CROWELL LAW OFFICES
TRIBAL ADVOCACY GROUP

O'KEEFE & O'KEEFE LLP
ATTORNEYS

April 6, 2021

Via Email

Amy Hoyt
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Re: *SPRAWLDEF, et al. v. The City of Richmond, et al.*
Ninth Circuit Court of Appeals Case No. 20-17503

Dear Amy:

We were very disappointed to receive your calls, and then your March 24, 2021 follow-up letter, informing us that the City of Richmond (the "City") is abandoning its obligation to defend the appeal in the above-referenced matter. The City's misconduct in this regard is an act of bad faith that constitutes contempt of the Amended Judgment (DKT 410)(the "Amended Judgment") entered in *The Guidiville Rancheria of California, et al. v. The United States of America, et al.,* Northern District of California Case No. CV 12-1326 YGR (the "Guidiville Case"), and an actual or anticipatory breach of the City's obligations under the Amended Judgment, which Amended Judgment also constitutes a contract (i.e., the stipulated settlement agreement (the "Settlement Agreement") entered into by the parties to the Guidiville Case). A copy of the Amended Judgment is attached as **Exhibit 1.** Pursuant to Paragraph 45 of the Amended Notice, we copy Arturo Gonzalez and Alexis Amezcua as the City has not provided us notice changing its designees for purposes of notices to the City required under the Amended Judgment.

You expressed in your call with Scott Crowell that you had not looked at how your client's decision implicates its rights and obligations under the Amended Judgment . Discussed in greater detail below, the Ninth Circuit Court of Appeals has held that a municipality, and its newly-elected Mayor, cannot openly act to breach a binding contract entered into by a prior City Council. The very same type of disregard that led to the decision issued by Ninth Circuit is being repeated here, except that here, it is not just a contract that is being willfully breached, but a stipulated judgment approved

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and ordered by Judge Gonzalez-Rogers. The City's actions in the SPRAWLDEF-related litigations must be in compliance with the Amended Judgment.

The City Must Provide Written Assurance That It Will Cure Its Contempt of The Amended Judgment And Its Breach Of The Stipulated Settlement Agreement

The Guidiville Rancheria ("Guidiville") and Upstream Point Molate LLC ("Upstream") demand that the City cure its contempt of the Amended Judgment and breach of the Settlement Agreement by forthwith formally withdrawing your March 24, 2021 notice that the City will not file a response to the appeal, and providing a written assurance that the City will either (1) instruct its legal counsel to prepare a good faith, substantive response to SPRAWLDEF's appeal, with confirmation that its legal counsel will do so, or (2) pay all legal fees incurred by Guidiville and Upstream to prepare the response to the appeal and instruct its legal counsel to file said response on behalf of the City.

Even if the City continues to refuse to prepare a response to the appeal, it is incumbent upon the City to instruct its legal counsel to file a response prepared on the City's behalf by legal counsel for Guidiville and/or Upstream. Given the statement in your March 24 notice that "The City will cooperate as necessary ….", we expect at a minimum that the City will provide an unequivocal written assurance that it will file a response to the appeal prepared on its behalf by legal counsel for Guidiville and/or Upstream. Neither Guidiville nor Upstream can countenance the City making a bad faith demonstration of its alignment with appellant SPRAWLDEF by refusing to file an answer to the appeal. That is simply not an acceptable course of conduct by the City.

If the City does not provide the written assurance requested above by next Friday, April 16, 2021, the City will force Guidiville and Upstream to exercise their respective rights to enforce the Amended Judgment and Settlement Agreement, including initiating contempt proceedings against the City, filing an action for breach of contract seeking indemnification of all legal fees incurred to prepare an answer to the appeal, and seeking an order requiring the City to immediately sell the subject property to Guidiville and Upstream under the terms of the Amended Judgment, rather than waiting until May of 2022, based on the City's contempt and anticipatory breach.

The City's March 24, 2021 Notice That It Intends To Abandon Its Obligation To Respond To SPRAWLDEF's Appeal Reveals On Its Face The City's Bad Faith

When the parties entered the Amended Judgment, Guidiville and Upstream had every expectation that the City would work in good faith to carry out the terms and spirit of the Amended Judgment, and that the City in general would work in good faith with Guidiville and Upstream to maximize the benefits that would flow to each of them from a future sale and development. While our clients continue to expect the City's good faith and cooperation, and in return continue to assure

the City that it can expect the same from them, the City's recent actions raise serious concerns about the City's bad faith motivations.

As a threshold matter, the disingenuous and pretextual nature of the City's notice to abandon its obligation to defend the appeal is expressly reflected in the content of your March 24, 2021 letter, which states: "The City anticipates that the real parties in interest will continue to participate in and defend the pending appeal." Notwithstanding that the term "real party in interest" is a term of art not applicable in this context, the City clearly is the primary interested party.

Under the Amended Judgment, the City (i) will receive 50% of the sale proceeds; (ii) will finally, for the first time since its original breach of the LDA with Upstream, begin to meet its obligations under the Base Closure Act, pursuant to which the federal government transferred land at Point Molate to the City subject to a federal mandate to develop that land for the economic benefit of the City's citizens; and (iii) will receive, along with the City's citizens, a long-overdue project at Point Molate. As Judge Gonzalez-Rogers stated during a September 11, 2018 hearing addressing the City's then-pending motion to dismiss, SPRAWLDEF's Petition challenging the Amended Judgment was hurting the citizens of Richmond:

> I think that we can all agree, especially in this climate, that transparency in our public processes is incredibly important. The Brown Act is an important state provision. We cannot have elected officials doing things behind closed doors.
>
> On the other hand, there has been a significant amount of public process in this case, and I think... I have to tell you I feel for the people of Richmond because no one can get this darn thing resolved. And it is, it is a tragedy for a city like the City of Richmond who is not the most well off, to have years and years and years of litigation without any benefits. So I am particularly interested in getting this resolved for the people of the City of Richmond. And I don't know what your motivations are, but I can tell you that there is a lot that has been done with respect to that land, and the people are entitled to have something come from it that will benefit them.

See 9/11/18 Transcript at 3:15-4:2. It is shocking to the conscience that the City would now, to the detriment of its citizens, turn its back on its obligation to carry out the express terms and purposes of the Amended Judgment, for the bad faith purpose of aligning itself with, and aiding the efforts of, the parties currently challenging the Amended Judgment that the City freely entered and that the City is legally obligated to honor and defend.

It should be noted that the current abandonment of the City's defense obligations appears to be a continuation of the behavior the Richmond City Council undertook in 2010 and 2011, which then led to the Amended Judgement discussed in this letter. At that time, the City Council abrogated its responsibilities under the Land Disposition Agreement (LDA) it had with Upstream and Guidiville. It was no secret that the 2011 City Council, led by Gayle McLaughlin, did not believe it

had to honor the agreements reached by the City by prior City Councils. Now, with the November 2020 election of Ms. McLaughlin and her allies to the current City Council, the City is, for ideological and personal political purposes, resorting to the same behavior, abrogating its agreements and causing economic and other damages to Upstream, Guidiville and the city's residents.

With regard to the legal issues in dispute, it is exclusively the City's alleged conduct which is at issue in SPRAWLDEF's Petition filed in *SPRAWLDEF, et al. v. City or Richmond, et al.,* Case No. 18-cv-03918-YGR, which Petition alleges a Brown Act violation by the City (the "SPRAWLDEF Case"). Indeed, SPRAWLDEF named only the City as a defendant in its Petition. Guidiville and Upstream were added later only because they were determined to be indispensable parties, as they had interests in the Amended Judgment. Similarly, and in turn, in SPRAWLDEF's instant appeal, the City is expressly named as the Appellee, and again, only the City's alleged conduct is at issue.

The City is obligated under the terms of the Amended Judgment and the Settlement Agreement to defend challenges to the Amended Judgment. Indeed, because it is the City's conduct alone that was at issue in the SPRAWLDEF Case, and is now at issue in SPRAWLDEF's appeal, the City has taken the lead in defending both the district court case and the appeal. While the City was represented by Morrison and Foerster and before the new City Council took its position in January 2021, the City in good faith complied with its obligation to take the lead in defending the Amended Judgment from challenges such as the SPRAWLDEF Case and SPRAWLDEF appeal.

We welcome an explanation from the City as to why it now contends it is not the "real party in interest", and how it rationalizes its bad faith in abandoning its obligation to defend the Amended Judgment on appeal.

The City Is Obligated Under The Amended Judgment To Zealously Defend That Judgment, Including Filing A Good Faith, Substantive Response To SPRAWLDEF's Instant Appeal And Defending The State Court CEQA Cases

On November 21, 2019, Judge Gonzalez-Rogers signed and entered the Amended Judgment in the Guidiville Case based on a second settlement reached in mediation with Chief Magistrate Spero. *See* Guidiville Case Docket No. 410. The Amended Judgment provides that, going forward, the City can either consider and approve certain discretionary conditions for development of the subject property, market and sell the property for development within 48 months, and pay a portion of the proceeds to Guidiville and Upstream, or alternatively, the City can transfer the subject property to Guidiville and Upstream. To this end, the Amended Judgment also provides that the City is responsible for costs, including legal fees, relating to entitlement and pre-development of the subject property in order to carry out the City's express obligations under the Amended Judgment. The City's express obligations include defending the legal actions at issue, which legal actions

present obstructions, *albeit frivolous obstructions,* to the City's satisfaction of its obligations under the Amended Judgment.

Relevant portions of the Amended Judgment read as follows:

> 5. "Development Areas" shall mean the four development areas shown on Figure 6, Land Use Areas, Point Molate Reuse Plan (attached as Exhibit A) or any parcel subsequently designated or subdivided from those four Development Areas subject to the provisions of 8 Paragraph 20.
>
> …
>
> 8. "Discretionary City Approvals" shall mean all discretionary approvals made by the City necessary to entitle development and construction of the Development Areas. The Discretionary City Approvals shall allow for a minimum of 670 residential units and further the goals of the Point Molate Reuse Plan, including preservation of open space and rehabilitation of the Core Historic District (including Building 6)…. Discretionary City Approvals includes any additional review and actions required under CEQA, zoning changes, and general plan amendments, but excludes (1) design review permits and certificates of appropriateness by the City; (2) ministerial permits provided by the City; and (3) other approvals or permits provided by any entity other than the City, such as the United States government, State of California, or regional agencies, such as the Bay Conservation Development Commission and the Regional Water Quality Control Board. The City shall diligently process any required design review permits and certificates of appropriateness and ministerial permits to be provided by the City; and City shall also diligently process and cooperate with all requests for information that might be required for any other approvals or permits provided by any entity other than the City, such as the United States government, State of California, or regional agencies, such as the Bay Conservation Development Commission and the Regional Water Quality Control Board.
>
> …
>
> 13. "Entitlement Costs" shall mean all costs incurred after the Effective Date, which directly concern the issuance of entitlements and compliance with CEQA, including, without limitation, the preparation of environmental review documents and costs similar to those Plaintiffs previously paid prior to completion of the Certified EIR. **The City is responsible for Entitlement Costs and related legal fees.** [Emphasis added]

14. "Pre-Development Costs" shall mean other costs incurred after the Effective Date, such as surveying and engineering consulting fees, and other costs associated with creating parcels, escrow fees, and title fees, **and legal fees related to the disposition of the property, including, but not limited to, legal counsel for preparing and reviewing contracts and agreements, parcel maps, and subdividing and surveying the property**. [Emphasis added]

15. "Net Revenue" shall mean Revenues less Customary Fees and Pre-Development Costs.

COMPLIANCE REQUIREMENTS

16. Within 6 months from the Effective Date, in accordance with CEQA and other applicable law, City shall consider Discretionary City Approvals, as defined in Paragraph 8 of this Judgment.

…

21. Within 30 months of the Effective Date or 24 months of the City issuing the last Discretionary City Approval, whichever occurs earlier, City must market the Development Areas for sale to one or more qualified developer(s) or builder(s) using commercially reasonable efforts….

22. Plaintiffs Tribe and Upstream, on the one hand, and City, on the other hand, will split all Net Revenues 50/50.

…

24. **City shall bear all expenses of maintaining and securing the Property, until the Development Areas are sold to a third party**. [Emphasis added]

25. If the Northern Development Area, Southern Development Area, Central Development Area, or any portions thereof, are not Sold within 30 months of the Effective Date or 24 months of City approving the last Discretionary City Approval, whichever occurs first ("City Sale Deadline"), Plaintiffs or either of them as designated by Upstream and the Tribe in writing, shall have the option to buy such Development Area(s) or portions thereof for a purchase price of $100 per Development Area or portion thereof….

…

RETENTION OF JURISDICTION

> 48. **The Court shall retain jurisdiction over this Action to enforce the terms of this Judgment. To avoid doubt, this Judgment applies to and is binding upon** the Tribe and Upstream and the City, and their respective heirs, successors, assigns and **future councils for the City** and the Tribe. **Consistent with settled law, any change in the composition of the City Council for the City shall not alter the City's obligations under this Judgment**. [Emphasis added]

If the City follows through on its bad faith notices, and refuses to respond to SPRAWLDEF's appeal, or terminates its defense in the consolidated CEQA actions in *North Coast Rivers Alliance v. City of Richmond*, Contra Costa County Superior Court Case No. N20-1528 (the "State Court CEQA Actions"), it will be in contempt of a federal court judgment.

The City's instruction to your firm to abandon the filing of a response is part of a growing number of actions recently taken by the City to undermine the Amended Judgment and to breach the Settlement Agreement. These bad faith actions include, but are not limited to, the following:

- The City's firing of Morrison Foerster, which firm was instrumental in negotiating and defending the Amended Judgment, which firm successfully represented the City in obtaining the dismissal of the SPRAWLDEF Case, and which firm in turn is in the best position to represent the City in responding to SPRAWLDEF's appeal;

- The City's recent letter to Cox, Castle & Nicholson LLP, purporting to provide notice terminating its defense in the consolidated CEQA actions in *North Coast Rivers Alliance v. City of Richmond*, Contra Costa County Superior Court Case No. N20-1528; and

- Recent comments made by City Councilmembers, acting in their official capacities, misrepresenting material facts relevant to the Amended Judgment, and making false and slanderous statements about Guidiville and Upstream.

The recent change in the City Council to an RPA majority has led to a predictable effort by this current City Council to direct the City to violate its legal obligations. Simply Googling "Gayle McLaughlin Point Molate" will provide a series of articles documenting the bad faith efforts of the current Councilmembers to stop the project in contravention of the Amended Judgment and Settlement Agreement. For ease of reference, we direct you to items like these:

1. There is a video posted on 8/18/20 at https://ptmolatealliance.org/gayle-mclaughlin-on-pt-molate-video/ in which now Councilmember McLaughlin recounts the history of her fight to stop Point Molate and seeks to get a Ballot measure going to stop the project at a time when she is campaigning to get back on the Council. There can be

no mistaking from her own words that she plans to do all that she can to avoid honoring the Amended Judgement and Settlement Agreement.

2. There is a short article at https://eastbayexpress.com/whose-richmond/ that generally details the shift in the Council majority to the RPA and their interest in changing prior Council real estate development decisions.

In furtherance of its obligations under the Amended Judgment, the City approved and entered into a Development and Disposition Agreement ("DDA") with Winehaven Legacy, LLC. The City also has been engaged in issuing Discretionary Approvals and entitlements specifically referenced in the Amended Judgment and the ensuing DDA. The same persons behind the SPRAWLDEF Case initiated state court lawsuits challenging the City's actions under CEQA. It is our understanding, based on communications with the City and its prior legal counsel, that the State Court CEQA Actions are frivolous and should be easily defeated, just as the City prevailed in the SPRAWLDEF Case. Rather than defend the State Court CEQA Actions, we understand that the City recently sent a notice to legal counsel for Winehaven purporting to terminate its defense of the CEQA cases. The City did not provide Guidiville or Upstream a copy of this notice, which we believe it is required to do per our prior request for the City to provide to us all material communications relative to the Amended Judgment, as well as the documents satisfying the reporting requirements set forth in the Amended Judgment.

We attach as **Exhibit 2,** a copy of an April 5, 2021, letter from Winehaven's legal counsel to the City, setting forth Winehaven's contentions that the City's notice constitutes a breach of the DDA. We incorporate that letter herein, as the arguments set forth therein also evidence contempt of the Amended Judgment.

Further, we request that the City forthwith provide us with a copy of the letter it sent to Winehaven purporting to terminate its defense of the State Court CEQA Actions, and copies of any other communications or other records and documents relating to the reasons why the City is now refusing to file a response to the SPRAWLDEF appeal, and why the City is terminating its defense of the State Court CEQA Actions. Please let us know when we can expect this information.

We request the City preserve and provide us any and all documents that reflect whether the City sought legal advice and evaluation before it sent out your March 24, 2021, letter to us providing notice that the City is abandoning its obligation to file a response to the SPRAWLDEF appeal, and the letter that was sent to Winehaven's counsel providing notice that the City is terminating its defense of the State Court CEQA Actions.

We also reiterate our request (made previously by letter dated November 27, 2018) that going forward, the City make a practice of providing to our clients, in real time and through our respective offices, copies of all material communications and documents which relate to the on-

going efforts of the City to entitle and sell the subject property in compliance with the Amended Judgment. This is the least Guidiville and Upstream can expect as a partner in this process under the terms of the Amended Judgment, and it will facilitate our clients' future input on key development issues; issues about which our clients are very knowledgeable given the time and work they have put into the subject property since 2003.

Our respective clients are all invested (and indeed, legally obligated) to work together to bring about the development and sale of the subject property as required by the Amended Judgment. To this end, in addition to reversing the City's bad faith termination of its defense of the State Court CEQA Actions, and its refusal to respond to the SPRAWLDEF appeal, we expect the City to make all reasonable and diligent efforts to entitle and deliver the subject property for sale to Winehaven pursuant to the DDA prior to the May 2022 deadline, if the City wishes to maintain control over the sale and development before it is required to sell the subject property to Guidiville and Upstream.

The City Is Once Again Breaching Its Contract With Guidiville and Upstream And Violating The Covenant of Good Faith and Fair Dealing

If the City fails to cure the issues raised above, and to the extent the City's on-going actions make it clear that the City will not meet the development and sale requirements set forth in the Amended Judgment within the 48-month time frame set forth therein, if at all, such failure may constitute an anticipatory breach of the Amended Judgment (based on case law treating obligations under a stipulated judgment as a contractual obligation), and may accelerate the timing of the City's obligation to sell the subject property to Guidiville and Upstream. There is no reason for our clients to wait 48 months to obtain the subject property if and once it becomes clear that the City will not meet the requirements which allow the City to maintain control over the subject property's development and sale.

The City's actions arguably also could provide the basis for a contempt proceeding against the City, especially if the City were to take further actions reflecting that the City is not attempting to comply with the Amended Judgment. As we stated in prior communications, it has never been in our clients' respective interests to pursue contempt, but the City's recent actions are placing Guidiville and Upstream in the unenviable position of potentially having to pursue a contempt proceeding in order to obtain the City's compliance with the federal court Amended Judgment.

In this regard, it is worth reminding the City that the Ninth Circuit Court of Appeals, in essence, already determined that the City acted in bad faith with regard to its dealings with Guidiville and Upstream related to the LDA, which bad faith led to the parties entering into the stipulations for entry of the Judgment and Amended Judgment in the Guidiville Case.

Relevant portions of the Ninth Circuit's opinion, a copy of which is attached as **Exhibit 3**, read as follows:

> **1. Breach of Implied Covenant of Good Faith and Fair Dealing.**
>
> The district court erred in concluding that Appellants failed to plead a plausible claim of breach of the implied covenant of good faith and fair dealing.
>
> "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." *Carma Developers (Cal.), Inc. v. Marathon Dev. California, Inc.*, 826 P.2d 710, 726 (Cal. 1992) (quoting Restatement (Second) of Contracts § 205). "In the case of a discretionary power, it has been suggested the covenant requires the party holding such power to exercise it 'for any purpose within the reasonable contemplation of the parties at the time of formation — to capture opportunities that were preserved upon entering the contract, interpreted objectively.'" *Id.* at 727 (quoting Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 Harv. L. Rev. 369, 373 (1980)).
>
> The Third Amended Complaint ("TAC") contains plausible allegations that the City violated the implied covenant of good faith and fair dealing by interfering with Appellants' ability to obtain federal approval for the casino, thereby preventing Appellants from satisfying a condition precedent of the LDA.
>
> The TAC alleges that, beginning in 2009, the City, through Mayor Gayle McLaughlin, contacted the Bureau of Indian Affairs, Contra Costa County, and various public officials including the Governor of the State of California and United States Senator Dianne Feinstein, to encourage them to deny, delay, or otherwise oppose the Tribe's quest to obtain the necessary federal and state approvals for gaming. Appellants allege that this pressure delayed the federal approval process — a condition precedent of the LDA — sufficiently that the City abandoned the project in April 2011 in part because "[w]ithout these Federal approvals, a casino use at Point Molate is not legally permitted." Resolution No. 23-11 ¶ 5. Appellants further allege that the City's pressure ultimately led the Department of the Interior ("DOI") to determine in September 2011 that the Point Molate property was not eligible for gaming.
>
> On April 5, 2011, the City issued Resolution 23-11, determining that a casino use was not allowed at Point Molate. In Resolution 23-11, the City cited the federal government's delay in granting the approvals and the opposition of other government officials as reasons for its denial. Appellants contend that the City acted in bad faith,

as the delay in approvals and the opposition of federal officials were induced by the City's own covert lobbying.

Under the "doctrine of prevention," if a contracting party interferes with the performance of a condition precedent in a way that the parties did not reasonably contemplate, then the interference is a breach of the implied covenant of good faith and fair dealing, and the interfering party "cannot in any way take advantage of that failure [of the condition precedent]." 13 *Williston on Contracts* § 39:3 (4th ed.)*; see also City of Hollister v. Monterey Ins. Co.*, 81 Cal. Rptr. 3d 72, 100 (Cal. Ct. App. 2008), *as modified on denial of reh'g* (Aug. 28, 2008). "The implied covenant of good faith and fair dealing requires a promisor to reasonably facilitate the occurrence of a condition precedent by . . . refraining from conduct which would prevent or hinder the occurrence of the condition . . . ." *Westerbeke Corp. v. Daihatsu Motor Co.*, 304 F.3d 200, 212 (2d Cir. 2002) (quoting *Cauff, Lippman & Co. v. Apogee Fin. Group, Inc.*, 807 F. Supp. 1007, 1022 (S.D.N.Y. 1992)).

Appellants allege in the TAC that the parties to the LDA did not contemplate that the City would directly attempt to oppose or interfere with the Tribe's gaming application and Request for a Land Determination. Whether the City is liable for the Mayor's actions depends on whether she acted in her official capacity, which is ordinarily a question of fact better resolved after discovery and not through a Motion for Judgment on the Pleadings. *See Farmers Ins. Grp. v. Cty. of Santa Clara*, 906 P.2d 440, 458–59 (Cal. 1995).

The TAC contains some of the alleged interfering communications from Mayor McLaughlin wherein she identifies herself as the Mayor acting on behalf of the City of Richmond. These allegations present an issue of fact concerning whether the Mayor was acting in her official capacity and are sufficient to plead a plausible claim of breach of the implied covenant of good faith attributable to the City. *See Mammoth Lakes Land Acquisition, LLC v. Town of Mammoth Lakes*, 120 Cal. Rptr. 3d 797, 803 (Cal. Ct. App. 2010) ("The Developer established a breach attributable to the Town by evidence of the actions of town officials, acting within their authority."). Therefore, the City is not entitled to judgment on the pleadings on the theory that it is not responsible for the actions of the Mayor.

This is the law of the case, and this Opinion highlights the connection between the City's prior and current bad faith. Further, the alleged facts that the Ninth Circuit ruled constituted a claim against the City, in fact, are undisputed, other than the City contending that then-Mayor McLaughlin was acting in her personal, and not official, capacity. That contention flies in the face of established law and does not pass the smell test; indeed, the Ninth Circuit implies as much in its Opinion. SPRAWLDEF's appeal is a tactical and frivolous appeal that is not likely to succeed. It is

reasonable to conclude that the only chance SPRAWLDEF has to prevail on appeal is if the City abandons its response.

If SPRAWLDEF were to prevail on appeal, at most, it would have the right to file an amended petition, which the City would be bound to defend against. Were that amended petition to succeed, the most likely outcome would be that the City would be ordered to comply with a procedural requirement in order to perfect its approval of the Amended Judgment. There is almost no pathway for SPRAWLDEF to succeed in obtaining any outcome that would have a material impact on the content and obligations of our respective clients under the Amended Judgment. That said, in the extremely unlikely situation where the Amended Judgment was somehow set aside, the City would be facing a summary judgment motion on liability in the Guidiville Case, which based on the law of this case, would likely be granted, and the City would once again be looking at going to trial on a damages case in excess of $250 million dollars.

Request For City Councilmembers To Produce And Preserve All Communications With SPRAWLDEF And CESP

Shortly after we received your March 24, 2021 letter, we received a call from SPRAWLDEF's legal counsel seeking to mediate. The respective actions of the City and SPRAWLDEF seem to represent a coordinated effort. Guidiville and Upstream hereby request that your office obtain and produce to us all communications between the current City Councilmembers and SPRAWLEF or CESP, or any of their respective lawyers, agents, employees, directors, officers or representatives. We also ask you to instruct all current City Councilmembers to preserve all communications relating to Point Molate since the entry of the Amended Judgment, regardless of whether the City Councilmembers contend that such communications were made in their personal or official capacities.

Guidiville and Upstream had hoped that the Amended Judgment would settle the issues between them and the City. As we previously discussed with the City and its legal counsel on several occasions, we all knew that SPRAWLDEF and CESP would file several challenges to the Amended Judgment and the City's Discretionary Approvals, if any. For that reason, it has long been discussed and understood by our respective clients and the City's former legal counsel that the need for good faith cooperation is heightened by the fact that our respective clients must work together to defend the Amended Judgment against spurious challenges by SPRAWLDEF, CESP or similar parties. Guidiville and Upstream have done that, and will continue to do so. We are hopeful that the City will provide Guidiville and Upstream with the requested written assurances, and that going forward, the City will remain committed to vigorously defending against the State Court CEQA Actions and SPRAWLDEF's appeal.

We value the cooperation of our respective firms and clients in working together to carry out the terms of the Amended Judgment, and to defend the Amended Judgment against third party

challenges. It is to that end that we look forward to your help in quickly convincing the City that its recent actions are inappropriate, and in placing the legal defenses and development back on track. To this end, our offices and our clients welcome the opportunity to meet with your office and/or the City to reaffirm our respective clients' mutual commitments to each other and coordinate our efforts to defend and carry out the terms of the Amended Judgment. Thank you for your immediate attention to this matter.

Sincerely,

/s/ Garet D. O'Keefe

Garet D. O'Keefe
Legal Counsel for Upstream

/s/ Scott Crowell

Scott Crowell
Legal Counsel for Guidiville

Encs.

cc (w/ Encs.): Teresa L. Stricker (teresa_stricker@ci.richmond.ca.us)
Heather McLaughlin (Heather_McLaughlin@ci.richmond.ca.us)
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Alexis A. Amezcua (AAmezcua@mofo.com)

EXHIBIT 1

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

THE GUIDIVILLE RANCHERIA OF CALIFORNIA, et al.,

Plaintiffs,

vs.

THE UNITED STATES OF AMERICA, et al.,

Defendants.

Case No. CV 12-1326 YGR

~~[PROPOSED]~~ **AMENDED JUDGMENT**

In March 2012, plaintiffs Guidiville Rancheria of California (Tribe) and Upstream Point Molate LLC (Upstream) (together, Plaintiffs) commenced the above-captioned action (Action) against defendant City of Richmond (City). The controversy concerns a Land Disposition Agreement (LDA) and its amendments, between Upstream and the City, the subject of which was a proposed development of property located at the former Navy Fuel Depot Point Molate in Richmond, California.

Following the signing of the LDA in 2004 and in accordance with the California Environmental Quality Act (CEQA), the Court finds that the City conducted a multi-year review of potential environmental impacts resulting from several proposed projects, including a project with residential units.[1] In 2011, the City certified a final environmental impact report (EIR) for potential projects at Point Molate. No party challenged the EIR.

In this Action, Plaintiffs allege, *inter alia*, that the City breached the LDA; the City denies Plaintiffs' claims.

In accordance with the stipulated request of the Parties, and good cause appearing,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED THAT:

1. Under 28 U.S.C. §§ 1331 and 1362, the Court has jurisdiction over the Action and shall retain such jurisdiction to enforce this Judgment.

2. The Court expressly finds and determines that the terms of this Judgment are fair, reasonable and in the public interest.

DEFINITIONS

3. "Judgment" shall mean this Amended Judgment, the Judgment dated April 12, 2018, and all exhibits attached thereto.

[1] The project with residential units analyzed in the 2011 Certified EIR is consistent with the City's previously approved Point Molate Reuse Plan, which the City adopted to comply with the terms of the transfer of Point Molate from the U.S. Navy to the City. The Reuse Plan expressly contemplates 670 residential units at Point Molate and Alternative D of the Certified 2011 EIR analyzed a project with more than 670 residential units.

4. "Point Molate" or the "Property" shall mean the approximately 270 acres of upland and 134 acres[2] of tidal and submerged real property that was transferred to the City by the United States Navy in or around September 2003, and the "Remainder Property" transferred to the City by the Navy in or around September 2009.

5. "Development Areas" shall mean the four development areas shown on Figure 6, Land Use Areas, Point Molate Reuse Plan (attached as Exhibit A) or any parcel subsequently designated or subdivided from those four Development Areas subject to the provisions of Paragraph 20.

6. "Point Molate Reuse Plan" shall mean the Reuse Plan prepared by a 45-member Blue Ribbon Advisory Committee in or around March 1997, and adopted by the Richmond City Council in 1997. In 2002, the U.S. Navy published a "Record of Decision for Disposal and Reuse of the Fleet Industrial Supply Center, Naval Fuel Depot, Point Molate, CA" (67 Fed. Reg. 41967, June 20, 2002) based on the Point Molate Reuse Plan, which included residential use as one of three alternatives. A complete copy of the Point Molate Reuse Plan is attached as Exhibit B and it is also available on the City's website at https://www.ci.richmond.ca.us/DocumentCenter/Home/View/7510. The City shall maintain a hard copy of the Point Molate Reuse Plan for review by the public.

7. "Certified EIR" shall mean the final Environmental Impact Report certified by the City on or about March 8, 2011, which can be located at http://www.ci.richmond.ca.us/1863/Point-Molate-Resort-and-Casino, and any and all errata, addenda or other modifications thereto, and as the same may be amended, supplemented or updated. The City shall maintain a hard copy of the Certified EIR for review by the public.

8. "Discretionary City Approvals" shall mean all discretionary approvals made by the City necessary to entitle development and construction of the Development Areas. The Discretionary City Approvals shall allow for a minimum of 670 residential units and further the

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[2] Any variation of the total acreage shall not alter the Parties obligations regarding the Property, which the Parties understand to mean the total land transferred from the Navy to the City in 2003 and 2009.

goals of the Point Molate Reuse Plan, including preservation of open space and rehabilitation of the Core Historic District (including Building 6). Those 670 residential units must comply with the requirements of the City's inclusionary housing ordinance in effect at this time. That compliance can be met either by (i) providing within the City the percentage of below market units presently specified in section 15.04.810.063 of the City's Municipal Code or (ii) paying an in-lieu fee, which must equal the amounts presently applied to residential projects within the City. Discretionary City Approvals includes any additional review and actions required under CEQA, zoning changes, and general plan amendments, but excludes (1) design review permits and certificates of appropriateness by the City; (2) ministerial permits provided by the City; and (3) other approvals or permits provided by any entity other than the City, such as the United States government, State of California, or regional agencies, such as the Bay Conservation Development Commission and the Regional Water Quality Control Board. The City shall diligently process any required design review permits and certificates of appropriateness and ministerial permits to be provided by the City; and City shall also diligently process and cooperate with all requests for information that might be required for any other approvals or permits provided by any entity other than the City, such as the United States government, State of California, or regional agencies, such as the Bay Conservation Development Commission and the Regional Water Quality Control Board.

9. "Effective Date" shall mean the date this Judgment is entered by the Court.

10. "Revenues" shall mean all amounts received or earned by City or Plaintiffs from the sale or development or long-term leasing (more than one (1) year) of any portion of the Development Areas, including, without limitation, any amounts received for (i) exclusive rights to negotiate, (ii) any purchase monies or purchase deposits paid, (iii) any option payments, (iv) any amounts paid pursuant to a services agreement or any similar one-time payment, or recurring payments made to City or Plaintiffs by the purchaser(s), developer(s), builder(s) or any subsequent owner of any portion of the Development Areas or (v) any reimbursement for costs or expenses incurred pursuant to Paragraph 24. "Revenues" does not include grants, reimbursements paid to the City or to Plaintiffs by a third party (e.g., developer) for costs incurred

in the pre-development phase other than costs incurred under Paragraph 24, short-term rental/use fees collected by the City prior to the sale of the Development Areas, property taxes or other taxes paid to the City and proceeds received from a financing district.

11. "Customary Fees" means fees paid to City for permits or similar customary administrative fees, cost-recovery fees, development fees and/or impact fees (e.g., traffic, school and in-lieu housing impact fees) in amounts routinely charged and similarly collected by the City on other projects.

12. "Sale" or "Sold" or "Sell" or any similar term relating to the sale of the property that is the subject of this Judgment, shall mean close of escrow upon which purchase monies are paid to City or Plaintiffs in exchange for which title to the portion of the property being sold in that transaction is simultaneously transferred to the buyer(s). The terms "Sale" or "Sold" or "Sell" shall also include execution of a contract or agreement to sell any portion of the Development Areas so long as the sale of a substantial portion of any one of the Development Areas is closed and title transferred within 48 months of the Effective Date, with the understanding that such contracts/agreements are to facilitate phased developments and must remain in effect until the final parcel of the Development Area at issue is sold.

13. "Entitlement Costs" shall mean all costs incurred after the Effective Date, which directly concern the issuance of entitlements and compliance with CEQA, including, without limitation, the preparation of environmental review documents and costs similar to those Plaintiffs previously paid prior to completion of the Certified EIR. The City is responsible for Entitlement Costs and related legal fees.

14. "Pre-Development Costs" shall mean other costs incurred after the Effective Date, such as surveying and engineering consulting fees, and other costs associated with creating parcels, escrow fees, and title fees, and legal fees related to the disposition of the property, including, but not limited to, legal counsel for preparing and reviewing contracts and agreements, parcel maps, and subdividing and surveying the property.

15. "Net Revenue" shall mean Revenues less Customary Fees and Pre-Development Costs.

COMPLIANCE REQUIREMENTS

16. Within 6 months from the Effective Date, in accordance with CEQA and other applicable law, City shall consider Discretionary City Approvals, as defined in Paragraph 8 of this Judgment.

17. The Court anticipates and expects that City will receive and consider input from the public with respect to the future development of Point Molate. Nothing herein shall prohibit or limit the City from holding public workshops or receiving any other public input with respect to any future development considered by City pursuant to this Judgment, including selection of a master developer or developers.

18. Of the approximately 270 acres of upland area, the Point Molate Reuse Plan designates approximately 30% as Development Areas and 70% as open space, the ratio of which shall not change. In the Core Historic District (including Building 6), there are 374,572 square feet of contributing structures (based on the list in Table 3.6-1 and Figure 3.6-6 from the Certified EIR), all of which shall be preserved for adaptive reuse.

19. City may utilize the existing Certified EIR and prior studies pertaining to the Property to the extent possible to comply with CEQA.

20. The Discretionary City Approvals may adjust lot lines as allowed and analyzed under the Certified EIR, or otherwise to allow for construction of the residential units on different portions of the Property than is set forth in the Point Molate Reuse Plan and may allow for more than 670 residential units and non-residential use, insofar as this is consistent with the overall open space preservation goals of the Point Molate Reuse Plan.

21. Within 30 months of the Effective Date or 24 months of the City issuing the last Discretionary City Approval, whichever occurs earlier, City must market the Development Areas for sale to one or more qualified developer(s) or builder(s) using commercially reasonable efforts. At the City's discretion, separate portions of the Development Areas may be sold to different developers or builders to increase the sales price derived from the sale of the Development Areas. With the consent of the Parties, which consent must be made by a writing signed by all Parties, Development Areas or parcels may be leased long term instead of being sold. Prior to the Sale of

the Development Areas, either Party may elect to have an independent, third-party that is selected jointly by the Parties verify that the subject Sale is fair and reasonable and the product of an arms-length negotiation, and such verification shall be a condition precedent to completion of such Sale. The Parties shall share evenly the costs associated with any such verification.

22. Plaintiffs Tribe and Upstream, on the one hand, and City, on the other hand, will split all Net Revenues 50/50.

23. Within thirty (30) days of receiving any Revenues, City shall notify Upstream and the Tribe of the amount and source of such Revenues. Within sixty (60) days of receiving any Revenues, City shall distribute 50% of any Net Revenues via wire transfer into a banking account to be designated by Plaintiffs in writing within thirty (30) days of the Effective Date, or as may be designated in writing thereafter by Plaintiffs.

24. City shall bear all expenses of maintaining and securing the Property, until the Development Areas are sold to a third party.

25. If the Northern Development Area, Southern Development Area, Central Development Area, or any portions thereof, are not Sold within 30 months of the Effective Date or 24 months of City approving the last Discretionary City Approval, whichever occurs first ("City Sale Deadline"), Plaintiffs or either of them as designated by Upstream and the Tribe in writing, shall have the option to buy such Development Area(s) or portions thereof for a purchase price of $100 per Development Area or portion thereof. Plaintiffs' option to purchase the Development Area shall include up to fifty percent of the land-side portion of the shoreline knoll referenced in the Certified EIR. Promptly after Plaintiffs, or either them, exercise the option granted herein, City shall be obligated to forthwith sell the parcels identified in the exercise of the option, or portions thereof, to Plaintiffs, or either of them. Within thirty (30) days of the Effective Date, City shall cause a memorandum of this Judgment to be recorded on title to the Property, which shall reference the above-referenced option of Upstream and Tribe.

26. For each parcel of the Development Area or portion thereof sold to Plaintiffs, upon a sale by either of them of such parcel(s), Plaintiffs shall pay to the City fifty percent (50%) of the Net Revenues received by Plaintiffs. Plaintiffs must sell any Development Area or portion

thereof purchased pursuant to this Judgment within 5 years of the City's Sale Deadline or 4 years after the City makes a decision on any additional, discretionary City entitlements concerning any purchased portions, whichever is later, otherwise the Development Area(s) or portion(s) thereof revert back to the City, and the City shall pay Plaintiffs $100 for each Development Area or portion thereof.[3] If the City takes back property under this Paragraph, the Revenue sharing described in Paragraph 22 will still apply, and the City will have an on-going obligation to market and sell the remaining unsold portions of the Development Areas.

27. Within thirty (30) days of receiving any Revenue, Plaintiffs shall notify the City of the amount and source of such Revenue. Within sixty (60) days of receiving any Revenues, Plaintiffs shall distribute 50% of Net Revenue received by Plaintiffs to the City via wire transfer into a banking account to be designated in writing by the City.

28. Upstream and Tribe, or either of them as designated by Upstream and the Tribe in writing, and any of their transferees, may pursue development of the parcels in accordance with the Discretionary City Approvals, or may seek additional or new entitlements for the development of the parcels beyond the Discretionary City Approvals required by this Judgment that City may or may not grant in its sole discretion. The Parties, and each of them, acknowledge the Tribe, commencing in 2004 and ending in 2012, maintained an office in Building 123 at Point Molate.

REPORTING REQUIREMENTS

29. Absent further order from the Court, the Parties shall provide a joint update to the Court every 120 days regarding efforts to comply with the Judgment.

30. Within 30 days of a request made by Plaintiffs, or either of them, the City must provide Upstream and Tribe a copy of any contracts, agreements or other documents providing

[3] For purposes of paragraph 26, discretionary City entitlements include any additional review and actions required under CEQA, zoning changes, and general plan amendments but excludes (1) design review permits and certificates of appropriateness by the City; (2) ministerial permits provided by the City; and (3) other approvals or permits provided by any entity other than the City, such as the United States government, State of California, or regional agencies, such as the Bay Conservation Development Commission and the Regional Water Quality Control Board.

for payment of Revenue to City with respect to any portion of the Property that is the subject of this Judgment.

31. The City must provide Plaintiffs a copy of any agreements the City executes for sale of any portion of the Property, including the Development Areas, within fifteen (15) days of the City Council's approval of such agreement(s).

32. The reporting requirements of this Judgment do not relieve City of any reporting obligations required by any other federal, state or local law, regulation, permit or other requirement.

33. Notwithstanding the foregoing, Upstream and Tribe may use and disclose any information provided pursuant to this Judgment in any proceeding to enforce the provisions of this Judgment and as otherwise permitted by law.

AUDITING OPTION

34. The City shall keep accurate and complete accounting records of all transactions relating to the maintenance, entitlement, development, sale of, or receipt of funds relating to the Property, including, without limitation, any records of Revenues or other monies paid to or received by City relating to the Property, all accounting records, invoices, ledgers, cancelled checks, deposit slips, bank statements, original estimates, estimating work sheets, contracts or contract amendments, change order files, insurance documents, memoranda and correspondence. City shall establish and maintain a reasonable accounting system that enables City to readily identify City's costs, expenses, Revenues, and other monies paid to or received by City relating to the Property.

35. Upon no less than 30 days' written notice, and no more than once a year during the first five years after the Effective Date, Upstream and Tribe and their authorized representatives may audit, examine and make copies of City's records kept by or under City's control relating to its performance under this Judgment, including, without limitation, records of all Revenues or other monies paid to, received by, or committed to City relating to sale or development of the Property. If an audit is requested, City, at Plaintiffs' expense, shall make its records available for examination and copying during regular business hours at City's offices or another location as

mutually agreed by the Parties. Excluded from any audit are records protected by federal, state, and local privilege laws, including any records that would fall under exemptions set forth in the California Public Records Act.

36. Costs of any audits conducted under the authority of this right to audit will be borne by Upstream and Tribe unless the audit identifies City's failure to disburse more than $50,000 owed to Upstream and Tribe hereunder, in which case City shall reimburse Upstream and Tribe for the costs of the audit.

COMPLIANCE WITH CEQA AND OTHER LAWS

37. The Parties acknowledge, and the Court expressly finds and orders, that this Judgment is not an approval of a project, and the City is responsible for compliance with all federal, state and local laws, regulations, and permits, relating to the Property, including compliance with CEQA. This finding and order may be asserted by the Parties as a bar to any suit challenging the validity of this Judgment.

38. The Parties agree that the Judgment does not grant any entitlements for development at Point Molate, and that the City acknowledges it is required to comply with all laws, statutes, or regulations, including compliance with CEQA, applicable to any future specific entitlements or development at Point Molate that the City may consider.

RELEASE

39. Upon entry of this Judgment, Plaintiffs, and each of their respective executors, representatives, heirs, successors, assigns, bankruptcy trustees, guardians, and all those who claim through them or who assert claims on their behalf, will be deemed to have completely released and forever discharged City from any claim, right, demand, charge, complaint, action, cause of action, obligation, or liability of any and every kind, based on an alleged violation of the LDA or its amendments, in connection with the sale and/or development of Point Molate, and all claims for monetary, equitable, declaratory, injunctive, or any other form of relief, whether known or unknown, suspected or unsuspected, under the law of any jurisdiction, which Plaintiffs ever had or now have, resulting from, arising out of, or in any way, directly or indirectly, connected with the claims raised in the Action or in the California state court action entitled *The City of*

Richmond v. Upstream Point Molate, LLC, filed in Contra Costa County Superior Court, Case No. C11-01834 ("State Court Action"), or claims which could have been raised in the Action or State Court Action based on or relating to the same facts.

40. Upon entry of this Judgment, City, and all those who claim through City or who assert claims on behalf of City, will be deemed to have completely released and forever discharged Plaintiffs, and each of their respective executors, representatives, heirs, successors, assigns, bankruptcy trustees, guardians, and all those who claim through them or who assert claims on their behalf, from any claim, right, demand, charge, complaint, action, cause of action, obligation, or liability of any and every kind, based on an alleged violation of the LDA or its amendments, in connection with the sale and/or development of Point Molate, and all claims for monetary, equitable, declaratory, injunctive, or any other form of relief, whether known or unknown, suspected or unsuspected, under the law of any jurisdiction, which the City ever had or now has, resulting from, arising out of, or in any way, directly or indirectly, connected with the claims raised in the Action or in the State Court Action, or claims which could have been raised in the Action or State Court Action based on or relating to the same facts.

41. As of the Effective Date, all claims asserted in this Action shall be and hereby are dismissed with prejudice. The Parties further agree that they will dismiss with prejudice the claims asserted in the State Court Action.

42. The Parties, and each of them, each waive and release any and all provisions, rights, and benefits conferred either (a) by section 1542 of the California Civil Code, or (b) by any law of any state or territory of the United States, or principle of common law, which is similar, comparable, or equivalent to section 1542 of the California Civil Code, with respect to the claims released pursuant to Section 4.1. Section 1542 of the California Civil Code reads:

> Section 1542. General Release, extent. A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor.

The Parties, and each of them, may hereafter discover facts other than or different from those that they know or believe to be true with respect to the subject matter of the claims released pursuant to the terms of this Judgment, but the Parties, and each of them, expressly agree that, upon entry of the Judgment, they shall have waived and fully, finally, and forever settled and released any known or unknown, suspected or unsuspected, asserted or unasserted, contingent or non-contingent claim with respect to the claims released, whether or not concealed or hidden, without regard to subsequent discovery or existence of such different or additional facts.

43. The Parties shall bear their own costs of this action, including attorneys' fees, except that the prevailing party in any action or proceeding to enforce the terms of this Judgment shall be entitled to recover, from the non-prevailing party, all reasonable costs, including reasonable attorney's fees.

44. Nothing in this Judgment is intended to limit or expand the Tribe's right to continue to pursue its claims asserted in this Action against the Federal Defendants, which expressly are not resolved herein, or to pursue any lands be taken into trust by the United States for the benefit of the Tribe, for any lawful purposes. The Tribe will request to license City-owned or City-controlled property for Tribe use and the City will process that request in the normal course, in the same manner as other such requests are processed.

NOTICES

45. Unless otherwise specified in this Judgment, whenever notifications, submissions, or communications are required by this Judgment, they shall be made in writing and addressed as follows:

As to Upstream by email: Jim.Levine@upstream.us.com; and garet@okeefelaw.com

As to Upstream by mail:

Jim Levine
Upstream Point Molate LLC
2000 Powell Street, Suite 920
Emeryville, CA 94608
(510) 350-4101

and

Garet D. O'Keefe
O'Keefe & O'Keefe LLP
1068 Cragmont Avenue

Berkeley, CA 94708
(510) 282-0319 (t)

As to the Tribe be email: mdwastenot@gmail.com; and scottcrowell@clotag.net

As to the Tribe by mail: Guidiville Rancheria of California
P.O. Box 339
Talmage, CA 95481
Attention: Merlene Sanchez, Chairperson

and

Scott Crowell
Crowell Law Offices – Tribal Advocacy Group
1487 W. State Route 89A, Suite 8
Sedona, AZ 86336
(425) 802-5369 (t)

As to City by email: agonzalez@mofo.com
aamezcua@mofo.com

and

Bruce_Goodmiller@ci.richmond.ca.us
Rachel_Sommovilla@ci.richmond.ca.us

As to City by mail: Arturo González
Alexis Amezcua
Morrison & Foerster LLP
425 Market Street
San Francisco, CA 94105

and

Bruce Reed Goodmiller
Rachel Sommovilla
City Attorney's Office
450 Civic Center Plaza
P.O. Box 4046
Richmond CA 94804-1630

46. Any Party may, by written notice to the other Parties, change its designated notice recipient(s) or notice address provided above.

47. Notices submitted pursuant to this Section shall be deemed submitted upon receipt, unless otherwise provided in this Judgment or by agreement of the Parties in writing.

RETENTION OF JURISDICTION

48. The Court shall retain jurisdiction over this Action to enforce the terms of this Judgment. To avoid doubt, this Judgment applies to and is binding upon the Tribe and Upstream and the City, and their respective heirs, successors, assigns and future councils for the City and the Tribe. Consistent with settled law, any change in the composition of the City Council for the City shall not alter the City's obligations under this Judgment.

49. This Judgment embodies the final, complete and exclusive agreement and understanding among the Parties with respect to the agreement reflected in this Judgment and supersedes all prior agreements and understandings, whether oral or written, concerning settlement embodied herein. Other than deliverables that are subsequently submitted and approved pursuant to this Judgment (if any), the Parties acknowledge that there are no representations, agreements, or understandings relating to the disposition of the Action other than those expressly contained in this Judgment.

Date: November 21, 2019

YVONNE GONZALEZ ROGERS
UNITED STATES DISTRICT JUDGE

FOR THE GUIDIVILLE RANCHERIA OF CALIFORNIA:

Dated: 11-08-19

MERLENE SANCHEZ
Tribal Chairperson

As to Form:

CROWELL LAW OFFICES – TRIBAL ADVOCACY GROUP

Dated: _____

By: _____
Scott Crowell
Attorneys for Plaintiff Guidiville Band of Pomo Indians

FOR THE GUIDIVILLE RANCHERIA OF CALIFORNIA:

Dated: _____

_____
MERLENE SANCHEZ
Tribal Chairperson

As to Form:

CROWELL LAW OFFICES – TRIBAL ADVOCACY GROUP

Dated: November 7, 2019

By: _____
Scott Crowell
Attorneys for Plaintiff Guidiville Band of Pomo Indians

FOR UPSTREAM POINT MOLATE, LLC:

Dated: Nov 9, 2019

JAMES D. LEVINE
General Manager
Upstream Point Molate, LLC

AS TO FORM:

O'KEEFE & O'KEEFE LLP

Dated: _____

By: _____
Garet D. O'Keefe
Attorneys for Plaintiff UPSTREAM POINT MOLATE LLC

FOR UPSTREAM POINT MOLATE, LLC:

Dated: _____

JAMES D. LEVINE
General Manager
Upstream Point Molate, LLC

AS TO FORM:

O'KEEFE & O'KEEFE LLP

Dated: 11/6/19

By: _____
Garet D. O'Keefe
Attorneys for Plaintiff UPSTREAM POINT MOLATE LLC

FOR CITY OF RICHMOND:

Dated: November 7, 2019

Acting City Manager, City of Richmond
Carlos Privat

AS TO FORM:

ACTING CITY ATTORNEY FOR CITY OF RICHMOND

Dated: 11/7/19

By: ~~Bruce Reed Goodmiller~~ Rachel Sommovilla
Attorneys for Defendant CITY OF RICHMOND

MORRISON & FOERSTER LLP

Dated: _____

By: _____
Arturo González
Attorneys for Defendant CITY OF RICHMOND

FOR CITY OF RICHMOND:

Dated: _____

_____
City Manager, City of Richmond

AS TO FORM:

CITY ATTORNEY FOR CITY OF RICHMOND

Dated: _____

By: _____
Bruce Reed Goodmiller
Attorneys for Defendant CITY OF RICHMOND

MORRISON & FOERSTER LLP

Dated: October 23, 2019

By: _____
Arturo González
Attorneys for Defendant CITY OF RICHMOND

EXHIBIT 2

COX CASTLE NICHOLSON

Cox, Castle & Nicholson LLP
50 California Street, Suite 3200
San Francisco, California 94111-4710
P: 415.262.5100 **F**: 415.262.5199

Linda C. Klein
415.262.5130
lklein@coxcastle.com

File No. 083086

April 5, 2021

VIA E-MAIL

Ms. Teresa L. Stricker
City Attorney
City of Richmond
450 Civic Center Plaza
Richmond, CA 94804

Mr. Christian L. Marsh
Downey Brand LLP
455 Market Street
Suite 1500
San Francisco, CA 94105

Re: Response to City's Notice Terminating Defense in *North Coast Rivers Alliance v. City of Richmon*d, Contra Costa County Super Court Case No. N20-1528

Dear Ms. Stricker and Mr. Marsh:

We were surprised to receive a letter from you stating that the City of Richmond ("City") is terminating its defense of the pending consolidated action, *North Coast Rivers Alliance v. City of Richmond*, challenging the City's decision to approve our client's proposed mixed-use development on Point Molate ("Project").

The City's termination of its defense and the Joint Defense Agreement, without first determining if such termination would be mutually agreeable with our client, Winehaven Legacy LLC ("WLL"), violates both the Development and Disposition Agreement ("DDA") and the Development Agreement ("DA"). Both the DDA and DA state that "[u]pon commencement of any such action, the City and Developer shall meet in good faith and seek to establish a mutually acceptable method of defending such action." (DDA, § 11.10; DA, § 11.15.) As required by these agreements, the City and WLL met and agreed to jointly defend the litigation and entered into a Joint Defense Agreement. The City is now taking an approach (unilaterally terminating its defense) that is not mutually acceptable to WLL, in violation of the DDA and DA.

The City cites to Section 8.4.2 of the Development Agreement ("DA") as authorizing its actions. While DA Section 8.4.2 states that the City has "sole discretion to terminate its defense at any time," that language does not appear in the DDA and conflicts with the requirement under

the DDA to establish a mutually acceptable defense strategy. Under DA Section 3.4.5, where the DA and DDA conflict, the DDA "shall control."

The City's termination of its defense also conflicts with the fundamental requirement applicable to all contracts to exercise good faith when fulfilling contractual agreements. Multiple provisions in the DDA and DA reflect this requirement, obligating the City to use good faith and cooperate with WLL. (E.g., DDA Sections 1.1, 2.3.3, 3.1, 3.2, 3.3, 4.6.2.8, 5.4.1, 5.5.2, 5.5.6, 11.22, and 11.24, and DA Sections 2.1.2, 2.4, 4.2, 6.3, 8.1, and 8.3.)

The City also has a duty not to prejudice the litigation, as indicated by the requirement in various DDA and DA provisions to cooperate with WLL on the Project. (See also Gov't Code § 66474.9(b)(2) [requiring a city to cooperate fully in the defense of a challenged subdivision map if the conditions require the subdivider indemnify the city, as the Project conditions do here].) The City's decision to withdraw from the defense could prejudice the outcome of the litigation, as the judge may infer from the City's sudden reversal that the City is convinced by petitioners that it has legally erred, rather than that the decision stems from a change in political direction. Moreover, under Government Code section 66474.9(b)(2), if the City "fails to cooperate fully in the defense, the subdivider shall not thereafter be responsible to defend, indemnify, or hold harmless the local agency." The City's termination notice means that the City is at risk of being responsible for the cost of the administrative record and other litigation expenses, including potentially petitioners' attorneys' fees.

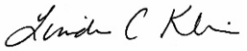
Even if the City were not to participate in the litigation, the City has a duty to continue working with WLL to process the approvals needed to undertake the Project, including "to comply with [a] court order in such a manner as will maintain the integrity of the Project Approvals and avoid or minimize to the greatest extent possible (i) any impact to the development of the Project as provided for in, and contemplated by, the Vested Elements, or (ii) any conflict with the Vested Elements or frustration of the intent or purpose of the Vested Elements." (DA, § 8.5.) And if the Project ultimately does not timely move forward, the City would nonetheless be obligated to sell Point Molate to Upstream and the Guidiville Rancheria of California under the federal settlement agreement. We are thus unclear on what the City hopes to gain by violating the DDA.

This letter serves as WLL's notice to the City of its breach of DDA Section 11.10 and DA Section 11.15, as required under DDA Section 10.3.2 and DA Section 7.1. We request that the City provide times at which it would be willing to meet and confer regarding this breach. We also remind the City that it must "continue to perform" its DDA and DA obligations, including "processing, issuing, and/or approving Subsequent Approvals" (DA § 2.4) and "help[ing] facilitate and cooperate . . . in seeking any Other Agency Approvals" (DA § 8.3), pending the resolution of this breach (DA § 7.7; see DDA § 10.3.2 [WLL can demand specific performance of the City's obligations under the DDA]).

WLL looks forward to meeting and conferring with the City soon to come to a mutually acceptable method of defending the lawsuit against the Project.

Sincerely,

Cox, Castle & Nicholson LLP



Linda C. Klein

cc: Andrew B. Sabey, Cox, Castle & Nicholson LLP
Daniel Engler, Cox, Castle & Nicholson LLP
Marc Magstadt, Winehaven Legacy LLP
David Soyka, Winehaven Legacy LLP

087029\12505049v2

EXHIBIT 3

FILED

AUG 4 2017

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GUIDIVILLE RANCHERIA OF CALIFORNIA,

Plaintiff-Appellant,

UPSTREAM POINT MOLATE, LLC,

Plaintiff-Counter-Defendant-Appellant,

v.

UNITED STATES OF AMERICA; RYAN ZINKE, Secretary of the Interior; MICHAEL S. BLACK, Acting Assistant Secretary - Indian Affairs,

Defendants,

and

CITY OF RICHMOND,

Defendant-Counter Claimant-Appellee.

No. 15-15221

D.C. No. 4:12-cv-01326-YGR

MEMORANDUM*

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

GUIDIVILLE RANCHERIA OF CALIFORNIA,

Plaintiff-Appellant,

and

UPSTREAM POINT MOLATE, LLC,

Plaintiff-Counter Defendant,

v.

UNITED STATES OF AMERICA; RYAN ZINKE, Secretary of the Interior; MICHAEL S. BLACK, Acting Assistant Secretary - Indian Affairs,

Defendants,

and

CITY OF RICHMOND,

Defendant-Counter Claimant-Appellee.

No. 15-17069

D.C. No. 4:12-cv-01326-YGR

Appeal from the United States District Court
for the Northern District of California
Yvonne Gonzalez Rogers, District Judge, Presiding

Argued and Submitted February 14, 2017
San Francisco, California

Before: GOULD and BERZON, Circuit Judges, and GARBIS,** District Judge.

This appeal presents a dispute between the City of Richmond, California ("the City"), a developer, Upstream Point Molate, LLC ("Upstream"), the Guidiville Band of Pomo Indians ("the Tribe"), and the United States[1] in connection with a proposed development project for Point Molate, the site of a decommissioned United States Navy fuel depot located on the coast of the City.

Upstream and the Tribe have sued the City for breach of the Land Disposition Agreement ("LDA") between Upstream and the City, as well as for breach of the implied covenant of good faith and fair dealing. The district court granted the City's Motion for Judgment on the Pleadings and dismissed the breach of contract and bad-faith claims, denied Appellants leave to amend, and awarded the City legal fees from the Tribe and Upstream. The district court then entered an

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** The Honorable Marvin J. Garbis, United States District Judge for the District of Maryland, sitting by designation.

[1] The Tribe also asserts federal claims against the United States pertaining to the denial of approval of federal gaming authorization under the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 *et seq.* The district court has stayed proceedings regarding the Tribe's claim against the United States pending resolution of the instant appeal.

amended judgment, finding no just reason for delay pursuant to Federal Rules of Civil Procedure 54(b). We have jurisdiction under 28 U.S.C. § 1291.

As discussed herein, we affirm the dismissal of certain of Appellants' claims, reverse the dismissal of certain of Appellants' claims, and remand for further proceedings.

1. Breach of Implied Covenant of Good Faith and Fair Dealing. The district court erred in concluding that Appellants failed to plead a plausible claim of breach of the implied covenant of good faith and fair dealing.

"Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." *Carma Developers (Cal.), Inc. v. Marathon Dev. California, Inc.*, 826 P.2d 710, 726 (Cal. 1992) (quoting Restatement (Second) of Contracts § 205). "In the case of a discretionary power, it has been suggested the covenant requires the party holding such power to exercise it 'for any purpose within the reasonable contemplation of the parties at the time of formation — to capture opportunities that were preserved upon entering the contract, interpreted objectively.'" *Id.* at 727 (quoting Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 Harv. L. Rev. 369, 373 (1980)).

The Third Amended Complaint ("TAC") contains plausible allegations that the City violated the implied covenant of good faith and fair dealing by interfering with Appellants' ability to obtain federal approval for the casino, thereby preventing Appellants from satisfying a condition precedent of the LDA.

The TAC alleges that, beginning in 2009, the City, through Mayor Gayle McLaughlin, contacted the Bureau of Indian Affairs, Contra Costa County, and various public officials including the Governor of the State of California and United States Senator Dianne Feinstein, to encourage them to deny, delay, or otherwise oppose the Tribe's quest to obtain the necessary federal and state approvals for gaming. Appellants allege that this pressure delayed the federal approval process — a condition precedent of the LDA — sufficiently that the City abandoned the project in April 2011 in part because "[w]ithout these Federal approvals, a casino use at Point Molate is not legally permitted." Resolution No. 23-11 ¶ 5. Appellants further allege that the City's pressure ultimately led the Department of the Interior ("DOI") to determine in September 2011 that the Point Molate property was not eligible for gaming.

On April 5, 2011, the City issued Resolution 23-11, determining that a casino use was not allowed at Point Molate. In Resolution 23-11, the City cited the federal government's delay in granting the approvals and the opposition of other

government officials as reasons for its denial. Appellants contend that the City acted in bad faith, as the delay in approvals and the opposition of federal officials were induced by the City's own covert lobbying.

Under the "doctrine of prevention," if a contracting party interferes with the performance of a condition precedent in a way that the parties did not reasonably contemplate, then the interference is a breach of the implied covenant of good faith and fair dealing, and the interfering party "cannot in any way take advantage of that failure [of the condition precedent]." 13 *Williston on Contracts* § 39:3 (4th ed.)*;* s*ee also City of Hollister v. Monterey Ins. Co.*, 81 Cal. Rptr. 3d 72, 100 (Cal. Ct. App. 2008), *as modified on denial of reh'g* (Aug. 28, 2008). "The implied covenant of good faith and fair dealing requires a promisor to reasonably facilitate the occurrence of a condition precedent by . . . refraining from conduct which would prevent or hinder the occurrence of the condition . . . ." *Westerbeke Corp. v. Daihatsu Motor Co.*, 304 F.3d 200, 212 (2d Cir. 2002) (quoting *Cauff, Lippman & Co. v. Apogee Fin. Group, Inc.*, 807 F. Supp. 1007, 1022 (S.D.N.Y. 1992)).

Appellants allege in the TAC that the parties to the LDA did not contemplate that the City would directly attempt to oppose or interfere with the Tribe's gaming application and Request for a Land Determination. Whether the City is liable for the Mayor's actions depends on whether she acted in her official capacity, which is

ordinarily a question of fact better resolved after discovery and not through a Motion for Judgment on the Pleadings. *See Farmers Ins. Grp. v. Cty. of Santa Clara*, 906 P.2d 440, 458–59 (Cal. 1995).

The TAC contains some of the alleged interfering communications from Mayor McLaughlin wherein she identifies herself as the Mayor acting on behalf of the City of Richmond. These allegations present an issue of fact concerning whether the Mayor was acting in her official capacity and are sufficient to plead a plausible claim of breach of the implied covenant of good faith attributable to the City. *See Mammoth Lakes Land Acquisition, LLC v. Town of Mammoth Lakes*, 120 Cal. Rptr. 3d 797, 803 (Cal. Ct. App. 2010) ("The Developer established a breach attributable to the Town by evidence of the actions of town officials, acting within their authority."). Therefore, the City is not entitled to judgment on the pleadings on the theory that it is not responsible for the actions of the Mayor.

We also disagree with the district court's conclusion that the waiver provision in the Sixth Amendment to the LDA precluded a claim based on the Mayor's actions. That Amendment, executed May 18, 2010, states,

> "[N]o event of default under the LDA exists as of [May 18, 2010], and that no event has occurred which, with the passage of time or the giving of notice, or both, would constitute an event of default."

Sixth Amendment to the LDA, § 5.

However, to the extent that there may have been a waiver of default claims, the waiver would not apply to the alleged actions causing defaults after May 18, 2010. At least two of the Mayor's allegedly improper actions, as well as the City's disapproval of the casino project, occurred after May 18, 2010.[2] Therefore, the City is not entitled to judgment on the pleadings by virtue of the waiver provision in the Sixth Amendment.

We therefore conclude that the TAC states a plausible claim that, by preventing the occurrence of the condition precedent and relying partially on the non-occurrence to deny the casino project and avoid carrying out the purpose of the LDA, the City breached the implied covenant of good faith and fair dealing when it promulgated Resolution 23-11 and discontinued consideration of a casino use for Point Molate.

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[2] Specifically, these included a June 1, 2010 letter to several U.S. Senators lobbying them to deny the Tribe's application, and an August 15, 2010 speech at a conference of the United States Representatives regarding Indian Gaming, where Appellants allege that "Mayor McLaughlin in her official capacity of Mayor, expressly advanced the City's position the Tribe's Land Determination Request should be denied . . . ." TAC ¶¶ 63-64.

2. Breach of Express Terms of Contract. Appellants also claim that the City breached the express terms of § 2.8 of the LDA,[3] which states:

> If it is determined that the development of Indian gaming uses on the Property is not commercially feasible or not legally permitted, the Developer may purchase and lease the Property without any involvement by any Native American tribe, and, prior to the Closing Date, *the Developer and the City shall negotiate exclusively in good faith* for a period not to exceed one hundred twenty (120) days with respect to an alternative development proposal.

LDA § 2.8 (emphasis added).

We agree with the district court that the TAC's allegations regarding breach of express terms of contract were conclusory and unsupported by any specific allegations. Appellants, however, should have been permitted to augment these allegations in a Fourth Amended Complaint.

3. Leave to Amend. The district court abused its discretion in denying Appellants' motion for leave to file the Proposed Fourth Amended Complaint ("FAC"). In the Proposed FAC, Appellants added non-conclusory, factual allegations regarding the 120-day negotiation period. Appellants' new allegations

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[3] Appellants also contend that the City violated the Sixth Amendment to the LDA by failing to give "equal consideration to each project alternative identified in the [Final Environmental Impact Report]." Sixth Amendment to the LDA, § 3(c). Since Appellants did not raise this issue in the district court or in the TAC, it will not herein be considered.

plausibly state that the City was merely going through the motions of negotiating. The Proposed FAC states that City representatives would come to negotiation meetings only "to listen," that the City repeatedly failed to respond to Upstream's substantive questions concerning the City's goals or preferences for the project, and that during the negotiation period the City filed a lawsuit against Upstream seeking declaratory relief that it had no further obligations under the LDA, including Section 2.8.[4] FAC ¶¶ 89–90, 94–95, 98, 106–07.

While the City was contractually free to reject Upstream's proposal, the City's mere attendance at meetings and correspondence with Upstream is not *per se* good faith negotiation. *See Placentia Fire Fighters v. City of Placentia*, 129 Cal. Rptr. 126, 136 (Cal. Ct. App. 1976) ("Consequently, to sit at a bargaining table, or to sit almost forever, or to make concessions here and there, could be the very means by which to conceal a purposeful strategy to make bargaining futile or fail.").

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[4] Upstream also alleges that, unlike past negotiations over LDA amendments, the City's attorneys attended the meetings instead of the City Council members, and that in every other project considered by the City during the same time period, the City issued a Statement of Overriding Consideration or Mitigated Negative Declaration to approve the project despite findings of adverse negative impacts. FAC ¶¶ 115, 120.

When taken in a light most favorable to Appellants, the TAC plausibly alleges that the City did not negotiate in good faith. Accordingly, the Order Denying Leave to Amend is reversed, and Upstream may file the Proposed FAC.

4. Attorneys' Fees. In light of the reversal of the district court's dismissal, the district court's order on attorneys' fees is vacated. However, we conclude that the district court correctly determined that the Tribe waived its sovereign immunity and would not be exempt from a future attorneys' fees award.

The Tribe asked, as part of its requested relief, that the district court grant "[a]n award of damages against the City of Richmond for . . . cost of suit, including reasonable attorneys[']] fees and costs as permitted by law." TAC at 38. Thus, attorneys' fees was one of the issues that the Tribe expressly requested the district court to resolve and put under its jurisdiction. *Cf. Rupp v. Omaha Indian Tribe*, 45 F.3d 1241, 1245 (8th Cir. 1995) (finding that the Tribe had waived sovereign immunity as to counterclaims when it "affirmatively requested the district court to resolve the ownership of the disputed land by asking the defendants to assert any [claims] they may have in the disputed lands").

Once the Tribe consented to federal court jurisdiction over the attorneys' fees issue, it was bound by the district court's determination under California law, which applies to the Tribe as it would to any other third-party beneficiary. *See* Cal.

Civ. Code, § 1717; *Real Prop. Servs. Corp. v. City of Pasadena*, 30 Cal. Rptr. 2d 536, 541 (Cal. Ct. App. 1994).

For the foregoing reasons:

1. We reverse the district court's grant of the Motion for Judgment on the Pleadings and remand the case for further proceedings regarding whether the City violated the LDA by interfering with the Tribe's ability to fulfill a condition precedent.
2. We affirm the district court's dismissal of the express breach of contract claims.
3. We reverse the district court's order denying leave to amend the Proposed Fourth Amended Complaint. Appellants may file the Proposed Fourth Amended Complaint.
4. The district court's amended judgment is vacated and the case is remanded for further proceedings consistent herewith, including consideration of a legal fee award against the Tribe.

The parties shall bear their own costs on appeal.

AFFIRMED in part, REVERSED in part, and REMANDED.