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12 Attorneys for CITY OF OAKLAND

13 SUPERIOR COURT OF THE STATE OF CALIFORNIA

14 COUNTY OF ALAMEDA

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

19 Plaintiffs,

20 v.

21 CITY OF OAKLAND, a California municipal
corporation,

22 Defendant.

23 CITY OF OAKLAND

24 Counter-Plaintiff,

25 v.

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

27 Counter-Defendants.

Consolidated Case Nos. RG18930929 /
RG20062473

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

**CITY OF OAKLAND’S OBJECTIONS TO
THE COURT’S OCTOBER 27, 2023
PROPOSED STATEMENT OF DECISION**

Action Filed: December 4, 2018

Trial Date: July 10, 2023

1 Pursuant to C.C.P. §634 and Rule of Court 3.1590(g), Defendant and Counter-Plaintiff the
2 City of Oakland (“City”) submits the following objections to the Court’s October 27, 2023
3 Proposed Statement of Decision (“PSOD”) with respect to the liability phase of trial. The City
4 objects to the PSOD in its entirety on the grounds that the Court’s factual findings and legal
5 conclusions are contrary to law and not supported by substantial evidence. The PSOD is
6 noteworthy in the extent to which it contradicts and omits the contract requirements the parties
7 agreed to in the West Gateway Ground Lease, in favor of faulting the City for failing to take
8 action that the contract did not require. The conclusions reached by the Court also rest on a
9 version of the trial evidence that is frequently contrary to the record, and the PSOD largely omits
10 any discussion of the City’s uncontroverted evidence that directly disproves facts found in the
11 decision, including failing to acknowledge directly relevant admissions by OBOT. The City
12 respectfully reserves all arguments and rights on appeal that relate in whole or in part to these
13 objections whether or not errors of law or fact are specifically addressed herein.

14 In addition to these general objections, the City further objects to the PSOD on the
15 specific grounds set forth below, including the substantial omissions and ambiguities throughout.
16 For each and every objection identifying an omission, the City also objects to the extent that
17 omission renders the Court’s analysis or conclusions ambiguous.

18 **I. Improper Inferences Regarding the Parties’ Settlement Positions**

19 1. The PSOD, in two different places, makes an “inference” regarding the City’s
20 settlement negotiation strategy to support its conclusion the City was acting in bad faith,
21 notwithstanding the Court’s rulings that such issues would not be a part of this trial. PSOD 77:1-
22 2; 93:20-25; *see also* 80:20-23 (reciting OBOT’s counsel’s allegations of the same). In particular,
23 the PSOD concludes that the only “reasonable inference” from certain City actions or inactions is
24 that “the City believed it could coerce OBOT into *agreeing* to build a coal-free terminal.” PSOD
25 at 77:1-2 (emphasis added). The Court later concludes the City was attempting to gain
26 “*bargaining leverage*” to “coerce... concessions” in “bad faith.” PSOD 93:19-22 (emphasis
27 added). The City strenuously objects to the Court’s use of implications regarding potential
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1 settlement agreements in service of its liability findings, and respectfully requests that the Court,
2 consistent with its trial rulings, revise the decision to remove those statements.

3 OBOT's attempts at trial to introduce evidence with respect to these very inferences were
4 properly rejected by the Court at trial as inappropriate and inadmissible. This Court's pretrial
5 order explicitly precludes any "reference to or evidence of" material related to settlement. *See*
6 12/13/22 Order. The Court reinforced that prohibition on the first day of trial. Trial Tr. 113:5-8,
7 117:14-19. The Court then made multiple rulings during trial redacting documents that contained
8 references to settlement proposals by the parties, *e.g.* Trial Tr. 608:4-6 (redacting Ex. 217), or
9 directing witnesses and counsel to avoid settlement communications (which continued throughout
10 the relevant time frames) during testimony. *E.g.* Trial Tr. 1470:15-22; 2865:8-15; 2866:16-25;
11 2867:14-18; 2868:20-2869:4; 3299:4-12.

12 Notwithstanding these rulings, the PSOD adopts OBOT's argument that the City's actions
13 were aimed at achieving by way of agreement what it did not achieve in the federal litigation.
14 Setting aside the City's position regarding a lack of any basis for these inferences, these
15 conclusions regarding the parties' negotiating positions are not only inappropriate for all the
16 reasons given by the Court at trial, but also severely prejudicial to the City. The Court's rulings
17 during trial ensured that the City would not be required to defend or explain those positions, or
18 introduce counter-evidence regarding OBOT's positions, regardless of how extreme. As the
19 Court explained, parties should be free to take whatever positions they wish in trying to negotiate
20 a resolution, without those positions being construed as bad faith efforts to challenge or
21 undermine existing contract terms. Trial Tr. 602:13-22. That, unfortunately, is exactly how the
22 proposed decision reads. The City respectfully requests that the conclusions that the PSOD draws
23 regarding the implications of the City's actions for reaching agreement or for "bargaining
24 leverage" at 77:1-2 and 93:21-25 be removed from the final decision.

25 **II. Erroneous Conclusions Regarding OBOT's Past Due Rent**

26 2. The PSOD's erroneous conclusion that the City acted in bad faith in 2018 by
27 requesting that OBOT pay rent is directly contrary to contract terms the PSOD omits. PSOD
28

1 70:1-26. In particular, OBOT unambiguously agreed that force majeure *would not apply to rent*:
2 “the provisions of this Section 16.1 shall not apply to Tenant's obligation to pay Rent, including
3 Additional Rent.” Ex. 68-84. Having so agreed, regardless of any dispute over other force
4 majeure extensions, there can be no dispute that OBOT was obligated, unless and until this
5 contract terminates, to pay the City the rent that was due. Implied terms cannot alter express
6 terms, and it cannot be “bad faith” for the City to ask OBOT to pay the rent that was due.

7 In addition, the PSOD recognizes that the only basis for any tolling of the obligation to
8 pay rent after the Ground Lease Commencement Date is the provision that allowed up to extra
9 two years if OBOT diligently pursued the OBOT Wharf and Rail Improvements (which are *not*
10 *the same as the Minimum Project Rail Improvements* at issue with respect to the Initial Milestone,
11 *see* Ex. 68-31-32 (§6.1). The City granted that tolling, notwithstanding OBOT’s failure to
12 proceed with those improvements (and moreover, gave OBOT many additional months before
13 calling default). The PSOD incorrectly states, with no support, that the City did not reasonably
14 “consider” whether OBOT had promptly commenced and diligently pursued the improvements
15 that would trigger this tolling. PSOD 70:24-26. The uncontroverted record evidence was as of
16 March 2018 “there had been no construction of the OBOT Wharf and Rail Improvements,” and
17 the City granted OBOT two years of rent tolling *anyway* to advance the project.¹ Trial Tr.
18 3235:11-20. OBOT did not contest Ms. Lake’s testimony or offer any contrary evidence.

19 Finally, the Court appears to have relied here on the conclusion that the City’s ongoing
20 public improvement work was not entirely complete, again omitting the pertinent contract terms.
21 PSOD 70. OBOT leased the Premises subject to those ongoing improvements without any
22 contingency for its unambiguous rent obligations. Ex. 68-11, 68-17, 68-31 (§§1.1.1;1.7.3; 6.1.)
23 And, with respect to the final completion and survey of those public improvements, OBOT
24 expressly agreed that:

25 *The Parties’ rights and obligations under this Lease shall continue unabated with respect*
26 _____

27 ¹ Relatedly, the PSOD statement that “The Parties stipulated that the Commencement Date was
28 tolled” is likewise incorrect for the same reasons: OBOT failed to meet the requirements, but the
City granted the extension anyway; actions reflecting good, not bad, faith. PSOD 48:16-17.

1 to the original Premises until the Parties' agreement upon the adjustments to the Premises
2 set forth in the certification (or the final resolution or determination of any such
disagreement).

3 Ex. 68-11 (§1.1.1, emphasis added). Again, where the express terms of the contract require
4 compliance with the parties' obligations (notwithstanding whether any public improvements were
5 ongoing or not) and do *not permit OBOT to withhold rent*, no implied term can alter these
6 requirements. The City respectfully requests that the decision be revised to remove conclusions
7 of "bad faith" with respect to rent, which are contrary to the plain terms of the contract.

8 **III. Additional Specific Factual Conclusions Contrary to Record Evidence:**

9 The following errors that are also directly contradicted by uncontroverted record evidence
10 (in addition to further errors and omissions detailed in the enclosed Appendix):

11 **3. The PSOD confuses the draft TLS BOD (Ex. 37) and submitted TLS BOD (Ex.**
12 **38), incorrectly stating that coal and soda ash were referenced as commodities in the BOD**
13 **submitted to the City in 2015. PSOD 36:19-37:1.** Ex. 37 is an excerpt of the draft BOD that
14 was never provided to the City, and Ex. 38 is an excerpt of the BOD that was submitted to the
15 City in 2015. *See, e.g.,* Trial Tr. 1018:4-1021:22. There was no dispute at trial that the TLS BOD
16 that OBOT submitted to the City referenced Commodity A and Commodity B, after OBOT edited
17 the internal draft specifically to *remove* references to coal. *See* Trial Tr. 1018:4-1021:22.

18 **4. The PSOD incorrectly states that the City failed to keep OBOT apprised of the**
19 **RAA negotiations, PSOD 69:19-23, and that there was "no evidence or testimony" that Ms.**
20 **Cappio's 2016 memo stating that a discussion draft of the RAA would be ready thirteen**
21 **months later in November 2017 was a typographical error. PSOD 61:21-62:2.** The record
22 includes multiple drafts of the RAA that were exchanged with Plaintiffs, starting in *January 2017*,
23 during the negotiations in which OGRE and its counsel *participated* throughout 2017 and 2018.
24 *See* Ex. 727 (January 2017 draft shared with OBOT counsel proposing edits to Fall 2016
25 discussion draft); Ex. 719 (March 2017 RAA draft, shared with OBOT counsel); Ex. 720 (April
26 2017 RAA draft, shared with OBOT counsel); Ex. 728 (December 2017 RAA draft, shared with
27 OBOT counsel). The Court's conclusion also omits the significant March 2018 document in
28 which OBOT/OGRE's counsel summarizes the remaining issues in dispute in the RAA

1 negotiations *in which they were participating* (Ex. 734), and the 2018 email communications
2 between the City and OBOT/OGRE regarding the negotiations *in which they were participating*.
3 *E.g.*, Exs. 641, 160, 205. The alleged failure to keep OBOT apprised and statement that the Court
4 received “minimal information” about efforts to advance the RAA are directly contrary to *all*
5 evidence, and the City respectfully requests those conclusions be removed. PSOD 66:27-28.

6 **5. The PSOD incorrectly states that the Ground Lease anticipated that OBOT**
7 **“would” sublease its interest to others. PSOD 50:12.** The Ground Lease says nothing more
8 than OBOT *could* sublease its interest subject to certain circumstances and conditions (set forth in
9 Article 12), and nothing in the contract supports the statement that the City agreed that OBOT
10 *would* sublease its interests to any other entity. The Court informed the parties that it would not
11 take extrinsic evidence, *e.g.* Trial Tr. 3128:14-17, and none was offered or admitted supporting
12 the conclusion that the City agreed that OBOT in fact would not perform but would (as opposed
13 to “could”) transfer its obligations to another entity. The City respectfully requests this statement
14 be modified to accurately reflect the contract.

15 **6. The PSOD incorrectly states that “OBOT submitted all documentation and fees**
16 **required by the City for the West Burma fence” and the City never issued the permit.**
17 **PSOD 54, n.18.** First, it is undisputed that OGRE did not complete the fence permit application
18 until *January 2019*. *E.g.* Trial Tr. 2012:9-20. OGRE failed to obtain approval of its waste
19 reduction and recycling plan and finalize its permit application until January 2019. Ex. 271; Trial
20 Tr. 2023:4-2024:11. And OBOT never disputed that this plan was a basic requirement for such a
21 permit. Project Manager Morodomi acknowledged multiple times that the City was cooperating
22 with OGRE’s fence permit application and responding in a reasonable amount of time. Trial Tr.
23 2015:14-23, 2016:18-23, 10-23. Second, **the City fully approved the plans for the fence permit**
24 **in 2018 in a timely manner**, as Ms. Morodomi acknowledged. Ex. 667; Trial Tr. 2021:12-
25 2022:11. Third, the PSOD also omits the uncontroverted record evidence that this permit was an
26 example of how the Cappio memo procedures were effective at alerting Ms. Lake and facilitating
27 the processing and *approval* of OGRE’s request. Trial Tr. 3737:4-22. There is no basis in the
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1 record for the Court’s conclusion that the Cappio memo delayed this permit.

2 **7. The PSOD incorrectly states that OBOT spent \$8 million preparing the Basis of**
3 **Design. PSOD 78:22-23.** There was no dispute at trial that OBOT’s then-sublessee, TLS (*not*
4 OBOT), paid for the preparation of the Basis of Design. *See, e.g.*, Trial Tr. 1982:12-14; 1996:19-
5 1997:3; Trial Tr. 1342:24-1343:6. Indeed, the 2018 letter that the PSOD cites, Ex. 191, states that
6 “OBOT *and its potential subtenant*” have spent approximately \$8 million on the BOD. The Court
7 overreaches to conclude that *OBOT* spent this money, when the record evidence is uncontroverted
8 that it did not. The record shows that in fact OBOT spent very little, and instead *was paid*
9 millions of dollars by leveraging its interest in the West Gateway. *See, e.g.*, Exs. 194, 653, 638-9.

10 **8. The PSOD incorrectly states that the project was legally permitted to handle any**
11 **legal bulk commodity that could fit within the San Francisco Bay and fit under the Golden**
12 **Gate and Bay Bridges. PSOD 59:7-11.** There is no citation to support this statement. This
13 statement fundamentally misconstrues the contracts and the applicable laws and regulatory
14 requirements. It is not correct that the contracts must repeat all of the legal requirements that may
15 apply to the use, transportation, or storage of any given bulk commodity in order for those laws to
16 apply—those are the existing requirements under federal, state, and local law that the parties must
17 comply with, and those complex requirements may or may not have implications for particular
18 commodities. The lack of reference to specific commodities in the contracts therefore does not
19 warrant the unsupported conclusion that anything that fits under the bridges *necessarily complies*
20 *with all applicable laws and regulatory requirements for this project* unless the City informs
21 OBOT otherwise. OBOT was not “pre-approved” for all known commodities through the entire
22 regulatory process from the start – that is a fallacy invented by OBOT that this Court errs to
23 endorse. As the Ground Lease unambiguously states throughout Articles 5 and 6, OBOT *must*
24 comply with applicable laws and regulatory approvals, and that includes any of the applicable
25 requirements that could have implications for commodities that it proposes to store and ship.

26 **9. The PSOD incorrectly states that OBOT is a successor in interest to OGRE.**
27 **PSOD 1, n.2.** There is no record evidence that OBOT is a “successor in interest” to OGRE.

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1 OBOT and OGRE are separate companies, both of which are owned by CCIG (perhaps this
2 statement was meant to say that OBOT was a successor in interest to *CCIG*, which signed the
3 original LDDA and DA with the City; OGRE is not a party to either document).

4 **IV. Incorrect Statements Regarding the City’s Failure to Provide Evidence**

5 10. The PSOD frequently erroneously faults the City for failing to provide evidence and
6 the City respectfully requests the following inaccurate statements be removed from the decision:

- 7 • PSOD 46, n.13: “The City did not point to any language in the Ground Lease or provide
8 other authority to support its legal position” that termination was intended to be the
9 exclusive remedy should the City fail to complete the public improvements. The City
10 relied on many contract provisions to demonstrate that the construction deadlines were not
11 made contingent on completion of those improvements, and that as such the parties did not
12 intend for that event to be force majeure. City PSOD 21, 54; *see* Ex. 68-33 §6.1.1.1; *see*
13 *also* Ex. 68-31 §5.2.3(a); Ex. 68-117 §37.9.2(b).
- 14 • PSOD 64:1-2, 64:19-20: “The Court did not receive evidence or testimony that explained
15 why the City made its decision” to “stop[] using OBOT as the City’s agent to manage
16 public improvements[.]” The City’s October 17, 2017 letter explains that the arrangement
17 between the City and CCIG expired by its own terms after five years. Ex. 127. There was
18 no record evidence and OBOT never argued that the expiration of that agreement was
19 improper or adversely impacted the project.
- 20 • The PSOD states that the City did not provide a good faith justification for terminating the
21 Ground Lease. PSOD 76:25-27. The City’s witnesses confirmed that the City concluded,
22 *correctly*, that OBOT did not meet the unambiguous Initial Milestone deadline, which
23 triggered the express default and termination provisions. Likewise, the City submitted
24 extensive evidence regarding the basis for the conclusion that OBOT failed to cure,
25 including that OBOT’s submission reflected no work since 2015 and proposed a project
26 schedule years longer than the contract allowed, *e.g.* Exs. 750 (2015 BOD), 240 (2018
27 BOD); Trial Tr. 3748:14-22, 2026:13-2042:24, and when the City conducted a meeting to
28 hear from OBOT and its proposed subtenant, OBOT *again* left the room and did not
return, *e.g.* Trial Tr. 3946:23-3947:4; 3947:9-19.
- The PSOD states that the City did not provide sufficient feedback on the 2018 ITS BOD.
PSOD 84:14-17. The City *did* provide feedback, adhering to the contract requirements by
informing OBOT of the multiple deficiencies in the incomplete submission—and OBOT
responded to that feedback largely by denying rather than fixing the omissions. Exs. 247,
252. The contract did not require a “red line,” proposed edits, or questions: it requires the
City to approve, disapprove, or deem the drawings incomplete. Ex. 68-35 (§6.2.1).

26 **V. Objections Regarding Omissions and Ambiguities with Respect to the Court’s**

1 **Resolution of the Breach of Contract Claims, including Force Majeure**

2 11. The PSOD omits *any* discussion of the detailed contract provisions (*see* Ex. 68-34-46
3 (§6.2)), in which the parties agreed to the steps *OBOT* was required to take to move the project
4 forward; whether it satisfied those obligations; or how the City’s alleged actions and inactions
5 impacted those contract obligations.

6 12. The PSOD omits any discussion of the uncontroverted record evidence, including
7 *OBOT*’s admissions, that construction of the Bulk Terminal and at least one of the Minimum
8 Project Rail Improvements were separate mandatory contract requirements (including omitting
9 the definitions of those terms), and that *construction* of the terminal did not depend on or require
10 *construction* of any of rail (let alone *commencing* construction). The PSOD omits any analysis of
11 how the construction of the terminal or rail could be impacted by events related to the other.

12 13. The PSOD omits discussion of the substantial evidence that *OBOT* could have, but
13 chose not to, Commence Construction of at least one Minimum Project Rail Improvement by the
14 Initial Milestone Deadline. It was uncontroverted that *OGRE* began construction of track in the
15 areas of at least two of these (one on City land, one on Port land) and then, in 2018, ordered its
16 rail contractor to stop for reasons that *did not include* the City’s failure to “turn over” the land.
17 The PSOD omits discussion of evidence regarding the meaning of “completion” of the public
18 improvements and the “survey,” and the contract terms that required *OBOT* to perform with
19 respect to the required rail regardless of the certification of completion or survey.

20 14. The PSOD acknowledges the Ground Lease’s definition of “Commenced
21 Construction,” which requires that construction be active and ongoing, PSOD 48, n.14, Ex. 68-
22 129 (Article 40), but omits the admissions from *OBOT*’s witnesses that they were not engaged in
23 active and ongoing construction of rail as of the Initial Milestone deadline. Trial Tr. 3715:23-
24 3716:5. The PSOD also omits any discussion rejecting *OBOT*’s meritless arguments that
25 construction of the rail was somehow necessary for construction of the terminal, or that *OBOT*’s
26 suspended construction of track satisfied the contract.

27 15. For each and all events of Force Majeure found in the PSOD or alleged by *OBOT*, the
28 PSOD omits discussion or analysis of other contract provisions implicated by *OBOT*’s force

1 majeure claims, and whether extension of deadlines by force majeure conflicted with express
2 requirements under which OBOT already assumed risk, and all of the preconstruction
3 requirements and the Article 5 provisions, including the provision stating that OBOT could not be
4 held in default for failing to comply challenged legislation, which expressly permitted OBOT to
5 move forward with the project notwithstanding the City’s regulation of any commodity.

6 16. For each and all events of Force Majeure found in the PSOD or alleged by OBOT, the
7 PSOD omits discussion or analysis of how that event actually “hindered or delayed” OBOT’s
8 required performance of OBOT’s preconstruction requirements or the construction deadlines.

9 17. For each and all events of Force Majeure found in the PSOD or alleged by OBOT, the
10 PSOD omits discussion and analysis regarding causation with respect to the specific requirements
11 of the Initial Milestone deadline. Specifically, the PSOD omits any discussion of how each
12 alleged event was the proximate cause of OBOT’s delay in either constructing the terminal or rail
13 improvements at issue. The PSOD also omits any discussion of the significant lack of *any*
14 contemporaneous documentary evidence that any alleged event of force majeure caused any
15 delay: no internal or external communications, no documents ever telling the City that it could not
16 move forward without, for example, the City’s feedback on the BOD or a list of approved
17 commodities. Such documents do not exist. The PSOD likewise omits any discussion of the
18 substantial evidence demonstrating OBOT’s awareness of the continuing contract deadlines and
19 OBOT’s responsibility to move the project forward. The PSOD likewise omits any discussion of
20 the documents demonstrating OBOT’s delays, including but not limited to OBOT’s May 2016
21 letters to the City in which it told the City *not to review the BOD*, and that the BOD would be
22 *revised and resubmitted once a sublease was signed*.

23 18. For each and all events of Force Majeure found in the PSOD or alleged by OBOT, the
24 PSOD omits discussion or analysis of the substantial evidence demonstrating that delays in
25 meeting the Initial Milestone resulted from OBOT’s choice to perform via a preferred sublessee
26 and to wait for that sublessee. The PSOD omits discussion or analysis of the substantial evidence
27 that OBOT delayed the project to be paid more money throughout the summer of 2018, rather
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1 than submitting the project for approval after the federal decision in its favor.

2 19. The PSOD omits discussion or analysis of OBOT's choice and ability to proceed,
3 prior to the 2018 federal decision, by way of a sublease with IES that it then declared null and
4 void because of the sublease's failure to pay amounts owed; the substantial evidence that OBOT's
5 actions with respect to IES delayed the project; or how this evidence interacts with the conclusion
6 that the federal litigation explains OBOT's delays. PSOD 82:20-83:1.

7 20. The PSOD omits any discussion or analysis of OBOT's contentions and admissions
8 that as of September 2018, nothing had changed with respect to the alleged City's inactions that it
9 contended delayed the project, and OBOT moved the project forward anyway as soon as the ITS
10 sublease was signed, and how OBOT could ever prove causation in light of these facts.

11 21. The PSOD omits the substantial evidence that OBOT could have but chose not to
12 proceed with the project at any time, including OBOT's admissions that it could have self-funded
13 the project notwithstanding the City's regulation of coal. The PSOD also omits OBOT's
14 admissions that it was planning a bulk terminal that could ship any legal commodity without any
15 commitment to a particular commodity, admitting that such a terminal was possible to plan and
16 design. The PSOD also omits any discussion of the repeated misrepresentations and lies told by
17 OBOT's representatives to the City of Oakland and the public throughout this project.

18 22. For each and all events of Force Majeure found in the PSOD or alleged by OBOT, the
19 PSOD omits any discussion or analysis of evidence that each identified event of force majeure,
20 PSOD 89-90, was known or anticipated at the time of contract and thus cannot meet the definition
21 of an event of force majeure. The PSOD simply concludes that each alleged event of force
22 majeure was unforeseen and unanticipated, PSOD 89, n.33, but omits any discussion or analysis
23 of how the alleged events of force majeure were unforeseen and unanticipated (including but not
24 limited to the City's Ordinance/Resolution and OBOT's legal challenge to its applicability; the
25 feedback on the 2015 BOD; the City's position that discretionary permits and additional
26 environmental review, including of commodity-by-commodity issues, may be needed; the
27 ongoing public improvements; and the ongoing RAA negotiations), or the substantial evidence to
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1 the contrary, including the plain terms of the contract and OBOT’s admissions.

2 23. For each and all events of Force Majeure found in the PSOD or alleged by OBOT, the
3 PSOD omits any discussion or analysis of OBOT’s “skill,” “diligence” and “good faith” in
4 pursuing the specific requirements imposed by the Ground Lease to move the project forward,
5 including any preconstruction requirements. The PSOD omits any discussion of the evidence that
6 the manner in which OBOT preferred to perform, by way of delegating its obligations to fund,
7 construct and operate the terminal to a sublessee, was not required.

8 24. For each and all events of Force Majeure found in the PSOD or alleged by OBOT, the
9 PSOD omits any discussion or analysis of whether any aspect of OBOT’s timely performance
10 was rendered impossible or unduly expensive, employing instead an ambiguous lesser standard.
11 The PSOD omits any discussion or analysis of the substantial evidence and admissions that no
12 force majeure event rendered OBOT’s *timely* performance impossible or unduly expensive.

13 25. The PSOD omits any discussion or analysis of evidence connecting each and all
14 events of Force Majeure found in the PSOD or alleged by OBOT, or that the Court concluded
15 were acts of bad faith, with OBOT’s specific contractual obligations under the Ground Lease,
16 including OBOT’s preconstruction and construction obligations. The PSOD, aside from
17 reiterating the Initial Milestone requirements, does not discuss OBOT’s contractual obligations.

18 26. The PSOD omits OBOT’s significant admissions regarding its ability to finance and
19 move the project forward notwithstanding the City’s legislative actions with respect to coal or the
20 coal litigation, including the evidence regarding its decision to stay with a (coal-backed) proposed
21 sublessee rather than moving forward with another financier and commodity, such as iron ore or
22 soda ash. The PSOD also omits significant evidence and admissions that OBOT’s choices, rather
23 than City action, caused OBOT to delay the sublease, and any discussion of the parties’
24 agreement that force majeure would *not* include the inability to fund or finance the project.

25 27. The PSOD omits any discussion or analysis of how actions or inactions taken by the
26 City in its regulatory capacity, such as a lack of feedback on the BOD from the regulatory
27 approvals perspective, or the failure to identify “approved” commodities, impacted OBOT’s
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1 performance obligations under the Ground Lease, in light of the language of Article 5.

2 28. The PSOD does not address or resolve the ambiguities and omissions in its discussion
3 of OBOT's access to the rail corridor (for purposes of building track) on both City and Port land,
4 and the Court's conclusion that the City had not provided such access. Significantly, the PSOD
5 omits any discussion of the location of the various Minimum Project Rail Improvements and how
6 the location (on City or Port land) relates to evidence of access. The PSOD creates significant
7 ambiguity by incorrectly finding that all of the improvements were to be on the City's land and by
8 concluding that the City's alleged failure to "turn over" the rail corridor delayed performance.
9 The PSOD omits any discussion or analysis of the substantial counter evidence regarding
10 possession and access to both the City and Port land.

11 29. Relatedly, the PSOD omits any discussion of the uncontroverted evidence, including
12 OBOT's admissions, that the *relevant* public improvements were completed prior to OGRE's
13 construction of track, and in time for OBOT to construct the rail required for the Initial Milestone.
14 The PSOD omits the pertinent contract terms and evidence, and otherwise creates ambiguity by
15 reaching erroneous conclusions with respect to the provisions of the agreement requiring
16 certifying and surveying the final completion of all public improvements. The PSOD omits any
17 analysis connecting the final certification or survey with OBOT's possession, access, or ability to
18 construct track as required by the contract in the areas required for the Initial Milestone.

19 30. The PSOD omits any discussion of the decision, set forth in the June 2018 OGRE
20 Sublease with OBOT, to delay OGRE's construction of track for years past the Initial Milestone.

21 31. The PSOD improperly credits, without analysis, the conclusion that City did not
22 cooperate regarding the JV's obligation to vacate the "Laydown Area," despite the fact that
23 OBOT never made this argument at trial. PSOD 71:9-10. The PSOD omits any analysis
24 regarding the location of this Laydown Area, or whether or how the Laydown Area, subject to a
25 licensing agreement directly between OBOT as the landlord, and that contractor, impacted
26 construction of the rail or the terminal. The PSOD omits the fact that OBOT did not argue at trial
27 that the Laydown Area interfered with its ability to meet the Initial Milestone.

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1 32. The PSOD finds that several of the City’s alleged actions and inactions constituted
2 events of force majeure under the Ground Lease, and omits discussion of OBOT’s other specific
3 alleged claims of force majeure, including: (1) the City’s purported failure to cooperate with
4 OBOT to obtain third-party funding, including ACTC funds; (2) the City’s purported attempt to
5 require additional discretionary approvals and improperly reopen CEQA for the Project; (3) the
6 City’s purported interference with OBOT’s attempts to gain regulatory approvals, including the
7 STB petition; and (4) the City’s purported refusal to issue permits to OBOT. The PSOD does not
8 discuss or analyze these claims, conclude whether these alleged acts constitute events of force
9 majeure, or address the lack of record evidence supporting any of these claims.

10 33. The PSOD omits any discussion of whether or how the Court relied on extrinsic
11 evidence to interpret the contract, notwithstanding the Court’s statements at trial that it would not,
12 and notwithstanding the discussion of certain extrinsic evidence in the PSOD.

13 34. The PSOD omits discussion or analysis of the evidence regarding the many bulk or
14 oversized commodities other than coal, such as iron ore and soda ash, that were viable for the
15 terminal project, and the significance of the viability of those other commodities for OBOT’s
16 ability to move the project forward through the contract’s required steps.

17 35. The PSOD is ambiguous in that it omits any discussion of how the alleged acts it
18 concludes are acts of City “bad faith” or violate the implied covenant of good faith and fair
19 dealing meet the required definition of an event of force majeure. The PSOD also errs (and
20 creates ambiguity) by omitting any discussion of the fact that OBOT never made any force
21 majeure claim that the violations of the implied covenant of good faith and fair dealing were force
22 majeure events (as required by the contract’s notice provisions).

23 36. The PSOD omits any discussion and thereby creates ambiguity regarding its
24 conclusion that the 2016 Ordinance and Resolution delayed OBOT’s performance even *after* the
25 Resolution was enjoined by the federal court.

26 **VI. Objections Regarding Omissions and Ambiguities in the Court’s Discussion of the**
27 **Implied Covenant of Good Faith and Fair Dealing:**

28 37. The PSOD is ambiguous in that it fails to fully explain the basis for its conclusion that

1 the City breached the implied covenant, and which facts support that conclusion.

2 38. The PSOD creates ambiguity and error by omitting any analysis of whether the City's
3 conduct that allegedly violated the implied covenant was improper because the City acted in
4 *subjective* bad faith, or because the conduct was *objectively unreasonable*. Likewise, the PSOD
5 omits any discussion of how the evidence would support a conclusion of subjective bad faith or
6 objectively unreasonable conduct. The PSOD also omits any discussion or analysis of causation,
7 including any connection with OBOT's specific requirements and deadlines under the contract.

8 39. The PSOD omits discussion or analysis of the substantial evidence establishing that
9 the City's conduct was consistent with the City's contract obligations during both the
10 performance and cure periods and therefore objectively reasonable. The PSOD identifies no
11 discretionary act by the City under the contract that was implemented by the City in subjective
12 bad faith or objectively unreasonable manner not directly authorized by the contract. The PSOD
13 contains no analysis or discussion of how any action that the Court identifies that is addressed by
14 an express term of the agreement can violate an implied term. The PSOD omits any discussion
15 or analysis of how the acts of bad faith were not actions expressly authorized by contract. The
16 PSOD also fails to identify any specific benefit that OBOT was entitled to vis-à-vis the
17 preconstruction and construction requirements, or how the City's actions impacted any benefit
18 beyond the termination of the contract, which is expressly authorized.

19 **VII. Other Omissions and Ambiguities**

20 40. The PSOD omits any discussion or analysis of OBOT's waiver at trial of any
21 argument that the City breached the contracts, or that its performance under the Ground Lease
22 was excused, beyond the failure to extend the Ground Lease deadlines in response to events of
23 force majeure. OBOT alleged thirteen separate breaches as late as during trial, and abandoned all
24 but one. Thus, OBOT declined to pursue several arguments it made, both in its complaint and at
25 trial, that the City's alleged actions excused OBOT's performance. OBOT SOD 3-4, 19, 38.

26 41. The PSOD omits any discussion of OBOT's concession that the prior breach of the
27 DA did not breach the Ground Lease or excuse OBOT's performance by way of prior breach.

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1 42. The PSOD omits any discussion of OBOT’s failure to invoke the default provisions of
2 the Ground Lease and the express agreement to no self-help remedy.

3 43. The PSOD omits any discussion or analysis of the cure requirements or the evidence
4 that OBOT did not commence a cure that could be completed within a reasonable amount of time.

5 44. The PSOD omits any discussion of OBOT’s burden of proof (and appears at times to
6 improperly impose the burden on the City, rather than hold OBOT to its burden).

7 45. The PSOD omits any discussion, analysis, or conclusions regarding OGRE’s status as
8 a third-party beneficiary, and does not address whether the express no third-party beneficiaries
9 clause in the Ground Lease bars OGRE from suing as a third party. Ex. 68-120 (§38.4). The
10 PSOD treats OGRE’s claims as coextensive with OBOT’s without mentioning this language or
11 conducting any of the required analysis. PSOD at 1, n.2.

12 46. The PSOD omits any discussion or analysis of the specific relief OBOT requested in
13 the federal case and the res judicata implications of those abandoned remedies for the overlapping
14 relief requested here. The PSOD also omits any discussion or analysis of how or why the 2016
15 Ordinance and Resolution that was challenged in the prior federal litigation can be an actionable
16 event of force majeure in this case, and therefore the Court’s conclusory statements that res
17 judicata does not apply to the Ordinance and Resolution are ambiguous.

18 47. The PSOD creates ambiguity by making extensive factual findings regarding events
19 that occurred before the federal trial court decision on May 15, 2018, including quoting the
20 federal decision at length and incorporating its factual findings, but then concludes none of the
21 pre-May 2018 actions of the City other than the 2016 Ordinance and Resolution are actionable
22 events of force majeure or breaches of the implied covenant. The PSOD omits any discussion of
23 the relevance of those prior facts and thus contains considerable ambiguity the extent to which the
24 factual findings influence the Court’s legal conclusions.

25 48. The PSOD omits and discussion or analysis and therefore contains ambiguity with
26 respect to the impact of res judicata on the scope or availability of OBOT’s claim and the Court’s
27 conclusion that the City breached the implied covenant of good faith and fair dealing.

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Dated: November 13, 2023

Respectfully submitted,

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1 **Appendix of Additional Objections Identifying Errors, Omissions and Ambiguities**
2 **(Per Court’s October 27, 2023 Order)**

3 The City also identifies and objects to the inclusion of the following erroneous or
4 ambiguous statements in the PSOD:

5 **1. The PSOD suggests (at 35:7-11) that Megan Morodomi is or was a City**
6 **employee. PSOD 35:7-11.**

7 Ms. Morodomi worked for CCIG throughout the entire relevant time period. Trial Tr.
8 1886:2-8 (Ms. Morodomi worked for CCIG continuously from 2009 until 2022). As of 2023, she
9 now works for the Port, not the City. Trial Tr. 1885:8-9.

10 **2. The PSOD states that the Railroad R/O/W Property leased to OBOT contained**
11 **the areas in which OBOT was required to complete the Minimum Project Rail**
12 **Improvements. PSOD 49:6-7.**

13 While the Railroad R/O/W property included *some* of the areas in which OBOT was
14 required to complete the Minimum Project Rail Improvements, three of the Minimum Project Rail
15 Improvements—(i), (ii), and (iii)—are explicitly identified as being on *Port* property and thus not
16 leased to OBOT via the Ground Lease. Ex. 68-32.

17 **3. The PSOD states that “as noted in the Federal Decision, OBOT submitted the**
18 **Project’s Basis of Design (or BOD) to the City on July 15, 2015.” PSOD 36:19-20.**

19 The parties agreed that OBOT first provided the BOD to the City in September 2015, not
20 July 2015. *See* OBOT SOD 12:10 (“Plaintiffs first submitted the BOD in September 2015”); City
21 SOD at 16:1:5; 120:24. Judge Chhabria likewise concluded that the BOD was provided to the
22 City in September 2015. *See* PSOD at 7:8-9 (quoting *Oakland Bulk & Oversized Terminal, LLC*
23 *v. City of Oakland*, 321 F.Supp.3d 986, 989 (N.D. Cal. 2018)). That is also what the documentary
24 evidence at trial confirmed. *See* Ex. 51-1 (Sept. 2015: “[W]e are providing a copy of our basis of
25 design package for inclusion in your city staff report for the upcoming hearing.”). In addition,
26 this Court’s sentence cites Exhibit 37, which is a draft of the BOD Preliminary Engineering that
27 was never submitted to the City. Trial Tr. 2413:3-21.
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1 **4. The PSOD states that City correspondence “suggests OBOT did not provide the**
2 **more detailed information it promised” regarding the IES sublease, and the Court finds**
3 **that “at least through the spring of 2018, OBOT abandoned” the NDA request for the IES**
4 **sublease. PSOD 65:11-15.**

5 This statement omits that Mr. Tagami had declared the IES sublease “null and void” by
6 May 8, 2018 at the latest, but failed to inform the City of that fact (which the City continued to
7 wait for OBOT to provide the requested financial information regarding IES and continued to
8 wait for OBOT to make a project proposal for review) until September 28, 2018. Ex. 152 (email
9 from Mr. Tagami to Mr. Siegel and Mr. Rosen); Ex. 237.

10 **5. The PSOD states that “OBOT was also taking other steps to ensure that it could**
11 **construct track” after the federal decision, relying on the May 2018 STB petition. PSOD 69,**
12 **n.24.**

13 OBOT did not attempt at trial to explain OGRE’s three-year delay in submitting anything
14 to the STB after withdrawing its prior 2014 and 2015 petitions *or* demonstrate that the STB filing
15 was necessary to construct track (which it had admittedly done prior to seeking such STB
16 approval). Exs. 52, 155, 694. The PSOD also ignores the unexplained provisions of the June
17 2018 OGRE sublease delaying all of OGRE’s obligations to construct track. Ex. 162-7; City
18 PSOD at 53-54. The PSOD also omits any discussion of the fact that OGRE, when submitting
19 that May 2018 STB petition (and the verified declaration in support of Mark McClure), did not
20 tell the STB it could not build track because it did not have possession of or access to the land
21 because of the City’s delays, but represented *exactly the opposite*.

22 **6. The PSOD states that the City did not grant OBOT’s “additional requests for**
23 **NDAs and estoppel certificates.” PSOD 82, n.31.**

24 The undisputed evidence showed that the City did issue estoppel certificates for both ITS
25 and OGRE, and expressly stated that it was willing to issue the NDAs after the default was cured,
26 in accordance with the plain terms of contract. Ex. 675, 676; Ex. 226; *see also* Exs. 485, 676.

27 **7. The PSOD incorrectly states that OBOT “reiterated its seven previous force**
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1 **majeure claims against the City” when it paid rent in October 2018 “under protest.” PSOD**
2 **83:22-25.** The PSOD creates unnecessary ambiguity here: OBOT did not make “seven” prior
3 force majeure claims; the record references are to several letters simply referencing other claims.
4 Ex. 243-1.

5 **8. The PSOD states that “Ms. Landreth testified she did not recall reviewing**
6 **OBOT’s force majeure claims before she made the decision to terminate the Ground**
7 **Lease.” PSOD 85:22-24.**

8 The Court’s sentence is an incomplete and misleading characterization of Ms. Landreth’s
9 testimony. Ms. Landreth testified that while she did not “have ... as we sit here today specific
10 recollection of everything I reviewed,” she was clear that she “looked at everything that [she]
11 needed in order to make an informed decision,” including “a whole host of correspondence.” Trial
12 Tr. 3281:25-3282:3, 3284:7-13.

13 **9. The PSOD states that the 2012 Addendum to the 2002 EIR concluded that no**
14 **subsequent or supplemental EIR was required. PSOD 38:5-7.**

15 This statement inaccurately implies that the 2012 Addendum was the last word on the
16 subject of environmental reviews for the project, which is inconsistent both with the requirements
17 of CEQA and the plain language of the DA and Ground Lease. To the contrary, the Addendum
18 was intended to capture the potential environmental impacts of the project as proposed *at that*
19 *time*, and in no way foreclosed further review should a substantial change in circumstances occur,
20 as is required by CEQA. Ex. 1 at 15-16. Both the DA and the Ground Lease explicitly
21 acknowledge the possibility of subsequent CEQA review and contemplate that previously
22 conducted reviews may be insufficient to satisfy the requirements of CEQA. Ex. 7-25-26
23 (§3.5.1); Ex. 68-29 (§5.2.1).

24 **10. The PSOD incorrectly states that the City did not respond to OBOT’s**
25 **“repeated[]” claims of force majeure. PSOD 79:1-2, citing Ex. 191.** There was no dispute as
26 to the following timeline of the force majeure correspondence: At the time of the August 2018
27 letter the PSOD relies on in support of this statement, Ex. 191, OBOT had only made two claims
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1 of force majeure. The City immediately responded to OBOT’s March 2016 letter in detail on
2 March 22, 2016. PSOD 58:22-26; Ex. 76; Ex. 81. Two years later, in April 2018, OBOT re-
3 forwarded that 2016 letter (ignoring the City’s response) to the City again in response to the
4 City’s inquiry regarding overdue rent. This is both not a new force majeure claim, Ex. 148, *and*
5 *regardless the force majeure provision does not apply to rent (see Section 16.1)*. Then, on July
6 30, 2018, and August 3, 2018, OBOT made a new claim that the 2016 Ordinance was an event of
7 force majeure. Ex. 174. The City promptly acknowledged those claims on August 20, 2018. Ex.
8 185. After the Initial Milestone date passed, OBOT made a litany of additional claims for the first
9 time, and after careful consideration, the City rejected those claims when calling default on
10 September 21, 2018. There is no factual basis for the statement that the City did not respond and
11 certainly no factual basis for any conclusion that a lack of explanation from the City impacted
12 contract performance. *Nothing* in the Ground Lease requires either party to provide the other with
13 a detailed explanation of its legal position—of course the parties may do so, but they are not
14 required to in any way by this contract.

15 **11. The PSOD incorrectly implies that the City was at fault for the failure to**
16 **complete a Rail Operating Agreement (“ROA”). PSOD 78:26-28.** This error also stems from
17 the PSOD’s uncritical reliance on Ex. 191, which is a letter sent by OBOT in furtherance of its
18 litigation interests. Contrary to that letter and the PSOD, the ROA was an agreement to be
19 negotiated between OGRE and the Port of Oakland. The City was not a party to that agreement,
20 and OBOT did not refute the Port’s testimony that ROA negotiations were complicated because
21 of OGRE’s negotiating tactics and positions. Trial Tr. 3810:10-3811:15.

22 **12. The PSOD omits analysis of the relationship between the City and Port.** At
23 times, the decision implies that the City and Port are the same legal entity (see above, No. 12,
24 with respect to the ROA). They are not, as the parties to the Ground Lease acknowledged by
25 describing the Port as a “third party” to that agreement. Ex. 68-31, 68-47 (§§5.2.3, 7.4).

26 **13. The PSOD omits and thereby creates ambiguity in the discussion of the**
27 **relationship between the LDDA, DA, and Ground Lease.** PSOD 33:25-26. These are
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1 independently negotiated agreements with independent covenants. By calling these agreements a
2 “contract” the Court creates unnecessary and incorrect ambiguity.

3 **14. The PSOD incorrectly states that OBOT completed construction drawings for the**
4 **rail improvements by August 2017. PSOD 63:24-26.** The evidence references drawings for the
5 *public improvements* only, which OBOT admitted. The PSOD omits the uncontroverted evidence
6 and related testimony that the schematic drawings for the Minimum Project Rail Improvements
7 were never submitted for approval until March 2019. *E.g.*, Ex. 765. The PSOD also omits the
8 evidence that when the City alerted OBOT to the missing rail drawings in determining that the
9 2018 ITS BOD was incomplete, OBOT stated that OGRE would be responsible for the drawings
10 without reference to an earlier submission.

11 **15. The PSOD entirely omits any discussion of the testimony of Adam Rosen, ITS’s**
12 **former banker, who made several key admissions, including:**

- 13 • OBOT delayed design and construction work on the terminal because it was waiting to
14 sign a sublease, *not* because it was waiting on feedback from the City. Ex. 957 at 186:15-
15 187:2; 187:5-6; 186:8-11; 186:13.
- 16 • Mr. Tagami repeatedly told Mr. Rosen that “the City wanted the project to move forward
17 for non-coal commodities.” Ex. 957 at 200:11-16, 200:25-201:11.
- 18 • OBOT never intended to pay for the design or construction of the terminal, and always
19 intended to offload those costs onto a sublessee. Ex. 957 at 88:18-21, 88:24-89:1.
- 20 • There were a number of commodities that could have been shipped through the terminal,
21 but OBOT was focused on working with Mr. Siegel and being able to ship coal. Ex. 957
22 at 61:13-17.
- 23 • OBOT’s record of dishonesty extended to its business partners: OBOT did not inform
24 ITS’s investors that the City had called default until after Mr. Rosen facilitated the transfer
25 of a more than six million dollar take-down payment to OBOT to secure the ITS sublease.
26 Ex. 957 at 155:2-22, 157:13-22, 157:19-22, 164:4-16, 165:4-12, 166:9-15.

27 **17. The PSOD largely/entirely omits the testimony of former Planning and**
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1 **Building Department interim director Darin Ranelletti**, who credibly testified that:

- 2 • After OBOT walked out of the March 9, 2016 meeting, there was nothing to work on or
3 approve on the regulatory side until OBOT came forward with another request to restart
4 the meeting or presented a project proposal. Trial Tr. 3155:13-20, 3120:3-5. The absence
5 of this testimony is particularly notable in the PSOD’s discussion of the meeting. PSOD
6 55:7-56:4.
- 7 • The pre-application meeting process was voluntary and not required for the City, and the
8 responsibility to move a project forward through the regulatory process was entirely the
9 responsibility of a developer. Trial Tr. 3119:3-15, 3120:3-5.
- 10 • OBOT’s project proposals were likely to require permits that were designated as
11 discretionary under the Planning and Building Code such as grading permits. Trial Tr.
12 3112:8-14, 3116:24-3117:2. Further, the permits are defined as discretionary or
13 ministerial by law, and neither CEQA nor zoning has any effect on that designation. Trial
14 Tr. 3116:11-16, 3117:8-18, 3118:4-10. The PSOD’s discussion of discretionary review
15 for building permits, “administrative” review, and commodity-by-commodity review
16 acknowledges none of this evidence. PSOD 55:16-19. Likewise, there is no evidence that
17 the City ever said “building permits” would be subject to discretionary review.
- 18 • CEQA review is always required for a new project proposal. Trial Tr. 3124:8-14.
19 Accordingly, the PSOD’s statement that the City indicated it might “re-open” CEQA is
20 ambiguous in that it appears to rely on conclusions contrary to the law and the facts.
21 PSOD 55:16-19.

22 **16. The PSOD fails to discuss any of the events regarding OBOT’s business**
23 **arrangements with its proposed sublessee starting in 2014:** its preferred sublessee’s financial
24 difficulties and delays in entering into a sublease (the “Siegel Shuffle”); OBOT’s admissions of
25 its choice to stay with that sublessee and delay the project; or of the events that took place in the
26 summer of 2018, after the federal decision, during which OBOT took no steps to move the project
27 forward while negotiating payments in advance of signing a sublease.

1 **17. The PSOD fails to discuss or explain the basis for the conclusion that the**
2 **verbatim adoption of the federal court’s factual conclusions and analysis is relevant to the**
3 **contract claims here at issue, beyond res judicata. PSOD 4:19-23.** In particular, this creates a
4 significant ambiguity regarding whether the Court is faulting the City for not re-litigating this
5 evidence at trial.

6 **18. The PSOD states that the 2015 BOD given to the City by OBOT provided an**
7 **“extensive design framework” for the Project. PSOD 37:6-7.** This statement omits, and is
8 directly contradicted by, OBOT’s letters to the City which stated that “*there is no existing design*
9 *for the terminal*” for review, Ex. 589, and that “the design for this purpose-built facility has not
10 been finalized or confirmed.” Ex. 598; *see also* Ex. 750-7.

11 **19. The PSOD states that “an iterative, collaborative process” was required to**
12 **advance the project. PSOD 37:12-13.** Neither the Ground Lease nor the regulatory process
13 require a process with the requirements the Court appears to impose in this decision, and OBOT
14 did not identify the basis for requesting such a requirement because one does not exist.

15 **20. The PSOD’s discussion of Article 5 of the Ground Lease, PSOD 40:9-21, omits**
16 **any discussion of the clause stating that OBOT “shall not be in default . . . for failure to**
17 **comply with any Laws or insurance requirements if [OBOT] is contesting the applicability**
18 **of such Laws” to it. Ex. 58-28 (§5.1).** This provision undermines any conclusion that the
19 contract entitled OBOT to delay proceeding with the project until the federal lawsuit was
20 resolved.

21 **21. The PSOD’s discussion of the Cappio Memo omits any discussion of testimony**
22 **by Ms. Lake establishing that the principles of the memo were applied to all projects on the**
23 **Oakland Army Base, because it reflected “good practice.” PSOD 51-53. See Trial Tr.**
24 **3732:18-25.**

25 **22. The PSOD states that “the City stated it understood Mr. Tagami agreed to**
26 **receive the regulations in either electronic or paper format.” PSOD 58:19-21.** This is true,
27 but omits the uncontroverted documentary evidence that Mr. Tagami *agreed* to receive the
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1 regulations in electronic format. Exs. 84-1-2, 688; Trial Tr. 688:19-690:14, 692:7-693:4, 693:25-
2 694:10, 695:10-13.

3 **23. The PSOD’s discussion of the DA compliance reports, e.g., PSOD 62:11-26, omits**
4 **any explanation of the relevance of this discussion to the Ground Lease, which creates**
5 **ambiguity.** This particularly the case as OBOT admitted in its letters that the City was not in
6 default, which the PSOD omits entirely.

7 **24. The PSOD states that the City did not fully cooperate with OBOT after the**
8 **federal decision, but does not identify what that cooperation would entail, particularly since**
9 **OBOT had yet to submit schematic drawings for review under the Ground Lease. PSOD**
10 **67:8-10.** Likewise, the PSOD does not identify what steps pursuant to the contract at issue the
11 City was required to take to move the project forward at this time given the absence of any project
12 proposal. PSOD 68:5-11.

13 **25. The PSOD misconstrues Ex. 847. PSOD 67:11-21.** In that email, City staff
14 indicated that both the relevant public improvements were *complete* in areas where OBOT was
15 required to construct rail, and that OBOT had begun constructing rail in the area, but *not* on one
16 of the minimum project rail improvements. Ex. 847-1-2.

17 **26. The PSOD omits evidence that the City intended to convey to the State that**
18 **OBOT delayed the project through litigation, not that City’s actions that OBOT’s litigation**
19 **challenged delayed the project. PSOD 72:1-15.**

20 **27. The PSOD is ambiguous in that it finds the absence of a “substantive response”**
21 **by the City to OBOT’s force majeure claim breached the covenant of good faith and fair**
22 **dealing, despite this not being required by the terms of the contract. PSOD 74:9-12.** The
23 implied covenant cannot add or alter the existing contract terms, and the PSOD does not identify
24 an existing contract term or benefit that was violated.

25 **28. The PSOD finds that it was “impossible” for OBOT to submit relevant accurate**
26 **or relevant schematic drawings to the City unless OBOT knew which commodities could be**
27 **transported. PSOD 78:1-8.** Among other problems with this conclusion, the PSOD omits that
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1 OBOT specifically informed the City that it intended to design a multi-commodity terminal
2 designed to handle any commodity, and is ambiguous in that the PSOD also appears to credit
3 OBOT for the submission of the both 2015 TLS BOD and 2018 ITS BOD—which OBOT was
4 able to do without any confirmation of specific commodities.

5 **29. The PSOD describes the City’s conclusion that OBOT’s failure to meet the**
6 **Initial Milestone deadline as “inaccurate” and demonstrating a lack of bad faith, but omits**
7 **any evidence or discussion of actual bad faith as opposed to implementing the Ground Lease**
8 **as written and a good faith legal dispute as to the basis for enforcing the contract terms.**
9 **PSOD 78:6-8.**

10 **30. The PSOD finds the City’s choice to not provide a substantive response to**
11 **OBOT’s force majeure claims (which were made after OBOT was found to be in breach) is**
12 **evidence of bad faith, but omits any discussion of the basis for requiring the City to provide**
13 **such a response. PSOD 80:15-17.**

14 **31. The PSOD omits evidence that the City continued to work with OBOT in the fall**
15 **of 2018 through the cure period to understand OBOT’s proposal, including by attending a**
16 **meeting with ITS and Mr. Tagami—a meeting which Mr. Tagami left early, again, which**
17 **OBOT did not deny. PSOD 81:10-82:6.**

18 **32. The PSOD omits evidence, including OBOT’s own statements to the City and**
19 **admissions at trial, that OBOT delayed advancing the project until it could obtain a**
20 **sublessee who would finance construction was the cause of the delay in OBOT’s submission**
21 **of the 2018 ITS BOD until late September 2018. PSOD 82:8-13.**

22 **33. The PSOD creates ambiguity by stating that the City “warned OBOT it was**
23 **violating a key provision of the lease by not submitting schematic drawings.” PSOD 83:1-9.**
24 The City was not telling OBOT that it was currently in violation of a key provision of the lease,
25 but that the failure to date to submit the schematic drawings placed OBOT at significant risk of
26 being unable to meet the Initial Milestone deadline, and unambiguous mandatory requirement.

27 **34. The PSOD states that the Ground Lease did not require OBOT to spend money**
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1 to advance the project, and omits any discussion of the contractual provision in the Ground
2 Lease requiring OBOT to “bear and pay all costs and expenses of construction of the Initial
3 Improvements and all other Improvements. PSOD 83:10-19; Ex. 68-38 (§6.2.9).

4 35. The PSOD omits any discussion or analysis of the basis for its conclusion that the
5 coal ordinance constituted an event of force majeure before or after May 2018. PSOD 89:7-
6 9, 90:14-15.

7 36. The PSOD concludes that OBOT “timely” raised its force majeure claims, but
8 omits any discussion of the basis for that conclusion with respect to each of OBOT’s claims.
9 PSOD 90:16-17.

10 37. The PSOD omits OBOT’s admission at trial that the February 11, 2016 letter
11 sent by Ms. Landreth prior to the date of the Ground Lease referenced commodity by
12 commodity review, and OBOT’s admissions that it was aware prior to the Ground Lease
13 that the City was going to consider additional environmental review and the project might
14 require discretionary permits. PSOD 41, n.10.

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