

<p>DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, Colorado 80202</p>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
<p>Plaintiff: DENVER TRANSIT PARTNERS, LLC, a Delaware limited liability company,</p> <p>vs.</p> <p>Defendant: REGIONAL TRANSPORTATION DISTRICT, a political subdivision of the State of Colorado.</p>	
<p>Attorneys for Defendant Regional Transportation District: Gregory S. Tamkin, Colo. Reg. No. 27105 Andrea Ahn Wechter, Colo. Reg. No. 43722 DORSEY & WHITNEY LLP 1400 Wewatta Street, Suite 400 Denver, Colorado 80202-5549 Telephone: (303) 629-3400 Fax: (303) 629-3450 Email: tamkin.greg@dorsey.com Email: wechter.andrea@dorsey.com</p> <p>Jocelyn L. Knoll (<i>pro hac vice</i> pending) Lincoln Loehrke (<i>pro hac vice</i> pending) DORSEY & WHITNEY LLP 50 South Sixth Street, #1500 Minneapolis, MN 55402 Telephone: (612) 340-2600 Fax: (612) 340-2868 Email: knoll.jocelyn@dorsey.com Email: loehrke.lincoln@dorsey.com</p>	<p>Case Number: 2018CV33495</p> <p>Division: 368</p>
<p>DEFENDANT REGIONAL TRANSPORTATION DISTRICT'S COUNTERCLAIMS AND ANSWER TO COMPLAINT</p>	

The Regional Transportation District (“RTD”), by and through its counsel, Dorsey & Whitney LLP, hereby files its Counterclaims and responds to Plaintiff Denver Transit Partners, LLC’s (“DTP”) Complaint as follows:

COUNTERCLAIMS

As for its Counterclaims against DTP, RTD pleads as follows:

INTRODUCTION

1. The Eagle P3 Project (the “Project”) is intended to be a cornerstone of the Denver region’s FasTracks transportation program. The \$2.2 billion Project includes, among other things, the design, construction, maintenance, and operation of three new commuter rail lines: the A-Line (Union Station to Denver Airport Station), the B-Line (Union Station to Westminster), and the G-line (Union Station to Wheat Ridge). Unfortunately, DTP, who was retained to design and build the Project by 2016, has not performed critical obligations and has attempted to shift the blame for its cost over-runs and delays to RTD and regulators.

2. In 2010, RTD hired DTP as the Project Concessionaire, charged with broad design, build, finance, operation, and maintenance (“DBFOM”) responsibilities. RTD and DTP executed a Concession and Lease Agreement (“CA”) dated July 9, 2010. Unless otherwise defined herein, capitalized terms have the same meaning as in the CA.

3. DTP is a joint venture managed by and owned in significant part by Fluor Enterprises, Inc., a unit of Fluor Corporation. Other leading members of DTP’s Project team include Balfour Beatty Infrastructure, Inc.; Ames Construction; and units of John Laing plc and Aberdeen Global Infrastructure Partners LP.

4. This dispute is about DTP’s failure to satisfy its obligations as a DBFOM Concessionaire—including DTP’s belated efforts to dismiss concerns about the safety and performance of its system and retroactively shift blame for grade crossing attendant costs and Project delays from its design/build contractors (also managed by Fluor) to the railroad regulatory professionals at the Federal Railroad Administration (“FRA”) and Colorado Public Utilities Commission (“CPUC”).

5. Pursuant to the CA, the A-Line, B-Line, and G-Line were scheduled to open for revenue service at staggered dates in 2016.

6. Two years later, DTP has not completed or opened the G-Line. Testing and resolution of system defects continue to the present.

7. DTP has not achieved all Revenue Service Commencement Certificates by the Project’s Revenue Service Deadline Date. This failure constitutes a Concessionaire Termination Event under the CA.

8. Although the A-Line and B-Line opened on time, they did so with deficient and incomplete systems. Both the FRA and the CPUC required grade crossing attendants (a/k/a “flaggers” or crossing guards) as a condition of various waivers and conditional approvals because, among other safety concerns regarding DTP’s performance, DTP’s grade crossing activation system did not function as intended. Of particular concern was the crossing warning time; *i.e.*, the time from when the crossing systems begin to activate (lights flashing) to when a train arrives at the crossing.

9. In exchange for being allowed to begin A-Line and B-Line service notwithstanding its failure to satisfy the CA’s prerequisites, DTP agreed in certain “Stipulation and Limited Waiver Side Agreement[s] to the Concession and Lease Agreement” (hereinafter “Side Agreements”) to accept reduced service payments as its “full compensation” and bear “all increased costs” necessitated by compliance with FRA and CPUC requirements—including the cost of crossing attendants. Since 2016, RTD has paid DTP more than \$160 million in service payments, which constitute DTP’s full compensation under the Side Agreements.

10. In 2016, DTP acknowledged the deficiencies in its system and its responsibility for the grade crossing attendants.

11. DTP (through the railroad of record, RTD) sought regulatory waivers, explaining that its Wireless Crossing Activation System (“WCAS”) was inoperable and not yet complete.

12. DTP did not comply with the longstanding FRA requirement that the grade crossing system “activate in accordance with the design of the warning system,” 49 C.F.R. § 234.225, nor was its system in conformance with the design warning times submitted to and approved by the CPUC.

13. During the period regulators required crossing attendants on the A-Line and B-Line, DTP provided regulators data and warning time reports showing deficient performance, including reports showing warning times for various crossings *averaged* 200% or more of the design time. In 2016, warning times over thousands of activations often averaged more than a minute, compared to approximately 30-second design times. Similarly excessive warning times continued after DTP turned on the WCAS. The warning time data—including average and median warning times far in excess of warning time design values—indicated that (1) DTP’s system was not functioning as intended and activating in accordance with the warning system design; (2) occasional, unpredictable human factor considerations were not the root cause of DTP’s excessive and inconsistent warning time performance; and (3) DTP had failed to design and commission its crossing activation systems to account for normal train handling behavior and typical crossing operation.

14. In August 2016, DTP and its system designer, Wabtec, represented to the FRA and CPUC that the system was not “functioning as intended” and required updated software to work as intended.

15. In October 2016, DTP's consultants admitted warning times were "excessive," "inconsistent," and "higher than design," requiring "corrective actions."

16. Accordingly, without objection or claim, DTP made substantial corrective actions and modifications to its WCAS and other crossing activation systems in late 2016 and beyond. DTP's system modifications through March 2017 improved warning time performance. Nevertheless, performance continued to differ significantly from DTP's previously submitted designs.

17. In September 2017, DTP sought to amend the previously approved CPUC crossing applications to include a Wireless Crossing Activation Buffer Time ("WCABT"), developed in 2017 by DTP's WCAS designer Wabtec, that DTP had omitted from its earlier design submittals.

18. DTP failed to provide the CPUC and other railroad stakeholders sufficient evidence of the WCABT's safety, causing additional delay pending an evidentiary hearing before the CPUC, which ultimately resulted in an April 25, 2018 CPUC Order approving the WCABT design amendment and allowing the railroad to use the WCABT.

19. Section 17.1 of the CA specifies that DTP is the party that must "apply for, obtain, renew, replace, extend the validity of and arrange necessary amendments to" CPUC approvals and other Project Permits (with certain exceptions not at issue here). RTD's obligations are limited to cooperating with DTP's regulatory efforts at DTP's cost, such as executing or filing DTP's applications in RTD's name (given RTD's status as the railroad of record).

20. The substantial Project delays, and extended presence of crossing attendants, attributable to excessive and inconsistent warning times, would have been avoided if DTP had properly completed the design, construction, testing, and commissioning of its grade crossing activation systems before starting revenue service (so that warning times did not differ significantly from design), and if DTP had included in its original CPUC submittals the buffer time and allowable acceleration design parameters that DTP now believes necessary for its subcontractor Wabtec's first-of-a-kind WCAS to function at these crossings.

21. More than a year after the A-Line opened for service, DTP first claimed a Change in Law and Force Majeure for regulatory review of crossing warning times and sought the costs of grade crossing attendants. Doing so, DTP attempted to renege on the Side Agreements, dismiss its own admissions about the deficient performance of its crossing activation system, and claim entitlement to retroactive relief on the theory that both the FRA and CPUC somehow changed the law.

22. In addition to providing warning times in accordance with the design of its system, the CA required DTP to provide properly functioning Constant Warning Time devices

sufficient for the establishment of Quiet Zones. Quiet Zones allow the Project's high-frequency commuter trains to operate without blaring loud train horns at each crossing.

23. DTP has, to date, failed to establish to the FRA that it has provided properly functioning Constant Warning Time devices and demonstrate to the FRA that DTP's first-of-a-kind WCAS is performing satisfactorily within DTP's design parameters.

24. As a result, none of the Project lines have achieved Quiet Zone status as required in the CA. DTP's performance failures have forced RTD to seek additional waivers from the FRA while local residents, businesses, and other valued Project stakeholders endure continued train horns.

25. Problems with DTP's crossing activation systems continue to this day. DTP has failed to satisfy the FRA that DTP's system is performing within its relaxed WCABT parameters and providing Constant Warning Time.

26. Other software defects in the WCAS have resulted in the renewed presence of crossing attendants at some crossings, and continued delays that are not excusable under the CA.

27. The DTP team of Fluor, Balfour Beatty, Ames, and others—not RTD, or the FRA, or the CPUC—is responsible for the Project delays, crossing attendant costs, and extended duration of loud train horns.

28. Additionally, DTP has not made RTD whole for DTP's other failures to perform in accordance with the CA. DTP initially designed and built Project rail bridges to the wrong design standard—it designed the bridges to highway (AASHTO) instead of the rail (AREMA) standards expressly specified in the CA. Although DTP rebuilt or retrofitted the bridges—at significant impact to the Project—the bridges are not built to the contractually required design standard. RTD will incur additional maintenance costs at the end of the concession and other impacts as a result of DTP's failure to comply with the CA's standards.

29. DTP's failure to perform under this DBFOM public-private partnership has caused, and is causing, RTD to suffer substantial damages including without limitation reduced revenue (*e.g.*, the unopened G-line has not produced revenue for two years); increased expenses such as heightened and extended overhead and project management (*e.g.*, DTP's delayed and deficient performance has generated substantial unanticipated overhead costs); added regulatory, compliance, and insurance costs (*e.g.*, fees and costs RTD incurred before the FRA and CPUC); and reputational harm.

30. Crucially, DTP's failure to perform on its DBFOM contract has left the public without the fully functioning and regulatory compliant commuter rail system DTP promised to substantially complete, and was paid to complete, two years ago.

31. In January 2018, DTP referred what it called the Change in Law and Force Majeure dispute to a Dispute Resolution Panel (the "Panel"). The Panel of three respected

construction law neutrals reached a non-binding decision favorable to RTD on June 26, 2018. Among other things, the Panel concluded there was no Change in Law by the FRA or Force Majeure with respect to the FRA's review of, and response to, DTP's excessive and inconsistent grade crossing warning times; that DTP's crossing activation system was not functioning as designed in 2016 or thereafter and required significant redesign; and that DTP's alleged "bicycle exit gate delay" and "FAST Act" Changes in Law did not cause any critical path delay and had no significant monetary impact on the Project.

32. Through its Complaint, DTP allegedly seeks among other things this Court's *de novo* review of the Dispute Resolution Panel's decision as specified in the CA's dispute resolution procedure.

33. Through its Counterclaims, RTD likewise seeks the Court's *de novo* review and judgment on the Panel's decision, and further sets forth its entitlement to:

- a. A declaration that DTP did not establish any of the Changes in Law, Change in Law Changes, or Force Majeure Events alleged in the Complaint; that DTP's alleged damages are self-inflicted; and that DTP is responsible for the Project delays and all RTD's damages resulting from such delays and DTP's failure to deliver the Project in accordance with the terms and conditions of the CA;
- b. A declaration that DTP is in default under the CA, and that one or more Concessionaire Termination Events have occurred;
- c. Breach of contract damages from DTP as a result of DTP's unexcused Project delay and DTP's failure to satisfy its obligations under the CA;
- d. Breach of contract damages attributable to DTP's failure to design and build Project bridges to the specified design standards; and
- e. Such other and further relief in favor of RTD as the Court deems just and proper.

PARTIES, JURISDICTION, AND VENUE

34. DTP, the Project's DBFOM Concessionaire, is a Delaware limited liability company composed of a partnership between Fluor Enterprises, Inc. (hereinafter "Fluor"), a unit of Fluor Corporation; Denver Rail (Eagle) Holdings, Inc., a unit of John Laing Group plc; and Aberdeen Infrastructure Investments (No 4) USA LLC, a unit of Aberdeen Global Infrastructure Partners LP. DTP's principal place of business is located at 701 West 48th Avenue, Denver, Colorado 80216.

35. Upon information and belief, Fluor is managing partner of DTP.

36. DTP engaged Denver Transit Systems, LLC (“DTS”)—a joint venture of Fluor and Balfour Beatty Infrastructure, Inc. (hereinafter “Balfour Beatty”)— as its design-build contractor for the Project.

37. Upon information and belief, Fluor is managing partner of DTS.

38. DTS, in turn, engaged Denver Transit Constructors, LLC (“DTC”)—a joint venture of Fluor, Ames Construction, and Balfour Beatty—as the design-build subcontractor for the Project. Fluor/HDR Global Design Consultants, LLC, operating as a subsidiary of Fluor, is the Project’s lead designer.

39. Upon information and belief, Fluor is managing partner of DTC.

40. DTP engaged Denver Transit Operators, LLC (“DTO”) — a joint venture of Fluor, Balfour Beatty, and Alternate Concepts, Inc.—as its operations and maintenance contractor for the Contract.

41. Upon information and belief, Fluor is a 33% partner in DTO.

42. Fluor is managing partner of the concession and of design-build contracts. As managing partner of DTP, Fluor is responsible for financing, design, construction, testing and commissioning, and operations and maintenance of the 36-mile Eagle commuter rail network. This includes arranging and managing the financing and directing the efforts for design-build and operations and maintenance.

43. RTD is a public body politic and corporate and political subdivision of the State of Colorado, organized and existing under the terms of the Regional Transportation District Act, C.R.S. §32-9-101 *et seq.*, as amended, with its primary place of business located at 1660 Blake Street, Denver, Colorado 80202.

44. This Court has jurisdiction over this civil action pursuant to C.R.S. § 13-1-124(1)(g), because the causes of action arise out of business transacted by RTD and DTP in Colorado, and out of the use of real property in Colorado.

45. Venue is also proper in this judicial district pursuant to C.R.C.P. 98, because the claims concern real property in Denver County, and because RTD resides in Denver County.

46. RTD has complied with C.R.C.P. 16.1 by filing a District Court Civil Cover Sheet for Initial Pleading of Counterclaim and Notice to Elect Exclusion from C.R.C.P. 16.1 Simplified Procedure. RTD further states that this case is not subject to the simplified procedures for court actions under C.R.C.P. 16.1 because its counterclaims against DTP exceed \$100,000.

GENERAL ALLEGATIONS

DTP Assumed the Responsibilities and Risks of a Design, Build, Finance, Operate, and Maintain Concession

47. The Project is a DBFOM public-private partnership. DTP is the Project's Concessionaire. DTP agreed to design, construct, operate, and maintain the subject rail lines to the CA's requirements and in accordance with regulatory requirements.

48. In the CA, DTP agreed to (among other things) design, build, test, and gain regulatory approval for the Project, including the highway-rail grade crossing control systems. The grade crossings were to employ state-of-the-art technology, comply with regulatory requirements, and provide constant warning times in an electrified commuter rail context.

49. DTP must carry out and complete the Work "in accordance with the provisions of [the Concession] Agreement, the Project Requirements and Good Industry Practice to ensure that the Work and each part of the Commuter Rail Projects and the Commuter Rail Maintenance Facility are in compliance with the Project Requirements and Good Industry Practice."

50. DTP must carry out and complete the Work "materially in accordance with the contents of the Concessionaire's Proposal."

51. The CA defines Project Requirements to include an array of design, construction, rolling stock, and O&M specifications, all Permits, the Environmental Requirements, and all Applicable Requirements, among other things. Applicable Requirements "means the requirement of any Law made or of any Permit issued by any Relevant Authority in each case to the extent that the same are applicable to the Concessionaire, the Work, the Concessionaire-operated Components or the Eagle Project."

52. The CA further requires that DTP obtain all regulatory approvals, with the exception of certain RTD Permits not at issue here. The CA specifies DTP "shall apply for, obtain, renew, replace, extend the validity of and arrange necessary amendments to, all Permits legally required in connection with its performance of this Agreement except for RTD Permits."

53. With respect to the train control and at-grade crossing systems, the CA made DTP responsible for providing "state-of-the-art railway signalizing techniques and products," including "highway-rail grade crossing warning systems." DTP is responsible for designing, furnishing, installing, and testing these systems, and ensuring they are, at a minimum, compliant "with the requirements of applicable Law."

54. A crucial grade crossing design requirement is that DTP provide "constant warning time" at the grade crossings. The CA specifies that DTP's system "shall be consistent with those measures necessary for the establishment of a quiet zone defined in 49 CFR 222.35," and states crossings "shall have constant warning train detection."

55. In addition to constant warning time requirements, a key and longstanding FRA regulation requires that the grade crossing warning system “activate in accordance with the design of the warning system, but in no event shall it provide less than 20 seconds warning time for the normal operation of through trains before the grade crossing is occupied by rail traffic.” 49 C.F.R. § 234.225. FRA regulations require compliance with the warning time design (in addition to a 20-second floor). Regulatory guidance and practice explains that crossing warning time should not “differ significantly” from design.

56. To satisfy the Project’s grade crossing and constant warning time standards, DTP proposed a “wireless crossing activation system” (“WCAS”) to overcome what it perceived as challenges with providing constant warning time using traditional technology in an electrified commuter railroad. In so doing, DTP’s Technical Proposal promised “robust” and “reliable” constant warning times in an electrified, commuter rail context. To accomplish this result, DTP unilaterally chose to meet the constant warning time standards through the use of technology from a sub-supplier, Wabtec, that was a first-of-a-kind system for both Wabtec and DTP. DTP’s choice to pursue the constant warning time standards in this manner was a business decision DTP made in competitively pursuing this Project.

DTP Has Not Timely Designed and Built the Project to Satisfy Project Requirements and Obtain Regulatory Approvals

57. DTP has not completed its work, and satisfied the Revenue Service Commencement Requirements, by the CA’s deadlines. DTP’s failure to comply with its regulatory and contractual obligations resulted in, among other things, a two-year delay to the Project and commuter rail lines that operate only through FRA waivers.

58. Under the CA, the Independent Engineer is to issue Revenue Service Commencement Certificates (“RSCC”) upon satisfaction of all Revenue Service Commencement Requirements, and Final Completion Certificates upon satisfaction of all Final Completion Requirements. The CA contemplates that DTP will receive certain Construction Payments and, following satisfaction of the Revenue Service Commencement Requirements and issuance of RSCC, monthly Service Payments based on the availability and performance of the Project. Pursuant to the CA, no Service Payments are due prior to completion of the Revenue Service Commencement Requirements and the Independent Engineer’s issuance of the appropriate Revenue Service Commencement Certificate.

59. The Revenue Service Commencement Requirements include, among other things, the requirements that (1) except with respect to certain Punch List Items, DTP has completed the respective Commuter Rail Project “in accordance with the provisions of [the CA], the Project Requirements and Good Industry Practice to ensure that the Work, such Commuter Rail Project and each part of them are completed and operate in compliance with the Project Requirements” and (2) “all Permits required for the operation of such Commuter Rail Project and such Commuter Rail Service have been obtained in final form and are not subject to appeal.”

60. The CA requires that DTP obtain all Revenue Service Commencement Certificates on or before the Revenue Service Deadline Date. As extended due to certain relief events and through negotiations, that date is June 2, 2018.

61. DTP did not obtain all Revenue Service Commencement Certificates on or before the Revenue Service Deadline Date.

62. Failure to obtain all Revenue Service Commencement Certificates prior to the Revenue Service Deadline Date is a Concessionaire Termination Event.

63. The CA further included Revenue Service Target Dates. As adjusted for various events not at issue in this lawsuit, the Revenue Service Target Dates were April 22, 2016, July 25, 2016, and October 26, 2016, for the A-Line, B-Line, and G-Line, respectively.

64. DTP did not obtain the Revenue Service Commencement Certificates by the Revenue Service Target Dates.

65. DTP represented to RTD during the Project that it would be ready to commence revenue operations on the Revenue Service Target Dates specified above, particularly the April 22, 2016 and July 25, 2016 start dates. RTD relied on DTP's representations.

66. The Independent Engineer issued the A-Line RSCC, with deferred requirements, on September 8, 2018.

67. The Independent Engineer issued the B-Line RSCC, with deferred requirements, on October 23, 2017.

68. The Independent Engineer has not issued the G-Line RSCC. DTP has not completed pre-revenue testing and other Revenue Service Commencement Requirements.

69. DTP has not established its entitlement to any further adjustment to the Revenue Service Deadline Date or the Revenue Service Target Dates. DTP's delays and failure to perform are not excusable under the CA, and constitute a breach of DTP's obligations to RTD.

DTP's Design and Construction Deficiencies Delayed Pre-Revenue Service Testing, Caused Life Safety Concerns, and Drew Regulatory Ire

70. DTP experienced a multitude of self-inflicted construction delays that impacted and compressed the period available for testing and commissioning its train control and crossing systems.

71. For example, DTP built numerous rail bridges to the wrong design standard. In 2014 and thereafter, DTP then had to retrofit or rebuild the bridges.

72. The bridge rework and other design and construction deficiencies impacted the communication and power lines necessary for testing and commissioning, and compressed the testing schedule. This resulted in DTP attempting to test crossings when civil improvements were not yet complete, and was in contravention of CPUC guidance.

73. Likewise, DTP's subcontractor charged with providing the train control and crossing systems (Wabtec) was late in installing and testing those systems. Thus, instead of executing the as-planned, several months-long testing and commissioning period prior to commencing A-line revenue service in April 2016—time in which DTP's first-of-a-kind systems could be installed, thoroughly tested, and appropriately tuned—DTP started revenue service without the WCAS even operable.

74. DTP's attempt to test an incomplete system in 2015 and 2016 created significant problems and raised regulatory concerns. Project personnel documented numerous complaints from the public, media, and local emergency services personnel about crossings that malfunctioned. For example, warning times routinely ran into the minutes. Occasionally, gates would be down for 10, 20, or 30 minutes—in some cases for hours—without a train present. Gate arms would be stuck in the down position, or would move up and down periodically. DTP's performance during testing drew regulatory attention from both the FRA and CPUC.

75. Regulatory scrutiny increased further following the safety-critical events of March 1, 2016. On that date, there were a total of 3 grade crossing failures, the most serious of which resulted in a near miss with two motor vehicles. In other words, DTP's crossing system failed, allowing trains to enter unprotected crossings. Although DTP sought to fix the precise software defect that caused or contributed to the March 1 event, warning times remained highly variable and clearly deficient.

DTP Admitted Its System was Incomplete and Inoperable, Sought Regulatory Waivers Conditioned on Grade Crossing Attendants, and Promised in Side Agreements to Bear the Cost of Crossing Attendants

76. Meanwhile, the April 22, 2016 A-Line opening date—advertised to the public months beforehand, based on DTP's representations about Project completion—rapidly approached. The Independent Engineer and other independent monitors recognized that DTP had not satisfied all Revenue Service Commencement Requirements, *i.e.*, all contractual prerequisites to opening the line to the public. Among other things, DTP had not provided an operational constant warning time grade crossing activation system, performed all required system demonstrations, or gained all necessary regulatory approvals.

77. To open the A-line on April 22, 2016, DTP and RTD first had to seek conditional approvals and waivers from the FRA and CPUC. A key condition, from FRA and CPUC, was that DTP maintain grade crossing attendants. At DTP's behest, in April 2016 the FRA issued the first of a series of short-term waivers (ultimately extending into 2017) that provided relief from certain regulatory requirements “with regard to the inoperative Wireless Crossing Activation

System (WCAS) and the corresponding long warning times,” provided that grade crossing attendants “must be used until the grade crossing warning systems provide warning times within the designed time for all trains for 7 consecutive days.”

78. In April 2016, the CPUC described “numerous safety issues that have occurred and continued to occur” on the A-line; these operational and safety concerns lead the CPUC to also require crossing attendants until DTP and RTD could certify and demonstrate that crossings were “complete, operational, and in conformance with the approved design and operational parameters of the crossing.”

79. DTP also had to seek agreement from RTD to open the A-Line without satisfying the revenue service prerequisites. The parties executed a Stipulation and Limited Waiver Side Agreement (the “A-line Side Agreement”) wherein RTD allowed DTP to begin revenue service notwithstanding the inoperable crossing activation system and other deficiencies. In return, DTP agreed to accept reduced Service Payments (deducting \$250,000/month) until DTP completed the constant warning time function and other Revenue Service Commencement Requirements, and the Independent Engineer issued the RSCC.

80. In the A-Line Side Agreement, DTP further agreed to “comply with all applicable requirements of the FRA and the Public Utilities Commission regarding operations prior to the completion of the constant warning time function for the grade crossing activation system”; agreed to bear the cost of grade crossing attendants and be “responsible for all increased costs necessitated by this stipulation”; and agreed that the modified service payments were its “full compensation” related to the issue.

81. On July 23, 2016, the parties executed a similar Side Agreement for the B-Line, with a \$100,000/month deduction.

82. Since 2016, RTD has paid DTP more than \$160 million in service payments. DTP received these funds pursuant to the A-Line and B-Line Side Agreements, notwithstanding DTP’s failure to satisfy the Revenue Service Commencement Requirements and timely obtain Revenue Service Commencement Certificates on the A-Line and B-Line. Receipt of these payments is DTP’s “full compensation” under the A-Line and B-Line Side Agreements.

83. In the A-Line and B-Line Side Agreements, DTP further stipulated it would “provide an additional five Key Personnel as mutually agreed between DTP and RTD until such time that the Revenue Service Commencement Certificate has been issued.” DTP did not provide the additional personnel.

84. The A and B lines opened for service in April and July 2016, respectively, with non-conforming grade crossing activation systems and unsatisfied Revenue Service Commencement Requirements. DTP had agreed in stipulations and waivers that reduced Service Payments were its full compensation, and further agreed to comply with all FRA and CPUC requirements.

85. The FRA and CPUC’s waivers required grade crossing attendants. DTP expressly agreed to bear all of those costs, without limitation or reservation. DTP did not contemporaneously claim any Change in Law or Force Majeure events regarding the regulatory consensus that DTP had not satisfied warning time and constant warning time requirements.

86. DTP’s admitted failure to provide a fully functioning system, satisfying all Project Requirements and applicable law, prior to commencing revenue operations placed the Project in a waiver regime, for which different and unique regulatory requirements exist. Contrary to DTP’s representations to RTD, DTP failed to timely correct its system’s deficiencies and establish satisfactory performance under the Project waivers and existing law. This caused the project to linger in a waiver regime, and to this day the portions of the Project open for revenue service operate under time-limited FRA waivers.

Following Revenue Service on the A- and B-lines, DTP Failed to Timely Complete and Correct its Grade Crossing Systems. DTP Continued to Redesign and Modify Its System and Make Required Corrective Actions into 2017, Without Asserting Any Relevant Change in Law or Force Majeure.

87. DTP did not timely resolve its crossing system deficiencies following commencement of A- and B-line revenue service operations. Instead, warning times continued to be excessively long and variable. *Average* and *median* warning times were often in the minutes—on crossings with approximately 30-second design times. Some crossings *never* achieved their design time, and instead experienced excessive warning times on essentially every activation. For instance, data DTP provided to regulators showed the Clayton Street crossing had a 32-second design warning time. Even after multiple software iterations, as of August 2016 (four months after commencement of A-line revenue service) the average warning time was over 55 seconds, and the crossing *never* provided the 32-second design time.

88. In Summer and Fall 2016, DTP admitted through its words and actions that its grade crossing systems were not functioning appropriately. While DTP proposed certifying that certain crossings were complete in June 2016, the data it provided disproved its own contentions—it reflected *average* warning times several times above design, instead of the “moderate percentage” promised by DTP. DTP did not object or claim a Change in Law when CPUC personnel suggested the purported certifications would be rejected. RTD rejected DTP’s purported June 2016 certifications based on the warning time concerns and other deficiencies such as incomplete and non-conforming civil improvements. Instead of objecting to the rejection of its June 2016 certifications, in August 2016, DTP and Wabtec expressly admitted to FRA and CPUC that numerous crossings still were not “functioning as intended” and required “updated software” to “work[] as intended.”

89. Given Wabtec’s failure to complete and correct the warning time systems, in Fall 2016, at the request of FRA, DTP engaged a separate consultant, HNTB, to review Wabtec’s performance.

90. In October and November 2016, HNTB identified many items in DTP's then-existing system leading to "higher than design", "inconsistent," and "excessive" warning times. HNTB proposed several categories of corrective action items and an ambitious schedule to complete the software and system changes over the next several months. HNTB also issued crossing performance monitoring and corrective action reports measuring, among other things, only 27% compliance with its grade crossing activation standard.

91. Faced with such reports of its system's performance, DTP did not claim any Change in Law. Instead, Wabtec acknowledged that its "original WCA software" generated "longer than desired warning times," and that "concerns about excessive warning times" required "a change" in the WCAS. Wabtec set about changing its system design to include "Approach Condition Adjustment Factors," which would allow the system to account for driver behavior and unique conditions at each crossing. Prior to this modification, DTP's WCAS was incapable of being tuned to account for such factors. Wabtec believed its various system modifications would "bring the crossing warning time in line with the crossing design" when "an excessive warning time due to normal train handling is observed at [the] crossing."

92. DTP's schedules reflect that A-Line crossing system "modifications" recommended by HNTB were not complete before March 31, 2017.

93. In or about August 2016, testing was suspended on the G-Line due to DTP's failure to comply with FRA regulations, including ongoing A- and B-line crossing warning time deficiencies, and FRA enforcement action for G-Line warning time deficiencies. DTP did not contemporaneously assert any Change in Law as a result. The FRA and CPUC allowed DTP to resume G-Line testing at various dates in 2017.

94. Likewise, the FRA and CPUC required, and continued to require, crossing attendants due to DTP's deficient and incomplete crossing activation systems—not the bicycle exit gate delay issue. RTD appropriately rejected DTP's alleged Change in Law related to the bicycle exit gate delay issue.

95. Among other things, DTP had the option of using either (1) an exit gate delay (where the crossing exit gates delay closing for a fixed period of time, to allow highway users still in the crossing to escape prior to the arrival of a train) or (2) vehicle detection (where the crossing determines whether to delay the closing of exit gates depending on whether it detects a vehicle inside the crossing).

96. DTP initially chose to design the crossings using vehicle detection, but then failed to provide detection for all "vehicles" as that term is defined in the Colorado Revised Statutes. The Colorado Attorney General's office, in conjunction with the CPUC, confirmed that under longstanding Colorado law "vehicles" include bicycles.

97. The CPUC's concern was that DTP's failure to provide detection for all vehicles—including bicycles—risked having bicyclists trapped inside the four-quadrant gates,

with potential life safety consequences. In light of this concern, DTP proposed to use the exit gate delay option instead—where the exit gates delay closing for a fixed period of time, to allow bicyclists and other vehicles time to escape the crossing.

98. The change to implement an exit gate delay, while sufficiently significant to warrant a design amendment under existing CPUC practice, required nominal time and costs to implement (upon information and belief, programming took two days) and was complete prior to the time period DTP seeks relief.

In Addition to Making Corrective Actions to its Grade Crossing Systems, in 2017 DTP Discovered It Omitted Parameters from Its Previously-Approved Warning Time Design

99. In or around March 2017, DTP’s subcontractor Wabtec discovered that it did not consider certain factors in the warning time calculations submitted to, and approved by, the CPUC in 2013 and 2014. To account for these factors unique to its design, DTP proposed to add certain “buffers” to the conventional design warning time calculation, calling it a “Wireless Crossing Activation Buffer Time” or “WCABT.” DTP and HNTB stated to FRA that other systems similar to its own “commonly use” such buffers, but DTP did not use them previously for its RTD design. FRA, for its part, “expressed concern that this missed parameter was just now being discovered.”

100. In Spring 2017, DTP was still working on completing its A- and B-Line grade crossing activation systems and implementing the necessary corrective actions identified by its consultants. While warning times improved with these changes, they were not in accordance with DTP’s design submittals.

101. Further investigation revealed that DTP had failed to include necessary factors in its design. DTP then set out to “change” its design submittals to include its Eagle-specific WCABT. The WCABT, in essence, demonstrated that DTP’s first-of-a-kind WCAS required up to a 20-second buffer time to account for complexities in its system—significantly more than the two or five second buffers included in DTP’s original design. DTP neither made this discovery, nor did it seek regulatory approval for the design change, until various points in 2017.

DTP Claimed a Change-in-Law on May 26, 2017 on the Mistaken Belief that the FRA Would Deny its WCABT Amendment

102. On May 26, 2017, DTP for the first time claimed a Change in Law and Force Majeure with respect to the grade crossing systems and warning times. DTP claimed the “unquestionable tipping point” for this alleged Change in Law was certain May 2017 meetings with the FRA which, according to DTP, suggested the FRA would not accept DTP’s revised WCABT design.

103. On June 16, 2017, the FRA indicated it may accept DTP’s new WCABT design concept based on the same meetings that DTP inexplicably claimed to evince a Change in Law. FRA stated its acceptance would be limited to the regulatory requirement that DTP’s crossing

systems operate as designed. (FRA continued to express concern regarding whether DTP's WCABT design provided constant warning times, and in 2018 confirmed that DTP's system is currently not in compliance with constant warning time requirements.) FRA conditioned its acceptance on DTP subsequently developing new design documentation, proposing measurement criteria for its system, and providing data reflecting that its system was performing within such criteria.

104. DTP's May 2017 Change in Law and Force Majeure notice, and DTP's request for retroactive relief to 2016, was baseless and untimely under the CA. It is not a Change in Law or Force Majeure to insist that the system operate as designed.

DTP Did Not Attempt To Establish Its System Was Operating Within Its WCABT Design Until September 2017

105. DTP did not complete the WCABT design documentation, develop the necessary grade crossing measurement criteria, and provide requested warning time bell curve data to FRA until September 2017.

106. In response to that information, on September 28, 2017, the FRA granted the railroad a five-year waiver "from the operational restrictions in the current FRA waiver applicable to the A-Line and B-Line for purposes of compliance with 49 CFR § 234.225." Thus, the FRA's five-year waiver provided a path for removal of the crossing attendants on the A-Line and B-Line, subject to DTP satisfying certain conditions (such as submitting a flagger removal plan) and satisfying the requirements of other regulatory agencies, such as the CPUC. FRA subsequently continued to express concern regarding whether DTP provided constant warning times for quiet zone purposes and demonstrated performance within the WCABT design parameters, and continued to request data from DTP pursuant to the terms of the five-year waiver.

The CPUC Sought An Evidentiary Hearing On the WCABT Amendment

107. The CPUC is the regulatory entity charged with approving the grade crossing design, thus the CPUC had a different role than the FRA with respect to design amendments. DTP did not prepare a design amendment that RTD, as the railroad of record, could submit to the CPUC until September 2017. DTP's pleading was expressly characterized as a design amendment, and sought to change the earlier-approved warning time design to include the -5/+15 second WCABT.

108. On or about September 27, 2017, the CPUC denied the WCABT amendment, referencing a lack of evidence in the record that the additional 15 seconds was safe. The CPUC noted that DTP's earlier design had already been approved by the CPUC and did not include WCABT, and admonished DTP for "anticipat[ing] none of the issues that it now claims is creating the need to extend warning times". The CPUC also noted that other stakeholders, such

as the Union Pacific Railroad, which shares certain of the crossings with DTP, expressed concerns about the safety and necessity of the WCABT.

109. The CPUC invited RTD and DTP to seek a rehearing where they could submit evidence that the WCABT is safe. RTD and DTP presented such evidence in a February 15, 2018 hearing. RTD relied upon DTP's assertions, data, and experts, and cooperated with DTP's efforts to obtain regulatory approval pursuant to Section 17 of the CA.

110. The CPUC accepted the WCABT as a crossing certification standard in an April 25, 2018 Order. The Order provided a path for the removal of grade crossing attendants upon completion of CPUC staff field inspections and certification that the crossings were complete and operational.

DTP Has Not Provided a Properly Functioning Constant Warning Time System and Has Not Achieved All Revenue Service Commencement Requirements

111. The FRA's September 28, 2017 Five-Year Waiver and the CPUC's April 25, 2018 Order provided a path for removal of the crossing attendants on the A-Line, following certain field demonstrations and other actions. Crossing attendants were fully removed on the A-Line and B-Line in July 2018 and October 2017, respectively.

112. Crossing attendants remained on the G-Line, as that line was in pre-revenue service testing. G-line testing had been suspended due to DTP's A-Line and B-Line deficiencies and FRA enforcement action for G-Line warning time deficiencies. DTP was allowed to resume G-line testing in 2017. To date, DTP has not completed testing for the G-line. The line remains unopened, notwithstanding its October 2016 targeted completion date.

113. Contrary to DTP's obligations under the CA and Side Agreements, a significant percentage of crossing activations continue to be outside of DTP's WCABT design.

114. On July 19, 2018, the FRA informed RTD that DTP's system is not providing constant warning time, thus DTP has not to date provided constant warning time functionality. As a result, the FRA informed the parties that RTD and the local municipalities will be required to apply for additional waivers to achieve FRA approval for quiet zones, rather than immediately receiving the quiet zones promised in DTP's Proposal and required by the terms of the CA.

115. Neither the A-Line nor G-Line has achieved quiet zone status, due to DTP's failure to properly provide the crossing equipment and systems promised in the CA and reflected on its design documentation.

116. The FRA has recently identified various other significant deficiencies with DTP's performance, including DTP's failure to provide a "vital" PTC system, DTP's failure to complete FRA-required testing, and a WCAS software defect that can result in insufficient warning times. System deficiencies required the renewal of crossing attendants at certain crossings. The deficiencies are breaches of DTP's obligations under the CA.

117. Although the IE issued RSCCs for the A-Line and B-Line, it did so with certain deferred requirements. DTP's failure to timely satisfy these and other obligations is a breach of the CA.

DTP Has Not Made RTD Whole For DTP's Failure to Follow the Correct Design Standards on Railroad Bridges

118. DTP designed and constructed Project rail bridges to the wrong design standard. While DTP rebuilt, retrofit, or reinforced the bridges, the bridges are not as robust as they would have been had DTP designed and built them to contractually required standards. To date, DTP has not made RTD whole for the damages RTD has or will suffer, including diminished value, decreased service life, and increased maintenance expenses RTD will incur following cessation of the DTP concession.

119. The CA required that DTP "design and construct rail bridges and associated structures in accordance with the AREMA Manual for Railway Engineering and the CDOT Design Manual." The AREMA (American Railway Engineering and Maintenance-of-Way Association) standards are common for commercial train bridges.

120. Contrary to the CA's specifications, DTP initially designed and constructed the bridges to American Association of State Highway and Transportation Officials ("AASHTO") standards. AASHTO standards are common for motor vehicle highway bridges, and are in general less rigorous than AREMA standards.

121. The bridges DTP provided to RTD have less strength or decreased service life relative to the AREMA-standard structures specified in the CA. This diminishes the value of the bridges, increases RTD's costs, and will result in additional maintenance of the structures once RTD takes possession.

122. In December 2014, DTP submitted an "Independent Design Check" ("IDC"), performed by Fluor/HDR, that had been prompted by concerns first raised by RTD. The IDC found that DTP's design entities failed to design numerous structures in "compliance with the contract (specifically, the AREMA Manual for Railway Engineering)." The IDC found that the Jersey Cutoff bridge required demolition and replacement, and various other structures required retrofits. The IDC further stated that the proposed retrofits were "pending structural analysis" and that "bridge retrofits required as a result of this IDC will be discussed" at a later date.

123. Bridge reconstruction and remediation work impacted the Project schedule and compressed the time available for DTP's commuter rail testing and commissioning activities prior to the scheduled commencement of revenue service.

124. DTP sought to comply with alternative design standards rather than replace or retrofit structures to AREMA standards. RTD notified DTP that it would incur additional maintenance costs (*e.g.*, additional cracking to be repaired), reduced service life, and other impacts as a result of DTP's failure to design the bridges to AREMA requirements. In

December 2015, DTP submitted design variance requests that RTD accepted in February 2016, subject to comments and RTD's right to continue seeking its damages resulting from DTP's failure to comply with AREMA standards.

125. Negotiations regarding RTD's claims against DTP, including RTD's damages attributable to the Project delay and damages from defective bridges, continued until discussions ceased on September 19, 2018. At or about 12:30am on September 20, 2018, DTP filed its Complaint. To date, neither RTD nor DTP has referred certain of RTD's claims to a Dispute Resolution Panel. In the event the Court determines that the CA's Dispute Resolution Panel process is necessary for any of RTD's counterclaims, RTD respectfully reserves its right to request a stay, or any other appropriate relief, pending a Dispute Resolution Panel process.

FIRST COUNTERCLAIM FOR RELIEF
(Declaratory Judgment)

126. RTD incorporates the allegations in paragraphs 1 through 125 as if fully set forth herein.

127. A dispute has arisen between RTD and DTP regarding the cause of Project delays, whether DTP's delays are excusable due to the existence of any Change in Law Changes or a Force Majeure event, and the apportionment of the parties' damages stemming from the delays and crossing attendants.

128. RTD asserts that DTP has not established the existence of its alleged Changes in Law or Force Majeure Event; DTP's delays are inexcusable and non-compensable; DTP's damages are self-inflicted; and RTD is owed all appropriate relief stemming from DTP's failure to comply with the CA and a construction of contract terms regarding future costs and obligations stemming from DTP's failure to so comply. RTD further asserts that DTP is liable for RTD's damages resulting from DTP's failure to design and construct bridges to the standards specified in the CA. DTP disagrees.

129. RTD requests that the Court declare that (a) DTP's failure to perform is not excused by the CA's Change in Law and Force Majeure provisions; (b) DTP's failure to timely complete the project pursuant to the Project Requirements is not caused by the actions of RTD, the FRA, or the CPUC, but rather is attributable to DTP's actions and omissions; (c) DTP is not entitled to any relief; (d) RTD is entitled to all damages and relief under the CA resulting from DTP's failure to perform when and as promised; and (e) DTP is in default under the CA, and one or more Concessionaire Termination Events have occurred.

SECOND COUNTERCLAIM FOR RELIEF
(Breach of Contract—Failure to Timely Complete the Project and Comply with Project Requirements)

130. RTD incorporates the allegations in paragraphs 1 through 129 as if fully set forth herein.

131. RTD and DTP entered into the CA described above, which provides that DTP must design, build, finance, operate, and maintain the Project pursuant to the terms and conditions set forth.

132. DTP has not completed its work in accordance with the requirements, deadlines, and other terms and conditions of the CA. Among other things, DTP has not completed the commuter rail lines on time, nor has it complied with the Project Requirements such as the CA's specifications for the crossing activation systems.

133. DTP has breached the CA by so failing to complete its work.

134. RTD has substantially performed its duties pursuant to the CA.

135. DTP's breach of the CA has caused damages to RTD in an amount to be determined at trial.

THIRD COUNTERCLAIM FOR RELIEF
(Breach of Contract—Bridges)

136. RTD incorporates the allegations in paragraphs 1 through 135 as if fully set forth herein.

137. RTD and DTP entered into the CA described above, which provides that DTP must design, build, finance, operate, and maintain the Project pursuant to the terms and conditions set forth.

138. DTP did not design and construct Project structures pursuant to terms and conditions of the CA. Among other things, DTP did not design and construct the rail bridges to AREMA standards.

139. DTP has breached the CA by so failing to design and construct Project structures in accordance with the CA's specified design standards.

140. RTD has substantially performed its duties pursuant to the CA.

141. DTP's breach of the CA has caused damages to RTD in an amount to be determined at trial.

PRAYER FOR RELIEF

WHEREFORE, Defendant Regional Transportation District requests:

- a. That the Court enter judgment in favor of RTD and against Denver Transit Partners, LLC, adjudges DTP liable to RTD on RTD's counterclaims in an amount of damages to be determined at trial, and for pre-judgment and post-judgment interest, costs and expenses, reasonable attorneys' fees incurred by RTD in this action, and for such other and further relief as the Court deems just and proper.
- b. For a declaratory judgment to declare, adjudge, and order that (a) DTP's failure to perform under the CA is not excused by the CA's Change in Law and Force Majeure provisions; (b) DTP's failure to timely complete the project pursuant to the Project Requirements is not caused by the actions of RTD, the FRA, or the CPUC, but rather is attributable to DTP's actions and omissions; (c) DTP is not entitled to any relief; (d) RTD is entitled to all damages and relief under the CA resulting from DTP's failure to perform when and as promised; and (e) DTP is in default under the CA, and one or more Concessionaire Termination Events have occurred.

RTD'S RESPONSES TO DTP'S COMPLAINT

142. RTD admits the allegations in paragraph 1 of the Complaint, except insofar as DTP alleges its business address is located in the 80226 zip code.

143. RTD admits the allegations in paragraph 2 of the Complaint.

144. RTD admits the allegations in paragraph 3 of the Complaint.

145. In response to paragraph 4 of the Complaint, RTD admits that venue is proper in this judicial district.

146. In response to paragraph 5 of the Complaint, RTD admits DTP filed a District Court Civil Case Cover Sheet for Initial Pleading of Complaint, Counterclaim, Cross-Claim or Third Party Complaint. RTD states DTP's Complaint purports to make a Jury Demand (notwithstanding the parties' contractual waiver of any right to a jury in this matter), but DTP did not indicate a jury demand or payment of the requisite fee in said Civil Cover Sheet. RTD admits the allegations in the second sentence of paragraph 4 of the Complaint.

147. RTD admits the allegations in paragraph 6 of the Complaint.

148. RTD admits the allegations in paragraph 7 of the Complaint.

149. RTD admits that DTP appeals a Dispute Resolution Panel ("DRP") determination that did not result in settlement, and denies the remaining allegations in paragraph 8 of the Complaint.

150. In response to paragraph 9 of the Complaint, RTD states that the Concession and Lease Agreement ("CA"), and the CA's Change in Law and Force Majeure provisions, speak for themselves. RTD states that it is without sufficient information or knowledge to form a belief as

to whether and how DTP passed its assumed risks to other entities and persons. RTD denies the remaining allegations in paragraph 9.

151. In response to paragraph 10 of the Complaint, RTD states that the CA speaks for itself. RTD denies the allegations in paragraph 10.

152. In response to paragraph 11 of the Complaint, RTD states that the CA speaks for itself. RTD denies the allegations in paragraph 11 to the extent they are inconsistent with the CA.

153. RTD admits the first sentence of paragraph 12 of the Complaint, and further admits that DTP did not complete testing necessary for the Independent Engineer (“IE”) to issue a completion certificate. RTD denies the remaining allegations in paragraph 12.

154. In response to paragraph 13 of the Complaint, RTD is without sufficient information nor knowledge to form a belief as how any relief would flow down to others or for what purpose DTP is pursuing recovery, and denies that DTP is entitled to any relief. RTD states that the CA’s Dispute Resolution Procedure speaks for itself, and denies the allegations in paragraph 13 to the extent they are inconsistent with the CA.

155. RTD admits the first sentence of paragraph 14 of the Complaint. RTD denies the remaining allegations in said paragraph, and specifically denies that RTD has breached its obligations under the CA.

156. In response to paragraph 15 of the Complaint, RTD states that the RFP and FRA’s Train Horn Rule speak for themselves, and denies all allegations to the extent they are inconsistent with the RFP and the Train Horn Rule. RTD admits that the Request for Proposals (“RFP”) contained preliminary engineering reflecting certain at-grade crossings instead of grade separated crossings or other alternatives, and that the RFP (among other things) required the creation of “Quiet Zones,” provision of Constant Warning Time (“CWT”) systems, and Positive Train Control (“PTC”). RTD further admits that Quiet Zones must satisfy FRA regulations. RTD denies the remaining allegations in paragraph 15.

157. RTD denies the allegations in paragraph 16 of the Complaint.

158. RTD denies the allegations in paragraph 17 of the Complaint, and further states it is without sufficient information to form a belief as to whether or how unspecified persons or regulators view at-grade crossings.

159. In response to paragraph 18 of the Complaint, RTD admits that the FRA prescribes certain standards and approves Quiet Zones in certain circumstances, and further admits that the Colorado Public Utilities Commission (“CPUC”) has, among other things, oversight responsibility for the configuration and design of public highway-rail crossings in the State of Colorado. RTD denies the remaining allegations in paragraph 18.

160. RTD denies the allegations in paragraph 19 of the Complaint.

161. RTD denies the allegations in paragraph 20 of the Complaint.

162. In response to the first sentence of paragraph 21 of the Complaint, RTD admits that DTP's design included the installation of four-quadrant gates at certain crossings. RTD admits the allegations in the second sentence of paragraph 21 of the Complaint.

163. In response to the allegations in the first sentence of paragraph 22 of the Complaint, RTD admits that DTP conducted some testing in June and July 2015, but denies the remaining allegations in said sentence, including whether the June/July 2015 testing was all the testing performed, that the testing was adequately performed, and that this testing did in fact reflect proper operation. RTD further denies that DTP had completed construction pursuant to the approved design. In response to the second and third sentences of paragraph 22, RTD is without sufficient information nor knowledge to form a belief as to the truth of these allegations.

164. RTD denies the allegations in the first sentence of paragraph 23 of the Complaint, and with respect to the second sentence admits that DTP's revenue service operations were scheduled to commence in April 2016. RTD denies the remaining allegations in paragraph 23, and states that to RTD's knowledge the CPUC's concern with DTP's then-existing vehicle detection and four-quadrant gate system is that it did not detect all vehicles such as bicycles, and that bicyclists risked being trapped in the crossing by the four-quadrant gates.

165. RTD denies the allegations in paragraph 24 of the Complaint, and further states that DTP had the option to provide for (1) vehicle detection or (2) an exit gate delay. DTP initially chose to utilize vehicle detection but then failed to provide a system that detected all vehicles.

166. In response to paragraph 25 of the Complaint, RTD is without sufficient information or knowledge to form a belief as to whether or how bicycle detection technology may be usable with or approved by the FRA.

167. In response to paragraph 26 of the Complaint, RTD denies, and states that DTP agreed to implement a timed exit gate solution and developed the Exit Gate Operations Proposal. RTD denies the second sentence of paragraph 26.

168. RTD denies the allegations in paragraph 27 of the Complaint.

169. RTD denies the allegations in paragraph 28 of the Complaint.

170. RTD denies the allegations in paragraph 29 of the Complaint, and by way of further explanation, states that both RTD and DTP proposed crossing attendants, and that the FRA and CPUC required crossing attendants—which DTP offered to provide and did not object to—due to multiple safety, performance, and completeness concerns with DTP's system that were unrelated to the bicycle exit gate delay issue.

171. In response to paragraph 30 of the Complaint, RTD admits that the CPUC required the railroad to post guards at the crossings. RTD denies the remaining allegations in paragraph 30.

172. RTD denies the allegations in paragraph 31 of the Complaint.

173. In response to paragraph 32 of the Complaint, RTD admits that the CPUC applications and approvals (that were DTP's responsibility) were still pending during the time of the scheduled April 2016 opening of the A-line, and denies the remaining allegations.

174. In response to the first sentence of paragraph 33 of the Complaint, RTD admits that A-Line and B-Line entered operations on April 22, 2016 and July 25, 2016, respectively, and further states that they did so with crossing attendants made necessary by DTP's failure to complete its scope of work and achieve regulatory approvals, and pursuant to Side Agreements made necessary by DTP's failure to satisfy the Revenue Service Commencement Requirements specified in the CA. RTD denies the second sentence of paragraph 33.

175. In response to paragraph 34 of the Complaint, RTD admits that the CA required DTP provide CWT devices, among other things. RTD denies the remaining allegations in paragraph 34, particularly to the extent they conflict with FRA regulations.

176. In response to paragraph 35 of the Complaint, RTD admits the CA specifications require CWT devices, among other things. RTD denies the remaining allegations in paragraph 35, and states that although DTP promised to provide CWT through its Wireless Crossing Activation System ("WCAS") and other means, it has to date failed to provide properly functioning CWT devices that satisfy the FRA's Quiet Zone requirements.

177. RTD denies the allegations in paragraph 36 of the Complaint.

178. In response to paragraph 37 of the Complaint, RTD admits that DTP's system required a waiver—indeed, a series of waivers—from the FRA Maintenance Rule, and that said waivers required crossing attendants. RTD denies the remaining allegations in paragraph 37.

179. In response to paragraph 38 of the Complaint, RTD admits that the FRA allowed operations with the WCAS turned on and conditionally certified PTC. RTD states that the FRA, CPUC, and others, including DTP itself, did not believe that the WCAS and the CWT system were functioning properly when the WCAS was turned on or thereafter, and that DTP subsequently implemented numerous modifications and corrective actions to its WCAS. RTD further states that as a result of DTP's incomplete and improperly operating system, the Project required a series of FRA waivers to avoid further penalties and potential cessation of operations, and that said waivers were conditioned on DTP continuing to provide crossing attendants. RTD denies the remaining allegations in paragraph 38.

180. In response to paragraph 39 of the Complaint, RTD admits that the CA contemplates issuance of the Revenue Service Commencement Certificate ("RSCC") prior to

entering passenger service; that DTP did not satisfy RSCC requirements, or receive a RSCC, prior to entering passenger service on the A-line in April 2016; and that DTP's failure to do so kept the project in the Design/Build phase. RTD denies the remaining allegations in paragraph 39.

181. RTD denies the allegations in paragraph 40 of the Complaint.

182. RTD denies the allegations in paragraph 41 of the Complaint.

183. In response to paragraph 42 of the Complaint, RTD states that DTP's June 9, 2016 correspondence speaks for itself. RTD denies the allegations in paragraph 42.

184. RTD denies the allegations in paragraph 43 of the Complaint.

185. In response to paragraph 44 of the Complaint, RTD states that the May 25, 2017 correspondence speaks for itself, and denies the allegations in said paragraph.

186. In response to paragraph 45 of the Complaint, RTD states that DTP's May 26, 2017 correspondence speaks for itself, and denies the allegations in said paragraph.

187. RTD denies the allegations in paragraph 46 of the Complaint.

188. In response to paragraph 47 of the Complaint, RTD states that DTP's June 9, 2016 correspondence speaks for itself, and denies the allegations in said paragraph.

189. In response to paragraph 48 of the Complaint, RTD admits that notwithstanding DTP's failure to achieve RSCC, pursuant to the A-Line Side Agreement RTD paid DTP monthly service payments sans the agreed-upon \$250,000 deduction. RTD further admits that it voluntarily ceased said deduction in August 2018 (notwithstanding DTP's failure to complete the constant warning time function and other CA requirements). RTD denies the remaining allegations in paragraph 48.

190. In response to paragraph 49, RTD admits that FRA regulations require that crossings "operate as designed," *e.g.*, 49 CFR § 234.225 (specifying that grade crossing warning systems "activate in accordance with the design of the warning system"), and that DTP requested that RTD seek extensions to the FRA waiver from this requirement. RTD denies the remaining allegations in paragraph 49 of the Complaint.

191. RTD denies the allegations in paragraph 50 of the Complaint.

192. RTD denies the allegations in paragraph 51 of the Complaint.

193. RTD denies the allegations in paragraph 52 of the Complaint.

194. In response to paragraph 53 of the Complaint, RTD states that DTP's June 9, 2016 correspondence speaks for itself, and denies the allegations to the extent they are inconsistent with said correspondence.

195. In response to paragraph 54 of the Complaint, RTD admits that on the G-line the CPUC required crossing guards, and that in or about August 2016 testing of the commuter rail trains was suspended. RTD states that the CPUC required crossing guards for freight movements after DTP cut crossings over to DTP's new configuration and the quad gate system, and that regulators did not allow DTP to perform certain wireless crossing functionality testing on the G-line commuter rail trains due to, among other things, ongoing warning time problems on DTP's A-Line and B-Line commuter rail systems (which used the same crossing activation and CWT systems as the G-line commuter rail systems). RTD admits that the freight trains used a different, traditional grade crossing activation system than DTP's commuter rail lines, and that the freight trains generally only moved through crossings two or three times a day. RTD denies the remaining allegations in paragraph 54.

196. In response to paragraph 55 of the Complaint, RTD denies the first sentence of said paragraph. RTD admits that the G-line was scheduled to commence operations on October 26, 2016, and that it did not do so (and still has not commenced operations today, as DTP continues to perform necessary testing and commissioning). RTD denies the remainder of paragraph 55, including DTP's allegations that it was ready to commence service on October 26, 2016.

197. In response to paragraph 56 of the Complaint, RTD admits that on July 23, 2016 it entered into a second Side Agreement with DTP, for the B-Line, with a stipulated \$100,000/month deduction. RTD denies the remaining allegations in paragraph 56.

198. In response to paragraph 57 of the Complaint, RTD admits that "neither the CPUC nor FRA passed new rules or regulations on warning time consistency." RTD denies the remaining allegations in paragraph 57.

199. RTD admits the allegations in paragraph 58 of the Complaint. RTD further states that DTP's consultants, and its subcontractor responsible for the WCAS, also observed "inconsistent" and "excessive" warning times that were in their view indicative of the system not functioning as intended.

200. RTD denies the allegations in paragraph 59 of the Complaint.

201. RTD denies the allegations in paragraph 60 of the Complaint.

202. In response to paragraph 61, RTD admits the allegations only to the extent DTP alleges it attended meetings with FRA representatives, requested waivers, and relied on the waiver process to operate, and that violations of FRA regulations can result in financial penalties. RTD denies the remaining allegations in paragraph 61.

203. RTD denies the allegations in paragraph 62 of the Complaint.

204. RTD denies the allegations in paragraph 63 of the Complaint.

205. In response to paragraph 64 of the Complaint, RTD admits that DTP sent a Change in Law notice regarding the FAST Act on October 21, 2016, which speaks for itself, and that RTD did not conclude that a Change in Law occurred. RTD denies the remaining allegations in paragraph 64.

206. In response to paragraph 65 of the Complaint, RTD admits the FRA issued a 5-year waiver on September 28, 2017. RTD denies the remaining allegations in paragraph 65.

207. RTD denies the allegations in paragraph 66 of the Complaint.

208. In response to paragraph 67 of the Complaint, RTD admits that B-Line Side Agreement service payment deductions ceased on or about October 19, 2017, and that deductions continued under the A-Line Side Agreement which had not achieved RSCC. RTD denies the remaining allegations in paragraph 67.

209. In response to paragraph 68 of the Complaint, RTD admits the CPUC issued an order on April 28, 2018. RTD denies the remaining allegations in the first three sentences of paragraph 68. With respect to the fourth and fifth sentences, RTD admits the CPUC supported completion and conducted final inspections on an expedited basis.

210. In response to paragraph 69 of the Complaint, RTD states that the CPUC's order speaks for itself. RTD denies the allegations in paragraph 69 to the extent they are inconsistent with the CPUC's order. RTD further denies the allegations in the last sentence of paragraph 69.

211. In response to paragraph 70 of the Complaint, RTD states that the CPUC concurrence speaks for itself, and denies the allegations in said paragraph.

212. In response to paragraph 71 of the Complaint, RTD states that the CPUC's April 25, 2018 concurring opinion speaks for itself. RTD denies the allegations to the extent they are inconsistent with said concurring opinion.

213. In response to paragraph 72 of the Complaint, RTD denies, and states that the CPUC's concurrence speaks for itself; DTP was responsible for completing its design and developing the motion to amend; DTP did not develop and seek to file the motion to amend sooner; and DTP could have intervened in the CPUC proceedings.

214. In response to paragraph 73 of the Complaint, RTD states that the CPUC's April 25, 2018 concurring opinion speaks for itself. RTD denies the allegations to the extent they are inconsistent with said concurring opinion. RTD states that under the CA, DTP is responsible for obtaining regulatory approvals and providing the facts or information it deems necessary to achieve regulatory approvals, and that RTD is to cooperate with DTP and DTP's cost. DTP

often developed and provided information and draft language for RTD's submittal of railroad of record filings to the CPUC.

215. RTD admits the allegations in the first sentence of paragraph 74 of the Complaint, and denies the remaining allegations in said paragraph.

216. RTD denies the allegations in paragraph 75 of the Complaint.

217. RTD denies the allegations in paragraph 76 of the Complaint.

218. RTD denies the allegations in paragraph 77 of the Complaint.

219. RTD denies the allegations in paragraph 78 of the Complaint.

220. In response to paragraph 79 of the Complaint, RTD admits the CA sets forth a Dispute Resolution Procedure, which speaks for itself. RTD denies that all issues unresolved by negotiation are to be submitted to a Dispute Resolution Panel.

221. In response to paragraph 80 of the Complaint, RTD admits the parties submitted the dispute to a Dispute Resolution Panel following management and executive level negotiations. RTD denies the remaining allegations and states that DTP's referral of the dispute to the panel is dated January 24, 2018.

222. RTD admits the allegations in paragraph 81 of the Complaint.

223. In response to paragraph 82 of the Complaint, RTD states that the CA speaks for itself. RTD admits that the DRP Decision shall be reviewed by the Court *de novo*, and denies the remaining allegations to the extent they are inconsistent with the CA.

224. Paragraph 83 of the Complaint does not contain an allegation to which a response is required.

225. In response to paragraph 84 of the Complaint, RTD admits that DTP and RTD entered into the CA. The CA speaks for itself, and relief for a Change in Law Change or Force Majeure Event is subject to the terms of the CA. RTD denies the allegations in paragraph 84 to the extent they are inconsistent with the CA.

226. RTD denies the allegations in paragraph 85 of the Complaint.

227. RTD denies the allegations in paragraph 86 of the Complaint.

228. RTD denies the allegations in paragraph 87 of the Complaint. RTD further states that DTP has not established its entitlement for such relief under the CA.

229. RTD denies the allegations in paragraph 88 of the Complaint.

230. RTD denies the allegations in paragraph 89 of the Complaint.
231. Paragraph 90 of the Complaint does not contain an allegation to which a response is required.
232. RTD admits the allegations in paragraph 91 of the Complaint.
233. RTD denies the allegations in paragraph 92 of the Complaint.
234. RTD denies the allegations in paragraph 93 of the Complaint.
235. RTD denies the allegations in paragraph 94 of the Complaint.
236. RTD denies the allegations in paragraph 95 of the Complaint.
237. RTD denies the allegations in paragraph 96 of the Complaint.
238. RTD denies the allegations in paragraph 97 of the Complaint.
239. RTD denies the allegations in paragraph 98 of the Complaint.
240. RTD denies the allegations in paragraph 99 of the Complaint.
241. Paragraph 100 of the Complaint does not contain an allegation to which a response is required.
242. RTD admits the allegations in paragraph 101 of the Complaint.
243. RTD admits the allegations in paragraph 102 of the Complaint.
244. In response to paragraph 103 of the Complaint, RTD denies that DTP is entitled to its requested declaration.
245. RTD denies any remaining allegations in DTP's Complaint not specifically admitted herein.
246. RTD denies that DTP is entitled to the relief sought as set forth in the Prayer for Relief, including all subparagraphs.

RTD'S OBJECTION TO DTP'S JURY DEMAND

Pursuant to Section 50.8 of the Concession Agreement, both parties have waived their right to a trial by jury in this matter. Accordingly, RTD affirmatively states that DTP may not demand a trial by jury and notes that such demand should be stricken.

RTD'S AFFIRMATIVE DEFENSES

- A. Plaintiff's Complaint fails to state a claim upon which relief can be granted.
- B. Plaintiff's claims are barred by the terms of the Concession Agreement.
- C. Plaintiff's claims are barred by the terms of the Side Agreements.
- D. Plaintiff's claims are barred by the doctrine of accord and satisfaction.
- E. Plaintiff's claims are barred by its failure to comply with the Concession Agreement's notice of claim and dispute resolution procedure.
- F. Plaintiff's claims are barred by the failure of a condition.
- G. Plaintiff's claims are barred by the doctrine of waiver.
- H. Plaintiff's claims are barred by the doctrine of laches.
- I. Plaintiff's claims are barred by the doctrine of estoppel.
- J. Plaintiff's claims are barred, in whole or part, by the statute of limitations.
- K. Plaintiff's claims are barred by the doctrine of unclean hands.
- L. Plaintiff's claims are barred by its failure to mitigate its damages.

Respectfully submitted this 11th day of October, 2018.

s/ Gregory S. Tamkin

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***Attorneys for Defendant Regional
Transportation District***

CERTIFICATE OF SERVICE

I hereby certify that on October 11, 2018, I caused a true and correct copy of the above and foregoing **COUNTERCLAIMS AND ANSWER TO COMPLAINT** to be filed via the Colorado Courts E-filing System (CCE) which will provide notice of the filing and availability of such document by electronic mail to the following attorneys of record:

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