SUPERIOR COURT OF CALIFORNIA

COUNTY OF SANTA CLARA

REPUBLIC METROPOLITAN, LLC, Plaintiff, v. CITY OF SANTA CLARA, Defendant.	Case No. 22CV393667 ORDER RE: DEMURRER TO FIRST AMENDED COMPLAINT AND MOTION TO STRIKE Order Issued on Submitted Matter

Defendant the City of Santa Clara's (the "City" or "Defendant") demurrer to the First Amended Complaint ("FAC") filed by plaintiff Republic Metropolitan, LLC ("Plaintiff") and motion to strike portions contained therein came on for hearing before the Honorable Christopher G. Rudy on November 1, 2022, at 9 a.m. in Department 7. The Court heard argument from both sides and took the matter under submission. Having thoroughly considered the matter, the Court is issues its final ruling follows:

I. Background

A. Factual

This action arises out of negotiations for the development of a proposed mixed-use transit-oriented development in a parking lot abutting Santa Clara University ("SCU") that is owned by the City and non-party Valley Transportation Authority ("VTA"). According to the

allegations of the operative FAC, after a year of in-person meetings and conversation with City officials, members of the VTA, SCU representatives and community leaders, on May 31, 2017, Richard Kramer ("Kramer"), Chairman of the family of companies that includes Plaintiff, sent the City a letter detailing a proposal for Plaintiff, the City and VTA to enter into an Exclusive Negotiations Agreement ("ENA") for the purpose of developing housing on the subject lot ("Proposal Letter"). (FAC, ¶ 75, Exhibit A.) The proposal was successful, and the three sides commenced negotiations that extended throughout the remainder of 2017. (*Id.*, ¶ 78.)

On February 6, 2018, Plaintiff as Developer and the City and VTA as Owners entered into an ENA for the purposes of advancing the project. (Complaint, ¶ 79, Exhibit B.) Among other things, the ENA mandated "Good Faith Negotiations" over a negotiating period of 12 months, renewable for up to 6 months, during which time the City and VTA would not negotiate with any entity other than Plaintiff. (*Id.*) To secure the arrangement, Plaintiff was required to submit two $25,000 negotiation deposits, advance the project, and make regular reports. (*Id.*) The ENA specified that the City would take the lead in negotiating on behalf of itself and VTA. (*Id.*, ¶ 80.) Despite this term, much of the responsibility for working through issues fell to VTA. (*Id.*)

In negotiating the ENA, the City had a non-delegable duty to operate in good faith and to disclose any known or apparent risks that could disrupt the planned project, including those relating to requirements tied to entitlements or applicable regulations. (FAC, ¶ 81.) However, at no time did the City advise Plaintiff that there would be necessary actions to take or procedures to follow under the Surplus Land Act ("SLA"), or that the law could pose any obstacle at all to the project. (*Id.*) This non-disclosure justified Plaintiff in believing that there was no SLA issue or concern and reflected then-Santa Clara City Attorney Brian Doyle's ("Doyle") belief that the

project was not subject to any requirements under the SLA. (*Id.*) Plaintiff alleges that but for misrepresentations by the City on which it relied concerning whether the site was developable, it would not have entered into the ENA and would not have spent extensive time and money seeking to advance the project. (*Id.*, ¶ 82.) It continues that had the City done its due diligence and disclosed the potential SLA issue, it could have insisted on further assurances and barring a satisfactory contingency plan, walked away altogether. (*Id.*)

The original ENA also contained an unconscionable "Defaults and Remedies" term which was procedurally unfair as a late addition drafted by the City and not initialed or confirmed by Plaintiff. (FAC, ¶ 83.) The term was substantively unfair in that it effectively zeroed out the requirement for the City to do (or pay) anything at all in exchange for the substantial consideration Plaintiff provided to the City if the relationship between itself and Plaintiff soured or the project did not materialize. (*Id.*) The City would be able to walk away in exchange for a payout that could never exceed sums the City received from Plaintiff during the pendency of the project. (*Id.*)

On February 8, 2019, Plaintiff, the City and VTA entered into Amendment Number 1 to the ENA, thereby exercising the option to extend the negotiating term for six months, and for Plaintiff to supply a third $25,000 negotiation deposit. (FAC, ¶ 84.) While the original ENA had been entered on February 6, 2018 and called for a negotiations period of 12 months, the Amendment was not signed until after the nominal running of the original 12-month deadline. (*Id.*, ¶ 85.) Nevertheless, the parties were by then working together collaboratively to make steady progress on the project, and this course of performance created an implied-in-fact extension of the original agreement that sustained the parties' obligations under the ENA through the date when the Amendment was signed. (*Id.*)

By mid-2019, the parties had agreed to expand the project from student housing to workforce housing as well, and also agreed that more time was needed to (1) complete the plan for relocation of a municipal well on the site that produced approximately 5 percent of the City's water supply and (2) complete the CEQA environmental review process. (FAC, ¶ 88.) On July 16, 2019, the City Council voted unanimously to authorize a second extension of twelve months, which the parties officially executed on December 5, 2019. (*Id.*, ¶¶ 85-86.) While the first ENA extension had formally extended the negotiations period only through August 5, 2019, the parties continued to meet, negotiate project planning, and advance the project through the approvals process. (*Id.*, ¶ 89.) This additional course of performance created an implied-in-fact extension of the ENA that sustained the parties' obligations thereunder through November 12, 2019 when the second extension was signed. (*Id.*, Exhibit D.)

Throughout the period when the ENA was in force, as well as for nearly six months after the city terminated the project, Plaintiff fully performed its obligations thereunder and worked to undertake all work necessary to bring the project to life. (FAC, ¶¶ 94-97.) However, the City ultimately unlawfully obstructed the project, as outlined below.

On November 26, 2019, shortly before the parties officially executed the second ENA extension, but after its final form had been reached, the Sixth District Court of Appeals issued its decision in *Anderson v. City of San Jose*. (FAC, ¶ 98.) The *Anderson* decision addressed a policy statement by the San Jose City Council challenging the scope of the SLA; the statement took the view that the SLA did not apply to charter cities like San Jose- or by extension to Santa Clara, also a charter city. (*Id.*) The *Anderson* court rejected this assertion, concluding that because the affordable housing concerns identified in the SLA are properly recognized as a matter of statewide concern, the SLA is equally binding on both general law and charter cities.

(*Id.*, ¶ 99.) As the ENA for Plaintiff's project was still in force when *Anderson* was issued, there was still time for compliance with the SLA. (*Id.*) However, Doyle utilized the ruling as justification for stopping the project and to that end, on December 18, 2019, delivered a memo to City Mayor Gillmor and the City Council advising that the based on the ruling the City was obligated to comply with the provisions of the SLA. (*Id.*, ¶ 100.) He then asserted that the City would consequently have to review any transactions currently being negotiated, but where title had not yet been transferred or leased would possibly have to terminate them to achieve compliance, including potential transactions currently under an ENA if the ENA was not the result of a procedure that was in compliance with the SLA. (*Id.*, ¶ 100-101.) Notably, *Anderson* said nothing about what procedural requirements might attach if a city had already entered into an ENA without conducting a bidding process or ending negotiations or terminating projects. (*Id.*, ¶ 102.)

The following day, Doyle met with Plaintiff's outside counsel and castigated him for not insisting that the City and VTA conduct a round of offers as contemplated under the SLA. (FAC, ¶ 103.) Despite this, as the ENA extension had gone through, Plaintiff continued to follow through with project planning with no indication that the City or VTA were anything other than fully committed to moving the project toward completion. (*Id.*, ¶ 104.)

On March 31, 2020, Plaintiff's counsel sent a letter to Doyle in response to his position, seeking a collaborative resolution and emphasizing the discretion retained by the City over matters involving designating land surplus and the SLA. (FAC, ¶ 105.) Doyle responded the following day, expressing his view that the project could not go forward for multiple reasons, some of which involved the SLA. (*Id.*, ¶ 106.) Doyle also argued, in a position shift, that he believed that as of the signing of the original ENA the parties should have arranged for SLA

compliance then, and that because the lot continued to house an operating well, the City Council would not be able to make the necessary findings that the property could be declared surplus. (*Id.*, Exhibit E.) Doyle was deliberately concealing that Plaintiff had already undertaken substantial measured to comply with environmental standards pertaining to well relocation and environmental impacts generally. (*Id.*, ¶ 108.) Rather than giving credit to this work, Doyle unilaterally ordered the CEQA consultant to hire a third-party consultant to conduct a peer review of the well relocation effort, thereby effectively overruling all other stakeholders by administrative fiat. (*Id.*, ¶ 109.) Plaintiff alleges that Doyle utilized the environmental review process as a bureaucratic weapon to obstruct progress on a project that he personally did not support. (*Id.*)

Despite the foregoing, the parties continued to proceed under the understanding that everything was on track and all were acting in good faith to make the project a reality. (FAC, ¶ 110.) Consistent with an April 2020 Informational Report which recounted the steps being taken by the parties to address replacement of the well and other issues (which did not include any reference to SLA compliance), the City Council voted unanimously at the July 14, 2020 meeting to approve a third amendment and extension to the ENA. (*Id.*, ¶¶ 110-111, Exhibit F.) Although one member expressed concerns relating to SLA compliance and arrangements for the replacement well, and suggested that the SLA issue should have been discussed before entering into the ENA, she nevertheless voted in favor of the extension. (*Id.*, ¶ 112.) Doyle stated that continuation of the ENA would not effectuate the disposition of any public land and therefore could not trigger any requirement to establish compliance with the SLA. (*Id.*) He further advised that it was the City, not the developer, that was responsible for any liabilities associated with SLA compliance. (*Id.*)

Unbeknownst to Plaintiff, Doyle then orchestrated a sustained effort to suppress all progress on and ultimately terminated the project, all while the ENA remained in force. (FAC, ¶ 113.) During this time, Plaintiff continued its time-consuming and costly efforts to bring the project to fruition, without any indication from the City that it should cease doing so. (*Id.*, ¶ 114.) The parties continued to collaborate, working up a proposed final form of a Term Sheet preparatory to entering into a Development Disposition Agreement ("DAA"), a document that, once finalized and enacted, would have transferred the subject lot to Plaintiff via a 99-year lease and given it the green light to obtain final authorizations and commence with construction. (FAC, ¶ 115.) Plaintiff submitted the Term Sheet on July 30, 2020. (*Id.*, ¶ 116.) The City and VTA responded two weeks later, and that response manifested the three stakeholders' agreement on substantially all of the terms except essentially one- indemnification by Plaintiff in the event its counterparts should be found liable in connection with a charge of having failed to comply with the SLA. (*Id.*, ¶ 118.) Apparently at Doyle's request and based on his reading of *Anderson*, as part of its recommendations relating to the vote on the third ENA amendment and extension, the City Manager's Office had recommended that the City seek such indemnity, despite *Anderson* not speaking to the timing of SLA compliance. (*Id.*) At this point in time, there was no suggestion that the indemnity issue had the potential to block the entire project. (*Id.*)

Although the second ENA extension had formally extended the negotiations period only through August 5, 2020, Plaintiff and the City, along with the VTA, continued to meet, negotiate the project planning, and advance the project through the approvals process. (FAC, ¶ 119.) This further additional course of performance created yet another implied-in-fact extension of the ENA that sustained the parties worked collaboratively to reduce the third extension to writing. (*Id.*)

On October 15, 2020, unbeknownst to Plaintiff, the City Council conducted secret proceedings almost entirety in closed session which Doyle maintained involved no "reportable actions." (FAC, ¶ 120.) Up until the day before, Plaintiff and the City were working collaboratively to secure environmental approval, secure planning approval, and reach a final agreement on a term sheet, the three essential building blocks of this type of development project. (*Id.*) The numerous communications and interactions exchanged and undertaken reconfirmed the ongoing binding agreement established under the ENA and its extensions and further extended through course of performance. (*Id.*, ¶ 121.)

The meeting was adjourned unilaterally by the mayor after purported "technical difficulties." (FAC, ¶ 124.) The foregoing actions were a flagrant violation of the Brown Act. (*Id.*, ¶ 125.) Doyle allegedly structured the proceedings to create the superficial appearance of satisfying one of the Brown Act's narrow exceptions, the rule permitting closed session discussions with real property negotiators (Gov. Code, § 54956.8). (*Id.*, ¶ 125.) However, the subject matter of the meeting went far beyond the scope of the foregoing exception, which is limited to "price and terms of payment" for the subject transaction, by including a decision to repudiate an existing contractual relationship and break off negotiations all together. (*Id.*, ¶ 126.) Plaintiff understands, on information and belief, that following a discussion involving Doyle, the City Council voted to terminate the ENA and reverse the position it had taken publicly at the July 14, 2020 meeting. (*Id.*, ¶ 127.)

Plaintiff had no inkling that anything was amiss at that time. (FAC, ¶ 128.) On November 12, 2020, when the City issued a short letter stating that it considered the term of the second ENA extension as having "expired" on August 5, 2020, the City had directed staff to cease efforts to further the project, and it would be returning any unspent portions of Plaintiff's

deposit following an accounting and resolution of outstanding third-party invoices. (*Id.*, ¶ 132, Exhibit N.) Instead of communicating directly with Plaintiff's personnel who had regularly been working on the project, the letter was sent to the office of Plaintiff's corporate affiliate in Washington D.C., which (intentionally) deprived Plaintiff of timely notice of the City's decision. Consequently, Plaintiff did not receive notice of the City's decision until December 22, 2020. (*Id.*) Despite its representations regarding an accounting and return of unspent sums in the letter, the City has never contacted Plaintiff with any accounting or record of the resolution of any outstanding third-party invoices and has never returned any portion of the negotiated deposits paid by it. (FAC, ¶ 133.)

On April 28, 2021, after unsuccessfully attempting to reinstate discussions through informal channels, Plaintiff petitioned the City Council to re-agendize the matter of the third ENA amendment and extension. (FAC, ¶ 136.) From that moment on, Doyle undertook a concerted and sustained effort to obfuscate and mislead to ensure that Plaintiff would continue to be denied an opportunity to be heard. (*Id.*, ¶ 137.) City policy dictates that the City Council direct the actions of City staff as it pertains to written petitions, however, Doyle succeeded in directing City staff to disregard this boundary. (*Id.*, ¶ 138.)

On May 25, 2021, the City Manager's office made an Agenda Report for the petition, the contents of which suggest City staff went through several rounds of edits to cover the staff's tracks after they violated City policy concerning written petitions to the City Council. (FAC, ¶ 139, Exhibit P.) The Agenda Report concluded that the ENA had expired on August 5, 2020, and therefore amendment was not possible, and alluded to compliance with the SLA. (*Id.*) The report omitted many of the most salient facts, including that the City Council had voted in July 2020 to authorize the third ENA amendment and extension, and that the City Council, at Doyle's

direction, had taken up the project again in closed session in October 2020 where it voted to terminate it. (*Id.*, ¶ 140.) The Agenda Report, consisting of a biased record, had the intention of and succeeded in misleading the Council. (*Id.*)

On June 9, 2021, Plaintiff's outside counsel resubmitted the petition. (FAC, ¶ 142.) The responding Agenda Report was, in all material aspects, identical to the prior Agenda Report. (*Id.*) City staff effectively blocked the City Council from obtaining the full record containing all objective information, and usurped the role of the Council. (*Id.*, Exhibit Q.) Based on the foregoing, a motion was made to support the staff's recommendation, i.e., not to agendize the ENA. (*Id.*, ¶ 143.) This violated City policy as it was based on the staff's opinion and not the City Council's own discussions. (*Id.*) On this limited record, the City Council voted 4-3 to follow the Staff recommendation and take no action. (*Id.*)

At the City's Council's July 6, 2021 meeting, Plaintiff's Vice President for Development, Kelly Macy appeared explaining that Plaintiff would provide the indemnity for any activity pursuant to the SLA and requesting that the Council allow Plaintiff a fair hearing on the merits. (FAC, ¶ 144.) A councilmember moved to reconsider, which he was permitted to do because he was on the prevailing side that had voted to take no action on the original petition. (*Id.*, ¶ 145.) However, Doyle threw up enough procedural roadblocks to ensure that Plaintiff would not get what it requested. (*Id.*) A subsequently prepared Staff Agenda Report on the motion for reconsideration, which contained many misstatements of fact, was issued and the motion was placed on the agenda for the July 13, 2021. (*Id.*, ¶¶ 148-151, Exhibit R.) According to the report, the only topic for discussion was reconsideration of the decision not to agendize Plaintiff's June 9 petition. (*Id.*)

At the July 13, 2021 meeting, the City Manager took to the floor to make a highly improper presentation that misrepresented facts and attacked Plaintiff's reputation, over the protestations of Mayor Gillmor, who noted that such extensive argument was wholly inappropriate in the context of a procedural vote on whether to take up the merits at another time. (FAC, ¶ 152.) Plaintiff was never offered the opportunity to speak on its own behalf and the motion ultimately failed. (*Id.*) Aside from suffering significant financial harm which it likely cannot recoup unless the project is built, the proprietary information developed by Plaintiff (and its retained consultants) concerning the proposed project is now in the City's possession and it could use such information to bring in a different project with a different developer in the future. (*Id.*, ¶ 153.) In other words, Plaintiff was tricked into working toward and investing in the City's development for free. (*Id.*)

B. Procedural

Based on the foregoing allegations, Plaintiff initiated the instant action with the filing of the Complaint on January 24, 2022, asserting the following causes of action: (1) violation of the Housing Accountability Act (Gov. Code, § 65580, et seq.); (2) negligent misrepresentation; (3) breach of contract (specific performance); (4) breach of contract (damages); (5) breach of implied covenant of good faith and fair dealing; and (6) unjust enrichment/quantum meruit. The City subsequently demurred to each of the foregoing claims on the ground of failure to state facts sufficient to constitute a cause of action and also moved to strike portions of the Complaint. (Code Civ. Proc., §§ 430.10, subd. (e), 435 and 436.) After entertaining oral argument at the hearing on June 14, 2022, the Court sustained the demurrer to the fourth (breach of contract-damages) and fifth (breach of the implied covenant) causes of action with leave to amend and to

all of the remaining claims asserted in the Complaint *without* leave to amend. As a result of foregoing, the motion to strike was deemed moot.

On June 30, 2022, Plaintiff filed the operative FAC asserting claims for: (1) breach of contract; and (2) breach of the implied covenant of good faith and fair dealing. On August 2, 2022, the City filed the instant demurrer to each of the foregoing claims on the ground of failure to state facts sufficient to constitute a cause of action. (Code Civ. Proc., § 430.10, subd. (d).) The City also filed a motion to strike portions of the FAC. Plaintiff opposes both motion.

II. The City's Demurrer

A. Breach of Contract

In the original Complaint, Plaintiff alleged that the City breached the ENA in the following ways: unreasonably refusing to negotiate in good faith a final term sheet for a DDA or Lease Option Agreement ("LOA"); Doyle and City staff advising the City Council inaccurately and fraudulently in recommending that it improperly condition entry of a third amendment and extension of the ENA on terms not contemplated by the parties, including terms requiring Plaintiff to "provide" a second well site and to indemnify the City for any liability it might owe under the SLA; falsely representing to the City Council that Plaintiff had not met its obligations under the ENA and consequently recommending that it vote to unilaterally withdraw from and terminate the ENA; ensuring the foregoing recommendations were made in a closed session in order to deprive Plaintiff and the public from receiving due process or any meaningful process, and frustrating public oversight; unilaterally withdrawing from and terminating the ENA and participation in the project; and misrepresenting the procedural requirements for reconsideration of the decision. (Complaint, ¶ 168.)

When the City previously demurred to this cause of action, it argued that it failed for the following reasons: (1) five of the six alleged breaches occurred *after* the ENA expired and thus cannot constitute a breach; (2) four of the six breached pertained to internal communications between the City staff and the City Council and are therefore not actionable; (3) the City had no contractual obligation to enter into a third amendment/extend the ENA and thus its refusal to do so was not an actionable breach; and (4) Plaintiff was not entitled to the damages claimed under the ENA.

The Court found persuasive the City's first argument because five of the six alleged breaches of the agreement occurred *after* the ENA expired and a defendant cannot breach a contract where there is no contract in existence to breach. (See, e.g., *City of El Cajon v. El Cajon Police Officers' Assn.* (1996) 49 Cal.App.4th 64, 76; *San Bernardino Public Employees Assn. v. City of Fontana* (1998) 67 Cal.App.4th 1215, 1223.) These breaches included the following:

- The breach predicated on the City's refusal to "negotiate in good faith" a final term sheet for a DDA or lease option agreement which occurred on August 11, 2020 (Complaint, ¶ 175(a));
- The breaches regarding advice provided by the City attorney/staff to the City Council concerning termination of the ENA on a closed session in October 2020 (Complaint, ¶ 175(c)-(d));
- The breach based on the City's letter to Plaintiff notifying it that the ENA had already expired and that the City would cease efforts to further the proposed project, which occurred on November 12, 2020 (Complaint, ¶ 119, Exhibit H); and
- The breach regarding the City attorney/staff's advice to the City Council concerning the "procedural requirements for reconsideration of the decision to withdraw from and terminate the ENA" which occurred after June 2021 (Complaint, ¶¶ 130-140).

The Court also found merit in the City's contention that purported breaches based on internal communications between the City staff/attorneys and the City Council were not actionable because other than the general duty to negotiate in good faith, Plaintiff cited no specific contractual duties implicated by those communications, which were *not* negotiations with

Plaintiff. The Court noted, as emphasized by the City, that the City had no contractual obligation to enter into a third amendment to the ENA and thus no breach could be stated based on the recommendation to the City Council "that it [improperly] condition entry of a third amendment and extension of the ENA" on certain terms. (Complaint, ¶ 175(b).) For the same reason, the Court concluded that no breach could be stated based on the City's failure to extend the ENA, which was the sixth and final alleged breach the fourth cause of action of the Complaint was predicated on. (*Id.*, ¶ 175(e).) Any extensions of the ENA were within the City's discretion under paragraph 2- without any good faith or other restrictions on the exercise of that discretion.

With the foregoing in mind, turning to the FAC, Plaintiff's primary amendment to the Complaint is the addition of multiple paragraphs that allege the existence of an implied in fact agreement to extend the ENA beyond August 5, 2020. (FAC, ¶¶ 85-87, 89-90, 92, 119-121, 128-129.) More specifically, Plaintiff alleges that the first extension was not formally executed until two days after the original ENA period expired (¶ 85), and the second was not formally executed until three months later (¶ 89). Plaintiff pleads that the parties continued in joint negotiation efforts after August 5, 2020, when the second extension expired, and alleges that:

> In 2020 just as in 2019, the City's continued participation in project planning and operations advancing the project also constituted a waiver of any termination right express or implied that may have existed under the agreement based solely on the running of any defined negotiations period, since the City's declining to invoke the conclusion of the negotiations period communicated that it was still bound by its obligations through course of performance.

(FAC, ¶ 119.)

The City maintains that the foregoing allegations do not resurrect the expired ENA and the Court agrees. First, as Plaintiff concedes, the City and the VTA would only agree to an extension if the following conditions were met: (1) Plaintiff provided a second well; (2) Plaintiff indemnified the City from any SLA liability; and (3) a final term sheet was accomplished by November 2020.

(FAC, ¶¶ 157, subd. (b) and Exhibit G at p. 2.) Plaintiff notably does not allege that it ever accepted each of the foregoing conditions, and the allegations in the FAC that, as of August 11, 2020, the parties still referred to the statutory indemnity issue as "OPEN, pending further discussions" (FAC, ¶ 118, Exhibit H at p. 11, ¶ 44) and that, two months later, the parties "remained in active negotiations regarding the terms of an SLA indemnity provision as late as one date before" October 15, 2020 (*id.*, ¶ 129 at 57:1-3), expressly establish that all of the necessary conditions were actually *not* met.

Second, the City argues, persuasively, that Plaintiff's claim for an implied extension is *directly* contrary to the express terms of the ENA as amended. It is a long-settled component of contract law that implied terms can *never* be read to vary the express terms of an agreement. (See *Carma Developers (Cal.), Inc. v. Marathon Development California, Inc.* (1992) 2 Cal.4th 342, 374; *Wagner v. Glendale Adventist Medical Center* (1989) 216 Cal.App.3d 1379, 1393 [explaining that "there can be no implied contractual term completely at variance with an express term of a contract ...."].) Here, the ENA provides that:

> **Negotiating Period.** The negotiating period (the "Negotiating Period") under this Agreement shall commence on February 6, 2018 and terminate on 11:59 p.m. on August 5, 2020.
>
> Any further extensions or modification of the Negotiating Period will require formal amendment of this Agreement approved by the City Council, the VTA Board of Directors in their complete discretion and executed by the City, VTA, and the Developer [Plaintiff].
>
> If a DDA or LOA has not been executed by the City, VTA, and the Developer (or its affiliate) by the expiration of the Negotiating Period, then this Agreement shall terminate and no party shall have any further rights or obligations under this Agreement, except those that explicitly survive termination herein. ...

(FAC, Exhibit D at p. 2, ¶ 2.)

Similar language appeared in the original ENA and the first amendment (*id.*, Exhibit B at p. 2, ¶ 2, Exhibit C at pp. 1-2), and this language requires that any extension be formally approved by the City Council and the VTA Board of Directors and executed. While these formalities were observed for the first and second extensions, per the allegations of the FAC, Plaintiff does not allege that they occurred with respect to the purported third extension. Problematically for Plaintiff, the ENA provides that in the absence of a formally executed extension, the ENA "shall terminate." (FAC, Exhibit B at p. 2, ¶ 2.) In its opposition, Plaintiff insists that the City Council "formally approved" the third ENA extension, but the allegations and exhibits it relies on in support of this assertion in fact undercut it. The exhibit cited as "approval" of the extension, Exhibit G, is simply an agenda report in which City staff presented alternatives and recommendations for the City Council, and reiterated the City's requirement for SLA indemnification, and there are no allegations that there was a formal amendment to the ENA that was approved by the City Council *and* executed by all three parties.

Because the ENA expired by its own terms on August 5, 2020, any actions that took place subsequent to that date cannot support a claim for its breach. (See, *City of El Cajon v. El Cajon Police Officers' Assn., supra,* 49 Cal.App.4th at 76 [stating that a defendant cannot breach a contract where there is no contract in existence to breach].) Finally, as the City had no contractual obligation to enter into a third extension, their "failure" to do so does not qualify as an actionable breach. Consequently, Plaintiff has failed to correct the deficiencies that compelled the Court to sustain the City's demurrer to this claim in the original Complaint. At oral argument, in opposition to the Court's tentative ruling, Plaintiff requested further leave to amend. However, Plaintiff was given a previous opportunity to cure the deficiencies in the original Complaint and was unable to do so. Despite what Plaintiff argues will lead to an unfair

result if further leave is not granted, the Court is not persuaded that Plaintiff has any further facts to add that would cure the deficiencies Court has identified. Therefore, the City's demurrer to the breach of contract claim in the FAC on the ground of failure to state facts sufficient to constitute a cause of action is SUSTAINED WITHOUT LEAVE TO AMEND.

B. Breach of the Implied Covenant of Good Faith and Fair Dealing

In its prior order on the City's demurrer to this claim in the Complaint, the Court sustained the motion to the implied covenant claim based on the City's argument that it was substantively identical to the preceding breach of contract claim. While the Plaintiff had not alleged in the Complaint that the City's actions violated specific provisions of the ENA, as the breach of the ENA cause of action did, the claim was otherwise predicated on the exact same allegations as that cause of action. The Court explained that if the allegations of a breach of implied covenant claim "do not go beyond the statement of a mere contract breach and, relying on the same alleged acts, simply seek the same damages or other relief already claimed in a companion cause of action, they may be disregarded as superfluous as no additional claim is actually stated. (*Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1395.) As the breach of the implied covenant was duplicative of the preceding breach of contract claim, the Court sustained the demurrer. The Court also sustained the demurrer because the implied covenant cannot contravene the express provisions of the ENA and Plaintiff failed to plead something more than breach of an express term. (*Id.*)

Here, the City maintains that the implied covenant claim in the FAC suffers from the same deficiencies as it did in the Complaint, explaining that as pleaded now it is still virtually identical to the first cause of action, with the only difference being that Plaintiff removed the references to the ENA and added "unfairly and in bad faith." It continues that the City had no

obligation to enter into a third amendment of the ENA, and thus it cannot serve as a predicate for this claim, because to conclude otherwise would be an improper altering of the express terms of the agreement. The Court agrees.

Substantively, there is no difference between the first and second causes of action, and no artful pleading, i.e., the inclusion of the phrase "unfairly and in bad faith," compels a contrary conclusion. Further, the City had no good faith obligation to enter into a third extension of the ENA and the Court will not condone the rewriting of the parties' agreement in order to rescue Plaintiff's claim. (See *Foley v. Euless* (1931) 214 Cal. 506, 511 [explaining that courts should not "rewrite contracts for parties by inserting an implied provision, unless, from the language employed, such implied provision is necessary to carry out the intention of the parties. No implied condition can be inserted as against the express terms of the contract or to supply a covenant upon which [the contract] was intentionally silent."].) At oral argument Plaintiff argued in opposition to the tentative ruling and sought further leave to amend. However, having been previously granted leave, Plaintiff was unable to cure the deficiencies the Court identified. The Court heard nothing at oral argument which would persuade it that further amendment would yield a different result. Consequently, the City's demurrer to the second cause of action on the ground of failure to state facts sufficient to constitute a cause of action is SUSTAINED WITHOUT LEAVE TO AMEND.

III. The City's Motion to Strike

Given the Court's ruling on the demurrer, the City's motion to strike is MOOT.

Date: NOV 10 2022

The Honorable Christopher G. Rudy
Judge of the Superior Court

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA CLARA

DOWNTOWN COURTHOUSE
191 NORTH FIRST STREET
SAN JOSÉ, CALIFORNIA 95113
CIVIL DIVISION

FILED

NOV 14 2022

CLERK OF THE COURT

BY: R. Belligan Deputy Clerk

RE: **Republic Metropolitan LLC vs City of Santa Clara**
Case Number: **22CV393667**

PROOF OF SERVICE

ORDER ISSUED ON SUBMITTED MATTER. ORDER RE: DEMURRER TO FIRST AMENDED COMPLAINT AND MOTION TO STRIKE was delivered to the parties listed below the above entitled case as set forth in the sworn declaration below.

If you, a party represented by you, or a witness to be called on behalf of that party need an accommodation under the American with Disabilities Act, please contact the Court Administrator's office at (408) 882-2700, or use the Court's TDD line (408) 882-2690 or the Voice/TDD California Relay Service (800) 735-2922.

DECLARATION OF SERVICE BY MAIL: I declare that I served this notice by enclosing a true copy in a sealed envelope, addressed to each person whose name is shown below, and by depositing the envelope with postage fully prepaid, in the United States Mail at San Jose, CA on November 14, 2022. CLERK OF THE COURT, by Richelle Belligan, Deputy.

cc: Joseph W Cotchett 840 Malcolm Road Suite 200 Burlingame CA 94010
Brendan F Macaulay Nossaman LLP 50 California St 34th Fl San Francisco CA 94111