UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

In re: INSIGHT TERMINAL SOLUTIONS, LLC, *et al.*, Debtors.	Case No. 3:25-cv-00023 Judge Benjamin Beaton
INSIGHT TERMINAL SOLUTIONS, LLC, as the Reorganized Debtor, Plaintiff, v. CITY OF OAKLAND, Defendant.	

DEFENDANT CITY OF OAKLAND'S RULE 9033 OBJECTIONS TO AND/OR MOTION FOR RECONSIDERATION OF BANKRUPTCY COURT PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW RESOLVING CROSS-MOTIONS FOR SUMMARY JUDGMENT, AND RENEWED MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Plaintiff Insight Terminal Solutions ("ITS") has taken advantage of its bankruptcy to bring state law business tort claims against Defendant City of Oakland (the "City") in the wrong court, years too late, in violation of the requirements of the California Government Claims Act, and despite prior state court litigation funded by ITS that fully precludes this attempted second bite at the apple. Even if these threshold issues were not each dispositive, California law does not permit ITS to convert what is essentially a contract dispute into a tort, and, on the properly admissible evidentiary record, ITS failed to establish basic elements of its claims. The Bankruptcy Court's proposed decision allowed ITS to run the table on nearly every legal and evidentiary issue, notwithstanding binding law to the contrary, and in so doing committed a litany of errors. With the law and facts properly construed, partial summary judgment to ITS was erroneous and summary judgment must be granted to the City, for many independent reasons.

This Court has withdrawn the bankruptcy reference, and these dispositive issues are all squarely before this Court to now resolve *de novo*. Thus, whether the Court construes this brief as an objection to the Bankruptcy Court's proposed findings of fact and conclusions of law pursuant to Federal Rule of Bankruptcy Procedure 9033 and 28 U.S.C. §157(c), a motion for reconsideration, a renewed motion for summary judgment, or all three, the City respectfully requests this Court grant judgment to the City.

FACTUAL RECORD AND PROCEDURAL BACKGROUND

Plaintiff ITS was established in 2018 by former Kentucky resident John Siegel to sublease land from an Oakland, California-based company, Oakland Bulk and Oversized Terminal LLC ("OBOT"), and work alongside OBOT to develop a bulk commodity shipping

terminal on City-owned land within the former Oakland Army Base. Adv. ECF 118-1, Ex. D.[1] Two years prior, in February 2016, the City and OBOT signed the West Gateway Ground Lease ("Ground Lease"), which transferred possession of the land to OBOT, set forth the required uses, and obligated OBOT to construct and operate the commodity terminal. *Id*., Ex. A. OBOT agreed to commence construction by August 14, 2018, or face early contract termination. *Id*., Ex. A §§1.7.3, 6.1.1.1. It failed to meet that deadline, claiming *force majeure*, and by 2018 the parties were embroiled in a contract dispute. *Id*. ¶¶7, 10, Ex. B. at 1. On September 21, 2018, the City issued a default that gave OBOT 30 days to cure. *Id*. ¶9, Ex. B.

After the default notice, on September 24, 2018, OBOT and ITS entered into the ITS sublease ("Sublease"), under which ITS would assume OBOT's responsibilities to develop the terminal. *Id.*, Ex. D §1.7.2. The City is not a party to the Sublease, but, per the Ground Lease, the Sublease assumes the Ground Lease terms. *Id*., Ex. D §§37.9.1-9.2.

It is undisputed that the City first learned of ITS and the Sublease at the same time, on September 28, 2018. *Id.* ¶¶11, 17, 27, Ex. C at 1. The Notice of Sublease and the Sublease itself did not provide the City with material information regarding ITS's finances or business plans. *Id*., Ex. C, D. On that same day, OBOT also submitted accompanying requests for a non-disturbance agreement ("NDA") with ITS (*id.*, Ex. E), an estoppel certificate (*id*., Ex. F), and a terminal design plan for landlord approval (*id*., Ex. G). Because the Ground Lease prohibited

[1] Citations are to the admissible evidence submitted in support of the parties' cross-motions, not to the Bankruptcy Court's findings, which are largely predicated on inadmissible evidence including the improperly incorporated state court decisions. *See infra*, Sections VI, V. To the extent the Court's findings were drawn from ITS's "Separate Statement of Undisputed Facts" (ECF 116-30), that document contains extensive misstatements of evidence. *See* Adv. ECF 123-3 (City Response, identifying errors and inadmissible evidence). The Rule 9033(b)(2) record for purposes of these Objections consists of the Adversary Proceeding record, cited here as "Adv. ECF," and the main bankruptcy filings cited herein as "Bk. ECF." Citations to this Court's docket are designated "ECF."

subleases during the default/cure period (*id*. ¶11, Ex. A §§12.1.4.6, 12.5.1(v)), the City did not approve or recognize the Sublease or enter the NDA. *Id*. ¶¶11, 20, Ex. A §12.1.4.6, Ex. H. The City did issue the estoppel and responded to OBOT's design documents. *Id*., Exs. I, J.

The cure period expired on October 22, 2018, and the City exercised its discretion to determine that OBOT had not cured by commencing construction. *Id*., Ex. K. On October 23, 2018, the City noticed the final default and invoked the termination provision of the Ground Lease. *Id*., Ex. K; *see id*., Ex. A §18.1.7. ITS admits the City was not directing its actions at ITS, but acted "because [it] believed the Ground Lease was in default." Adv. ECF 116-30 at 10.

In December 2018, OBOT sued the City in California state court for breach of contract and business tort claims. Adv. ECF 118-1, Ex. L ¶¶159, 171; *Oakland Bulk & Oversized Terminal, LLC v. City of Oakland*, Cal. Super. Ct. Case No. RG18930929 ("*OBOT II*").[2] Another of OBOT's sublessees, Oakland Global Rail Enterprise ("OGRE"), joined as a plaintiff. Adv. ECF 118-1, Ex. L ¶13. OBOT and OGRE both pled business tort claims, including alleged interference with the ITS Sublease. *Id*., Ex. L ¶¶104-226.

Prior to filing *OBOT II*, OBOT and ITS entered into a common interest agreement, documenting a shared legal interest in the outcome of litigation against the City. Adv. ECF 118-2, Ex. B, at 32:19-34:1, Ex. C. ITS chose not to join that litigation, but instead funded half of the litigation costs. *Id.*, Ex. B at 36:2-37:25; Adv. ECF 118-1, Ex. D §2.10.1; Ex. L ¶¶12-13; Bk. ECF 304, 336. OBOT shared a draft complaint with then-ITS principal John Siegel, and ITS

[2] OBOT had sued the City in 2016 in the Northern District of California regarding this same project, alleging legislation enacted by the City breached various development contracts. *See Oakland Bulk & Oversized Terminal, LLC v. City of Oakland*, 321 F.Supp.3d 986 (N.D. Cal. 2018), *aff'd*, 960 F.3d 603 (9th Cir. 2020) ("*OBOT I*"). ITS agreed in the Sublease to fund 50% of that ongoing litigation. Adv. ECF 118-2, Ex. B at 36:2-37:25; Adv. ECF 118-1, Ex. D §2.10.1; *see also id.* §§13.1-13.2; Bk. ECF 304, 336.

lender Autumn Wind Lending ("AWL"), for review and feedback, which OBOT incorporated before filing. Adv. ECF 118-2, Exs. D, E; Bk. ECF 61-1 ¶11. ITS was aware in 2018 of all of the City's actions alleged to breach the Ground Lease and constitute torts in *OBOT II*.

In 2019, the California court dismissed the business tort claims against the City on multiple grounds, including failure to state a claim. *OBOT II*, 2019 WL 10984289, at *6-8 (May 16, 2019). OBOT and OGRE did not appeal that ruling. *OBOT II*, Cal. Super. Ct. Case No. RG18930929. The City filed breach of contract claims against OBOT, and the *OBOT II* litigation continued in the California state courts on those contract claims from 2018 through 2025.

While that litigation was pending, in 2019, ITS defaulted on a loan from Los Angeles-based AWL and fell behind in payments to OBOT. Adv. ECF 118-2, Ex. B at 36:6-19, 102:9-11. ITS filed a voluntary chapter 11 petition in the Bankruptcy Court on July 17, 2019 ("Bankruptcy Case"). Bk. ECF 1. ITS did not list the City or any claims against it anywhere on its bankruptcy petition or schedules. *Id.*; Bk. ECF 63. Instead, ITS blamed AWL and OBOT for causing the bankruptcy and explained that ITS continued to work with the City. Bk. ECF 61, 61-1.

AWL actively participated in the bankruptcy, initially moving to dismiss, and eventually competing with Siegel for control of ITS, including by submitting a competing plan of reorganization. Bk. ECF 195, 217. Neither of the competing plans disclosed potential claims against the City. *Id.*; Bk. ECF 245. The Bankruptcy Court confirmed AWL's plan (the "Plan") on November 3, 2020. Bk. ECF 379.

Through 2023, ITS continued to fund and participate in the *OBOT II* litigation but never joined that case. Adv. ECF 118-1 ¶¶29-30; Adv. ECF 118-2, Ex. B at 35:5-37:17. In late 2023, the California trial court ruled that OBOT had failed to meet the contract construction deadlines, but that the City had breached the contract by failing to recognize *force majeure* events and

therefore also violated the implied covenant of good faith. *OBOT II*, 2023 WL 11567068 (Nov. 22, 2023). On December 22, 2023, the court rejected OBOT's claimed contract damages derived from projected project profits of nearly $1 billion (arising entirely from sublease revenue) as speculative and granted zero dollars in future lost profits. *OBOT II*, 2023 WL 11567070 (Dec. 22, 2023). OBOT elected a specific performance remedy extending the contract deadline, and judgment was entered on January 23, 2024. *OBOT II*, 2024 WL 2107062 (Jan. 23, 2024).[3]

On March 11, 2024, ITS filed this Adversary Proceeding, alleging interference with the ITS Sublease and other economic relationships, arising from the same City actions at issue in *OBOT II*. Adv. ECF 1. ITS claimed a billion dollars in damages, predicated on the projected lost future terminal profits that failed to convince the *OBOT II* court. *Id.* at 1, 20. The City moved to dismiss for lack of jurisdiction and failure to state a claim. Adv. ECF 25. The Bankruptcy Court denied that motion, adopting ITS's proposed decision verbatim. Adv. ECF 55, 56.

The Bankruptcy Court ordered a short 120-day period for fact and expert discovery, denying the City's motions to compel and to extend discovery, Adv. ECF 77; 98; 107, while allowing ITS to use Bankruptcy Rule 2004 for improper extra-litigation discovery, Bk. ECF 523. On July 28, 2025, the parties filed cross motions for summary judgment, Adv. ECF 116, 118, and ITS filed a related motion for judicial notice of the *OBOT II* decisions, Adv. ECF 117.

On September 12, 2025, this Court denied the City's motion to withdraw the bankruptcy reference without prejudice to refiling after the ruling on the pending motions. ECF 1, 31.

On October 27, 2025, the Bankruptcy Court issued "Findings of Fact and Conclusions of

[3] The judgment and remedy were stayed pending appeal under California law, as confirmed by court order. ECF 47-1 (*OBOT II* July 30, 2024 order). In June 2025, the intermediate state appellate court affirmed the Superior Court's ruling. *Oakland Bulk & Oversized Terminal, LLC v. City of Oakland*, 112 Cal.App.5th 519 (2025). The case was finally resolved when the California Supreme Court denied review. Cal. S.Ct. Case No. S292313 (Cal. Sept. 17, 2025).

Law … in accordance with Rule 9033," in which it recommended denying the City's motion, granting ITS's motion except as to the precise amount of damages, and granting ITS's motion for judicial notice. Adv. ECF 142 ("Order"). That decision again adopted ITS's proposed decision (Adv. ECF 139), almost word for word. *Id*. The Order included a "Judgment." *Id*. After the City requested a status conference with this Court to address a renewed motion to withdraw the reference, on October 30, the Bankruptcy Court *sua sponte* modified the Order to instruct that the Judgment was "final," and to remove the reference to Rule 9033 as a "scrivener's error." Adv. ECF 146. The City promptly renewed its request to withdraw the reference, which this Court granted on October 31, 2025. ECF 36. On November 21, this Court granted the City's further motion to vacate the improper "Judgment" entered by the Bankruptcy Court. ECF 49.

DISCUSSION

I. Legal Standards

A federal court's "subject-matter jurisdiction can be challenged at any time." *In re Federated Dep't Stores, Inc.*, 328 F.3d 829, 833 (6th Cir. 2003) (citation omitted); Fed. R. Civ. P. 12(h)(3). Any review of a bankruptcy court's ruling on jurisdiction following withdrawal of the reference is also *de novo*. *E.g.*, *In re Ames Dep't Stores Inc.*, 512 B.R. 736, 743 (S.D.N.Y. 2014) (withdrawing reference but ordering bankruptcy court to issue proposed findings/ conclusions on jurisdictional issue, which would be reviewed *de novo*).

This Court's review of the parties' cross-motions for summary judgment is also *de novo*. 28 U.S.C. § 157(c)(1).[4] Such review remains *de novo* where, as here, the reference has been

[4] As explained *infra* at Section II, federal courts lack subject matter jurisdiction here. ITS and the Bankruptcy Court predicated jurisdiction as "related to" the underlying bankruptcy. Adv. ECF 55 at 9-10; 56 at 9-10; 139 at 1, 19-20; Order at 19-20. As such, ITS's claims are necessarily non-core claims pursuant to 28 U.S.C. §157, and so the Bankruptcy Court's summary judgment order

withdrawn after a bankruptcy court issues a proposed decision reviewable pursuant to Rule 9033(c)(1). *See In re Ames,* 512 B.R. at 743. The standard of review is functionally the same for a motion for reconsideration or a renewed motion for summary judgment; the court may still "reconsider or reverse" the prior interlocutory ruling "for any reason." *Am. C.L. Union of Ky. v. McCreary Cnty.*, 607 F.3d 439, 450 (6th Cir. 2010) (motion for reconsideration); *see also Cameron v. Ohio*, 344 F.App'x 115, 118 (6th Cir. 2009) (renewed motion).

Where there is "no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law, a court must grant summary judgment." *Bambach v. Moegle*, 92 F.4th 615, 622 (6th Cir. 2024). "The respondent cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must present affirmative evidence in order to defeat a properly supported motion for summary judgment." *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479 (6th Cir. 1989) (quotation omitted). As the party with the burden of persuasion at trial, ITS's burden in moving for judgment is "higher in that it must show that the record contains evidence satisfying the burden of persuasion and that the evidence is so powerful that no reasonable jury would be free to disbelieve it." *Surles v. Andison*, 678 F.3d 452, 455-56 (6th Cir. 2012) (cleaned up); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The parties' burdens require admissible evidence. Fed. R. Civ. P. 56(c); *Moore v. Holbrook*, 2 F.3d 697, 699 (6th Cir. 1993). Such evidence cannot be submitted for the first time on reply. *Travelers Prop. Cas. Co. of Am. v. Hillerich & Bradsby Co.*, 598 F.3d 257, 275 (6th Cir. 2010); *Seay v. Tenn. Valley Auth.*, 339 F.3d 454, 481-82 (6th Cir. 2003).

II. Federal Courts Lack Subject Matter Jurisdiction Over the Adversary Proceeding

The tort claims brought by ITS against the City neither arise in or under federal

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was subject to the review procedures in 28 U.S.C. § 157(c)(1) and Rule 9033. The standard of review does not become deferential because this Court has withdrawn the reference.

bankruptcy law, nor, as the Bankruptcy Court incorrectly held, are they "related to" the bankruptcy. Order at 19-25. The Bankruptcy Court erred by finding federal jurisdiction extended to business tort claims brought six years after the pertinent facts transpired, four years post-confirmation, and solely for reorganized ITS's own benefit. While the Sixth Circuit has not adopted a definitive standard for narrowed post-confirmation "related to" jurisdiction, under either of the frameworks discussed below—the "close nexus" test laid out by the Third Circuit or a more factor-driven analysis—this case does not belong in federal court.

A. Related to Jurisdiction Narrows Post-Confirmation

ITS's tort claims do not arise in or under federal bankruptcy law, and, as both ITS and the Bankruptcy Court recognized, the only possible avenue for federal jurisdiction is being "related to" the bankruptcy. 28 U.S.C. §1334(b); Adv. ECF 55 at 9-10; Adv. ECF 56 at 9; Adv. ECF 139 at 1, 19-20; Order at 20. Yet this "related to" jurisdiction "cannot be limitless." *Celotex Corp. v. Edwards*, 514 U.S. 300, 308 n.6 (1995). The Bankruptcy Court correctly stated the general Sixth Circuit standard for "related to" jurisdiction: whether the outcome of the proceeding "could conceivably have any effect on the estate being administered in bankruptcy." Order at 20 (citing *Mich. Employment Security Comm. v. Wolverine Radio Co., Inc. (In re Wolverine Radio Co.)*, 930 F.2d 1132, 1142 (6th Cir. 1991) (quoting *Pacor, Inc. v. Higgins (In re Pacor)*, 743 F.2d 984 (3d Cir. 1984)). But it erred by failing to acknowledge that "related to" jurisdiction is "sharply reduced" after plan confirmation, because by that time the purpose of a bankruptcy case has been effectuated. *In re Ventilex USA, Inc.*, 509 B.R. 140, 143 (Bankr. S.D. Ohio 2014) (citing cases); *see also Thickstun Bros. Equip. Co. v. Encompass Serv. Corp. (In re Thickstun Bros. Equip. Co.)*, 344 B.R. 515, 521 (B.A.P. 6th Cir. 2006) (recognizing that the *Pacor* test is "difficult to apply" post-confirmation, and "other circuit and bankruptcy courts have modified or limited the [*Pacor*] test when the proceeding arises post-confirmation.").

The Sixth Circuit has not clearly defined the contours of this diminished post-confirmation jurisdiction. The Third Circuit's test, which has been cited with approval by the Sixth Circuit Bankruptcy Appellate Panel, other circuit courts, and other courts within the Sixth Circuit, requires a "close nexus" between the claims and "the bankruptcy plan or proceeding." *Thickstun Bros. Equip. Co.*, 344 B.R. at 521 (citing *Binder v. Price Waterhouse & Co. (In re Resorts Int'l, Inc.)*, 372 F.3d 154, 166-67 (3d. Cir. 2004)).[5] Yet, noting that the Sixth Circuit has not expressly adopted the "close nexus" test, the Eastern District of Kentucky Bankruptcy Court recently compiled factors used by courts to assess post-confirmation jurisdiction:

> (1) whether the parties in the proceeding participated in the debtor's bankruptcy case, (2) whether the chapter 11 debtor reorganized its affairs or liquidated through bankruptcy, (3) whether the claims pertain to activity in or leading to the bankruptcy case, (4) whether a close nexus exists between the debtor's plan or bankruptcy case and the proceeding; and (5) whether and how the confirmed plan addresses or references the claims asserted in the proceeding.

Tew v. ED&F Man Cap. Mkts., Ltd. (In re Tew), 2023 WL 7981684, at *9 (Bankr. E.D. Ky. Nov. 16, 2023). What both of these frameworks assess, in overlapping ways, is the closeness of the relationship between the claims and the bankruptcy case. Here, the business tort claims bear no relationship to a bankruptcy during which they did not arise and in which they were not disclosed. The fact that the Sublease was assumed through the Plan as a business asset of

[5] The Fifth Circuit very recently emphasized the limited nature of post-confirmation jurisdiction and the requirement that the "matters pertain[] to the implementation or execution of the plan." *Carnero G&P, L.L.C. v. SN EF Maverick, L.L.C. (In re Sanchez Energy Corp.)*, 2025 WL 3166819, at *5 (5th Cir. Nov. 13, 2025) ("A number of subsequent cases have explored the scope of post-confirmation jurisdiction, because reorganized debtors perceive advantage in returning to the bankruptcy court's protective womb. When jurisdiction has been found lacking, it was often because . . . the relationship of the dispute to the preceding bankruptcy case was tenuous or non-existent."); *see also Valley Historic Ltd. P'ship v. Bank of N.Y.*, 486 F.3d 831, 837 (4th Cir. 2007); *Montana v. Goldin (In re Pegasus Gold Corp.)*, 394 F.3d 1189, 1195 (9th Cir. 2005); *In re Ventilex USA, Inc.*, 509 B.R. 140, 143 (Bankr. S.D. Ohio 2014); *Morris v. Zelch (In re Reg'l Diagnostics, LLC)*, 372 B.R. 3, 22 (Bankr. N.D. Ohio 2007).

reorganized ITS provides the context for the Adversary Proceeding, but that alone is insufficient to confer jurisdiction. The Bankruptcy Court erred by concluding otherwise.

B. There is No "Close Nexus" Between the Claims and the Bankruptcy

A "close nexus" exists where claims involve "[m]atters that affect the interpretation, implementation, consummation, execution, or administration of the confirmed plan." *Thickstun Bros. Equip. Co.*, 344 B.R. at 521 (quoting *Resorts Int'l*, 372 F.3d at 170). The tort claims here involve none of these issues.

First, the Plan was deemed substantially consummated on the Effective Date (Bk. ECF 195, Art. VIII(J)), and therefore has been implemented. Resolving these tort claims also does not require interpretation of the Plan. Neither the Bankruptcy Court nor the parties reference the Plan in any substantive arguments. Adv. ECF 116, 118, 142; *see also infra* at Sections III-V; *Tew*, 2023 WL 7981684, at *11 (rejecting "related to" jurisdiction where claims do not "require a reviewing court to interpret Debtors' Plan or to enforce any of its provisions"); *Grimes v. Graue (In re Haws)*, 158 B.R. 965, 971 (Bankr. S.D. Tex. 1993) (same).

Finally, the tort claims do not have any impact on Plan administration or execution. Plan confirmation allowed ITS to emerge from bankruptcy and carry on as a business without Bankruptcy Court supervision. Bk. ECF 195, 379. In so doing, ITS took the risk and rewards of attempting to comply with and profit from the Sublease, with full knowledge of the City's ongoing contract disputes with OBOT and the City's 2018 actions on which that dispute was based. *Supra* at 3-4. Nowhere does the Plan require or guarantee that, with assumption of the Sublease, ITS would succeed as a business notwithstanding preexisting disputes, nor could it.

The Bankruptcy Court's conclusion that these claims "are relevant to the execution of the Plan and Confirmation Order," Order at 21, was unexplained and lacks any basis. The Court appears to have concluded that overlapping subject matter and context is sufficient, but that is

not the "close nexus" between the claims and the bankruptcy required to satisfy this test. *See, e.g., Resorts Int'l*, 372 F.3d at 168 (Trustee's professional negligence and breach of contract claims arose under state law; "[t]hough the Plan and Trust Agreement provide the context of the case, this bare factual nexus is insufficient to confer bankruptcy jurisdiction."). In examining whether a close nexus existed under directly analogous circumstances, the Bankruptcy Court for the Eastern District of Tennessee found that, "[u]nder any construct of post confirmation jurisdiction embraced by the courts, this adversary proceeding lies beyond bankruptcy court subject matter jurisdiction." *Equip. Finders, Inc. v. Fireman's Fund Ins. Co. (In re Equip. Finders, Inc.)*, 473 B.R. 720, 734 (Bankr. M.D. Tenn. 2012).[6] This Court should do the same.

C. The City Prevails Under the *Tew* Factor Test As Well

If this Court applies the *Tew* factors, the City also prevails. 2023 WL 7981684, at *9.

1. The City did not participate in the bankruptcy with respect to the tort claims—and could not have. The City objected to confirmation of either of the competing chapter 11 plans because both were predicated on the validity of the Sublease. *See* Bk. ECF 276. As set forth below, the Plan did not mention the City at all, let alone any potential tort claims against it, so the City had no cause to address them. The City did not otherwise participate in the bankruptcy.

2. ITS is a reorganized debtor acting for its own benefit. ITS reorganized through the Plan, emerging from bankruptcy to "make a go" of its business, which entailed complying with and attempting to profit from the Sublease; as a result, its actions "redound primarily to that

[6] "[S]ix months after confirmation, a reorganized debtor sues two noncreditors on state law and contract claims. These disputes arose prior to confirmation, but are nowhere referenced in either the Amended Plan or Disclosure Statement . . . The financial projections submitted with the Amended Plan show no dependence and make no provision for insurance proceeds . . . The Amended Plan vests all estate property in the Reorganized Debtor upon confirmation. After confirmation no bankruptcy estate existed nor was any trust or fund established to be administered for the benefit of [debtor's] creditors . . . This action does not ask the bankruptcy court to interpret, construe, enforce or implement [debtor's] Amended Plan." *Id.*

end." *Tew*, 2023 WL 7981684, at *10. In contrast, a liquidating debtor "exists for the singular purpose of executing an order of the bankruptcy court. Any litigation involving such a debtor thus relates much more directly to a proceeding under title 11." *Id.* (citing *E. Ky. Power Coop., Inc. v. Greenwich Ins. Co.*, 2006 WL 6351092, at *2 (E.D. Ky. Jan. 24, 2006)); *see also McKinstry v. Sergent*, 442 B.R. 567, 575 (E.D. Ky. 2011) ("[T]he assertion that courts should shun post-confirmation jurisdiction to avoid unending meddling in a reorganized debtor's affairs has no bearing in cases like this one where there is no reorganized debtor to toss back into the real world, but rather a litigation trust designed solely to carry out the court's order and wind up the extinct debtor's affairs."). For this reason, the distinction the Bankruptcy Court drew between a "typical reorganized debtor" and ITS, which is a "single-purpose entity created to develop the Terminal pursuant to the Sublease," Order at 23, is meaningless for this analysis. That ITS is a single-purpose entity does not mean that it is not "mak[ing] a go" with respect to that single purpose of constructing and operating the bulk terminal pursuant to the Sublease for its own benefit. A factory, for example, whose sole purpose is producing widgets, still does so for the benefit of its owners. The Bankruptcy Court's note that "funds recovered would reimburse the plan proponent entity that funded the payments made to creditors with allowed claims under the Plan," Order at 22 n.3, proves exactly this point.

3. The California tort claims alleged in the Adversary Proceeding are not "rooted in" the bankruptcy. There is no "related to" jurisdiction where the claims at issue "are not rooted in bankruptcy and could be pursued outside of bankruptcy" and "do not pertain to activity in" the Bankruptcy Case. *Tew*, 2023 WL 7981684, at *11. ITS's tort claims could have been brought in California; this is not like cases where state-law claims form the basis for related to jurisdiction because the acts at issue occurred as a part of the bankruptcy. *See id.* (citing *Evans v. Tippie (In*

re C & M Russell, LLC), 2017 WL 439303, at *2 (Bankr. C.D. Cal. Jan. 31, 2017) (malpractice claims related to bankruptcy where they arose out of defendant law firm's representation of the debtor); *Tang v. Citic Capital Holdings Ltd.*, 2022 WL 6036573, at *6 (D. N.J. Oct. 7, 2022) (RICO claims related to bankruptcy where scheme to defraud the debtor's investors included filing the allegedly sham chapter 11 case)).[7]

Here, the only alleged connection to which the Bankruptcy Court could point is the argument—a post-confirmation invention of ITS—that the City's actions caused ITS to lose economic opportunities, which it claimed resulted in the filing of the Bankruptcy Case. Order at 21-22. However, ITS did not submit any admissible evidence on summary judgment supporting the allegation that the economic impact of the City's actions actually caused ITS's 2019 bankruptcy. Adv. ECF 116, 116-30. That argument is also belied by ITS's statements during the bankruptcy that AWL's actions caused the bankruptcy (Bk. ECF 61-1), and AWL's statements blaming ITS's mismanagement and deceptive practices (Bk. ECF 13 at 4; 72 at 2; 245 at 6-7).[8]

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[7] That the tort claims could have been brought in 2018 also weighs against related to jurisdiction. *See, e.g., Morris v. Zelch (In re Reg'l Diagnostics, LLC)*, 372 B.R. 3, 24-25 (Bankr. N.D. Ohio 2007) (citing *Shandler v. DLJ Merchant Banking, Inc. (In re Insilco Techs., Inc.)*, 330 B.R. 512, 525-26 (Bankr. D. Del. 2005) (no jurisdiction over state-law claims that arose prepetition)); *Fairchild Liquidating Trust v. New York (In re Fairchild Corp.)*, 452 B.R. 525, 531-32 (Bankr. D. Del. 2011) ("[C]laims based on pre-petition conduct that were asserted post-confirmation, but could have been brought prior to confirmation[,] lack a nexus sufficient to confer jurisdiction upon the bankruptcy court.")).

[8] The Bankruptcy Court's finding that the City's actions in terminating the Ground Lease *caused* the ITS bankruptcy is not established by the evidence ITS submitted on summary judgment, let alone by admissible evidence, and is contrary to the bankruptcy record. Order at 7, 44. The Court takes a large leap from the City's actions and any alleged impact they had on other lenders in 2018 on the one hand, to ITS's 2019 bankruptcy filing, on the other. The ITS evidence states that ITS did not pay the AWL loan, AWL decided to foreclose, and ITS subsequently filed for bankruptcy. *See* Adv. ECF 116-30 ¶50; 116-27 ¶6. The Bankruptcy Court appears to have *inferred* that ITS could not pay AWL and thus filed for bankruptcy *because* of the City (and not for any other reason). But ITS did not submit evidence to that effect, and the Court ignored the directly contrary evidence submitted to it by AWL in the bankruptcy, where AWL argued:

The Bankruptcy Court also concluded based on *allegations* in the Complaint alone that the City "continues to interfere with ITS's post-confirmation efforts to get the benefit of its bargain under the Plan." Order at 22. But ITS did not submit any evidence regarding any action by the City post-2018, either. Adv. ECF 116, 116-30. Regardless, even had the City's actions caused economic harm that resulted in ITS seeking bankruptcy protection, that is insufficient to "root" the tort claims in the bankruptcy. *See, e.g.*, *Tew*, 2023 WL 7981684, at *10-11 (finding that allegations that defendant's conduct had indirectly necessitated the bankruptcy filing did not mean the claims were rooted in bankruptcy).

4. The Plan does not reference these claims. As articulated by *Tew*, this factor looks to a plan's treatment of the claims as a shorthand for their relationship to the bankruptcy. *Id*. at *12 (citing *In re Insilco Techs., Inc.*, 330 B.R. at 525 ("If the litigation is truly so critical to the Plan's implementation, it would have been more specifically described in the Disclosure Statement and Plan so that creditors could have considered its effect when deciding whether to vote in favor of the Plan.")). This is because a plan's reservation of jurisdiction "cannot create subject matter jurisdiction where none would exist otherwise." *In re Resorts Int'l, Inc.*, 372 F.3d at 161.

The Plan here does not "address[] or reference[] the claims asserted in the proceeding" at

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> Further demonstrative of Siegel's mismanagement of the Debtors and self-dealing is the fact that, against the advice of his advisors, he ignored several promising potential lenders and strategic partners that were ready and able to pay off the Lender and, instead, focused his efforts entirely on reaching a deal with a single party, which he viewed to be personally beneficial to him. Of course, this deal never materialized and, after the June 30, 2019 payment default, the Debtors refused to honor their agreement in the Waiver and Amendment to turn over the Collateral and continued to seek a refinancing transaction (ignoring a cease and desist letter issued by the Lender dated July 8, 2019). Shortly after the Lender demanded the Debtors cease their refinancing efforts, they commenced the Chapter 11 cases…

Bk. ECF 13 at 4-5.

all. *Tew*, 2023 WL 7981684, at *9. The Bankruptcy Court therefore erred in finding both that this *Tew* factor supported jurisdiction and that the purported retention of jurisdiction had been effective. Order at 23-24. A court generally looks to the retention of jurisdiction and reservation of claims provisions in a bankruptcy plan to determine whether the claims were disclosed such that creditors voting on the plan were aware of them for purposes of understanding potential distributions. *Nestlé Waters N. Am., Inc. v. Mt. Glacier LLC (In re Mt. Glacier LLC)*, 877 F.3d 246 (6th Cir. 2017)). Neither the Plan nor the Disclosure Statement references any claims against the City, or these torts specifically. Bk. ECF 195, 245. Notably, the Disclosure Statement said:

> Under new management, the Reorganized Debtor will actively participate in settling all of the Debtor's regulatory issues with the City of Oakland, develop the Sublease and maintain the property, thereby protecting the value of the Debtor's primary asset. In the alternative, the Reorganized Debtor intends to solicit competitive bids for the Sublease.

Bk. ECF 245 at Art. III(C). In other words, the Disclosure Statement notified creditors that (reorganized) ITS would either settle "regulatory issues" with the City and develop the Sublease *or* sell the Sublease. Pursuing California tort damages against the City was not contemplated.

Instead, both the retention of jurisdiction and the reservation of "Litigation Claims" are broad, general, and boilerplate, *see* Bk. ECF 195 at Arts. I(A)(38); VII(K); IX(A)), which is insufficient to reserve claims and similarly points against a close nexus with the bankruptcy case. *Browning v. Levy*, 283 F.3d 761, 775 (6th Cir. 2002) (holding general reservation of litigation rights that did not list the specific defendant or the factual basis for the claim was insufficient to preserve those rights); *Tew*, 2023 WL 7981684, at *12 (holding debtors' schedules that listed a "contingent and unliquidated claim[] of any nature" against defendant, "wholly insufficient" to preserve the specific claim). Similarly, plans and disclosure statements that "contained either no mention of the reserved claims or only a general reservation of litigation rights" are "insufficient to preserve jurisdiction." *Morris v. Zelch (In re Reg'l Diagnostics, LLC)*, 372 B.R. 3, 24-25

(Bankr. N.D. Ohio 2007) (citing *In re Haws*, 158 B.R. at 970-71); *In re Insilco Techs., Inc.*, 330 B.R. at 525-26).[9] The most "relatively general" reservation that has been sufficient to support related to jurisdiction is *In re Gordon Sel-Way, Inc.*, 270 F.3d 280, 288-89 (6th Cir. 2001), in which the Sixth Circuit found that the provision "the [c]ourt shall further retain jurisdiction to… hear and determine all controversies relating to obligations of the Debtor incurred in the conduct of [its business] prior to confirmation" sufficed with respect to a federal tax penalty incurred pre-confirmation in a liquidation case. But that is a far cry from the Bankruptcy Court's citation to *Gordon Sel-Way* for the proposition that "[w]hile the Plan does not specify each potential claim and potential litigation target, that lack of minute detail is not problematic." Order at 24 (citing *Gordon Sel-Way*, 270 F.3d at 288-89).

The Bankruptcy Court erroneously relied on a statement made about the City early in the bankruptcy by ITS in opposing AWL's motion to dismiss (Order at 10-11) to overcome the later omission of any reference to claims against the City in the place where it mattered—the Plan and Disclosure Statement. Order at 22. The Court made several errors in relying on that language.

First, the language relied on by the Bankruptcy Court does not refer to business tort claims by ITS against the City. Order at 10-11 (quoting Bk. ECF 61 ¶¶28, 35). Other statements in the same document make clear that ITS was referring to the litigation between OBOT and the City; it did not ever refer to tort claims by ITS against the City. Bk. ECF 61 ¶59.[10]

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[9] The Bankruptcy Court noted that "The City chose not to challenge the Plan's broad retention of claims and jurisdiction[.]" Order at 25. The City had no cause to do so because claims against it were not identified in either section. No party should be required to object and thereby identify monetary claims against its own interest that a debtor has not even identified itself. The Order cited no authority to the contrary, nor could it.

[10] ITS was referring to *OBOT's* litigation against the City, *id.* ¶¶1, 59, including when it explained: "these Cases were filed to help address and resolve the California litigation associated with the Oakland Overburden. While this litigation has actually been favorable thus far for the

Second, the caselaw on "related to" jurisdiction does not look outside the plan and disclosure statement for indication of the relationship between the claims at issue and a bankruptcy. The Bankruptcy Court mis-cited *Mt. Glacier LLC*, 877 F.3d at 249, for the proposition that information "both within and beyond the case" should be considered in assessing whether a party and creditors are on notice of claims. Order at 24. The Sixth Circuit only looked at the contents of the plan and disclosure statement (which identified both the party and the forum, *id*. at 248), and did not examine other docket entries, let alone information "beyond the case." *Id.* at 248-49; *see also Browning*, 283 F.3d at 769, 774-75 (reviewing plan and disclosure statement); *Reg'l Diagnostics*, 372 B.R. at 12-16 (same).

Third, the Bankruptcy Court uncritically allowed ITS to have it both ways: at the same time arguing that a reference to litigation regarding the "Oakland Overburden" early in the bankruptcy put the City on notice that tort claims might someday be filed against it by (reorganized) ITS, while also excusing AWL from the obligation to identify known claims in its plan because AWL was a mere "non-debtor competing plan proponent." Order at 24. As discussed further below, this is all in further tension with the Court's denial to the City of the benefit of the statute of limitations (*infra*, at 18-20) and claim preclusion (*infra*, at 24-28).

Under any framework, therefore, federal courts lack "related to" jurisdiction. This Court should enter judgment to the City and vacate the Bankruptcy Court's decision in its entirety.[11]

Sublease and the Project from the standpoint of legal merit, it nonetheless harms the Sublease and Project due to its protracted nature, which is holding the Project hostage." *Id.* AWL did not refer to any claims by ITS against the City either, when it responded: "their progress with the City of Oakland (or rather the lack thereof) is irrelevant at this juncture." Bk. ECF 72 ¶17.

[11] The jurisdiction discussion was adopted essentially verbatim from ITS's proposed findings, like the rest of the Order. In August 2025, the Sixth Circuit admonished the same Bankruptcy Court, in another adversary proceeding in ITS's bankruptcy, for adopting wholesale proposed decisions provided by a party. *Insight Terminal Solutions v. Cecelia Financial Management*, 148

III. Three Additional Threshold Issues Also Require Judgment in Favor of the City

A. ITS's Claims Are Time-Barred Under Well-Established California Law

ITS's tort claims are both subject to at most a two-year statute of limitations. Cal. Gov't Code §945.6; *see* Adv. ECF 118 at 24-25. All of the evidence of allegedly tortious City actions relied upon by ITS ends in *2018*, when the City terminated the Ground Lease. *See* Adv. ECF 116 at 5-7 ("City's Improper Conduct"); Adv. ECF 116-30 (ITS Separate Statement of Undisputed Facts); Adv. ECF 122. Although ITS made allegations regarding City action subsequent to the *OBOT II* judgment (including filing the appeal and respecting the resulting stay imposed by California law, *supra* at n.3), it relied on no post-2018 conduct for these torts and submitted no evidence of any later City actions. *Id.*[12]

California's discovery rule cannot save ITS's claims where it waited six years after knowledge of the facts on which it relies to sue. *Norgart v. Upjohn Co.*, 21 Cal.4th 383, 397-98 (1999). The limitations period begins to run when a plaintiff "discovers the cause of action," which occurs "when he at least suspects a factual basis, *as opposed to a legal theory*, for its elements." *Id.* at 397-98 (emphasis added). Indisputably, ITS was aware in 2018 of each of the allegedly tortious acts it relies on here. *Supra* at 3-4.

The Bankruptcy Court erroneously held that ITS's claims did not accrue until the court in

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F.4th 869, 882 (6th Cir. 2025) ("appellate courts have repeatedly expressed displeasure with a lower court's decision to use one party's proposed 'findings of fact and conclusions of law' when ruling against the other side." (citing *Kilburn v. United States*, 938 F.2d 666, 671 (6th Cir. 1991) (collecting cases)). In that matter, it was *ITS* objecting to the practice.

[12] The *only* post-2018 evidence ITS attempted to put into the summary judgment record were two newspaper articles from 2025, involving statements by a then-candidate for Mayor. Adv. ECF 122-1 Exs. 4, 5. The Bankruptcy Court erred by admitting, Order at 19, and citing, *id.* at 30, this "evidence," both because it is inadmissible hearsay and not a City action. To the extent the Bankruptcy Court gestured at later continuing conduct, it erred by relying on allegations at the summary judgment stage. Order at 30 (incorporating Adv. ECF 56 at 17-18). Regardless, the City's pursuit of an appeal and reliance on a court order confirming a mandatory stay are not tortious conduct. *Supra* at n.3; *see also* Adv. ECF 47 at 13-14.

OBOT II made a *legal determination* regarding the validity of the Ground Lease. Order at 31-32. This is directly contrary to California law: there is "no authority" for the notion that "interference claims d[o] not accrue … even though the plaintiff is aware of the facts giving rise to injury—until a legal determination has been made in a separate action as to the wrongfulness of a defendant's conduct." *Shropshire v. Fred Rappoport Co.*, 294 F.Supp.2d 1085, 1101 (N.D. Cal. 2003); *see also Cypress Semiconductor Corp. v. Superior Ct.*, 163 Cal.App.4th 575, 585 (2008). The Order, at 32, cites a case that is about *actions* in secret, not legal implications, *April Enterprises, Inc. v. KTTV*, 147 Cal.App.3d 805, 832 (1983), and an inapposite ripeness decision, *Brown v. Ferro Corp.*, 763 F.2d 798, 801 (6th Cir. 1985).

The Bankruptcy Court further erred by invoking estoppel to excuse ITS's untimely filing. Order at 30-31. First, the Order appears to erroneously rely on *Illinois* law. *Id.* at 30. Next, it allowed ITS to toll the statute of limitations by relying on the City's (accurate) report in its 2020 confirmation objection that the California litigation disputed the validity of the Ground Lease. *Id*.; *see* Bk. ECF 276 at 12; Adv. ECF 118-1 ¶36. This is predicated on the same mistaken view that the legal implications of the City's actions, rather than the facts, are what matter. Moreover, ITS could not have relied on a 2020 statement when it decided *in 2018* to fund rather than join the *OBOT II* litigation, and ITS certainly submitted no evidence of detrimental reliance. *See Honeywell v. Workers' Comp. Appeals Bd.*, 35 Cal.4th 24, 38 (2005) (equitable estoppel requires detrimental reliance). Nor does the City's objection meet the elements of judicial estoppel: (1) it said nothing about the statute of limitations so is not "clearly inconsistent" with its defense, and (2) the City did not prevail. *New Hampshire v. Maine*, 532 U.S. 742, 751 (2001).[13] Finally, the

[13] Even under the Bankruptcy Court's (incorrect) theory of tolling, its math is wrong: even if the statute ran from ITS's knowledge of the facts (at the latest, as of the October 23, 2018 notice

reference to the recent resolution of the *OBOT II* litigation is a non-sequitur. Order at 32.

B. ITS Cannot Sue the City Directly in Tort or Under Any California Statute

1. No Direct Tort Liability

ITS sued the City directly in tort, Adv. ECF 1, ignoring that pursuant to the California Government Claims Act, there "is no common law tort liability for public entities in California." *In re Groundwater Cases*, 154 Cal.App.4th 659, 688 (2007); *see also Miklosy v. Regents of Univ. of Cal.*, 44 Cal.4th 876, 899 (2008) ("[Government Code] section 815 abolishes common law tort liability for public entities."). Rather, "direct tort liability of public entities must be based on a specific statute declaring them to be liable." *Eastburn v. Reg'l Fire Prot. Auth.*, 31 Cal.4th 1175, 1183 (2003); *see* Cal. Gov't Code §815(a).

The Bankruptcy Court erred by excusing ITS's failure to bring a statutory claim in lieu of asserting a common law tort. *See Nahas v. City of Mountain View*, 2005 WL 2739303, at *7, 9 (N.D. Cal. Oct. 24, 2005) (dismissing business tort claims against a public entity for failure to identify any statutory basis for liability, and reminding plaintiffs of their Rule 11 obligations); *see also Oliveira v. Cnty. of Madera*, 2017 WL 550060, at *7 (E.D. Cal. Feb. 9, 2017); *VNT Prop. 1, LLC v. City of Buena Park*, 2015 WL 12762257, at *11 (C.D. Cal. Aug. 11, 2015); *Bekele v. Ford*, 2011 WL 4368566, at *11 (N.D. Cal. Sept. 17, 2011). The California Legislature has never enacted any statute making governments liable for tortious interference with contract or prospective economic advantage. *See, e.g.*, *Nahas*, 2005 WL 2739303, at *7, 9.[14]

With no direct statutory claim, ITS invoked, and the Bankruptcy Court erroneously

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terminating the Ground Lease) through the City's August 4, 2020 bankruptcy objection, and then was tolled until the November 22, 2023 *OBOT II* liability decision, the statute expired on February 10, 2024, nearly a month before this lawsuit was filed. *See* Adv. ECF 129 at 14.

[14] For good reason, as local governments take action with economic impact every day. The choice to impose *tort* liability, with consequential damages on municipalities, for this type of business interference tort is a choice for the California Legislature, not the Bankruptcy Court.

endorsed, the use of Cal. Gov't Code §815.2, which makes public entities vicariously liable for torts committed by their employees. That statute has *significant* limitations and is subject to immunities that the Bankruptcy Court ignored or misinterpreted.

2. No Vicarious Liability

Acts of the City. Public entities cannot be liable pursuant to Section 815.2 for acts taken in the entity's own name, even if the action is effectuated by employees. *Miklosy*, 44 Cal.4th at 899-901 (rejecting vicarious liability for alleged tortious termination by supervisor because only the public entity employer can fire an employee); *Yee v. Superior Ct.*, 31 Cal.App.5th 26, 40 (2019) ("A public entity cannot be held vicariously liable for actions of its employees that are actually acts of the entity itself, albeit performed by necessity by employees or agents."). ITS bases its tort claims only on actions taken *by the City* (such as issuing an estoppel certificate or entering into an NDA) with respect to the Ground Lease (a contract entered into by the City); enacting legislation (which only the City as a legislative body can do); and issuing permits (which only the City as regulatory entity can do). *See* Adv. ECF 116 at 5-7 ("City's Improper Conduct"); Adv. ECF 116-30. Because all of the actions on which ITS relies were "actually acts of the [City] itself" (*Yee*, 31 Cal.App.5th at 40; *Miklosy*, 44 Cal.4th at 899-901), the City cannot be vicariously liable under Section 815.2. ITS neither responded to this argument nor addressed *Miklosy* or *Yee* in its briefing. Adv. ECF 122 at 9-12.

Having failed to respond, ITS provided an untimely new analysis in its proposed decision, which the Bankruptcy Court adopted from ITS's submission (Order at 32-37) in violation of *Travelers*, 598 F.3d at 275. *Compare* Adv. ECF 116, 122 at 9-12, 130 at 2 *with* Adv. ECF 139 at 32-37; *see* Adv. ECF 140 (City Obj.). That analysis is replete with errors.

First, ITS has invented a rule that the City can avoid vicarious liability pursuant to §815.2 only for acts that are "uniquely governmental," arguing that leases are not unique to the

government. Order at 35-37. This argument is directly contrary to the California Supreme Court's decision in *Miklosy*, 44 Cal.4th at 900, which ITS and the Bankruptcy Court entirely ignored. Order at 35-37. *Miklosy* held that the employing public entity cannot be vicariously liable for acts taken in its own name when accused of tortious wrongful termination, and there was no indication that the commonplace fact that private entities also act as employers undermined this holding. 44 Cal.4th at 900. *Yee*, cited by ITS, does not *turn* on any such distinction either. 31 Cal.App.5th at 40.[15]

The Bankruptcy Court also adopted ITS's lengthy (and irrelevant) discussion of the difference between governmental and proprietary actions. Order at 33-34. The Government Claims Act specifically "eliminate[d] the common law liability of public entities for injuries inflicted in *proprietary activities*." *See* Cal. Gov't Code §815, Legis. Comm. Comments (emphasis added). None of that discussion is remotely responsive or on point.

Failure to identify and establish employee liability. For a public entity to be vicariously liable for an employee's actions, the party invoking Section 815.2 must identify the individual and establish each element of the tort against that individual. *Munoz v. City of Union City*, 120 Cal.App.4th 1077, 1113 (2004). ITS has never done so, and that is also fatal. *Koussaya v. City of Stockton*, 54 Cal.App.5th 909, 945 (2020) ("if a specific individual officer has not engaged in an act or omission giving rise to that officer's tort liability, the City cannot be held vicariously liable."). At most, ITS pointed to contract implementation by City lawyers, but that hardly

[15] ITS and the Bankruptcy Court cited two cases the proposition that California courts have endorsed public entity vicarious liability under §815.2 for business torts, but neither involved acts of the public entity in its own name. *City of Costa Mesa v. D'Alessio Invs., LLC*, 214 Cal.App.4th 358, 366 (2013) (slanderous statements to tenants by city employees regarding drugs, prostitution and other illegal activity); *H & M Assocs. v. City of El Centro*, 109 Cal.App.3d 399, 404 (1980) (city manager calls to mortgagees, the local newspaper, other government entities).

suffices to establish tort liability. Adv. ECF 122 at 9 (relying on unnamed "cast of bad actors").

Statutory immunity for discretionary acts. Finally, the identified actions would easily qualify under California law for discretionary act immunity. Cal. Gov't Code §815.2 (no vicarious liability where employee is immune); §820.2 ("public employee is not liable for an injury resulting from … the exercise of the discretion vested in him, whether or not such discretion be abused."). A decision whether to perform under a contract is immune as discretionary, even where the contract is misinterpreted. *E.g.*, *Osborne v. Huntington Beach Sch. Dist.*, 5 Cal.App.3d 510, 514-15 (1970) ("immunity attaches" to advising "governmental agency not to perform an unenforceable oral contract"); *see also Caldwell v. Montoya*, 10 Cal.4th 972, 982 (1995) ("whether to renew the superintendent's employment contract"); *Land Waste Mgmt. v. Contra Costa Cnty. Bd. of Supervisors*, 222 Cal.App.3d 950, 963 (1990) ("failure or refusal to issue or deny a permit, license or similar authorization"); *Krolikowski v. S.D. City Emps. Ret. Sys.*, 24 Cal.App.5th 537, 551 (2018) (pension benefits calculation); *Swinerton & Walberg Co. v. City of Inglewood*, 40 Cal.App.3d 98, 101 n.3 (1974) (misaward of public construction contract).

Again adopting ITS's language, the Bankruptcy Court here invented another dichotomy, reasoning that actions that rise to the level of "tortious conduct" or "misconduct" cannot be "discretionary decision making." Order at 37. This is not grounded in California law and is backwards. If the only actions that qualify as discretionary under Section 820.2 are those that are not tortious, then Section 820.2's immunity provision from tort would serve no purpose at all. *Blanks v. Seyfarth Shaw LLP*, 171 Cal.App.4th 336, 378 (2009).[16]

[16] Notably, the Bankruptcy Court did not even address the City's arguments that certain alleged actions underlying ITS's claims are subject to additional immunity provisions. ITS lists "[e]nacting a no-coal ordinance" (Adv. ECF 118-2, Ex. A at 12-15), but legislative acts are subject to immunity. Cal. Gov't Code §§818.2, 821; Cal. Civ. Code §47(a)-(b). ITS further

C. ITS's Claims Are Barred by Claim Preclusion

The Bankruptcy Court made significant errors in denying the City the application of res judicata, while at the same time importing wholesale the findings and conclusions of the California state courts in ITS's favor. Order at 11-16, 26-30. First, California claim preclusion law applies here, *Marrese v. Am. Acad. of Orthopaedic Surgeons*, 470 U.S. 373, 379-86 (1985), and the Bankruptcy Court erred in again relying on other jurisdictions. Order at 26, 29.

California law "prevents relitigation of the same cause of action in a second suit between the same parties or parties in privity with them." *Mycogen Corp. v. Monsanto Co.*, 28 Cal.4th 888, 896 (2002). It bars not only claims actually raised, but also claims, theories, or remedies that could have been raised. *Atwell v. City of Rohnert Park*, 27 Cal.App.5th 692, 698 (2018). ITS created no issue of disputed fact that defeats this defense, on each element.

Same primary right addressed by claims that could have been raised. For purposes of preclusion under California law, two claims involve the same "cause of action" if they implicate the same "primary right," which is "the right to be free from a particular injury." *Atwell*, 27 Cal.App.5th at 699. Accordingly, if the second suit involves the same harm, "the same primary right is at stake even if in the second suit the plaintiff pleads different theories of recovery, seeks different forms of relief and/or adds new facts supporting recovery." *Id.* It will always be the case that the claims brought by a privity are technically different because they are asserted by a different party, but that is not the proper question under California law.

This suit and *OBOT II* implicate the same primary right to develop (and allegedly profit from) the Terminal, which was allegedly derailed by the City's termination of the Ground Lease. OBOT (and OGRE) asserted the same business tort claims predicated on the same alleged

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alleges the failure to process permits, but Government Code §§ 818.4 and 821.2 provide complete immunity for permitting. *See Land Waste Mgmt*, 222 Cal.App.3d at 963.

conduct, which ITS could have joined but chose not to. *Compare* Adv. ECF 118-1, Ex. L *with* Adv. ECF 116 at 5-7. ITS marshals exactly the same facts to support its claims as those raised in *OBOT II*, including the City's refusal to issue an NDA and estoppel certificate for the Sublease, enacting the No Coal Ordinance, failing to diligently advance the project, and terminating the Ground Lease. Adv. ECF 116 at 5-7; Adv. ECF 116-30. Even if there were some minor differences between the facts alleged, claim preclusion applies because ITS "could have" raised its tort claims in *OBOT II*. *Atwell*, 27 Cal.App.5th at 699; *see Weikel v. TCW Realty Fund II Holding Co.*, 55 Cal.App.4th 1234, 1247-51 (1997) (res judicata barred second suit by shopping mall developer relying on different legal claims, different documents and subsequent events, in light of same primary right to construct a building).[17] The Bankruptcy Court fundamentally erred by ignoring this law, concluding that *OBOT II* involved a different cause of action simply because ITS was not involved in that case, and relying on the incorrect belief that litigation concerned only the Ground Lease and not interference with the Sublease. Order at 27; *but see* Adv. ECF 118-1, Ex. L ¶¶ 188-203 (OBOT alleging interference with Sublease). *Atwell*, 27 Cal.App.5th at 699, controls, and the undisputed record establishes this element of preclusion.

Privity. The undisputed facts and ITS's own admissions established privity, which California courts determine as a matter of law. *Cal Sierra Dev., Inc. v. George Reed, Inc.*, 14 Cal.App.5th 663, 675 (2017). ITS *admitted* that "ITS and OBOT [shared] a common interest in the outcome of" *OBOT II*. Adv. ECF 118-2, Ex. B at 33:14-34:1. Nor was there any dispute that

[17] The Bankruptcy Court also made much of the fact that ITS did not file for bankruptcy until after *OBOT II* was initiated. Order at 26-27. But this is not a "new fact[]" that "alter[s] the legal rights of the parties" with respect to the allegedly tortious acts at issue here. *City of Oakland v. Oakland Police & Fire Ret. Sys.*, 224 Cal.App.4th 210, 230 (2014); *see also McCloskey v. Carlton Builders*, 165 Cal.App.3d 689, 691-93 (1985) (suit for new harm caused by events occurring after first suit barred by claim preclusion where harms arose from same primary right).

ITS bankrolled and participated in the *OBOT II* litigation; or that counsel for OBOT in *OBOT II* also represents ITS in this proceeding. *Supra* at 3-4. Because ITS's Sublease with OBOT is entirely derivative of the Ground Lease, Adv. ECF 118-1, Ex. D §37.9.1, ITS shared OBOT's incentive to obtain a judicial determination that the City's termination of the Ground Lease was unlawful. ITS's entire theory of damages is that the Ground Lease termination challenged in *OBOT II* made the Sublease effectively worthless. Adv. ECF 1 ¶54.

Courts routinely hold that contractual arrangements similar to the OBOT-ITS Sublease establish privity with respect to litigation. *Cal Sierra Dev.*, 14 Cal.App.5th at 674 (holding licensee and sub-licensee shared "an identical interest" sufficient to establish privity where they were "similarly impacted by the propriety (or impropriety) of [an asphalt] plant's location" on a land parcel being used for mining); *Mooney v. Caspari*, 138 Cal.App.4th 704, 719 (2006) (finding privity where, "[t]o obtain their stated objective of profiting from the project, both [parties] depended upon the successful development of the property, and strove together to achieve that end"); *Lewis v. Cnty. of Sacramento*, 218 Cal.App.3d 214, 219 (1990). ITS and OBOT's joint interest in the outcome of the litigation given the lessee-sublessee relationship is sufficient to establish privity. ITS's undisputed funding and participation in litigation is a further basis to establish privity. *Montana v. United States*, 440 U.S. 147, 155 (1979); *Palmer v. City of Oakland*, 86 Cal.App.3d 39, 43 (1978); 7 Witkin, Cal. Proc. 6th Judgm. §492 (2025).

Privity is not limited, as the Bankruptcy Court seemed to believe, to parties that "control" each other. Order at 28-29. To the contrary, California law requires "an identity or community of interest" that received "adequate representation" in *OBOT II*, such that ITS "should reasonably have expected to be bound" by *OBOT II*. *DKN Holdings LLC v. Faerber*, 61 Cal.4th 813, 826 (2015) (citation omitted). The Bankruptcy Court's determination that OBOT and ITS's interests

were "not … aligned" ignored ITS's admissions and all the evidence of alignment discussed above and also is notably in tension with other conclusions reached by the Bankruptcy Court, including that ITS's claims were so dependent on the outcome of *OBOT II* that ITS's cause of action did not even accrue until the conclusion of that case (Order at 28, 31-32), and the adoption of the *OBOT II* decisions as the foundation of ITS's claims (Order at 11-16).

The Bankruptcy Court further erred by relying on *other* aspects of the OBOT and ITS relationship, including that OBOT and ITS were adverse in the *bankruptcy* litigation. Order at 29. Under California law, privity "does not embrace relationships between persons or entities, but rather it deals with a person's relationship to the subject matter of the litigation." *Cal Sierra Dev.*, 14 Cal.App.5th at 674. The Bankruptcy Court also superficially concluded that ITS did not have sufficient interest in the Ground Lease as a non-party, ignoring that the outcome of the *OBOT II* litigation would resolve whether the Sublease was valid at all. Most remarkably, the Bankruptcy Court concluded that payment by agreement between ITS and OBOT of millions of dollars in legal fees and costs does not reflect privity because ITS was required to make those payments by contract. Order at 28-29. This conclusion that two parties' entry into a binding agreement to work together and provide financial support for the same goal (defeating the City in the *OBOT II* litigation) reflects "divergent" interests is wildly off the mark. *Id.*

Finality. The *OBOT II* litigation is final for purposes of California law, as of the Supreme Court's September 17, 2025 denial of review. *Supra* n.3. In addition, because OBOT did not appeal the Superior Court's dismissal of its tort claims, that ruling was already final. *Moore v. Wood*, 26 Cal.2d 621, 629 (1945); *L.A. Unified Sch. Dist. v. L.A. Branch NAACP*, 714 F.2d 935, 940 n.12 (9th Cir. 1983) (applying *Moore*). And, under California law, a dismissal with leave to amend is final "if the demurrer was sustained in the first action on a ground equally applicable to

the second." *Daniels v. Select Portfolio Servicing, Inc.*, 246 Cal.App. 4th 1150, 1165 (2016), *disapproved on other grounds by Sheen v. Wells Fargo Bank, N.A.*, 12 Cal.5th 905 (2022); *see also Pollock v. Univ. of S. California*, 112 Cal.App.4th 1416, 1428 (2003) (collecting cases). OBOT and OGRE's tort claims were dismissed because they were barred by the statutes of limitations and the Government Claims Act, and for failure to allege the "independent[] wrongful" act required for the prospective economic advantage tort—which apply to ITS's claims as well. *OBOT II*, 2019 WL 10984289, at *6-8 (under California law, such contractual breaches "'cannot be transmuted into tort liability by claiming that the breach detrimentally affected the promisee's business.'") (quoting *JRS Prod., Inc. v. Matsushita Elec. Corp, of Am.*, 115 Cal.App.4th 168, 181-82 (2004)). The Bankruptcy Court erred by concluding, contrary to California law, that a dismissal with leave to amend is not final. Order at 29-30. The Order also erroneously cited inapposite authorities on *voluntary* dismissal. *Id.*

IV. ITS Failed to Establish Essential Elements of Both Torts

A. Evidentiary Errors[18]

1. The *OBOT II* Decisions

Judicial notice cannot import the findings and conclusions of other courts. ITS primarily built its record "evidence" around importing all of the facts and conclusions found by the California courts in *OBOT II* via a motion for judicial notice. ECF 117; *see* ECF 116 at 2, 116-30. Indeed, the central findings made by the Court with respect to the City's purported "actions to interfere with and frustrate the development of the Terminal" rely on these decisions. Order at 6, 39-40, 42-43. The Bankruptcy Court erred by taking judicial notice beyond the judicial acts the orders represent, to wholesale import these findings and conclusions into the record. Order at

[18] The City submitted extensive well-founded objections to ITS's evidence. Adv. ECF 123-3, 123-4, 124, 129-1, 135. The Order erroneously overruled them all. Order. at 11-19.

11-12; *see, e.g., United States v. Collier*, 68 F.App'x 676, 683 (6th Cir. 2003) ("The district court did not err in refusing to take judicial notice of the judgment beyond acknowledgment that the proceeding had taken place."); *Don Lee Distrib., Inc. v. NLRB*, 145 F.3d 834, 841 n.5 (6th Cir. 1998) ("[W]e have held that it is appropriate to take judicial notice of 'adjudicative facts' such as agency and judicial decisions, even where those decisions contain disputed statements of fact, as long as we take judicial notice for some purpose other than to take a position on the disputed fact issue[.]"); *see also Liberty Mut. Ins. Co. v. Rotches Pork Packers, Inc.*, 969 F.2d 1384, 1388-89 (2d Cir. 1992); Adv. ECF 123 (collecting cases).[19] Moreover, the Bankruptcy Court's holding that "a court can accept as true facts found and conclusions reached included [sic] in orders, judgment and findings of fact and conclusions of law" thus was plainly erroneous under the above law. Order at 12. The Order cites only cases in which a court took judicial notice of documents from *its own docket in the same case. Id.*[20]

ITS forfeited collateral estoppel. The Bankruptcy Court further erred by endorsing ITS's untimely issue preclusion arguments. Order at 12-16. ITS did not invoke collateral estoppel in support of its motions for summary judgment or judicial notice, or in opposition to the City's motion, Adv. ECF 116, 117, 122. Instead, ITS chose to fight the City's claim preclusion argument by arguing (albeit incorrectly) that ITS was not in privity with OBOT, and by arguing that the issues in the two cases were different. Adv. ECF 122 at 13, 15. ITS pivoted to invoke

[19] Facts in court decisions cannot be admitted through the Rule 803 hearsay exception for public documents either. *E.g., United States v. Jones*, 29 F.3d 1549, 1554 (11th Cir. 1994).
[20] *In re Wells*, 536 B.R. 264, 267 n.1 (Bankr. E.D. Ark. 2015) (judicial notice of plan filed in that bankruptcy to "ascertain undisputed facts such as the general treatment of Farmers Bank's claim"); *In re Snider Farms, Inc.*, 83 B.R. 977, 986-87 (Bankr. N.D. Ind. 1988) (judicial notice of prior ruling in same bankruptcy, recognizing that a court has the "right to take notice of its own files and records and it had no duties to grind the same corn a second time"); *Garcia v. Sterling*, 176 Cal.App.3d 17, 21 (Ct. App. 1985) (under inapplicable California rules of evidence, "[a] court may properly take judicial notice of its own records").

collateral estoppel for the first time on reply in support of its judicial notice motion. Adv. ECF 133 at 3-6. ITS has forfeited this argument. *E.g.*, *Travelers*, 598 F.3d at 275 ("Arguments raised only in reply, and not in the original pleadings, are not properly raised before the district court"); *Flexiworld Techs., Inc. v. Lexmark Int'l, Inc.*, 2023 WL 2573872, at *6 n.11 (E.D. Ky. Mar. 20, 2023) (issue preclusion arguments waived by raising "for the first time in a reply"); *see* Adv. ECF 135 at 2-3; 138 at 8-9. The Court doubly erred by applying issue preclusion to *the City's* motion, to which ITS never invoked this argument. Adv. ECF 122.

ITS did not establish issue preclusion. As an initial matter, the Bankruptcy Court granted "non-mutual offensive collateral estoppel," Order at 13, ignoring that, under California law, non-mutual offensive collateral estoppel is *not available* against government entities. *See Helene Curtis, Inc. v. Assessment Appeals Bd.*, 76 Cal.App.4th 124, 133 (1999) (adopting *United States v. Mendoza*, 464 U.S. 154, 155 (1984)); *K.G. v. Meredith*, 204 Cal.App.4th 164, 172 n.9 (2012); *see* Adv. ECF 135 at 5; 138 at 9.[21] Either the parties are in privity (in which case the City is right that claim preclusion bars this case for the reasons explained above, *supra* at 24-28), or they are not, in which case ITS cannot invoke collateral estoppel. ITS *cannot* have it both ways.[22]

[21] The Court again erred by relying on law from other jurisdictions. Order at 13-15.

[22] Drawing on cases involving private parties, the Bankruptcy Court's issue preclusion analysis recognized that "courts should avoid applying non-mutual offensive collateral estoppel where it would encourage 'a "wait and see" attitude' among potential plaintiffs hoping 'that the first action by another plaintiff will result in a favorable judgment.'" Order at 13 (quoting *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 330 (1979)). That is exactly what ITS has done here by funding the *OBOT II* litigation, awaiting the outcome (which provided for no damages), and then suing again six years after the pertinent facts. The conclusion that this was not a "wait and see" tactic because ITS "would have lacked standing to pursue claims in *OBOT II*" is entirely wrong. Order at 14. Nothing prevented ITS from joining the *OBOT II* litigation as a subtenant asserting the same tort claims against the City that OBOT and OGRE did—whether ITS could have sued in tort does not depend on whether it could have also sued in contract, as the Bankruptcy Court appears to have believed. *Id*. Of course, had ITS done so, its tort claims would have been dismissed under California law in 2019 along with OBOT and OGRE's for failure to state a claim (*supra* at 4, 24-25, 28), and this dispute would have been over *long* ago.

Even if this argument were not barred, ITS also has not met its "burden" to "establish [the] elements" of issue preclusion, including specifically establishing the exact identity of *each* issue of fact or law that it believes should have preclusive effect. *People v. Strong*, 13 Cal. 5th 698, 716 (2022); *Williams v. Drs. Med. Ctr. of Modesto, Inc.*, 100 Cal.App.5th 1117, 1137 (2024) (issues not identical where "the factual allegations in the FAC are not identical to the factual allegations in the First Lawsuit's SAC"). ITS asked for the *wholesale* incorporation of the decisions and never specified which findings of fact or issues of law are identical to any issues here. Adv. ECF 133 at 3-6. And in response, the Bankruptcy Court erred by incorporating the "Judicial Decisions" without analysis or differentiation. Order at 15.

Unlike claim preclusion, which bars an action even under different legal theories if it could have been raised in the prior case (*supra*, Section III(C)), issue preclusion requires the legal issues to be "identical." *Atwell*, 27 Cal.App.5th at 699. The identical legal issues were the losing tort claims, which the Bankruptcy Court ignored (incorrectly finding that the City lost every issue, Order at 14-15). *Supra* at 4. Under blackletter California law, the *contract* claims in *OBOT II* are not identical to the business tort claims ITS seeks to prosecute here. *Applied Equip. Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal.4th 503, 515 (1994). ITS also *admitted* that these issues were not identical, which the Bankruptcy Court also ignored. Adv. ECF 122 at 13, 15.

The Court fundamentally erred by permitting ITS to import these decisions to create its record here, and this error permeates its analysis of these torts. Order at 4-8, 38, 40, 41, 43.

2. Tandon Declaration

ITS relies on a declaration from AWL principal Vikas Tandon regarding events in 2018 (at which time he was an outside lender, not with ITS), including relaying hearsay conversations with investment bankers and a different third-party lender (GACP). Adv. ECF 123-4 at 3-4 (objecting to Adv. ECF 116-27 ¶¶2, 3, 4); *see Alpert v. United States*, 481 F.3d 404, 409 (6th

Cir. 2007) (holding that declarant's statement "was apparently based solely upon information that he received from elsewhere and is thus inadmissible hearsay"); *Schreiber Mfg. Co. v. Saft Am., Inc.*, 704 F.Supp. 759, 766 (E.D. Mich. 1989) ("Those portions of [a] declaration which constitute hearsay or legal conclusions shall be disregarded in ruling upon [a summary judgment] motion."). The Bankruptcy Court's blanket conclusion that these were "conversations within the scope of Federal Rule of Evidence 803" is entirely erroneous—no hearsay exception in that rule applies. Order at 18. The City also correctly objected to Tandon's introduction of a hearsay "draft" loan document from GACP, which is plainly inadmissible and which the Court relied on but did not address, committing further error. *Kean v. Brinker Int'l, Inc.*, 140 F.4th 759, 771 (6th Cir. 2025).[23] Finally, the City also objected to statements lacking in foundation, which the Court erroneously forgave as "based on Tandon's personal knowledge, supported by business records," Order at 18, when ITS provided no such support. Adv. ECF 123-4 at 3-4 (objecting to Adv. ECF 116-27 ¶¶2, 6); *Alpert*, 481 F.3d at 409 (statements "based upon his 'belief' [do] not demonstrate the personal knowledge required by Fed. R. Civ. P. 56(e)").

3. Wolff and Rosen Testimony

ITS also relied on deposition testimony, taken in the *OBOT II* matter, from ITS's former officer James Wolff and ITS's former investment banker Adam Rosen. The City presented well-taken objections to portions of the deposition testimony that constituted inadmissible hearsay,

[23] The supposed availability of the GACP funding was a key fact for the Bankruptcy Court, but ITS submitted no direct or admissible evidence establishing the availability of these funds, including no evidence from GACP, and relied only on inadmissible hearsay. Order at 7 (relying on ITS SOF Nos. 46-49); *see* Adv. ECF 123-3 (addressing Fact Nos. 46-49); Adv. ECF 123-4. The Court further erred by adopting ITS's proposed language stating that ITS "was forced" to enter into the AWL loan because of the City's conduct without scrutiny. Order at 39. ITS obtained the loan from AWL to pay *OBOT's* demand for $7 million in advance of signing the Sublease. Bk. ECF at 60-1 ¶¶8-9; 98 (Order denying AWL's motion to dismiss: "the purpose behind the loan facility was to provide financing to Debtors so they could retain rights in sublease").

lacked foundation, or offered inadmissible opinions. Adv. ECF 123-3; 123-4. The Bankruptcy Court erred by addressing only the issue of whether deposition testimony was admissible per se. Order at 18. Even if a deposition is admissible at summary judgment, the prior testimony cannot recount hearsay, lack foundation, or offer an impermissible opinion. *See* Adv. ECF 123-3; Adv. ECF 123-4 (objecting to Adv. ECF 116-24, Ex. 19 at 15:16-17:23, 21:8-14, 29:5-16, 32:16-25, 34:13-20, 35:9-15; Adv. ECF 116-25, Ex. 20 at 111:2-11, 111:13-25, 117:25-119:10, 129:1-132:1, 145:7-13, 149:21-150:9, 174:18-175:8, 176:21-177:10, 177:24-179:7, 241:11-242:5, 260:2-8). This inadmissible evidence is frequently the sole basis for many of the "facts" in the ITS Separate Statement, which the Bankruptcy Court adopted wholesale, Order at 4, and relied on to establish elements of ITS's claims, *see, e.g.*, Order at 6-8, 39, 44.

B. No Independent Wrongful Act

A plaintiff must establish that the intentionally wrongful acts designed to disrupt a prospective business relationship are independently *wrongful*. *Drink Tank Ventures LLC v. Real Soda in Real Bottles, Ltd.*, 71 Cal.App.5th 528, 537-38 (2021). The alleged acts must be "wrongful by some measure beyond the fact of the interference itself" and "proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard." *Id*. at 537 (quoting *Ixchel Pharma, LLC v. Biogen, Inc.*, 9 Cal.5th 1130, 1142 (2020)). Breaching a contract does not suffice: "[A] bare breach of contract, without more, is not tortious, [and] such a breach cannot constitute independently wrongful conduct capable of giving rise to the tort of intentional interference with a prospective economic advantage." *Id.* at 540; *JRS Prods.*, 115 Cal.App.4th at 183; *Arntz Contracting Co. v. St. Paul Fire & Marine Ins. Co.*, 47 Cal.App.4th 464, 479 (1996). Breach of the implied covenant of good faith is a contract claim, not a tort, and it cannot form the basis of an interference tort. *Sheen*, 12 Cal.5th at 930; *Deerpoint Grp., Inc. v.*

Agrigenix, LLC, 345 F.Supp.3d 1207, 1235 (E.D. Cal. 2018). [24]

Just as OBOT and OGRE's torts previously failed for this reason (*supra* at 4), ITS's claim fails because it is premised on conduct amounting to a breach of the Ground Lease. Adv. ECF 118-2, Ex. A at 12-15. ITS relies on nothing proscribed by statute, regulation, tort law, or constitutional provision. *See id.* The Bankruptcy Court concluded that "Defendant's judicially determined improper and unjustified conduct significantly disrupted and burdened Plaintiff's economic relationships," (Order at 40), but ignored this required element (*id.*at 38-42).

The Bankruptcy Court further erred by concluding that the City's actions were *designed* to disrupt the ITS-OBOT relationship, entirely ignoring ITS's affirmative admission that, when the City terminated the Ground Lease with OBOT, it did not consider or intend to impact ITS, and was acting solely from the belief that OBOT was actually in default. *Id.*; *supra* at 3.

For both of these reasons, ITS has failed a basic element of its prospective advantage tort.

C. Interference Cannot be Based on Knowledge *After* Allegedly Tortious Acts

The Bankruptcy Court predicated ITS's prospective economic relations tort claim on knowledge of three relationships (with OBOT, a lender called Great American Capital Partners ("GACP"), and the State of Utah). Order at 40. With respect to the latter two, the *only* evidence was an October 26, 2018 letter from ITS's lawyer to the City. Adv. ECF 116-14 (submitting letter). It is undisputed this letter came *after* the last allegedly tortious act, terminating the Ground Lease on October 23, 2018. Adv. ECF 118-1 ¶¶10-11, 21-23, 25, 27. The Court erred by

[24] This accords with longstanding California law that "a breach of contract becomes tortious only when it also violates an independent duty arising from principles of tort law." *Applied Equip.*, 7 Cal.4th at 515. This bright-line distinction between tort and contract law "encourage[s] contractual relations and commercial activity by enabling parties to estimate in advance the financial risks of their enterprise." *Id.* Breaching a contract can be a business decision and has never been held to be *unlawful* or basis for a tort. Indeed, a breach of contract is not independently wrongful "even if the defendant [breached the contract] with an improper motive." *Drink Tank*, 71 Cal.App.5th at 538; *accord Applied Equip.*, 7 Cal.4th at 516.

ignoring this timing and attempting to hold the City liable for interfering with relationships about which it did not know at the time of the alleged tortious acts.[25]

D. Interference with Contract Cannot be Based on a Subcontract to Which the Defendant is not a Stranger

ITS's interference with contract claim is predicated on interference with the Sublease caused by the City's actions that amount to breach of the Ground Lease, as found by the state court in *OBOT II*. Order at 42-44.[26] California law does not impose tort liability for "[c]onduct amounting to a breach of contract." *Applied Equip.*, 7 Cal.4th at 515. And, specifically, California law does not impose tort liability for interference with existing contracts, where the breach of a primary contract arguably causes some follow-on harm to a related subcontract, without proof of additional action directed specifically at the subcontractor. *PM Grp., Inc. v. Stewart*, 154 Cal.App.4th 55, 65 (2007); *accord United Nat. Maint., Inc. v. S.D. Convention Ctr., Inc.*, 766 F.3d 1002, 1008 (9th Cir. 2014); *Synergy Project Mngmt., Inc. v. City & Cnty of San Francisco*, 2018 WL 2234596, at *5 (N.D. Cal. May 16, 2018); *accord Caliber Paving Co. v. Rexford Indus. Realty & Mgmt., Inc.*, 54 Cal.App.5th 175, 186 (2020). As the Ninth Circuit explained in discussing *PM Group*, "a contracting party could not be held liable for interfering with the performance of subcontracts if that claim hinged on the defendant's failure to perform

[25] The Court also erred in relying on actions by the City *prior* to any knowledge of the ITS-OBOT Sublease on September 28, 2018. Adv. ECF 118-2, Ex. A at 12-15; Adv. ECF 118-1 ¶¶17-19, 27, Ex. C. None of the City's actions before September 24, 2018 could form the basis for an intentional tort with respect to a company that did not yet exist.

[26] Many of the "facts" recited by the Bankruptcy Court in this section of its Order are contrary to the evidence, most notably ITS's admission that the City did not intend to interfere with the Sublease when it terminated the Ground Lease, because it was acting solely from the belief that the Ground Lease was in default. *Supra* at 3. The Bankruptcy Court further erred by mischaracterizing the California court decisions, incorrectly stating that "it has already been judicially determined that the City intended to and did in fact disrupt the rights of ITS under the Sublease." Order at 43. The state court did not address the City's intent with respect to ITS or the Sublease, as that issue was not before it. Adv. ECF 117-1, Ex. 1. All of the "facts" that ITS imported and the Court endorsed solely from those decisions lack any admissible evidence.

on the original contract." *United Nat. Maint.*,766 F.3d at 1008. Permitting every subcontractor to sue in tort whenever a primary contract was breached would entirely undermine the principle that a breach of contract, without more, does not give rise to tort liability. This law, which the Court ignored, *see* Order at 42-44, conclusively resolves this claim in favor of the City.

V. The Bankruptcy Court Also Erred in Granting Summary Judgment to ITS

The Bankruptcy Court further erred in affirmatively granting summary judgment to ITS where ITS failed to demonstrate a lack of dispute with respect to all required elements and that the evidence would conclusively be resolved in its favor. *Surles v. Andison*, 678 F.3d 452, 455 56 (6th Cir. 2012). Thus, even if the Court were to deny judgment to the City (which it should not), summary judgment cannot be granted to ITS in light of the following additional errors:

1. Inadmissible Expert Reports. ITS argued that damages were undisputed, relying on a single expert report purporting to discuss the value of ITS's business that it submitted *without* a sworn declaration. Adv. ECF 116 at 15, 18, 19.[27] It is blackletter law that a court cannot consider unsworn documents or hearsay on summary judgment, including expert reports submitted without declaration. *Moore*, 2 F.3d at 699; Fed. R. Civ. Pro 56(c); *Pack v. Damon Corp*., 434 F.3d 810, 815 (6th Cir. 2006) ("[T]he Bukowski Report is unsworn and thus is hearsay, which may not be considered on a motion for summary judgment."); *see also Smith v. Prudential Ins. Co. of Am*., 864 F.Supp.2d 654, 659 (M.D. Tenn. Feb. 2, 2012) ("[U]nsworn expert reports constitute hearsay and may not be considered at [] summary judgment").[28] When the City

[27] ITS was well aware that damages were (of course) opposed, having received a responsive expert report from the City's expert, and having defended the deposition of its own expert. As addressed further below, ITS failed to meet its burden as the party with the burden of proof at trial, of demonstrating a lack of dispute as to all material facts. *Infra* 38-40.

[28] *See also Sigler v. Am. Honda Motor Co*., 532 F.3d 469, 481 (6th Cir. 2008) ("[T]he district court improperly considered Honda's unsworn, hearsay evidence in deciding to grant Honda's

challenged this inadmissible evidence, ITS submitted a new declaration on reply, with additional facts (purporting to establish the expert's credentials) and adding an *additional* expert report not previously submitted. Adv. ECF 130-2. Well-established Sixth Circuit law prohibits the submission of evidence on reply to purportedly meet the moving party's summary judgment burden. *See Seay v. Tenn. Valley Auth.*, 339 F.3d 454, 481-82 (6th Cir. 2003). This error was prejudicial and precluded the City from moving to exclude ITS's expert opinions, which are *wildly* speculative with respect to the value of ITS's business, as inadmissible pursuant to Rule 702. The Bankruptcy Court should not have admitted those late-filed reports. Order at 17, 44-45; *see infra* at 38-40. The Court erred in relying on a single an out-of-circuit district court decision rather than established Sixth Circuit law. Order at 17.

2. Injury and Harm. Both of ITS's tort claims require proof that the City caused ITS an injury. *See Roy Allan Slurry Seal, Inc. v. Am. Asphalt S., Inc.*, 2 Cal.5th 505, 512 (2017); *Pac. Gas & Elec. Co. v. Bear Stearns & Co.*, 50 Cal.3d 1118, 1126 (1990). ITS submitted no evidence of causation or harm; it offered only the unsworn expert report of an assessing business valuation at a point in time, that expressly does not evaluate causation or harm. And, even if that report were admissible, these issues are plainly disputed by the City, including through its responding expert, and arguments and evidence regarding flaws in ITS's analysis. *Phillips v. Cohen*, 400 F.3d 388, 399 (6th Cir. 2025). The Court erred by concluding the disputes were limited to the amount of damages, rather than the harm element of these claims. Order at 44-45.[29]

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motion for summary judgment."); *Carr v. Tatangelo*, 338 F.3d 1259, 1273 n.26 (11th Cir. 2003) (same); *Scott v. Edinburg*, 346 F.3d 752, 759 (7th Cir. 2003) (same); *Smith v. Palafox*, 728 F.App'x 270, 275 (5th Cir. 2018) (same).

[29] To the extent the Court adopted ITS's proposed statement asserting that it would have, but for the City's actions, obtained financing from GACP and Utah, and "sought bankruptcy protection" because of the City, those statements are based on no admissible evidence. *Supra* at 32-33, n.8;

3. Business Relationships and Benefits. The City contested whether there was any admissible evidence in support of any economic relationship that "contains the probability of future economic benefit to" ITS, a required element of ITS's interference with prospective business relations claim. *Roy Allan*, 2 Cal.5th at 512. California law imposes this requirement to "preclude[] recovery for overly speculative expectancies." *Westside Ctr. Assocs. v. Safeway Stores 23, Inc.*, 42 Cal.App.4th 507, 522 (1996) (quoting *Youst v. Longo*, 43 Cal.3d 64, 71 (1987)). ITS relied here largely on the *OBOT II* decisions and other inadmissible evidence discussed above (including its own "expert" report and hearsay) where it cited evidence at all. *Supra* at 28-33, 37-38; *see* Adv. ECF 116 at 7-8 (citing UF 48-49, 51-52 with respect to GACP); *id.* at 11-12 (citing nothing for GACP); *id*. at 11-12 (citing only state court decisions); *see* Adv. ECF 123-3. A plaintiff with the burden of proof cannot be granted summary judgment without affirmatively providing admissible evidence sufficient to meet its burden with respect to the relationships on which it relies. *Claybrook v. Birchwell*, 199 F.3d 350, 354 n.1 (6th Cir. 2000).

4. Fact and Amount of Damages. Both the fact and amount of damages are disputed and would have to be resolved by a jury—if ITS could survive summary judgment (which it cannot). ITS's motion dedicated a single paragraph to damages, without any discussion of how this element is undisputed, or any authority supporting its theory. Adv. ECF 116 at 19. ITS apparently claims that the City's actions in 2018 caused a total loss of business value measured by projecting profits over the life of the entire lease (notwithstanding its desire to maintain the

see also Adv. ECF 118-2, Ex. B, at 92:18-20 (Tandon admitting that there could be reasons other than the City's conduct that prevented the Utah relationship from coming to fruition). There was, at the very least, a material dispute of fact as to this element. The Court relied on impermissible inferences to resolve disputed facts in favor of moving party ITS. *Celotex*, 477 U.S. at 330 n.2.

Sublease and ongoing efforts to develop the project post-*OBOT II*). *Id.*; Order at 44-45.[30] In response, the City's expert explained at length why ITS's report failed to establish the existence of *any* lost business value.[31] Adv. ECF 123-2, Ex. A. Even if ITS's expert report were not inadmissible (*supra* at 36-37), "competing expert opinions present the 'classic battle of the experts'" inappropriate for resolution on summary judgment. *Phillips*, 400 F.3d at 399 (quoting *Cadmus v. Aetna Cas. & Sur. Co.*, 100 F.3d 956 (6th Cir. 1996)); *see also 01 Communique Lab'y, Inc. v. Citrix Sys., Inc.*, 151 F.Supp.3d 778, 804 (N.D. Ohio 2015).

Notwithstanding these factual disputes, the Bankruptcy Court violated the City's right to a jury trial on damages when it purported to resolve factual issues pertaining to the fact and amount of damages in ITS's favor, concluding that ITS had "proven" "with reasonable certainty" that the City "caused" damages, including allegedly conceding a baseline amount. Order at 44-45. But ITS must prove, to a jury, "damage[s]" that actually "result[ed]" from the City's misconduct. *Pac. Gas*, 50 Cal.3d at 1126; *Franklin v. Dynamic Details, Inc.*, 116 Cal.App.4th 375, 391-94 (2004). It is not the Bankruptcy Court's role to resolve disputed factual questions.

The Bankruptcy Court's analysis is also erroneous for other reasons. The City's expert

[30] ITS's proposed expert provided only an opinion as to the entire value of the future profits as if the business were a complete loss, and not any cost of delay or interference. Adv. ECF 123-1, Ex. B at 169:10-171:11; Adv. ECF 116-26, Ex. 21 at 4, 59.

[31] The City's responding expert, and admissions on cross-examination of ITS's expert, also create factual disputes as to, among other things: 1) whether ITS would have obtained the necessary funding and completed the Terminal but for the City's actions, Adv. ECF 123-2, Ex. A ¶¶ 33-34, 36-38; 2) whether the terminal would have even been profitable given market supply and demand for coal, Adv. ECF 123-2, Ex. A ¶¶ 46-63; 3) whether the Lerman Report's damages calculations are accurate or reliable given that its Monte Carlo analysis only models uncertainty for three of the model's 28 parameters, Adv. ECF 123-2, Ex. A ¶¶ 68-79; and 4) whether Lerman's assumptions underlying each of these 28 parameters—including the mean value, standard deviation, and distribution shape—are sound, reliable, accurate, and adequately justified. Adv. ECF 123-2, Ex. A ¶¶ 80-87. At the appropriate time (*i.e.*, prior to any trial, if necessary), the City would raise any further objections to the admissibility of Mr. Lerman's opinion testimony, including the reliability of his methods and conclusions.

conducted sensitivity analysis to demonstrate that ITS's predicted profits were faulty, by altering the assumptions regarding product volume; he never conceded any range of damages exist between "$230 million and $354 million." Order at 45; *see* Adv. ECF 123-2, Ex. A ¶ 72. The Bankruptcy Court further ignored that ITS presented no evidence *at all* on causation between the City's actions and the lost value, with ITS's own expert admitting he was assuming causation. Adv. ECF 123-1, Ex. B at 13:5-23. The Court also improperly concluded that the Sublease in its current state was worth $20 million. Order at 44. The Court further ignored the City's argument that damages cannot be predicated on the "value" of the business as a complete loss, since ITS intends to profit from this business over the life of the Sublease by constructing and operating this business. *See* Adv. ECF 123 at 13-14.

CONCLUSION

For all these reasons, the City requests the Court grant summary judgment to the City.

Respectfully submitted,

Dated November 26, 2025

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was served electronically upon all parties in the electronic filing system.

Dated: November 26, 2025

By: /s/ *Danielle Leonard*
Danielle Leonard