

April 4, 2019

247421

Via courier

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, DC 20423-0001

ENTERED
Office of Proceedings
April 4, 2019
Part of
Public Record



Re: *Oakland Global Rail Enterprise – Authority to Operate a Rail Line in Oakland, CA
– Petition for Exemption from 49 U.S.C. § 10901, STB Docket No. FD 36168*

Dear Ms. Brown:

Enclosed please find for filing in the above-captioned proceeding an original with ten (10) copies of the City of Oakland's Petition for Reconsideration.

I also am attaching to this filing the \$300 filing fee pursuant to 49 C.F.R. § 1002.2(f)(61). However, the City of Oakland seeks a waiver of the filing fee based on the fact that it is a local government entity filing the Petition for Reconsideration on behalf of the general public. *See* 49 C.F.R. § 1002.2(e). The City of Oakland is directed by duly elected officials who are filing this Petition for Reconsideration to further the public's benefit and interest in the matter at hand.

Also enclosed is an additional copy of the City of Oakland's Petition for Reconsideration to be date stamped and returned back to our offices.

Please do not hesitate to contact me if you have any questions.

Sincerely,



Charles A. Spitulnik
Counsel for City of Oakland, California

cc: All Parties of Record

Enclosures

FILING FEE WAIVED

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB FINANCE DOCKET NO. 36168



**OAKLAND GLOBAL RAIL ENTERPRISE
- AUTHORITY TO OPERATE A RAIL LINE IN OAKLAND, CA -
PETITION FOR EXEMPTION FROM 49 U.S.C. § 10901**

PETITION OF CITY OF OAKLAND FOR RECONSIDERATION

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Dated: April 4, 2019

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SURFACE TRANSPORTATION BOARD**

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**OAKLAND GLOBAL RAIL ENTERPRISE
– AUTHORITY TO OPERATE A RAIL LINE IN OAKLAND, CA –
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PETITION OF CITY OF OAKLAND FOR RECONSIDERATION

SUMMARY

The City of Oakland, California (“City”) hereby petitions this Board pursuant to 49 C.F.R. § 1115.3 for reconsideration of its decision served March 15, 2019 in the above-captioned proceeding granting the Oakland Global Rail Enterprise’s (“OGRE”) Petition for Declaratory Order (“March 15th Decision”). As explained below, new evidence of changed circumstances—specifically, termination of the sublease providing OGRE with the property interest necessary to conduct rail activities over the portion of the trackage located within the former Oakland Army Base that is owned by the City (the “Line”)¹—have materially affected the context for the Board’s March 15th Decision. Furthermore, the Board’s decision to grant the petition where the petitioning party is not a rail carrier and does not provide transportation subject to the Board’s jurisdiction was a material error. In addition, the Board’s determination of and justification for asserting jurisdiction over the Line was also a material error. Accordingly, the City requests that this Board reconsider the March 15th Decision, reverse its determination, and deny OGRE’s petition.

¹ For the purposes of this petition, the term “Line” refers to the “West” and “Middle” segments owned by the City that are discussed in the March 15th Decision, and excludes the “East Segment”, owned by the Port.

BACKGROUND

The March 15th Decision and prior filings by the City, OGRE, and the Port of Oakland (“Port”) in this proceeding (Docket No. FD 36168) describe the history of the Line and the relationship of the parties. The following background will focus on facts that are relevant to the changed circumstances supporting the City’s Petition for Reconsideration.

As indicated by previous filings, OGRE had acquired a sublease from the Oakland Bulk Oversized Terminal (“OBOT”) to conduct rail improvements over the Line. *See* OGRE Petition for Declaratory Order, Ex. 1, V.S. McClure at 2 (Filed May 23, 2018). OBOT granted this sublease pursuant to a ground lease between OBOT and the City (“Ground Lease”) for portions of the Oakland Army Base property owned by the City (“OAB Property”).

On May 23, 2018, OGRE filed a petition for declaratory order in this docket asking the Board to find that OGRE does not need STB authorization to construct/reconstruct the Line to make it operable. The City filed a reply to OGRE’s petition on June 29, 2018 questioning whether portions of the Line were subject to STB jurisdiction based on the Line’s regulatory history. In response, on August 1, 2018, the STB’s Acting Director of Office of Proceedings ordered OGRE to provide additional information for the Line and its plans. OGRE filed a supplemental filing on August 21, 2018. The City and the Port each filed replies on September 18, 2018. On September 27, 2018, OGRE filed replies to the City’s and the Port’s filings. On October 9, 2018, the Port filed a reply to OGRE’s surreply arguing that OGRE misinterpreted the Port’s prior filing.

On September 21, 2018, the City served OBOT with a Notice to Cure for failure to satisfy its obligations under its Ground Lease with the City, attached hereto as **EXHIBIT A**. After OBOT failed to cure or commence diligently dispatching to cure for its breach pursuant to

the Ground Lease, on October 23, 2018, the City served OBOT with a Notice of Default, attached hereto as **EXHIBIT B**. Pursuant to the terms of the Ground Lease, the Notice of Default automatically terminated the Lease effective November 23, 2018. *See* Notice of Default.

On December 4, 2018, OBOT and OGRE filed a complaint in the Superior Court of the State of California for the County of Alameda arguing, among other things, breach of contract and intentional interference with contract in relation to the Ground Lease. OBOT and OGRE Complaint, Cal. Sup. Ct. Civil Case No. RG18930929 (Filed Dec. 4, 2018), attached hereto as **EXHIBIT C**. On January 14, 2019, the City filed a Notice of Demurrer in which it demurred to each of OBOT and OGRE's claims on grounds that they did not state facts sufficient to constitute a cause of action. *See* City of Oakland Notice of Demurrer and Demurrer to Plaintiffs' Complaint, Cal. Sup. Ct. Civil Case No. RG18930929 (Filed January 14, 2019), attached hereto as **EXHIBIT D**. A preliminary hearing on the matter is set for April 25, 2019.

On March 15, 2019, the STB issued a decision granting OGRE's petition, asserting jurisdiction over portions of the Line and requiring further filings from OGRE, OBOT and the City. *Oakland Global Rail Enterprise – Petition for Declaratory Order*, STB Docket No. FD 36168 (Service Date March 15, 2019) ("March 15th Decision"). The March 15th Decision granted OGRE's Petition for Declaratory Order, determining that it had jurisdiction over the Line and concluding that OGRE did not need Board authorization to "rehabilitate" the Line.

In the March 15th Decision the Board declined to address a "threshold" issue presented by the Port regarding the appropriateness of issuing a declaratory holding where OGRE did not hold the property rights to conduct rail operations, as was the case over Port trackage (which the Board labelled the "East Segment"). *Id.*, slip op. at 5. Instead, the Board declared the issue "moot" because it did not believe that OGRE had properly raised the question regarding Port-

owned trackage. *Id.*, slip op. at 5, 10. The Board noted that “[b]ecause OGRE is not seeking operating authority here, this issue is outside the scope of the current petition.” *Id.*, slip op. at 11, n.12. It also commented that “because a grant of operating authority is permissive, the lack of the necessary contractual and property rights would not necessarily foreclose a grant of operating authority. . . . Of course, if the Board were to grant operating authority in the future, OGRE would need to obtain the necessary property or contract rights in order to exercise that authority.” *Id.* (citations omitted).

With respect to the segments on City property, the “West Segment” and “Middle Segment”, the Board noted that “[i]t is the Board’s understanding that OGRE ultimately intends to access the interstate system via the East Segment, which would connect the Middle Segment with the Port’s track, which connects to [Union Pacific Railroad]’s main line.” *Id.*, slip op. at 7.

Although the Board agreed with the City “that the evidence on the record regarding the West Segment does not establish that the track is jurisdictional as OGRE claims,” it nevertheless concluded that “it is not necessary to determine the historical jurisdictional status of the West Segment to determine whether the track now requires authority under § 10901,” *id.*, slip op. at 7, and relied on other factors to determine that the West Segment was jurisdictional spur track, rather than private track, *id.*, slip op. at 8-10.

ARGUMENT

Pursuant to federal statute and Board regulations, parties may petition the Board for reconsideration of a final decision within 20 days of service of the Board’s final decision. 49 U.S.C. § 1322(c); 49 C.F.R. § 1115.3. Petitions for reconsideration are favored as they are “a more expeditious and efficient means of achieving corrections or adjustments than resort to the

federal courts in the first instance.” *Texas Municipal Power Agency v. Burlington N. & Santa Fe R.R. Co.*, STB Docket No. 42056, slip op. at 2 (Service Date Sept. 27, 2004).

Permissible grounds for reconsideration include where the “prior action will be affected materially because of new evidence or changed circumstances”, or where the “prior action involves material error.” 49 C.F.R. § 1115.3(b)(1)-(2). In either case, the basis for reconsideration must be one that “would mandate a different result.” *See Montezuma Grain Co. v. STB*, 339 F.3d 535, 541-42 (7th Cir. 2003).

1. The City’s termination of OGRE’s sublease is new evidence constituting changed circumstances that materially affect the March 15th Decision

a. The City’s termination of OGRE’s sublease is new evidence constituting changed circumstances

In order for new evidence or changed circumstances to support reconsideration or reopening² of a Board decision, the evidence or change in circumstances must actually be a new development. *See Texas Municipal*, slip op. at 2 (“[T]he term ‘new evidence’ refers to evidence that was not reasonably available to the party when the record was developed, and not simply newly raised.”); *Village of Barrington, Ill. v. STB*, 892 F.3d 252, 269 (7th Cir. 2018) (*citing Texas Municipal*). The “newness” of evidence or changed circumstances is established based on what was, or reasonably could have been, included in the original record before the Board. *See Village of Barrington*, 892 F.3d at 269 (“[N]ew evidence is facts which through no fault of [the petitioner’s], the original proceeding did not contain.”).

The Board’s precedent indicates that the Board will generally deny petitions for reconsideration where the new evidence or changed circumstances have occurred before the underlying proceedings have commenced or before party filings are completed. *See, e.g., Friends*

² The grounds for granting a petition for reconsideration and a petition to reopen are the same: “material error, new evidence, or substantially changed circumstances.” 49 U.S.C. § 1322(c). *Cf.* 49 C.F.R. § 1115.3 with 49 C.F.R. § 1115.4.

of *Sierra Railroad, Inc. v. ICC*, 881 F.2d 663, 665 (9th Cir. 1989), cert. denied, 493 U.S. 1093 (1990) (petition to reopen denied because “new” evidence “could have been brought there by appeal from the original order”); *Village of Barrington*, 892 F.3d at 269-70; *Canadian Nat’l Ry. Co. and Grand Trunk Corp. – Control – EJ&E West Co.*, STB Docket No. FD 35087 (Sub-No. 8) (Service Date Oct. 30, 2017) (“*Canadian National II*”). For instance, in *Canadian National II*, this Board denied a local municipality’s petition for reconsideration of a decision to deny reopening the Board’s earlier approval of an acquisition of one railroad by another. *Canadian Nat’l Ry. Co. and Grand Trunk Corp. – Control – EJ&E West Co.*, STB Docket No. FD 35087 (Sub-No. 8) (Service Date Oct. 30, 2017). In its petition to reopen the proceedings, the municipality argued that the operating railroad needed to mitigate its impact at a particular grade crossing. *Id.*, slip op. at 3. After the Board denied the municipality’s petition to reopen, the municipality filed a petition for reconsideration, offering as “new” evidence a traffic analysis of data collected several years earlier and conducted before the completion of briefing of the petition to reopen before the Board. *Id.*, slip op. at 9. The Board found, among other things, that the new analysis did not constitute new information because “the data was readily available to [the municipality] when the record was developed.” *Id.*

In contrast, the Board has accepted petitions for reconsideration based on new evidence or changed circumstances that occur between the period when the parties complete their final submissions before the Board and when the Board issues a decision on the matter. *See, e.g., Wisconsin & Southern R.R. Co. – Acquisition Exemption – Iowa, Chicago & Eastern R.R. Corp.*, STB Docket No. FD 34464 (Service Date July 30, 2004). In *Wisconsin Southern*, the Board granted a petition to reconsider denial of a waiver of notification to employees in a railroad acquisition approval proceeding. *Id.* The Board agreed with the petitioner that evidence of actual

notice provided to the relevant employees after filing of the waiver request but before the Board's denial of the waiver constituted new evidence supporting reconsideration that the standard notification period was necessary. *Id.*, slip op. at 3. *But cf. Town of Babylon and Pinelawn Cemetery – Petition for Declaratory Order*, STB Docket No. FD 35057, slip op. at 4 (Service Date Sept. 26, 2008) (denying reconsideration where “the parties could have sought to supplement the record with the veto statement before the Board reached its decision.”).

Here, the changed circumstances—termination of OGRE's sublease—occurred after the City made its final submissions to the Board, and the new evidence demonstrating changed circumstances has been accumulating almost entirely after the record was completed upon the final substantive surreply made by OGRE on October 9th, 2018. *See supra*, p. 2. It would have been impossible for the City to include in its final submission to the Board on September 18, 2018, for termination of the Ground Lease, which occurred November 23, 2018. In fact, termination of the Ground Lease post-dates all substantive filings developing the record before the Board in this proceeding. *See supra*, p.2.

Additional factors also support not immediately filing supplemental notice of the developing events to the Board. The pendency of state court litigation over the contractual relationship between OGRE and the City discourages supplemental notification to the Board before more complete evidence of termination of OGRE's property rights over the Line has been developed. In addition, the expected date of a Board decision in these proceedings was unknown. In any event, reconsidering the decision now before it has become final is preferable to reopening the matter.

b. Termination of OGRE's sublease materially affects the March 15th Decision

A successful petition for reconsideration requires that the grounds materially affect the outcome of the proceedings, *i.e.* that it “would mandate a different result.” *Montezuma Grain Co. v. STB*, 339 F.3d 535, 542 (7th Cir. 2003). New evidence or changed circumstances “must be sufficient to convince the Board that its prior decision in the case would be materially affected.” *Denver & Rio Grande Ry. Historical Found. – Petition for Declaratory Order*, STB Docket No. FD 35496, slip op. at 4 (Service Date Mar. 24, 2015).

While the Board's determination of jurisdiction over railroad property and infrastructure is appropriate where there is some anticipation that rail service will take place, it is inappropriate where a non-carrier is merely seeking to wield the Board's jurisdiction to ward off legitimate local regulation with the threat of preemption.³ *See James Riffin – Petition for Declaratory Order*, STB Docket No. FD 35245, slip op. at 6 (Service Date Sept. 15, 2009). While the Board will weigh in on jurisdictional and regulatory matters brought by would-be carriers or property owners in anticipation of those non-carriers' commencement of common carrier rail service, *see e.g. Effingham R.R. – Petition for Declaratory Order – Construction at Effingham, Ill.*, 2 S.T.B. 606, 609-10 (1997), *aff'd sub no. United Transp. Union-Ill. Legislative Bd. v. STB*, 183 F.3d 606 (7th Cir. 1999); *Jersey Marine R., LLC – Petition for Declaratory Order*, STB Docket No. 36063 (Service Date Jan. 31, 2017); *Port Auth. of N.Y. and N.J. – Petition for Declaratory Order*, STB Docket No. 34428 (Service Date Jan. 21, 2004); *The N.Y. City Economic Dev. Corp. – Petition for Declaratory Order*, STB Docket No. FC 34429 (Service Date July 15, 2004), it has done so based on assurances and understanding that the non-carrier or property owners is in a position to begin common carrier operations. For instance, in *Jersey Marine*, the Board granted a non-

³ Although OGRE appears to have indicated it would decline to assert preemption in state court, *see* OGRE Reply dated April 1, 2019, at 7, it would be imprudent for the City to proceed on only that assurance.

carrier's petition for declaratory order concerning its ability to rehabilitate a jurisdictional line without the Board's authority based in part on the understanding that the non-carrier's activities were conducted within property for which it had the requisite property rights. *See Jersey Marine*, slip op. at 5 ("Here, JMR is not an existing carrier, as in *Swanson*, but is seeking to become a new carrier."). *See also Port Authority of N.Y. and N.J.*, slip op. at 5 ("[A]n entity with the right to operate over the [connecting lines] may build the proposed connector without additional authority from this agency. If the Port Authority has the authority to do these things it may build the connector without Board authority. So may any other entity that has those rights.").

In contrast, where a petitioner has neither Board authority nor the property rights necessary to provide transportation on a line, the Board has avoided making determinations that intrude into the domain of state law property and contractual rights. *See, e.g., Riffin*, STB Docket No. FD 35245 (denying petition for declaratory order from petitioner seeking determination of rail carrier status and seeking federal preemption with respect to activities conducted on a railroad line for which he had no property interest); *Tri-State Brick and Stone of New York, Inc. and Tri-State Transp. Inc. – Petition for Declaratory Order*, STB Docket No. FD 34824 (Service Date Aug. 11, 2006) (denying a petition for declaratory order from a petitioner seeking an order requiring petitioner's landlord to grant petitioner the right to receive rail shipments on petitioner's desired lease terms).

The termination of the Ground Lease between the City and OBOT simultaneously terminated OGRE's sublease of the Line from OBOT.⁴ Without the requisite property rights to

⁴ In its reply to the City's Petition for Stay in this proceeding filed April 1, 2019, OGRE states that "the City misleadingly asserts that OBOT's ground lease with the City—and thereby OGRE's sublease with OBOT—has been terminated. In California, the law is clear that where there is dispute over real property rights between a landlord and a tenant, the tenant's right to possess the property will remain in effect until there is a judicial determination that the lease has been terminated." OGRE Reply, at 4, *citing Mihans v. Municipal Court*, 7 Cal. App. 3d 479, 484 (Cal. Ct. App. 1970). In fact, no judicial involvement is required for the Ground Lease, and

provide transportation over the Line, OGRE cannot be considered a rail carrier.⁵ See *Riffin*, slip op. at 1. Nor has OGRE obtained or even sought the Board's authority to operate as a common carrier. See March 15th Decision, slip op. at 5, 11 n.12. Without either the appropriate property rights or the regulatory authority, OGRE satisfies exactly none of the indicia necessary to invoke the Board's jurisdictional requirements. See 49 U.S.C. § 10501(a), (b). Accordingly, it is inappropriate for the Board to decide at this time the Line's jurisdictional status or what OGRE may or may not do on the City's property.

Although the Board in the March 15th Decision asserts that its authority to operate is permissive, and that "the lack of the necessary contractual and property rights would not necessarily foreclose a grant of operating authority," March 15th Decision, slip op. at 11, n.12, the cases that the Board cites in support follow the standard outlined above. In *Ohio River Partners*, the dispute involved a non-carrier that was seeking authority to acquire a rail line, thereby becoming a carrier. *Ohio River Partners LLC – Acquisition and Operation Exemption – Hannibal Development, LLC*, STB Docket No. FD 35984, slip op. at 1 (Service Date Apr. 1, 2016). *Lackawanna* involved revocation of authority already granted to a railroad. *Lackawanna Cnty. R.R. Auth. – Acquisition Exemption – F&L Realty, Inc.*, STB Docket No. FD 33905 *et al.*, slip op. at 6 (Service Date Oct. 22, 2001). In these cases, the parties involved were actually seeking or were defending their authority to operate as common carriers. OGRE is doing neither.

consequently OGRE's sublease, to terminate—the terms of the lease determine that, and the City has taken all steps required to terminate the lease. While the City may need to initiate an unlawful detainer action to ultimately evict OGRE, termination of the leases has already occurred.

⁵ Even with such property rights, OGRE would also need Board authority in order to be considered a rail carrier.

In this case, changed circumstances supported by new evidence have resulted in OGRE, which lacks the Board's authority to operate on the Line,⁶ losing the contractual and property rights to conduct rail operations over the Line. Those contractual and property rights are critical, since they underpin the Board's premise for considering OGRE's petition: the assumption "that OGRE ultimately intends to access the interstate system." See March 15th Decision, slip op. at 7. This new development removes the tenuous footing upon which OGRE asserts the Board's right to make a determination regarding its reconstruction activities. Accordingly, the termination of OGRE's sublease materially affects the March 15th Decision, which the Board should now reconsider.

In the March 15th Decision the Board sidestepped the "threshold" question raised by the Port regarding whether it was appropriate for the Board to make a determination regarding a rail line over which a would-be railroad had no property rights to operate. See March 15th Decision, slip op. at 5, 10. Termination of the Ground Lease, and consequently OGRE's sublease, raises exactly the same question with respect to those segments owned by the City.

2. The Board materially erred in asserting jurisdiction over the Line in the March 15th Decision

In alleging material error, a party "must do more than simply make a general allegation; it must substantiate its claim of material error." *Jimmy Lee Waneck and Starr Swearingen Waneck, et al. – Petition for Declaratory Order*, STB Docket No. FD 36167, slip op. at 3 (Service Date Oct. 31, 2018).

⁶ See *Oakland Global R. Enterprise, LLC – Acquisition and Operating Exemption – In the Port of Oakland, Cal.*, STB Docket No. FD 35807 (Service Date Apr. 30, 2014) (granting "noncarrier" OGRE's motion to withdraw its notice of exemption to operate over City and Port property).

a. The Board materially erred in determining jurisdiction over the Line where there is no actual carrier seeking to operate over it

The Board has in the past declined to take sides in a dispute between a tenant and its landlord and to proclaim a basis for asserting federal preemption where the tenant is in no position to avail itself of such preemption. To do so now would be inconsistent with its own precedent and constitute a material error in the Board's analysis.

For example, in *Tri-State*, the Board denied a petition for declaratory order from a non-carrier seeking a Board determination of jurisdiction over property leased from the City of New York. *Tri-State*, slip op. at 2. Similarly to OGRE/OBOT, the non-carrier in that case was a disgruntled former tenant of a municipality, the property was served by rail, and, like OBOT, the tenant intended to conduct transloading operations on the property. *Id.* In denying the petition, the Board noted that its "jurisdiction is limited by statute to 'transportation by rail carrier,'" and stated that the Board's authority over the interstate rail network does not "entitle any person to occupy property of another merely because that property has access to rail service." *Tri-State*, slip op. at 6. The Board declined to make a determination regarding its jurisdiction over the property or the common carrier obligation of the municipality that owned it, noting that:

Because we do not have jurisdiction over [the tenant's] activities, we cannot set the terms and conditions, including land use charges, for [the tenant's] use of the [property], or even insist that Petitioners' use of the Yard should continue. Those are issues for the courts to decide. Therefore, the petition to institute a declaratory order proceeding will be denied.

Id., slip op. at 6.

The Board does not have jurisdiction over OGRE's activities. Yet the March 15th Decision helps establish OGRE's authority to use the City's property, including authorizing reconstruction of rail facilities and a new segment of jurisdictional track by a non-carrier (*i.e.*, the West Segment). It is hard to see how, particularly under the new circumstances, the March 15th

Decision could be distinguished from a future petition by a non-carrier tenant, such as a prospective shipper, seeking to draw the Board into taking sides in a dispute with its landlord and proclaiming a basis for asserting federal preemption where the tenant is in no position to avail itself of such preemption. Rather than declining the petition for reconsideration, as it did in *Tri-State*, the Board here has accepted OGRE's invitation to extend itself beyond its jurisdictional limits.

A real danger of the March 15th Decision, if left standing, is what the Board avoided doing in *Tri-State*: providing a basis for OGRE and OBOT to argue before a state court that they are permitted to engage in activities protected from local regulation by federal preemption. Armed with a decision from this Board providing it with the authority to "rehabilitate" the Line, OGRE and OBOT may now think they can argue in front of a state court that the Board's ruling and the preemption of state law that comes with the Board's assertion of jurisdiction, *see* 49 U.S.C. §10501, limits the City's ability to restrict such activities. Such an outcome would contravene the Board's precedent, and thus constitutes a material error that the Board should reconsider.

b. The Board materially erred in choosing to determine and analyzing jurisdiction over the West Segment

The March 15th Decision essentially extends the Board's authority over a piece of property—the West Segment—that, as the Board itself indicates, potentially has never been used for interstate transportation by a rail carrier, at the request of an entity that at this point will never serve as a rail carrier over that property. *See* March 15th Decision, slip op. at 7. Even where the Board feels it is uncontroversial to declare jurisdiction over a segment where there is evidence of prior Board authority—*i.e.*, the Middle Segment—it should refrain from doing so for a contested segment with unclear jurisdictional status until there is an actual rail carrier seeking actual

authority to operate. Accordingly, its decision to determine jurisdiction was a material error that should be reversed.

Moreover, even if it were appropriate for the Board to make a determination regarding the jurisdictional status of the West Segment, the Board misapplied its own factors for doing so. The March 15th Decision plainly states that the Board “agrees that the evidence on the record regarding the West Segment does not establish that the track is jurisdictional as OGRE claims.” March 15th Decision, slip op. at 7. Notwithstanding this determination, the Board proceeds to declare that it now has jurisdiction over the West Segment based on the premise that “it is not necessary to determine the historical jurisdictional status of the West Segment to determine whether the track now requires authority under § 10901.” March 15th Decision, slip op. at 7. In fact, the historical status and use is one of the very factors that the Board *should* consider in making a determination regarding jurisdictional status. *Id.* at 8, n.8; *Union Pac. Corp., Union Pac. R.R. Co. and MI Pac. R.R. Co. – Control and Merger – S. Pac. R. Corp., S. Pac. Transp. Co., St. Louis S.W. Ry. Co., SPCSL Corp., & the Denver & Rio Grande W. R.R. Co.*, STB Docket No. FD 32760, slip op. at 12 (Service Date Jan 31, 2018) (“The Board has adopted a case-by-case approach that analyzes the disputed track’s intended use, physical characteristics, relationship to the rail system, *and history*.” (Emphasis added.)). It may not be necessary to determine with absolute certainty what the historical status of the West Segment was, but it certainly should be considered as a factor in the analysis. The Board failed to explain why the lack of historical basis for asserting jurisdiction over the West Segment did not overcome other factors to which the Board gave credence. This also constituted a material error, and accordingly the Board should reconsider it.

Determining jurisdiction over a trackage that is unbuilt, in right-of-way may have never been subject to Board jurisdiction, on land that is owned by another entity, at the request of a non-carrier, is too speculative and moves beyond what the Board should be prepared to consider. Accordingly, the Board's decision to assert jurisdiction over the West Segment, and its analysis in making that determination, is in material error.

3. The Board should reconsider the March 15th Decision in light of the impact on the public interest and potentially dangerous consequences for future Board proceedings

The Board here has given OGRE permission to commence construction on property in which the City has determined that OGRE no longer has any identifiable property interest. The City's interest—and therefore the interests of the people of Oakland whom the City represents—in the OAB Property will be irreparably harmed if the Board's March 15th Decision stands and provides OGRE with a basis for flouting the City's state property rights. This harm extends beyond "mere economic injury" for which adequate compensatory relief will be available later. *See Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843, n.2 (D.C. Cir. 1977)

Furthermore, as indicated above, there is likely to be significant precedential implications, and could embolden shippers, would-be railroads, and disgruntled tenants to file petitions for declaratory order to determine jurisdiction in order to steamroll landlords, local municipalities, and state courts into accepting federal preemption where there is none. This possibility alone strongly suggests that the Board reconsider the March 15th Decision to simply deny the petition, or at the very least modify its holding to align with its previous precedent.

The City, along with the Port, is committed to developing the OAB Property and utilizing its capacity as a transportation hub and economic driver for the area. Indeed, that is why the City

initiated the project for redevelopment of the OAB Property in the first place and solicited participation by OBOT and OGRE. The City does not have, and never has had, any intent to thwart the use of the OAB Property for multimodal transportation purposes, nor does it intend or desire to obstruct or undermine the valid assertion of Board authority. Rather, the City is keenly interested in promoting the economic redevelopment of the OAB Property to serve the interests of the public, and accordingly is working diligently to resolve challenges that hamper implementation of the City's vision for the area. OBOT and OGRE do not have the right, and should not be given the opportunity, to wield the Board's authority where it controverts the public interest without serving any practical purpose.

CONCLUSION

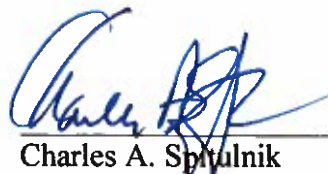
The City's termination of the sublease providing OGRE with the property interest necessary to conduct rail activities over the Line has materially affected the context for the March 15th Decision. Moreover, the Board made a material error when it decided to grant OGRE's Petition for Declaratory Order, and when and how it concluded that it should assert jurisdiction over the Line.

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WHEREFORE, and in view of the foregoing, the City respectfully requests this Board to reverse the March 15th Decision and deny OGRE's petition for declaratory order.

Dated: April 4, 2019

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Charles A. Spitulnik", is written over a horizontal line.

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Certificate of Service

I hereby certify that I have this 4th day of April, 2019, caused to be served a copy of the foregoing Petition of City of Oakland for Reconsideration upon the following parties of record by e-mail and by first class mail, with postage prepaid:

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Charles A. Spitulnik

EXHIBIT A

City of Oakland Notice of Cure

CITY OF OAKLAND



ONE FRANK H. OGAWA PLAZA • 6TH FLOOR • OAKLAND, CALIFORNIA 94612

Office of the City Attorney
Barbara J. Parker

(510) 238-3601
FAX: (510) 238-6500
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VIA HAND DELIVERY

September 21, 2018

Oakland Bulk & Oversized Terminal, LLC
c/o California Capital & Investments, Inc.
The Rotunda Building
300 Frank Ogawa Plaza, Suite 340
Oakland, CA 94612
Attn: Mr. Phil Tagami

Re: Notice to Cure with respect to an Unmatured Event of Default by Oakland Bulk & Oversized Terminal, LLC ("OBOT") under Section 6.1.1.1 of the Army Base Redevelopment Project Ground Lease for West Gateway between the City of Oakland ("City") and OBOT, dated February 16, 2016 ("Ground Lease"). All capitalized terms used in this letter are defined in the Ground Lease unless otherwise defined herein

Dear Mr. Tagami:

As noted in earlier correspondence (see letter dated August 20, 2018, the "August 20 Letter"), OBOT has failed to satisfy its obligation to Commence Construction of the Minimum Project by the Initial Milestone Date under Section 6.1.1.1 of the Ground Lease. Such failure has resulted in an Unmatured Event of Default, notwithstanding OBOT's claims of Force Majeure. We write to inform you that **the City rejects such claims and provides you an official notice to cure this Unmatured Event of Default pursuant to Section 18.1.7 of the Ground Lease.**

As you are aware, the Ground Lease requires OBOT to cure within thirty (30) days of this letter, or within such additional reasonable time necessary once a cure has been commenced and is being diligently dispatched (the "Cure Period"); notwithstanding this requirement, the City hereby agrees to extend the Cure Period by 120 days (the "Extended Cure Period"), subject to the parties entering into an agreement ("Agreement"), by no later than September 26, 2018, on all of the terms stated below:

Oakland Bulk & Oversized Terminal, LLC
c/o California Capital & Investments, Inc.
Attn: Mr. Phil Tagami
Re: Notice to Cure
September 21, 2018
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VIA HAND DELIVERY

- 1) OBOT and the City agree to a thirty (30) day period to attempt, in good faith, to reach a settlement agreement for the Coal Litigation based on the City's June 19, 2018 responses to the OBOT Restated and Clarified Settlement Proposal dated December 18, 2017 and consistent with the guiding principles originally laid out by the Council for its settlement terms:
 - a) OBOT's agreement to develop a Ban-Compliant Terminal;
 - b) No payment of attorneys' fees;
 - c) No payment of damages - either in cash or in kind with properties; and
 - d) City's agreement to forgo revenues at front end of lease term in exchange for a true up at back end of lease term.

If the parties are not able to reach a settlement by the end of the negotiation period, then the obligations to negotiate in good faith would terminate and OBOT would have the remainder of the Extended Cure Period to perform as set forth in the Ground Lease and the Agreement.

- 2) OBOT and the City mutually release all potential claims, including but not limited to Force Majeure and any breach of contract claims, they may have against each other, existing or that may exist, as a result of actions or inactions arising prior to the date of the Agreement. This release would not resolve the pending appeal from the decision in District Court case no. 16-cv-07014-VC (the "Coal Litigation") nor would the parties be waiving any future claims.
- 3) OBOT takes corrective actions to cure the breach, including, at a minimum, (a) completion of all requirements necessary to commence construction of the Rail Improvements, including a BCDC permit scope acceptable to the City; and (b) diligent pursuit of the Terminal by the schedule of milestones the City will provide to OBOT at the end of the negotiating period occurring in accordance with Item (1).

Please let us know, in writing, by close of business on Monday, September 24, 2018, whether you elect the terms of the City's proposed Extended Cure Period. If we do not receive such written notice, the Cure Period will stand as set forth in the Ground Lease, and OBOT will have thirty days (30) from the date of this letter to cure.

Oakland Bulk & Oversized Terminal, LLC
c/o California Capital & Investments, Inc.
Attn: Mr. Phil Tagami
Re: Notice to Cure
September 21, 2018
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VIA HAND DELIVERY

We further note that failure to perform such cure shall constitute an Event of Default under Section 18.1, and pursuant to Section 6.1.2.1, OBOT must pay the Minimum Project Liquidated Damages within thirty (30) days of such Event of Default and the Ground Lease shall automatically terminate with respect to the Unimproved Premises (as defined in the Ground Lease).

Very truly yours,


BARBARA PARKER
City Attorney

cc: Mayor Libby Schaaf
Council President Larry Reid and Members of the City Council
Sabrina Landreth, City Administrator
Betsy Lake, Deputy City Administrator
Bijal Patel, Special Counsel

EXHIBIT B

City of Oakland Notice of Default

CITY OF OAKLAND



ONE FRANK H. OGAWA PLAZA • 6TH FLOOR • OAKLAND, CALIFORNIA 94612

Office of the City Attorney
Barbara J. Parker
City Attorney

(510) 238-3601
FAX: (510) 238-6500
TTY/TDD: (510) 238-3254

October 23, 2018

Via Hand Delivery

Phil Tagami
Oakland Bulk and Oversized Terminal, LLC
c/o California Capital & Investment Group, Inc.
The Rotunda Building
300 Frank Ogawa Plaza, Suite 340
Oakland, CA 94612

Re: Notice of Event of Default under the Army Base Gateway
Redevelopment Project Ground Lease for West Gateway between
the City of Oakland ("**City**") and Oakland Bulk and Oversized
Terminal, LLC ("**OBOT**"), dated February 16, 2016 ("**Ground
Lease**"); all capitalized terms are defined in the Ground Lease
unless otherwise defined herein

Dear Mr. Tagami:

As described in the Notice to Cure with respect to an Unmatured Event of Default delivered to OBOT on September 21, 2018 (the "**Notice to Cure**"), OBOT has failed to satisfy its obligations under the Ground Lease to Commence Construction of the Minimum Project by the Initial Milestone Date. The Notice to Cure began a thirty (30)-day period (the "**Cure Period**") during which OBOT was to cure, or alternatively, to commence and diligently dispatch a cure of OBOT's failure to Commence Construction of the Minimum Project (a "**Satisfactory Cure**").

The City has determined that OBOT has failed to achieve a Satisfactory Cure within the Cure Period. As such, the City hereby notifies OBOT of the occurrence of an Event of Default pursuant to Section 18.1.7 of the Ground Lease.

Pursuant to Section 6.1.2.1 of the Ground Lease, (1) OBOT is required to pay the Minimum Project Liquidated Damages to the City within thirty (30) days from the date of the Event of Default; and (2) effective thirty (30) days after the Event of Default and without any further notice, the Ground Lease automatically terminates with respect to

Via Hand Delivery

Phil Tagami

October 23, 2018

Page Two

the Unimproved Premises. OBOT must comply with all requirements of Section 6.1.2.1 on or before November 22, 2018.

Very truly yours,



BARBARA J. PARKER
City Attorney

cc: Sabrina Landreth, City Administrator
Elizabeth Lake, Deputy City Administrator
Bijal M. Patel, Special Counsel

EXHIBIT C

OBOT and OGRE Complaint to the Superior Court of the State of California

BY FAX



21064288

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FILED
ALAMEDA COUNTY
DEC 4 - 2018
CLERK OF THE SUPERIOR COURT
By *Janina Puno*

Attorneys for Plaintiffs
OAKLAND BULK AND OVERSIZED TERMINAL and
OAKLAND GLOBAL RAIL ENTERPRISE

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ALAMEDA

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

Plaintiffs,

v.

CITY OF OAKLAND, a California municipal
corporation,

Defendant.

Civil Case No.

1818930929

COMPLAINT FOR:

- (1) BREACH OF CONTRACT;
- (2) ANTICIPATORY BREACH;
- (3) BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING;
- (4) FRAUDULENT INDUCEMENT/ FALSE PROMISE;
- (5) INTENTIONAL INTERFERENCE WITH CONTRACT (TLS);
- (6) INTENTIONAL INTERFERENCE WITH PROSPECTIVE ECONOMIC RELATIONS (TLS AND ITS);
- (7) NEGLIGENT INTERFERENCE WITH PROSPECTIVE ECONOMIC RELATIONS (TLS AND ITS);
- (8) INTENTIONAL INTERFERENCE WITH CONTRACT (OGRE);
- (9) INTENTIONAL INTERFERENCE WITH PROSPECTIVE ECONOMIC RELATIONS (OGRE);
- (10) NEGLIGENT INTERFERENCE WITH PROSPECTIVE ECONOMIC RELATIONS (OGRE);
- (11) DECLARATORY RELIEF; AND
- (12) SPECIFIC PERFORMANCE

1 Plaintiffs Oakland Bulk and Oversized Terminal, LLC ("OBOT") and Oakland Global
2 Rail Enterprise, LLC ("OGRE") (collectively, "Plaintiffs") hereby complain against Defendant
3 City of Oakland ("Defendant" or "City") and allege as follows:

4
5 **SUMMARY OF ACTION**

6 1. Plaintiffs bring this action to compel the City to fulfill its promises and honor its
7 legal obligations to Plaintiffs, who are the developers of a rail-to-ship bulk commodity terminal
8 ("Terminal") located at a portion of the former Oakland Army Base known as the West Gateway.
9 Over the last several years, the City has engaged in an uninterrupted pattern of delay and
10 interference, all with the objective of preventing OBOT from completing this project. Indeed, the
11 City's latest tactic—falsely asserting that its Lease with OBOT has automatically terminated as
12 the result of a claimed default that did not occur—speaks volumes about the City's misguided
13 attempts to eliminate this project in violation of its long-standing contractual commitments.
14

15 2. The former Oakland Army Base is uniquely situated with its immediate proximity
16 to both a deep-water port and existing rail capacity, which allows for significant international
17 goods movement through a bulk goods shipping terminal that can receive, store, handle, and ship
18 goods that are typically transported in large quantities. Absent these characteristics, such goods
19 would have to be transported via diesel trucks with significantly higher ambient air emissions,
20 including particulate matter, in and around the already impacted community of West Oakland.
21

22 3. Beginning in 2010, Plaintiffs, or their predecessors-in-interest, and the City
23 entered into a series of contracts with respect to the former Oakland Army Base in general and the
24 "West Gateway" portion of the former base in particular, including the following:

- 25 a. that certain Exclusive Negotiation Agreement, dated January 22, 2010 (as
26 amended, the "ENA");
27 b. that certain Army Base Gateway Redevelopment Project Lease Disposition and
28

1 Development Agreement, effective December 4, 2012 (as amended, the "LDDA");
2 c. that certain Development Agreement by and between the City of Oakland and
3 Prologis CCIG Oakland Global, LLC Regarding the Property and Project Known as
4 "Gateway Development/Oakland Global" dated July 16, 2013 (the "DA"); and
5 d. that certain Army Base Gateway Development Project Ground Lease for West
6 Gateway, dated February 16, 2016 (as amended, the "Lease"), whereby OBOT ground
7 leased (i) the West Gateway property; and (ii) the existing rail right-of-way ("Railroad
8 R/O/W Property" and together with West Gateway property, the "Property").
9
10 4. Pursuant to their rights and obligations under such agreements, the developers set
11 out to redevelop a significant portion of the former Oakland Army Base, which included
12 reestablishing certain rail improvements (the "Shortline Rail") and developing the Terminal. The
13 Shortline Rail and the Terminal are collectively referred to herein as the "Project".
14
15 5. In order to reach this vision, it was understood that OBOT would sublease portions
16 of the Property to a terminal subtenant who would design, construct and operate the Terminal and
17 a rail subtenant who would design, construct and operate the Shortline Rail.
18
19 6. Once realized, the Project is positioned to streamline customer logistics supply
20 chains, create more service options for shippers from the United States seeking greater access to
21 and from foreign markets, solidify Oakland's reputation as a major west coast trade center for
22 American resources, and carry on the proud history of Oakland's working waterfront through the
23 creation of long-term job opportunities for Oakland residents.
24
25 7. Currently, the DA and the Lease define the City's and OBOT's rights and
26 obligations with respect to the Project.
27
28 8. In one egregious omission or act after another, the City has failed to perform its
material obligations under the Lease and DA, and has aggressively taken steps to prevent

1 OBOT's performance under the Lease and receipt of its benefit of the bargain thereunder. The
2 City's omissions and actions constitute breaches of its contractual obligations and thwart
3 completion of the Project. Such breaches include enforcement of an illegal and politically-driven
4 ordinance and resolution banning any transfer of coal through the West Gateway Terminal; threat
5 of inappropriate and unwarranted additional layers of legal review that may subject Plaintiffs to
6 litigation exposure; unfounded accusations against Plaintiffs of contractual default; refusal to
7 address essential prerequisites for permit submittals; failure and refusal to turnover possession of
8 the very premises that Plaintiffs have a right and obligation to occupy and improve; and
9 interference with Plaintiffs' funding and permitting efforts with outside regulatory agencies.
10

11 9. The City's breach of the Lease has caused harm to Plaintiffs, continues to cause
12 harm to Plaintiffs, and excuses any non-performance by Plaintiffs under the Lease and/or the DA.
13

14 10. Plaintiffs seek to hold the City accountable for its legal obligations in pursuing this
15 action.

16 11. Section 38.13 of the Lease states that if a party to the Lease is required to bring an
17 action against the other party for a failure to perform thereunder, or if any other dispute arises
18 between the parties, the prevailing party is entitled to recover all costs and expenses incurred,
19 including attorneys' fees.
20

21 PARTIES

22 12. Plaintiff OBOT is a California limited liability company with its principal place of
23 business in Oakland, California. Pursuant to the DA and the Lease, OBOT is the developer of the
24 Project.

25 13. Plaintiff OGRE is a California limited liability company with its principal place of
26 business in Oakland, California. OGRE is an affiliate of OBOT and entered into a sublease
27 agreement with OBOT with respect to the Shortline Rail portion of the Project. OGRE seeks to
28

1 rehabilitate the rail network and become a Class III common carrier, providing rail switching
2 services (including on behalf of Class I common carriers) on the Oakland Army Base rail
3 network.

4
5 14. Defendant City is a municipal corporation and a chartered city organized and
6 existing under the laws of the State of California.

7 **JURISDICTION AND VENUE**

8 15. Jurisdiction in this Court is proper because the amount in controversy exceeds
9 \$25,000.

10 16. Venue is proper in this Court pursuant to Code of Civil Procedure section 394
11 because Plaintiffs' claims are asserted against Oakland, which is located in Alameda County.
12 This Court is also a proper venue because a substantial part of the events giving rise to the claim
13 occurred in Oakland, California.

14
15 17. The contract at issue in this case contains the following provision at Section 38.9:

16 This Lease is entered into in the City of Oakland, State of California, and
17 shall be governed by, and interpreted in accordance with, the laws of the
18 State of California . . . all action or proceedings arising directly or
indirectly under this Lease may, at the sole option of Landlord, be litigated
in courts have situs within the City of Oakland . . .

19 **GENERAL ALLEGATIONS**

20 **I. Reuse Plan for Oakland Army Base.**

21 18. In 1999, the U.S. Department of Defense closed the U.S. Army facility known as
22 the "Oakland Army Base" for military use. Following its closure, 370 acres of the former
23 Oakland Army Base property were transferred to the City, with approximately 200 acres of the
24 waterfront area allocated by the City to the Port of Oakland, acting by and through its Board of
25 Port Commissioners ("Port") operation area,¹ while the remaining 170 acres known as the
26

27
28 ¹ The Port is a political subdivision of the City of Oakland. The Charter of the City of Oakland (as amended through November 2016), Section 700. The seven members of the Board of Port Commissioners are nominated by the Mayor

1 "Gateway Development Area" remained for redevelopment by the City.

2 19. Facing the loss of local jobs and other economic benefits from the closure of the
3 Oakland Army Base, the City adopted a "Redevelopment Plan for the Oakland Army Base
4 Development Project" to facilitate the "redevelopment, rehabilitation, and revitalization" of the
5 Gateway Development Area (as amended, the "Redevelopment Plan"). Its "major goals"
6 included, among other things, the "strengthening of the economic base of the community by the
7 construction and installation of infrastructure" to "stimulate new development, employment, and
8 social and economic growth." To achieve its goals the Redevelopment Plan did not present
9 "specific proposals," but instead "present[ed] a process and a basic framework" within which the
10 City could "fashion, develop, and proceed with . . . specific plans, projects and solutions." The
11 Redevelopment Plan granted the City authority to sell or lease real property in the Gateway
12 Development Area for "redevelopment of [the] land by private enterprise."
13

14 20. In 2008, after numerous other proposed projects for redevelopment of the Oakland
15 Army Base failed, the City issued a Request for Qualifications seeking plans from private
16 developers to "transform the [Gateway Development Area] into a mixed use commercial and/or
17 industrial development."
18

19 21. Thirteen developers submitted proposals, including California Capital &
20 Investment Group, Inc. ("CCIG") and AMB Property, L.P. ("AMB"). CCIG is the sole member
21 of OBOT. CCIG and AMB were jointly selected as the developers for the West Gateway, Central
22

23
24 of the City of Oakland and appointed by the City Council. Section 1204 of the Charter expressly states "[a]ll real
25 property acquired by the City shall be held in the name of 'The City of Oakland.'" See also the Charter of the City of
26 Oakland (as amended through November 2016), Section 706(15) (providing that the powers of the Port include the
27 ability "[t]o acquire *in the name of the City* by purchase, condemnation, gift, lease, or otherwise take over and hold
28 all lands, property, property rights, leases, or easements, and personal property of every kind, necessary or convenient
for the development and operation of the port, or for the carrying out of the powers herein granted to the Board.
Whenever the Board determines that any lands owned by the City within its jurisdiction have become unnecessary
for port purposes or harbor development, it may in its discretion transfer such lands to the control of the Council, free
from all restrictions, or it may sell or exchange such lands, by ordinance subject to the referendum provisions of this
Charter.") (*emphasis added*).

1 Gateway and East Gateway of the former Oakland Army Base.

2 22. At all times, the developers clearly communicated to the City, including in project
3 documentation, their plan to develop the Terminal at the West Gateway.

4 23. The City was aware that coal was a potential bulk commodity to be transported
5 through the Terminal. For example: (i) in 2011 a potential subtenant of the Terminal, Kinder
6 Morgan, gave a presentation to City officials that identified coal as 34% of the "Bulk Tonnage
7 Breakout" Kinder Morgan shipped; (ii) on or about April 19, 2012, the City commissioned and
8 received a report from the Tioga Group, Inc. that identified coal as a likely bulk commodity that
9 could be handled at the Terminal ("Tioga Report"); (iii) in May 2012, Port staff exchanged emails
10 that expressly referenced coal as a potential commodity to be shipped through the Terminal; (iv)
11 in June 2012, CCIG provided to City officials a video of a comparable facility in Long Beach that
12 depicted coal; (v) a May 2013 study commissioned by the Port expressly included coal on its list
13 of suggested commodities; (vi) a September 12, 2013 Report on Compliance prepared by the
14 City's outside counsel, Holland & Knight, and adopted by the City through resolution, included
15 the "Long Range Property Management Plan" for the Oakland Army Base that cited examples of
16 typical bulk commodities to be handled by the Terminal: "(e.g. **lumber, coal, sulfur**)"; and (vii)
17 September 2013 emails between staff members at San Francisco Bay Conservation and
18 Development Commission ("BCDC") and Earthjustice noted that coal had been expressly
19 included in discussions regarding potential commodities at the Terminal.

20 24. Informed in large measure by the Tioga Report, the City was aware that the
21 ultimate success and viability of the Project largely hinged on the ability to identify and secure
22 the commitment of a commodity provider with long-term needs for the processing and handling
23 capacity the Terminal would provide over its 66-year useful life.

24 25. The use of rail to transport bulk commodities to and from shipping vessels is the
25
26
27
28

1 keystone component of the Project. The City, the Port, OBOT, and OGRE all have repeatedly
2 acknowledged the importance of rail to the Project, including through the City's adoption of the
3 master plan. But now, not only is the City objecting to the rail work moving forward, but it has
4 allowed the other major developer at the Oakland Army Base, Prologis, Inc. ("Prologis"), to
5 develop non-rail served buildings contrary to the master plan and what was represented to OBOT
6 and OGRE as part of the business case for the Project; to be fair, Prologis originally attempted to
7 locate rail served tenants, but because the Rail Access Agreement was not in place and the City's
8 actions prevented the completion of the rail work, no rail rate could be quoted, so there was no
9 serious interest by a rail tenant.
10

11 **II. Contracts Entered into by Plaintiffs and City.**

12 26. As stated above, the material contracts related to the redevelopment of the former
13 Oakland Army Base include the ENA, the LDDA², the DA and the Lease.
14

15 27. Under the ENA, the developers (i) funded the development of the redevelopment
16 concept and the City's environmental review of such redevelopment concept; (ii) spearheaded the
17 City's ability to secure in excess of \$250,000,000 in grant funds from the federal government and
18 the State of California transportation commission; and (iii) negotiated the terms of the LDDA.
19

20 28. Under the LDDA, the City and the developers agreed, among other matters, (i) to
21 work together on the design, funding and construction of certain street, utility, grading, wharf, rail
22 and other improvements that were necessary for the developers' redevelopment of the subject
23 portions of the former Oakland Army Base (the "Public Improvements"); and (ii) to the form of
24 the leases for the subject property (including the Lease).³
25

26 ² Certain terms of the Third Amendment to the LDDA were subsumed in the Lease and lapsed automatically upon
execution of the Lease.

27 ³ The LDDA was originally entered into by the City, the Oakland Redevelopment Successor Agency ("ORSA") and
Prologis CCIG Oakland Global, LLC (a joint venture entity formed by a CCIG affiliate and a Prologis affiliate,
28 "Prologis/CCIG"). On or about August 30, 2013, ORSA assigned its rights and obligations under the LDDA to the
City. On or about June 13, 2014, Prologis/CCIG assigned its rights and obligations under the LDDA with respect to

1 29. The DA was entered into to, among other matters, vest the developer's rights to
2 develop the redevelopment project for the subject portions of the former Oakland Army Base.⁴

3 30. Under the Lease, (i) the City agreed (among other obligations) to continue to
4 cooperate with OBOT in the identification and pursuit of additional funds for the Public
5 Improvements and construct the funded Public Improvements, and OBOT agreed to (among other
6 obligations) to pay the required rent and develop the Minimum Project (which included certain
7 rail and terminal improvements).

8 31. Neither the DA nor the Lease impose any restrictions preventing the transport of
9 coal or petcoke through the Terminal. Neither agreement limits or otherwise differentiates the
10 type(s) of bulk commodities that could be exported from the Terminal. There is no existing
11 zoning that prohibits or disallows any legal commodity (e.g. coal).

12 32. In particular, Section 3.4 of the DA specified that only "Existing City Regulations"
13 as of the adoption of the DA would "govern the development of the Project and all Subsequent
14 Approvals with respect to the development of the Project on the Project Site." The only
15 exception to this express contractual promise is Section 3.4.2 of the DA: the City could apply
16 health and safety regulations adopted after July 16, 2013, to the Terminal only if (a) the
17 application of any such health and safety regulation is "otherwise permissible pursuant to
18 Laws"— "Laws" being defined to include the "Constitution of the United States, and any codes,
19 statutes, regulations, or executive mandates thereunder"; and (b) the "City determines based on
20 substantial evidence and after a public hearing that a failure to do so would place existing or
21 future occupants or users of the Project, adjacent neighbors, or any portion thereof, or all of them,

22
23
24
25
26 the Property pursuant to that certain Partial Assignment and Assumption (West Gateway) of the Lease Disposition
27 and Development Agreement (the "WGW Partial Assignment").

28 ⁴ The DA was originally entered into between the City and Prologis/CCIG. Pursuant to Section 10.1 of the DA,
Prologis/CCIG's rights and obligations under the DA with respect to the West Gateway were automatically assigned
to OBOT upon the execution of the WGW Partial Assignment by the City, Prologis/CCIG and OBOT confirming
OBOT as a permitted assignee under the LDDA with respect to the West Gateway.

1 in a condition substantially dangerous to their health or safety.”⁵

2 33. In order to induce developers to pursue their respective projects at the Army Base,
3 the City represented that it had entered into a Cooperation Agreement dated December 20, 2012,
4 with local community groups in West Oakland, as well as various labor organizations to make
5 sure the neighbors and labor groups supported the Project in exchange for community benefit
6 concessions. Although OBOT was not a party to the Cooperation Agreement, the City mandated
7 that the related cost and obligations be borne by OBOT and the other developers.
8

9 34. OBOT came to realize that the community groups and labor refused to honor their
10 obligation to support the Project, and instead were quick to interfere with the Project despite
11 having received the benefit of the bargain. Community groups breached the Cooperation
12 Agreement prior to the City’s execution of the Lease. The City failed to enforce compliance with
13 the Cooperation Agreement, which delayed Project completion and caused monetary damage to
14 Plaintiffs.
15

16 35. Moreover, on information and belief, the \$541,440.00 payment OBOT made to the
17 City for the West Oakland Community Fund (“WOCF”) has never been distributed to said fund
18 but has been retained by the City.
19

20 36. Following the execution of the DA and the Lease, Plaintiffs invested years of
21 effort and millions of dollars in planning the development of the Project. To date, OBOT and its
22 affiliates have invested well in excess of \$30 million on these development efforts. And
23 Plaintiffs will suffer damages in excess of \$100 million if the City’s conduct prevents completion
24 of the Project.
25

26 37. In 2013, CCIG stated that its immediate commodity focus was on iron ore and
27 copper concentrate, which was accurate at the time. However, CCIG refused to make a pledge to
28

⁵ Certain other narrow exceptions exist that allow the City to apply new regulations to the project, but none of those exceptions apply here.

1 the City to take coal and all fossil fuels off of the table as potential commodities to be handled at
2 the Terminal. CCIG explained that *to be viable in the competitive marketplace, the Project must*
3 *be responsive to the demands of the market over the 66-year life of the Lease.*

4 38. Further, as part of its development process and in furtherance of its obligations
5 under the foregoing contracts, OBOT began to search for a company to construct and operate the
6 Terminal. In the spring of 2014, OBOT entered negotiations with Terminal Logistics Solutions,
7 LLC ("TLS").

8 39. The negotiations eventually resulted in a November 2014 Exclusive Negotiation
9 Agreement and Sublease Option between OBOT and TLS (the "Sublease Option"). The Sublease
10 Option granted TLS an exclusive option to sublease and operate the Terminal for a sixty-six (66)
11 year period.

12 40. Consistent with the City-approved DA and industry practice for such facilities, the
13 Sublease Option did not restrict the shipment of coal or any other commodity to and
14 through the Terminal.

15
16
17 **III. The City's Obligations to Cooperate with OBOT to Secure Funding and Permits and**
18 **Construct the Funded Public Improvements.**

19 41. In each of the LDDA and Lease, the City agreed to cooperate with OBOT to
20 obtain third party permits or approvals necessary to construct the Public Improvements and to
21 cooperate to identify and to pursue funds for the Public Improvements.

22 42. However, the City has not cooperated with Plaintiffs to obtain funds or permits,
23 and in several instances the City has affirmatively obstructed such matters.

24 43. For example, the City and the Port established a Joint Environmental Remediation
25 Fund ("JERF") to fund remediation for the entirety of the former Oakland Army Base reuse plan.
26 Remediation of areas essential to the core operations of the Project were and remain an essential
27 prerequisite to being able to construct and operate the Project on formerly contaminated lands.
28

1 The Public Improvements budget expressly excluded environmental remediation costs, however,
2 the City used an undisclosed amount of Public Improvements funds, as opposed to JERF funds,
3 for remediation work, thereby depleting funds for non-Project-allocated work. All funds in the
4 JERF have long-since been exhausted for unknown purposes.

5
6 44. On or about April 24, 2014, Fred Blackwell, the then City Administrator,
7 identified various categories of funding deficiencies in City accounts relative to the original
8 agreements for the Public Improvements (directly impacting the Project), and asked OBOT to
9 work "collaboratively with the City to solve the funding shortfall."

10 45. On June 5, 2014, the City obtained an amendment to a permit issued by BCDC for
11 a portion of the Public Improvements (the "BCDC Amendment"). The BCDC Amendment
12 included, at the City's direction: (a) the installation of the re-aligned W. Burma Road that will
13 provide primary vehicular access to the West Gateway; and (b) certain driveway, parking and
14 public access improvements located to the west of the West Gateway (the "Public Access
15 Improvements"). The BCDC Amendment characterized the Public Access Improvements as both
16 part of the permitted improvements and the required mitigation.

17
18 46. On July 8, 2014, as the City's project manager for the public infrastructure work,
19 CCIG responded to the City's request for cooperation by noting that previous iterations of the
20 budget identified sources sufficient to meet the City's required contribution. CCIG asked for
21 clarification of the City's funding sources and requested accounting documentation for various
22 funding discrepancies and irregularities including: (i) the Tidelands Trust Burma Road Fund that
23 the City had allocated inconsistently from time to time; (ii) the City's failure to separately account
24 for funds to be distinguished between disparate segments of the overall Project; and (iii)
25 allocation of third-party legal expenses.

26
27 47. On November 4, 2014, the City provided a funding update for the Project termed
28

1 the Mid-Project Budget Revise, which re-sequenced completion of the Public Improvement
2 components and set out the sources and uses that form the basis for the final budget. In summary,
3 under the Mid-Project Budget Revise, OBOT assumed far greater obligations and costs in
4 exchange for the City's assurances that the Lease would become effective more quickly and
5 construction and completion of the Terminal accelerated. OBOT lived up to its side of the
6 bargain, the City receiving the benefit thereof, but the City has repeatedly failed to honor its
7 promises, and indeed, has endeavored to prevent completion of the Project.
8

9 48. The most material example of the City's failure to meet its obligations under the
10 Lease relates to its refusal to accept \$22 million Measure BB bond funds from the Alameda
11 County Transportation Commission ("ACTC") for the design and construction of certain Public
12 Improvements that were originally the City's obligations under the LDDA and Lease and were
13 assumed by OBOT pursuant to the Third Amendment to the LDDA.
14

15 49. On November 4, 2014, Alameda County voters approved Measure BB, authorizing
16 an extension and augmentation of the existing transportation sales tax (Measure BB). Measure
17 BB is projected to generate approximately \$8 billion in revenues from April 2015 to March 2045
18 for transportation improvements for Alameda County. ACTC is responsible for disbursing funds
19 generated by Measure BB.
20

21 50. The City asked OBOT to support Measure BB during its campaign, which OBOT
22 did with the expectation that certain funds generated by Measure BB could potentially be
23 allocated to the Project (specifically, the original Public Improvements that were assumed by
24 OBOT).

25 51. Measure BB was adopted, and ACTC identified approximately \$22 million as
26 available to the Project as part of its goal of recognizing the economic importance of port/marine
27 terminal facilities and providing connections between goods and markets with minimal impacts to
28

1 residential neighborhoods. In addition, ACTC allocated funds to the City to perform public
2 improvements in and around the Property.

3 52. Yet the City has interfered with requested disbursements of funds on behalf of the
4 Project causing ACTC to not disburse any funds to aid in development of the Project to date.

5 53. For example, on June 13, 2015, the City's representative on the ACTC
6 Commission introduced a resolution at an ACTC Commission meeting to prevent the ACTC
7 funds from being released for the City Funded Wharf Improvements absent a promise to not ship
8 coal or petcoke.
9

10 54. Additionally, on July 31, 2015, Mayor Libby Schaaf and Councilmember Lynette
11 Gibson McElhaney co-signed a letter to the Executive Director of ACTC in which they requested
12 disbursement of Measure BB funds. Despite their obligation under the Lease to cooperate with
13 OBOT to secure third party funds, the City requested ACTC disburse funds to construct "public"
14 versus "private" improvements at the former Oakland Army Base. They expressly highlighted
15 that "the potential for the export of coal and related product is an extremely controversial issue"
16 related to the "private improvements." Distinguishing their request for funding for the public
17 improvements from that allocated for the private improvements, the letter states: "Please be
18 advised, however, that our efforts to appropriately address the coal export issue related to the
19 developers [sic] private improvements do not affect the City's request for ACTC grant funding
20 for the public infrastructure improvements at the Army Base." (Emphasis in original.)
21

22 55. Consequently, the City requested and received ACTC funds for public
23 improvement costs that were used to pay back the funds that were inappropriately used for
24 remediation work rather than JERF funds.
25

26 56. On October 31, 2016, the City applied for \$27.46 million in ACTC funding for
27 Wharf Improvements at Wharf 7 on the Property—improvements that would need to be made no
28

1 matter the type of bulk commodity handled by the Project. However, in yet another act of bad
2 faith, on information and belief, a City representative used her influence as an ACTC
3 Commissioner to block the funding of the \$27.46 million over the coal and petcoke issue.
4

5 57. Thereafter, and despite OBOT's continued requests, the City has failed to make
6 any effort to pursue the ACTC funds or to locate any other source of funding, instead electing to
7 engage in a campaign of obstruction.

8 58. The City has neglected its obligation to cooperate with OBOT to pursue third party
9 funds, and instead, it has affirmatively interfered with OBOT's ability to obtain any funds from
10 ACTC, as part of its on-going effort to oppose the Project absent a promise by OBOT to not ship
11 coal or petcoke.

12 59. Moreover, the Lease requires OBOT's and the other developers' approvals before
13 making adjustments to the budget. On information and belief, the City has reallocated money
14 from what is contemplated by the budget without first obtaining OBOT's and the other
15 developers' consent.
16

17 **IV. The City Caved to Political Opposition to the Project.**

18 60. Soon after OBOT started negotiations with TLS, word began to spread about one
19 of the potential commodities TLS intended to handle at the Terminal, coal, which generated
20 significant public concern in Oakland. Even though the City was previously aware that coal,
21 petcoke and other fossil fuels could be handled at the Terminal, special interest groups began
22 focusing on the matter in 2014. Facing political pressure from environmental and special interest
23 groups, the Oakland City Council adopted a resolution expressing the City's general opposition to
24 transporting fossil fuels through the City on June 17, 2014 ("2014 Resolution") despite the fact
25 that coal was regularly transported through the City by rail at that time. The City did not conduct
26 any study or hold a public hearing before passing the 2014 Resolution. The City and OBOT
27
28

1 executed the DA on July 16, 2013, therefore the 2014 Resolution was not binding on OBOT or
2 the Project.

3 61. Despite executing the Lease, the City continued to yield to political pressure to the
4 Project's detriment. While the City Council contracted with Environmental Science Associates
5 ("ESA") to perform a health and safety review (without going through a competitive bid process),
6 the marketplace safely transported over 1 billion metric tons of seaborne coal annually and
7 transported many million tons of coal domestically by interstate rail. On July 27, 2016, the City
8 enacted a politically-motivated illegal ordinance prohibiting the storage and handling of coal at
9 bulk goods facilities in Oakland ("Ordinance"), and adopted a resolution that would apply the
10 Ordinance to OBOT on the alleged grounds that it would be "necessary to prevent conditions
11 substantially dangerous to the health and/or safety of existing and/or future occupants or users of
12 the Project and Adjacent Neighbors" ("Resolution").
13
14

15 62. On May 15, 2018, the United States District Court for the Northern District of
16 California ("District Court")⁶ found that the City breached the DA, which gave OBOT vested
17 rights to develop and to operate a bulk-commodity terminal, by adopting the Ordinance and
18 Resolution without any "substantial evidence" that transporting coal through the terminal would
19 present a "substantial danger" to people in Oakland.
20

21 63. The District Court found: "The resolution applying the coal ordinance to the
22 OBOT facility is invalid, because it is a breach of the development agreement. The City is
23 therefore enjoined from relying on the resolution either to apply the ordinance to OBOT or to
24 restrict future coal operations at the facility. As a practical matter, this renders the coal ordinance
25 a nullity, because the only reason the City adopted it was to restrict OBOT's operations, and
26 OBOT is the only facility in Oakland to which it could conceivably apply." ("District Court
27

28 ⁶ *Oakland Bulk & Oversized Terminal, LLC v. City of Oakland*, Case No. 3:16-cv-07014-VC (N.D. Cal, May 15, 2018).

1 Ruling”).

2 64. The City breached its obligations under the Lease and DA by adopting the
3 Ordinance and Resolution. Further, the City’s illegal regulatory actions are the basis for a Force
4 Majeure claim under the Lease,⁷ which includes delays caused by “acts of the government.”

5 65. Prior to adopting the Ordinance and Resolution, the City was aware of the effect
6 the new regulations would have on Plaintiffs’ ability to survive as a business. OBOT openly
7 shared with the City its need to finalize an option agreement and sublease for the Project with a
8 bulk commodity provider willing to make a substantial investment in the Project including tens of
9 millions of dollars and a decades-long commitment.

10 66. The City had actual knowledge that the Ordinance and Resolution would interfere
11 with Plaintiffs’ ability to receive the benefits of the Lease and the DA. The City’s adoption of the
12 Ordinance and Resolution as well as its defense against OBOT’s lawsuit with no substantial
13 evidence to support the City’s position delayed OBOT’s performance under the Lease. Rather
14 than resolving OBOT’s claims, the City defended its erroneous position and delayed the Project.

15 67. On or about June 13, 2018, the City filed a Notice of Appeal of the District Court
16 Ruling. The City continues to prosecute its appeal of the District Court Ruling, and continues to
17 interfere with OBOT’s ability to perform timely under the Lease.

18 **V. No New Discretionary Decisions or Creek Protection Permit Are Required.**

19 68. The City prepared an Environmental Impact Review (“EIR”) for the entire Army
20 Base in 2002. The City adopted the Addendum EIR on June 21, 2012 (“2012 Addendum”). The

21
22
23
24
25 ⁷ Force Majeure is defined by the Lease as: “events which result in delays in Party’s performance of its obligations
26 hereunder due to causes beyond such Party’s control, including, but not restricted to, acts of God or of the public
27 enemy, *acts of the government, acts of the other Party*, fires, floods, earthquakes, tidal waves, terrorist acts, strikes,
28 freight embargoes, delays of subcontractors and unusually severe weather and, in the case of Tenant, any delay
resulting from a defect in Landlord’s title to the Premises other than a Permitted Exception. Force Majeure does not
include failure to obtain financing or have adequate funds. The delay cause by Force Majeure includes not only the
period of time during which performance of an act is hindered, but also such additional time thereafter as may
reasonably be required to complete performance of the hindered act.” (Emphasis added.)

1 2012 Addendum included the imposition of an extensive suite of mandatory mitigation measures
2 and conditions of approval.

3 69. Per the terms of the DA, the certified EIR already addressed the environmental
4 impacts of the Project:

5
6 3.5.1 Reliance on Project EIR. The EIR, which has been certified
7 by City as being in compliance with CEQA, addresses the potential
8 environmental impacts of the entire Project as it is described in the
9 Project Approvals. It is agreed that, in acting on any discretionary
10 Subsequent Approvals for the Project, City will rely on the EIR to
11 satisfy the requirements of CEQA to the fullest extent permissible
12 by CEQA and City will not require a new initial study, negative
13 declaration or subsequent or supplemental EIR unless required by
14 CEQA, as determined by City in its capacity as the Lead Agency,
15 and will not impose on the Project any mitigation measures or other
16 conditions of approval other than those specifically imposed by the
17 City Approvals, specifically required by the Existing City
18 Regulations or by subsequent CEQA review.

19 70. The City has relied on the certified EIR on multiple occasions after special interest
20 groups started expressing opposition to coal and petcoke.

21 71. There are no present circumstances that would justify supplemental environmental
22 review of the Project. No further permits are required to develop and construct the Project that
23 require discretionary review by the City.

24 72. In addition, the 2012 Addendum (prepared for and adopted by the City as lead
25 agency) expressly states that the Project does not require a Creek Protection Permit: "In
26 conclusion, waters in the project area are not defined as a creek by the Creek Protection
27 Ordinance. This finding is consistent with the 2002 EIR findings that there are no creeks in or
28 near the project area, and conditions do not exist that could cause a conflict with the City's Creek
Protection Ordinance."

73. There is no legitimate reason for the City to require OBOT to obtain any further
discretionary permits to construct the Project, and if the City subjects the Project to further
unnecessary discretionary review it will do so in bad faith.

1 **VI. Cappio Memo.**

2 74. On November 6, 2015, Assistant Oakland City Administrator Claudia Cappio sent
3 an internal memorandum to the Oakland Planning and Building Department regarding Permitting
4 for the Facilities ("Cappio Memo"). The Cappio Memo represents a transparent effort by the City
5 to slow down or halt construction of the Project, contrary to the intent and obligations of the
6 parties set forth in the DA, Lease and Mid-Project Budget Revise. The Cappio Memo provides
7 that, "[d]ue to the high-profile nature of the project it is important for the City Administrator's
8 Office to provide updates to the City Council on the status of OBOT implementation," and
9 Cappio intends to notify the City Council whenever an application for a building or construction
10 related permit is submitted by OBOT. These directions are highly unusual and atypical.

12 75. Cappio instructed the Planning and Building Department to notify City staff "upon
13 receipt of any building or construction-related permit application for OBOT (including, without
14 limitation, building permit, p-job permit, grading permit, *creek protection permit*, etc.)"
15 (emphasis added) and further instructed that the Planning and Building Department that it may
16 not "deem the application complete or issue the permit until after consultation with" Cappio,
17 Rachel Flynn, the Director of Planning and Building, and Darin Ranelletti, the Deputy Director of
18 Planning and Building, all of whom answer to the City Administrator, who, in turn, answers to
19 the Mayor.

21 76. On information and belief, no other development project at the Oakland Army
22 Base or in the City at large has ever had a similar restriction placed upon it, particularly one that
23 modifies the regulatory scheme in place in violation of the DA and Lease.

25 77. On information and belief, the Cappio Memo has never been formally withdrawn
26 by the City. Moreover, all of the individuals identified in the Cappio Memo as needing to
27 approve any permit have since left their respective positions with the City, causing additional
28

1 confusion and delay for the permitting of the Project.

2 **VII. Permit Application Pre-Meeting.**

3 78. During a pre-application meeting on March 9, 2016 at which OBOT expected to
4 discuss with City department heads the necessary components to complete an application for a
5 building permit for the Project, OBOT presented the Basis of Design to relevant City department
6 heads and permit decision-makers. OBOT previously submitted the Basis of Design to the City
7 and has consistently requested feedback and direction from the City regarding specific permit
8 requirements.
9

10 79. In the March 9, 2016 meeting, the City stated that OBOT's Project permit
11 applications are subject to additional discretionary approvals, notwithstanding Section 3.4.4 of the
12 DA which provides that the City "shall have the right to apply to the Project at any time, *as a*
13 *ministerial act*, the Construction Code and Standards in effect at the time of the approval of any
14 City Approval or Subsequent Approval thereunder." OBOT questioned the City's continued and
15 repeated references to the review being "discretionary," as discretionary decisions by the City, in
16 some instances, potentially reopen analysis under CEQA, and the CEQA analysis of the Project
17 had long-since been completed. Given the DA's express provision that review of the Project for
18 permitting would be "ministerial," OBOT informed the City that designation of such review as
19 "discretionary" in order to trigger new CEQA review, would violate the DA.⁸
20
21

22 80. In response to these questions, the City stated that the Project would require a
23 creek bed alteration permit, which was discretionary. As noted above, however, the 2012
24 Addendum expressly concludes that no creek bed permit is required.

25 81. It is clear that by subjecting each permit application to increased scrutiny and
26 discretionary review, the City is attempting to reopen CEQA review improperly for the purpose
27

28 ⁸ There are legal principles that would justify re-opening of CEQA (e.g., a significant change in the Project proposed by OBOT), but none of those principles were or are present in this instance.

1 of interfering with Plaintiffs' completion of the Project. Moreover, the City stated at the March 9,
2 2016 meeting that it would conduct a commodity-by-commodity review under CEQA for any
3 commodity handled by the Terminal; Assistant City Attorney, Mark Wald, also stated the same in
4 an email to OBOT's outside counsel.
5

6 82. Additionally, the City stated at the March 9, 2016 meeting that it was unsure of
7 whether the current Construction Codes and Standards were sufficient to address the issues that
8 may be raised by the construction and operation of a bulk terminal facility and that it was going to
9 implement a process to review the current codes and standards and determine if they need to be
10 supplemented for the Project. To OBOT's knowledge, the City has never identified the
11 Construction Codes and Standards that would be applicable to the Project, hence the continued
12 and pressing need to meet with the City Building and Planning Department.
13

14 83. Under Section 3.4.3 of the DA, the City has an obligation to compile a record of
15 all "existing City regulations" applicable to the Project. Despite repeated requests, the City
16 consistently refused to provide the record of applicable regulations. Instead, the City ultimately
17 requested that OBOT compile the noted record, a City obligation, which OBOT did and
18 transmitted to the City. The City, however, failed to certify the compilation as the binding record
19 of regulations applicable to the Project.
20

21 84. The purpose and intent of the DA is to establish the existing regulations and permit
22 requirements and shield OBOT from future changes in regulation with limited exceptions.

23 85. On March 11, 2016, OBOT provided a notice of the Force Majeure Delay as
24 defined in the Lease that was caused by the City's inability to inform OBOT of the Construction
25 Codes and Standards and applicable City regulations that apply to the Premises and Project
26 Improvements, as those terms are defined in the governing documents. Because the City
27 admitted that it was unable to provide the foundational information set forth in the applicable
28

1 Construction Codes and Standards and applicable City regulations as required under Section 3.4.4
2 of the DA, OBOT was prevented from continuing work on the design of the Project
3 Improvements beyond the Basis of Design.

4 86. Due to the City's act of Force Majeure, OBOT is entitled to an extension of at least
5 two years of the Commencement Date, as defined in the Lease, with a further continuing
6 extension for so long as the City fails in its obligations to identify the applicable Construction
7 Codes and Standards and applicable City regulations to which design and construction of the
8 Terminal must comply, process permit applications, as well as compliance with all of its
9 numerous obligations under the DA and Lease.

10
11 **VIII. The City's Interference with Essential Rail Improvements.**

12 87. The City also obstructed the Project's progress in areas other than the illegal
13 Ordinance and Resolution. The Project requires Plaintiffs to construct the Shortline Rail, to
14 connect the existing rail line to the Port Rail Terminal and allow the Terminal to link rail to vessel
15 break bulk shipping operations. For over six years the City has intentionally blocked and
16 interfered with OBOT's efforts to acquire rights for, to access properties for, and to rehabilitate
17 these essential Rail Improvements.

18
19 88. The City's refusal to advance and interference with the Shortline Rail not only
20 blocks Project progress, it interferes with Plaintiffs' ability to secure potential customers and
21 jeopardizes Plaintiffs' ability to collect payments from such customers.

22
23 89. The rail-related delays caused by the City and the Port have caused Plaintiffs to
24 lose valuable service contracts and incur monetary losses and delays.

25 **A. Rail Access Agreement.**

26 90. On information and belief, the Port Rail Terminal (defined in the Lease) is located
27 on City property controlled by the Port. At this time, there is no permanent rail operator at the
28

1 Port Rail Terminal.

2 91. The City granted to OBOT (and OGRE) the City's "rights to access and use the
3 Port Rail Terminal" under Section 1.5.1 the Lease.

4 92. However, the Port has previously represented to OGRE that it is unwilling to enter
5 into a Rail Operating Agreement for rail service at the Port Rail Terminal until the Rail Access
6 Agreement is executed between the City and the Port.

7 93. Despite the City and Port agreeing upon fundamental terms in 2012, not to
8 mention that all of the land in question is owned by the City, the Port and the City have failed for
9 over six years to process, to secure and to provide a written Rail Access Agreement as required
10 by Section 5.2.3 of the Lease.

11 94. Despite OBOT's written demands, including its July 20, 2018 letter, the City has
12 failed to use and refuses to use commercially reasonable efforts to pursue a Rail Access
13 Agreement as required by the Lease.

14 95. After four years of stagnation, Cappio committed in October 2016 for the City and
15 Port to meet and discuss the draft Rail Access Agreement by early November 2017.

16 96. To OBOT's knowledge, such a meeting did not take place until August 29, 2018,
17 nearly a year after the date originally promised.

18 97. And while the City, Port, and OGRE met on three occasions during August-
19 September 2018, on information and belief, the City and Port were attempting to collude to
20 expand the operational rights of the Port beyond what had previously been agreed to by the
21 parties, depicted in all drawings, and represented to the State and Federal governments, while
22 continuing to thwart OGRE's efforts by refusing to employ commercially reasonable efforts to
23 negotiate in good faith the Rail Access Agreement for the benefit of OGRE and OBOT.

24 98. On September 26, 2018, the City elected to discontinue any regularly scheduled
25
26
27
28

1 Rail Access Agreement meetings. To OBOT and OGRE's knowledge, no further meetings to
2 discuss the Rail Access Agreement have been held. The City's and the Port's collusive refusal to
3 reach closure on a Rail Access Agreement prevented OBOT and OGRE from performing their
4 obligations under the DA and the Lease.

5 **B. Rail Right of Way.**

6 99. In addition, the City has an obligation under the Lease to provide a Rail Right of
7 Way ("R/O/W") on the West Gateway property to OBOT/OGRE to allow rail construction and
8 operations.
9

10 100. OBOT and OGRE have diligently and in good faith attempted to pursue the
11 physical work necessary for rail access to the Project and the rehabilitation of pre-existing rail on
12 the Project site, including: (i) hiring a contractor to perform the rail work; (ii) working to obtain
13 an industrial track agreement with Union Pacific Railroad; and (iii) expending over \$1.6 million
14 on rail materials and labor, with the materials currently stockpiled on-site waiting for installation.
15 Yet, the City has still not turned over the Rail R/O/W to OBOT on the required schedule, nor has
16 it confirmed the Rail R/O/W conforms with engineered drawings.
17

18 101. On July 24, 2018, the City demanded that OBOT pay rent for the West Gateway,
19 including the Rail R/O/W to which the City continued and continues to deny OBOT/OGRE
20 access, going back to February 16, 2018, under the threat of default under the Lease. OBOT paid
21 and continues to pay rent to the City for the West Gateway (including the Rail R/O/W) under
22 protest.
23

24 102. On October 9, 2018, the City confirmed that it was not prepared to turn over the
25 rail corridor to OGRE, citing an uncompleted survey of the facilities.

26 103. As recently as October 18, 2018, the City stated that the Rail R/O/W had not been
27 turned over. And as of the time of the filing of this Complaint, the City has continued its failure
28

1 to grant OBOT/OGRE access to the Rail R/O/W. Again, the City's failure to do so, prevented
2 OBOT/OGRE's performance, resulting in delay and monetary damage.

3 C. **The City's Failure To Cooperate and Affirmative Interference At The**
4 **Surface Transportation Board.**

5 104. The City and Port are actively interfering with OGRE's efforts to obtain approvals
6 from the Surface Transportation Board ("STB") to facilitate track rehabilitation and operation of
7 the rail.

8 105. Since 2015, the City or the Port, or both, have objected to each petition that OGRE
9 filed with the STB.

10 106. In May 2018, OGRE filed a petition with the STB seeking confirmation that no
11 additional STB approval was required to rehabilitate the Rail R/O/W consistent with the City's
12 own construction drawings and the City and Port master redevelopment plan, primarily those rail
13 improvements the City obligated OBOT/OGRE to make under Section 6.1 of the Lease; OGRE is
14 statutorily obligated to obtain STB authorization prior to the construction of rail where the STB
15 has jurisdiction. OGRE expressly noted in its petition for a declaratory order that it would be
16 seeking operation exemption from the STB under a separate application. Beginning on June 29,
17 2018, the City and the Port have repeatedly opposed OGRE's May petition.

18 107. Under Section 5.2.2.2 of the Lease, the City is obligated to "cooperate in good
19 faith regarding Tenant's efforts to obtain Regulatory Approvals for the Project from any
20 regulatory agency other than City," which it failed to do.

21 108. As a result of the City's breach of its obligation to cooperate, OGRE has been
22 forced to spend tens of thousands of dollars in legal fees to defend against the City's objection to
23 the STB, and, more importantly, the rehabilitation of the Rail R/O/W has been delayed
24 indefinitely.
25
26
27
28

1 **D. The City's Failure to Provide Property Rights to OBOT.**

2 109. To induce OBOT to enter into the Lease, the City represented that it had easements
3 with the Port that would allow OBOT and its subtenants the right to enter upon Port property to
4 construct and use the relevant segment of track, as set forth in Sections 1.1.1, 1.1.2, 1.5.1, and
5 1.5.2 of the Lease.

6 110. The Port has represented to the STB that OGRE has not yet obtained the property
7 rights that it needs from the Port to build any track on "Port property."

8 111. To the extent OBOT/OGRE do not have the right to enter upon Port property to
9 make the Rail Improvements, the City has materially misrepresented the property rights granted
10 to OBOT under the Lease.

11 **IX. The City's Illegitimate Claim of an Unmatured Event of Default.**

12 112. Because of the City's action, TLS did not exercise its Sublease Option. After the
13 issuance of the District Court Ruling, where now the parties thought the City would cease its
14 pattern of interference, OBOT entered into a sublease agreement with Insight Terminal Solutions,
15 LLC ("ITS"), whereby ITS will develop and operate the Terminal.

16 113. Rather than cooperating with Plaintiffs to proceed with the Project, the City has
17 renewed its efforts to kill the Project by falsely asserting that OBOT is in default under the Lease
18 and continuing its pattern of obstructionist conduct.⁹

19 114. On August 20, 2018, the City sent a letter to OBOT claiming that OBOT failed to
20 commence construction of the Minimum Project by the Initial Milestone Date set forth in the
21 Lease. The City alleged OBOT had committed an Unmatured Event of Default and demanded
22 that OBOT cure the "Default."

23
24
25
26
27 ⁹ Elected officials, including Mayor Schaaf repeatedly made clear to the public and press her adamant opposition to
28 coal being transported at and through the Project and her intention to do anything necessary to prohibit it. She
personally told a principal of OBOT that she would do anything in her power to make sure that no coal would come
through Oakland, "even if it meant killing the entire project to do so."

1 115. OBOT vehemently denied it committed an Unmatured Event of Default and
2 reiterated its prior claim that the City has caused Force Majeure under the Lease tolling any
3 performance deadline of OBOT commensurate on an ongoing basis with the City's own actions
4 thwarting and impeding OBOT's ability to perform.
5

6 116. The City has an obligation to issue a Non-Disturbance Agreement for the
7 Subtenant ("NDA") who will operate the Project under Section 12.5 of the Lease.

8 12.5.1 Conditions for Non-Disturbance Agreements. From
9 time to time upon the request of Tenant, Landlord shall enter into
10 agreements with Subtenants providing generally, with regard to a
11 given Sublease, that in the event of any termination of this Lease,
12 Landlord will not terminate or otherwise disturb the rights of the
13 Subtenant under such Sublease, but will instead honor such
14 Sublease as if such agreement had been entered into directly
15 between Landlord and such Subtenant ("Non-Disturbance
16 Agreements"). . . (v) if Tenant is then in default of any of its
17 obligations under this Lease, Landlord may condition its agreement
18 to provide a Non Disturbance Agreement on the cure of such
19 defaults as Landlord may specify either in a notice of default given
20 under Section 18.1 or in a notice conditionally approving Tenant's
21 request for such Non Disturbance Agreement (and if an Event of
22 Default or Unmatured Event of Default on the part of Tenant then
23 exists, then Landlord may withhold or condition the giving of a
24 Non Disturbance Agreement) . . .

25 117. An NDA is key to a subtenant's ability to obtain financing for the construction of
26 its sublease improvements, as any potential lender will want to know that the sublandlord's
27 breach of the master lease will not affect the subtenant's rights under the sublease.
28

118. Plaintiffs submitted a form of NDA to the City four times beginning in April 2018.
After the third submission, on August 24, 2018, the City responded for the first time and made
redline interlineation changes to the form Plaintiffs previously submitted. Plaintiffs executed the
revised NDA and submitted it to the City; however, at the conclusion of a meeting with the City
on August 29, 2018, the City indicated that before signing it needed to make additional changes
to the NDA, stating that it would do so later that same day.

119. After a week and a half of following up with the City to no avail, in a letter to the

1 City dated September 7, 2018, OBOT and OGRE rescinded their respective signatures and,
2 consistent with Section 12.5.2 of the Lease, included a copy of the form of NDA showing
3 requested interlineations or deletions to the form of NDA previously circulated by the City, a
4 copy of which is attached hereto as **Exhibit 1**.

5
6 120. Section 12.5.2 of the Lease requires the City to approve or specifically disprove
7 the requested interlineations or deletions within twenty (20) days. That Section also provides:
8 "Failure by Landlord to approve or disapprove of specific interlineations, deletions or other
9 modifications requested by a Subtenant within such twenty (20) day period shall be deemed to be
10 approval of the requested changes"

11
12 121. On September 27, 2018, the City refused to issue a NDA with respect to the
13 proposed sublease between OBOT and OGRE, notwithstanding the City's contractual obligation
14 to do so. As a pretext, the City predicated its refusal on Section 12.5.1 of the Lease and the City's
15 incorrect claim that it is entitled to withhold or condition the grant of a NDA to a Subtenant
16 because OBOT has committed an Unmatured Event of Default related to the Initial Milestone
17 Date. The City argued that OBOT may renew its request for an NDA for the OGRE Sublease
18 following "resolution of the Unmatured Event of Default."

19
20 122. The City's obligation under Section 12.5.2 of the Lease to comment upon
21 requested changes to a form of NDA is not conditioned upon the absence of an Event of Default
22 under the Lease. On October 3, 2018, OBOT and OGRE notified the City that they deemed the
23 City's non-response as approval of the requested changes to the form of NDA. In an October 17,
24 2018 letter, the City rejected this assertion, claiming that the City's refusal to issue an NDA
25 somehow relieves it of its obligations under Section 12.5.2.

26
27 123. On September 28, 2018, concurrent with the execution of the ITS sublease, OBOT
28 submitted a request to the City for an NDA in favor of ITS. The City refuses to provide the

1 requested NDA. On October 3, 2018, the City was provided notice that its refusal to issue the
2 NDA has and will continue to cause substantial damage to OBOT and OGRE, and it is interfering
3 with their business and contractual relationships with third-parties.

4 124. Also on September 28, 2018, OBOT submitted a request to the City for estoppel
5 certificates pursuant to Section 26.1 of the Lease for both ITS and OGRE. As permitted under
6 item (d) of Section 26.1 of the Lease, for the OGRE estoppel, OBOT asked for a list of matters
7 affecting the status of the Rail R/O/W, including, without limitation, the date when City will turn
8 over the Rail R/O/W to OBOT, as well as OBOT's ability to enter onto lands the Port claims it
9 owns to perform the Rail Improvements.
10

11 125. On October 18, 2018, the City provided an estoppel certificate for OGRE, which
12 erroneously references the Unmatured Event of Default; however, the City refused to estop the
13 property rights granted to OBOT under the Lease saying that the request was unreasonable—this,
14 while the Port, a department of the City, was arguing OBOT had no rights to access a majority of
15 the Rail R/O/W, including the necessary rail interface with the Union Pacific mainline.
16

17 126. Also on October 18, 2018, the City refused to provide an estoppel certificate for
18 ITS. Despite acknowledging that the Lease is in full force and effect and that OBOT has been
19 paying rent, the City claimed that ITS may not rely on the estoppel because, the City erroneously
20 claims, OBOT's sublease with ITS is invalid and that an Unmatured Event of Default was
21 pending.
22

23 127. On October 23, 2018, the City claimed that OBOT failed to cure the alleged
24 Unmatured Event of Default during the cure period and alleged that OBOT defaulted under the
25 Lease. The City alleged that OBOT is required to pay liquidated damages within thirty (30) days
26 after the Notice of Default and alleged the Lease "automatically terminates" with respect to the
27 Unimproved Premises, as defined by the Lease. The City demanded that OBOT pay liquidated
28

1 damages on or before November 22, 2018.

2 128. OBOT disputes that it defaulted under the Lease. And because it is not in default
3 of the Lease, OBOT did not pay liquidated damages to the City on or before November 22, 2018.

4 **X. The City's Refusal to Cooperate with OBOT Continues to Present Date.**

5 129. As a part of the master plan, the City was to provide perimeter fencing at the
6 Oakland Army Base, including at the Property.

7 130. Once again, due to budgetary issues, the City requested that the developers
8 (including OBOT) take on the obligation to construct perimeter fencing at their respective lease
9 areas but sold the idea by representing that the construction could take place under the City's
10 existing building permit for the public infrastructure project. On information and belief, Prologis
11 constructed its perimeter fencing under the City's existing permit, and the City ended up paying
12 for and constructing the fence for the other developer. However, the City has made OBOT and
13 OGRE obtain a new building permit causing additional costs and delay, which has also lead to
14 security issues at the Property.

15 131. Moreover, in the course of evaluating the permit application for the fence, the City
16 departed from the previously agreed upon plan for the placement of the fence in the public right
17 of way and instead insisted that the fence be constructed on OBOT/OGRE's private leased lands.

18 132. Additionally, the City insisted on a new review of the proposed fence, including
19 revised plans and design drawings, even though the parties previously agreed upon the design of
20 the fence. Plaintiffs acquiesced; however, the permit has still not been issued due to the City's
21 ongoing issues with BCDC.

22 133. The City objects to the previously agreed upon Public Access Improvements that
23 were included in the June 5, 2014 BCDC Amendment.

24 134. BCDC has stated that it will not permit the use of the W. Burma Road
25
26
27
28

1 improvements that are required to provide access to the West Gateway and that it will not process
2 the additional BCDC permits that are required for the development and operation of the Project
3 until the City constructs the Public Access Improvements required under the existing BCDC
4 Amendment. The City's refusal to do so constitutes active interference with OBOT's ability to
5 obtain the BCDC permits necessary to continue with the Project.
6

7 135. The City has represented to OBOT that it considers any mitigation measures
8 required by BCDC to be allocated to the Community Facilities District ("CFD") established for
9 the Project. However, the parties previously negotiated which public improvements are
10 designated as OBOT obligations under the CFD, and the parties agreed that, among other things,
11 the City would pay for mitigation measures for W. Burma Road.
12

13 136. Additionally, even though the master plan contemplated the Port be included in the
14 CFD as a financial contributor thereto, and the Port is receiving beneficial use of the public
15 infrastructure within the CFD's jurisdiction, the City has not yet added the Port to the CFD, all
16 the while availing itself of the CFD's benefits.

17 137. The City is now refusing to honor its prior commitments with regard to the
18 funding of mitigation measure improvements as set forth in the master plan and the DA.
19

20 **XI. The City's Improper Rejection of OBOT's DA Compliance.**

21 138. Each year since executing the DA, OBOT has provided a summary of its efforts to
22 substantially comply with the terms of the DA. For the first time, after certifying OBOT's
23 compliance each and every year before, on August 27, 2018, the City claimed that OBOT has not
24 met its obligations under Section 3.3 of the DA, to "develop the Private Improvements for each
25 Phase of the Project in accordance with the 'Minimum Project' description, scope, schedule and
26 sequencing set forth in the Ground Lease for each Phase." The City claimed that OBOT failed to
27 submit schematic drawings or a building permit application to the City for review prior to the
28

1 Initial Milestone Date.

2 139. The City's actions have prevented OBOT's ability to progress with construction of
3 the Project. Furthermore, the City's assertion that OBOT failed to comply with the Initial
4 Milestone Date was premature because the DA expressly provides that the annual review is meant
5 to be a retrospective review of compliance over the prior year (i.e. July 31, 2017 to July 31, 2018)
6 and it should not include a review of the current year's compliance.
7

8 140. Pursuant to Section 6.3 of the DA, if the City does not agree with OBOT's
9 response, it must commence a meet and confer/mediation process. Despite OBOT's repeated
10 requests to meet and confer, the City refuses to do so without explanation, constituting another
11 breach of the DA.
12

13 **XII. The City's Improper Rejection of the Basis of Design.**

14 141. Because the City has not, in recent history, processed any construction work like
15 that contemplated by the Project, it asked OBOT and, at the time, TLS, to submit a "Basis of
16 Design" setting forth the conceptual design of the Project so that the parties could meet and
17 discuss what would be necessary for the City to issue a building permit. As such, a Basis of
18 Design was submitted to the City on July 21, 2015, and again on September 8, 2015—it is this
19 Basis of Design that formed the basis of the discussion at the March 9, 2016 meeting.
20

21 142. In order to move the development of the Terminal forward, and having no
22 response from the City to the prior submission, OBOT, on behalf of ITS, re-submitted the Basis
23 of Design to the City on September 28, 2018, requested the City's comments thereon relative to
24 preparing a more comprehensive permit application for the Terminal, and requested the City's
25 cooperation to obtain the necessary building permits.

26 143. To that end, October 4, 2018, representatives from OBOT and ITS met with
27 representatives from the City (Elizabeth Lake and Bijal Patel) to discuss the Project and request
28

1 the City's help in setting up preliminary intake meetings with the Building and Planning
2 Department. On that same day, representatives from OBOT and ITS reached out to William
3 Gilchrist, Director of the City's Building and Planning Department to request a meeting to discuss
4 the development and the steps that would be taken by the parties for ITS to get a building permit
5 from the City to construct the Terminal. A meeting was scheduled for October 14, 2018.
6

7 144. On October 13, 2018, Mr. Gilchrist sent an email saying that he was cancelling the
8 meeting. Despite multiple attempts by OBOT and ITS to reschedule the meeting, the City and
9 Mr. Gilchrist refuse to meet.

10 145. The City acknowledged receipt of the Basis of Design and other materials on
11 October 18, 2018. However, the City stated that it was recognizing only "conceptual drawings,"
12 merely a portion of the full context of the Basis of Design, and is apparently disregarding the rest.
13 The City then went on to contend that the submittal is "incomplete," largely without specifying
14 how or why the submittal is incomplete or the material required to render it complete; where the
15 City did specify items it deemed to be missing, nearly all of that information was already in the
16 Basis of Design. The City also asserted that "[t]he City's response to this submittal shall in no
17 way be construed as a substantive response or acceptance of a cure or commencement of cure of
18 the Unmatured Event of Default described in the letter from the City Attorney dated September
19 21, 2018."
20
21

22 146. In yet another attempt to meet with the City, on October 19, 2018, ITS and its
23 contractor completed and delivered to the City a Development Review Application, formally
24 requesting a meeting with the City. The City has not responded to the Development Review
25 Application. Moreover, on October 25, 2018, OBOT sent a letter to the City addressing the
26 City's statements in its October 18, 2018 response to the Basis of Design, pointing out to the City
27 where the City had overlooked information or otherwise providing responses to the City's
28

1 questions, and again requesting a meeting with the City. The City has not responded to the
2 October 25 letter.

3 147. The City repeatedly and consistently insists that it will not take any action to move
4 the Project forward unless and until OBOT agrees to construct a "ban compliant" terminal.
5 However, the District Court Ruling found the City's application of the Ordinance and Resolution
6 to the Project is invalid, constitutes a breach of the DA, and the City may not rely on the illegal
7 coal ban to restrict operations at the Project.
8

9 148. After losing its legal battle against the Project, the City has resolved to engage in a
10 bureaucratic attack on the Project with the hope of causing its demise. Those actions by the City
11 necessitated the filing of this action.
12

13 149. Given the City's conduct as described above, on October 19, 2018, Plaintiffs
14 presented a timely claim for damages and injunctive relief to the City in compliance with
15 Government Code § 900 *et seq.* ("Notice of Claim"). Plaintiffs identified the facts giving rise to
16 the City's liability as described herein and provided notice of each claim set forth below.
17

18 150. Rather than respond to Plaintiffs' Notice of Claim, the City published statements
19 to the press on November 10, 2018, incorrectly claiming that the City terminated the Lease. On
20 November 13, 2018, Plaintiffs asked the City to clarify whether the November 10, 2018 statement
21 to the press constituted a rejection of Plaintiffs' Notice of Claim.

22 151. On November 20, 2018, the City published false statements to the press that the
23 Lease terminated automatically "this week."

24 152. On December 3, 2018, the City served a Three-Day Notice to Quit or Cure
25 alleging that OBOT violated the Lease and demanding that OBOT "cure" the breach or vacate the
26 Property within three (3) days. Plaintiffs dispute the validity of that Notice.
27

28 153. The City failed to act on Plaintiffs' Notice of Claim within forty-five (45) days

1 after the City received the claim, therefore Plaintiffs' claim application was deemed denied on
2 December 3, 2018.

3 **FIRST CAUSE OF ACTION**

4 **Breach of Written Contract (Lease)**

5 **(Against Defendant)**

6 154. Plaintiffs reallege and incorporate by reference the allegations of paragraphs 1
7 through 153 as set forth above.

8 155. OBOT has performed each of the obligations to be performed by it under the
9 Lease, except for those excused or otherwise discharged by reason of the City's conduct,
10 including but not limited to payment of rent, taxes, and operating expenses under the Lease.
11

12 156. The City breached the Lease and the DA by, among other things: (i) enactment of
13 the illegal Ordinance and Resolution banning any transfer of coal through the Project; (ii)
14 assertion of a defense of the illegal Ordinance and Resolution in the trial court and prosecution of
15 appeal; (iii) allegation that OBOT committed an Unmatured Event of Default and Event of
16 Default; (iv) refusal to address essential prerequisites for permit submittals for the Project; (v)
17 refusal to issue permits for the Project; (vi) failure and refusal to turnover possession of the
18 Property that Plaintiffs have a right and obligation to improve, including but not limited to the
19 Rail R/O/W; (vii) interference with Plaintiffs' funding and permitting efforts with outside
20 regulatory agencies; (viii) failure to cooperate to identify and pursue third party funds for the
21 Project, including, but not limited to, funds generated by Measure BB; (ix) interference with
22 ACTC's disbursement of funds to the Project; (x) failure to execute a Rail Access Agreement
23 with the Port so that the Port will permit OGRE to construct the Rail Improvements; (xi)
24 interference in Plaintiffs' proceedings before the STB; (xii) refusal to issue an NDA and estoppel
25 for OBOT's subtenants; (xiii) improper rejection of OBOT's invocation of the Force Majeure
26
27
28

1 Lease provision and refusal to extend completion dates as required by the Lease; and (xiv)
2 rejection of Plaintiffs' Basis of Design and refusal to meet and confer as required by the Lease.

3 157. Had the City not engaged in these breaches: (i) Plaintiffs would have proceeded
4 with development of the Project in a timely manner; (ii) Plaintiffs and their subtenant would not
5 have been forced to expend substantial sums of money on legal fees, increased construction and
6 lending costs, and delays; and (iii) Plaintiffs would have received expected funds from third-
7 parties to fund the Project. As a result of the City's breaches, Plaintiffs have incurred damages.
8 Plaintiffs will suffer irreparable harm to the extent Plaintiffs lose the unique opportunity complete
9 the Project in an ever-changing marketplace.
10

11 158. Plaintiffs' damages are a foreseeable and proximate result of the City's breaches of
12 the Lease and DA. The City had actual knowledge that, among other things, enforcement of the
13 illegal Ordinance and Resolution would interfere with Plaintiffs' ability to receive the bargained-
14 for benefits of the Lease and DA.
15

16 159. Plaintiffs have been damaged in amount subject to proof at trial in excess of \$100
17 million. Plaintiffs will continue to be damaged unless the City is compelled to perform under the
18 Lease and the DA.
19

20 **SECOND CAUSE OF ACTION**

21 **Anticipatory Breach (Lease)**

22 **(Against Defendant)**

23 160. Plaintiffs reallege and incorporate by reference the allegations of paragraphs 1
24 through 159 as set forth above.

25 161. OBOT has performed each of the obligations to be performed by it under the
26 Lease, except for those excused or otherwise discharged by reason of the City's conduct,
27 including but not limited to payment of rent, taxes, and operating expenses under the Lease.

28 162. The City gave Plaintiffs notice that it would not perform its obligations under the

1 Lease and DA by, among other things, (i) private and public statements by elected officials
2 opposing the Project and threatening to "kill" the Project; (ii) alleging that OBOT committed an
3 Unmatured Event of Default and Event of Default; (iii) requiring inappropriate additional layers
4 of environmental and discretionary review that may subject Plaintiffs to litigation exposure; (iv)
5 refusal to compile a record of all "existing City regulations" applicable to the Project; and (v)
6 requiring Plaintiffs to pay for improvements and mitigation measures that the City committed to
7 pay.
8

9 163. At the time Plaintiffs received the City's repudiation, Plaintiffs had performed
10 each of the obligations to be performed by it under the Lease, except for those excused or
11 otherwise discharged by reason of the City's conduct, and Plaintiffs were ready, able, and willing
12 to complete performance on their part.
13

14 164. As a result of the City's anticipatory breach of the Lease and DA, Plaintiffs have
15 been damaged in an amount to be proven at trial. Plaintiffs will continue to be damaged unless
16 the City is compelled to perform under the Lease and DA.
17

18 **THIRD CAUSE OF ACTION**

19 **Breach of the Implied Covenant of Good Faith and Fair Dealing (Lease)** 20 **(Against Defendant)**

21 165. Plaintiffs reallege and incorporate by reference the allegations of paragraphs 1
22 through 164 as set forth above.

23 166. OBOT has performed each of the obligations to be performed by it under the
24 Lease, except for those excused or otherwise discharged by reason of the City's conduct,
25 including but not limited to payment of rent, taxes, and operating expenses under the Lease.

26 167. Expressly stated in the Lease and the DA and implied as a matter of law is a
27 covenant of good faith and fair dealing that requires, among other things, that the City would not
28

1 do anything to unfairly interfere with the right of Plaintiffs to receive the benefits of the Lease
2 and DA.

3 168. OBOT has acted in good faith in its interactions with the City throughout the
4 Project process. In contrast, the City unfairly and in bad faith interfered with Plaintiffs' right to
5 receive the benefits of the Lease and the DA, and otherwise breached the implied covenant of
6 good faith and fair dealing, by among other things: (i) enactment of the illegal Ordinance and
7 Resolution banning any transfer of coal through the Project; (ii) assertion of a defense of the
8 illegal Ordinance and Resolution in the trial court and prosecution of appeal; (iii) allegation that
9 OBOT committed an Unmatured Event of Default and Event of Default; (iv) refusal to address
10 essential prerequisites for permit submittals for the Project; (v) refusal to issue permits for the
11 Project; (vi) failure and refusal to turnover possession of the Property that Plaintiffs have a right
12 and obligation to improve, including but not limited to the Rail R/O/W; (vii) interference with
13 Plaintiffs' funding and permitting efforts with outside regulatory agencies; (viii) failure to use
14 commercially reasonable efforts to identify and pursue third party funds for the Project, including
15 but not limited to funds generated by Measure BB; (ix) interference with ACTC's disbursement
16 of funds to the Project; (x) failure to execute a Rail Access Agreement with the Port so that the
17 Port will permit OGRE to construct the Rail Improvements; (xi) interference in Plaintiffs'
18 proceedings before the STB; (xii) refusal to issue an NDA and estoppel for OBOT's subtenants;
19 (xiii) rejection of Plaintiffs' Basis of Design and refusal to meet and confer as required by the
20 Lease; (xiv) private and public statements by elected officials opposing the Project and
21 threatening to "kill" the Project; (xv) requiring inappropriate additional layers of environmental
22 and discretionary review that may subject Plaintiffs to litigation exposure; (xvi) refusal to compile
23 a record of all "existing City regulations" applicable to the Project; (xvii) rejecting Plaintiffs'
24 Forcè Majeure claim; and (xviii) requiring Plaintiffs to pay for improvements and mitigation
25
26
27
28

1 measures that the City committed to pay.

2 169. Had the City not engaged in these breaches of the implied covenant of good faith
3 and fair dealing: (i) Plaintiffs would have proceeded with development of the Project in a timely
4 manner; (ii) Plaintiffs and their subtenant would not have been forced to expend substantial sums
5 of money on legal fees, increased construction and lending costs, and delays; and (iii) Plaintiffs
6 would have received expected funds from third-parties to fund the Project. As a result of the
7 City's breaches, Plaintiffs have incurred damages. Plaintiffs will suffer irreparable harm to the
8 extent Plaintiffs lose the unique opportunity complete the Project in an ever-changing
9 marketplace.
10

11 170. Plaintiffs' damages are a foreseeable and proximate result of the City's breaches of
12 the implied covenant of good faith and fair dealing.
13

14 171. Plaintiffs have been damaged in amount subject to proof at trial of not less than
15 \$100 million. Plaintiffs will continue to be damaged unless the City is compelled to perform
16 under the Lease and DA.
17

18 **FOURTH CAUSE OF ACTION**

19 **Fraudulent Inducement/False Promise**

20 **(Against Defendant)**

21 172. Plaintiffs reallege and incorporate by reference the allegations of paragraphs 1
22 through 171 as set forth above.

23 173. The City made a series of promises to OBOT to induce OBOT to enter the Lease
24 and DA, including among others, (i) a promise to perform under the Lease; (ii) a promise to
25 cooperate in the completion of the Project; (iii) a promise that certain funds generated by Measure
26 BB would be allocated and disbursed to OBOT to build Wharf Improvements; and (iv) a promise
27 that the City would cooperate with Plaintiffs in obtain permits and funding from third-parties.
28

1 174. The City did not intend to perform its promises at the time it entered into the Lease
2 to the extent Plaintiffs subleased the Terminal to a bulk commodity provider that shipped coal.

3 175. Specifically, on November 4, 2014, City Administrator Blackwell provided OBOT
4 the Mid-Project Budget Revise, which purported to re-sequence completion of the Public
5 Improvement components and set out the sources and uses that form the basis for the final budget.
6

7 176. OBOT relied on Blackwell's assurances that the Lease would become effective
8 more quickly and construction and completion of the Terminal accelerated if OBOT agreed to
9 assume more funding obligations under the Mid-Project Budget Revise.

10 177. The City intended that Plaintiffs rely on its promises that the City would cooperate
11 in the development of the Project.
12

13 178. Plaintiffs invested years of effort and millions of dollars, in an amount to be
14 proven at trial, to develop the Project based on their reasonable reliance on the City's promise to
15 perform under the Lease and the DA.

16 179. The City has not performed its promised acts as described above, and as a result
17 Plaintiffs have been harmed.

18 180. Plaintiffs' reliance on the City's promises was a substantial factor in causing its
19 harm.
20

21 FIFTH CAUSE OF ACTION

22 **Intentional Interference with Contractual Relations (TLS)**

23 **(Against Defendant)**

24 181. Plaintiffs reallege and incorporate by reference the allegations of paragraphs 1
25 through 180 as set forth above.

26 182. OBOT entered into the Sublease Option with TLS in November 2014, which
27 granted TLS an exclusive option to sublease and operate the Terminal. The Sublease Option did
28

1 not restrict the type of bulk commodity to be transported through the Terminal.

2 183. The City knew of the proposed sublease between OBOT and TLS.

3 184. The City knew that the success of the Project hinged on OBOT's ability to secure
4 the commitment of a commodity provider with long-term needs for the useful life of the
5 Terminal.

6 185. The City's conduct prevented performance of the sublease between OBOT and
7 TLS by making it harder to timely complete the Project. Consequently TLS has abandoned the
8 sublease.

9 186. By engaging in this conduct, the City intended to disrupt the performance of the
10 sublease between OBOT and TLS. Alternatively, the City knew that disruption of performance
11 was certain or substantially certain to occur.

12 187. As a direct result of the City's conduct, Plaintiffs were harmed in an amount to be
13 proven at trial. Plaintiffs will continue to be damaged unless the City is compelled to perform
14 under the Lease and DA.

15
16
17 **SIXTH CAUSE OF ACTION**

18 **Intentional Interference with Prospective Economic Relations (TLS and ITS)**
19 **(Against Defendant)**

20 188. Plaintiffs reallege and incorporate by reference the allegations of paragraphs 1
21 through 187 as set forth above.

22 189. Since 2012, the City has intentionally interfered with Plaintiffs' prospective
23 economic relationships with two potential subtenants, TLS and ITS, by engaging in a series of
24 disruptive acts as described above. The sublease with TLS would have resulted in a future
25 economic benefit to OBOT; and the sublease with ITS will result in a future economic benefit to
26 OBOT.
27
28

1 190. The City knew of the proposed sublease between OBOT and TLS, and the
2 subsequent sublease between OBOT and ITS, because OBOT had informed the City of the terms
3 of the subleases and requested that the City issue an NDA to the subtenants.

4 191. The City knew that the success of the Project hinged on OBOT's ability to secure
5 the commitment of a commodity provider with long-term needs for the useful life of the
6 Terminal.
7

8 192. The prospective economic relationship between OBOT and TLS has been
9 disrupted because of the City's wrongful conduct. Specifically, TLS abandoned its proposed
10 sublease with OBOT and OBOT was required to seek out a new subtenant to develop the Project.

11 193. The prospective economic relationship between OBOT and ITS has been disrupted
12 because of the City's wrongful conduct. Specifically, the City refuses to issue an NDA and
13 estoppel for the sublease agreement between ITS and OBOT which threatens OBOT's ability to
14 perform under the sublease agreement.
15

16 194. As a proximate result of the City's wrongful conduct, Plaintiffs have been
17 damaged in an amount to be proven at trial. Plaintiffs will continue to be damaged unless the
18 City is compelled to perform under the Lease and DA.
19

20 **SEVENTH CAUSE OF ACTION**

21 **Negligent Interference with Prospective Economic Relations (TLS and ITS)**

22 **(Against Defendant)**

23 195. Plaintiffs reallege and incorporate by reference the allegations of paragraphs 1
24 through 194 as set forth above.

25 196. The City has negligently interfered with Plaintiffs' prospective economic
26 relationships.

27 197. The sublease with TLS would have resulted in a future economic benefit to
28

1 Plaintiffs; and the sublease with ITS will result in a future economic benefit to Plaintiffs.

2 198. The City knew of the proposed sublease between OBOT and TLS, and the
3 subsequent sublease between OBOT and ITS, because OBOT had informed the City of the terms
4 of the subleases and requested that the City issue an NDA and estoppel to the subtenants.
5

6 199. The City knew or should have known that its wrongful conduct, as described
7 above, and failure to act with reasonable care would disrupt Plaintiffs' economic relationship with
8 TLS and ITS.

9 200. The City breached its duty to Plaintiffs by failing to act with reasonable care
10 including but not limited to: (i) refusing to issue an NDA, (ii) failing to issue an estoppel without
11 a false claim that OBOT committed an Unmatured Event of Default; and (iii) breaching the Lease
12 and DA as described above.
13

14 201. OBOT's economic relationships with TLS and ITS have been disrupted.

15 202. The City negligently failed and continues to fail, to cure its negligence by failing
16 to perform under the Lease and DA.

17 203. As a proximate result of the City's negligence, Plaintiffs have been damaged in an
18 amount to be proven at trial. Plaintiffs will continue to be damaged unless the City is compelled
19 to perform under the Lease and DA.
20

21 EIGHTH CAUSE OF ACTION

22 **Intentional Interference with Contractual Relations (OGRE)**

23 **(Against Defendant)**

24 204. Plaintiffs reallege and incorporate by reference the allegations of paragraphs 1
25 through 203 as set forth above.

26 205. OGRE entered into a sublease agreement with OBOT ("OGRE Sublease") that
27 granted OGRE an exclusive right to rehabilitate the rail network and become a Class III common
28

1 carrier, providing rail switching services (including on behalf of Class I common carriers) on the
2 Oakland Army Base rail network.

3 206. The City knew of the OGRE Sublease.

4 207. OGRE incurred costs in reliance on its ability to perform and receive the benefits
5 of the OGRE Sublease, including but not limited to: (i) costs to purchase materials to construct
6 the rail; (ii) payment of rent under the OGRE Sublease; and (iii) costs to purchase a locomotive to
7 provide rail services.
8

9 208. The City knew that the success of the Project hinged on OBOT's ability to secure a
10 subtenant to rehabilitate the rail network and provide rail switching services.

11 209. The City's conduct has prevented and is preventing performance of the sublease
12 between OGRE and OBOT by making it harder to timely complete the Project.
13

14 210. By engaging in this conduct, the City intended to disrupt the performance of the
15 sublease between OGRE and OBOT. Alternatively, the City knew that disruption of performance
16 was certain or substantially certain to occur.

17 211. As a direct result of the City's conduct, Plaintiffs were harmed in an amount to be
18 proven at trial. Plaintiffs will continue to be damaged unless the City is compelled to perform
19 under the Lease and DA.
20

21 NINTH CAUSE OF ACTION

22 **Intentional Interference with Prospective Economic Relations (OGRE)** 23 **(Against Defendant)**

24 212. Plaintiffs reallege and incorporate by reference the allegations of paragraphs 1
25 through 211 as set forth above.

26 213. The City has intentionally interfered with OGRE's prospective economic
27 relationships with potential customers of its rail switching services, by engaging in a series of
28

1 disruptive acts as described above. OGRE is unable to secure customers for its rail operation
2 because of the City's omissions and actions. OGRE's prospective economic relationships would
3 have resulted in a future economic benefit to Plaintiffs.

4 214. The City knew of the OGRE Sublease, because Plaintiffs had informed the City of
5 the terms of the OGRE Sublease and requested that the City issue an NDA to the OGRE as a
6 subtenant.
7

8 215. The City knew that the success of the Project hinged on OBOT's ability to secure a
9 subtenant to rehabilitate the rail network and provide rail switching services.

10 216. The prospective economic relationship between OGRE and its potential rail
11 customers has been disrupted because of the City's wrongful conduct.

12 217. As a proximate result of the City's wrongful conduct, Plaintiffs have been
13 damaged in an amount to be proven at trial. Plaintiffs will continue to be damaged unless the
14 City is compelled to perform under the Lease and DA.
15

16 **TENTH CAUSE OF ACTION**

17 **Negligent Interference with Prospective Economic Relations (OGRE)**
18 **(Against Defendant)**

19 218. Plaintiffs reallege and incorporate by reference the allegations of paragraphs 1
20 through 217 as set forth above.

21 219. The City has negligently interfered with OGRE's prospective economic
22 relationships with potential customers.

23 220. OGRE's ability to obtain customers for rail services as provided for under the
24 OGRE Sublease would have resulted in a future economic benefit to OGRE.
25

26 221. The City knew of the OGRE Sublease, because Plaintiffs had informed the City of
27 the terms of the OGRE Subleases and requested that the City issue an NDA to the OGRE as a
28

1 subtenant.

2 222. The City knew or should have known that its wrongful conduct, as described
3 above, and failure to act with reasonable care would disrupt OGRE's economic relationship with
4 its potential customers.

5 223. The City breached its duty to Plaintiffs by failing to act with reasonable care
6 including but not limited to: (i) refusing to turn over the Rail R/O/W to OBOT; (ii) refusing to
7 issue an NDA to OGRE, (iii) failing to issue an estoppel without a false claim that OBOT
8 committed an Unmatured Event of Default; and (iv) breaching the Lease and DA as described
9 above.
10

11 224. OGRE's economic relationships with its potential customers have been disrupted.

12 225. The City negligently failed and continues to fail, to cure its negligence by failing
13 to perform under the Lease and DA.
14

15 226. As a proximate result of the City's negligence, Plaintiffs have been damaged in an
16 amount to be proven at trial. Plaintiffs will continue to be damaged unless the City is compelled
17 to perform under the Lease and DA.

18 **ELEVENTH CAUSE OF ACTION**

19 **Declaratory Relief**

20 **(Against Defendant)**

21 227. Plaintiffs reallege and incorporate by reference the allegations of paragraphs 1
22 through 226 as set forth above.

23 228. An actual, ripe, justiciable, and substantial controversy has arisen and now exists
24 between Plaintiffs and the City with respect to several issues. Plaintiffs contend that the City has
25 breached and/or repudiated its obligations under the Lease and DA. It is clear from the City's
26 responses to Plaintiffs' correspondences that the City disagrees. The City contends that OBOT
27
28

1 has committed an Event of Default under the Lease, and Plaintiffs dispute the City's contention.

2 229. Under Code of Civil Procedure Section 1060 *et seq.*, Plaintiffs seek a judicial
3 declaration, including but not limited to the following:

4 (i) OBOT and OGRE are not in default under the DA or the Lease;

5 (ii) neither the Lease nor the DA has been terminated, either automatically or otherwise
6 and both remain in full force and effect;

7 (iii) ALTERNATIVELY, if the Court determines OBOT has committed an unmatured
8 event of default or event of default, OBOT has commenced cure that vitiates any grounds
9 for termination of the Lease or DA by the City;

10 (iv) On March 11, 2016 OBOT properly invoked the Force Majeure Delay Lease
11 provisions and is entitled to an extension of at least two years of the Commencement
12 Date, as defined in the Lease, with a further continuing extension for so long as the City
13 fails in its obligations to identify the applicable Construction Codes and Standards and
14 applicable City regulations to which design and construction of the Terminal must comply
15 or otherwise fails to meet its obligations under the DA or Lease;

16 (v) the process is to be open so that permits requested by OBOT or OGRE will be issued
17 by the City as a ministerial act (without delay) and are not subject to discretionary review;

18 (vi) a creek protection permit is not required for the Project;

19 (vii) the City is required to turnover possession of the Property that Plaintiffs have a right
20 and obligation to improve, including but not limited to the Rail R/O/W;

21 (viii) the City is required to identify and to pursue third party funds for the Project,
22 including but not limited to funds generated by Measure BB;

23 (ix) the City is required to request and to process ACTC's disbursement of funds to the
24 Project;

1 (x) the City is required to execute a Rail Access Agreement with the Port pursuant to the
2 agreed upon terms between the City and Port as set forth in that certain Amended and
3 Restated Cost Sharing Agreement;

4 (xi) the rail network contemplated by the Rail Access Agreement is limited to the track
5 east of Wake Avenue;

6 (xii) there is no such thing as "Port property" and OBOT/OGRE have all the rights to
7 access the rail areas set forth in the Lease;

8 (xiii) the City and Port are obligated to support and not to interfere with Plaintiffs'
9 proceedings before the STB;

10 (xiv) the City is obligated to issue an NDA and estoppel for OBOT's subtenants without
11 reference to any unmaturred event of default or event of default;

12 (xv) the form of NDA has been approved by the City and is attached hereto as **Exhibit 1**.

13 (xvi) the City is obligated to accept Plaintiffs' Basis of Design and to meet and confer as
14 required by the Lease;

15 (xvii) OBOT and its subtenant may have beneficial use of the West Gateway, and use the
16 West Gateway for open storage consistent with the Lease;

17 (xviii) the City is obligated to construct the Public Access Improvements consistent with
18 its BCDC permit without seeking contribution from OBOT; and

19 (xviii) the City had knowledge prior to execution of the LDDA, DA, and Lease, that coal
20 was a potential commodity to be handled by the Terminal.

21
22 230. A judicial declaration is necessary and appropriate at this time under the
23 circumstances in order that Plaintiffs may ascertain their rights and interests with respect to the
24 contracts between Plaintiffs and the City.
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27
28

1 **TWELFTH CAUSE OF ACTION**

2 **Specific Performance of Contract**

3 **(Against Defendant)**

4 231. Plaintiffs reallege and incorporate by reference the allegations of paragraphs 1
5 through 230 as set forth above.

6 232. The Lease and DA are sufficiently certain in their terms to be specifically
7 enforced.

8 233. OBOT has substantially performed each of the obligations to be performed by it
9 under the Lease, except for those excused or otherwise discharged by reason of the City's
10 conduct, including but not limited to payment of rent under the Lease.

11 234. The City has breached the Lease and DA as described above.

12 235. The City has received adequate consideration for the Lease and DA, including but
13 not limited to payment of rent under the Lease.

14 236. The Lease and DA are just and reasonable as to the City, and its assent was not
15 obtained by misrepresentation, concealment, circumvention, or unfair practices of Plaintiffs. At
16 all relevant times, the City was aware that Plaintiffs intended to build a bulk commodity terminal
17 that could be used to transport all legally permitted commodities, including, without limitation,
18 coal.

19 237. Plaintiffs have no adequate remedy at law for the City's wrongful conduct.
20 Plaintiffs will suffer irreparable harm to the extent Plaintiffs lose the unique opportunity complete
21 the Project in an ever-changing marketplace.

22 //

23 //

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PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for judgment as follows:

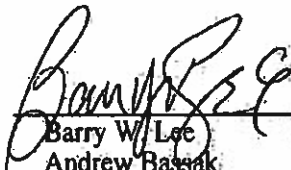
1. Compensatory damages in an amount to be proven at trial;
2. Declaratory relief as set forth above;
3. Specific performance of all of Defendant's contractual obligations set forth in the DA and Lease;
4. A preliminary and permanent injunction enjoining and forbidding the City from interfering or attempting to interfere with the completion of the Project by Plaintiffs;
5. For attorneys' fees and costs of suit incurred herein; and
6. For such other further relief as the Court may deem just and proper.

DEMAND FOR JURY TRIAL

Pursuant to California Code of Civil Procedure section 631, Plaintiffs hereby demand a trial by jury.

Dated: December 4, 2018

MANATT, PHELPS & PHILLIPS, LLP

By: 

Barry W. Lee

Andrew Bassak

Ana G. Guardado

Attorneys for Plaintiffs

OAKLAND BULK AND OVERSIZED
TERMINAL and OAKLAND GLOBAL RAIL
ENTERPRISE

EXHIBIT 1

NON-DISTURBANCE AND ATTORNMENT AGREEMENT

THIS NON-DISTURBANCE AND ATTORNMENT AGREEMENT ("Agreement"), dated as of _____, 2018 (the "Effective Date"), is entered into by and among the City of Oakland, a municipal corporation, (hereinafter called "**Master Landlord**"), Oakland Bulk and Oversized Terminal, LLC, a California limited liability company (hereinafter called "**Tenant**"), and Oakland Global Rail Enterprise, LLC, a California limited liability company (hereinafter called "**Subtenant**").

WITNESSETH:

WHEREAS, Master Landlord and Tenant entered into that certain Army Base Redevelopment Project Ground Lease, dated as of February 16, 2016 (the "**Master Lease**"), which Master Lease is attached hereto as **Exhibit 1** and includes certain rights and obligations with respect to the property described in the Master Lease as the Premises (the "**Premises**");

WHEREAS, Tenant and Subtenant have entered into that certain Sublease Agreement (WGW Rail), dated as of June 26, 2018 (the "**Sublease**"), which Sublease is attached hereto as **Exhibit 2** and includes certain rights and obligations with respect to a portion the Premises further described in the Sublease (the "**Sublease Premises**");

WHEREAS, Subtenant desires to be assured of continued occupancy of the Sublease Premises under the terms of the Sublease; and

WHEREAS, this Agreement is entered into pursuant to Section 12.5 of the Master Lease.

AGREEMENT

NOW, THEREFORE, in consideration of the mutual promises, covenants and agreements herein contained, the receipt and sufficiency of which are hereby acknowledged, the parties hereto, intending to be legally bound hereby, agree as follows:

1. Non-Disturbance; New Lease. In the event the Master Lease expires, terminates or is canceled or of the surrender thereof by Tenant, whether voluntary, involuntary, or by operation of law, and Master Landlord retakes possession of the Premises during the term of the Sublease, including but not limited to, due to a default by Tenant under the Master Lease (individually and collectively, the "**Master Lease Termination**"), subject to the terms of this Agreement:

(a) The Sublease shall not terminate as a result of the Master Lease Termination;

(b) So long as Subtenant is not then in default, after applicable notice and cure periods under any of the terms, covenants, or conditions of the Sublease, Master Landlord hereby agrees not to materially affect or materially disturb Subtenant's right to possession of the Sublease Premises and any of Subtenant's other rights under the Sublease in the exercise of Master Landlord's rights under the Master Lease;

(c) Master Landlord and Subtenant hereby agree that following the Master Lease Termination, the Sublease shall thereafter be deemed a direct lease between Master Landlord and Subtenant; and

(d) Within ~~(-)~~ thirty (30) days of the Master Lease Termination, Master Landlord and Subtenant agree to prepare and execute a new direct lease, ~~commercially reasonable terms acceptable to Master Landlord and Tenant based on the same or substantially similar terms as the Sublease,~~ for the remainder of the Sublease term (the "New Lease"), at which point the Sublease shall automatically terminate.

2. Limitation on Landlord's Liability under Sublease or New Lease. In the event of a Master Lease Termination, Master Landlord shall not:

(a) Be liable to Subtenant for any act, omission or breach of the Sublease by Tenant, except with respect to (i) continuing material defaults that first arose prior to the Master Lease Termination, but only to the extent continuing after the Master Lease Termination and (ii) matters that first arise after the Master Lease Termination to the extent provided for in the Master Lease;

(b) Be subject to any offsets or defenses which Subtenant might have against Tenant; provided, however, the foregoing shall not prevent any offsets or defenses under the Sublease or New Lease that (i) arise after the Master Lease Termination to the extent provided for in the Sublease or New Lease, whichever is then in force, and (ii) are expressly permitted under the terms of the Master Lease (provided that offsets and defenses against Master Landlord for continuing material defaults that first arose prior to the Master Lease Termination shall be limited to the extent continuing after the Master Lease Termination); or

(c) Be liable to Subtenant for any security deposit or prepaid rent or other fees or sums previously paid by Subtenant to Tenant unless such deposits are actually transferred to Master Landlord.

2. Attornment. Subject to the provisions of Sections 1 and 2, above, Subtenant hereby agrees to attorn to Master Landlord.

3. Subtenant Estoppel. Subtenant hereby agrees and represents:

3.1 That a true and accurate copy of the Sublease, including all exhibits and amendments, is attached hereto as Exhibit 2 and is unmodified, except for such attached and fully executed amendments, and to Subtenant's actual or constructive

knowledge is in full force and effect, as so amended;

3.2 Concurrently herewith, Subtenant has paid the following amounts to Tenant as "Rent" under the Sublease: None.

3.3 To Subtenant's actual or constructive knowledge, Subtenant is not aware of any defaults by any party under the Sublease which have not been cured, except as follows: (if none, insert "None"): None.

4. Continued Effect of Master Lease. As between Master Landlord and Tenant, and ~~Subtenant~~, the Sublease shall not alter, amend or otherwise modify any provisions of the Master Lease. This Agreement shall not release or discharge Tenant of any of its obligations under the Master Lease or release, discharge or alter the primary liability of Tenant to pay rent and all other sums due under the Master Lease and to perform and comply with all other obligations of Tenant under the Master Lease. Subtenant shall not violate any of the terms and conditions of the Master Lease to the extent applicable to the use and occupancy of the Sublease Premises. Subject to the terms of Sections 1 and 2, above, any breach of the Master Lease by Tenant ~~or Subtenant~~ and/or any breach of the Sublease by Subtenant which results in a breach of the Master Lease shall entitle Master Landlord to all the rights and remedies provided in the Master Lease. Nothing in this agreement shall be construed as validation of Tenant's ~~or Subtenant's~~ performance or lack thereof with respect to any of either of their obligations under the Master Lease, assurance that Tenant ~~or Subtenant have or have has~~ or has not defaulted under the Master Lease, or a waiver of Master Landlord's ability to pursue all appropriate remedies against Tenant ~~and/or Subtenant~~ under the Master Lease, and at law and equity for all such default, whether ~~arising~~ before or after the date of this Agreement.

5. Term of Master Lease and Sublease. Subtenant acknowledges and agrees that, subject to the provisions of this Agreement including without limitation Section 2 above, the term of the Sublease shall terminate upon the termination of the Master Lease and execution and delivery of the New Lease.

6. Entire Agreement; Successors. This Agreement contains the entire agreement between the parties hereto regarding the matters which are the subject of this Agreement. In the event of an assignment under the Master Lease by Master Landlord or, in the case of Tenant, an assignment permitted by Master Landlord under Section 12.1 of the Master Lease or a Permitted Transfer as defined in Section 12.3 of the Master Lease of Tenant's interest in the Master Lease with respect to all or a portion of the Sublease Premises, then the assignee of either Master Landlord or Tenant, as applicable, shall automatically be deemed the assignee of Master Landlord or Tenant, as applicable, under this Agreement, and such assignee shall automatically assume and be subject to all the terms herein and the obligations of Master Landlord or Tenant, as applicable, under this Agreement. No other assignments of this Agreement shall be permitted, ~~except as~~ except as described in the Master Lease. Subject to the foregoing, the terms, covenants and conditions of this Agreement shall apply to and bind the heirs, successors, the

executors and administrators and permitted assigns of all the parties hereto. To the extent applicable, this Agreement shall insure to the benefit of Subtenant's Mortgagee and its successors and assigns. The parties acknowledge and agree that no rule or construction, to the effect that any ambiguities are to be resolved against the drafting party, shall be employed in the interpretation of this Agreement. If any provision of this Agreement is determined to be illegal or unenforceable, such determination shall not affect any other provisions of this Agreement, and all such other provisions shall remain in full force and effect.

7. Counterparts. This Agreement may be executed in any number of counterparts, provided each of the parties hereto executes at least one counterpart; each such counterpart hereof shall be deemed to be an original instrument, but all such counterparts together shall constitute but one agreement.

8. Brokerage Commissions. Tenant and Subtenant covenant and agree that under no circumstances shall Master Landlord be liable for any brokerage commission or other charge or expense in connection with the Sublease or this Agreement and Tenant and Subtenant agree to protect, defend, indemnify and hold Master Landlord harmless from the same and from any cost or expense (including but not limited to attorneys' fees) incurred by Landlord in resisting any claim for any such brokerage commission.

9. Attorneys' Fees. In the event of any litigation between the parties hereunder to enforce or interpret this Agreement, the prevailing party (whether after trial or appeal) shall be entitled to recover from the party not prevailing its reasonable attorneys' fees and costs, in addition to all other proper relief.

10. Governing Law. This Agreement and the rights and obligations of the parties hereto are governed by the laws of the State of California.

[Rest of Page Left Blank]

IN WITNESS WHEREOF, the undersigned have caused this Agreement to be executed as of the Effective Date.

MASTER LANDLORD:

City of Oakland,
a municipal corporation

By: _____

Name: _____

Its: _____

Approved as to form and legality this
____ day of ____, 2018

City Attorney

TENANT:

**OAKLAND BULK AND OVERSIZED
TERMINAL, LLC,** a California limited
liability company

By: _____
Phil Tagami
Authorized Signatory

SUBTENANT:

**OAKLAND GLOBAL RAIL
ENTERPRISE, LLC,** a California limited
liability company

By: _____
Mark McClure
Manager

**EXHIBIT 1
MASTER LEASE**

[Attached]

**EXHIBIT 2
SUBLEASE**

[Attached]

EXHIBIT 3

MEMORANDUM OF AGREEMENT

[Attached]

RECORDING REQUESTED BY
AND WHEN RECORDED MAIL TO:

The City of Oakland
250 Frank H. Ogawa Plaza, 3rd Floor
Oakland, CA 94612
Reference: Oakland Army Base

With a copy to:

Oakland Bulk & Oversized Terminal, LLC
300 Frank H. Ogawa Plaza, Ste. 340
Oakland, CA 94612

(Space Above This Line For Recorder's Use Only)

**MEMORANDUM OF
NON-DISTURBANCE AND ATTORNMENT AGREEMENT**

This Memorandum of Non-Disturbance and Attornment Agreement (this "Memorandum"), dated as of _____, 2018, is entered into by and between the CITY OF OAKLAND, a municipal corporation ("Master Landlord"), Oakland Bulk and Oversized Terminal, LLC, a California limited liability company ("Tenant"), and Oakland Global Rail Enterprise, LLC, a California limited liability company ("Subtenant").

Master Landlord and Tenant have entered into that certain Army Base Gateway Redevelopment Project Ground Lease for West Gateway between Master Landlord and Tenant, dated February 16, 2016 (the "Master Lease"), whereby Master Landlord leased to Tenant, and Tenant leased from Master Landlord, that certain real property located in the City of Oakland as more particularly described in the Master Lease. A Memorandum of the Master Lease has been recorded in the Official Records of Alameda County as Document No. 2016-038036.

Tenant and Subtenant have entered into that certain Sublease Agreement (WGWRail), dated December 15, 2016 (the "Sublease"), whereby Tenant subleased to Subtenant, and Subtenant leased from Tenant, that certain portion of the Master Lease premises located in the City of Oakland as more particularly described in Exhibit A attached hereto. A Memorandum of the Sublease has been recorded in the Official Records of Alameda County as Document No. _____.

Master Landlord, Tenant and Subtenant have entered into that certain Non-Disturbance and Attornment Agreement dated _____, 2018, with respect to the Master Lease and the Sublease (the "NDA"). All terms in this Memorandum that are not defined herein shall have the same meanings as set forth in the NDA.

This Memorandum incorporates herein in full, by this reference, all provisions of

the NDA. This Memorandum is solely for recording and notice purposes and in no way alters, amends, modifies or supplements the provisions of the Master Lease, Sublease or NDA. In the event of any conflict between any provision of the NDA and any provision of this Memorandum, the NDA shall control.

This Memorandum shall extend to and be binding upon the parties hereto and their legal representatives, heirs, successors, and assigns.

This Memorandum may be executed in counterparts, each of which is deemed to be an original, and all such counterparts constitute one and the same instrument.

IN WITNESS WHEREOF, Master Landlord, Tenant and Subtenant have executed this Memorandum as of the date first written above.

MASTER LANDLORD:

City of Oakland,
a municipal corporation

By: _____

Name: _____

Its: _____

Approved as to form and legality this
____ day of _____, 2018

City Attorney

TENANT:

**OAKLAND BULK AND OVERSIZED
TERMINAL, LLC,** a California limited
liability company

By: _____
Phil Tagami
Authorized Signatory

SUBTENANT:

**OAKLAND GLOBAL RAIL
ENTERPRISE, LLC,** a California limited
liability company

By: _____
Mark McClure
Manager

**EXHIBIT A
TO
MEMORANDUM**

LEGAL DESCRIPTION OF REAL PROPERTY

[See attached]

EXHIBIT D

Selected City of Oakland Demurrer Filings with the Superior Court of the State of California

1 BARBARA J. PARKER, City Attorney – SBN 069722
MARIA BEE, Chief Assistant City Attorney – SBN 167716
2 DAVID A. PEREDA, Special Counsel – SBN 237982
JAMILAH A. JEFFERSON, Senior Deputy City Attorney – SBN 219027
3 One Frank H. Ogawa Plaza, 6th Floor
Oakland, California 94612
4 Telephone: (510) 238-7686
Facsimile: (510) 238-6500
5 jjefferson@oaklandcityattorney.org

6 Manuel A. Martinez (SBN 115075)
Ellen A. Cirangle (SBN 164188)
7 Kyle A. Withers (SBN 269459)
LUBIN OLSON & NIEWIADOMSKI LLP
8 The Transamerica Pyramid
600 Montgomery Street, 14th Floor
9 San Francisco, California 94111
Telephone: (415) 981-0550
10 Facsimile: (415) 981-4343
mmartinez@lubinolson.com
11 ecirangle@lubinolson.com
kwithers@lubinolson.com

12 Attorneys for Defendant
13 CITY OF OAKLAND

14 SUPERIOR COURT OF THE STATE OF CALIFORNIA
15 COUNTY OF ALAMEDA
16

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

20 Plaintiffs,

21 v.

22 CITY OF OAKLAND, a California
municipal corporation,

23 Defendant.
24
25
26
27
28

Case No. RG18930929

ASSIGNED FOR PURPOSES TO
JUDGE JO-LYNNE Q. LEE, DEPT 18

**DEFENDANT CITY OF OAKLAND'S
NOTICE OF DEMURRER AND
DEMURRER TO PLAINTIFFS'
COMPLAINT**

Reservation No. R-2039261

Date: April 30, 2019
Time: 3:00 p.m.

Action Filed: December 4, 2018
Trial Date: Not Set

1 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

2 **PLEASE TAKE NOTICE** that on April 30, 2019 at 3:00 p.m., or as soon
3 thereafter as the matter may be heard in Department 18 of the above-entitled Court, located at
4 1221 Oak Street, Oakland, California, defendant City of Oakland (the "City") will and hereby
5 does demur under Code of Civil Procedure section 430.10(e) to each of the causes of action
6 asserted in the Complaint filed by plaintiffs Oakland Bulk and Oversized Terminal, LLC and
7 Oakland Global Rail Enterprise, LLC (together, "Plaintiffs") on the grounds that Plaintiffs do not
8 "state facts sufficient to constitute a cause of action," and that the claims are barred by res
9 judicata, the relevant statute of limitations, and the Government Claims Act. The City will request
10 that the Court sustain the demurrer without leave to amend.

11 As explained in the concurrently filed Declaration of Ellen A. Cirangle, the parties
12 met and conferred as required by Code of Civil Procedure section 430.41(a).

13 This demurrer is based on this Notice and Demurrer and Demurrer, the
14 Memorandum of Points and Authorities in Support of the Demurrer, the Declaration of Ellen A.
15 Cirangle in Support of the Demurrer, the Request for Judicial Notice in Support of the Demurrer,
16 the Complaint, all other pleadings and papers on file, and any further evidence or arguments that
17 may be submitted to the Court at or before the hearing on the Demurrer.

18 **GENERAL DEMURRER**

19 The City hereby demurs to the causes of action asserted against it in the Complaint
20 filed by Plaintiffs as follows:

21 **Demurrer to the First Cause of Action (Breach of Written Contract (Lease))**

22 1. The City generally demurs to Plaintiffs' First Cause of Action for Breach
23 of Written Contract (Lease) under Code of Civil Procedure section 430.10(e) because it (a) does
24 not "state facts sufficient to constitute a cause of action" and (b) is barred by res judicata.

25 **Demurrer to the Second Cause of Action (Anticipatory Breach (Lease))**

26 2. The City generally demurs to Plaintiffs' Second Cause of Action for
27 Anticipatory Breach (Lease) under Code of Civil Procedure section 430.10(e) because it (a) does
28 not "state facts sufficient to constitute a cause of action" and (b) is barred by res judicata.

1 **Demurrer to Third Cause of Action**

2 **(Breach of the Implied Covenant of Good Faith and Fair Dealing (Lease))**

3 3. The City generally demurs to Plaintiffs' Third Cause of Action for Breach
4 of the Implied Covenant of Good Faith and Fair Dealing (Lease) under Code of Civil Procedure
5 section 430.10(e) because it (a) does not "state facts sufficient to constitute a cause of action" and
6 (b) is barred by res judicata.

7 **Demurrer to Fourth Cause of Action (Fraudulent Inducement / False Promise)**

8 4. The City generally demurs to Plaintiffs' Fourth Cause of Action for
9 Fraudulent Inducement / False Promise under Code of Civil Procedure section 430.10(e) because
10 it (a) does not "state facts sufficient to constitute a cause of action," (b) is barred by res judicata,
11 (c) is barred on its face by the three-year statute of limitations (Civ. Proc. Code § 338(d)), and
12 (d) is barred by the Government Claims Act (Gov't Code § 815(a)).

13 **Demurrer to Fifth Cause of Action**

14 **(Intentional Interference with Contractual Relations (TLS))**

15 5. The City generally demurs to Plaintiffs' Fifth Cause of Action for
16 Intentional Interference with Contractual Relations (TLS) under Code of Civil Procedure section
17 430.10(e) because it (a) does not "state facts sufficient to constitute a cause of action," (b) is
18 barred by res judicata, (c) is barred on its face by the two-year statute of limitations (Civ. Proc.
19 Code § 339(1)), and (d) is barred by the Government Claims Act (Gov't Code § 815(a)).

20 **Demurrer to Sixth Cause of Action**

21 **(Intentional Interference with Prospective Economic Relations (TLS and ITS))**

22 6. The City generally demurs to Plaintiffs' Sixth Cause of Action for
23 Intentional Interference with Prospective Economic Relations (TLS and ITS) under Code of Civil
24 Procedure section 430.10(e) because it (a) does not "state facts sufficient to constitute a cause of
25 action," (b) is barred by res judicata, (c) is barred on its face by the two-year statute of limitations
26 (Civ. Proc. Code § 339(1)), and (d) is barred by the Government Claims Act (Gov't Code §
27 815(a)).

28 ///

1 **Demurrer to Seventh Cause of Action**

2 **(Negligent Interference with Prospective Economic Relations (TLS and ITS))**

3 7. The City generally demurs to Plaintiffs' Seventh Cause of Action for
4 Negligent Interference with Prospective Economic Relations (TLS and ITS) under Code of Civil
5 Procedure section 430.10(e) because it (a) does not "state facts sufficient to constitute a cause of
6 action," (b) is barred by res judicata, (c) is barred on its face by the two-year statute of limitations
7 (Civ. Proc. Code § 339(1)), and (d) is barred by the Government Claims Act (Gov't Code §
8 815(a)).

9 **Demurrer to Eighth Cause of Action**

10 **(Intentional Interference with Contractual Relations (OGRE))**

11 8. The City generally demurs to Plaintiffs' Eighth Cause of Action for
12 Intentional Interference with Contractual Relations (OGRE) under Code of Civil Procedure
13 section 430.10(e) because it (a) does not "state facts sufficient to constitute a cause of action,"
14 (b) is barred by res judicata, (c) is barred on its face by the two-year statute of limitations (Civ.
15 Proc. Code § 339(1)), and (d) is barred by the Government Claims Act (Gov't Code § 815(a)).

16 **Demurrer to Ninth Cause of Action**

17 **(Intentional Interference with Prospective Economic Relations (OGRE))**

18 9. The City generally demurs to Plaintiffs' Ninth Cause of Action for
19 Intentional Interference with Prospective Economic Relations (OGRE) under Code of Civil
20 Procedure section 430.10(e) because it (a) does not "state facts sufficient to constitute a cause of
21 action," (b) is barred by res judicata, (c) is barred on its face by the two-year statute of limitations
22 (Civ. Proc. Code § 339(1)), and (d) is barred by the Government Claims Act (Gov't Code §
23 815(a)).

24 **Demurrer to Tenth Cause of Action**

25 **(Negligent Interference with Prospective Economic Relations (OGRE))**

26 10. The City generally demurs to Plaintiffs' Tenth Cause of Action for
27 Negligent Interference with Prospective Economic Relations (OGRE) under Code of Civil
28 Procedure section 430.10(e) because it (a) does not "state facts sufficient to constitute a cause of

1 action,” (b) is barred by res judicata, (c) is barred on its face by the two-year statute of limitations
2 (Civ. Proc. Code § 339(1)), and (d) is barred by the Government Claims Act (Gov’t Code §
3 815(a)).

4 **Demurrer to Eleventh Cause of Action (Declaratory Relief)**

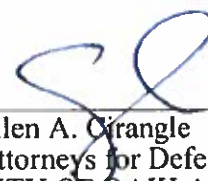
5 11. The City generally demurs to Plaintiffs’ Eleventh Cause of Action for
6 Declaratory Relief under Code of Civil Procedure section 430.10(e) because it (a) does not “state
7 facts sufficient to constitute a cause of action” and (b) is barred by res judicata.

8 **Demurrer to Twelfth Cause of Action (Specific Performance of Contract)**

9 12. The City generally demurs to Plaintiffs’ Twelfth Cause of Action for
10 Specific Performance of Contract under Code of Civil Procedure section 430.10(e) because it
11 (a) does not “state facts sufficient to constitute a cause of action” and (b) is barred by res judicata.

12 Dated: January 14, 2019

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

20 Plaintiffs,

21 v.

22 CITY OF OAKLAND, a California
23 municipal corporation,

24 Defendant.

Case No. RG18930929

ASSIGNED FOR PURPOSES TO
JUDGE JO-LYNNE Q. LEE, DEPT 18

**MEMORANDUM OF POINTS OF
AUTHORITIES IN SUPPORT OF
DEFENDANT CITY OF OAKLAND'S
DEMURRER TO PLAINTIFFS'
COMPLAINT**

Reservation No. R-2039261

Date: April 30, 2019
Time: 3:00 p.m.

Action Filed: December 4, 2018
Trial Date: Not Set

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1 **I. INTRODUCTION**

2 This lawsuit arises from agreements between plaintiff Oakland Bulk and
3 Oversized Terminal, LLC ("OBOT") and defendant City of Oakland (the "City") related to the
4 development of a rail-to-ship bulk commodity terminal at the former Oakland Army Base.
5 Plaintiffs claim the City has run a continuous campaign to interfere with OBOT's development of
6 a coal terminal at the site since at least 2012. But OBOT already sued the City for this alleged
7 campaign. The prior action involved the same parties (or their affiliates), the same agreements,
8 the same development, the same type of alleged wrongdoing, and the same injury. Plaintiffs
9 elected to waive any damage claim in the prior action and conceded this would preclude them
10 from seeking damages in any subsequent lawsuit. Res judicata bars Plaintiffs' claims here
11 because they either were brought or could have been brought in the prior action. The Government
12 Claims Act and the relevant statutes of limitations also bar Plaintiffs' tort claims, and Plaintiffs
13 otherwise fail to state viable causes of action.

14 **II. STATEMENT OF FACTS**

15 **A. Plaintiffs' allegations in this action**

16 **1. The City and OBOT enter into agreements related to the Project.**

17 The City and OBOT (or its predecessors-in-interest) entered into several
18 agreements related to the development of a portion of the former Oakland Army Base called the
19 West Gateway into a rail-to-ship bulk commodity terminal and the reestablishment of rail
20 improvements (the "Project"). Compl. ¶¶ 1-4, 18-20. These included the Exclusive Negotiation
21 Agreement dated January 22, 2010, the Army Base Gateway Redevelopment Project Lease
22 Disposition and Development Agreement dated December 4, 2012 (the "LDDA"), the
23 Development Agreement dated July 16, 2013 (the "DA"), and the Army Base Gateway
24 Development Project Ground Lease for West Gateway dated February 16, 2016 (the "Lease"). *Id.*
25 ¶¶ 3, 26-30. OBOT subleased the Project's rail improvements to its affiliate plaintiff Oakland
26 Global Rail Enterprise, LLC ("OGRE"). *Id.* ¶ 13.

27 **2. The City's "uninterrupted pattern of delay and interference."**

28 In 2014, it was revealed that OBOT intended to develop the Project to transport

1 coal—not iron ore and copper concentrate as previously represented. *Id.* ¶¶ 37, 38, 60. Plaintiffs
2 allege that, because the City is opposed to having coal shipped through the Project (*id.* ¶¶ 58, 60,
3 113, 147, 174), “[o]ver the last several years, the City has engaged in an uninterrupted pattern of
4 delay and interference, all with the objective of preventing OBOT from completing this project.”
5 *Id.* ¶ 1. The City’s alleged “delay and interference” included:

- 6 • “For over six years the City has intentionally blocked and interfered with OBOT’s
7 efforts to acquire rights for, to access properties for, and to rehabilitate [] essential
8 Rail Improvements.” *Id.* ¶ 87; *see also id.* at ¶ 93 (“[T]he Port and the City have
9 failed for over six years to process, to secure and to provide a written Rail Access
10 Agreement as required by Section 5.2.3 of the Lease.”).
- 11 • On June 17, 2014, the Oakland City Council adopted a resolution opposing the
12 transportation of coal in Oakland (the “2014 Resolution”). *Id.* ¶ 60.
- 13 • At various times in 2014, the City interfered with OBOT’s ability to use the Joint
14 Environmental Remediation Fund and Public Improvement funds to remediate the
15 project. *Id.* ¶¶ 42-47. In 2015, the City interfered with OBOT’s requests for
16 disbursement of Measure BB funds from the Alameda County Transportation
17 Commission because of the “potential for the export of coal.” *Id.* ¶¶ 48-59.
- 18 • On November 6, 2015, Assistant Oakland City Administrator Claudia Cappio sent
19 an internal memorandum requesting that the Planning and Building Departments
20 notify the City Administrator when they received permit applications for the
21 Project. *Id.* ¶¶ 74-77.
- 22 • “Since 2015, the City or the Port, or both, have objected to each petition that
23 OGRE filed” with the Surface Transportation Board “to facilitate track
24 rehabilitation and operation of the rail.” *Id.* ¶¶ 104-105.
- 25 • On March 9, 2016, the City notified OBOT that its permit applications are subject
26 to additional discretionary approvals, causing OBOT to give notice of Force
27 Majeure Delay under the Lease on March 11, 2016. *Id.* ¶¶ 78-86.
- 28 • In 2016, the City “continued to yield to political pressure to the Project’s
detriment” and contracted with Environmental Science Associates (“ESA”) to
perform a health and safety review. *Id.* ¶ 61.
- On July 27, 2016, the City enacted an ordinance prohibiting the storage and
handling of coal at bulk-good facilities in Oakland (the “Ordinance”) and adopted
a resolution applying the Ordinance to OBOT (the “Resolution”). *Id.* ¶ 61.

Since passing the Ordinance in 2016, the City allegedly continued “uninterrupted”
its efforts to “kill” the project because of its opposition to coal. *See, e.g., id.* ¶¶ 1, 112-153.

3. Since 2012, the City breached the agreements and harmed Plaintiffs.

Plaintiffs claim the City’s “uninterrupted pattern of delay and interference”
breached the DA and the Lease, delayed the Project, and forced Plaintiffs to incur significant out-

1 of-pocket costs. *Id.* ¶ 157. Plaintiffs seek over \$100 million for the damage allegedly caused by
2 the “enforcement of the illegal Ordinance and Resolution.” *Id.* ¶¶ 158, 159, 169. Plaintiffs also
3 claim the City tortiously interfered with their actual and prospective relationships with third
4 parties, which made it harder “to timely complete the project” (*id.* ¶¶ 181-237), and that the City
5 fraudulently induced OBOT to develop the Project. *Id.* ¶¶ 175, 178. Besides monetary relief,
6 Plaintiffs seek declaratory relief and specific performance. *Id.* ¶¶ 227-237.

7 **B. OBOT’s allegations in its prior federal action against the City.**

8 This is the second lawsuit in two years that OBOT has filed against the City for
9 breach of contract related to the Project. On December 7, 2016, OBOT filed a 41-page complaint
10 (the “Federal Complaint”) against the City in the United States District Court for the Northern
11 District of California (the “Federal Action”). Request for Judicial Notice (“RJN”), Ex. A.

12 The Federal Action and this action concern the same agreements relating to the
13 same Project—the West Gateway development. *Compare* Compl. ¶¶ 3, 13, 18-21, 26-32, 38-39,
14 with RJN, Ex. A ¶¶ 3, 4, 5, 21-31, 34-35, 122.¹ In the Federal Action, OBOT claimed the City
15 engaged in a multi-year “campaign to ban the transport of coal” at the Project (RJN, Ex. A ¶¶ 7-
16 8); in this action, Plaintiffs claim the City engaged in an “uninterrupted pattern of delay and
17 interference” to ban the transport of coal at the Project. Compl. ¶¶ 1, 58, 60, 113, 147, 174.

18 The City’s “campaign” in the Federal Action and its “uninterrupted pattern of
19 delay and interference” in this action took place simultaneously and involved much of the same
20 purported wrongdoing by the City. *Compare, e.g.,* RJN, Ex. A ¶¶ 8, 36-37, 41-44, 46, 78, with
21 Compl. ¶¶ 60, 61, 66, 147. For example, the “campaign” and the “uninterrupted pattern of delay
22 and interference” both include the 2014 Resolution, the City’s statements in opposition to coal
23 from 2014 to 2016, the 2016 Ordinance and Resolution, and allegedly improper work done by
24 ESA to support the Ordinance. *See id.* Indeed, according to Plaintiffs, the “campaign”

25
26 ¹ OBOT’s June 14, 2017 amended complaint requested injunctive relief “prohibiting the City
27 from asserting that OBOT has breached the DA, the LDDA, and the Ground Lease for West
28 Gateway, dated February 16, 2016, by any failure to perform resulting from the City’s
misconduct.” RJN, Ex. B at 41. OBOT also asserted that its reference to the DA in its original
Federal Complaint encompassed the Lease. RJN, Ex. C at 9 n.12 (noting the Lease is “expressly
incorporated into the DA”); *see also* RJN, Ex. D at 3 n.2 (stating the “lease is part of the DA.”).

1 “culminated” with the City’s adoption of the Ordinance. RJN, Ex. A at ¶ 8.

2 In the Federal Action, OBOT alleged the City’s “campaign” was a breach of
3 contract and caused the same harm alleged here (i.e., a diminution in value of OBOT’s
4 investment of the Project, out-of-pocket costs, and loss of a sublease). *Compare* RJN, Ex. A ¶¶
5 32-35, 123, 124, 161-67, pp. 40-41, *with* Compl. ¶¶ 158, 159, 169, 178, 181-187.

6 Plaintiffs seek damages in this action because they voluntarily waived damages in
7 the Federal Action. In July 2017, OBOT waived its damage claims to avoid a jury trial in the
8 Federal Action. RJN, Ex. E, at 7:8-22, 9:7-8. The federal court warned OBOT that “res judicata
9 would bar [it] from seeking damages on the same claims or claims that could have been brought
10 in this case.” *Id.* at 9:9-13. OBOT conceded that the federal court was “100 percent right that
11 there ... will be res judicata impacts” but OBOT confirmed it was “not seeking damages in the
12 trial ... and if [it] win[s], [it] do[es] not intend to seek further relief.” *Id.* at 9:14-22.

13 On May 15, 2018, the federal court issued a final judgment granting OBOT
14 declaratory and injunctive relief on OBOT’s breach of contract claim. Compl. ¶¶ 62-63; RJN,
15 Exs. F-G. The City’s appeal of that decision is pending. Compl. ¶ 67.

16 **III. ARGUMENT**

17 **A. The applicable legal standard.**

18 A defendant may demur to a complaint on the grounds that it “does not state facts
19 sufficient to constitute a cause of action.” Civ. Proc. Code § 430.10(e). Courts should sustain a
20 demurrer if the action is barred by the doctrine of res judicata. *See Boeken v. Philip Morris USA,*
21 *Inc.*, 48 Cal. 4th 788, 792 (2010). Similarly, “[w]hen a ground for objection to a complaint, such
22 as the statute of limitations, appears on its face or from matters of which the court may or must
23 take judicial notice, a demurrer on that ground is proper.” *Vaca v. Wachovia Mortg. Corp.*, 198
24 Cal. App. 4th 737, 746 (2011) (citation omitted).

25 **B. Plaintiffs’ claims are barred by res judicata.**

26 OBOT’s prior Federal Action was based on the same alleged campaign to ban coal
27 at the terminal that is the subject of this Complaint, and OBOT challenged that campaign on the
28 same alleged contractual right to handle coal at the terminal that it invokes here. OBOT expressly

1 disclaimed damages in the Federal Action after being put on notice by the Court that doing so
2 would preclude OBOT from ever seeking damages for claims it brought or could have brought in
3 the Federal Action. Res judicata precludes all of Plaintiffs' claims here.²

4 "Res judicata, also known as claim preclusion, bars litigation in a subsequent
5 action of any claims that were raised or could have been raised in the prior action." *Owens v.*
6 *Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 713 (9th Cir. 2001) (citation omitted). Res
7 judicata applies if there is a "final judgment on the merits," "identity or privity between parties"
8 and "identity of claims." *Id.* (citation omitted). Similarly, under California law, res judicata
9 prevents relitigation of the same cause of action between the same parties or parties in privity
10 with them. *Mycogen Corp. v. Monsanto Co.*, 28 Cal. 4th 888, 896–97 (2002). If a plaintiff
11 prevails in an action, the cause is merged into the judgment and may not be asserted in a
12 subsequent lawsuit. *Id.* Res judicata bars all issues that could have been raised—not only issues
13 actually raised. *Villacres v. ABM Indus. Inc.*, 189 Cal. App. 4th 562, 569 (2010).

14 "Res judicata precludes piecemeal litigation by splitting a single cause of action
15 or relitigation of the same cause of action on a different legal theory or for different relief.' A
16 predictable doctrine of res judicata benefits both the parties and the courts because it 'seeks to
17 curtail multiple litigation causing vexation and expense to the parties and wasted effort and
18 expense in judicial administration.'" *Mycogen*, 28 Cal. 4th at 897 (citations omitted).

19 **1. There is a final judgment on the merits in the Federal Action.**

20 The federal court entered judgment on May 23, 2018. RJN, Ex. G. The City's
21 pending appeal does not impact the finality of that judgment. *Calhoun v. Franchise Tax Bd.*, 20
22

23 ² Federal law determines the effect of the judgment in the Federal Action. *Guerrero v. Cal. Dep't*
24 *of Corrs. & Rehab.*, 28 Cal. App. 5th 1091, 239 Cal. Rptr. 3d 726, 733 (2018). Under federal law,
25 courts apply state law in diversity-jurisdiction cases and federal law in federal-question cases. *Id.*
26 (citations omitted). It is unclear whether federal or state res judicata law applies here because the
27 Federal Action was based on federal-question jurisdiction, but the federal court rendered
28 supplemental jurisdiction. *Compare Chudacoff v. Univ. Med. Ctr.*, Case No. 11–16232, 2013 WL
1679357, at *1 (9th Cir. April 18, 2013) (applying federal law), with *Hardy v. America's Best*
Home Loans, 232 Cal. App. 4th 795, 806 (2014) (applying California law). The Court need not
decide this issue because the claims are barred under either state or federal law.

1 Cal. 3d 881, 887 (1978) (“We note that an appeal from the federal judgment is now pending in
2 the Ninth Circuit Court of Appeals. The federal rule is that ‘a judgment or order, once rendered, is
3 final for purposes of res judicata until reversed on appeal or modified or set aside in the court of
4 rendition.’ A federal judgment is as final in California courts as it would be in federal courts, and
5 the Board thus correctly relies on the judgment that followed the trial.”) (citations omitted).

6 **2. The same parties (or their privies) were involved in both actions.**

7 The same parties were involved in both actions: OBOT and the City. Although
8 OGRE was not a named party in the Federal Action, OGRE was in privity with OBOT. *See In re*
9 *Gottheiner*, 703 F.2d 1136, 1140 (9th Cir. 1983) (privity exists if there is “sufficient commonality
10 of interest” between the parties) (citation omitted); *see also Citizens for Open Access to Sand &*
11 *Tide, Inc. v. Seadrift Ass’n*, 60 Cal. App. 4th 1053, 1069 (1998) (“The concept of privity ... refers
12 ‘to a mutual or successive relationship to the same rights of property, or to such an identification
13 in interest of one person with another as to represent the same legal rights’”). OGRE and OBOT
14 are affiliates who share a common owner and OBOT disclosed OGRE as an interested party in
15 the Federal Action. Compl. ¶ 13; RJN, Ex. H; RJN, Ex. I at 3, n.4. OGRE’s only interest in the
16 Project arises from its sublease with OBOT for the rail portion of the Project (Compl. ¶ 13), and
17 the rail portion of the Project was at issue in the Federal Action. *See, e.g.*, RJN, Ex. A, ¶¶ 33, 86;
18 RJN, Ex. I at 3-4. OGRE thus has the same interest that OBOT had in the Federal Action, and
19 OBOT represented both its and OGRE’s interests in that action.

20 **3. There is an identity of claims.**

21 There is an “identity of claims”: Plaintiffs could have brought the claims asserted
22 in this action in the Federal Action because they involve the same “primary right” under
23 California law and arise from the same “transaction or series of transactions” under federal law.

24 a. Plaintiffs’ claims involve the same “primary right.”

25 “California law approaches the issue by focusing on the ‘primary right’ at stake: if
26 two actions involve the same injury to the plaintiff and the same wrong by the defendant then the
27 same primary right is at stake even if in the second suit the plaintiff pleads different theories of
28 recovery, seeks different forms of relief and/or adds new facts supporting recovery.” *Cal Sierra*

1 *Dev., Inc. v. George Reed, Inc.*, 14 Cal. App. 5th 663, 675 (2017) (citation omitted). “A primary
2 right is the right to be free of a particular injury,” and the “cause of action is the right to obtain
3 redress for a harm suffered, regardless of the specific remedy sought or the legal theory (common
4 law or statutory) advanced.” *Id.* at 675-76 (citations omitted). “[T]here is only a single cause of
5 action for the invasion of one primary right and the harm suffered is the significant factor.” *Id.*
6 (citations omitted).

7 The primary right here is the same as in the Federal Action: OBOT’s right to
8 pursue development of a coal terminal at the Project. As the Court stated in the Federal Action:
9 OBOT’s claim was that it “has a contractual right to pursue development of a coal terminal to the
10 extent allowed under the municipal code as it existed when the [DA] was signed. ... This is the
11 right [OBOT] is suing on.” RJN, Ex. J at 1. In the Federal Action, OBOT sought relief for the
12 injury allegedly suffered when the City interfered with this right. RJN, Ex. A, ¶¶ 161-167. OBOT
13 sues for the same primary right here—injury suffered by the City’s alleged interference with
14 OBOT’s purported contractual right to pursue development of a coal terminal at the Project. *See,*
15 *e.g.*, Compl. ¶¶ 1, 58, 60-67, 113, 147, 174 ; *see also Weikel v. TCW Realty Fund II Holding Co.*,
16 55 Cal. App. 4th 1234, 1248 (1997) (finding later claims barred by res judicata because plaintiff’s
17 primary right in both lawsuits was “interest in constructing a building” and defendant’s duty “not
18 to unreasonably interfere” with these rights).

19 Plaintiffs cannot save their claims here by alleging additional facts and causes of
20 action because all of OBOT’s claims in both cases stem from the City’s alleged ongoing
21 interference with OBOT’s right to develop a coal terminal. “‘Res judicata bars the relitigation not
22 only of claims that were conclusively determined in the first action, but also matter that was
23 within the scope of the action, related to the subject matter, and relevant to the issues so that it
24 could have been raised.’ ‘A party cannot by negligence or design withhold issues and litigate
25 them in consecutive actions. Hence the rule is that the prior judgment is res judicata on matters
26 which were raised or could have been raised, on matters litigated or litigable.’” *Burdette v.*
27 *Carrier Corp.*, 158 Cal. App. 4th 1668, 1674–75 (2008) (citations omitted); *Cal Sierra Dev.*, 14
28 Cal. App. 5th at 675 (adding “new facts supporting recovery” does not save the second claim).

1 Nor can Plaintiffs save part of their claims by asserting wrongdoing after the
2 Federal Action, because those allegations relate to Plaintiffs' same injury from the City's
3 "continuing" wrongdoing. There is no alleged violation of a new or different "primary right" after
4 the Federal Action. *See, e.g., U.S. v. E. Mun. Water Dist.*, CV 04-8182 CBM, 2008 WL
5 11334421, at *9 (C.D. Cal. April 3, 2008) ("[A]llegations that Defendants continue to take
6 actions inconsistent with their obligations under the [contract] do not give rise to additional
7 breaches of the agreement") (citing *Abbott v. The 76 Land & Water Co.*, 161 Cal. 42, 48-49
8 (1911)). Plaintiffs were therefore required to seek *all* damages in the Federal Action. Yet now, for
9 example, Plaintiffs seek delay damages for the City's defense and appeal of the Federal Action.
10 Compl. ¶¶ 66-67. But res judicata required Plaintiffs to seek damages for "delay in the
11 performance occasioned by the litigation" in the Federal Action "even if they [were] still
12 speculative at the time of the suit." *Mycogen*, 28 Cal. 4th at 906-07. A plaintiff "is bound to prove
13 in the first action, not only such damage as has been actually suffered, but also such prospective
14 damage by reason of the breach as he may be legally entitled to; for *the judgment he recovers in*
15 *such action will be a conclusive adjudication as to the total damage on account of the breach.*"
16 *Id.* at 907 (quoting *Abott*, 161 Cal. at 48) (emphasis added).

17 b. Plaintiffs' claims arise from the same series of transactions.

18 For the same reasons, res judicata bars Plaintiffs' claims under federal law. *See*
19 *Guerrero*, 28 Cal. App. 5th 1091, 239 Cal. Rptr. 3d at 732 ("The basic principles of claim
20 preclusion are roughly the same under California and federal law."). Under federal law, a later
21 action is barred if it arises from the same "transaction or series of transactions" as the original
22 action. *W. Sys., Inc. v. Ulloa*, 958 F.2d 864, 871 (9th Cir. 1992). Whether two claims are part of
23 the same series of transactions depends on "whether they are related to the same set of facts and
24 whether they could be conveniently tried together." *Id.* (citation omitted). The fact that both cases
25 involve infringement of the same primary right, although not dispositive, is a factor supporting a
26 finding the transactions are the same. *Zakinov v. Blue Buffalo Pet Products, Inc.*, 17-cv-01301-
27 AJB-WVG, 2018 WL 1426932, *6 (S.D. Cal. March 22, 2018).

28 Plaintiffs here claim the City's actions, including actions also at issue in the

1 Federal Action, were all part of an “uninterrupted pattern of delay and interference.” *See supra* at
2 II.A.2. Plaintiffs have thus framed all of their factual allegations in this lawsuit as part of the same
3 series of transactions as the Federal Action. Having pled all these facts as part of a single lawsuit
4 here, Plaintiffs admit these issues could be conveniently tried together. Even if federal law is
5 applied, res judicata bars Plaintiffs’ claims. *Owens*, 244 F.3d at 713 (res judicata bars all claims
6 that “could have been raised” in the first action).

7 Accordingly, res judicata bars Plaintiffs’ entire complaint.³

8 **C. Plaintiffs’ seven tort claims are barred by the Government Claims Act.**⁴

9 The Government Claims Act exempts the City from liability for damages, except
10 where a statute provides otherwise. Gov’t Code § 815(a). Plaintiffs fail to allege any statutory
11 basis for liability for their tort claims (the fourth through tenth causes of action).⁵

12 **D. Plaintiffs’ seven tort claims are barred by the relevant statutes of limitations.**

13 **1. OBOT’s fraudulent inducement / false promise claim is time barred.**

14 OBOT’s fraud claim (the fourth cause of action) is barred by the three-year statute
15 of limitations. Civ. Proc. Code § 338(d); *Kline v. Turner*, 87 Cal. App. 4th 1369, 1373-74 (2003).
16 Plaintiffs filed the complaint on December 4, 2018, so the claim is barred if it accrued before
17 December 4, 2015. *See Britton v. Girardi*, 235 Cal. App. 4th 721, 733-34 (2015). OBOT claims
18 fraudulent inducement into the DA, which the parties entered into in 2013, and the Lease, the
19

20 ³ To the extent the Court determines Plaintiffs can bring a claim for any portion of the alleged
21 wrongdoing after the Federal Action, the City has concurrently and in the alternative filed a
motion to strike all allegations in the complaint that predate the Federal Action.

22 ⁴ Due to inartful pleading, both Plaintiffs appear to assert all twelve causes of action. However,
23 OGRE does not and cannot allege it has a contractual relationship with the City and thus OGRE
cannot assert many of the causes of action itself. *See generally* Compl. Based on the *facts* alleged
24 in the complaint, the City interprets OBOT as bringing the first, second, third, fourth, fifth, sixth,
seventh, eleventh, and twelfth causes of action and OGRE as bringing the eighth, ninth, and tenth
causes of action. To the extent that this is incorrect, Plaintiffs fail to state a claim.

25 ⁵ Even if Plaintiffs had identified a statutory basis, statutory immunities shield the City from
26 liability. *See, e.g.*, Gov’t Code § 818.8 (setting forth immunity from misrepresentation/fraud for
public entities); Gov’t Code § 822.2 (providing for immunity from misrepresentation/fraud for
27 public employees); *see also Tokeshi v. State of Cal.*, 217 Cal. App. 3d 999, 1004-05 (1990)
(misrepresentation immunity “applies to interference with financial or commercial interest”);
28 *Harshbarger v. City of Colton*, 197 Cal. App. 3d 1335, 1340 (1988) (same).

1 form of which the parties agreed to in 2012 as part of the LDDA. Compl. ¶¶ 3-4, 28-29, 173.
2 Because OBOT filed the complaint “more than three years after commission of the [alleged]
3 fraud,” OBOT “has the burden of pleading and proving that [it] did not make the discovery until
4 within three years prior to the filing of the complaint.” *Cansino*, 224 Cal. App. 4th at 1472
5 (citation omitted). OBOT “must plead ‘facts showing that [it] was not negligent in failing to make
6 the discovery sooner and that [it] had no actual or presumptive knowledge of facts sufficient to
7 put [it] on inquiry.’ To that end, [OBOT] must allege facts showing ‘the time and surrounding
8 circumstances of the discovery and what the discovery was.’” *Id.* (citations omitted). OBOT did
9 not allege any facts related to the timing or nature of its discovery of the alleged fraud. *See*
10 Compl. ¶¶ 173-180.

11 Even had OBOT alleged its fraud claim did not accrue until after December 4,
12 2015, such allegations would contradict OBOT’s admission that, “facing political pressure from
13 environmental and special interest groups, the Oakland City Council adopted a resolution
14 expressing the City’s general opposition to transporting fossil fuels through the City on June 17,
15 2014.” Compl. ¶ 60. OBOT was on inquiry notice at least four-and-a-half years before OBOT
16 filed its complaint. *See Kline*, 87 Cal. App. 4th at 1373-74 (“The courts interpret discovery in this
17 context to mean not when the plaintiff became aware of the specific wrong alleged, but when the
18 plaintiff suspected or should have suspected that an injury was caused by wrongdoing.”).

19 **2. Plaintiffs’ tortious interference claims are time barred.**

20 OBOT’s tortious interference claims (the fifth, sixth, and seventh causes of action)
21 are barred by the two-year statute of limitations because the claims accrued before December 4,
22 2016. *See* Civ. Proc. Code § 339(1); *Knoell v. Petrovich*, 76 Cal. App. 4th 164, 168 (1999). These
23 claims accrued when the interference occurred. *Id.*; *see also Trembath v. Digardi*, 43 Cal. App. 3d
24 834, 836 (1974). OBOT alleges the City has intentionally and negligently interfered with OBOT’s
25 economic relationships with two potential subtenants “since 2012.” *See* Compl. ¶¶ 189-190, 196-
26 198. And in the Federal Complaint, OBOT alleged that passing the Ordinance in July 2016 (i.e.,
27 before December 4, 2016) “significantly diminished the value of the Sublease Option, causing
28 [one of the two potential subtenants] not to exercise its option and instead to seek to renegotiate

1 the payment terms of the proposed sublease at substantially less advantageous terms for OBOT.”
2 See RJN, Ex. A ¶ 123; see also Compl. ¶¶ 182-187.

3 OGRE’s tortious interference claims (the eighth, ninth, and tenth causes of action)
4 are also barred by the two-year state of limitations. See Civ. Proc. Code § 339(1); *Knoell*, 76 Cal.
5 App. 4th at 168. OGRE alleges the City’s “conduct is preventing performance of the sublease
6 between OGRE and OBOT by making it harder to timely complete” the Shortline Rail portion of
7 the Project (Compl. ¶ 209), and that the “prospective economic relationship between OGRE and
8 its potential rail customers has been disrupted because of the City’s wrongful conduct.” Compl.
9 ¶¶ 216, 224. But OGRE claims the City has interfered with their efforts to complete the Shortline
10 Rail “for over six years.” Compl. ¶ 87 (emphasis added); see also *id.* ¶ 93 (“[T]he Port and the
11 City have failed for over six years to process, to secure and to provide a written Rail Access
12 Agreement as required by Section 5.2.3 of the Lease.”) (emphasis added); *Id.* ¶ 105.

13 **E. Even if not barred, Plaintiffs still fail to state viable causes of action.**

14 Plaintiffs seek to convert into tort claims an ordinary breach-of-contract claim
15 based on the City’s alleged violation of certain contractual terms. But “[c]onduct amounting to a
16 breach of contract becomes tortious only when it also violates an independent duty arising from
17 principles of tort law. ... ‘An omission to perform a contract obligation is never a tort, unless that
18 omission is also an omission of a legal duty.’” *Applied Equip. Corp. v. Litton Saudi Arabia Ltd.*, 7
19 Cal. 4th 503, 515 (1994) (citations omitted).

20 **1. OBOT fails to state a fraud claim**

21 **a. OBOT does not allege the fraud with specificity.**

22 OBOT fails to allege its fraud claim with particularity. “Fraud allegations ‘involve
23 a serious attack on character’ and therefore are pleaded with specificity. General and conclusory
24 allegations are insufficient. The particularity requirement demands that a plaintiff plead facts
25 which ‘show how, when, where, to whom, and by what means the representations were
26 tendered.’” *Cansino*, 224 Cal. App. 4th at 1469 (citations omitted) (affirming order sustaining
27 demurrer without leave to amend); see also *Robinson Helicopter Co., Inc. v. Dana Corp.*, 34 Cal.
28 4th 979, 993 (2005) (“We trust the trial courts of this state to enforce this pleading requirement.”).

1 OBOT's fraud allegations are precisely the type of general, conclusory allegations that do not
2 withstand demurrer. *See* Compl. ¶¶ 173-180. For example, Plaintiffs allege "[t]he City made a
3 series of promises to OBOT to induce OBOT to enter the Lease and DA, including among other
4 things ... a promise to perform under the Lease" Compl. ¶ 173. And Plaintiffs allege "[t]he
5 City intended that Plaintiffs rely on its promises that the City would cooperate in the development
6 of the Project." Compl. ¶ 177. Such vague, conclusory allegations cannot survive demurrer.

7 b. OBOT does not allege an actionable intent to defraud.

8 OBOT's fraud claim also fails as a matter of law because OBOT does not and
9 cannot allege an actionable intent to defraud. "[I]n a promissory fraud action, to sufficiently
10 allege defendant made a misrepresentation, the complaint must allege (1) the defendant made a
11 representation of intent to perform some future action, i.e., the defendant made a promise, and
12 (2) the defendant did not really have that intent at the time that the promise was made, i.e., the
13 promise was false." *Beckwith v. Dahl*, 205 Cal. App. 4th 1039, 1060 (2012). OBOT alleges that
14 "[t]he City did not intend to perform its promises at the time it entered into the Lease *to the extent*
15 *Plaintiffs subleased the Terminal to a bulk commodity provider that shipped coal.*" Compl. ¶ 174
16 (emphasis added). But OBOT does not and cannot allege the City ever made any promise to
17 cooperate with "a bulk commodity provider that shipped coal." *See, e.g.*, Compl. ¶ 31 ("Neither
18 agreement limits or otherwise differentiates the type(s) of bulk commodities that could be
19 exported from the Terminal."); *see also* Compl. ¶ 173. OBOT also does not and cannot allege the
20 City did not intend to perform its promises if OBOT subleased the Terminal to a third party that
21 shipped bulk commodities other than coal. Compl. ¶¶ 172-180. According to OBOT, prior to
22 entering into the DA in 2013, OBOT's sole member had represented to the City that its
23 "immediate commodity focus was on iron ore and copper concentrate"—not coal. Compl. ¶ 37.
24 OBOT also alleges the City adopted the coal ban after "yield[ing] to political pressure" in 2016
25 (*id.* ¶ 61), which undercuts any allegation the City intended to defraud OBOT in 2013. Any
26 allegation the City made any purported misrepresentation to OBOT about the shipment of coal at
27 the Project is thus at odds with OBOT's other allegations.

1 c. OBOT does not allege “justifiable” reliance.

2 OBOT does not and cannot allege justifiable reliance given the City’s extensive
3 and public opposition to the shipment of coal. “[T]he plaintiff must set ‘forth facts to show that
4 his or her actual reliance on the representations were justifiable, so that the cause of the damage
5 was the defendant’s wrong and not the plaintiff’s fault.’ There must be more pled than a simple
6 statement plaintiff justifiably relied on the statements. The complaint must contain ‘allegations of
7 facts showing that the actual inducement of plaintiffs was justifiable or reasonable.’ *Beckwith*,
8 205 Cal. App. 4th at 1066-67 (citations omitted). OBOT does not even allege a “simple
9 statement” that it justifiably relied on any representation. *See* Compl. ¶¶ 172-180. Even had it
10 done so, those “facts” would be contradicted by other allegations: OBOT admits that, years
11 before the parties signed the Lease, “the Oakland City Council adopted a resolution expressing
12 the City’s general opposition to transporting fossil fuels through the City.” Compl. ¶ 60.

13 **2. Plaintiffs fail to state a claim for interference with business relations.**

14 a. Plaintiffs do not allege an “independently wrongful act.”

15 Plaintiffs’ claims for intentional and negligent interference with prospective
16 economic relations (sixth, seventh, ninth, and tenth causes of action) fail because Plaintiffs do not
17 allege an “independently wrongful act.” *See Della Penna v. Toyota Motor Sales, U.S.A., Inc.*, 11
18 Cal. 4th 376, 393 (1995) (holding that a plaintiff “must plead and prove as part of its case-in-chief
19 that the defendant ... engaged in conduct that was wrongful by some legal measure other than the
20 fact of interference itself”). “The independently wrongful act must be the act of interference itself,
21 but such act must *itself* be independently wrongful. That is, ‘[a] plaintiff need not allege the
22 interference and a second act independent of the interference. Instead, a plaintiff must plead and
23 prove that the conduct alleged to constitute the interference was independently wrongful, i.e.,
24 unlawful for reasons other than that it interfered with a prospective economic advantage.” *Crown*
25 *Imports, LLC v. Superior Court*, 223 Cal. App. 4th 1395, 1404 (2014) (citation omitted). “An act
26 is not independently wrongful merely because defendant acted with an improper motive. ...
27 [Instead], an act is independently wrongful if it is unlawful, that is, if it is proscribed by some
28 constitutional, statutory, regulatory, common law, or other determinable legal standard.” *Korea*

1 *Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1158–59 (2003) (citations omitted); see
2 also *Stevenson Real Estate Servs., Inc. v. CB Richard Ellis Real Estate Servs., Inc.*, 138 Cal. App.
3 4th 1215, 1223 (2006). Plaintiffs allege no “independently wrongful act.”

4 b. The City does not owe any duty to Plaintiffs.

5 Plaintiffs’ claims for negligent interference with prospective economic relations
6 (the seventh and tenth causes of action) also fail as a matter of law because the City does not owe
7 Plaintiffs any legally recognizable duty. “The threshold element of a cause of action for
8 negligence is the existence of a duty to use due care toward an interest of another that enjoys legal
9 protection against unintentional invasion.” *Lake Almanor Assocs. L.P. v. Huffman-Broadway*
10 *Grp., Inc.*, 178 Cal. App. 4th 1194, 1205 (2009) (citation omitted). “‘Recognition of a duty to
11 manage business affairs so as to prevent purely economic loss to third parties in their financial
12 transactions is the exception, not the rule, in negligence law’ so courts are reluctant to impose
13 duties to prevent purely economic harm to third parties.” *Id.* (citations omitted); see also *Girard*
14 *v. Delta Towers Joint Venture*, 20 Cal. App. 4th 1741, 1749 (1993) (holding that the landlord did
15 not owe a tenant a duty because the parties “were not in unequal bargaining positions, they each
16 contracted strictly out of a profit motive, and ordinary damages for breach of a lease were
17 available equally to both”). “Moreover, a plaintiff who is not party to a contract between a
18 defendant and a third party generally may not recover for loss of expected economic advantage
19 resulting from the defendant’s negligent performance of the contract unless there is a special
20 relationship between the parties.” *Limandri v. Judkins*, 52 Cal. App. 4th 326, 348-49 (1997)
21 (citation omitted). Plaintiffs fail to allege any “special relationship” that would give rise to a duty.

22 c. Plaintiffs rely on a non-viable “interference with the market” claim.

23 OGRE’s claims for intentional and negligent interference with prospective
24 economic relations (the ninth and tenth causes of action) also fail as a matter of law because
25 OGRE relies on a non-viable “interference with the market” theory. See *Westside Ctr. Assocs. v.*
26 *Safeway Stores 23, Inc.*, 42 Cal. App. 4th 507, 528 (1996). OGRE alleges “[t]he City has
27 intentionally [or negligently] interfered with [its] prospective economic relationships with
28 potential customers”—not its *current* customers. Compl. ¶¶ 213, 219. But “the interference tort

1 applies [only] to interference with *existing* noncontractual relations which hold the promise of
2 future economic advantage.’ The tort’s requirements ‘presuppose the relationship existed *at the*
3 *time* of the defendant’s allegedly tortious acts lest liability be imposed for actually and
4 intentionally disrupting a relationship which has yet to arise.’” *Roy Allan Slurry Seal, Inc. v. Am.*
5 *Asphalt S., Inc.*, 2 Cal. 5th 505, 517–18 (2017) (citations omitted). OGRE seeks to achieve
6 precisely what the California Supreme Court has held a plaintiff cannot do: impose liability on a
7 defendant for disrupting a *potential* relationship.

8 d. There is no claim for negligent interference with contract.

9 OBOT’s claim for negligent interference with prospective economic relations (the
10 seventh cause of action) also fails because it is in substance a claim for negligent interference
11 with contractual relations. OBOT claims the City negligently interfered with OBOT’s “sublease
12 with TLS” and its “sublease with ITS.” Compl. ¶ 197. As such, OBOT’s claim relates to alleged
13 interference with preexisting contracts—not potential contracts or economic relationships. But
14 “[i]n California there is no cause of action for *negligent* interference with contractual relations.
15 While there exists a cause of action for negligent interference with *prospective* economic
16 advantage [citation], the California Supreme Court ... has rejected a cause of action for negligent
17 interference with contract.” *Davis v. Nadrich*, 174 Cal. App. 4th 1, 9 (2009) (citations omitted).

18 3. **Plaintiffs fail to state a claim for specific performance.**

19 Plaintiffs’ claim for specific performance fails as a matter of law because “the
20 precise act which is to be done” is not “clearly ascertainable.” *See* Civ. Code § 3390(e); *see also*
21 *Darbin Enters., Inc. v. San Fernando Cmty. Hosp.*, 239 Cal. App. 4th 399, 409 (2015); *Lewis v.*
22 *YouTube, LLC*, 244 Cal. App. 4th 118, 127 (2016). In their prayer for relief, Plaintiffs request a
23 judgment requiring “[s]pecific performance of all of [the City’s] contractual obligations set forth
24 in the DA and Lease.” Prayer for Relief at ¶ 3. But Plaintiffs identify no precise act to be
25 compelled or any specific contractual provision to be enforced.

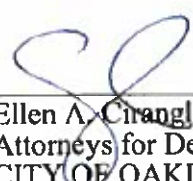
26 **IV. CONCLUSION**

27 The City respectfully requests that the Court sustain its demurrer to all of the
28 causes of action in Plaintiffs’ Complaint without leave to amend.

1 Dated: January 14, 2019

LUBIN OLSON & NIEWIADOMSKI LLP

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3 By:



Ellen A. Cirangle
Attorneys for Defendant
CITY OF OAKLAND

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB FINANCE DOCKET NO. 36168

**OAKLAND GLOBAL RAIL ENTERPRISE
– AUTHORITY TO OPERATE A RAIL LINE IN OAKLAND, CA –
PETITION FOR EXEMPTION FROM 49 U.S.C. § 10901**



PETITION OF CITY OF OAKLAND FOR RECONSIDERATION

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Office of Proceedings

Communications with respect to this document should be addressed to: April 4, 2019

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Dated: April 4, 2019

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB FINANCE DOCKET NO. 36168

**OAKLAND GLOBAL RAIL ENTERPRISE
– AUTHORITY TO OPERATE A RAIL LINE IN OAKLAND, CA –
PETITION FOR EXEMPTION FROM 49 U.S.C. § 10901**

PETITION OF CITY OF OAKLAND FOR RECONSIDERATION

SUMMARY

The City of Oakland, California (“City”) hereby petitions this Board pursuant to 49 C.F.R. § 1115.3 for reconsideration of its decision served March 15, 2019 in the above-captioned proceeding granting the Oakland Global Rail Enterprise’s (“OGRE”) Petition for Declaratory Order (“March 15th Decision”). As explained below, new evidence of changed circumstances—specifically, termination of the sublease providing OGRE with the property interest necessary to conduct rail activities over the portion of the trackage located within the former Oakland Army Base that is owned by the City (the “Line”)¹—have materially affected the context for the Board’s March 15th Decision. Furthermore, the Board’s decision to grant the petition where the petitioning party is not a rail carrier and does not provide transportation subject to the Board’s jurisdiction was a material error. In addition, the Board’s determination of and justification for asserting jurisdiction over the Line was also a material error. Accordingly, the City requests that this Board reconsider the March 15th Decision, reverse its determination, and deny OGRE’s petition.

¹ For the purposes of this petition, the term “Line” refers to the “West” and “Middle” segments owned by the City that are discussed in the March 15th Decision, and excludes the “East Segment”, owned by the Port.

BACKGROUND

The March 15th Decision and prior filings by the City, OGRE, and the Port of Oakland (“Port”) in this proceeding (Docket No. FD 36168) describe the history of the Line and the relationship of the parties. The following background will focus on facts that are relevant to the changed circumstances supporting the City’s Petition for Reconsideration.

As indicated by previous filings, OGRE had acquired a sublease from the Oakland Bulk Oversized Terminal (“OBOT”) to conduct rail improvements over the Line. *See* OGRE Petition for Declaratory Order, Ex. 1, V.S. McClure at 2 (Filed May 23, 2018). OBOT granted this sublease pursuant to a ground lease between OBOT and the City (“Ground Lease”) for portions of the Oakland Army Base property owned by the City (“OAB Property”).

On May 23, 2018, OGRE filed a petition for declaratory order in this docket asking the Board to find that OGRE does not need STB authorization to construct/reconstruct the Line to make it operable. The City filed a reply to OGRE’s petition on June 29, 2018 questioning whether portions of the Line were subject to STB jurisdiction based on the Line’s regulatory history. In response, on August 1, 2018, the STB’s Acting Director of Office of Proceedings ordered OGRE to provide additional information for the Line and its plans. OGRE filed a supplemental filing on August 21, 2018. The City and the Port each filed replies on September 18, 2018. On September 27, 2018, OGRE filed replies to the City’s and the Port’s filings. On October 9, 2018, the Port filed a reply to OGRE’s surreply arguing that OGRE misinterpreted the Port’s prior filing.

On September 21, 2018, the City served OBOT with a Notice to Cure for failure to satisfy its obligations under its Ground Lease with the City, attached hereto as **EXHIBIT A**. After OBOT failed to cure or commence diligently dispatching to cure for its breach pursuant to

the Ground Lease, on October 23, 2018, the City served OBOT with a Notice of Default, attached hereto as **EXHIBIT B**. Pursuant to the terms of the Ground Lease, the Notice of Default automatically terminated the Lease effective November 23, 2018. *See* Notice of Default.

On December 4, 2018, OBOT and OGRE filed a complaint in the Superior Court of the State of California for the County of Alameda arguing, among other things, breach of contract and intentional interference with contract in relation to the Ground Lease. OBOT and OGRE Complaint, Cal. Sup. Ct. Civil Case No. RG18930929 (Filed Dec. 4, 2018), attached hereto as **EXHIBIT C**. On January 14, 2019, the City filed a Notice of Demurrer in which it demurred to each of OBOT and OGRE's claims on grounds that they did not state facts sufficient to constitute a cause of action. *See* City of Oakland Notice of Demurrer and Demurrer to Plaintiffs' Complaint, Cal. Sup. Ct. Civil Case No. RG18930929 (Filed January 14, 2019), attached hereto as **EXHIBIT D**. A preliminary hearing on the matter is set for April 25, 2019.

On March 15, 2019, the STB issued a decision granting OGRE's petition, asserting jurisdiction over portions of the Line and requiring further filings from OGRE, OBOT and the City. *Oakland Global Rail Enterprise – Petition for Declaratory Order*, STB Docket No. FD 36168 (Service Date March 15, 2019) ("March 15th Decision"). The March 15th Decision granted OGRE's Petition for Declaratory Order, determining that it had jurisdiction over the Line and concluding that OGRE did not need Board authorization to "rehabilitate" the Line.

In the March 15th Decision the Board declined to address a "threshold" issue presented by the Port regarding the appropriateness of issuing a declaratory holding where OGRE did not hold the property rights to conduct rail operations, as was the case over Port trackage (which the Board labelled the "East Segment"). *Id.*, slip op. at 5. Instead, the Board declared the issue "moot" because it did not believe that OGRE had properly raised the question regarding Port-

owned trackage. *Id.*, slip op. at 5, 10. The Board noted that “[b]ecause OGRE is not seeking operating authority here, this issue is outside the scope of the current petition.” *Id.*, slip op. at 11, n.12. It also commented that “because a grant of operating authority is permissive, the lack of the necessary contractual and property rights would not necessarily foreclose a grant of operating authority. . . . Of course, if the Board were to grant operating authority in the future, OGRE would need to obtain the necessary property or contract rights in order to exercise that authority.” *Id.* (citations omitted).

With respect to the segments on City property, the “West Segment” and “Middle Segment”, the Board noted that “[i]t is the Board’s understanding that OGRE ultimately intends to access the interstate system via the East Segment, which would connect the Middle Segment with the Port’s track, which connects to [Union Pacific Railroad]’s main line.” *Id.*, slip op. at 7.

Although the Board agreed with the City “that the evidence on the record regarding the West Segment does not establish that the track is jurisdictional as OGRE claims,” it nevertheless concluded that “it is not necessary to determine the historical jurisdictional status of the West Segment to determine whether the track now requires authority under § 10901,” *id.*, slip op. at 7, and relied on other factors to determine that the West Segment was jurisdictional spur track, rather than private track, *id.*, slip op. at 8-10.

ARGUMENT

Pursuant to federal statute and Board regulations, parties may petition the Board for reconsideration of a final decision within 20 days of service of the Board’s final decision. 49 U.S.C. § 1322(c); 49 C.F.R. § 1115.3. Petitions for reconsideration are favored as they are “a more expeditious and efficient means of achieving corrections or adjustments than resort to the

federal courts in the first instance.” *Texas Municipal Power Agency v. Burlington N. & Santa Fe R.R. Co.*, STB Docket No. 42056, slip op. at 2 (Service Date Sept. 27, 2004).

Permissible grounds for reconsideration include where the “prior action will be affected materially because of new evidence or changed circumstances”, or where the “prior action involves material error.” 49 C.F.R. § 1115.3(b)(1)-(2). In either case, the basis for reconsideration must be one that “would mandate a different result.” *See Montezuma Grain Co. v. STB*, 339 F.3d 535, 541-42 (7th Cir. 2003).

1. The City’s termination of OGRE’s sublease is new evidence constituting changed circumstances that materially affect the March 15th Decision

a. The City’s termination of OGRE’s sublease is new evidence constituting changed circumstances

In order for new evidence or changed circumstances to support reconsideration or reopening² of a Board decision, the evidence or change in circumstances must actually be a new development. *See Texas Municipal*, slip op. at 2 (“[T]he term ‘new evidence’ refers to evidence that was not reasonably available to the party when the record was developed, and not simply newly raised.”); *Village of Barrington, Ill. v. STB*, 892 F.3d 252, 269 (7th Cir. 2018) (citing *Texas Municipal*). The “newness” of evidence or changed circumstances is established based on what was, or reasonably could have been, included in the original record before the Board. *See Village of Barrington*, 892 F.3d at 269 (“[N]ew evidence is facts which through no fault of [the petitioner’s], the original proceeding did not contain.”).

The Board’s precedent indicates that the Board will generally deny petitions for reconsideration where the new evidence or changed circumstances have occurred before the underlying proceedings have commenced or before party filings are completed. *See, e.g., Friends*

² The grounds for granting a petition for reconsideration and a petition to reopen are the same: “material error, new evidence, or substantially changed circumstances.” 49 U.S.C. § 1322(c). *Cf* 49 C.F.R. § 1115.3 with 49 C.F.R. § 1115.4.

of *Sierra Railroad, Inc. v. ICC*, 881 F.2d 663, 665 (9th Cir. 1989), cert. denied, 493 U.S. 1093 (1990) (petition to reopen denied because “new” evidence “could have been brought there by appeal from the original order”); *Village of Barrington*, 892 F.3d at 269-70; *Canadian Nat’l Ry. Co. and Grand Trunk Corp. – Control – EJ&E West Co.*, STB Docket No. FD 35087 (Sub-No. 8) (Service Date Oct. 30, 2017) (“*Canadian National II*”). For instance, in *Canadian National II*, this Board denied a local municipality’s petition for reconsideration of a decision to deny reopening the Board’s earlier approval of an acquisition of one railroad by another. *Canadian Nat’l Ry. Co. and Grand Trunk Corp. – Control – EJ&E West Co.*, STB Docket No. FD 35087 (Sub-No. 8) (Service Date Oct. 30, 2017). In its petition to reopen the proceedings, the municipality argued that the operating railroad needed to mitigate its impact at a particular grade crossing. *Id.*, slip op. at 3. After the Board denied the municipality’s petition to reopen, the municipality filed a petition for reconsideration, offering as “new” evidence a traffic analysis of data collected several years earlier and conducted before the completion of briefing of the petition to reopen before the Board. *Id.*, slip op. at 9. The Board found, among other things, that the new analysis did not constitute new information because “the data was readily available to [the municipality] when the record was developed.” *Id.*

In contrast, the Board has accepted petitions for reconsideration based on new evidence or changed circumstances that occur between the period when the parties complete their final submissions before the Board and when the Board issues a decision on the matter. *See, e.g., Wisconsin & Southern R.R. Co. – Acquisition Exemption – Iowa, Chicago & Eastern R.R. Corp.*, STB Docket No. FD 34464 (Service Date July 30, 2004). In *Wisconsin Southern*, the Board granted a petition to reconsider denial of a waiver of notification to employees in a railroad acquisition approval proceeding. *Id.* The Board agreed with the petitioner that evidence of actual

notice provided to the relevant employees after filing of the waiver request but before the Board's denial of the waiver constituted new evidence supporting reconsideration that the standard notification period was necessary. *Id.*, slip op. at 3. *But cf. Town of Babylon and Pinelawn Cemetery – Petition for Declaratory Order*, STB Docket No. FD 35057, slip op. at 4 (Service Date Sept. 26, 2008) (denying reconsideration where “the parties could have sought to supplement the record with the veto statement before the Board reached its decision.”).

Here, the changed circumstances—termination of OGRE's sublease—occurred after the City made its final submissions to the Board, and the new evidence demonstrating changed circumstances has been accumulating almost entirely after the record was completed upon the final substantive surreply made by OGRE on October 9th, 2018. *See supra*, p. 2. It would have been impossible for the City to include in its final submission to the Board on September 18, 2018, for termination of the Ground Lease, which occurred November 23, 2018. In fact, termination of the Ground Lease post-dates all substantive filings developing the record before the Board in this proceeding. *See supra*, p.2.

Additional factors also support not immediately filing supplemental notice of the developing events to the Board. The pendency of state court litigation over the contractual relationship between OGRE and the City discourages supplemental notification to the Board before more complete evidence of termination of OGRE's property rights over the Line has been developed. In addition, the expected date of a Board decision in these proceedings was unknown. In any event, reconsidering the decision now before it has become final is preferable to reopening the matter.

b. Termination of OGRE's sublease materially affects the March 15th Decision

A successful petition for reconsideration requires that the grounds materially affect the outcome of the proceedings, *i.e.* that it “would mandate a different result.” *Montezuma Grain Co. v. STB*, 339 F.3d 535, 542 (7th Cir. 2003). New evidence or changed circumstances “must be sufficient to convince the Board that its prior decision in the case would be materially affected.” *Denver & Rio Grande Ry. Historical Found. – Petition for Declaratory Order*, STB Docket No. FD 35496, slip op. at 4 (Service Date Mar. 24, 2015).

While the Board's determination of jurisdiction over railroad property and infrastructure is appropriate where there is some anticipation that rail service will take place, it is inappropriate where a non-carrier is merely seeking to wield the Board's jurisdiction to ward off legitimate local regulation with the threat of preemption.³ *See James Riffin—Petition for Declaratory Order*, STB Docket No. FD 35245, slip op. at 6 (Service Date Sept. 15, 2009). While the Board will weigh in on jurisdictional and regulatory matters brought by would-be carriers or property owners in anticipation of those non-carriers' commencement of common carrier rail service, *see e.g. Effingham R.R. – Petition for Declaratory Order – Construction at Effingham, Ill.*, 2 S.T.B. 606, 609-10 (1997), *aff'd sub no. United Transp. Union-Ill. Legislative Bd. v. STB*, 183 F.3d 606 (7th Cir. 1999); *Jersey Marine R., LLC – Petition for Declaratory Order*, STB Docket No. 36063 (Service Date Jan. 31, 2017); *Port Auth. of N.Y. and N.J. – Petition for Declaratory Order*, STB Docket No. 34428 (Service Date Jan. 21, 2004); *The N.Y. City Economic Dev. Corp. – Petition for Declaratory Order*, STB Docket No. FC 34429 (Service Date July 15, 2004), it has done so based on assurances and understanding that the non-carrier or property owners is in a position to begin common carrier operations. For instance, in *Jersey Marine*, the Board granted a non-

³ Although OGRE appears to have indicated it would decline to assert preemption in state court, *see* OGRE Reply dated April 1, 2019, at 7, it would be imprudent for the City to proceed on only that assurance.

carrier's petition for declaratory order concerning its ability to rehabilitate a jurisdictional line without the Board's authority based in part on the understanding that the non-carrier's activities were conducted within property for which it had the requisite property rights. *See Jersey Marine*, slip op. at 5 ("Here, JMR is not an existing carrier, as in *Swanson*, but is seeking to become a new carrier."). *See also Port Authority of N.Y. and N.J.*, slip op. at 5 ("[A]n entity with the right to operate over the [connecting lines] may build the proposed connector without additional authority from this agency. If the Port Authority has the authority to do these things it may build the connector without Board authority. So may any other entity that has those rights.").

In contrast, where a petitioner has neither Board authority nor the property rights necessary to provide transportation on a line, the Board has avoided making determinations that intrude into the domain of state law property and contractual rights. *See, e.g., Riffin*, STB Docket No. FD 35245 (denying petition for declaratory order from petitioner seeking determination of rail carrier status and seeking federal preemption with respect to activities conducted on a railroad line for which he had no property interest); *Tri-State Brick and Stone of New York, Inc. and Tri-State Transp. Inc. – Petition for Declaratory Order*, STB Docket No. FD 34824 (Service Date Aug. 11, 2006) (denying a petition for declaratory order from a petitioner seeking an order requiring petitioner's landlord to grant petitioner the right to receive rail shipments on petitioner's desired lease terms).

The termination of the Ground Lease between the City and OBOT simultaneously terminated OGRE's sublease of the Line from OBOT.⁴ Without the requisite property rights to

⁴ In its reply to the City's Petition for Stay in this proceeding filed April 1, 2019, OGRE states that "the City misleadingly asserts that OBOT's ground lease with the City—and thereby OGRE's sublease with OBOT—has been terminated. In California, the law is clear that where there is dispute over real property rights between a landlord and a tenant, the tenant's right to possess the property will remain in effect until there is a judicial determination that the lease has been terminated." OGRE Reply, at 4, *citing Mihans v. Municipal Court*, 7 Cal. App. 3d 479, 484 (Cal. Ct. App. 1970). In fact, no judicial involvement is required for the Ground Lease, and

provide transportation over the Line, OGRE cannot be considered a rail carrier.⁵ See *Riffin*, slip op. at 1. Nor has OGRE obtained or even sought the Board's authority to operate as a common carrier. See March 15th Decision, slip op. at 5, 11 n.12. Without either the appropriate property rights or the regulatory authority, OGRE satisfies exactly none of the indicia necessary to invoke the Board's jurisdictional requirements. See 49 U.S.C. § 10501(a), (b). Accordingly, it is inappropriate for the Board to decide at this time the Line's jurisdictional status or what OGRE may or may not do on the City's property.

Although the Board in the March 15th Decision asserts that its authority to operate is permissive, and that "the lack of the necessary contractual and property rights would not necessarily foreclose a grant of operating authority," March 15th Decision, slip op. at 11, n.12, the cases that the Board cites in support follow the standard outlined above. In *Ohio River Partners*, the dispute involved a non-carrier that was seeking authority to acquire a rail line, thereby becoming a carrier. *Ohio River Partners LLC – Acquisition and Operation Exemption – Hannibal Development, LLC*, STB Docket No. FD 35984, slip op. at 1 (Service Date Apr. 1, 2016). *Lackawanna* involved revocation of authority already granted to a railroad. *Lackawanna Cnty. R.R. Auth. – Acquisition Exemption – F&L Realty, Inc.*, STB Docket No. FD 33905 *et al.*, slip op. at 6 (Service Date Oct. 22, 2001). In these cases, the parties involved were actually seeking or were defending their authority to operate as common carriers. OGRE is doing neither.

consequently OGRE's sublease, to terminate—the terms of the lease determine that, and the City has taken all steps required to terminate the lease. While the City may need to initiate an unlawful detainer action to ultimately evict OGRE, termination of the leases has already occurred.

⁵ Even with such property rights, OGRE would also need Board authority in order to be considered a rail carrier.

In this case, changed circumstances supported by new evidence have resulted in OGRE, which lacks the Board's authority to operate on the Line,⁶ losing the contractual and property rights to conduct rail operations over the Line. Those contractual and property rights are critical, since they underpin the Board's premise for considering OGRE's petition: the assumption "that OGRE ultimately intends to access the interstate system." *See* March 15th Decision, slip op. at 7. This new development removes the tenuous footing upon which OGRE asserts the Board's right to make a determination regarding its reconstruction activities. Accordingly, the termination of OGRE's sublease materially affects the March 15th Decision, which the Board should now reconsider.

In the March 15th Decision the Board sidestepped the "threshold" question raised by the Port regarding whether it was appropriate for the Board to make a determination regarding a rail line over which a would-be railroad had no property rights to operate. *See* March 15th Decision, slip op. at 5, 10. Termination of the Ground Lease, and consequently OGRE's sublease, raises exactly the same question with respect to those segments owned by the City.

2. The Board materially erred in asserting jurisdiction over the Line in the March 15th Decision

In alleging material error, a party "must do more than simply make a general allegation; it must substantiate its claim of material error." *Jimmy Lee Waneck and Starr Swearingen Waneck, et al. – Petition for Declaratory Order*, STB Docket No. FD 36167, slip op. at 3 (Service Date Oct. 31, 2018).

⁶ *See Oakland Global R. Enterprise, LLC – Acquisition and Operating Exemption – In the Port of Oakland, Cal.*, STB Docket No. FD 35807 (Service Date Apr. 30, 2014) (granting "noncarrier" OGRE's motion to withdraw its notice of exemption to operate over City and Port property).

a. The Board materially erred in determining jurisdiction over the Line where there is no actual carrier seeking to operate over it

The Board has in the past declined to take sides in a dispute between a tenant and its landlord and to proclaim a basis for asserting federal preemption where the tenant is in no position to avail itself of such preemption. To do so now would be inconsistent with its own precedent and constitute a material error in the Board's analysis.

For example, in *Tri-State*, the Board denied a petition for declaratory order from a non-carrier seeking a Board determination of jurisdiction over property leased from the City of New York. *Tri-State*, slip op. at 2. Similarly to OGRE/OBOT, the non-carrier in that case was a disgruntled former tenant of a municipality, the property was served by rail, and, like OBOT, the tenant intended to conduct transloading operations on the property. *Id.* In denying the petition, the Board noted that its "jurisdiction is limited by statute to 'transportation by rail carrier,'" and stated that the Board's authority over the interstate rail network does not "entitle any person to occupy property of another merely because that property has access to rail service." *Tri-State*, slip op. at 6. The Board declined to make a determination regarding its jurisdiction over the property or the common carrier obligation of the municipality that owned it, noting that:

Because we do not have jurisdiction over [the tenant's] activities, we cannot set the terms and conditions, including land use charges, for [the tenant's] use of the [property], or even insist that Petitioners' use of the Yard should continue. Those are issues for the courts to decide. Therefore, the petition to institute a declaratory order proceeding will be denied.

Id., slip op. at 6.

The Board does not have jurisdiction over OGRE's activities. Yet the March 15th Decision helps establish OGRE's authority to use the City's property, including authorizing reconstruction of rail facilities and a new segment of jurisdictional track by a non-carrier (*i.e.*, the West Segment). It is hard to see how, particularly under the new circumstances, the March 15th

Decision could be distinguished from a future petition by a non-carrier tenant, such as a prospective shipper, seeking to draw the Board into taking sides in a dispute with its landlord and proclaiming a basis for asserting federal preemption where the tenant is in no position to avail itself of such preemption. Rather than declining the petition for reconsideration, as it did in *Tri-State*, the Board here has accepted OGRE's invitation to extend itself beyond its jurisdictional limits.

A real danger of the March 15th Decision, if left standing, is what the Board avoided doing in *Tri-State*: providing a basis for OGRE and OBOT to argue before a state court that they are permitted to engage in activities protected from local regulation by federal preemption. Armed with a decision from this Board providing it with the authority to "rehabilitate" the Line, OGRE and OBOT may now think they can argue in front of a state court that the Board's ruling and the preemption of state law that comes with the Board's assertion of jurisdiction, *see* 49 U.S.C. §10501, limits the City's ability to restrict such activities. Such an outcome would contravene the Board's precedent, and thus constitutes a material error that the Board should reconsider.

b. The Board materially erred in choosing to determine and analyzing jurisdiction over the West Segment

The March 15th Decision essentially extends the Board's authority over a piece of property—the West Segment—that, as the Board itself indicates, potentially has never been used for interstate transportation by a rail carrier, at the request of an entity that at this point will never serve as a rail carrier over that property. *See* March 15th Decision, slip op. at 7. Even where the Board feels it is uncontroversial to declare jurisdiction over a segment where there is evidence of prior Board authority—*i.e.*, the Middle Segment—it should refrain from doing so for a contested segment with unclear jurisdictional status until there is an actual rail carrier seeking actual

authority to operate. Accordingly, its decision to determine jurisdiction was a material error that should be reversed.

Moreover, even if it were appropriate for the Board to make a determination regarding the jurisdictional status of the West Segment, the Board misapplied its own factors for doing so. The March 15th Decision plainly states that the Board “agrees that the evidence on the record regarding the West Segment does not establish that the track is jurisdictional as OGRE claims.” March 15th Decision, slip op. at 7. Notwithstanding this determination, the Board proceeds to declare that it now has jurisdiction over the West Segment based on the premise that “it is not necessary to determine the historical jurisdictional status of the West Segment to determine whether the track now requires authority under § 10901.” March 15th Decision, slip op. at 7. In fact, the historical status and use is one of the very factors that the Board *should* consider in making a determination regarding jurisdictional status. *Id.* at 8, n.8; *Union Pac. Corp., Union Pac. R.R. Co. and MI Pac. R.R. Co. – Control and Merger – S. Pac. R. Corp., S. Pac. Transp. Co., St. Louis S.W. Ry. Co., SPCSL Corp., & the Denver & Rio Grande W. R.R. Co.*, STB Docket No. FD 32760, slip op. at 12 (Service Date Jan 31, 2018) (“The Board has adopted a case-by-case approach that analyzes the disputed track’s intended use, physical characteristics, relationship to the rail system, *and history*.” (Emphasis added.)). It may not be necessary to determine with absolute certainty what the historical status of the West Segment was, but it certainly should be considered as a factor in the analysis. The Board failed to explain why the lack of historical basis for asserting jurisdiction over the West Segment did not overcome other factors to which the Board gave credence. This also constituted a material error, and accordingly the Board should reconsider it.

Determining jurisdiction over a trackage that is unbuilt, in right-of-way may have never been subject to Board jurisdiction, on land that is owned by another entity, at the request of a non-carrier, is too speculative and moves beyond what the Board should be prepared to consider. Accordingly, the Board's decision to assert jurisdiction over the West Segment, and its analysis in making that determination, is in material error.

3. The Board should reconsider the March 15th Decision in light of the impact on the public interest and potentially dangerous consequences for future Board proceedings

The Board here has given OGRE permission to commence construction on property in which the City has determined that OGRE no longer has any identifiable property interest. The City's interest—and therefore the interests of the people of Oakland whom the City represents—in the OAB Property will be irreparably harmed if the Board's March 15th Decision stands and provides OGRE with a basis for flouting the City's state property rights. This harm extends beyond "mere economic injury" for which adequate compensatory relief will be available later. *See Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843, n.2 (D.C. Cir. 1977)

Furthermore, as indicated above, there is likely to be significant precedential implications, and could embolden shippers, would-be railroads, and disgruntled tenants to file petitions for declaratory order to determine jurisdiction in order to steamroll landlords, local municipalities, and state courts into accepting federal preemption where there is none. This possibility alone strongly suggests that the Board reconsider the March 15th Decision to simply deny the petition, or at the very least modify its holding to align with its previous precedent.

The City, along with the Port, is committed to developing the OAB Property and utilizing its capacity as a transportation hub and economic driver for the area. Indeed, that is why the City

initiated the project for redevelopment of the OAB Property in the first place and solicited participation by OBOT and OGRE. The City does not have, and never has had, any intent to thwart the use of the OAB Property for multimodal transportation purposes, nor does it intend or desire to obstruct or undermine the valid assertion of Board authority. Rather, the City is keenly interested in promoting the economic redevelopment of the OAB Property to serve the interests of the public, and accordingly is working diligently to resolve challenges that hamper implementation of the City's vision for the area. OBOT and OGRE do not have the right, and should not be given the opportunity, to wield the Board's authority where it controverts the public interest without serving any practical purpose.

CONCLUSION

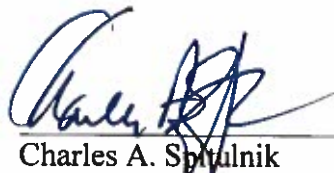
The City's termination of the sublease providing OGRE with the property interest necessary to conduct rail activities over the Line has materially affected the context for the March 15th Decision. Moreover, the Board made a material error when it decided to grant OGRE's Petition for Declaratory Order, and when and how it concluded that it should assert jurisdiction over the Line.

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WHEREFORE, and in view of the foregoing, the City respectfully requests this Board to reverse the March 15th Decision and deny OGRE's petition for declaratory order.

Dated: April 4, 2019

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Charles A. Spitulnik", is written over a horizontal line.

Charles A. Spitulnik
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Kaplan Kirsch & Rockwell LLP
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(202) 955-5600

Counsel for the City of Oakland, California

Certificate of Service

I hereby certify that I have this 4th day of April, 2019, caused to be served a copy of the foregoing Petition of City of Oakland for Reconsideration upon the following parties of record by e-mail and by first class mail, with postage prepaid:

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Counsel for the Port of Oakland



Charles A. Spitulnik

EXHIBIT A

City of Oakland Notice of Cure

CITY OF OAKLAND



ONE FRANK H. OGAWA PLAZA • 6TH FLOOR • OAKLAND, CALIFORNIA 94612

Office of the City Attorney
Barbara J. Parker

(510) 238-3601
FAX: (510) 238-6500
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VIA HAND DELIVERY

September 21, 2018

Oakland Bulk & Oversized Terminal, LLC
c/o California Capital & Investments, Inc.
The Rotunda Building
300 Frank Ogawa Plaza, Suite 340
Oakland, CA 94612
Attn: Mr. Phil Tagami

Re: Notice to Cure with respect to an Unmatured Event of Default by Oakland Bulk & Oversized Terminal, LLC ("OBOT") under Section 6.1.1.1 of the Army Base Redevelopment Project Ground Lease for West Gateway between the City of Oakland ("City") and OBOT, dated February 16, 2016 ("Ground Lease"). All capitalized terms used in this letter are defined in the Ground Lease unless otherwise defined herein

Dear Mr. Tagami:

As noted in earlier correspondence (see letter dated August 20, 2018, the "August 20 Letter"), OBOT has failed to satisfy its obligation to Commence Construction of the Minimum Project by the Initial Milestone Date under Section 6.1.1.1 of the Ground Lease. Such failure has resulted in an Unmatured Event of Default, notwithstanding OBOT's claims of Force Majeure. We write to inform you that **the City rejects such claims and provides you an official notice to cure this Unmatured Event of Default pursuant to Section 18.1.7 of the Ground Lease.**

As you are aware, the Ground Lease requires OBOT to cure within thirty (30) days of this letter, or within such additional reasonable time necessary once a cure has been commenced and is being diligently dispatched (the "Cure Period"); notwithstanding this requirement, the City hereby agrees to extend the Cure Period by 120 days (the "Extended Cure Period"), subject to the parties entering into an agreement ("Agreement"), by no later than September 26, 2018, on all of the terms stated below:

Oakland Bulk & Oversized Terminal, LLC
c/o California Capital & Investments, Inc.
Attn: Mr. Phil Tagami
Re: Notice to Cure
September 21, 2018
Page Two

VIA HAND DELIVERY

- 1) OBOT and the City agree to a thirty (30) day period to attempt, in good faith, to reach a settlement agreement for the Coal Litigation based on the City's June 19, 2018 responses to the OBOT Restated and Clarified Settlement Proposal dated December 18, 2017 and consistent with the guiding principles originally laid out by the Council for its settlement terms:
 - a) OBOT's agreement to develop a Ban-Compliant Terminal;
 - b) No payment of attorneys' fees;
 - c) No payment of damages - either in cash or in kind with properties; and
 - d) City's agreement to forgo revenues at front end of lease term in exchange for a true up at back end of lease term.

If the parties are not able to reach a settlement by the end of the negotiation period, then the obligations to negotiate in good faith would terminate and OBOT would have the remainder of the Extended Cure Period to perform as set forth in the Ground Lease and the Agreement.

- 2) OBOT and the City mutually release all potential claims, including but not limited to Force Majeure and any breach of contract claims, they may have against each other, existing or that may exist, as a result of actions or inactions arising prior to the date of the Agreement. This release would not resolve the pending appeal from the decision in District Court case no. 16-cv-07014-VC (the "Coal Litigation") nor would the parties be waiving any future claims.
- 3) OBOT takes corrective actions to cure the breach, including, at a minimum, (a) completion of all requirements necessary to commence construction of the Rail Improvements, including a BCDC permit scope acceptable to the City; and (b) diligent pursuit of the Terminal by the schedule of milestones the City will provide to OBOT at the end of the negotiating period occurring in accordance with Item (1).

Please let us know, in writing, by close of business on Monday, September 24, 2018, whether you elect the terms of the City's proposed Extended Cure Period. If we do not receive such written notice, the Cure Period will stand as set forth in the Ground Lease, and OBOT will have thirty days (30) from the date of this letter to cure.

Oakland Bulk & Oversized Terminal, LLC
c/o California Capital & Investments, Inc.
Attn: Mr. Phil Tagami
Re: Notice to Cure
September 21, 2018
Page Three

VIA HAND DELIVERY

We further note that failure to perform such cure shall constitute an Event of Default under Section 18.1, and pursuant to Section 6.1.2.1, OBOT must pay the Minimum Project Liquidated Damages within thirty (30) days of such Event of Default and the Ground Lease shall automatically terminate with respect to the Unimproved Premises (as defined in the Ground Lease).

Very truly yours,


BARBARA PARKER
City Attorney

cc: Mayor Libby Schaaf
Council President Larry Reid and Members of the City Council
Sabrina Landreth, City Administrator
Betsy Lake, Deputy City Administrator
Bijal Patel, Special Counsel

EXHIBIT B

City of Oakland Notice of Default

CITY OF OAKLAND



ONE FRANK H. OGAWA PLAZA • 6TH FLOOR • OAKLAND, CALIFORNIA 94612

Office of the City Attorney
Barbara J. Parker
City Attorney

(510) 238-3601
FAX: (510) 238-6500
TTY/TDD: (510) 238-3254

October 23, 2018

Via Hand Delivery

Phil Tagami
Oakland Bulk and Oversized Terminal, LLC
c/o California Capital & Investment Group, Inc.
The Rotunda Building
300 Frank Ogawa Plaza, Suite 340
Oakland, CA 94612

Re: Notice of Event of Default under the Army Base Gateway
Redevelopment Project Ground Lease for West Gateway between
the City of Oakland ("**City**") and Oakland Bulk and Oversized
Terminal, LLC ("**OBOT**"), dated February 16, 2016 ("**Ground
Lease**"); all capitalized terms are defined in the Ground Lease
unless otherwise defined herein

Dear Mr. Tagami:

As described in the Notice to Cure with respect to an Unmatured Event of Default delivered to OBOT on September 21, 2018 (the "**Notice to Cure**"), OBOT has failed to satisfy its obligations under the Ground Lease to Commence Construction of the Minimum Project by the Initial Milestone Date. The Notice to Cure began a thirty (30)-day period (the "**Cure Period**") during which OBOT was to cure, or alternatively, to commence and diligently dispatch a cure of OBOT's failure to Commence Construction of the Minimum Project (a "**Satisfactory Cure**").

The City has determined that OBOT has failed to achieve a Satisfactory Cure within the Cure Period. As such, the City hereby notifies OBOT of the occurrence of an Event of Default pursuant to Section 18.1.7 of the Ground Lease.

Pursuant to Section 6.1.2.1 of the Ground Lease, (1) OBOT is required to pay the Minimum Project Liquidated Damages to the City within thirty (30) days from the date of the Event of Default; and (2) effective thirty (30) days after the Event of Default and without any further notice, the Ground Lease automatically terminates with respect to

Via Hand Delivery

Phil Tagami

October 23, 2018

Page Two

the Unimproved Premises. OBOT must comply with all requirements of Section 6.1.2.1 on or before November 22, 2018.

Very truly yours,



BARBARA J. PARKER
City Attorney

cc: Sabrina Landreth, City Administrator
Elizabeth Lake, Deputy City Administrator
Bijal M. Patel, Special Counsel

EXHIBIT C

**OBOT and OGRE Complaint to the Superior
Court of the State of California**



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BY FAX

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Attorneys for Plaintiffs
OAKLAND BULK AND OVERSIZED TERMINAL and
OAKLAND GLOBAL RAIL ENTERPRISE

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ALAMEDA

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

Plaintiffs,

v.

CITY OF OAKLAND, a California municipal
corporation,

Defendant.

Civil Case No. **RA18930929**
COMPLAINT FOR:

- (1) BREACH OF CONTRACT;
- (2) ANTICIPATORY BREACH;
- (3) BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING;
- (4) FRAUDULENT INDUCEMENT/ FALSE PROMISE;
- (5) INTENTIONAL INTERFERENCE WITH CONTRACT (TLS);
- (6) INTENTIONAL INTERFERENCE WITH PROSPECTIVE ECONOMIC RELATIONS (TLS AND ITS);
- (7) NEGLIGENT INTERFERENCE WITH PROSPECTIVE ECONOMIC RELATIONS (TLS AND ITS);
- (8) INTENTIONAL INTERFERENCE WITH CONTRACT (OGRE);
- (9) INTENTIONAL INTERFERENCE WITH PROSPECTIVE ECONOMIC RELATIONS (OGRE);
- (10) NEGLIGENT INTERFERENCE WITH PROSPECTIVE ECONOMIC RELATIONS (OGRE);
- (11) DECLARATORY RELIEF; AND
- (12) SPECIFIC PERFORMANCE

FILED
ALAMEDA COUNTY
DEC 4 - 2018
CLERK OF THE SUPERIOR COURT
By *Janita Puno* Deputy

1 Plaintiffs Oakland Bulk and Oversized Terminal, LLC ("OBOT") and Oakland Global
2 Rail Enterprise, LLC ("OGRE") (collectively, "Plaintiffs") hereby complain against Defendant
3 City of Oakland ("Defendant" or "City") and allege as follows:

4
5 **SUMMARY OF ACTION**

6 1. Plaintiffs bring this action to compel the City to fulfill its promises and honor its
7 legal obligations to Plaintiffs, who are the developers of a rail-to-ship bulk commodity terminal
8 ("Terminal") located at a portion of the former Oakland Army Base known as the West Gateway.
9 Over the last several years, the City has engaged in an uninterrupted pattern of delay and
10 interference, all with the objective of preventing OBOT from completing this project. Indeed, the
11 City's latest tactic—falsely asserting that its Lease with OBOT has automatically terminated as
12 the result of a claimed default that did not occur—speaks volumes about the City's misguided
13 attempts to eliminate this project in violation of its long-standing contractual commitments.

14
15 2. The former Oakland Army Base is uniquely situated with its immediate proximity
16 to both a deep-water port and existing rail capacity, which allows for significant international
17 goods movement through a bulk goods shipping terminal that can receive, store, handle, and ship
18 goods that are typically transported in large quantities. Absent these characteristics, such goods
19 would have to be transported via diesel trucks with significantly higher ambient air emissions,
20 including particulate matter, in and around the already impacted community of West Oakland.

21
22 3. Beginning in 2010, Plaintiffs, or their predecessors-in-interest, and the City
23 entered into a series of contracts with respect to the former Oakland Army Base in general and the
24 "West Gateway" portion of the former base in particular, including the following:

- 25 a. that certain Exclusive Negotiation Agreement, dated January 22, 2010 (as
26 amended, the "ENA");
27
28 b. that certain Army Base Gateway Redevelopment Project Lease Disposition and

1 Development Agreement, effective December 4, 2012 (as amended, the "LDDA");

2 c. that certain Development Agreement by and between the City of Oakland and
3 Prologis CCIG Oakland Global, LLC Regarding the Property and Project Known as
4 "Gateway Development/Oakland Global" dated July 16, 2013 (the "DA"); and
5

6 d. that certain Army Base Gateway Development Project Ground Lease for West
7 Gateway, dated February 16, 2016 (as amended, the "Lease"), whereby OBOT ground
8 leased (i) the West Gateway property; and (ii) the existing rail right-of-way ("Railroad
9 R/O/W Property" and together with West Gateway property, the "Property").

10 4. Pursuant to their rights and obligations under such agreements, the developers set
11 out to redevelop a significant portion of the former Oakland Army Base, which included
12 reestablishing certain rail improvements (the "Shortline Rail") and developing the Terminal. The
13 Shortline Rail and the Terminal are collectively referred to herein as the "Project".
14

15 5. In order to reach this vision, it was understood that OBOT would sublease portions
16 of the Property to a terminal subtenant who would design, construct and operate the Terminal and
17 a rail subtenant who would design, construct and operate the Shortline Rail.

18 6. Once realized, the Project is positioned to streamline customer logistics supply
19 chains, create more service options for shippers from the United States seeking greater access to
20 and from foreign markets, solidify Oakland's reputation as a major west coast trade center for
21 American resources, and carry on the proud history of Oakland's working waterfront through the
22 creation of long-term job opportunities for Oakland residents.
23

24 7. Currently, the DA and the Lease define the City's and OBOT's rights and
25 obligations with respect to the Project.

26 8. In one egregious omission or act after another, the City has failed to perform its
27 material obligations under the Lease and DA, and has aggressively taken steps to prevent
28

1 OBOT's performance under the Lease and receipt of its benefit of the bargain thereunder. The
2 City's omissions and actions constitute breaches of its contractual obligations and thwart
3 completion of the Project. Such breaches include enforcement of an illegal and politically-driven
4 ordinance and resolution banning any transfer of coal through the West Gateway Terminal; threat
5 of inappropriate and unwarranted additional layers of legal review that may subject Plaintiffs to
6 litigation exposure; unfounded accusations against Plaintiffs of contractual default; refusal to
7 address essential prerequisites for permit submittals; failure and refusal to turnover possession of
8 the very premises that Plaintiffs have a right and obligation to occupy and improve; and
9 interference with Plaintiffs' funding and permitting efforts with outside regulatory agencies.
10

11 9. The City's breach of the Lease has caused harm to Plaintiffs, continues to cause
12 harm to Plaintiffs, and excuses any non-performance by Plaintiffs under the Lease and/or the DA.
13

14 10. Plaintiffs seek to hold the City accountable for its legal obligations in pursuing this
15 action.

16 11. Section 38.13 of the Lease states that if a party to the Lease is required to bring an
17 action against the other party for a failure to perform thereunder, or if any other dispute arises
18 between the parties, the prevailing party is entitled to recover all costs and expenses incurred,
19 including attorneys' fees.
20

21 PARTIES

22 12. Plaintiff OBOT is a California limited liability company with its principal place of
23 business in Oakland, California. Pursuant to the DA and the Lease, OBOT is the developer of the
24 Project.

25 13. Plaintiff OGRE is a California limited liability company with its principal place of
26 business in Oakland, California. OGRE is an affiliate of OBOT and entered into a sublease
27 agreement with OBOT with respect to the Shortline Rail portion of the Project. OGRE seeks to
28

1 rehabilitate the rail network and become a Class III common carrier, providing rail switching
2 services (including on behalf of Class I common carriers) on the Oakland Army Base rail
3 network.

4
5 14. Defendant City is a municipal corporation and a chartered city organized and
6 existing under the laws of the State of California.

7 **JURISDICTION AND VENUE**

8 15. Jurisdiction in this Court is proper because the amount in controversy exceeds
9 \$25,000.

10 16. Venue is proper in this Court pursuant to Code of Civil Procedure section 394
11 because Plaintiffs' claims are asserted against Oakland, which is located in Alameda County.
12 This Court is also a proper venue because a substantial part of the events giving rise to the claim
13 occurred in Oakland, California.

14
15 17. The contract at issue in this case contains the following provision at Section 38.9:

16 This Lease is entered into in the City of Oakland, State of California, and
17 shall be governed by, and interpreted in accordance with, the laws of the
18 State of California . . . all action or proceedings arising directly or
indirectly under this Lease may, at the sole option of Landlord, be litigated
in courts have situs within the City of Oakland . . .

19 **GENERAL ALLEGATIONS**

20 **I. Reuse Plan for Oakland Army Base.**

21 18. In 1999, the U.S. Department of Defense closed the U.S. Army facility known as
22 the "Oakland Army Base" for military use. Following its closure, 370 acres of the former
23 Oakland Army Base property were transferred to the City, with approximately 200 acres of the
24 waterfront area allocated by the City to the Port of Oakland, acting by and through its Board of
25 Port Commissioners ("Port") operation area,¹ while the remaining 170 acres known as the
26

27
28 ¹ The Port is a political subdivision of the City of Oakland. The Charter of the City of Oakland (as amended through
November 2016), Section 700. The seven members of the Board of Port Commissioners are nominated by the Mayor

1 "Gateway Development Area" remained for redevelopment by the City.

2 19. Facing the loss of local jobs and other economic benefits from the closure of the
3 Oakland Army Base, the City adopted a "Redevelopment Plan for the Oakland Army Base
4 Development Project" to facilitate the "redevelopment, rehabilitation, and revitalization" of the
5 Gateway Development Area (as amended, the "Redevelopment Plan"). Its "major goals"
6 included, among other things, the "strengthening of the economic base of the community by the
7 construction and installation of infrastructure" to "stimulate new development, employment, and
8 social and economic growth." To achieve its goals the Redevelopment Plan did not present
9 "specific proposals," but instead "present[ed] a process and a basic framework" within which the
10 City could "fashion, develop, and proceed with . . . specific plans, projects and solutions." The
11 Redevelopment Plan granted the City authority to sell or lease real property in the Gateway
12 Development Area for "redevelopment of [the] land by private enterprise."
13
14

15 20. In 2008, after numerous other proposed projects for redevelopment of the Oakland
16 Army Base failed, the City issued a Request for Qualifications seeking plans from private
17 developers to "transform the [Gateway Development Area] into a mixed use commercial and/or
18 industrial development."
19

20 21. Thirteen developers submitted proposals, including California Capital &
21 Investment Group, Inc. ("CCIG") and AMB Property, L.P. ("AMB"). CCIG is the sole member
22 of OBOT. CCIG and AMB were jointly selected as the developers for the West Gateway, Central
23

24 of the City of Oakland and appointed by the City Council. Section 1204 of the Charter expressly states "[a]ll real
25 property acquired by the City shall be held in the name of 'The City of Oakland.'" See also the Charter of the City of
26 Oakland (as amended through November 2016), Section 706(15) (providing that the powers of the Port include the
27 ability "[t]o acquire *in the name of the City* by purchase, condemnation, gift, lease, or otherwise take over and hold
28 all lands, property, property rights, leases, or easements, and personal property of every kind, necessary or convenient
for the development and operation of the port, or for the carrying out of the powers herein granted to the Board.
Whenever the Board determines that any lands owned by the City within its jurisdiction have become unnecessary
for port purposes or harbor development, it may in its discretion transfer such lands to the control of the Council, free
from all restrictions, or it may sell or exchange such lands, by ordinance subject to the referendum provisions of this
Charter.") (*emphasis added*).

1 Gateway and East Gateway of the former Oakland Army Base.

2 22. At all times, the developers clearly communicated to the City, including in project
3 documentation, their plan to develop the Terminal at the West Gateway.

4 23. The City was aware that coal was a potential bulk commodity to be transported
5 through the Terminal. For example: (i) in 2011 a potential subtenant of the Terminal, Kinder
6 Morgan, gave a presentation to City officials that identified coal as 34% of the "Bulk Tonnage
7 Breakout" Kinder Morgan shipped; (ii) on or about April 19, 2012, the City commissioned and
8 received a report from the Tioga Group, Inc. that identified coal as a likely bulk commodity that
9 could be handled at the Terminal ("Tioga Report"); (iii) in May 2012, Port staff exchanged emails
10 that expressly referenced coal as a potential commodity to be shipped through the Terminal; (iv)
11 in June 2012, CCIG provided to City officials a video of a comparable facility in Long Beach that
12 depicted coal; (v) a May 2013 study commissioned by the Port expressly included coal on its list
13 of suggested commodities; (vi) a September 12, 2013 Report on Compliance prepared by the
14 City's outside counsel, Holland & Knight, and adopted by the City through resolution, included
15 the "Long Range Property Management Plan" for the Oakland Army Base that cited examples of
16 typical bulk commodities to be handled by the Terminal: "(e.g. lumber, coal, sulfur)"; and (vii)
17 September 2013 emails between staff members at San Francisco Bay Conservation and
18 Development Commission ("BCDC") and Earthjustice noted that coal had been expressly
19 included in discussions regarding potential commodities at the Terminal.

20 24. Informed in large measure by the Tioga Report, the City was aware that the
21 ultimate success and viability of the Project largely hinged on the ability to identify and secure
22 the commitment of a commodity provider with long-term needs for the processing and handling
23 capacity the Terminal would provide over its 66-year useful life.

24 25. The use of rail to transport bulk commodities to and from shipping vessels is the
25
26
27
28

1 keystone component of the Project. The City, the Port, OBOT, and OGRE all have repeatedly
2 acknowledged the importance of rail to the Project, including through the City's adoption of the
3 master plan. But now, not only is the City objecting to the rail work moving forward, but it has
4 allowed the other major developer at the Oakland Army Base, Prologis, Inc. ("Prologis"), to
5 develop non-rail served buildings contrary to the master plan and what was represented to OBOT
6 and OGRE as part of the business case for the Project; to be fair, Prologis originally attempted to
7 locate rail served tenants, but because the Rail Access Agreement was not in place and the City's
8 actions prevented the completion of the rail work, no rail rate could be quoted, so there was no
9 serious interest by a rail tenant.
10

11 **II. Contracts Entered into by Plaintiffs and City.**

12 26. As stated above, the material contracts related to the redevelopment of the former
13 Oakland Army Base include the ENA, the LDDA², the DA and the Lease.
14

15 27. Under the ENA, the developers (i) funded the development of the redevelopment
16 concept and the City's environmental review of such redevelopment concept; (ii) spearheaded the
17 City's ability to secure in excess of \$250,000,000 in grant funds from the federal government and
18 the State of California transportation commission; and (iii) negotiated the terms of the LDDA.
19

20 28. Under the LDDA, the City and the developers agreed, among other matters, (i) to
21 work together on the design, funding and construction of certain street, utility, grading, wharf, rail
22 and other improvements that were necessary for the developers' redevelopment of the subject
23 portions of the former Oakland Army Base (the "Public Improvements"); and (ii) to the form of
24 the leases for the subject property (including the Lease).³
25

26 ² Certain terms of the Third Amendment to the LDDA were subsumed in the Lease and lapsed automatically upon
27 execution of the Lease.

28 ³ The LDDA was originally entered into by the City, the Oakland Redevelopment Successor Agency ("ORSA") and
Prologis CCIG Oakland Global, LLC (a joint venture entity formed by a CCIG affiliate and a Prologis affiliate,
"Prologis/CCIG"). On or about August 30, 2013, ORSA assigned its rights and obligations under the LDDA to the
City. On or about June 13, 2014, Prologis/CCIG assigned its rights and obligations under the LDDA with respect to

1 29. The DA was entered into to, among other matters, vest the developer's rights to
2 develop the redevelopment project for the subject portions of the former Oakland Army Base.⁴

3 30. Under the Lease, (i) the City agreed (among other obligations) to continue to
4 cooperate with OBOT in the identification and pursuit of additional funds for the Public
5 Improvements and construct the funded Public Improvements, and OBOT agreed to (among other
6 obligations) to pay the required rent and develop the Minimum Project (which included certain
7 rail and terminal improvements).

8 31. Neither the DA nor the Lease impose any restrictions preventing the transport of
9 coal or petcoke through the Terminal. Neither agreement limits or otherwise differentiates the
10 type(s) of bulk commodities that could be exported from the Terminal. There is no existing
11 zoning that prohibits or disallows any legal commodity (e.g. coal).

12 32. In particular, Section 3.4 of the DA specified that only "Existing City Regulations"
13 as of the adoption of the DA would "govern the development of the Project and all Subsequent
14 Approvals with respect to the development of the Project on the Project Site." The only
15 exception to this express contractual promise is Section 3.4.2 of the DA: the City could apply
16 health and safety regulations adopted after July 16, 2013, to the Terminal only if (a) the
17 application of any such health and safety regulation is "otherwise permissible pursuant to
18 Laws"— "Laws" being defined to include the "Constitution of the United States, and any codes,
19 statutes, regulations, or executive mandates thereunder"; and (b) the "City determines based on
20 substantial evidence and after a public hearing that a failure to do so would place existing or
21 future occupants or users of the Project, adjacent neighbors, or any portion thereof, or all of them,
22
23
24
25

26 the Property pursuant to that certain Partial Assignment and Assumption (West Gateway) of the Lease Disposition
27 and Development Agreement (the "WGW Partial Assignment").

28 ⁴ The DA was originally entered into between the City and Prologis/CCIG. Pursuant to Section 10.1 of the DA,
Prologis/CCIG's rights and obligations under the DA with respect to the West Gateway were automatically assigned
to OBOT upon the execution of the WGW Partial Assignment by the City, Prologis/CCIG and OBOT confirming
OBOT as a permitted assignee under the LDDA with respect to the West Gateway.

1 in a condition substantially dangerous to their health or safety.”⁵

2 33. In order to induce developers to pursue their respective projects at the Army Base,
3 the City represented that it had entered into a Cooperation Agreement dated December 20, 2012,
4 with local community groups in West Oakland, as well as various labor organizations to make
5 sure the neighbors and labor groups supported the Project in exchange for community benefit
6 concessions. Although OBOT was not a party to the Cooperation Agreement, the City mandated
7 that the related cost and obligations be borne by OBOT and the other developers.
8

9 34. OBOT came to realize that the community groups and labor refused to honor their
10 obligation to support the Project, and instead were quick to interfere with the Project despite
11 having received the benefit of the bargain. Community groups breached the Cooperation
12 Agreement prior to the City’s execution of the Lease. The City failed to enforce compliance with
13 the Cooperation Agreement, which delayed Project completion and caused monetary damage to
14 Plaintiffs.
15

16 35. Moreover, on information and belief, the \$541,440.00 payment OBOT made to the
17 City for the West Oakland Community Fund (“WOCF”) has never been distributed to said fund
18 but has been retained by the City.
19

20 36. Following the execution of the DA and the Lease, Plaintiffs invested years of
21 effort and millions of dollars in planning the development of the Project. To date, OBOT and its
22 affiliates have invested well in excess of \$30 million on these development efforts. And
23 Plaintiffs will suffer damages in excess of \$100 million if the City’s conduct prevents completion
24 of the Project.

25 37. In 2013, CCIG stated that its immediate commodity focus was on iron ore and
26 copper concentrate, which was accurate at the time. However, CCIG refused to make a pledge to
27

28 ⁵ Certain other narrow exceptions exist that allow the City to apply new regulations to the project, but none of those exceptions apply here.

1 the City to take coal and all fossil fuels off of the table as potential commodities to be handled at
2 the Terminal. CCIG explained that *to be viable in the competitive marketplace, the Project must*
3 *be responsive to the demands of the market over the 66-year life of the Lease.*

4 38. Further, as part of its development process and in furtherance of its obligations
5 under the foregoing contracts, OBOT began to search for a company to construct and operate the
6 Terminal. In the spring of 2014, OBOT entered negotiations with Terminal Logistics Solutions,
7 LLC ("TLS").

9 39. The negotiations eventually resulted in a November 2014 Exclusive Negotiation
10 Agreement and Sublease Option between OBOT and TLS (the "Sublease Option"). The Sublease
11 Option granted TLS an exclusive option to sublease and operate the Terminal for a sixty-six (66)
12 year period.

14 40. Consistent with the City-approved DA and industry practice for such facilities, the
15 Sublease Option did not restrict the shipment of coal or any other commodity to and
16 through the Terminal.

17 **III. The City's Obligations to Cooperate with OBOT to Secure Funding and Permits and**
18 **Construct the Funded Public Improvements.**

19 41. In each of the LDDA and Lease, the City agreed to cooperate with OBOT to
20 obtain third party permits or approvals necessary to construct the Public Improvements and to
21 cooperate to identify and to pursue funds for the Public Improvements.

22 42. However, the City has not cooperated with Plaintiffs to obtain funds or permits,
23 and in several instances the City has affirmatively obstructed such matters.

24 43. For example, the City and the Port established a Joint Environmental Remediation
25 Fund ("JERF") to fund remediation for the entirety of the former Oakland Army Base reuse plan.
26 Remediation of areas essential to the core operations of the Project were and remain an essential
27 prerequisite to being able to construct and operate the Project on formerly contaminated lands.
28

1 The Public Improvements budget expressly excluded environmental remediation costs, however,
2 the City used an undisclosed amount of Public Improvements funds, as opposed to JERF funds,
3 for remediation work, thereby depleting funds for non-Project-allocated work. All funds in the
4 JERF have long-since been exhausted for unknown purposes.

5
6 44. On or about April 24, 2014, Fred Blackwell, the then City Administrator,
7 identified various categories of funding deficiencies in City accounts relative to the original
8 agreements for the Public Improvements (directly impacting the Project), and asked OBOT to
9 work "collaboratively with the City to solve the funding shortfall."

10 45. On June 5, 2014, the City obtained an amendment to a permit issued by BCDC for
11 a portion of the Public Improvements (the "BCDC Amendment"). The BCDC Amendment
12 included, at the City's direction: (a) the installation of the re-aligned W. Burma Road that will
13 provide primary vehicular access to the West Gateway; and (b) certain driveway, parking and
14 public access improvements located to the west of the West Gateway (the "Public Access
15 Improvements"). The BCDC Amendment characterized the Public Access Improvements as both
16 part of the permitted improvements and the required mitigation.

17
18 46. On July 8, 2014, as the City's project manager for the public infrastructure work,
19 CCIG responded to the City's request for cooperation by noting that previous iterations of the
20 budget identified sources sufficient to meet the City's required contribution. CCIG asked for
21 clarification of the City's funding sources and requested accounting documentation for various
22 funding discrepancies and irregularities including: (i) the Tidelands Trust Burma Road Fund that
23 the City had allocated inconsistently from time to time; (ii) the City's failure to separately account
24 for funds to be distinguished between disparate segments of the overall Project; and (iii)
25 allocation of third-party legal expenses.

26
27 47. On November 4, 2014, the City provided a funding update for the Project termed
28

1 the Mid-Project Budget Revise, which re-sequenced completion of the Public Improvement
2 components and set out the sources and uses that form the basis for the final budget. In summary,
3 under the Mid-Project Budget Revise, OBOT assumed far greater obligations and costs in
4 exchange for the City's assurances that the Lease would become effective more quickly and
5 construction and completion of the Terminal accelerated. OBOT lived up to its side of the
6 bargain, the City receiving the benefit thereof, but the City has repeatedly failed to honor its
7 promises, and indeed, has endeavored to prevent completion of the Project.
8

9 48. The most material example of the City's failure to meet its obligations under the
10 Lease relates to its refusal to accept \$22 million Measure BB bond funds from the Alameda
11 County Transportation Commission ("ACTC") for the design and construction of certain Public
12 Improvements that were originally the City's obligations under the LDDA and Lease and were
13 assumed by OBOT pursuant to the Third Amendment to the LDDA.
14

15 49. On November 4, 2014, Alameda County voters approved Measure BB, authorizing
16 an extension and augmentation of the existing transportation sales tax (Measure BB). Measure
17 BB is projected to generate approximately \$8 billion in revenues from April 2015 to March 2045
18 for transportation improvements for Alameda County. ACTC is responsible for disbursing funds
19 generated by Measure BB.
20

21 50. The City asked OBOT to support Measure BB during its campaign, which OBOT
22 did with the expectation that certain funds generated by Measure BB could potentially be
23 allocated to the Project (specifically, the original Public Improvements that were assumed by
24 OBOT).

25 51. Measure BB was adopted, and ACTC identified approximately \$22 million as
26 available to the Project as part of its goal of recognizing the economic importance of port/marine
27 terminal facilities and providing connections between goods and markets with minimal impacts to
28

1 residential neighborhoods. In addition, ACTC allocated funds to the City to perform public
2 improvements in and around the Property.

3 52. Yet the City has interfered with requested disbursements of funds on behalf of the
4 Project causing ACTC to not disburse any funds to aid in development of the Project to date.

5 53. For example, on June 13, 2015, the City's representative on the ACTC
6 Commission introduced a resolution at an ACTC Commission meeting to prevent the ACTC
7 funds from being released for the City Funded Wharf Improvements absent a promise to not ship
8 coal or petcoke.

9 54. Additionally, on July 31, 2015, Mayor Libby Schaaf and Councilmember Lynette
10 Gibson McElhaney co-signed a letter to the Executive Director of ACTC in which they requested
11 disbursement of Measure BB funds. Despite their obligation under the Lease to cooperate with
12 OBOT to secure third party funds, the City requested ACTC disburse funds to construct "public"
13 versus "private" improvements at the former Oakland Army Base. They expressly highlighted
14 that "the potential for the export of coal and related product is an extremely controversial issue"
15 related to the "private improvements." Distinguishing their request for funding for the public
16 improvements from that allocated for the private improvements, the letter states: "Please be
17 advised, however, that our efforts to appropriately address the coal export issue related to the
18 developers [sic] **private improvements** do not affect the City's request for ACTC grant funding
19 for the **public infrastructure improvements** at the Army Base." (Emphasis in original.)

20 55. Consequently, the City requested and received ACTC funds for public
21 improvement costs that were used to pay back the funds that were inappropriately used for
22 remediation work rather than JERF funds.

23 56. On October 31, 2016, the City applied for \$27.46 million in ACTC funding for
24 Wharf Improvements at Wharf 7 on the Property—improvements that would need to be made no
25

1 matter the type of bulk commodity handled by the Project. However, in yet another act of bad
2 faith, on information and belief, a City representative used her influence as an ACTC
3 Commissioner to block the funding of the \$27.46 million over the coal and petcoke issue.

4
5 57. Thereafter, and despite OBOT's continued requests, the City has failed to make
6 any effort to pursue the ACTC funds or to locate any other source of funding, instead electing to
7 engage in a campaign of obstruction.

8 58. The City has neglected its obligation to cooperate with OBOT to pursue third party
9 funds, and instead, it has affirmatively interfered with OBOT's ability to obtain any funds from
10 ACTC, as part of its on-going effort to oppose the Project absent a promise by OBOT to not ship
11 coal or petcoke.

12
13 59. Moreover, the Lease requires OBOT's and the other developers' approvals before
14 making adjustments to the budget. On information and belief, the City has reallocated money
15 from what is contemplated by the budget without first obtaining OBOT's and the other
16 developers' consent.

17 **IV. The City Caved to Political Opposition to the Project.**

18 60. Soon after OBOT started negotiations with TLS, word began to spread about one
19 of the potential commodities TLS intended to handle at the Terminal, coal, which generated
20 significant public concern in Oakland. Even though the City was previously aware that coal,
21 petcoke and other fossil fuels could be handled at the Terminal, special interest groups began
22 focusing on the matter in 2014. Facing political pressure from environmental and special interest
23 groups, the Oakland City Council adopted a resolution expressing the City's general opposition to
24 transporting fossil fuels through the City on June 17, 2014 ("2014 Resolution") despite the fact
25 that coal was regularly transported through the City by rail at that time. The City did not conduct
26 any study or hold a public hearing before passing the 2014 Resolution. The City and OBOT
27
28

1 executed the DA on July 16, 2013, therefore the 2014 Resolution was not binding on OBOT or
2 the Project.

3 61. Despite executing the Lease, the City continued to yield to political pressure to the
4 Project's detriment. While the City Council contracted with Environmental Science Associates
5 ("ESA") to perform a health and safety review (without going through a competitive bid process),
6 the marketplace safely transported over 1 billion metric tons of seaborne coal annually and
7 transported many million tons of coal domestically by interstate rail. On July 27, 2016, the City
8 enacted a politically-motivated illegal ordinance prohibiting the storage and handling of coal at
9 bulk goods facilities in Oakland ("Ordinance"), and adopted a resolution that would apply the
10 Ordinance to OBOT on the alleged grounds that it would be "necessary to prevent conditions
11 substantially dangerous to the health and/or safety of existing and/or future occupants or users of
12 the Project and Adjacent Neighbors" ("Resolution").
13

14
15 62. On May 15, 2018, the United States District Court for the Northern District of
16 California ("District Court")⁶ found that the City breached the DA, which gave OBOT vested
17 rights to develop and to operate a bulk-commodity terminal, by adopting the Ordinance and
18 Resolution without any "substantial evidence" that transporting coal through the terminal would
19 present a "substantial danger" to people in Oakland.
20

21 63. The District Court found: "The resolution applying the coal ordinance to the
22 OBOT facility is invalid, because it is a breach of the development agreement. The City is
23 therefore enjoined from relying on the resolution either to apply the ordinance to OBOT or to
24 restrict future coal operations at the facility. As a practical matter, this renders the coal ordinance
25 a nullity, because the only reason the City adopted it was to restrict OBOT's operations, and
26 OBOT is the only facility in Oakland to which it could conceivably apply." ("District Court
27

28 ⁶ *Oakland Bulk & Oversized Terminal, LLC v. City of Oakland*, Case No. 3:16-cv-07014-VC (N.D. Cal, May 15, 2018).

1 Ruling”).

2 64. The City breached its obligations under the Lease and DA by adopting the
3 Ordinance and Resolution. Further, the City’s illegal regulatory actions are the basis for a Force
4 Majeure claim under the Lease,⁷ which includes delays caused by “acts of the government.”
5

6 65. Prior to adopting the Ordinance and Resolution, the City was aware of the effect
7 the new regulations would have on Plaintiffs’ ability to survive as a business. OBOT openly
8 shared with the City its need to finalize an option agreement and sublease for the Project with a
9 bulk commodity provider willing to make a substantial investment in the Project including tens of
10 millions of dollars and a decades-long commitment.

11 66. The City had actual knowledge that the Ordinance and Resolution would interfere
12 with Plaintiffs’ ability to receive the benefits of the Lease and the DA. The City’s adoption of the
13 Ordinance and Resolution as well as its defense against OBOT’s lawsuit with no substantial
14 evidence to support the City’s position delayed OBOT’s performance under the Lease. Rather
15 than resolving OBOT’s claims, the City defended its erroneous position and delayed the Project.
16

17 67. On or about June 13, 2018, the City filed a Notice of Appeal of the District Court
18 Ruling. The City continues to prosecute its appeal of the District Court Ruling, and continues to
19 interfere with OBOT’s ability to perform timely under the Lease.
20

21 **V. No New Discretionary Decisions or Creek Protection Permit Are Required.**

22 68. The City prepared an Environmental Impact Review (“EIR”) for the entire Army
23 Base in 2002. The City adopted the Addendum EIR on June 21, 2012 (“2012 Addendum”). The
24

25 ⁷ Force Majeure is defined by the Lease as: “events which result in delays in Party’s performance of its obligations
26 hereunder due to causes beyond such Party’s control, including, but not restricted to, acts of God or of the public
27 enemy, *acts of the government, acts of the other Party*, fires, floods, earthquakes, tidal waves, terrorist acts, strikes,
28 freight embargoes, delays of subcontractors and unusually severe weather and, in the case of Tenant, any delay
resulting from a defect in Landlord’s title to the Premises other than a Permitted Exception. Force Majeure does not
include failure to obtain financing or have adequate funds. The delay cause by Force Majeure includes not only the
period of time during which performance of an act is hindered, but also such additional time thereafter as may
reasonably be required to complete performance of the hindered act.” (Emphasis added.)

1 2012 Addendum included the imposition of an extensive suite of mandatory mitigation measures
2 and conditions of approval.

3 69. Per the terms of the DA, the certified EIR already addressed the environmental
4 impacts of the Project:

5
6 3.5.1 Reliance on Project EIR. The EIR, which has been certified
7 by City as being in compliance with CEQA, addresses the potential
8 environmental impacts of the entire Project as it is described in the
9 Project Approvals. It is agreed that, in acting on any discretionary
10 Subsequent Approvals for the Project, City will rely on the EIR to
11 satisfy the requirements of CEQA to the fullest extent permissible
12 by CEQA and City will not require a new initial study, negative
13 declaration or subsequent or supplemental EIR unless required by
14 CEQA, as determined by City in its capacity as the Lead Agency,
15 and will not impose on the Project any mitigation measures or other
16 conditions of approval other than those specifically imposed by the
17 City Approvals, specifically required by the Existing City
18 Regulations or by subsequent CEQA review.

19 70. The City has relied on the certified EIR on multiple occasions after special interest
20 groups started expressing opposition to coal and petcoke.

21 71. There are no present circumstances that would justify supplemental environmental
22 review of the Project. No further permits are required to develop and construct the Project that
23 require discretionary review by the City.

24 72. In addition, the 2012 Addendum (prepared for and adopted by the City as lead
25 agency) expressly states that the Project does not require a Creek Protection Permit: "In
26 conclusion, waters in the project area are not defined as a creek by the Creek Protection
27 Ordinance. This finding is consistent with the 2002 EIR findings that there are no creeks in or
28 near the project area, and conditions do not exist that could cause a conflict with the City's Creek
Protection Ordinance."

73. There is no legitimate reason for the City to require OBOT to obtain any further
discretionary permits to construct the Project, and if the City subjects the Project to further
unnecessary discretionary review it will do so in bad faith.

1 **VI. Cappio Memo.**

2 74. On November 6, 2015, Assistant Oakland City Administrator Claudia Cappio sent
3 an internal memorandum to the Oakland Planning and Building Department regarding Permitting
4 for the Facilities ("Cappio Memo"). The Cappio Memo represents a transparent effort by the City
5 to slow down or halt construction of the Project, contrary to the intent and obligations of the
6 parties set forth in the DA, Lease and Mid-Project Budget Revise. The Cappio Memo provides
7 that, "[d]ue to the high-profile nature of the project it is important for the City Administrator's
8 Office to provide updates to the City Council on the status of OBOT implementation," and
9 Cappio intends to notify the City Council whenever an application for a building or construction
10 related permit is submitted by OBOT. These directions are highly unusual and atypical.

12 75. Cappio instructed the Planning and Building Department to notify City staff "upon
13 receipt of any building or construction-related permit application for OBOT (including, without
14 limitation, building permit, p-job permit, grading permit, *creek protection permit*, etc.)"
15 (emphasis added) and further instructed that the Planning and Building Department that it may
16 not "deem the application complete or issue the permit until after consultation with" Cappio,
17 Rachel Flynn, the Director of Planning and Building, and Darin Ranelletti, the Deputy Director of
18 Planning and Building, all of whom answer to the City Administrator, who, in turn, answers to
19 the Mayor.

21 76. On information and belief, no other development project at the Oakland Army
22 Base or in the City at large has ever had a similar restriction placed upon it, particularly one that
23 modifies the regulatory scheme in place in violation of the DA and Lease.

25 77. On information and belief, the Cappio Memo has never been formally withdrawn
26 by the City. Moreover, all of the individuals identified in the Cappio Memo as needing to
27 approve any permit have since left their respective positions with the City, causing additional
28

1 confusion and delay for the permitting of the Project.

2 **VII. Permit Application Pre-Meeting.**

3 78. During a pre-application meeting on March 9, 2016 at which OBOT expected to
4 discuss with City department heads the necessary components to complete an application for a
5 building permit for the Project, OBOT presented the Basis of Design to relevant City department
6 heads and permit decision-makers. OBOT previously submitted the Basis of Design to the City
7 and has consistently requested feedback and direction from the City regarding specific permit
8 requirements.
9

10 79. In the March 9, 2016 meeting, the City stated that OBOT's Project permit
11 applications are subject to additional discretionary approvals, notwithstanding Section 3.4.4 of the
12 DA which provides that the City "shall have the right to apply to the Project at any time, *as a*
13 *ministerial act*, the Construction Code and Standards in effect at the time of the approval of any
14 City Approval or Subsequent Approval thereunder." OBOT questioned the City's continued and
15 repeated references to the review being "discretionary," as discretionary decisions by the City, in
16 some instances, potentially reopen analysis under CEQA, and the CEQA analysis of the Project
17 had long-since been completed. Given the DA's express provision that review of the Project for
18 permitting would be "ministerial," OBOT informed the City that designation of such review as
19 "discretionary" in order to trigger new CEQA review, would violate the DA.⁸
20
21

22 80. In response to these questions, the City stated that the Project would require a
23 creek bed alteration permit, which was discretionary. As noted above, however, the 2012
24 Addendum expressly concludes that no creek bed permit is required.

25 81. It is clear that by subjecting each permit application to increased scrutiny and
26 discretionary review, the City is attempting to reopen CEQA review improperly for the purpose
27

28 ⁸ There are legal principles that would justify re-opening of CEQA (e.g., a significant change in the Project proposed by OBOT), but none of those principles were or are present in this instance.

1 of interfering with Plaintiffs' completion of the Project. Moreover, the City stated at the March 9,
2 2016 meeting that it would conduct a commodity-by-commodity review under CEQA for any
3 commodity handled by the Terminal; Assistant City Attorney, Mark Wald, also stated the same in
4 an email to OBOT's outside counsel.

5
6 82. Additionally, the City stated at the March 9, 2016 meeting that it was unsure of
7 whether the current Construction Codes and Standards were sufficient to address the issues that
8 may be raised by the construction and operation of a bulk terminal facility and that it was going to
9 implement a process to review the current codes and standards and determine if they need to be
10 supplemented for the Project. To OBOT's knowledge, the City has never identified the
11 Construction Codes and Standards that would be applicable to the Project, hence the continued
12 and pressing need to meet with the City Building and Planning Department.

13
14 83. Under Section 3.4.3 of the DA, the City has an obligation to compile a record of
15 all "existing City regulations" applicable to the Project. Despite repeated requests, the City
16 consistently refused to provide the record of applicable regulations. Instead, the City ultimately
17 requested that OBOT compile the noted record, a City obligation, which OBOT did and
18 transmitted to the City. The City, however, failed to certify the compilation as the binding record
19 of regulations applicable to the Project.

20
21 84. The purpose and intent of the DA is to establish the existing regulations and permit
22 requirements and shield OBOT from future changes in regulation with limited exceptions.

23 85. On March 11, 2016, OBOT provided a notice of the Force Majeure Delay as
24 defined in the Lease that was caused by the City's inability to inform OBOT of the Construction
25 Codes and Standards and applicable City regulations that apply to the Premises and Project
26 Improvements, as those terms are defined in the governing documents. Because the City
27 admitted that it was unable to provide the foundational information set forth in the applicable
28

1 Construction Codes and Standards and applicable City regulations as required under Section 3.4.4
2 of the DA, OBOT was prevented from continuing work on the design of the Project
3 Improvements beyond the Basis of Design.

4 86. Due to the City's act of Force Majeure, OBOT is entitled to an extension of at least
5 two years of the Commencement Date, as defined in the Lease, with a further continuing
6 extension for so long as the City fails in its obligations to identify the applicable Construction
7 Codes and Standards and applicable City regulations to which design and construction of the
8 Terminal must comply, process permit applications, as well as compliance with all of its
9 numerous obligations under the DA and Lease.
10

11 **VIII. The City's Interference with Essential Rail Improvements.**

12 87. The City also obstructed the Project's progress in areas other than the illegal
13 Ordinance and Resolution. The Project requires Plaintiffs to construct the Shortline Rail, to
14 connect the existing rail line to the Port Rail Terminal and allow the Terminal to link rail to vessel
15 break bulk shipping operations. For over six years the City has intentionally blocked and
16 interfered with OBOT's efforts to acquire rights for, to access properties for, and to rehabilitate
17 these essential Rail Improvements.
18

19 88. The City's refusal to advance and interference with the Shortline Rail not only
20 blocks Project progress, it interferes with Plaintiffs' ability to secure potential customers and
21 jeopardizes Plaintiffs' ability to collect payments from such customers.
22

23 89. The rail-related delays caused by the City and the Port have caused Plaintiffs to
24 lose valuable service contracts and incur monetary losses and delays.

25 **A. Rail Access Agreement.**

26 90. On information and belief, the Port Rail Terminal (defined in the Lease) is located
27 on City property controlled by the Port. At this time, there is no permanent rail operator at the
28

1 Port Rail Terminal.

2 91. The City granted to OBOT (and OGRE) the City's "rights to access and use the
3 Port Rail Terminal" under Section 1.5.1 the Lease.

4 92. However, the Port has previously represented to OGRE that it is unwilling to enter
5 into a Rail Operating Agreement for rail service at the Port Rail Terminal until the Rail Access
6 Agreement is executed between the City and the Port.

7 93. Despite the City and Port agreeing upon fundamental terms in 2012, not to
8 mention that all of the land in question is owned by the City, the Port and the City have failed for
9 over six years to process, to secure and to provide a written Rail Access Agreement as required
10 by Section 5.2.3 of the Lease.

11 94. Despite OBOT's written demands, including its July 20, 2018 letter, the City has
12 failed to use and refuses to use commercially reasonable efforts to pursue a Rail Access
13 Agreement as required by the Lease.

14 95. After four years of stagnation, Cappio committed in October 2016 for the City and
15 Port to meet and discuss the draft Rail Access Agreement by early November 2017.

16 96. To OBOT's knowledge, such a meeting did not take place until August 29, 2018,
17 nearly a year after the date originally promised.

18 97. And while the City, Port, and OGRE met on three occasions during August-
19 September 2018, on information and belief, the City and Port were attempting to collude to
20 expand the operational rights of the Port beyond what had previously been agreed to by the
21 parties, depicted in all drawings, and represented to the State and Federal governments, while
22 continuing to thwart OGRE's efforts by refusing to employ commercially reasonable efforts to
23 negotiate in good faith the Rail Access Agreement for the benefit of OGRE and OBOT.

24 98. On September 26, 2018, the City elected to discontinue any regularly scheduled
25
26
27
28

1 Rail Access Agreement meetings. To OBOT and OGRE's knowledge, no further meetings to
2 discuss the Rail Access Agreement have been held. The City's and the Port's collusive refusal to
3 reach closure on a Rail Access Agreement prevented OBOT and OGRE from performing their
4 obligations under the DA and the Lease.

5
6 **B. Rail Right of Way.**

7 99. In addition, the City has an obligation under the Lease to provide a Rail Right of
8 Way ("R/O/W") on the West Gateway property to OBOT/OGRE to allow rail construction and
9 operations.

10 100. OBOT and OGRE have diligently and in good faith attempted to pursue the
11 physical work necessary for rail access to the Project and the rehabilitation of pre-existing rail on
12 the Project site, including: (i) hiring a contractor to perform the rail work; (ii) working to obtain
13 an industrial track agreement with Union Pacific Railroad; and (iii) expending over \$1.6 million
14 on rail materials and labor, with the materials currently stockpiled on-site waiting for installation.
15 Yet, the City has still not turned over the Rail R/O/W to OBOT on the required schedule, nor has
16 it confirmed the Rail R/O/W conforms with engineered drawings.

17
18 101. On July 24, 2018, the City demanded that OBOT pay rent for the West Gateway,
19 including the Rail R/O/W to which the City continued and continues to deny OBOT/OGRE
20 access, going back to February 16, 2018, under the threat of default under the Lease. OBOT paid
21 and continues to pay rent to the City for the West Gateway (including the Rail R/O/W) under
22 protest.

23
24 102. On October 9, 2018, the City confirmed that it was not prepared to turn over the
25 rail corridor to OGRE, citing an uncompleted survey of the facilities.

26 103. As recently as October 18, 2018, the City stated that the Rail R/O/W had not been
27 turned over. And as of the time of the filing of this Complaint, the City has continued its failure
28

1 to grant OBOT/OGRE access to the Rail R/O/W. Again, the City's failure to do so, prevented
2 OBOT/OGRE's performance, resulting in delay and monetary damage.

3 C. **The City's Failure To Cooperate and Affirmative Interference At The**
4 **Surface Transportation Board.**

5 104. The City and Port are actively interfering with OGRE's efforts to obtain approvals
6 from the Surface Transportation Board ("STB") to facilitate track rehabilitation and operation of
7 the rail.

8 105. Since 2015, the City or the Port, or both, have objected to each petition that OGRE
9 filed with the STB.

10 106. In May 2018, OGRE filed a petition with the STB seeking confirmation that no
11 additional STB approval was required to rehabilitate the Rail R/O/W consistent with the City's
12 own construction drawings and the City and Port master redevelopment plan, primarily those rail
13 improvements the City obligated OBOT/OGRE to make under Section 6.1 of the Lease; OGRE is
14 statutorily obligated to obtain STB authorization prior to the construction of rail where the STB
15 has jurisdiction. OGRE expressly noted in its petition for a declaratory order that it would be
16 seeking operation exemption from the STB under a separate application. Beginning on June 29,
17 2018, the City and the Port have repeatedly opposed OGRE's May petition.

18 107. Under Section 5.2.2.2 of the Lease, the City is obligated to "cooperate in good
19 faith regarding Tenant's efforts to obtain Regulatory Approvals for the Project from any
20 regulatory agency other than City," which it failed to do.

21 108. As a result of the City's breach of its obligation to cooperate, OGRE has been
22 forced to spend tens of thousands of dollars in legal fees to defend against the City's objection to
23 the STB, and, more importantly, the rehabilitation of the Rail R/O/W has been delayed
24 indefinitely.
25
26
27
28

1 **D. The City's Failure to Provide Property Rights to OBOT.**

2 109. To induce OBOT to enter into the Lease, the City represented that it had easements
3 with the Port that would allow OBOT and its subtenants the right to enter upon Port property to
4 construct and use the relevant segment of track, as set forth in Sections 1.1.1, 1.1.2, 1.5.1, and
5 1.5.2 of the Lease.

6 110. The Port has represented to the STB that OGRE has not yet obtained the property
7 rights that it needs from the Port to build any track on "Port property."

8 111. To the extent OBOT/OGRE do not have the right to enter upon Port property to
9 make the Rail Improvements, the City has materially misrepresented the property rights granted
10 to OBOT under the Lease.

11 **IX. The City's Illegitimate Claim of an Unmatured Event of Default.**

12 112. Because of the City's action, TLS did not exercise its Sublease Option. After the
13 issuance of the District Court Ruling, where now the parties thought the City would cease its
14 pattern of interference, OBOT entered into a sublease agreement with Insight Terminal Solutions,
15 LLC ("ITS"), whereby ITS will develop and operate the Terminal.

16 113. Rather than cooperating with Plaintiffs to proceed with the Project, the City has
17 renewed its efforts to kill the Project by falsely asserting that OBOT is in default under the Lease
18 and continuing its pattern of obstructionist conduct.⁹

19 114. On August 20, 2018, the City sent a letter to OBOT claiming that OBOT failed to
20 commence construction of the Minimum Project by the Initial Milestone Date set forth in the
21 Lease. The City alleged OBOT had committed an Unmatured Event of Default and demanded
22 that OBOT cure the "Default."

23
24
25
26
27 ⁹ Elected officials, including Mayor Schaaf repeatedly made clear to the public and press her adamant opposition to
28 coal being transported at and through the Project and her intention to do anything necessary to prohibit it. She
personally told a principal of OBOT that she would do anything in her power to make sure that no coal would come
through Oakland, "even if it meant killing the entire project to do so."

1 115. OBOT vehemently denied it committed an Unmatured Event of Default and
2 reiterated its prior claim that the City has caused Force Majeure under the Lease tolling any
3 performance deadline of OBOT commensurate on an ongoing basis with the City's own actions
4 thwarting and impeding OBOT's ability to perform.
5

6 116. The City has an obligation to issue a Non-Disturbance Agreement for the
7 Subtenant ("NDA") who will operate the Project under Section 12.5 of the Lease.

8 12.5.1 Conditions for Non-Disturbance Agreements. From
9 time to time upon the request of Tenant, Landlord shall enter into
10 agreements with Subtenants providing generally, with regard to a
11 given Sublease, that in the event of any termination of this Lease,
12 Landlord will not terminate or otherwise disturb the rights of the
13 Subtenant under such Sublease, but will instead honor such
14 Sublease as if such agreement had been entered into directly
15 between Landlord and such Subtenant ("Non-Disturbance
16 Agreements"). . . (v) if Tenant is then in default of any of its
17 obligations under this Lease, Landlord may condition its agreement
18 to provide a Non Disturbance Agreement on the cure of such
19 defaults as Landlord may specify either in a notice of default given
20 under Section 18.1 or in a notice conditionally approving Tenant's
21 request for such Non Disturbance Agreement (and if an Event of
22 Default or Unmatured Event of Default on the part of Tenant then
23 exists, then Landlord may withhold or condition the giving of a
24 Non Disturbance Agreement) . . .

25 117. An NDA is key to a subtenant's ability to obtain financing for the construction of
26 its sublease improvements, as any potential lender will want to know that the sublandlord's
27 breach of the master lease will not affect the subtenant's rights under the sublease.
28

1 118. Plaintiffs submitted a form of NDA to the City four times beginning in April 2018.
2 After the third submission, on August 24, 2018, the City responded for the first time and made
3 redline interlineation changes to the form Plaintiffs previously submitted. Plaintiffs executed the
4 revised NDA and submitted it to the City; however, at the conclusion of a meeting with the City
5 on August 29, 2018, the City indicated that before signing it needed to make additional changes
6 to the NDA, stating that it would do so later that same day.
7

8 119. After a week and a half of following up with the City to no avail, in a letter to the

1 City dated September 7, 2018, OBOT and OGRE rescinded their respective signatures and,
2 consistent with Section 12.5.2 of the Lease, included a copy of the form of NDA showing
3 requested interlineations or deletions to the form of NDA previously circulated by the City, a
4 copy of which is attached hereto as **Exhibit 1**.

5
6 120. Section 12.5.2 of the Lease requires the City to approve or specifically disprove
7 the requested interlineations or deletions within twenty (20) days. That Section also provides:
8 "Failure by Landlord to approve or disapprove of specific interlineations, deletions or other
9 modifications requested by a Subtenant within such twenty (20) day period shall be deemed to be
10 approval of the requested changes"

11
12 121. On September 27, 2018, the City refused to issue a NDA with respect to the
13 proposed sublease between OBOT and OGRE, notwithstanding the City's contractual obligation
14 to do so. As a pretext, the City predicated its refusal on Section 12.5.1 of the Lease and the City's
15 incorrect claim that it is entitled to withhold or condition the grant of a NDA to a Subtenant
16 because OBOT has committed an Unmatured Event of Default related to the Initial Milestone
17 Date. The City argued that OBOT may renew its request for an NDA for the OGRE Sublease
18 following "resolution of the Unmatured Event of Default."

19
20 122. The City's obligation under Section 12.5.2 of the Lease to comment upon
21 requested changes to a form of NDA is not conditioned upon the absence of an Event of Default
22 under the Lease. On October 3, 2018, OBOT and OGRE notified the City that they deemed the
23 City's non-response as approval of the requested changes to the form of NDA. In an October 17,
24 2018 letter, the City rejected this assertion, claiming that the City's refusal to issue an NDA
25 somehow relieves it of its obligations under Section 12.5.2.

26
27 123. On September 28, 2018, concurrent with the execution of the ITS sublease, OBOT
28 submitted a request to the City for an NDA in favor of ITS. The City refuses to provide the

1 requested NDA. On October 3, 2018, the City was provided notice that its refusal to issue the
2 NDA has and will continue to cause substantial damage to OBOT and OGRE, and it is interfering
3 with their business and contractual relationships with third-parties.

4
5 124. Also on September 28, 2018, OBOT submitted a request to the City for estoppel
6 certificates pursuant to Section 26.1 of the Lease for both ITS and OGRE. As permitted under
7 item (d) of Section 26.1 of the Lease, for the OGRE estoppel, OBOT asked for a list of matters
8 affecting the status of the Rail R/O/W, including, without limitation, the date when City will turn
9 over the Rail R/O/W to OBOT, as well as OBOT's ability to enter onto lands the Port claims it
10 owns to perform the Rail Improvements.

11
12 125. On October 18, 2018, the City provided an estoppel certificate for OGRE, which
13 erroneously references the Unmatured Event of Default; however, the City refused to estop the
14 property rights granted to OBOT under the Lease saying that the request was unreasonable—this,
15 while the Port, a department of the City, was arguing OBOT had no rights to access a majority of
16 the Rail R/O/W, including the necessary rail interface with the Union Pacific mainline.

17
18 126. Also on October 18, 2018, the City refused to provide an estoppel certificate for
19 ITS. Despite acknowledging that the Lease is in full force and effect and that OBOT has been
20 paying rent, the City claimed that ITS may not rely on the estoppel because, the City erroneously
21 claims, OBOT's sublease with ITS is invalid and that an Unmatured Event of Default was
22 pending.

23
24 127. On October 23, 2018, the City claimed that OBOT failed to cure the alleged
25 Unmatured Event of Default during the cure period and alleged that OBOT defaulted under the
26 Lease. The City alleged that OBOT is required to pay liquidated damages within thirty (30) days
27 after the Notice of Default and alleged the Lease "automatically terminates" with respect to the
28 Unimproved Premises, as defined by the Lease. The City demanded that OBOT pay liquidated

1 damages on or before November 22, 2018.

2 128. OBOT disputes that it defaulted under the Lease. And because it is not in default
3 of the Lease, OBOT did not pay liquidated damages to the City on or before November 22, 2018.

4 **X. The City's Refusal to Cooperate with OBOT Continues to Present Date.**

5 129. As a part of the master plan, the City was to provide perimeter fencing at the
6 Oakland Army Base, including at the Property.

7 130. Once again, due to budgetary issues, the City requested that the developers
8 (including OBOT) take on the obligation to construct perimeter fencing at their respective lease
9 areas but sold the idea by representing that the construction could take place under the City's
10 existing building permit for the public infrastructure project. On information and belief, Prologis
11 constructed its perimeter fencing under the City's existing permit, and the City ended up paying
12 for and constructing the fence for the other developer. However, the City has made OBOT and
13 OGRE obtain a new building permit causing additional costs and delay, which has also lead to
14 security issues at the Property.
15

16 131. Moreover, in the course of evaluating the permit application for the fence, the City
17 departed from the previously agreed upon plan for the placement of the fence in the public right
18 of way and instead insisted that the fence be constructed on OBOT/OGRE's private leased lands.
19

20 132. Additionally, the City insisted on a new review of the proposed fence, including
21 revised plans and design drawings, even though the parties previously agreed upon the design of
22 the fence. Plaintiffs acquiesced; however, the permit has still not been issued due to the City's
23 ongoing issues with BCDC.
24

25 133. The City objects to the previously agreed upon Public Access Improvements that
26 were included in the June 5, 2014 BCDC Amendment.

27 134. BCDC has stated that it will not permit the use of the W. Burma Road
28

1 improvements that are required to provide access to the West Gateway and that it will not process
2 the additional BCDC permits that are required for the development and operation of the Project
3 until the City constructs the Public Access Improvements required under the existing BCDC
4 Amendment. The City's refusal to do so constitutes active interference with OBOT's ability to
5 obtain the BCDC permits necessary to continue with the Project.
6

7 135. The City has represented to OBOT that it considers any mitigation measures
8 required by BCDC to be allocated to the Community Facilities District ("CFD") established for
9 the Project. However, the parties previously negotiated which public improvements are
10 designated as OBOT obligations under the CFD, and the parties agreed that, among other things,
11 the City would pay for mitigation measures for W. Burma Road.
12

13 136. Additionally, even though the master plan contemplated the Port be included in the
14 CFD as a financial contributor thereto, and the Port is receiving beneficial use of the public
15 infrastructure within the CFD's jurisdiction, the City has not yet added the Port to the CFD, all
16 the while availing itself of the CFD's benefits.
17

18 137. The City is now refusing to honor its prior commitments with regard to the
19 funding of mitigation measure improvements as set forth in the master plan and the DA.
20

21 **XI. The City's Improper Rejection of OBOT's DA Compliance.**

22 138. Each year since executing the DA, OBOT has provided a summary of its efforts to
23 substantially comply with the terms of the DA. For the first time, after certifying OBOT's
24 compliance each and every year before, on August 27, 2018, the City claimed that OBOT has not
25 met its obligations under Section 3.3 of the DA, to "develop the Private Improvements for each
26 Phase of the Project in accordance with the 'Minimum Project' description, scope, schedule and
27 sequencing set forth in the Ground Lease for each Phase." The City claimed that OBOT failed to
28 submit schematic drawings or a building permit application to the City for review prior to the

1 Initial Milestone Date.

2 139. The City's actions have prevented OBOT's ability to progress with construction of
3 the Project. Furthermore, the City's assertion that OBOT failed to comply with the Initial
4 Milestone Date was premature because the DA expressly provides that the annual review is meant
5 to be a retrospective review of compliance over the prior year (i.e. July 31, 2017 to July 31, 2018)
6 and it should not include a review of the current year's compliance.
7

8 140. Pursuant to Section 6.3 of the DA, if the City does not agree with OBOT's
9 response, it must commence a meet and confer/mediation process. Despite OBOT's repeated
10 requests to meet and confer, the City refuses to do so without explanation, constituting another
11 breach of the DA.
12

13 **XII. The City's Improper Rejection of the Basis of Design.**

14 141. Because the City has not, in recent history, processed any construction work like
15 that contemplated by the Project, it asked OBOT and, at the time, TLS, to submit a "Basis of
16 Design" setting forth the conceptual design of the Project so that the parties could meet and
17 discuss what would be necessary for the City to issue a building permit. As such, a Basis of
18 Design was submitted to the City on July 21, 2015, and again on September 8, 2015—it is this
19 Basis of Design that formed the basis of the discussion at the March 9, 2016 meeting.
20

21 142. In order to move the development of the Terminal forward, and having no
22 response from the City to the prior submission, OBOT, on behalf of ITS, re-submitted the Basis
23 of Design to the City on September 28, 2018, requested the City's comments thereon relative to
24 preparing a more comprehensive permit application for the Terminal, and requested the City's
25 cooperation to obtain the necessary building permits.

26 143. To that end, October 4, 2018, representatives from OBOT and ITS met with
27 representatives from the City (Elizabeth Lake and Bijal Patel) to discuss the Project and request
28

1 the City's help in setting up preliminary intake meetings with the Building and Planning
2 Department. On that same day, representatives from OBOT and ITS reached out to William
3 Gilchrist, Director of the City's Building and Planning Department to request a meeting to discuss
4 the development and the steps that would be taken by the parties for ITS to get a building permit
5 from the City to construct the Terminal. A meeting was scheduled for October 14, 2018.
6

7 144. On October 13, 2018, Mr. Gilchrist sent an email saying that he was cancelling the
8 meeting. Despite multiple attempts by OBOT and ITS to reschedule the meeting, the City and
9 Mr. Gilchrist refuse to meet.

10 145. The City acknowledged receipt of the Basis of Design and other materials on
11 October 18, 2018. However, the City stated that it was recognizing only "conceptual drawings,"
12 merely a portion of the full context of the Basis of Design, and is apparently disregarding the rest.
13 The City then went on to contend that the submittal is "incomplete," largely without specifying
14 how or why the submittal is incomplete or the material required to render it complete; where the
15 City did specify items it deemed to be missing, nearly all of that information was already in the
16 Basis of Design. The City also asserted that "[t]he City's response to this submittal shall in no
17 way be construed as a substantive response or acceptance of a cure or commencement of cure of
18 the Unmatured Event of Default described in the letter from the City Attorney dated September
19 21, 2018."
20
21

22 146. In yet another attempt to meet with the City, on October 19, 2018, ITS and its
23 contractor completed and delivered to the City a Development Review Application, formally
24 requesting a meeting with the City. The City has not responded to the Development Review
25 Application. Moreover, on October 25, 2018, OBOT sent a letter to the City addressing the
26 City's statements in its October 18, 2018 response to the Basis of Design, pointing out to the City
27 where the City had overlooked information or otherwise providing responses to the City's
28

1 questions, and again requesting a meeting with the City. The City has not responded to the
2 October 25 letter.

3 147. The City repeatedly and consistently insists that it will not take any action to move
4 the Project forward unless and until OBOT agrees to construct a "ban compliant" terminal.
5 However, the District Court Ruling found the City's application of the Ordinance and Resolution
6 to the Project is invalid, constitutes a breach of the DA, and the City may not rely on the illegal
7 coal ban to restrict operations at the Project.
8

9 148. After losing its legal battle against the Project, the City has resolved to engage in a
10 bureaucratic attack on the Project with the hope of causing its demise. Those actions by the City
11 necessitated the filing of this action.
12

13 149. Given the City's conduct as described above, on October 19, 2018, Plaintiffs
14 presented a timely claim for damages and injunctive relief to the City in compliance with
15 Government Code § 900 *et seq.* ("Notice of Claim"). Plaintiffs identified the facts giving rise to
16 the City's liability as described herein and provided notice of each claim set forth below.
17

18 150. Rather than respond to Plaintiffs' Notice of Claim, the City published statements
19 to the press on November 10, 2018, incorrectly claiming that the City terminated the Lease. On
20 November 13, 2018, Plaintiffs asked the City to clarify whether the November 10, 2018 statement
21 to the press constituted a rejection of Plaintiffs' Notice of Claim.

22 151. On November 20, 2018, the City published false statements to the press that the
23 Lease terminated automatically "this week."

24 152. On December 3, 2018, the City served a Three-Day Notice to Quit or Cure
25 alleging that OBOT violated the Lease and demanding that OBOT "cure" the breach or vacate the
26 Property within three (3) days. Plaintiffs dispute the validity of that Notice.
27

28 153. The City failed to act on Plaintiffs' Notice of Claim within forty-five (45) days

1 after the City received the claim, therefore Plaintiffs' claim application was deemed denied on
2 December 3, 2018.

3
4 **FIRST CAUSE OF ACTION**
5 **Breach of Written Contract (Lease)**
6 **(Against Defendant)**

7 154. Plaintiffs reallege and incorporate by reference the allegations of paragraphs 1
8 through 153 as set forth above.

9 155. OBOT has performed each of the obligations to be performed by it under the
10 Lease, except for those excused or otherwise discharged by reason of the City's conduct,
11 including but not limited to payment of rent, taxes, and operating expenses under the Lease.

12 156. The City breached the Lease and the DA by, among other things: (i) enactment of
13 the illegal Ordinance and Resolution banning any transfer of coal through the Project; (ii)
14 assertion of a defense of the illegal Ordinance and Resolution in the trial court and prosecution of
15 appeal; (iii) allegation that OBOT committed an Unmatured Event of Default and Event of
16 Default; (iv) refusal to address essential prerequisites for permit submittals for the Project; (v)
17 refusal to issue permits for the Project; (vi) failure and refusal to turnover possession of the
18 Property that Plaintiffs have a right and obligation to improve, including but not limited to the
19 Rail R/O/W; (vii) interference with Plaintiffs' funding and permitting efforts with outside
20 regulatory agencies; (viii) failure to cooperate to identify and pursue third party funds for the
21 Project, including, but not limited to, funds generated by Measure BB; (ix) interference with
22 ACTC's disbursement of funds to the Project; (x) failure to execute a Rail Access Agreement
23 with the Port so that the Port will permit OGRE to construct the Rail Improvements; (xi)
24 interference in Plaintiffs' proceedings before the STB; (xii) refusal to issue an NDA and estoppel
25 for OBOT's subtenants; (xiii) improper rejection of OBOT's invocation of the Force Majeure
26
27
28

1 Lease provision and refusal to extend completion dates as required by the Lease; and (xiv)
2 rejection of Plaintiffs' Basis of Design and refusal to meet and confer as required by the Lease.

3 157. Had the City not engaged in these breaches: (i) Plaintiffs would have proceeded
4 with development of the Project in a timely manner; (ii) Plaintiffs and their subtenant would not
5 have been forced to expend substantial sums of money on legal fees, increased construction and
6 lending costs, and delays; and (iii) Plaintiffs would have received expected funds from third-
7 parties to fund the Project. As a result of the City's breaches, Plaintiffs have incurred damages.
8 Plaintiffs will suffer irreparable harm to the extent Plaintiffs lose the unique opportunity complete
9 the Project in an ever-changing marketplace.
10

11 158. Plaintiffs' damages are a foreseeable and proximate result of the City's breaches of
12 the Lease and DA. The City had actual knowledge that, among other things, enforcement of the
13 illegal Ordinance and Resolution would interfere with Plaintiffs' ability to receive the bargained-
14 for benefits of the Lease and DA.
15

16 159. Plaintiffs have been damaged in amount subject to proof at trial in excess of \$100
17 million. Plaintiffs will continue to be damaged unless the City is compelled to perform under the
18 Lease and the DA.
19

20 **SECOND CAUSE OF ACTION**

21 **Anticipatory Breach (Lease)**

22 **(Against Defendant)**

23 160. Plaintiffs reallege and incorporate by reference the allegations of paragraphs 1
24 through 159 as set forth above.

25 161. OBOT has performed each of the obligations to be performed by it under the
26 Lease, except for those excused or otherwise discharged by reason of the City's conduct,
27 including but not limited to payment of rent, taxes, and operating expenses under the Lease.

28 162. The City gave Plaintiffs notice that it would not perform its obligations under the

1 Lease and DA by, among other things, (i) private and public statements by elected officials
2 opposing the Project and threatening to "kill" the Project; (ii) alleging that OBOT committed an
3 Unmatured Event of Default and Event of Default; (iii) requiring inappropriate additional layers
4 of environmental and discretionary review that may subject Plaintiffs to litigation exposure; (iv)
5 refusal to compile a record of all "existing City regulations" applicable to the Project; and (v)
6 requiring Plaintiffs to pay for improvements and mitigation measures that the City committed to
7 pay.
8

9 163. At the time Plaintiffs received the City's repudiation, Plaintiffs had performed
10 each of the obligations to be performed by it under the Lease, except for those excused or
11 otherwise discharged by reason of the City's conduct, and Plaintiffs were ready, able, and willing
12 to complete performance on their part.
13

14 164. As a result of the City's anticipatory breach of the Lease and DA, Plaintiffs have
15 been damaged in an amount to be proven at trial. Plaintiffs will continue to be damaged unless
16 the City is compelled to perform under the Lease and DA.
17

18 **THIRD CAUSE OF ACTION**

19 **Breach of the Implied Covenant of Good Faith and Fair Dealing (Lease)** 20 **(Against Defendant)**

21 165. Plaintiffs reallege and incorporate by reference the allegations of paragraphs 1
22 through 164 as set forth above.
23

24 166. OBOT has performed each of the obligations to be performed by it under the
25 Lease, except for those excused or otherwise discharged by reason of the City's conduct,
26 including but not limited to payment of rent, taxes, and operating expenses under the Lease.
27

28 167. Expressly stated in the Lease and the DA and implied as a matter of law is a
covenant of good faith and fair dealing that requires, among other things, that the City would not

1 do anything to unfairly interfere with the right of Plaintiffs to receive the benefits of the Lease
2 and DA.

3 168. OBOT has acted in good faith in its interactions with the City throughout the
4 Project process. In contrast, the City unfairly and in bad faith interfered with Plaintiffs' right to
5 receive the benefits of the Lease and the DA, and otherwise breached the implied covenant of
6 good faith and fair dealing, by among other things: (i) enactment of the illegal Ordinance and
7 Resolution banning any transfer of coal through the Project; (ii) assertion of a defense of the
8 illegal Ordinance and Resolution in the trial court and prosecution of appeal; (iii) allegation that
9 OBOT committed an Unmatured Event of Default and Event of Default; (iv) refusal to address
10 essential prerequisites for permit submittals for the Project; (v) refusal to issue permits for the
11 Project; (vi) failure and refusal to turnover possession of the Property that Plaintiffs have a right
12 and obligation to improve, including but not limited to the Rail R/O/W; (vii) interference with
13 Plaintiffs' funding and permitting efforts with outside regulatory agencies; (viii) failure to use
14 commercially reasonable efforts to identify and pursue third party funds for the Project, including
15 but not limited to funds generated by Measure BB; (ix) interference with ACTC's disbursement
16 of funds to the Project; (x) failure to execute a Rail Access Agreement with the Port so that the
17 Port will permit OGRE to construct the Rail Improvements; (xi) interference in Plaintiffs'
18 proceedings before the STB; (xii) refusal to issue an NDA and estoppel for OBOT's subtenants;
19 (xiii) rejection of Plaintiffs' Basis of Design and refusal to meet and confer as required by the
20 Lease; (xiv) private and public statements by elected officials opposing the Project and
21 threatening to "kill" the Project; (xv) requiring inappropriate additional layers of environmental
22 and discretionary review that may subject Plaintiffs to litigation exposure; (xvi) refusal to compile
23 a record of all "existing City regulations" applicable to the Project; (xvii) rejecting Plaintiffs'
24 Force Majeure claim; and (xviii) requiring Plaintiffs to pay for improvements and mitigation
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26
27
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1 measures that the City committed to pay.

2 169. Had the City not engaged in these breaches of the implied covenant of good faith
3 and fair dealing: (i) Plaintiffs would have proceeded with development of the Project in a timely
4 manner; (ii) Plaintiffs and their subtenant would not have been forced to expend substantial sums
5 of money on legal fees, increased construction and lending costs, and delays; and (iii) Plaintiffs
6 would have received expected funds from third-parties to fund the Project. As a result of the
7 City's breaches, Plaintiffs have incurred damages. Plaintiffs will suffer irreparable harm to the
8 extent Plaintiffs lose the unique opportunity complete the Project in an ever-changing
9 marketplace.
10

11 170. Plaintiffs' damages are a foreseeable and proximate result of the City's breaches of
12 the implied covenant of good faith and fair dealing.
13

14 171. Plaintiffs have been damaged in amount subject to proof at trial of not less than
15 \$100 million. Plaintiffs will continue to be damaged unless the City is compelled to perform
16 under the Lease and DA.

17 **FOURTH CAUSE OF ACTION**

18 **Fraudulent Inducement/False Promise**

19 **(Against Defendant)**

20 172. Plaintiffs reallege and incorporate by reference the allegations of paragraphs 1
21 through 171 as set forth above.
22

23 173. The City made a series of promises to OBOT to induce OBOT to enter the Lease
24 and DA, including among others, (i) a promise to perform under the Lease; (ii) a promise to
25 cooperate in the completion of the Project; (iii) a promise that certain funds generated by Measure
26 BB would be allocated and disbursed to OBOT to build Wharf Improvements; and (iv) a promise
27 that the City would cooperate with Plaintiffs in obtain permits and funding from third-parties.
28

1 174. The City did not intend to perform its promises at the time it entered into the Lease
2 to the extent Plaintiffs subleased the Terminal to a bulk commodity provider that shipped coal.

3 175. Specifically, on November 4, 2014, City Administrator Blackwell provided OBOT
4 the Mid-Project Budget Revise, which purported to re-sequence completion of the Public
5 Improvement components and set out the sources and uses that form the basis for the final budget.
6

7 176. OBOT relied on Blackwell's assurances that the Lease would become effective
8 more quickly and construction and completion of the Terminal accelerated if OBOT agreed to
9 assume more funding obligations under the Mid-Project Budget Revise.

10 177. The City intended that Plaintiffs rely on its promises that the City would cooperate
11 in the development of the Project.

12 178. Plaintiffs invested years of effort and millions of dollars, in an amount to be
13 proven at trial, to develop the Project based on their reasonable reliance on the City's promise to
14 perform under the Lease and the DA.
15

16 179. The City has not performed its promised acts as described above, and as a result
17 Plaintiffs have been harmed.

18 180. Plaintiffs' reliance on the City's promises was a substantial factor in causing its
19 harm.
20

21 **FIFTH CAUSE OF ACTION**

22 **Intentional Interference with Contractual Relations (TLS)**

23 **(Against Defendant)**

24 181. Plaintiffs reallege and incorporate by reference the allegations of paragraphs 1
25 through 180 as set forth above.

26 182. OBOT entered into the Sublease Option with TLS in November 2014, which
27 granted TLS an exclusive option to sublease and operate the Terminal. The Sublease Option did
28

1 not restrict the type of bulk commodity to be transported through the Terminal.

2 183. The City knew of the proposed sublease between OBOT and TLS.

3 184. The City knew that the success of the Project hinged on OBOT's ability to secure
4 the commitment of a commodity provider with long-term needs for the useful life of the
5 Terminal.
6

7 185. The City's conduct prevented performance of the sublease between OBOT and
8 TLS by making it harder to timely complete the Project. Consequently TLS has abandoned the
9 sublease.

10 186. By engaging in this conduct, the City intended to disrupt the performance of the
11 sublease between OBOT and TLS. Alternatively, the City knew that disruption of performance
12 was certain or substantially certain to occur.
13

14 187. As a direct result of the City's conduct, Plaintiffs were harmed in an amount to be
15 proven at trial. Plaintiffs will continue to be damaged unless the City is compelled to perform
16 under the Lease and DA.

17 **SIXTH CAUSE OF ACTION**

18 **Intentional Interference with Prospective Economic Relations (TLS and ITS)**
19 **(Against Defendant)**

20 188. Plaintiffs reallege and incorporate by reference the allegations of paragraphs 1
21 through 187 as set forth above.

22 189. Since 2012, the City has intentionally interfered with Plaintiffs' prospective
23 economic relationships with two potential subtenants, TLS and ITS, by engaging in a series of
24 disruptive acts as described above. The sublease with TLS would have resulted in a future
25 economic benefit to OBOT; and the sublease with ITS will result in a future economic benefit to
26 OBOT.
27
28

1 190. The City knew of the proposed sublease between OBOT and TLS, and the
2 subsequent sublease between OBOT and ITS, because OBOT had informed the City of the terms
3 of the subleases and requested that the City issue an NDA to the subtenants.

4 191. The City knew that the success of the Project hinged on OBOT's ability to secure
5 the commitment of a commodity provider with long-term needs for the useful life of the
6 Terminal.

7 192. The prospective economic relationship between OBOT and TLS has been
8 disrupted because of the City's wrongful conduct. Specifically, TLS abandoned its proposed
9 sublease with OBOT and OBOT was required to seek out a new subtenant to develop the Project.

10 193. The prospective economic relationship between OBOT and ITS has been disrupted
11 because of the City's wrongful conduct. Specifically, the City refuses to issue an NDA and
12 estoppel for the sublease agreement between ITS and OBOT which threatens OBOT's ability to
13 perform under the sublease agreement.

14 194. As a proximate result of the City's wrongful conduct, Plaintiffs have been
15 damaged in an amount to be proven at trial. Plaintiffs will continue to be damaged unless the
16 City is compelled to perform under the Lease and DA.

17
18
19 **SEVENTH CAUSE OF ACTION**

20 **Negligent Interference with Prospective Economic Relations (TLS and ITS)**

21 **(Against Defendant)**

22 195. Plaintiffs reallege and incorporate by reference the allegations of paragraphs 1
23 through 194 as set forth above.

24 196. The City has negligently interfered with Plaintiffs' prospective economic
25 relationships.

26 197. The sublease with TLS would have resulted in a future economic benefit to
27
28

1 Plaintiffs; and the sublease with ITS will result in a future economic benefit to Plaintiffs.

2 198. The City knew of the proposed sublease between OBOT and TLS, and the
3 subsequent sublease between OBOT and ITS, because OBOT had informed the City of the terms
4 of the subleases and requested that the City issue an NDA and estoppel to the subtenants.
5

6 199. The City knew or should have known that its wrongful conduct, as described
7 above, and failure to act with reasonable care would disrupt Plaintiffs' economic relationship with
8 TLS and ITS.

9 200. The City breached its duty to Plaintiffs by failing to act with reasonable care
10 including but not limited to: (i) refusing to issue an NDA, (ii) failing to issue an estoppel without
11 a false claim that OBOT committed an Unmatured Event of Default; and (iii) breaching the Lease
12 and DA as described above.
13

14 201. OBOT's economic relationships with TLS and ITS have been disrupted.

15 202. The City negligently failed and continues to fail, to cure its negligence by failing
16 to perform under the Lease and DA.

17 203. As a proximate result of the City's negligence, Plaintiffs have been damaged in an
18 amount to be proven at trial. Plaintiffs will continue to be damaged unless the City is compelled
19 to perform under the Lease and DA.
20

21 EIGHTH CAUSE OF ACTION

22 **Intentional Interference with Contractual Relations (OGRE)**

23 **(Against Defendant)**

24 204. Plaintiffs reallege and incorporate by reference the allegations of paragraphs 1
25 through 203 as set forth above.

26 205. OGRE entered into a sublease agreement with OBOT ("OGRE Sublease") that
27 granted OGRE an exclusive right to rehabilitate the rail network and become a Class III common
28

1 carrier, providing rail switching services (including on behalf of Class I common carriers) on the
2 Oakland Army Base rail network.

3 206. The City knew of the OGRE Sublease.

4 207. OGRE incurred costs in reliance on its ability to perform and receive the benefits
5 of the OGRE Sublease, including but not limited to: (i) costs to purchase materials to construct
6 the rail; (ii) payment of rent under the OGRE Sublease; and (iii) costs to purchase a locomotive to
7 provide rail services.
8

9 208. The City knew that the success of the Project hinged on OBOT's ability to secure a
10 subtenant to rehabilitate the rail network and provide rail switching services.

11 209. The City's conduct has prevented and is preventing performance of the sublease
12 between OGRE and OBOT by making it harder to timely complete the Project.
13

14 210. By engaging in this conduct, the City intended to disrupt the performance of the
15 sublease between OGRE and OBOT. Alternatively, the City knew that disruption of performance
16 was certain or substantially certain to occur.

17 211. As a direct result of the City's conduct, Plaintiffs were harmed in an amount to be
18 proven at trial. Plaintiffs will continue to be damaged unless the City is compelled to perform
19 under the Lease and DA.
20

21 NINTH CAUSE OF ACTION

22 **Intentional Interference with Prospective Economic Relations (OGRE)** 23 **(Against Defendant)**

24 212. Plaintiffs reallege and incorporate by reference the allegations of paragraphs 1
25 through 211 as set forth above.

26 213. The City has intentionally interfered with OGRE's prospective economic
27 relationships with potential customers of its rail switching services, by engaging in a series of
28

1 disruptive acts as described above. OGRE is unable to secure customers for its rail operation
2 because of the City's omissions and actions. OGRE's prospective economic relationships would
3 have resulted in a future economic benefit to Plaintiffs.

4 214. The City knew of the OGRE Sublease, because Plaintiffs had informed the City of
5 the terms of the OGRE Sublease and requested that the City issue an NDA to the OGRE as a
6 subtenant.
7

8 215. The City knew that the success of the Project hinged on OBOT's ability to secure a
9 subtenant to rehabilitate the rail network and provide rail switching services.

10 216. The prospective economic relationship between OGRE and its potential rail
11 customers has been disrupted because of the City's wrongful conduct.

12 217. As a proximate result of the City's wrongful conduct, Plaintiffs have been
13 damaged in an amount to be proven at trial. Plaintiffs will continue to be damaged unless the
14 City is compelled to perform under the Lease and DA.
15

16 **TENTH CAUSE OF ACTION**

17 **Negligent Interference with Prospective Economic Relations (OGRE)**
18 **(Against Defendant)**

19 218. Plaintiffs reallege and incorporate by reference the allegations of paragraphs 1
20 through 217 as set forth above.

21 219. The City has negligently interfered with OGRE's prospective economic
22 relationships with potential customers.

23 220. OGRE's ability to obtain customers for rail services as provided for under the
24 OGRE Sublease would have resulted in a future economic benefit to OGRE.
25

26 221. The City knew of the OGRE Sublease, because Plaintiffs had informed the City of
27 the terms of the OGRE Subleases and requested that the City issue an NDA to the OGRE as a
28

1 subtenant.

2 222. The City knew or should have known that its wrongful conduct, as described
3 above, and failure to act with reasonable care would disrupt OGRE's economic relationship with
4 its potential customers.

5 223. The City breached its duty to Plaintiffs by failing to act with reasonable care
6 including but not limited to: (i) refusing to turn over the Rail R/O/W to OBOT; (ii) refusing to
7 issue an NDA to OGRE, (iii) failing to issue an estoppel without a false claim that OBOT
8 committed an Unmatured Event of Default; and (iv) breaching the Lease and DA as described
9 above.
10

11 224. OGRE's economic relationships with its potential customers have been disrupted.

12 225. The City negligently failed and continues to fail, to cure its negligence by failing
13 to perform under the Lease and DA.
14

15 226. As a proximate result of the City's negligence, Plaintiffs have been damaged in an
16 amount to be proven at trial. Plaintiffs will continue to be damaged unless the City is compelled
17 to perform under the Lease and DA.

18 **ELEVENTH CAUSE OF ACTION**

19 **Declaratory Relief**

20 **(Against Defendant)**

21 227. Plaintiffs reallege and incorporate by reference the allegations of paragraphs 1
22 through 226 as set forth above.

23 228. An actual, ripe, justiciable, and substantial controversy has arisen and now exists
24 between Plaintiffs and the City with respect to several issues. Plaintiffs contend that the City has
25 breached and/or repudiated its obligations under the Lease and DA. It is clear from the City's
26 responses to Plaintiffs' correspondences that the City disagrees. The City contends that OBOT
27
28

1 has committed an Event of Default under the Lease, and Plaintiffs dispute the City's contention.

2 229. Under Code of Civil Procedure Section 1060 *et seq.*, Plaintiffs seek a judicial
3 declaration, including but not limited to the following:

4 (i) OBOT and OGRE are not in default under the DA or the Lease;

5 (ii) neither the Lease nor the DA has been terminated, either automatically or otherwise
6 and both remain in full force and effect;

7 (iii) ALTERNATIVELY, if the Court determines OBOT has committed an unmatured
8 event of default or event of default, OBOT has commenced cure that vitiates any grounds
9 for termination of the Lease or DA by the City;

10 (iv) On March 11, 2016 OBOT properly invoked the Force Majeure Delay Lease
11 provisions and is entitled to an extension of at least two years of the Commencement
12 Date, as defined in the Lease, with a further continuing extension for so long as the City
13 fails in its obligations to identify the applicable Construction Codes and Standards and
14 applicable City regulations to which design and construction of the Terminal must comply
15 or otherwise fails to meet its obligations under the DA or Lease;

16 (v) the process is to be open so that permits requested by OBOT or OGRE will be issued
17 by the City as a ministerial act (without delay) and are not subject to discretionary review;

18 (vi) a creek protection permit is not required for the Project;

19 (vii) the City is required to turnover possession of the Property that Plaintiffs have a right
20 and obligation to improve, including but not limited to the Rail R/O/W;

21 (viii) the City is required to identify and to pursue third party funds for the Project,
22 including but not limited to funds generated by Measure BB;

23 (ix) the City is required to request and to process ACTC's disbursement of funds to the
24 Project;

1 (x) the City is required to execute a Rail Access Agreement with the Port pursuant to the
2 agreed upon terms between the City and Port as set forth in that certain Amended and
3 Restated Cost Sharing Agreement;

4 (xi) the rail network contemplated by the Rail Access Agreement is limited to the track
5 east of Wake Avenue;

6 (xii) there is no such thing as "Port property" and OBOT/OGRE have all the rights to
7 access the rail areas set forth in the Lease;

8 (xiii) the City and Port are obligated to support and not to interfere with Plaintiffs'
9 proceedings before the STB;

10 (xiv) the City is obligated to issue an NDA and estoppel for OBOT's subtenants without
11 reference to any unmaturred event of default or event of default;

12 (xv) the form of NDA has been approved by the City and is attached hereto as Exhibit 1.

13 (xvi) the City is obligated to accept Plaintiffs' Basis of Design and to meet and confer as
14 required by the Lease;

15 (xvii) OBOT and its subtenant may have beneficial use of the West Gateway, and use the
16 West Gateway for open storage consistent with the Lease;

17 (xviii) the City is obligated to construct the Public Access Improvements consistent with
18 its BCDC permit without seeking contribution from OBOT; and

19 (xviii) the City had knowledge prior to execution of the LDDA, DA, and Lease, that coal
20 was a potential commodity to be handled by the Terminal.

21
22 230. A judicial declaration is necessary and appropriate at this time under the
23 circumstances in order that Plaintiffs may ascertain their rights and interests with respect to the
24 contracts between Plaintiffs and the City.
25
26
27
28

1 **TWELFTH CAUSE OF ACTION**

2 **Specific Performance of Contract**

3 **(Against Defendant)**

4 231. Plaintiffs reallege and incorporate by reference the allegations of paragraphs 1
5 through 230 as set forth above.

6 232. The Lease and DA are sufficiently certain in their terms to be specifically
7 enforced.
8

9 233. OBOT has substantially performed each of the obligations to be performed by it
10 under the Lease, except for those excused or otherwise discharged by reason of the City's
11 conduct, including but not limited to payment of rent under the Lease.

12 234. The City has breached the Lease and DA as described above.

13 235. The City has received adequate consideration for the Lease and DA, including but
14 not limited to payment of rent under the Lease.
15

16 236. The Lease and DA are just and reasonable as to the City, and its assent was not
17 obtained by misrepresentation, concealment, circumvention, or unfair practices of Plaintiffs. At
18 all relevant times, the City was aware that Plaintiffs intended to build a bulk commodity terminal
19 that could be used to transport all legally permitted commodities, including, without limitation,
20 coal.

21 237. Plaintiffs have no adequate remedy at law for the City's wrongful conduct.
22 Plaintiffs will suffer irreparable harm to the extent Plaintiffs lose the unique opportunity complete
23 the Project in an ever-changing marketplace.
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PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for judgment as follows:

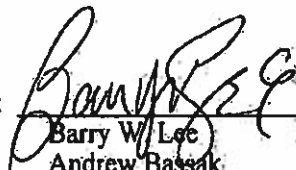
1. Compensatory damages in an amount to be proven at trial;
2. Declaratory relief as set forth above;
3. Specific performance of all of Defendant's contractual obligations set forth in the DA and Lease;
4. A preliminary and permanent injunction enjoining and forbidding the City from interfering or attempting to interfere with the completion of the Project by Plaintiffs;
5. For attorneys' fees and costs of suit incurred herein; and
6. For such other further relief as the Court may deem just and proper.

DEMAND FOR JURY TRIAL

Pursuant to California Code of Civil Procedure section 631, Plaintiffs hereby demand a trial by jury.

Dated: December 4, 2018

MANATT, PHELPS & PHILLIPS, LLP

By: 

Barry W. Lee

Andrew Bassak

Ana G. Guardado

Attorneys for Plaintiffs

OAKLAND BULK AND OVERSIZED

TERMINAL and OAKLAND GLOBAL RAIL
ENTERPRISE

EXHIBIT 1

NON-DISTURBANCE AND ATTORNMENT AGREEMENT

THIS NON-DISTURBANCE AND ATTORNMENT AGREEMENT ("Agreement"), dated as of _____, 2018 (the "Effective Date"), is entered into by and among the City of Oakland, a municipal corporation, (hereinafter called "**Master Landlord**"), Oakland Bulk and Oversized Terminal, LLC, a California limited liability company (hereinafter called "**Tenant**"), and Oakland Global Rail Enterprise, LLC, a California limited liability company (hereinafter called "**Subtenant**").

WITNESSETH:

WHEREAS, Master Landlord and Tenant entered into that certain Army Base Redevelopment Project Ground Lease, dated as of February 16, 2016 (the "**Master Lease**"), which Master Lease is attached hereto as Exhibit 1 and includes certain rights and obligations with respect to the property described in the Master Lease as the Premises (the "**Premises**");

WHEREAS, Tenant and Subtenant have entered into that certain Sublease Agreement (WGW Rail), dated as of June 26, 2018 (the "**Sublease**"), which Sublease is attached hereto as Exhibit 2 and includes certain rights and obligations with respect to a portion the Premises further described in the Sublease (the "**Sublease Premises**");

WHEREAS, Subtenant desires to be assured of continued occupancy of the Sublease Premises under the terms of the Sublease; and

WHEREAS, this Agreement is entered into pursuant to Section 12.5 of the Master Lease.

AGREEMENT

NOW, THEREFORE, in consideration of the mutual promises, covenants and agreements herein contained, the receipt and sufficiency of which are hereby acknowledged, the parties hereto, intending to be legally bound hereby, agree as follows:

1. Non-Disturbance; New Lease. In the event the Master Lease expires, terminates or is canceled or of the surrender thereof by Tenant, whether voluntary, involuntary, or by operation of law, and Master Landlord retakes possession of the Premises during the term of the Sublease, including but not limited to, due to a default by Tenant under the Master Lease (individually and collectively, the "**Master Lease Termination**"), subject to the terms of this Agreement:

(a) The Sublease shall not terminate as a result of the Master Lease Termination;

(b) So long as Subtenant is not then in default, after applicable notice and cure periods under any of the terms, covenants, or conditions of the Sublease, Master Landlord hereby agrees not to materially affect or materially disturb Subtenant's right to possession of the Sublease Premises and any of Subtenant's other rights under the Sublease in the exercise of Master Landlord's rights under the Master Lease;

(c) Master Landlord and Subtenant hereby agree that following the Master Lease Termination, the Sublease shall thereafter be deemed a direct lease between Master Landlord and Subtenant; and

(d) Within ~~(-)~~ thirty (30) days of the Master Lease Termination, Master Landlord and Subtenant agree to prepare and execute a new direct lease, ~~commercially reasonable terms acceptable to Master Landlord and Tenant based on the same or substantially similar terms as the Sublease,~~ for the remainder of the Sublease term (the "New Lease"), at which point the Sublease shall automatically terminate.

2. Limitation on Landlord's Liability under Sublease or New Lease. In the event of a Master Lease Termination, Master Landlord shall not:

(a) Be liable to Subtenant for any act, omission or breach of the Sublease by Tenant, except with respect to (i) continuing material defaults that first arose prior to the Master Lease Termination, but only to the extent continuing after the Master Lease Termination and (ii) matters that first arise after the Master Lease Termination to the extent provided for in the Master Lease;

(b) Be subject to any offsets or defenses which Subtenant might have against Tenant; provided, however, the foregoing shall not prevent any offsets or defenses under the Sublease or New Lease that (i) arise after the Master Lease Termination to the extent provided for in the Sublease or New Lease, whichever is then in force, and (ii) are expressly permitted under the terms of the Master Lease (provided that offsets and defenses against Master Landlord for continuing material defaults that first arose prior to the Master Lease Termination shall be limited to the extent continuing after the Master Lease Termination); or

(c) Be liable to Subtenant for any security deposit or prepaid rent or other fees or sums previously paid by Subtenant to Tenant unless such deposits are actually transferred to Master Landlord.

2. Attornment. Subject to the provisions of Sections 1 and 2, above, Subtenant hereby agrees to attorn to Master Landlord.

3. Subtenant Estoppel. Subtenant hereby agrees and represents:

3.1 That a true and accurate copy of the Sublease, including all exhibits and amendments, is attached hereto as Exhibit 2 and is unmodified, except for such attached and fully executed amendments, and to Subtenant's actual or constructive

knowledge is in full force and effect, as so amended;

3.2 Concurrently herewith, Subtenant has paid the following amounts to Tenant as "Rent" under the Sublease: None.

3.3 To Subtenant's actual or constructive knowledge, Subtenant is not aware of any defaults by any party under the Sublease which have not been cured, except as follows: (if none, insert "None"): None.

4. Continued Effect of Master Lease. As between Master Landlord and Tenant, ~~and Subtenant~~, the Sublease shall not alter, amend or otherwise modify any provisions of the Master Lease. This Agreement shall not release or discharge Tenant of any of its obligations under the Master Lease or release, discharge or alter the primary liability of Tenant to pay rent and all other sums due under the Master Lease and to perform and comply with all other obligations of Tenant under the Master Lease. Subtenant shall not violate any of the terms and conditions of the Master Lease to the extent applicable to the use and occupancy of the Sublease Premises. Subject to the terms of Sections 1 and 2, above, any breach of the Master Lease by Tenant ~~or Subtenant~~ and/or any breach of the Sublease by Subtenant which results in a breach of the Master Lease shall entitle Master Landlord to all the rights and remedies provided in the Master Lease. Nothing in this agreement shall be construed as validation of Tenant's ~~or Subtenant's~~ performance or lack thereof with respect to any of either of their obligations under the Master Lease, assurance that Tenant ~~or Subtenant have or have~~ has or has not defaulted under the Master Lease, or a waiver of Master Landlord's ability to pursue all appropriate remedies against Tenant ~~and/or Subtenant~~ under the Master Lease, and at law and equity for all such default, whether arising ~~arising~~ before or after the date of this Agreement.

5. Term of Master Lease and Sublease. Subtenant acknowledges and agrees that, subject to the provisions of this Agreement including without limitation Section 2 above, the term of the Sublease shall terminate upon the termination of the Master Lease and execution and delivery of the New Lease.

6. Entire Agreement; Successors. This Agreement contains the entire agreement between the parties hereto regarding the matters which are the subject of this Agreement. In the event of an assignment under the Master Lease by Master Landlord or, in the case of Tenant, an assignment permitted by Master Landlord under Section 12.1 of the Master Lease or a Permitted Transfer as defined in Section 12.3 of the Master Lease of Tenant's interest in the Master Lease with respect to all or a portion of the Sublease Premises, then the assignee of either Master Landlord or Tenant, as applicable, shall automatically be deemed the assignee of Master Landlord or Tenant, as applicable, under this Agreement, and such assignee shall automatically assume and be subject to all the terms herein and the obligations of Master Landlord or Tenant, as applicable, under this Agreement. No other assignments of this Agreement shall be permitted, ~~except as~~ except as described in the Master Lease. Subject to the foregoing, the terms, covenants and conditions of this Agreement shall apply to and bind the heirs, successors, the

executors and administrators and permitted assigns of all the parties hereto. To the extent applicable, this Agreement shall insure to the benefit of Subtenant's Mortgagee and its successors and assigns. The parties acknowledge and agree that no rule or construction, to the effect that any ambiguities are to be resolved against the drafting party, shall be employed in the interpretation of this Agreement. If any provision of this Agreement is determined to be illegal or unenforceable, such determination shall not affect any other provisions of this Agreement, and all such other provisions shall remain in full force and effect.

7. Counterparts. This Agreement may be executed in any number of counterparts, provided each of the parties hereto executes at least one counterpart; each such counterpart hereof shall be deemed to be an original instrument, but all such counterparts together shall constitute but one agreement.

8. Brokerage Commissions. Tenant and Subtenant covenant and agree that under no circumstances shall Master Landlord be liable for any brokerage commission or other charge or expense in connection with the Sublease or this Agreement and Tenant and Subtenant agree to protect, defend, indemnify and hold Master Landlord harmless from the same and from any cost or expense (including but not limited to attorneys' fees) incurred by Landlord in resisting any claim for any such brokerage commission.

9. Attorneys' Fees. In the event of any litigation between the parties hereunder to enforce or interpret this Agreement, the prevailing party (whether after trial or appeal) shall be entitled to recover from the party not prevailing its reasonable attorneys' fees and costs, in addition to all other proper relief.

10. Governing Law. This Agreement and the rights and obligations of the parties hereto are governed by the laws of the State of California.

[Rest of Page Left Blank]

IN WITNESS WHEREOF, the undersigned have caused this Agreement to be executed as of the Effective Date.

MASTER LANDLORD:

City of Oakland,
a municipal corporation

By: _____

Name: _____

Its: _____

Approved as to form and legality this
____ day of ____, 2018

City Attorney

TENANT:

**OAKLAND BULK AND OVERSIZED
TERMINAL, LLC,** a California limited
liability company

By: _____
Phil Tagami
Authorized Signatory

SUBTENANT:

**OAKLAND GLOBAL RAIL
ENTERPRISE, LLC,** a California limited
liability company

By: _____
Mark McClure
Manager

**EXHIBIT 1
MASTER LEASE**

[Attached]

**EXHIBIT 2
SUBLEASE**

[Attached]

EXHIBIT 3
MEMORANDUM OF AGREEMENT

[Attached]

RECORDING REQUESTED BY
AND WHEN RECORDED MAIL TO:

The City of Oakland
250 Frank H. Ogawa Plaza, 3rd Floor
Oakland, CA 94612
Reference: Oakland Army Base

With a copy to:

Oakland Bulk & Oversized Terminal, LLC
300 Frank H. Ogawa Plaza, Ste. 340
Oakland, CA 94612

(Space Above This Line For Recorder's Use Only)

**MEMORANDUM OF
NON-DISTURBANCE AND ATTORNMENT AGREEMENT**

This Memorandum of Non-Disturbance and Attornment Agreement (this "Memorandum"), dated as of _____, 2018, is entered into by and between the CITY OF OAKLAND, a municipal corporation ("Master Landlord"), Oakland Bulk and Oversized Terminal, LLC, a California limited liability company ("Tenant"), and Oakland Global Rail Enterprise, LLC, a California limited liability company ("Subtenant").

Master Landlord and Tenant have entered into that certain Army Base Gateway Redevelopment Project Ground Lease for West Gateway between Master Landlord and Tenant, dated February 16, 2016 (the "Master Lease"), whereby Master Landlord leased to Tenant, and Tenant leased from Master Landlord, that certain real property located in the City of Oakland as more particularly described in the Master Lease. A Memorandum of the Master Lease has been recorded in the Official Records of Alameda County as Document No. 2016-038036.

Tenant and Subtenant have entered into that certain Sublease Agreement (WGW Rail), dated December 15, 2016 (the "Sublease"), whereby Tenant subleased to Subtenant, and Subtenant leased from Tenant, that certain portion of the Master Lease premises located in the City of Oakland as more particularly described in Exhibit A attached hereto. A Memorandum of the Sublease has been recorded in the Official Records of Alameda County as Document No. _____.

Master Landlord, Tenant and Subtenant have entered into that certain Non-Disturbance and Attornment Agreement dated _____, 2018, with respect to the Master Lease and the Sublease (the "NDA"). All terms in this Memorandum that are not defined herein shall have the same meanings as set forth in the NDA.

This Memorandum incorporates herein in full, by this reference, all provisions of

the NDA. This Memorandum is solely for recording and notice purposes and in no way alters, amends, modifies or supplements the provisions of the Master Lease, Sublease or NDA. In the event of any conflict between any provision of the NDA and any provision of this Memorandum, the NDA shall control.

This Memorandum shall extend to and be binding upon the parties hereto and their legal representatives, heirs, successors, and assigns.

This Memorandum may be executed in counterparts, each of which is deemed to be an original, and all such counterparts constitute one and the same instrument.

IN WITNESS WHEREOF, Master Landlord, Tenant and Subtenant have executed this Memorandum as of the date first written above.

MASTER LANDLORD:

City of Oakland,
a municipal corporation

By: _____

Name: _____

Its: _____

Approved as to form and legality this
_____ day of _____, 2018

City Attorney

TENANT:

**OAKLAND BULK AND OVERSIZED
TERMINAL, LLC,** a California limited
liability company

By: _____
Phil Tagami
Authorized Signatory

SUBTENANT:

**OAKLAND GLOBAL RAIL
ENTERPRISE, LLC,** a California limited
liability company

By: _____
Mark McClure
Manager

**EXHIBIT A
TO
MEMORANDUM**

LEGAL DESCRIPTION OF REAL PROPERTY

[See attached]

EXHIBIT D

Selected City of Oakland Demurrer Filings with the Superior Court of the State of California

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12 Attorneys for Defendant
13 CITY OF OAKLAND

14 SUPERIOR COURT OF THE STATE OF CALIFORNIA
15 COUNTY OF ALAMEDA
16

17 OAKLAND BULK AND OVERSIZED
18 TERMINAL, LLC, a California limited
19 liability company, and OAKLAND
20 GLOBAL RAIL ENTERPRISE, LLC, a
21 California limited liability company,

20 Plaintiffs,

21 v.

22 CITY OF OAKLAND, a California
23 municipal corporation,

24 Defendant.

Case No. RG18930929

ASSIGNED FOR PURPOSES TO
JUDGE JO-LYNNE Q. LEE, DEPT 18

**DEFENDANT CITY OF OAKLAND'S
NOTICE OF DEMURRER AND
DEMURRER TO PLAINTIFFS'
COMPLAINT**

Reservation No. R-2039261

Date: April 30, 2019
Time: 3:00 p.m.

Action Filed: December 4, 2018
Trial Date: Not Set

1 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

2 **PLEASE TAKE NOTICE** that on April 30, 2019 at 3:00 p.m., or as soon
3 thereafter as the matter may be heard in Department 18 of the above-entitled Court, located at
4 1221 Oak Street, Oakland, California, defendant City of Oakland (the "City") will and hereby
5 does demur under Code of Civil Procedure section 430.10(e) to each of the causes of action
6 asserted in the Complaint filed by plaintiffs Oakland Bulk and Oversized Terminal, LLC and
7 Oakland Global Rail Enterprise, LLC (together, "Plaintiffs") on the grounds that Plaintiffs do not
8 "state facts sufficient to constitute a cause of action," and that the claims are barred by res
9 judicata, the relevant statute of limitations, and the Government Claims Act. The City will request
10 that the Court sustain the demurrer without leave to amend.

11 As explained in the concurrently filed Declaration of Ellen A. Cirangle, the parties
12 met and conferred as required by Code of Civil Procedure section 430.41(a).

13 This demurrer is based on this Notice and Demurrer and Demurrer, the
14 Memorandum of Points and Authorities in Support of the Demurrer, the Declaration of Ellen A.
15 Cirangle in Support of the Demurrer, the Request for Judicial Notice in Support of the Demurrer,
16 the Complaint, all other pleadings and papers on file, and any further evidence or arguments that
17 may be submitted to the Court at or before the hearing on the Demurrer.

18 **GENERAL DEMURRER**

19 The City hereby demurs to the causes of action asserted against it in the Complaint
20 filed by Plaintiffs as follows:

21 **Demurrer to the First Cause of Action (Breach of Written Contract (Lease))**

22 1. The City generally demurs to Plaintiffs' First Cause of Action for Breach
23 of Written Contract (Lease) under Code of Civil Procedure section 430.10(e) because it (a) does
24 not "state facts sufficient to constitute a cause of action" and (b) is barred by res judicata.

25 **Demurrer to the Second Cause of Action (Anticipatory Breach (Lease))**

26 2. The City generally demurs to Plaintiffs' Second Cause of Action for
27 Anticipatory Breach (Lease) under Code of Civil Procedure section 430.10(e) because it (a) does
28 not "state facts sufficient to constitute a cause of action" and (b) is barred by res judicata.

1 **Demurrer to Third Cause of Action**

2 **(Breach of the Implied Covenant of Good Faith and Fair Dealing (Lease))**

3 3. The City generally demurs to Plaintiffs' Third Cause of Action for Breach
4 of the Implied Covenant of Good Faith and Fair Dealing (Lease) under Code of Civil Procedure
5 section 430.10(e) because it (a) does not "state facts sufficient to constitute a cause of action" and
6 (b) is barred by res judicata.

7 **Demurrer to Fourth Cause of Action (Fraudulent Inducement / False Promise)**

8 4. The City generally demurs to Plaintiffs' Fourth Cause of Action for
9 Fraudulent Inducement / False Promise under Code of Civil Procedure section 430.10(e) because
10 it (a) does not "state facts sufficient to constitute a cause of action," (b) is barred by res judicata,
11 (c) is barred on its face by the three-year statute of limitations (Civ. Proc. Code § 338(d)), and
12 (d) is barred by the Government Claims Act (Gov't Code § 815(a)).

13 **Demurrer to Fifth Cause of Action**

14 **(Intentional Interference with Contractual Relations (TLS))**

15 5. The City generally demurs to Plaintiffs' Fifth Cause of Action for
16 Intentional Interference with Contractual Relations (TLS) under Code of Civil Procedure section
17 430.10(e) because it (a) does not "state facts sufficient to constitute a cause of action," (b) is
18 barred by res judicata, (c) is barred on its face by the two-year statute of limitations (Civ. Proc.
19 Code § 339(1)), and (d) is barred by the Government Claims Act (Gov't Code § 815(a)).

20 **Demurrer to Sixth Cause of Action**

21 **(Intentional Interference with Prospective Economic Relations (TLS and ITS))**

22 6. The City generally demurs to Plaintiffs' Sixth Cause of Action for
23 Intentional Interference with Prospective Economic Relations (TLS and ITS) under Code of Civil
24 Procedure section 430.10(e) because it (a) does not "state facts sufficient to constitute a cause of
25 action," (b) is barred by res judicata, (c) is barred on its face by the two-year statute of limitations
26 (Civ. Proc. Code § 339(1)), and (d) is barred by the Government Claims Act (Gov't Code §
27 815(a)).

28 ///

1 **Demurrer to Seventh Cause of Action**

2 **(Negligent Interference with Prospective Economic Relations (TLS and ITS))**

3 7. The City generally demurs to Plaintiffs' Seventh Cause of Action for
4 Negligent Interference with Prospective Economic Relations (TLS and ITS) under Code of Civil
5 Procedure section 430.10(e) because it (a) does not "state facts sufficient to constitute a cause of
6 action," (b) is barred by res judicata, (c) is barred on its face by the two-year statute of limitations
7 (Civ. Proc. Code § 339(1)), and (d) is barred by the Government Claims Act (Gov't Code §
8 815(a)).

9 **Demurrer to Eighth Cause of Action**

10 **(Intentional Interference with Contractual Relations (OGRE))**

11 8. The City generally demurs to Plaintiffs' Eighth Cause of Action for
12 Intentional Interference with Contractual Relations (OGRE) under Code of Civil Procedure
13 section 430.10(e) because it (a) does not "state facts sufficient to constitute a cause of action,"
14 (b) is barred by res judicata, (c) is barred on its face by the two-year statute of limitations (Civ.
15 Proc. Code § 339(1)), and (d) is barred by the Government Claims Act (Gov't Code § 815(a)).

16 **Demurrer to Ninth Cause of Action**

17 **(Intentional Interference with Prospective Economic Relations (OGRE))**

18 9. The City generally demurs to Plaintiffs' Ninth Cause of Action for
19 Intentional Interference with Prospective Economic Relations (OGRE) under Code of Civil
20 Procedure section 430.10(e) because it (a) does not "state facts sufficient to constitute a cause of
21 action," (b) is barred by res judicata, (c) is barred on its face by the two-year statute of limitations
22 (Civ. Proc. Code § 339(1)), and (d) is barred by the Government Claims Act (Gov't Code §
23 815(a)).

24 **Demurrer to Tenth Cause of Action**

25 **(Negligent Interference with Prospective Economic Relations (OGRE))**

26 10. The City generally demurs to Plaintiffs' Tenth Cause of Action for
27 Negligent Interference with Prospective Economic Relations (OGRE) under Code of Civil
28 Procedure section 430.10(e) because it (a) does not "state facts sufficient to constitute a cause of

1 action," (b) is barred by res judicata, (c) is barred on its face by the two-year statute of limitations
2 (Civ. Proc. Code § 339(1)), and (d) is barred by the Government Claims Act (Gov't Code §
3 815(a)).

4 **Demurrer to Eleventh Cause of Action (Declaratory Relief)**

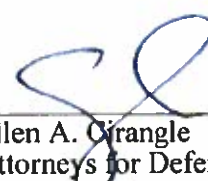
5 11. The City generally demurs to Plaintiffs' Eleventh Cause of Action for
6 Declaratory Relief under Code of Civil Procedure section 430.10(e) because it (a) does not "state
7 facts sufficient to constitute a cause of action" and (b) is barred by res judicata.

8 **Demurrer to Twelfth Cause of Action (Specific Performance of Contract)**

9 12. The City generally demurs to Plaintiffs' Twelfth Cause of Action for
10 Specific Performance of Contract under Code of Civil Procedure section 430.10(e) because it
11 (a) does not "state facts sufficient to constitute a cause of action" and (b) is barred by res judicata.

12 Dated: January 14, 2019

LUBIN OLSON & NIEWIADOMSKI LLP

13
14 By: 

15 Ellen A. Cirangle
16 Attorneys for Defendant
17 CITY OF OAKLAND
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18 Attorneys for Defendant
19 CITY OF OAKLAND

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28
SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA

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

Plaintiffs,

v.

CITY OF OAKLAND, a California
municipal corporation,

Defendant.

Case No. RG18930929

ASSIGNED FOR PURPOSES TO
JUDGE JO-LYNNE Q. LEE, DEPT 18

**MEMORANDUM OF POINTS OF
AUTHORITIES IN SUPPORT OF
DEFENDANT CITY OF OAKLAND'S
DEMURRER TO PLAINTIFFS'
COMPLAINT**

Reservation No. R-2039261

Date: April 30, 2019
Time: 3:00 p.m.

Action Filed: December 4, 2018
Trial Date: Not Set

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	CV 04-8182 CBM, 2008 WL 11334421, at *9 (C.D. Cal. April 3, 2008).....	13

1	<i>Vaca v. Wachovia Mortg. Corp.</i> ,	
2	198 Cal. App. 4th 737 (2011).....	9
3	<i>Villacres v. ABM Indus. Inc.</i> ,	
4	189 Cal. App. 4th 562 (2010).....	10
5	<i>W. Sys., Inc. v. Ulloa</i> ,	
6	958 F.2d 864 (9th Cir. 1992).....	13
7	<i>Weikel v. TCW Realty Fund II Holding Co.</i> ,	
8	55 Cal. App. 4th 1234 (1997).....	12
9	<i>Westside Ctr. Assocs. v. Safeway Stores 23, Inc.</i> ,	
10	42 Cal. App. 4th 507 (1996).....	19
11	<i>Zakinov v. Blue Buffalo Pet Products, Inc.</i> ,	
12	17-cv-01301-AJB-WVG, 2018 WL 1426932 (S.D. Cal. March 22, 2018).....	13
13	Statutes	
14	Civ. Code	
15	§ 3390(e)	20
16	Civ. Proc. Code	
17	§ 338(d).....	14
18	§ 339(1).....	15, 16
19	§ 430.10(e)	9
20	Gov't Code	
21	§ 815(a)	14
22	§ 818.8.....	14
23	§ 822.2.....	14
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1 **I. INTRODUCTION**

2 This lawsuit arises from agreements between plaintiff Oakland Bulk and
3 Oversized Terminal, LLC ("OBOT") and defendant City of Oakland (the "City") related to the
4 development of a rail-to-ship bulk commodity terminal at the former Oakland Army Base.
5 Plaintiffs claim the City has run a continuous campaign to interfere with OBOT's development of
6 a coal terminal at the site since at least 2012. But OBOT already sued the City for this alleged
7 campaign. The prior action involved the same parties (or their affiliates), the same agreements,
8 the same development, the same type of alleged wrongdoing, and the same injury. Plaintiffs
9 elected to waive any damage claim in the prior action and conceded this would preclude them
10 from seeking damages in any subsequent lawsuit. Res judicata bars Plaintiffs' claims here
11 because they either were brought or could have been brought in the prior action. The Government
12 Claims Act and the relevant statutes of limitations also bar Plaintiffs' tort claims, and Plaintiffs
13 otherwise fail to state viable causes of action.

14 **II. STATEMENT OF FACTS**

15 **A. Plaintiffs' allegations in this action**

16 **1. The City and OBOT enter into agreements related to the Project.**

17 The City and OBOT (or its predecessors-in-interest) entered into several
18 agreements related to the development of a portion of the former Oakland Army Base called the
19 West Gateway into a rail-to-ship bulk commodity terminal and the reestablishment of rail
20 improvements (the "Project"). Compl. ¶¶ 1-4, 18-20. These included the Exclusive Negotiation
21 Agreement dated January 22, 2010, the Army Base Gateway Redevelopment Project Lease
22 Disposition and Development Agreement dated December 4, 2012 (the "LDDA"), the
23 Development Agreement dated July 16, 2013 (the "DA"), and the Army Base Gateway
24 Development Project Ground Lease for West Gateway dated February 16, 2016 (the "Lease"). *Id.*
25 ¶¶ 3, 26-30. OBOT subleased the Project's rail improvements to its affiliate plaintiff Oakland
26 Global Rail Enterprise, LLC ("OGRE"). *Id.* ¶ 13.

27 **2. The City's "uninterrupted pattern of delay and interference."**

28 In 2014, it was revealed that OBOT intended to develop the Project to transport

1 coal—not iron ore and copper concentrate as previously represented. *Id.* ¶¶ 37, 38, 60. Plaintiffs
2 allege that, because the City is opposed to having coal shipped through the Project (*id.* ¶¶ 58, 60,
3 113, 147, 174), “[o]ver the last several years, the City has engaged in an uninterrupted pattern of
4 delay and interference, all with the objective of preventing OBOT from completing this project.”
5 *Id.* ¶¶ 1. The City’s alleged “delay and interference” included:

- 6 • “For over six years the City has intentionally blocked and interfered with OBOT’s
7 efforts to acquire rights for, to access properties for, and to rehabilitate [] essential
8 Rail Improvements.” *Id.* ¶ 87; *see also id.* at ¶ 93 (“[T]he Port and the City have
9 failed for over six years to process, to secure and to provide a written Rail Access
10 Agreement as required by Section 5.2.3 of the Lease.”).
- 11 • On June 17, 2014, the Oakland City Council adopted a resolution opposing the
12 transportation of coal in Oakland (the “2014 Resolution”). *Id.* ¶ 60.
- 13 • At various times in 2014, the City interfered with OBOT’s ability to use the Joint
14 Environmental Remediation Fund and Public Improvement funds to remediate the
15 project. *Id.* ¶¶ 42-47. In 2015, the City interfered with OBOT’s requests for
16 disbursement of Measure BB funds from the Alameda County Transportation
17 Commission because of the “potential for the export of coal.” *Id.* ¶¶ 48-59.
- 18 • On November 6, 2015, Assistant Oakland City Administrator Claudia Cappio sent
19 an internal memorandum requesting that the Planning and Building Departments
20 notify the City Administrator when they received permit applications for the
21 Project. *Id.* ¶¶ 74-77.
- 22 • “Since 2015, the City or the Port, or both, have objected to each petition that
23 OGRE filed” with the Surface Transportation Board “to facilitate track
24 rehabilitation and operation of the rail.” *Id.* ¶¶ 104-105.
- 25 • On March 9, 2016, the City notified OBOT that its permit applications are subject
26 to additional discretionary approvals, causing OBOT to give notice of Force
27 Majeure Delay under the Lease on March 11, 2016. *Id.* ¶¶ 78-86.
- 28 • In 2016, the City “continued to yield to political pressure to the Project’s
detriment” and contracted with Environmental Science Associates (“ESA”) to
perform a health and safety review. *Id.* ¶ 61.
- On July 27, 2016, the City enacted an ordinance prohibiting the storage and
handling of coal at bulk-good facilities in Oakland (the “Ordinance”) and adopted
a resolution applying the Ordinance to OBOT (the “Resolution”). *Id.* ¶ 61.

Since passing the Ordinance in 2016, the City allegedly continued “uninterrupted”
its efforts to “kill” the project because of its opposition to coal. *See, e.g., id.* ¶¶ 1, 112-153.

3. Since 2012, the City breached the agreements and harmed Plaintiffs.

Plaintiffs claim the City’s “uninterrupted pattern of delay and interference”
breached the DA and the Lease, delayed the Project, and forced Plaintiffs to incur significant out-

1 of-pocket costs. *Id.* ¶ 157. Plaintiffs seek over \$100 million for the damage allegedly caused by
2 the “enforcement of the illegal Ordinance and Resolution.” *Id.* ¶¶ 158, 159, 169. Plaintiffs also
3 claim the City tortiously interfered with their actual and prospective relationships with third
4 parties, which made it harder “to timely complete the project” (*id.* ¶¶ 181-237), and that the City
5 fraudulently induced OBOT to develop the Project. *Id.* ¶¶ 175, 178. Besides monetary relief,
6 Plaintiffs seek declaratory relief and specific performance. *Id.* ¶¶ 227-237.

7 **B. OBOT’s allegations in its prior federal action against the City.**

8 This is the second lawsuit in two years that OBOT has filed against the City for
9 breach of contract related to the Project. On December 7, 2016, OBOT filed a 41-page complaint
10 (the “Federal Complaint”) against the City in the United States District Court for the Northern
11 District of California (the “Federal Action”). Request for Judicial Notice (“RJN”), Ex. A.

12 The Federal Action and this action concern the same agreements relating to the
13 same Project—the West Gateway development. *Compare* Compl. ¶¶ 3, 13, 18-21, 26-32, 38-39,
14 with RJN, Ex. A ¶¶ 3, 4, 5, 21-31, 34-35, 122.¹ In the Federal Action, OBOT claimed the City
15 engaged in a multi-year “campaign to ban the transport of coal” at the Project (RJN, Ex. A ¶¶ 7-
16 8); in this action, Plaintiffs claim the City engaged in an “uninterrupted pattern of delay and
17 interference” to ban the transport of coal at the Project. Compl. ¶¶ 1, 58, 60, 113, 147, 174.

18 The City’s “campaign” in the Federal Action and its “uninterrupted pattern of
19 delay and interference” in this action took place simultaneously and involved much of the same
20 purported wrongdoing by the City. *Compare, e.g.,* RJN, Ex. A ¶¶ 8, 36-37, 41-44, 46, 78, with
21 Compl. ¶¶ 60, 61, 66, 147. For example, the “campaign” and the “uninterrupted pattern of delay
22 and interference” both include the 2014 Resolution, the City’s statements in opposition to coal
23 from 2014 to 2016, the 2016 Ordinance and Resolution, and allegedly improper work done by
24 ESA to support the Ordinance. *See id.* Indeed, according to Plaintiffs, the “campaign”

25
26 ¹ OBOT’s June 14, 2017 amended complaint requested injunctive relief “prohibiting the City
27 from asserting that OBOT has breached the DA, the LDDA, and the Ground Lease for West
28 Gateway, dated February 16, 2016, by any failure to perform resulting from the City’s
misconduct.” RJN, Ex. B at 41. OBOT also asserted that its reference to the DA in its original
Federal Complaint encompassed the Lease. RJN, Ex. C at 9 n.12 (noting the Lease is “expressly
incorporated into the DA”); *see also* RJN, Ex. D at 3 n.2 (stating the “lease is part of the DA.”).

1 “culminated” with the City’s adoption of the Ordinance. RJN, Ex. A at ¶ 8.

2 In the Federal Action, OBOT alleged the City’s “campaign” was a breach of
3 contract and caused the same harm alleged here (i.e., a diminution in value of OBOT’s
4 investment of the Project, out-of-pocket costs, and loss of a sublease). *Compare* RJN, Ex. A ¶¶
5 32-35, 123, 124, 161-67, pp. 40-41, *with* Compl. ¶¶ 158, 159, 169, 178, 181-187.

6 Plaintiffs seek damages in this action because they voluntarily waived damages in
7 the Federal Action. In July 2017, OBOT waived its damage claims to avoid a jury trial in the
8 Federal Action. RJN, Ex. E, at 7:8-22, 9:7-8. The federal court warned OBOT that “res judicata
9 would bar [it] from seeking damages on the same claims or claims that could have been brought
10 in this case.” *Id.* at 9:9-13. OBOT conceded that the federal court was “100 percent right that
11 there ... will be res judicata impacts” but OBOT confirmed it was “not seeking damages in the
12 trial ... and if [it] win[s], [it] do[es] not intend to seek further relief.” *Id.* at 9:14-22.

13 On May 15, 2018, the federal court issued a final judgment granting OBOT
14 declaratory and injunctive relief on OBOT’s breach of contract claim. Compl. ¶¶ 62-63; RJN,
15 Exs. F-G. The City’s appeal of that decision is pending. Compl. ¶ 67.

16 **III. ARGUMENT**

17 **A. The applicable legal standard.**

18 A defendant may demur to a complaint on the grounds that it “does not state facts
19 sufficient to constitute a cause of action.” Civ. Proc. Code § 430.10(e). Courts should sustain a
20 demurrer if the action is barred by the doctrine of res judicata. *See Boeken v. Philip Morris USA,*
21 *Inc.*, 48 Cal. 4th 788, 792 (2010). Similarly, “[w]hen a ground for objection to a complaint, such
22 as the statute of limitations, appears on its face or from matters of which the court may or must
23 take judicial notice, a demurrer on that ground is proper.” *Vaca v. Wachovia Mortg. Corp.*, 198
24 Cal. App. 4th 737, 746 (2011) (citation omitted).

25 **B. Plaintiffs’ claims are barred by res judicata.**

26 OBOT’s prior Federal Action was based on the same alleged campaign to ban coal
27 at the terminal that is the subject of this Complaint, and OBOT challenged that campaign on the
28 same alleged contractual right to handle coal at the terminal that it invokes here. OBOT expressly

1 disclaimed damages in the Federal Action after being put on notice by the Court that doing so
2 would preclude OBOT from ever seeking damages for claims it brought or could have brought in
3 the Federal Action. Res judicata precludes all of Plaintiffs' claims here.²

4 "Res judicata, also known as claim preclusion, bars litigation in a subsequent
5 action of any claims that were raised or could have been raised in the prior action." *Owens v.*
6 *Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 713 (9th Cir. 2001) (citation omitted). Res
7 judicata applies if there is a "final judgment on the merits," "identity or privity between parties"
8 and "identity of claims." *Id.* (citation omitted). Similarly, under California law, res judicata
9 prevents relitigation of the same cause of action between the same parties or parties in privity
10 with them. *Mycogen Corp. v. Monsanto Co.*, 28 Cal. 4th 888, 896–97 (2002). If a plaintiff
11 prevails in an action, the cause is merged into the judgment and may not be asserted in a
12 subsequent lawsuit. *Id.* Res judicata bars all issues that could have been raised—not only issues
13 actually raised. *Villacres v. ABM Indus. Inc.*, 189 Cal. App. 4th 562, 569 (2010).

14 "Res judicata precludes piecemeal litigation by splitting a single cause of action
15 or relitigation of the same cause of action on a different legal theory or for different relief.' A
16 predictable doctrine of res judicata benefits both the parties and the courts because it 'seeks to
17 curtail multiple litigation causing vexation and expense to the parties and wasted effort and
18 expense in judicial administration.'" *Mycogen*, 28 Cal. 4th at 897 (citations omitted).

19 **1. There is a final judgment on the merits in the Federal Action.**

20 The federal court entered judgment on May 23, 2018. RJN, Ex. G. The City's
21 pending appeal does not impact the finality of that judgment. *Calhoun v. Franchise Tax Bd.*, 20

22
23 ² Federal law determines the effect of the judgment in the Federal Action. *Guerrero v. Cal. Dep't*
24 *of Corrs. & Rehab.*, 28 Cal. App. 5th 1091, 239 Cal. Rptr. 3d 726, 733 (2018). Under federal law,
25 courts apply state law in diversity-jurisdiction cases and federal law in federal-question cases. *Id.*
26 (citations omitted). It is unclear whether federal or state res judicata law applies here because the
27 Federal Action was based on federal-question jurisdiction, but the federal court rendered
28 judgment only on OBOT's state-law breach-of-contract claim over which it had exercised
supplemental jurisdiction. *Compare Chudacoff v. Univ. Med. Ctr.*, Case No. 11–16232, 2013 WL
1679357, at *1 (9th Cir. April 18, 2013) (applying federal law), with *Hardy v. America's Best*
Home Loans, 232 Cal. App. 4th 795, 806 (2014) (applying California law). The Court need not
decide this issue because the claims are barred under either state or federal law.

1 Cal. 3d 881, 887 (1978) (“We note that an appeal from the federal judgment is now pending in
2 the Ninth Circuit Court of Appeals. The federal rule is that ‘a judgment or order, once rendered, is
3 final for purposes of res judicata until reversed on appeal or modified or set aside in the court of
4 rendition.’ A federal judgment is as final in California courts as it would be in federal courts, and
5 the Board thus correctly relies on the judgment that followed the trial.”) (citations omitted).

6 **2. The same parties (or their privies) were involved in both actions.**

7 The same parties were involved in both actions: OBOT and the City. Although
8 OGRE was not a named party in the Federal Action, OGRE was in privity with OBOT. *See In re*
9 *Gottheiner*, 703 F.2d 1136, 1140 (9th Cir. 1983) (privity exists if there is “sufficient commonality
10 of interest” between the parties) (citation omitted); *see also Citizens for Open Access to Sand &*
11 *Tide, Inc. v. Seadrift Ass’n*, 60 Cal. App. 4th 1053, 1069 (1998) (“The concept of privity ... refers
12 ‘to a mutual or successive relationship to the same rights of property, or to such an identification
13 in interest of one person with another as to represent the same legal rights’”). OGRE and OBOT
14 are affiliates who share a common owner and OBOT disclosed OGRE as an interested party in
15 the Federal Action. Compl. ¶ 13; RJN, Ex. H; RJN, Ex. I at 3, n.4. OGRE’s only interest in the
16 Project arises from its sublease with OBOT for the rail portion of the Project (Compl. ¶ 13), and
17 the rail portion of the Project was at issue in the Federal Action. *See, e.g.,* RJN, Ex. A, ¶¶ 33, 86;
18 RJN, Ex. I at 3-4. OGRE thus has the same interest that OBOT had in the Federal Action, and
19 OBOT represented both its and OGRE’s interests in that action.

20 **3. There is an identity of claims.**

21 There is an “identity of claims”: Plaintiffs could have brought the claims asserted
22 in this action in the Federal Action because they involve the same “primary right” under
23 California law and arise from the same “transaction or series of transactions” under federal law.

24 a. Plaintiffs’ claims involve the same “primary right.”

25 “California law approaches the issue by focusing on the ‘primary right’ at stake: if
26 two actions involve the same injury to the plaintiff and the same wrong by the defendant then the
27 same primary right is at stake even if in the second suit the plaintiff pleads different theories of
28 recovery, seeks different forms of relief and/or adds new facts supporting recovery.” *Cal Sierra*

1 *Dev., Inc. v. George Reed, Inc.*, 14 Cal. App. 5th 663, 675 (2017) (citation omitted). “A primary
2 right is the right to be free of a particular injury,” and the “cause of action is the right to obtain
3 redress for a harm suffered, regardless of the specific remedy sought or the legal theory (common
4 law or statutory) advanced.” *Id.* at 675-76 (citations omitted). “[T]here is only a single cause of
5 action for the invasion of one primary right and the harm suffered is the significant factor.” *Id.*
6 (citations omitted).

7 The primary right here is the same as in the Federal Action: OBOT’s right to
8 pursue development of a coal terminal at the Project. As the Court stated in the Federal Action:
9 OBOT’s claim was that it “has a contractual right to pursue development of a coal terminal to the
10 extent allowed under the municipal code as it existed when the [DA] was signed. ... This is the
11 right [OBOT] is suing on.” RJN, Ex. J at 1. In the Federal Action, OBOT sought relief for the
12 injury allegedly suffered when the City interfered with this right. RJN, Ex. A, ¶¶ 161-167. OBOT
13 sues for the same primary right here—injury suffered by the City’s alleged interference with
14 OBOT’s purported contractual right to pursue development of a coal terminal at the Project. *See,*
15 *e.g.*, Compl. ¶¶ 1, 58, 60-67, 113, 147, 174 ; *see also Weikel v. TCW Realty Fund II Holding Co.*,
16 55 Cal. App. 4th 1234, 1248 (1997) (finding later claims barred by res judicata because plaintiff’s
17 primary right in both lawsuits was “interest in constructing a building” and defendant’s duty “not
18 to unreasonably interfere” with these rights).

19 Plaintiffs cannot save their claims here by alleging additional facts and causes of
20 action because all of OBOT’s claims in both cases stem from the City’s alleged ongoing
21 interference with OBOT’s right to develop a coal terminal. “‘Res judicata bars the relitigation not
22 only of claims that were conclusively determined in the first action, but also matter that was
23 within the scope of the action, related to the subject matter, and relevant to the issues so that it
24 could have been raised.’ ‘A party cannot by negligence or design withhold issues and litigate
25 them in consecutive actions. Hence the rule is that the prior judgment is res judicata on matters
26 which were raised or could have been raised, on matters litigated or litigable.’” *Burdette v.*
27 *Carrier Corp.*, 158 Cal. App. 4th 1668, 1674–75 (2008) (citations omitted); *Cal Sierra Dev.*, 14
28 Cal. App. 5th at 675 (adding “new facts supporting recovery” does not save the second claim).

1 Nor can Plaintiffs save part of their claims by asserting wrongdoing after the
2 Federal Action, because those allegations relate to Plaintiffs' same injury from the City's
3 "continuing" wrongdoing. There is no alleged violation of a new or different "primary right" after
4 the Federal Action. *See, e.g., U.S. v. E. Mun. Water Dist.*, CV 04-8182 CBM, 2008 WL
5 11334421, at *9 (C.D. Cal. April 3, 2008) ("[A]llegations that Defendants continue to take
6 actions inconsistent with their obligations under the [contract] do not give rise to additional
7 breaches of the agreement") (citing *Abbott v. The 76 Land & Water Co.*, 161 Cal. 42, 48-49
8 (1911)). Plaintiffs were therefore required to seek *all* damages in the Federal Action. Yet now, for
9 example, Plaintiffs seek delay damages for the City's defense and appeal of the Federal Action.
10 Compl. ¶¶ 66-67. But res judicata required Plaintiffs to seek damages for "delay in the
11 performance occasioned by the litigation" in the Federal Action "even if they [were] still
12 speculative at the time of the suit." *Mycogen*, 28 Cal. 4th at 906-07. A plaintiff "is bound to prove
13 in the first action, not only such damage as has been actually suffered, but also such prospective
14 damage by reason of the breach as he may be legally entitled to; for *the judgment he recovers in*
15 *such action will be a conclusive adjudication as to the total damage on account of the breach.*"
16 *Id.* at 907 (quoting *Abbott*, 161 Cal. at 48) (emphasis added).

17 b. Plaintiffs' claims arise from the same series of transactions.

18 For the same reasons, res judicata bars Plaintiffs' claims under federal law. *See*
19 *Guerrero*, 28 Cal. App. 5th 1091, 239 Cal. Rptr. 3d at 732 ("The basic principles of claim
20 preclusion are roughly the same under California and federal law."). Under federal law, a later
21 action is barred if it arises from the same "transaction or series of transactions" as the original
22 action. *W. Sys., Inc. v. Ulloa*, 958 F.2d 864, 871 (9th Cir. 1992). Whether two claims are part of
23 the same series of transactions depends on "whether they are related to the same set of facts and
24 whether they could be conveniently tried together." *Id.* (citation omitted). The fact that both cases
25 involve infringement of the same primary right, although not dispositive, is a factor supporting a
26 finding the transactions are the same. *Zakinov v. Blue Buffalo Pet Products, Inc.*, 17-cv-01301-
27 AJB-WVG, 2018 WL 1426932, *6 (S.D. Cal. March 22, 2018).

28 Plaintiffs here claim the City's actions, including actions also at issue in the

1 Federal Action, were all part of an “uninterrupted pattern of delay and interference.” *See supra* at
2 II.A.2. Plaintiffs have thus framed all of their factual allegations in this lawsuit as part of the same
3 series of transactions as the Federal Action. Having pled all these facts as part of a single lawsuit
4 here, Plaintiffs admit these issues could be conveniently tried together. Even if federal law is
5 applied, res judicata bars Plaintiffs’ claims. *Owens*, 244 F.3d at 713 (res judicata bars all claims
6 that “could have been raised” in the first action).

7 Accordingly, res judicata bars Plaintiffs’ entire complaint.³

8 **C. Plaintiffs’ seven tort claims are barred by the Government Claims Act.**⁴

9 The Government Claims Act exempts the City from liability for damages, except
10 where a statute provides otherwise. Gov’t Code § 815(a). Plaintiffs fail to allege any statutory
11 basis for liability for their tort claims (the fourth through tenth causes of action).⁵

12 **D. Plaintiffs’ seven tort claims are barred by the relevant statutes of limitations.**

13 **1. OBOT’s fraudulent inducement / false promise claim is time barred.**

14 OBOT’s fraud claim (the fourth cause of action) is barred by the three-year statute
15 of limitations. Civ. Proc. Code § 338(d); *Kline v. Turner*, 87 Cal. App. 4th 1369, 1373-74 (2003).
16 Plaintiffs filed the complaint on December 4, 2018, so the claim is barred if it accrued before
17 December 4, 2015. *See Britton v. Girardi*, 235 Cal. App. 4th 721, 733-34 (2015). OBOT claims
18 fraudulent inducement into the DA, which the parties entered into in 2013, and the Lease, the
19

20 ³ To the extent the Court determines Plaintiffs can bring a claim for any portion of the alleged
21 wrongdoing after the Federal Action, the City has concurrently and in the alternative filed a
22 motion to strike all allegations in the complaint that predate the Federal Action.

23 ⁴ Due to inartful pleading, both Plaintiffs appear to assert all twelve causes of action. However,
24 OGRE does not and cannot allege it has a contractual relationship with the City and thus OGRE
25 cannot assert many of the causes of action itself. *See generally* Compl. Based on the *facts* alleged
26 in the complaint, the City interprets OBOT as bringing the first, second, third, fourth, fifth, sixth,
27 seventh, eleventh, and twelfth causes of action and OGRE as bringing the eighth, ninth, and tenth
28 causes of action. To the extent that this is incorrect, Plaintiffs fail to state a claim.

⁵ Even if Plaintiffs had identified a statutory basis, statutory immunities shield the City from
liability. *See, e.g.*, Gov’t Code § 818.8 (setting forth immunity from misrepresentation/fraud for
public entities); Gov’t Code § 822.2 (providing for immunity from misrepresentation/fraud for
public employees); *see also Tokeshi v. State of Cal.*, 217 Cal. App. 3d 999, 1004-05 (1990)
(misrepresentation immunity “applies to interference with financial or commercial interest”);
Harshbarger v. City of Colton, 197 Cal. App. 3d 1335, 1340 (1988) (same).

1 form of which the parties agreed to in 2012 as part of the LDDA. Compl. ¶¶ 3-4, 28-29, 173.
2 Because OBOT filed the complaint “more than three years after commission of the [alleged]
3 fraud,” OBOT “has the burden of pleading and proving that [it] did not make the discovery until
4 within three years prior to the filing of the complaint.” *Cansino*, 224 Cal. App. 4th at 1472
5 (citation omitted). OBOT “must plead ‘facts showing that [it] was not negligent in failing to make
6 the discovery sooner and that [it] had no actual or presumptive knowledge of facts sufficient to
7 put [it] on inquiry.’ To that end, [OBOT] must allege facts showing ‘the time and surrounding
8 circumstances of the discovery and what the discovery was.’” *Id.* (citations omitted). OBOT did
9 not allege any facts related to the timing or nature of its discovery of the alleged fraud. *See*
10 Compl. ¶¶ 173-180.

11 Even had OBOT alleged its fraud claim did not accrue until after December 4,
12 2015, such allegations would contradict OBOT’s admission that, “facing political pressure from
13 environmental and special interest groups, the Oakland City Council adopted a resolution
14 expressing the City’s general opposition to transporting fossil fuels through the City on June 17,
15 2014.” Compl. ¶ 60. OBOT was on inquiry notice at least four-and-a-half years before OBOT
16 filed its complaint. *See Kline*, 87 Cal. App. 4th at 1373-74 (“The courts interpret discovery in this
17 context to mean not when the plaintiff became aware of the specific wrong alleged, but when the
18 plaintiff suspected or should have suspected that an injury was caused by wrongdoing.”).

19 **2. Plaintiffs’ tortious interference claims are time barred.**

20 OBOT’s tortious interference claims (the fifth, sixth, and seventh causes of action)
21 are barred by the two-year statute of limitations because the claims accrued before December 4,
22 2016. *See* Civ. Proc. Code § 339(1); *Knoell v. Petrovich*, 76 Cal. App. 4th 164, 168 (1999). These
23 claims accrued when the interference occurred. *Id.*; *see also Trembath v. Digardi*, 43 Cal. App. 3d
24 834, 836 (1974). OBOT alleges the City has intentionally and negligently interfered with OBOT’s
25 economic relationships with two potential subtenants “since 2012.” *See* Compl. ¶¶ 189-190, 196-
26 198. And in the Federal Complaint, OBOT alleged that passing the Ordinance in July 2016 (i.e.,
27 before December 4, 2016) “significantly diminished the value of the Sublease Option, causing
28 [one of the two potential subtenants] not to exercise its option and instead to seek to renegotiate

1 the payment terms of the proposed sublease at substantially less advantageous terms for OBOT.”
2 See RJN, Ex. A ¶ 123; *see also* Compl. ¶¶ 182-187.

3 OGRE’s tortious interference claims (the eighth, ninth, and tenth causes of action)
4 are also barred by the two-year state of limitations. *See* Civ. Proc. Code § 339(1); *Knoell*, 76 Cal.
5 App. 4th at 168. OGRE alleges the City’s “conduct is preventing performance of the sublease
6 between OGRE and OBOT by making it harder to timely complete” the Shortline Rail portion of
7 the Project (Compl. ¶ 209), and that the “prospective economic relationship between OGRE and
8 its potential rail customers has been disrupted because of the City’s wrongful conduct.” Compl.
9 ¶¶ 216, 224. But OGRE claims the City has interfered with their efforts to complete the Shortline
10 Rail “for over six years.” Compl. ¶ 87 (emphasis added); *see also id.* ¶ 93 (“[T]he Port and the
11 City have failed for over six years to process, to secure and to provide a written Rail Access
12 Agreement as required by Section 5.2.3 of the Lease.”) (emphasis added); *Id.* ¶ 105.

13 **E. Even if not barred, Plaintiffs still fail to state viable causes of action.**

14 Plaintiffs seek to convert into tort claims an ordinary breach-of-contract claim
15 based on the City’s alleged violation of certain contractual terms. But “[c]onduct amounting to a
16 breach of contract becomes tortious only when it also violates an independent duty arising from
17 principles of tort law. ... ‘An omission to perform a contract obligation is never a tort, unless that
18 omission is also an omission of a legal duty.’” *Applied Equip. Corp. v. Litton Saudi Arabia Ltd.*, 7
19 Cal. 4th 503, 515 (1994) (citations omitted).

20 **1. OBOT fails to state a fraud claim**

21 **a. OBOT does not allege the fraud with specificity.**

22 OBOT fails to allege its fraud claim with particularity. “Fraud allegations ‘involve
23 a serious attack on character’ and therefore are pleaded with specificity. General and conclusory
24 allegations are insufficient. The particularity requirement demands that a plaintiff plead facts
25 which ‘show how, when, where, to whom, and by what means the representations were
26 tendered.’” *Cansino*, 224 Cal. App. 4th at 1469 (citations omitted) (affirming order sustaining
27 demurrer without leave to amend); *see also Robinson Helicopter Co., Inc. v. Dana Corp.*, 34 Cal.
28 4th 979, 993 (2005) (“We trust the trial courts of this state to enforce this pleading requirement.”).

1 OBOT's fraud allegations are precisely the type of general, conclusory allegations that do not
2 withstand demurrer. *See* Compl. ¶¶ 173-180. For example, Plaintiffs allege "[t]he City made a
3 series of promises to OBOT to induce OBOT to enter the Lease and DA, including among other
4 things ... a promise to perform under the Lease" Compl. ¶ 173. And Plaintiffs allege "[t]he
5 City intended that Plaintiffs rely on its promises that the City would cooperate in the development
6 of the Project." Compl. ¶ 177. Such vague, conclusory allegations cannot survive demurrer.

7 b. OBOT does not allege an actionable intent to defraud.

8 OBOT's fraud claim also fails as a matter of law because OBOT does not and
9 cannot allege an actionable intent to defraud. "[I]n a promissory fraud action, to sufficiently
10 allege defendant made a misrepresentation, the complaint must allege (1) the defendant made a
11 representation of intent to perform some future action, i.e., the defendant made a promise, and
12 (2) the defendant did not really have that intent at the time that the promise was made, i.e., the
13 promise was false." *Beckwith v. Dahl*, 205 Cal. App. 4th 1039, 1060 (2012). OBOT alleges that
14 "[t]he City did not intend to perform its promises at the time it entered into the Lease *to the extent*
15 *Plaintiffs subleased the Terminal to a bulk commodity provider that shipped coal.*" Compl. ¶ 174
16 (emphasis added). But OBOT does not and cannot allege the City ever made any promise to
17 cooperate with "a bulk commodity provider that shipped coal." *See, e.g.*, Compl. ¶ 31 ("Neither
18 agreement limits or otherwise differentiates the type(s) of bulk commodities that could be
19 exported from the Terminal."); *see also* Compl. ¶ 173. OBOT also does not and cannot allege the
20 City did not intend to perform its promises if OBOT subleased the Terminal to a third party that
21 shipped bulk commodities other than coal. Compl. ¶¶ 172-180. According to OBOT, prior to
22 entering into the DA in 2013, OBOT's sole member had represented to the City that its
23 "immediate commodity focus was on iron ore and copper concentrate"—not coal. Compl. ¶ 37.
24 OBOT also alleges the City adopted the coal ban after "yield[ing] to political pressure" in 2016
25 (*id.* ¶ 61), which undercuts any allegation the City intended to defraud OBOT in 2013. Any
26 allegation the City made any purported misrepresentation to OBOT about the shipment of coal at
27 the Project is thus at odds with OBOT's other allegations.

1 c. OBOT does not allege “justifiable” reliance.

2 OBOT does not and cannot allege justifiable reliance given the City’s extensive
3 and public opposition to the shipment of coal. “[T]he plaintiff must set ‘forth facts to show that
4 his or her actual reliance on the representations were justifiable, so that the cause of the damage
5 was the defendant’s wrong and not the plaintiff’s fault.’ There must be more pled than a simple
6 statement plaintiff justifiably relied on the statements. The complaint must contain ‘allegations of
7 facts showing that the actual inducement of plaintiffs was justifiable or reasonable.’ *Beckwith*,
8 205 Cal. App. 4th at 1066-67 (citations omitted). OBOT does not even allege a “simple
9 statement” that it justifiably relied on any representation. *See* Compl. ¶¶ 172-180. Even had it
10 done so, those “facts” would be contradicted by other allegations: OBOT admits that, years
11 before the parties signed the Lease, “the Oakland City Council adopted a resolution expressing
12 the City’s general opposition to transporting fossil fuels through the City.” Compl. ¶ 60.

13 2. **Plaintiffs fail to state a claim for interference with business relations.**

14 a. Plaintiffs do not allege an “independently wrongful act.”

15 Plaintiffs’ claims for intentional and negligent interference with prospective
16 economic relations (sixth, seventh, ninth, and tenth causes of action) fail because Plaintiffs do not
17 allege an “independently wrongful act.” *See Della Penna v. Toyota Motor Sales, U.S.A., Inc.*, 11
18 Cal. 4th 376, 393 (1995) (holding that a plaintiff “must plead and prove as part of its case-in-chief
19 that the defendant ... engaged in conduct that was wrongful by some legal measure other than the
20 fact of interference itself”). “The independently wrongful act must be the act of interference itself,
21 but such act must *itself* be independently wrongful. That is, ‘[a] plaintiff need not allege the
22 interference and a second act independent of the interference. Instead, a plaintiff must plead and
23 prove that the conduct alleged to constitute the interference was independently wrongful, i.e.,
24 unlawful for reasons other than that it interfered with a prospective economic advantage.” *Crown*
25 *Imports, LLC v. Superior Court*, 223 Cal. App. 4th 1395, 1404 (2014) (citation omitted). “An act
26 is not independently wrongful merely because defendant acted with an improper motive. ...
27 [Instead], an act is independently wrongful if it is unlawful, that is, if it is proscribed by some
28 constitutional, statutory, regulatory, common law, or other determinable legal standard.” *Korea*

1 *Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1158–59 (2003) (citations omitted); see
2 also *Stevenson Real Estate Servs., Inc. v. CB Richard Ellis Real Estate Servs., Inc.*, 138 Cal. App.
3 4th 1215, 1223 (2006). Plaintiffs allege no “independently wrongful act.”

4 b. The City does not owe any duty to Plaintiffs.

5 Plaintiffs’ claims for negligent interference with prospective economic relations
6 (the seventh and tenth causes of action) also fail as a matter of law because the City does not owe
7 Plaintiffs any legally recognizable duty. “The threshold element of a cause of action for
8 negligence is the existence of a duty to use due care toward an interest of another that enjoys legal
9 protection against unintentional invasion.” *Lake Almanor Assocs. L.P. v. Huffman-Broadway*
10 *Grp., Inc.*, 178 Cal. App. 4th 1194, 1205 (2009) (citation omitted). “‘Recognition of a duty to
11 manage business affairs so as to prevent purely economic loss to third parties in their financial
12 transactions is the exception, not the rule, in negligence law’ so courts are reluctant to impose
13 duties to prevent purely economic harm to third parties.” *Id.* (citations omitted); see also *Girard*
14 *v. Delta Towers Joint Venture*, 20 Cal. App. 4th 1741, 1749 (1993) (holding that the landlord did
15 not owe a tenant a duty because the parties “were not in unequal bargaining positions, they each
16 contracted strictly out of a profit motive, and ordinary damages for breach of a lease were
17 available equally to both”). “Moreover, a plaintiff who is not party to a contract between a
18 defendant and a third party generally may not recover for loss of expected economic advantage
19 resulting from the defendant’s negligent performance of the contract unless there is a special
20 relationship between the parties.” *Limandri v. Judkins*, 52 Cal. App. 4th 326, 348-49 (1997)
21 (citation omitted). Plaintiffs fail to allege any “special relationship” that would give rise to a duty.

22 c. Plaintiffs rely on a non-viable “interference with the market” claim.

23 OGRE’s claims for intentional and negligent interference with prospective
24 economic relations (the ninth and tenth causes of action) also fail as a matter of law because
25 OGRE relies on a non-viable “interference with the market” theory. See *Westside Ctr. Assocs. v.*
26 *Safeway Stores 23, Inc.*, 42 Cal. App. 4th 507, 528 (1996). OGRE alleges “[t]he City has
27 intentionally [or negligently] interfered with [its] prospective economic relationships with
28 potential customers”—not its *current* customers. Compl. ¶¶ 213, 219. But “the interference tort

1 applies [only] to interference with *existing* noncontractual relations which hold the promise of
2 future economic advantage.’ The tort’s requirements ‘presuppose the relationship existed *at the*
3 *time* of the defendant’s allegedly tortious acts lest liability be imposed for actually and
4 intentionally disrupting a relationship which has yet to arise.’” *Roy Allan Slurry Seal, Inc. v. Am.*
5 *Asphalt S., Inc.*, 2 Cal. 5th 505, 517–18 (2017) (citations omitted). OGRE seeks to achieve
6 precisely what the California Supreme Court has held a plaintiff cannot do: impose liability on a
7 defendant for disrupting a *potential* relationship.

8 d. There is no claim for negligent interference with contract.

9 OBOT’s claim for negligent interference with prospective economic relations (the
10 seventh cause of action) also fails because it is in substance a claim for negligent interference
11 with contractual relations. OBOT claims the City negligently interfered with OBOT’s “sublease
12 with TLS” and its “sublease with ITS.” Compl. ¶ 197. As such, OBOT’s claim relates to alleged
13 interference with preexisting contracts—not potential contracts or economic relationships. But
14 “[i]n California there is no cause of action for *negligent* interference with contractual relations.
15 While there exists a cause of action for negligent interference with *prospective* economic
16 advantage [citation], the California Supreme Court ... has rejected a cause of action for negligent
17 interference with contract.” *Davis v. Nadrich*, 174 Cal. App. 4th 1, 9 (2009) (citations omitted).

18 **3. Plaintiffs fail to state a claim for specific performance.**

19 Plaintiffs’ claim for specific performance fails as a matter of law because “the
20 precise act which is to be done” is not “clearly ascertainable.” *See* Civ. Code § 3390(e); *see also*
21 *Darbun Enters., Inc. v. San Fernando Cmty. Hosp.*, 239 Cal. App. 4th 399, 409 (2015); *Lewis v.*
22 *YouTube, LLC*, 244 Cal. App. 4th 118, 127 (2016). In their prayer for relief, Plaintiffs request a
23 judgment requiring “[s]pecific performance of all of [the City’s] contractual obligations set forth
24 in the DA and Lease.” Prayer for Relief at ¶ 3. But Plaintiffs identify no precise act to be
25 compelled or any specific contractual provision to be enforced.

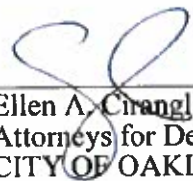
26 **IV. CONCLUSION**

27 The City respectfully requests that the Court sustain its demurrer to all of the
28 causes of action in Plaintiffs’ Complaint without leave to amend.

1 Dated: January 14, 2019

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3 By:


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CITY OF OAKLAND

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