conduct subsequent discretionary review under Section 3.5.2. (RT 2422:3-13, 2423:19-2423:10, 2520:6-8.) The City would need to make findings that there were substantial changes to the Project or the Project's circumstances; that those changes required major revisions to the EIR because of new significant environmental effects or a significant increase of previously known ones; and that certain other criteria were met. Cal. Code. Regs., tit. 14 § 15162(a)(1)-(2). Alternatively, the City would have been required to find new substantially important information that the City did not know and could not have known about when it certified the prior EIR. *Id.* § 15162(a)(3). The City's findings also needed to be based on "substantial evidence in light of the whole record" and meet other requirements. *Id.* § 15162(a). (*See also* City SOD 32:1-9.)

[18] The City also asks the Court to rely on DA, Section 3.4.6. (City SOD 12:7-9.) That section applies only to "Exactions" defined in the DA as "[a]n exaction (other than City Application Fees or City Development Fees), Dedication or reservation requirement, an obligation for on- or off-site improvements or construction of public improvements, or an obligation to provide services … [which] include, but are not limited to, mitigation measures imposed or adopted pursuant to CEQA or as part of the City Approvals." (Ex. 7, p. 12 (definition of "Exaction"); Ex. 7, p. 24 (DA § 3.4.6).) The definition includes "City Approvals" but "City Approvals" is defined in the DA to include only approvals that existed when the DA was adopted in 2013; and thus, not new approvals that the City sought to impose at the 2016 kickoff meeting and later. (Ex. 7, p. 11 (definition of "City Approvals").)

It is uncontested that the City did not make the required findings. Skyler Sanders testified that nothing occurred that would satisfy the requirements for subsequent CEQA review. (RT 2942:3-13, 3063:3-9, 2829:2-21.) Claudia Cappio agreed. (RT 2522:16-20.) The 2002 EIR and the 2012 addendum remained controlling. (RT 2526:4-9.)[19]

It is also undisputed that that the 2002 EIR and 2012 Addendum applied to the Terminal (RT 2626:10-21), including rail (RT 2630:15-24), covered all bulk commodities without limitation (Ex. 1, p. 44; RT 1587:25-1588:6, 2633:24-2634:13, 3994:14-22, 3995:5-13), "fully analyzed all potentially significant environmental effects in compliance with the CEQA and the CEQA Guidelines" (Ex. 378, p. 5, ¶¶ AA), and concluded that no subsequent or supplemental EIR was needed (Ex. 1, pp. 15; Ex. 839, p. 2).

Plaintiffs could not have foreseen that the City would impose a novel commodity-by-commodity review even though the 2002 EIR and 2012 Addendum already covered all bulk commodities; neither the DA nor Ground Lease required it; and the City had not satisfied the DA's subsequent review provision. The City invented its "process" out of whole cloth.

The City also asks the Court to find that the DA contemplated multiple types of subsequent approvals, including grading permits and discretionary approvals. (City SOD 11:28-12:5.) The City relies on the DA's definition of "Subsequent Approvals"—apparently because the definition includes a laundry list of approvals the City could require. (*Id.* (citing Ex. 7, p. 17).) The City does not attempt to connect any listed approval to the discretionary commodity-by-commodity review it required for OBOT.[20] Whether grading permits, for instance, were discretionary has no bearing on

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[19] The City contends that additional environmental review under CEQA may have been required for the dump pits identified in the Basis of Design and the potential use of Capesize vessels. (City SOD, p.32, n.18.) Even if that review were required, which is speculative at best, the City does not explain how it would connect to the commodity-by-commodity review the City imposed on OBOT.

[20] This is quintessential bad faith. The implied covenant of fair dealing is at its apex when a contract gives one party discretionary authority. *Carma Developers (Cal.), Inc. v. Marathon Dev. Cal., Inc.*, 2 Cal. 4th 342, 372 (1992); *see also Cal. Lettuce Growers v. Union Sugar Co.*, 45 Cal. 2d 474, 484 (1955). The City contends that it had discretion under the DA to require Subsequent Approvals including discretionary reviews. The City used that discretion to impose a new commodity-by-commodity review requirement without approving a single commodity or telling OBOT how to meet the requirement. The City created a hurdle that was impossible to clear, then terminated the Ground Lease when OBOT could not clear it.

the City's announcement that OBOT would be subjected to additional discretionary approvals on a commodity-by-commodity basis. OBOT has not raised a Force Majeure claim based on the City's non-issuance of grading permits.

The City also ignores the final six words of the definition—"each as permitted by this Agreement"—that significantly narrow events that can qualify as Subsequent Approvals. (*See* Ex. 7, pp. 16-17 (DA, pp. 12-13).) In other words, the items listed could be Subsequent Approvals only to the extent permitted under the DA. With respect to CEQA, that meant satisfying the requirements discussed above.

In sum, none of the City's cited evidence announces the type of review that Ms. Cappio stated would occur at the kickoff meeting: a discretionary review on a commodity-by-commodity basis.

In contrast, the testimony of Plaintiffs' witnesses is corroborated by documentary evidence of the City's plan leading up to the kickoff meeting to follow other state's approach and use CEQA to keep coal out of the Terminal; and by the City's later refusal to approve a single commodity. These facts and others regarding the City's refusal to approve a commodity are detailed above in Section II.C. (*See also* OBOT SOD 61:3-63:13 (detailing events from the May 8, 2015 internal City email thread looking for opportunities to use discretionary reviews to keep coal out of the Terminal (Ex. 27), to the Cappio Memo remaining in effect as of November 22, 2018 (RT 2261:9-15, 3302:15-23)).)

b. Delay and Hinderance

On delay, the City rehashes its foreseeability arguments (City SOD 106:22-107:8), then argues that discretionary permit or environmental review requirements could not have delayed or hindered OBOT's commencement of construction because OBOT did not submit plans or permits for approval prior to the Initial Milestone Date. (City SOD 107:8-14.) This ignores credible testimony that the City never clarified zoning, a procedure for OBOT to follow to obtain permits, or a plan for approving commodities, preventing permit applications. (*See* RT 287:22-288:4, 383:25-384:8, 390:24-391:16, 417:1-418:5, 419:2-420:1, 456:7-13, 477:2-478:9, 541:18-543:15, 2080:4-11, 2081:1-16; Ex. 72.) Darren Ranelletti, the City's witness, confirmed that the City failed

1 to adopt or communicate to Plaintiffs any official procedure to conduct a commodity-by-
2 commodity review. (RT 3178:3-22.) OBOT could not present anything to the zoning counter or
3 apply for a permit until the City established a process. (RT 384:3-8, 1604:18-23; Ex. 854, p. 54;
4 *see also* RT 1078:13-18.)

5 The City also characterizes City officials as eager to move the Project forward. (City SOD
6 107:14-20.) Nonsense. The City does not point to any City conduct to corroborate that testimony.
7 (*See id.*) Instead, the City appears to concede—by quoting Adam Rosen and Phil Tagami—that
8 rather than blocking the Project, "the city wanted the project to move forward *for non-coal*
9 *commodities*." (City SOD 107:15-20 (emphasis added).) That's a distinction without a difference.
10 The City would not permit the Terminal to move forward unless coal was off the table. Everyone
11 understood that. (*E.g.*, RT 3295:18-3296:18 (Landreth).) But the City had no right to bring the
12 Terminal to a standstill until coal was off the table; and OBOT had every right to build a Terminal
13 capable of handling coal.

14 The City also argues that it was not required under the Ground Lease to provide a list of
15 commodities to Plaintiffs.[21] (City SOD 108:1-19.) That is the same argument that the federal court
16 rejected as a strawman when it denied the City's motion to dismiss that case. *Oakland Bulk &*
17 *Oversized Terminal, LLC*, 2017 WL 11528287, at *1. The City's argument presupposes that OBOT
18 did *not* have the vested right to develop a terminal capable of handling any commodity it or its
19 subtenants chose, including coal, so long as the terminal complied with City law as it existed when

20
21 [21] In the City's view, the existence of a Ground Lease provision related to the subject matter of a
22 Force Majeure claim is a bar to that claim because the contract provision is evidence that the parties
could have predicted the alleged Force Majeure event. Here, the City also contends that the non-
23 existence of an express Ground Lease obligation for the City to perform an act bars a Force Majeure
claim based on the City's failure to perform that act. The City cannot have it both ways. If the City
24 were correct that both the existence and non-existence of Ground Lease provisions can bar Force
Claim claims, the result would be that no City act could constitute a Force Majeure event. That
25 result would render the language "acts of the other Party" in Section Article 40 meaningless. *See*
Cal. Civ. Code § 1643 (contract must receive interpretation that will make it operative and capable
26 of being carried into effect); *Wells v. One2One Learning Foundation*, 39 Cal. 4th at 1207
(acknowledging "the principle of statutory construction that interpretations which render any part
27 of a statute superfluous are to be avoided"); *Christian*, 164 Cal. App. 4th 539, at 551 (courts must
construe contracts in accordance with canons of statutory interpretation); *see also* Cal. Civ.
28 Code § 1636.

the DA was adopted in 2013. That issue was settled in *OBOT I.*

The City's argument also ignores that the City's conduct after the Ground Lease was entered created the need for commodity approval. The Ground Lease is silent on the issue because there were no limitations on commodities. The City's decision to limit commodities was extracontractual, unpredictable, and impossible to comply with because the City never provided a process to approve commodities or apply for permits (RT 541:18-543:4, 2080:4-11, 2081:1-16, 3178:3-22); nor did it identify a single commodity that it was willing to approve (RT 422:6-17, 1076:02-05, 2082:19-22, 2272:10-14, 2556:3-12).

The City also asks the Court to find that Plaintiffs could have built the Terminal without approval of any commodity based only on the testimony of Mr. Wolff (City SOD 108:6-14), while ignoring credible testimony from multiple witnesses on both sides that Plaintiffs could not complete Terminal design without knowing which commodities would be approved. (*See* RT 220:4-18, 292:8-17, 543:1-15 (Tagami), 1602:21-1603:2, 1604:24-1605:5 (McClure), 2275:7-10, 2276:3-8, 2336:10-17 (Cappio).) The City's reliance on Mr. Wolff's testimony also contradicts its contention that the BOD that OBOT and ITS submitted in 2018 was deficient because it was substantially the same BOD that TLS had submitted in 2015. The City also overstates Mr. Wolff's testimony. The City asked Mr. Wolff whether consultants were told "to pick the pencil back up"; and Mr. Wolff responded in the affirmative. (RT 1103:18-21.) He did not say that ITS would be able to get any further than TLS did without assurance on commodities or before resolving other issues. Mr. Wolff went on to explain: "We needed clarity regarding the commodities to be shipped from the city. So, again, the basis of design is a basis on assumptions and the assumptions are the products, and we couldn't get clarity on the products." (RT 1107:2-6.)

2. Permitting and the Cappio Memo (City FM 4, 9)

Plaintiffs do not make any foreseeability argument on its permitting process or the Cappio Memo (Ex. 61). That makes sense. The uncontested evidence demonstrates that the Memo was part of a secret plan that Plaintiffs did not discover until after the Ground Lease was executed when the Memo was produced in other third-party litigation. (RT 426:4-18, 1595:22-1596:2, 2264:17-2266:6.) Witnesses on both sides agreed that the Memo (including posting it at the zoning counter)

was unique and applied only to OBOT. (RT 431:1-7 (Tagami), 2253:17-23, 2256:13-17, 2260:8-13 (Cappio), 3208:15-3210:11 (Ranelletti), 3301:13-17, 3302:8-13 (Landreth); Ex. 854, p. 37.) OBOT could not have foreseen the Cappio Memo. Thus, even if the Court elects to read a foreseeability standard into Section 16.1 and the definition of "Force Majeure" in Article 40—which it should not do—it is uncontested that the standard does not bar Plaintiffs' Force Majeure claim regarding the Cappio Memo.

On delay and hinderance, the City argues only that (1) Plaintiffs never submitted a permit (City SOD 105:8-23); (2) the Memo served only to keep City Council informed (*id.* 105:24-106:14); and (3) Plaintiffs did not notice their Force Majeure claim until after the Initial Milestone Date (*id.* 106:15-20). As discussed above, OBOT could not apply for a permit until the City clarified the process, which never occurred.

The City's explanation of the Memo as a mere informational tool is not credible. The weight of evidence supports the conclusion that the Cappio Memo was ordered from the top. Ms. Cappio testified about the City's opposition to coal, her regular meetings with Mayor Schaaf on the issue, and the Mayor's search for a way to impose discretionary reviews on OBOT as a way to preclude coal at the Terminal. (RT 2211:2-6, 2397:1-11, 2431:13-19, 2532:18-2533:2, 2565:9-24.) And Mayor Schaaf herself confirmed that the purpose of the Cappio Memo was to give the City Council the opportunity to pass emergency legislation before any permits for the Project were issued. (RT 1798:8-23; 1818:15-20.) In other words, the City created the Cappio Memo for the specific purpose of causing delay. It had the desired effect.

Finally, on the issue of notice, Plaintiffs noticed their Force Majeure claim at the time the Ground Lease requires and before the claim accrued for the same reasons discussed above as to Plaintiffs' claim regarding the health and safety hearings, ordinance, and resolution, as well as the reasons identified in Plaintiffs' [Proposed] SOD. (*See* Section IV.D, *supra*; OBOT SOD 68:13-19.)

3. Zoning

The City argues that the zoning for the Terminal was "never in question" and that Claudia Cappio never mentioned "zoning" at the March 9, 2016 kickoff meeting. (City SOD 30:22-31:12.) But whether or not Ms. Cappio mentioned the word "zoning," the City communicated to

Plaintiffs at the kickoff meeting that the City would conduct a commodity-by-commodity review and prohibit the transport of certain commodities at the Terminal. That approach was contrary to the zoning and permitted uses applicable to the West Gateway and Section 3.5.1 of the DA, which required the City to rely on the approved EIR to the fullest extent permissible.

As noted in Plaintiffs' [Proposed] SOD, the West Gateway is in the City's Gateway Industrial Zone under Section 17.101F.010 of the Oakland Planning Code. (OBOT SOD 6:25-7:4.) The Planning Code establishes the permitted uses for that Zone, which include "Regional Freight Transportation Industrial Activities" such as freight handling and shipping services by water and rail, as well as the transportation of all types of goods without limitation. (Section 17.10.584.) The Planning Code does not expressly or impliedly limit the handling or shipping of any bulk commodities, including coal. But notwithstanding the fact that the Terminal was zoned for the transport of coal (and all other commodities), the City communicated its intent to unilaterally limit the commodities that Plaintiffs could ship through the Terminal. There was no contractual or legal basis (via zoning laws or otherwise) for the City to impose on Plaintiffs its commodity-by-commodity approach to development of the Terminal.

G. Plaintiffs' Force Majeure Claim Regarding the Railroad R/O/W Property

Plaintiffs argue that the City failed to give possession of the rail corridor, including the Railroad R/O/W Property to OBOT and OGRE, delaying their ability to perform under the Ground Lease. (*See* GL §§ 1.1.1, 1.1.2, 1.5.1, 1.5.2.) Plaintiffs did not have access to the land where the five Minimum Project Rail Improvements were to be constructed due to multiple City-controlled factors, including the City's completion of the public improvements, the City's acceptance of that completion, the City's JV demobilizing, completion of a re-survey of the Railroad R/O/W Property, and granting easements in OGRE's favor. (*See* Plaintiffs SOD 68:20-76:21.) The City's [Proposed] SOD focuses mostly on public improvements. Plaintiffs address most of those arguments and the City's other arguments regarding access to the rail corridor above in Section II.D.2. Plaintiffs address the City's additional arguments below.

1. Public Improvements (City FM 6)

a. Foreseeability

On foreseeability, the City asks the Court to find that OBOT (1) waived completion of Public Improvements as condition precedent to entering the Ground Lease; (2) agreed to take the Premises subject to completion of the Public Improvements, which would be ongoing; (3) did not negotiate a deadline or include a contingency in the Ground Lease; and (4) agreed to a sole and exclusive remedy. (City SOD 21:17-27, 96:1-13.) The City also argues that CCIG managed the public improvements for a time and set the schedule. (City SOD 96:9-11.)

The City's first argument regarding waiver fails for the reasons discussed above regarding the Mid-Project Budget Revise. (*See* Section II.E, *supra*.)

The City's second argument regarding OBOT's agreement to take the Premises subject to the Public Improvements misstates the Ground Lease's requirements. The City correctly points out that the Ground Lease contains an acknowledgment in Section 1.1.1 that the Public Improvements were ongoing. (City SOD 80:1-10, 96:7-9.) But the City is wrong on the effect of that provision. The plain language of Section 1.1.1 expressly applies only to the possibility that completion will impact the utility of parts of the corridor. It also provides a process to address that possibility—a survey to identify necessary adjustments to the Premises, certification of the survey by a civil engineer, and a dispute resolution procedure for the parties to agree to the adjustments. (*Id.*) It says nothing about assuming the risk that the City would not complete the public improvements until after the Initial Milestone Date, then refuse to handover the corridor after completion because the City had not yet "accepted" completion. This case is not about the impact of Public Improvements, once complete, on the corridor's utility. It is about the City's delay in handing over the corridor regardless of the level of utility each section had after the public improvements were complete.

The City's third argument regarding deadlines and contingencies is addressed above in Section II.B. In addition, the Ground Lease expressly requires the City to "commence construction of the Funded Public Improvements and *diligently prosecute* the same to Completion."

(GL § 37.9.2(b) (emphasis added).)[22] And as discussed above, OBOT did negotiate a contingency—a Force Majeure provision that applies to City acts, including acts before the Ground Lease was executed. (*See* Section III.D.2, *supra*.)

The City's fourth argument that termination was OBOT's exclusive remedy for the City's failure to complete the public improvements is belied by the contract's plain language. The City relies on Section 37.9.2(b) to argue that termination was OBOT's sole remedy for the City's delayed completion of the public improvements. (City SOD 80:1-10.) Section 37.9.2(b) provides for an *election* of remedies for the City's failure to complete public improvements: "Tenant ***may elect***, upon not less than ninety (90) days prior written notice to Landlord as Tenant's sole and exclusive remedy … to terminate this Lease …" (GL § 37.9.2(b) (emphasis added).) The verb "elect" precedes the noun phrase "exclusive remedy"—OBOT had the contractual right to "elect" termination as an exclusive remedy. OBOT did not make that election, which preserved its right to pursue other remedies, including preservation of the Ground Lease and asking the City to perform its contractual obligations. The City's interpretation would render the language "Tenant may elect" superfluous. *See* Cal. Civ. Code § 1643 (contract must receive interpretation that will make it operative and capable of being carried into effect); *Wells*, 39 Cal. 4th at 1207 (2006) (acknowledging "the principle of statutory construction that interpretations which render any part of a statute superfluous are to be avoided"); *Christian*, 164 Cal. App. 4th 539, at 551 (courts must construe contracts in accordance with canons of statutory interpretation).

Plaintiffs' interpretation is also consistent with the whole of the Ground Lease taken together. Cal. Civ. Code § 1641. The Ground Lease as a whole is asymmetrical, reserving termination as a remedy for the City as Landlord (GL §§ 19.2.2, 19.3), and limiting OBOT's remedies for Landlord defaults to relief other than termination (GL § 22.1). The Ground Lease includes a handful of exceptions to this design, in which OBOT can elect termination as an exclusive remedy, precluding the other remedies enumerated in Section 22.1. Section 37.9.2(b) is one of those exceptions, but it applies only if OBOT makes the election, which did not occur.

[22] The Funded Public Improvements include the site preparation work, the City Funded Wharf Improvements, and other improvements. (GL § 37.9.2(a)(i).)

Finally, the City argues that CCIG was its project manager as to the Public Improvements. Plaintiffs address that argument in their [Proposed] SOD. (*But see* OBOT SOD 76:1-15.) The City does not explain how CCIG's role as project manager would cause it to foresee that the City would terminate the Ground Lease before certifying completion of the Public Improvements and turning the corridor over to OBOT. With respect the to the Minimum Project Rail Improvements, OBOT was never given an opportunity to perform.

At bottom, the City's conduct was not foreseeable. Although some delay may have been foreseeable, the extent of that delay; the City's refusal to certify completion for almost a year after completion; its refusal to hand over the Railroad R/O/W Property after completion; and the City's use of its own failure to terminate the Ground Lease were not foreseeable.

b. Delay and Hinderance

On delay and hinderance, the City repeats the same arguments discussed above regarding access to the corridor; track that OGRE and IRC built in two of the Minimum Project Rail Improvement Areas; temporary construction easements; construction stopping in 2018; the OBOT/OGRE sublease; and the completion of public improvements. Plaintiffs address each of these arguments in Section II.D.2.

2. The Survey

The City contends that Plaintiffs did not cite the City's failure to re-survey the property in any of their Force Majeure claims. (City SOD 81:7-11.) Not true. The City's failure is expressly referenced in Plaintiffs' October 19, 2018 Force Majeure notice. (Ex 248, p. 42.) Plaintiffs noted that the City had still not turned over the Railroad R/O/W Property to OBOT and had cited its own failure to complete a survey of the corridor as an excuse for not turning over the property. (*Id.*)

The City also suggests that Section 1.1.1 of the Ground Lease precludes a Force Majeure claim based on the survey or Railroad R/O/W Property. (City SOD 51:7-12.) But nothing in that Section supports the City's position. Section 1.1.1 provides in pertinent part that "The Parties' rights and obligations under this Lease shall continue unabated with respect to the original Premises until the Parties' agreement upon the adjustments to the Premises set forth in the

certification (or the final resolution or determination of any such disagreement)." Section 1.1.1's reference to the "Parties' rights" necessarily includes Plaintiffs' rights to extensions under Section 16.1. The City's failure to complete the survey and turn over the Railroad R/O/W Property to Plaintiffs necessarily hindered Plaintiffs' ability to complete the Rail Improvements and thus entitled Plaintiffs to an extension of the Initial Milestone date under Section 16.1.

H. Plaintiffs' Force Majeure Claim Regarding the Rail Access Agreement (City FM 7)

Plaintiffs contend that the City's failure to enter the RAA with the Port by November 22, 2018, even though the City and Port had agreed to the primary terms of the RAA more than seven years earlier is an event of Force Majeure that operates to extend the Initial Milestone Date. (OBOT SOD 77:1-82:21.) It is uncontested that the primary terms of the RAA were agreed to before the Ground Lease was executed, and that the RAA had not been entered when the City terminated the Ground Lease.

On foreseeability, the City argues that (1) OBOT was aware that the City and Port had not entered the RAA and waived it as a precondition for entry of the Ground Lease; (2) OBOT did not negotiate a deadline for performance or a contingency for non-performance; and (3) the Ground Lease provides an exclusive remedy for failure to sign the RAA. (City SOD 22:1-9, 54:6-16, 80:11-14, 96:14-20.)

The City's first argument regarding OBOT's awareness and purported waiver fails for the reasons discussed above regarding the Mid-Project Budget Revise. (*See* Section II.E, *supra*.)

The City's second argument regarding deadlines and contingencies is addressed above in Section II.C. In addition, OBOT did negotiate a contingency—a Force Majeure provision that applies to City acts, including acts before the Ground Lease was executed. (*See* Section III.D.2, *supra*.)

The City's third argument regarding a purported exclusive remedies provision contradicts the Ground Lease's plain language. The City argues that OBOT's exclusive remedy for the City's failure to enter the RAA was contract termination. (City SOD 80:11-14 (citing GL § 5.2.3).) That argument fails for the same reasons as the City's argument regarding Section 37.9.2(b) and public

improvements because the two provisions have near identical language: "Tenant may elect, upon not less than ninety (90) days prior written notice to Landlord and as Tenant's sole and exclusive remedy … to terminate this Lease …" (GL § 5.2.3(a).) (*See* Section IV.G.1.a, *supra*.)

Further, the City's interpretation is absurd. If correct, the City could simply never enter into the RAA, and unless OBOT terminates the lease, the City could stall the project indefinitely. *See* Cal. Civ. Code § 1638.

On delay and hinderance, the City argues that (1) the RAA was not needed to access Port land; (2) there is no evidence that the City failed to use commercially reasonable efforts; and (3) OGRE delayed the RAA.

1. The RAA Was Necessary to Access Port Land.

The City's argument that the RAA was not needed to access Port-owned land defies common sense. It is undisputed that three of the Minimum Project Rail Improvements are located on Port land: the improvements on a portion of Lead Track No. 2 on the Port-owned Outer Claw (GL § 6.1(b)(iii)); a portion of Lead Track No. 1 also located in the Outer Claw. (GL § 6.1(b)(iv)); and Industrial Drill Track No. 1 (GL § 6.1(b)(v)). A fourth, the East of Wake Rail Improvements, is a portion of Lead Track No. 2 on City-owned land but subject to the Port Rail Easement. (GL § 6.1(b)(i).) The Port itself represented to the STB on September 18, 2018 that as of that date "OGRE ha[d] not yet obtained the property rights it would need from the Port to construct any track on Port property." (Ex. 214, p. 3.) The Port repeated that mantra throughout the comments it sent to the STB opposing OGRE's petition. (*Id.*, pp. 5-6, 11, 13, 16.) Rail access is the heart of the Project, which is why, according to Douglas Cole, "the Rail Access Agreement was one of the very first deliverables that the city and port were supposed to deliver to the developer." (Ex. 854, p. 31.)

The City hinges its argument on the existence of other easements that it claims permitted OGRE to enter Port land to build the Minimum Project. Plaintiffs address each of the City's access arguments, including its argument that OGRE could have used the City's temporary construction easements, above in Section II.D.2.

The only new argument the City raises is that the Rail Access Agreement is about operations and not access for construction. (City SOD 110:21-26.) Even if that were true, it remains

uncontested that the RAA was necessary so that OGRE could accurately quote rail rates and prepare for service; without that ability, negotiations with Union Pacific and others was difficult, if not impossible. (*See* RT 2163:22-2164:2, 2165:8-18, 3474:1-11, 3671:22-3672:4, 3672:23-3673:8.) Plaintiffs Force Majeure claim has always been about more than access. The City's conduct as to the RAA delayed development in other ways. But it also prevented OBOT and OGRE from having access to Port-owned land in the corridor.

The City also contends that Plaintiffs concede that the RAA was not necessary for OGRE or OBOT to construct the terminal or rail. (City SOD 54:17-55:5.) Not so. Nothing in the cited testimony supports the City's contention. Instead, Mr. McClure stated that the Ground Lease description of the RAA did not: (1) specifically include language that detailed the transfer of property rights necessary for OBOT to begin construction of the rail; (2) establish a schedule of the different elements of the rail that needed to be built; or (3) discuss construction of the track. (RT 3385:20-3386:2.) This testimony hardly concedes that the RAA "was not necessary"; and as detailed above, Mr. McClure and other witnesses were in accord that it was necessary.

2. Commercially Reasonable Efforts

The City contends that the only evidence on commercially reasonable efforts is the amount of time the City had taken as of November 22, 2018 to enter the RAA. (City SOD 110:26-111:2.) Even if true, the extreme delay in this case (more than seven years) is strong evidence that the City failed to use commercially reasonable efforts. *See, e.g.*, *Gen. Elec. Credit Corp. v. Bo-Mar Constr. Co.*, 72 Cal. App. 3d 887, 893 (1977) (delay between the repossession and sale of a machine reduced the sale price, which "alert[ed] the court to the possibility of commercially unreasonable practices"). Here, the evidence proves not only passage of time, but also complacency by the City. For instance on October 13, 2016, Ms. Cappio sent Mr. McClure and Mr. Tagami a letter regarding stating that a discussion draft of the RAA had been prepared and would be discussed by the City and the Port *13 months later in November 2017*. (Ex. 95, p. 3; RT 1685:20-1686:10.) The City has not explained how a 13-month delay to discuss an existing document is commercially reasonable; or how a 7-year delay to finalize an agreement after agreeing to a term sheet containing the material provisions of the deal is commercially reasonable. *See Wilshire Assocs., Inc. v. Ashland Partners*

& Co., LLP, 2010 WL 11505571, at *20 (C.D. Cal. Sept. 7, 2010) (lack of efforts, including various delays, by defendant evidenced a lack of commercially reasonable efforts).

In any event, Plaintiffs are not required to prove that the City failed to use commercially reasonable efforts. Under Section 16.1, they need only demonstrate that the acts of a party (the City) or government (the Port) delayed or hindered their ability to perform. For the reasons explained above and in Plaintiffs' [Proposed] SOD, Plaintiffs have met that burden.

3. OGRE Did Not Delay the RAA.

The City's evidentiary support for its argument that OGRE delayed the RAA misses the mark. (City SOD 55:16-26.) Mr. McClure's cited testimony merely identifies one topic as to which OGRE and the City may have been aligned. Exhibit 106 relates to the Rail Operating Agreement, not the RAA. And Ex. 734 includes a March 2018 list of open issues, without identifying the party that proposed each issue. The great weight of evidence demonstrates that OBOT and OGRE were always pushing for execution of the RAA, not delaying its finalization.

I. Plaintiffs' Force Majeure Claim Regarding Regulatory Approvals (City FM 8)

The City does not argue that the City's opposition to its STB application was foreseeable. Instead, the City contends that (1) OBOT had sole responsibility for obtaining regulatory approvals. (City SOD at 80:15-20 (citing GL §§ 5.2.2.1, 6.2.13)); (2) OGRE delayed its application until 2018 (*id.* at 111:11-17); and (3) there is no causal connection between the City's conduct and Plaintiffs' ability to meet the Initial Milestone Date (*id.* at 111:8-11).

Plaintiffs' address the City's arguments regarding responsibility for obtaining regulatory approvals above in Section II.F. The City relies on Sections 5.2.2.1 and 6.2.13 of the Ground Lease. Those sections are tempered by Section 5.2.2.2, which requires the City to "communicate regularly and to cooperate in good faith regarding Tenant's efforts to obtain Regulatory Approvals for the Project from any regulatory agency other than the City."

The City also attacks the timing of OGRE's petition. But OGRE filed the petition on May 23, 2018 (Ex. 155)—just one week after *OBOT I* was decided. And the City does not contest that OGRE needed an STB exemption to rehabilitate the track. Nor does the City contest that its opposition to the petition caused delay. Instead of working with OGRE, the City once again

engaged in delay, requesting that the STB require a full regulatory process before allowing the rail rehabilitation work to proceed. (*See* Ex. 856, pp. 27-30.) In other words, the City requested delay.

Lastly, regardless of whether the City's 2018 obstruction of OGRE's STB application delayed the Initial Milestone Date, the City's conduct is further evidence of its bad faith and willingness to breach its contractual obligations.

J. Plaintiffs' Force Majeure Claims Regarding Non-Disclosure Agreements and Estoppel Certificates (City FM 11-12)

In their [Proposed] SOD, Plaintiffs couch the City's refusal to issue non-disturbance agreements ("NDAs") and estoppel certificates to OBOT's subtenants as breaches that occurred, in part, as a result of the City's attempted termination of the Ground Lease. It is undisputed that the City expressly used the termination as a basis to refuse to issue the NDAs, and it used the curing of the alleged default as a condition in the estoppel certificates. The City correctly points out in its SOD that Plaintiffs also noticed these breaches as Force Majeure events. (*See* City SOD 113:6-13.)

However, the City argues only that Plaintiffs' claims were identified in correspondence after the Initial Milestone Date (RT 113:7-10); and that the City's conduct was proper, including because OBOT had no right to assign or sublet when it was in default. (City SOD 80:23-81:7 (citing GL §§ 19.3.4, 26.1); RT 113:10-13.) The City ignores that IES requested an NDA in January 2018 (Ex. 137), prior to the Initial Milestone Date. The City's failure to provide the NDA put into question the City's willingness to proceed with the development of the Terminal, and impacted IES's ability to finance the development. (RT 1087:10-23.)

V. PLAINTIFFS' CLAIM THAT THE CITY'S TERMINATION BREACHED THE GROUND LEASE BECAUSE OBOT COMMENCED A CURE

Even if the final Initial Milestone Date was August 14, 2018 and even if that date was not extended by events of Force Majeure, the City would still be in breach because Plaintiffs' commenced a cure as required under Section 18.1.7 of the Ground Lease. (OBOT SOD 20:23-21:27, 94:17-25.)

Under Section 18.1.7, the City can terminate the Ground Lease for default only if the

> violation or failure continues without cure for more than thirty (30)

> days after written notice from Landlord specifying the nature of such violation or failure, or, if such cure cannot reasonably be completed within such thirty (30)-day period, if Tenant does not within such thirty (30)-day period commence such cure, or having so commenced, does not prosecute such cure with diligence and dispatch to completion within a reasonable time thereafter

(GL § 18.1.7.) Section 18.1.7 places strict conditions on the City's termination power, and if those conditions are not met, that is an independent reason the City is in breach. The City must also prove that Plaintiffs did not satisfy the cure requirements in Section 18.1.7 as part of its affirmative breach claim.

It is uncontested that a cure could not reasonably have been completed in 30 days. Putting aside the obvious hurdles discussed above—e.g., the lack of a commodity approval or permitting process—the City had not approved Construction Drawings. Under the plain terms of Section 18.1.7, OBOT was required only to commence a cure and prosecute it with diligence. OBOT did that. The City disagrees. (City SOD 114:5-15.)

First, on September 28, 2018—seven days after the cure notice—OBOT and ITS submitted their updated and revised BOD as Schematic Drawings under Section 6.2.1 of the Ground Lease. (Ex. 238; Ex. 240; RT 617:24-618:20.) As detailed at length above and in Plaintiffs' [Proposed] SOD, OBOT, and ITS needed the City's comment on the BOD to refine Terminal design and build the Terminal. Rather than provide a meaningful review of the BOD, the City summarily rejected it as incomplete. On October 18, 2018, the City stated that it would recognize only the small "conceptual drawings" portion of the submission and disregard the rest. (Ex. 247.) The City claimed that the BOD was "incomplete," largely without specifying how or why; nor did the City identify what was required for OBOT to complete the BOD as the Ground Lease requires. (*Id.*; *see also* GL § 6.2.1 ("If Landlord deems the Construction Documents incomplete, Landlord shall notify Tenant of such fact within twenty-one (21) days after submission and shall indicate which portions of the Construction Documents it deems to be incomplete.").) And although OBOT recently heard testimony from Ms. Cappio about specific concerns she had with the BOD, none of those were shared in 2018 either. The City also stated that its letter was in "no way to be construed as a substantive response or acceptance of a cure or commencement of cure of the Unmatured Event of

1 Default described in the letter from the City Attorney dated September 21, 2018." (Ex. 247) The
2 letter makes it clear: the City never intended to allow OBOT to commence or complete the cure,
3 which is itself a breach of the Ground Lease.

4 Second, OBOT did not just submit the BOD and walk away. Millcreek Engineering, OBOT
5 and ITS's architect and engineer for the Project, scheduled a meeting with the City to discuss the
6 required City interdepartmental approvals and processes required to obtain a building permit. (Ex.
7 249.) The City committed to the meeting, then postponed it, leaving OBOT and ITS again in the
8 untenable position of receiving no cooperation from the City. The City's silence in response to
9 Millcreek's, ITS's and OBOT's requests to reschedule (Ex. 239, p. 1) made the City's intention's
10 clear.

11 Third, on September 26, 2018, Mark McClure contacted the City (Betsy Lake, and copying
12 John Monetta) about access to the rail corridor. (Ex. 227, p. 5 ("Given the recent correspondence
13 from the City Attorney related to the minimum project completion dates could you please confirm
14 the date of the formal turn-over of the rail corridor.").) In response, Ms. Lake forwarded the
15 message to Frank Kennedy, Isabel Brown, Bijal Patel, and John Monetta, and asked "Why are we
16 not turning over the rail corridor at the same time we are accepting the public improvements?" (*Id.*,
17 p. 4.) Ms. Lake later highlighted portions of Section 37.9.2(b), which defines "Completion" of the
18 public improvements, the standard for turning over the corridor to OBOT and OGRE, to flag the
19 provisions that she believed permitted the City to give possession to OBOT ad OGRE. (*Id.*, pp. 1-
20 2.) Ms. Lake concluded that "we can turn over the site improvements on the lease area on Monday
21 at the same time we accept the public improvements." (*Id.*, p. 1.) The City knew it had an obligation
22 to turn the property over to Plaintiffs but let the cure period pass without performing that obligation.

23 Fourth, Plaintiffs sent several Force Majeure letters to the City during the cure period.
24 (*See* Ex. 191; Ex. 193; Ex. 222; Ex. 243; Ex. 248; Ex. 670.) These letters again informed the City
25 of the impediments to Terminal development, which needed to be addressed in order to cure the
26 alleged default. Instead, the City waited for the cure period to run, then purported to reject the
27 Force Majeure notices. Sabrina Landreth, the City Administrator who decided to terminate the
28 Ground Lease, testified that she has no recollection of reviewing the Force Majeure claims or the

Section 16.1 of the Ground Lease before deciding to terminate. (RT 3266:21-3267:24, 3281:15-3282:16, 3283:3-3284:19.) That is bad faith.

Like Mrs. Willburn in *Sales, Inc. v. Willburn*, 205 Cal. App. 2d 321 (1962), the City demanded a cure, then put a chain across the road that OBOT needed to cross in order to provide that cure. The cure period is a microcosm of the Project—in thirty days, the City refused to substantively review the resubmitted BOD, cancelled a meeting to discuss the permit process, refused to hand over the rail corridor even though public improvements were complete, and ignored OBOT's letters detailing the City's conduct and explaining why OBOT needed and was contractually entitled to more time.

VI. PLAINTIFFS' CLAIM THAT THE CITY'S TERMINATION BREACHED THE GROUND LEASE BECAUSE OBOT COMMENCED CONSTRUCTION

The City also breached the Ground Lease if Plaintiffs Commenced Construction of the Minimum Project by the Initial Milestone Date. (*See* OBOT SOD 84:19-87:10.) The City must also prove that Plaintiffs did not Commence Construction as an element of its breach claim. The City asks the Court to find that (1) OBOT failed to satisfy contractual preconditions for commencing construction; (2) the Terminal and Railroad Improvements are wholly separate Minimum Project requirements; (3) that OBOT Commenced Construction on the Terminal itself; and (4) OBOT cannot meet the definition of Commenced Construction because construction was not ongoing.

A. Preconstruction Requirements

At the threshold, the City asks the Court to find that OBOT could not have Commenced Construction because it did not satisfy the preconditions for construction listed in section 6.2.6 of the Ground Lease, including the City approving Final Construction Documents (GL § 6.2.6.1) and OBOT obtaining all Construction Permits (GL § 6.2.6.2). (City SOD 24:13-25:7.) If the City is correct, OBOT should prevail on its Force Majeure claims related to permitting and the Basis of Design. Section 6.2 demonstrates that if the City prevented OBOT from obtaining permits or preparing and submitting additional Construction Documents, those acts delayed and hindered OBOT's ability to satisfy conditions to commence construction.

1. The Final Construction Documents Condition

The City's arguments overlap with its arguments on the Basis of Design—that OBOT did not submit Schematic Drawing under the Ground Lease, and OBOT was limited to the exclusive remedy of deeming the Basis of Design accepted under section 6.2.1. (City SOD 24:18-25:2.) Plaintiffs address those arguments above in Section IV.C.

It is undisputed that the City did not approve the BOD, let alone Final Construction Documents. As detailed below, the construction that OBOT/OGRE/IRC commenced was part of the Minimum Project and performed with the City's permission. Because the City authorized the work and OBOT, through its subtenant and contractor, performed it, the parties waived the condition for purposes of the work. *Old Republic Ins. Co. v. FSR Brokerage, Inc.*, 80 Cal. App. 4th 666, 678 (2000) ("California courts will find waiver when a party intentionally relinquishes a right or when that party's acts are so inconsistent with an intent to enforce the right as to induce a reasonable belief that such right has been relinquished.").

2. The Construction Permits Condition

The City argues the obvious (that Plaintiffs had not submitted permit applications) but ignores the context (that the City's conduct prevented Plaintiffs from submitting applications). Plaintiffs address the same argument above in Section IV.F.1.b.

It is undisputed that the City did not issue permits. However, the Rail Improvements did not require permits (RT 3612:21-3613:3), including because the City had already approved the work (RT 2745:4-10, 2746:18-2747:6). The Construction Permits condition does not apply to the work that Plaintiffs contend met the Initial Milestone Date.

B. The Meaning of "Bulk and Oversized Terminal" and "Railroad Improvements"

It is undisputed that Chris Stotka and IRC began construction on Lead Tracks No. 1 and No. 2 in the Outer Claw; that the track is within "Railroad Improvements" as defined in the Ground Lease; and that it is within the third Minimum Project Rail Improvement, which expressly includes the portion of Lead Track No. 2 to be constructed on the Outer Claw. (GL § 6.1(b)(iii); Ex. 833.) Whether the work was part of the Terminal turns on the language of the Ground Lease.

The City presents the Terminal and Rail Improvements as separate and distinct requirements. OBOT argues that the two have overlap, and that OGRE constructed rail within that overlap, meeting both the Terminal and Rail Improvement components of the Minimum Project by the Initial Milestone Date. The City's [Proposed] SOD does not address the language of section 6.1 that Plaintiffs contend create the overlap between "Bulk and Oversized Terminal" and "Rail Improvements" as defined in the Ground Lease.

First, the Ground Lease defines "Bulk and Oversized Terminal" as "[a] ship-to-rail terminal designed for the export of noncontainerized bulk goods and import of oversized or overweight cargo consistent with the Master Plan, *which includes, without limitation*, the City Funded Wharf Improvements and the wharf repairs and Improvements included in the OBOT Wharf and Rail Improvements ('Bulk and Oversized Terminal')" (GL, Ex. 3.1 (emphasis added).) The plain language of the Ground Lease's definition of "Bulk and Oversized Terminal" includes more than a single structure; it provides a *non-exhaustive* list of what is included in the Terminal, making clear that the list is "without limitation." (*Id.*)

Second, the Terminal includes rail improvements. (RT 3578:24-3579:2.) "Railroad Improvements" as defined in Exhibit 3.1 to the Ground Lease include improvements to Lead Tracks No. 1 and No. 2 consistent with the Master Plan. (GL, Ex. 3.1; RT 3579:12-3580:2.) Relatedly, the definition of "Bulk and Oversized Terminal" also incorporates "OBOT Wharf and Rail Improvements" which include the rail improvements listed in Exhibit 3.1—*e.g.*, Lead Tracks No. 1 and No. 2. (RT 3581:19-3582:8.) And Section 1.7.1 includes the OBOT Wharf and Rail Improvements within the Minimum Project. (GL § 1.7.1.) Therefore, if Plaintiffs Commenced Construction on either Lead 1 or Lead 2, it Commenced Construction of the Terminal.

Third, the final two sentences of Section 6.1 state: "The parties acknowledge that the OBOT Wharf and Rail Improvements and City Funded Wharf Improvements *are to be included within and as part of the wharf and rail Improvements* described in Sections 6.1(a) *and* (b) above. Therefore, the Parties further agree that Tenant shall be required to have Commenced Construction of the Minimum Project and Completed Construction of the Minimum Project pursuant to the schedule set forth in this Section 6.1." (Gl § 6.1 (emphasis added).) In other

words, the “wharf and rail improvements” are included as part of the Terminal both in Section 6.1 and in the definition of “Bulk and Oversized Terminal.”

C. “Commenced Construction”

The City argues that OBOT did not Commence Construction because construction was not ongoing. The facts discussed above regarding the City’s efforts to stop construction, including by not providing OBOT and OGRE with access to or possession of the Railroad R/O/W Property explain why construction was not ongoing. The rule is that when one contracting party prevents the other’s performance of a condition precedent (like Mrs. Willburn’s chain across the access road)), the party burdened by the condition (like Mad River) 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.”). The condition of ongoing construction is excused.

VII. PLAINTIFFS’ THIRD CAUSE OF ACTION FOR ANTICIPATORY REPUDIATION

Plaintiffs will not repeat here their anticipatory repudiation evidence and argument. (*See* Plaintiffs SOD 88:9-28.) The City’s SOD does little more than recite the basic legal principles applicable to a claim for anticipatory repudiation. (City SOD 66:24-67:21.) Plaintiffs generally agree with those principles. Here, the evidence discussed above demonstrates that the City’s unjustified termination of the Ground Lease constitutes an express repudiation, entitling Plaintiffs “to rescind, to attempt to keep the contract alive or to treat it as coming to an end and recover damages.” *Winegar v. Gray*, 204 Cal. App. 2d 303, 309 (1962). Plaintiffs’ election of the remedy it seeks will be a subject of the second phase of this trial.

VIII. BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

The City’s conduct breached the covenant of good faith and fair dealing for the reasons stated above and in the Plaintiffs’ [Proposed] SOD. (OBOT SOD 89:1-93:24.)

The City gives short shrift to Plaintiffs breach of the implied covenant claim. The City’s

Proposed SOD states the City's view on the legal standards for breach of the implied covenant (City SOD 67:22-69:13), promises to apply those standards to the facts (*id.* at 69:14-18), then conducts that application in a single footnote (*id.*, p. 69 n.50). The footnote states only that the City lacked a subjective belief in the invalidity of its actions, and its conduct was not objectively unreasonable. (*Id.*) The City cites no testimony to support its conclusion that the City believed its actions were valid.

The City can claim that it subjectively lacked a belief in the invalidity of its actions, but more than sufficient evidence shows otherwise. The City intended for this Project to "be killed" so long as coal was a part of the discussion, and because coal always remained a possible commodity, the City adopted a concerted plan to deny OBOT the benefits of the DA and the Ground Lease. The City's conduct (which does not need to breach an express term of the Ground Lease) breached the covenant of good faith and fair dealing because it demonstrates the City's subjective intent of building a no-coal Terminal. (*See also* OBOT SOD 89:1-93:24.) *Carma Devs. (Cal.), Inc. v. Marathon Dev. Cal., Inc.*, 2 Cal. 4th 342, 373 (1992) (noting that breach of a specific provision of the contract is not a necessary prerequisite for a breach of the implied covenant of good faith and fair dealing because "[w]ere it otherwise, the covenant would have no practical meaning.").

Even before the Ground Lease was signed, the City attempted to vest itself with discretionary power to control the commodities passing through the Terminal. For example, on May 8, 2015, Zac Wald (Councilmember McElhaney's Chief of Staff) sent an email to Mark Wald (Deputy City Attorney) looking for discretionary approvals that the City could use to reopen CEQA and the EIR to block coal at the Terminal. (RT 1585:17-1586:16; Ex. 27, p. 2.) Darin Ranelletti, the Deputy Director of Planning and Building at the time, received a copy of the email and understood that Zac Wald "was asking about approvals and attempts to block coal in other states" and "discretionary approvals that could be used as leverage for calling for a supplemental environmental document per what is in the email." (RT 3169:18-3172:10.) Mark Wald then forwarded the email to Mr. Ranelletti, Mr. Cole, and Mr. Monetta, asking whether any discretionary actions or approvals were coming up, including "amending the LDDA and/or agreements with CCIG." (Ex. 27.) Mr. Cole informed them that "[t]he only upcoming discretionary

actions/approvals that are scheduled" were to the benefit of the City. (*Id.*; *see also* RT 1587:6-11.)

Next, on November 6, 2015—six months after the Wald email—the City internally circulated the Cappio Memo at the direction of City Administrator Sabrina Landreth. (Ex. 61; RT 2251:14-17, 2257:3-5.) Copies were provided to the Planning and Building Department, Mayor Schaaf, and City Council. (Ex. 61, p. 2; RT 2251:18-2252:4.) The memo was not provided to Plaintiffs until it was produced in another litigation.

The Cappio Memo instructed the Planning and Building Department to notify three senior City officials (Ms. Cappio, Mr. Ranelletti, and Rachel Flynn, the Director of Planning and Building) upon receipt of any permit application from OBOT, and not to deem a permit application complete or issue a permit until after consultation with those three officials. (Ex. 61, pp. 2-3.) These requirements related *only* to OBOT's development of the ship-to-rail Terminal (RT 2252:5-7), and did not apply to the public improvements portion of the Project, private improvements by other developers, or any project outside of the Oakland Army Base. (RT 2252:8-21, 2258:2-13, 2361:10-19.) Most importantly, witnesses on both sides agreed that the Cappio Memo was unique, (RT 431:1-7, 2253:17-23, 2256:13-17, 2260:8-13, 3208:15-3210:11, 3301:13-17, 3302:8-13; Ex. 854, p. 37), and City planning staff were required to follow the Cappio Memo, but only with respect to OBOT applications (RT 1599:20-1600:1, 3300:17-22).

In addition, just two weeks before the City internally circulated the Cappio Memo, then Mayor Schaaf called Mr. McClure to discuss the Terminal, expressing her opposition to coal, and telling Mr. McClure that she would enlist New York Mayor Bloomberg's support to ensure that coal would not be handled at the ship-to-rail terminal. Mayor Schaff warned that she "would do everything in her power to make sure that no coal would come through Oakland even if it meant killing the entire project to do so." (Ex. 59A, pp.1-2; RT 1540:7-11, 1544:22-1545:5, 1546:21-1547:5, 1549:19-1550:6, 1556:17-24.)

Ms. Cappio confirmed that she periodically met with the Mayor "about the coal issue" (RT 2211:2-6), she understood that the City's political leaders, including Mayor Schaaf, were concerned about coal because of Oakland's "large environmental community" and potential voter unrest (RT 2397:1-11), and because of the potential political fallout with a large voting bloc, the project was

subjected to a heightened "level of scrutiny." (RT 2431:13-19.). Ms. Cappio also confirmed that Mayor Schaaf and other political leaders were looking for ways to impose discretionary reviews as a mechanism to preclude handling coal at the terminal. (RT 2532:18-2533:2.) It is undisputed that "Mayor Schaaf expressed strong feelings about her concerns for coal"; and Ms. Cappio did not deny that *the City would never let the Project be completed so long as coal was a potential commodity to be shipped through the Terminal*. (RT 2565:9-24.)

Even after *OBOT I*, Ms. Landreth, who reported directly to Mayor Schaaf (RT 3245:4-12), admitted that the City's position with respect to the no-coal ordinance did not change. (RT 3295:18-3296:18). In other words, the City would not permit the Terminal to go forward so long as coal was on the table.

In May 2018, Ms. Lake was informed that Plaintiffs had Commenced Construction, but the City had not fulfilled its obligations with respect to the public improvements, a precursor to turning over the rail corridor for private improvements. (Ex. 847; RT 4048:7-12, 4049:2-23, 4050:18-4051:1.) Despite this knowledge, the City sent letters to OBOT on August 20, 2018, stating that it had missed the Initial Milestone Date. (Ex. 185; Ex. 492). And while both letters acknowledged Plaintiffs' Force Majeure claims, including the initial March 11, 2016, claim (Ex. 76), the City stated it was electing to "continue a deferral of its substantive response to, including denial and/or legal challenge of, such claims." (Ex. 185-2; RT 492-2.)

Stated differently, even though City staff had informed Ms. Lake that OBOT had in fact Commenced Construction, and the City knew that it had not accepted completion of its public improvements or handed over the rail corridor to OBOT, the City made a conscious decision to ignore OBOT's Force Majeure claims in order to impose an invalid, earlier deadline and declare Plaintiffs in default. (*See* Ex. 217). Ms. Landreth also testified that she had no recollection of reviewing any of OBOT's Force Majeure claims. (RT 3261:6-3262:3, 3281:15-20.) Purporting to terminate the Ground Lease without reviewing the claims that put the Initial Milestone Date at issue is not objectively reasonable, and it reflects the City's subjective desire to stop coal at all costs. In light of all the evidence, the only reasonable conclusion is that the City's notice of default was just one more step towards its goal of achieving a ban-complaint terminal, and depriving OBOT and

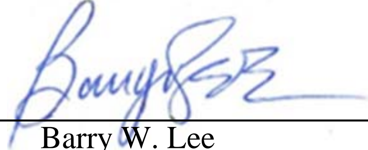
OGRE of the benefits of their agreement.

IX. DECLARATORY RELIEF

The City's Proposed SOD does not address Plaintiffs' declaratory relief claims.

Date: October 6, 2023

MANATT, PHELPS & PHILLIPS, LLP



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