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Code 128

# Docket #A118596

## Respondent Brief / Respondent's Brief on the Merits

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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FIRST APPELLATE DISTRICT, DIVISION FIVE**

ALAMEDA BELT LINE,
a California Corporation,

Plaintiff and Appellant,

v.

THE CITY OF ALAMEDA,
et al.,

Defendant and
Respondent.
_____/

Case No. A118596

Alameda County Superior
Court No. C-826373-7
Trial Judge: Hon. Jon S. Tigar

# BRIEF OF RESPONDENT


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**Court of Appeal**
**State of California**
**First Appellate District**

**CERTIFICATE OF INTERESTED ENTITIES OR PERSONS**
California Rules of Court, rule 8.208

Court of Appeal Case Number: A118596

Case Name: Alameda Belt Line v. The City of Alameda

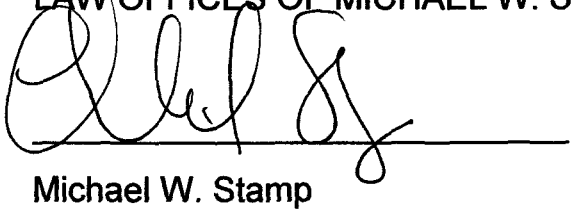
Please check the applicable box:

✓ There are no interested entities or persons to list in this Certificate per California Rules of Court, rule 8.208 (d)(3).

☐ Interested entities or persons are listed below:

| Name of Each Interested Entity or Person | Nature of Interest |
|---|---|
| 1. | |
| 2. | |

Dated July 29, 2008 LAW OFFICES OF MICHAEL W. STAMP



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## INTRODUCTION

This is a contract interpretation case. The trial court (Judge Jon S. Tigar, presiding) upheld the City of Alameda's valid contractual rights, and entered judgment in favor of the City. (VI-JA 1529-1601.) After considering the expert witness testimony and lay testimony presented by each side during trial, along with the 1924-1926 California Railroad Commission and Interstate Commerce Commission proceedings and Alameda Belt Line's financial and accounting records, the trial court interpreted and upheld the contract. The trial court determined that the City has the contractual right to purchase from Alameda Belt Line certain railroad properties including extensions of the railroad, based upon the purchase formula specified in the contract. (*Ibid.)*

The trial court prepared a lengthy, detailed analysis of the record, the facts, and the law, and adopted it as the Statement of Decision. (VI-JA 1457-1480.) The trial court correctly determined that the property description in the contract was made certain by the extrinsic or parol evidence presented at trial. The trial court, based upon substantial evidence, correctly identified the properties, including the railyard, that are within the contract language of "said belt line railroad including all extensions thereof." The trial court

determined the mutual expressed intention of the parties in forming the contract. The court determined the specialized trade and industry meanings of the key terms used in the purchase provision and in the contract as a whole, the fundamental purpose of the contract, and the effect to be given to each part of the contract, with each clause of the contract helping to interpret the other. (Civ. Code, §§ 1636, 1641, 1643, 1644, 1645, 1649, 3541; Code Civ. Proc., §§ 1858, 1864.) The trial court followed the decision of this Court of Appeal in *Alameda Belt Line v. City of Alameda* (2003) 113 Cal.App.4th 15, and the applicable statutes and case law on the interpretation of contracts. (VI-JA 1457-1480.)

On appeal, Appellant Alameda Belt Line abandons nearly all of its claims from the trial court and asserts two claims: a contract interpretation rejected by the trial court and unsupported by expert witness testimony, and a "frustration of purpose" claim not proved at trial. Appellant argues on appeal for an interpretation of the contract that is not consistent with the testimony, reports, and other evidence, is not logical or persuasive, is not consistent with the established usage and custom of the railroad industry, and is contrary with the expert testimony and factual record presented in the trial court.

Respondent City's position on appeal is that the trial court properly resolved all issues, including the conflicting expert testimony on the meaning, scope, trade and industry usage of terms used in the contract. The trial court's determinations are supported by substantial evidence, and are legally and factually correct. The judgment should be affirmed.

## ISSUES PRESENTED

1. Where the trial court's interpretation of the City's purchase right under the contract is dependent upon the credibility of conflicting expert testimony as to the intention of the parties and the meaning, trade or industry usage of the language of the contract, and the judgment is supported by substantial evidence, is the interpretation found by the trial court binding on appeal?
2. If the judgment is reviewed de novo on appeal, is the purchase right of the City enforceable as to the belt line railroad properties including the extensions of the railroad, as found by the trial court, as provided for in Paragraph 14 of the contract and as established by expert witness testimony, or is the Court to make a different interpretation limiting the purchase right to trackage or easements when the contract language has no

such limitation and the trial court and the only expert witness testimony on the subject concluded that no such limitation exists in the contract?

## STANDARD OF REVIEW ON APPEAL

A. Rules of Interpretation and Standard of Review.

> [W]hen, as here, ascertaining the intent of the parties at the time the contract was executed depends on the credibility of extrinsic evidence, that credibility determination and the interpretation of the contract are questions of fact that may properly be resolved by the jury [trier of fact] (*Warner Constr. Corp. v. City of Los Angeles* (1970) 2 Cal.3d 285, 289 ["since the interpretation of the crucial provisions turned on the credibility of expert testimony, the court did not err in submitting the construction of the contract to the jury"].)
>
> [¶] This rule — that the jury [trier of fact] may interpret an agreement when construction turns on the credibility of extrinsic evidence — is well established in our case law. (See, e.g., *Warner Constr. Corp. v. City of Los Angeles, supra,* 2 Cal.3d at p. 289; *Fischer v. First Internat. Bank* (2003) 109 Cal.App.4th 1433, 1443;

> *Horsemen's Benevolent & Protective Assn. v. Valley Racing Assn.* (1992) 4 Cal.App.4th 1538, 1562; *Kaufman & Broad Bldg. Co. v. City & Suburban Mortgage Co.* (1970) 10 Cal.App.3d 206, 216.) California's jury instructions reflect this (Judicial Council of Cal. Civ. Jury Instns. (2008) CACI No. 314; Com. to BAJI No. 10.75 (9th ed. 2002) p. 407), as do authoritative secondary sources (11 Williston on Contracts (4th ed.2006) § 30:7, pp. 87-91; Rest.2d Contracts, § 212, subd. (2), p. 125).

(*City of Hope Nat. Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375, 395-396 (*City of Hope*).)

The credibility determination and the interpretation of the contract, whether performed by a jury or by the trial court sitting as the trier of fact, are reviewed under the substantial evidence standard. When conflicting inferences arise from conflicting evidence, the trial court's resolution is binding on the appellate court. (*Wolf v. Walt Disney Pictures and Television* (2008) 162 Cal.App.4th 1107, 1127, applying *City of Hope, supra,* 43 Cal.4th 375 and *Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865-866.)

Under the substantial evidence standard, the reviewing court "must accept as true all evidence and all reasonable inferences from

the evidence tending to establish the correctness of the trial court's findings and decision, resolving every conflict in favor of the judgment. [Citation.]" (*Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 631.) "All intendments and presumptions are indulged to support [the judgment] on matters as to which the record is silent, and error must be affirmatively shown." (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) The City's position on appeal is that the judgment entered by the trial court, based on the resolution of the credibility and weight of the expert witness testimony presented by both sides at trial and supported by substantial evidence, is reviewed under the sufficiency of the evidence standard, and should be affirmed.

B. Appellate Review When There Is No Conflict in the Extrinsic Evidence Affecting the Interpretation of the Conflict.

ABL premises its appeal upon de novo review (AOB 27-28). Assuming solely for purposes of argument that de novo review is warranted, the trial court's findings and judgment should be affirmed based upon this Court's review and interpretation. (*ASP Properties Group v. Fard, Inc.* (2005) 133 Cal.App.4th 1257, 1266-1268.)

## STATEMENT OF FACTS

In 1918, the City of Alameda approved and then constructed a "belt line" railroad from the site of the Miller-Sweeney (Fruitvale)

Bridge along the northern waterfront for a distance of 6,364.5 feet. (Exhibit[1] 600, p. 2.) The City hired Southern Pacific Railroad to operate the railroad under an "informal license" arrangement. (Exhibit 604, ABL 19156:1-14.)

The City concluded that it needed to extend the belt line railroad. As an alternative to paying for the extensions, the City looked for a private entity to extend and operate the railroad. (Exhibit 700, sec. 1, ABL 19156:25-19157:27; sec. 4, ABL 20080.) On September 16, 1924, the Alameda City Council authorized the City to enter into an agreement to convey its railroad to Western Pacific Railroad Company (Western Pacific) and The Atchison, Topeka and Santa Fe Railway Company (Atchison Topeka), dependent upon the approval and authorization of the Interstate Commerce Commission (ICC) and California Railroad Commission (CRC). (Exhibit 650, pp. 1-4.)

On September 23, 1924, the Alaska Packers Association entered into an agreement with Western Pacific and Atchison

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[1] "Exhibit" refers to the exhibits introduced at trial. References to "ABL" followed by a page number (e.g. ABL 19156) refer to the page number of the testimony or other proceedings from the 1924-1926 proceedings. The Joint Appendix is referred to as "JA" preceded by the volume number and followed by the page number. For example, page 1457 of the Joint Appendix volume VI is referred to as VI-JA 1457. The Reporter's Transcript is referred to as "RT," preceded by the volume number and followed by the page number.

Topeka in contemplation of the railroads' formal purchase of the City's rail line. (Exhibit 508 [Alaska Packers contract].) Alaska Packers owned property within the City that it proposed to develop for terminal and industrial purposes. Some trackage already existed on the property (*id.*, p. 2). The Alaska Packers contract granted the following repurchase rights:

> The Alaska Company shall have the right to repurchase all trackage which shall have been acquired by the Belt Line from the Alaska Company, together with any additions and betterments which shall have been made thereto by the Belt Line and which the Alaska Company may desire to acquire, upon one (1) year's written notice, such repurchase to be made at and for the same price paid by the Belt Line in the first instance, together with the cost of such additions and betterments, without interest.

(Exhibit 508, paragraph 6, pp. 4-5, underlining added for emphasis.)

On December 15, 1924, the parties signed the agreement (1924 Agreement) authorized by City Ordinance 259. (Exhibit 523 [1924 agreement between the City on one side, and Western Pacific and Atchison Topeka on the other].)

The 1924 Agreement required that Western Pacific and Atchison Topeka form a new entity, Alameda Belt Line (ABL), to

construct and operate a belt line railroad. (Exhibit 523, 622, ABL 20132-20134.) ABL was created by its parent companies Western Pacific and Atchison Topeka for the purpose of acquiring, constructing and operating the belt line railroad. (Exhibit 615, ABL 19877.) All officers of ABL were also executives of a parent company. (I-RT 148:5-149:20.) ABL's economic value to its parent companies was the linkage between the short haul and long haul routes and service. (Exhibit 700, sec. 2, ABL 19811:1-13; Exhibit 624, ABL 19211:4-9, 19213:18-19218:28.)

This lawsuit focuses on Paragraph[2] 14 of the 1924 Agreement, which provides in its entirety as follows:

> Said City shall have the right at any time hereafter to purchase said belt line railroad including all extensions thereof, for a sum equal to the original cost, together with the cost of any and all additional investments and extensions made therein by said ALAMEDA BELT LINE, provided, that said City shall give at least one year's previous notice of its intention so to do by ordinance to that effect; and provided that at the same time, as the case may be, the branch

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[2] The trial court, this Court of Appeal, and the parties have referred to the numbered parts of the 1924 Agreement as "Paragraphs." The 1924 Agreement also uses the word "section."

> railroad, extensions and spur tracks referred to in the twelfth section hereof.
>
> [¶] It is agreed that said ALAMEDA BELT LINE will keep an accurate account of the cost of additional investments and extensions, and file a verified report thereof with the City Clerk of said City, similar to the report filed with the Railroad Commission. It is further agreed and understood that the term "investments" as herein used shall not include the cost of upkeep and repairs.

(Exhibit 523, Paragraph 14.)

As found by the trial court, other portions of the 1924 Agreement are also relevant. For example, Paragraph 9 "gave ABL the right to use a certain parcel of City-owned land in exchange for the payment of rent" (VI-JA 1459; Exhibit 523, Paragraph 9). The trial court found as follows:

> The rent was adjustable every ten years in accordance with the then-current value of the property. Thus, the 1924 Agreement shows that the parties knew at the time of signing that the land on which the railroad operated might increase in value. Nonetheless, the parties did not provide in Paragraph 14 for any revaluation of the land or the physical assets of the railroad if and when the City exercised its repurchase option.

(VI-JA 1459-1460.)

As another example, the trial court found that the 1924 Agreement expressly provided for the payment of interest in two circumstances:

> when another railroad wanted to purchase an ownership interest in ABL (Exh. 523, ¶ 3) or when the consummation of the City's sale of the belt line to ABL was unreasonably delayed after payment of the $30,000 (Exh. 523, ¶ 4). Nonetheless, the parties did not provide for the payment of interest if and when the City repurchased the railroad pursuant to Paragraph 14.

(VI-JA 1460.)

On March 2, 1925, ABL filed applications before the CRC and ICC. ABL sought CRC and ICC approval of the sale of the belt line by the City, and CRC and ICC approval to allow ABL to acquire and extend the belt line. (Exhibit 615, ABL 19876 [105 ICC 349, 350].)

Southern Pacific Railroad (Southern Pacific), the operator of the City's belt line railroad and a competitor of Western Pacific and Atchison Topeka, opposed the City's proposed sale of the railroad to ABL and ABL's proposed operations as a rail company. (Exhibit 619, ABL 20033, 20041, 20048-20050.)

Related proceedings of the parties were conducted before the CRC in March and April 1925. (Exhibit 624, ABL 19132, 19301, 19361, 19745.) In those proceedings, witnesses testified regarding ABL's application to acquire and extend the railroad. (Exhibit 624, ABL 19054-19792.)

On July 14, 1925, the CRC approved the issuance of $500,000 of common capital stock by ABL to acquire the existing belt line from the City and to construct the extensions. (Exhibit 506 [CRC Decision], pp. 4-5.) The CRC commissioner who presided at the hearing filed a report with the ICC, recommending the approval of ABL as a railroad. (Exhibit 610, ABL 19794-19798; Exhibit 624, ABL 19876.)

The 1925 CRC Decision described the future extensions of ABL. (Exhibit 506.) Those extensions "to extend the line" expressly include a classification yard (*id.,* at p. 3), which is an industry term used interchangeably with railyard and switching yard (I-RT 166:19-167:3; VI-JA 1461, n. 4). The CRC decision stated as follows:

> As stated, the Alameda Belt Line has agreed to purchase from the city of Alameda the belt line railroad for $30,000. The company estimates that it will have to expend $389,018.35 to extend the line which it intends to purchase from the city in

> a general westerly direction from a connection with the existing track of the city's railroad in Clement avenue near Minturn street to the westerly line of Webster street, including the line to a proposed freight ferry slip to be located on the estuary of San Antonio; with interchange track on Clement avenue between Broadway and Park street, and also classification yard, track scales, water and oil facilities, and engine houses, and that an expenditure of $75,725.23 is necessary in extending the line in a general westerly direction from the westerly line of Webster street to the shore line of San Francisco Bay. The total estimated expenditure of the Alameda Belt Line is reported at $494,545.58. The testimony shows that this expenditure will be incurred as soon as the industrial development warrants the same.

(Exhibit 506 [CRC decision], p. 3, underlining added for emphasis.)

The ICC examiner recommended approval of ABL's acquisition of the City's rail line, issuance of stock, joint control of ABL by Western Pacific and Atchison Topeka, and operation of the belt line railroad. (Exhibit 611, ABL 19800-19814.)

In December 1925, the ICC heard Southern Pacific's objections to the ICC examiner's recommendation. (Exhibit 624, ABL 19057-19126, ABL 20110-20191.) The ICC received briefs and exhibits, including testimony, in support of the application by Western Pacific and Atchison Topeka, and in opposition by Southern Pacific. (Exhibit 624, ABL 19057-19126, 20033-20191.) The applicants' brief stated that ABL would be expanding operations with the "necessary extensions" and the "construction of the necessary yard tracks and facilities for the storage of cars and handling of traffic." (Exhibit 624, ABL 20100.)

In January 1926, the ICC approved the acquisition and construction of the ABL railroad (105 ICC 349 [ICC Decision]). (Exhibit 615, ABL 19880.)

Consistent with the CRC Decision, the ICC Decision also described the "classification yard" (railyard) as an "extension" of the belt line railroad (Exhibit 615, ABL 19878-19879 [105 ICC 349, 355-356]). The ICC Decision stated in part:

> The estimated cost of the proposed extension from the present westerly terminus to the west line of Webster Street, including the line to the proposed ferry slip, together with interchange track on Clement Avenue, classification yard, track scales,

> water and oil facilities, and engine house is $389,018.35. The further extension from the west side of Webster Street to the shore line of San Francisco Bay is estimated to cost $75,527.23. The Belt Line expects to acquire the city's line and to begin construction of the proposed extensions as soon as authority therefor is received and necessary rights of way obtained.

(*Ibid.*, underlining added for emphasis.)

Following the January 1926 ICC approval, ABL formally accepted the 1924 Agreement with the City. In its acceptance, ABL acknowledged that the 1924 Agreement was in full force and effect: ABL "hereby accept[s], as an entirety, [the 1924 Agreement] . . . and does hereby make itself subject to all of the terms and conditions of said agreement." (Exhibit 666.) The acceptance was a condition precedent under the 1924 Agreement. (*Ibid.*)

On February 17, 1926, ABL's payment of $30,000 in accordance with the 1924 Agreement was acknowledged by the City. (Exhibits 548, 667, ABL 06251-06253.) On the same day, the City conveyed its existing rail line to ABL. (*Ibid.*)

All of ABL's services were confined to the City of Alameda. (I-RT 79:7-13.) As found by the trial court, ABL was a "belt line" or

"switching" railroad. (VI-JA 1460.) A switching railroad performs its services entirely within a defined geographical area, in this case the City of Alameda.[3] (I-RT 81:25-82:3.) The railroad included a switching yard for this purpose where ABL had twelve extensions of its main line, a switching operation, and ABL's offices. (I-RT 166:19-170:3.) The bulk of the physical work of ABL consisted of switching cars in the railyard. (I-RT 87:6-16; 103:15-21; 129:23-27.) As the trial court found, without the railyard, ABL could not have performed its essential function of switching cars. (VI-JA 1461, I-RT 129:23-130:11.)

In 1948 and 1950, ABL acknowledged the continuing validity of purchase rights in the 1924 Agreement. In 1948, ABL calculated the exact price (to the penny) of the Southern Pacific purchase right under Paragraph 3. (Exhibits 529-530.) In 1950, ABL's counsel again described ABL's 1948 calculations for SP's purchase right under the Agreement, and stated that Southern Pacific "can at any time" exercise its rights under Paragraph 3. (Exhibit 531, ABL 05052). The 1950 letter also referenced the City's "right to purchase the ABL's railroad at any time." (Exhibit 531, ABL 05051.) The letter

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[3] A belt line railroad is different from a "line haul" railroad which performs point-to-point service, such as from Los Angeles to Chicago. (I-RT 81:13-24.)

acknowledged that "the City has the right under the Agreement to buy back the belt line as extended." (Exhibit 531, ABL 05053.)

On November 10, 1998, the Alameda Belt Line ceased active operations. (I-RT 204:6-8, II-RT 359:16-18.)

On October 6, 1999, City staff filed a report with the City Council stating that ABL had cut back operations and sold parcels of its property. (Exhibit 600, p. 2.) On November 2, 1999, the City Council adopted Ordinance 2817 and notified ABL of the City's intention to purchase the belt line railroad under Paragraph 14 of the 1924 Agreement. (*Id.*; Exhibit 533.)

ABL did not acknowledge the City's purchase right. On May 11, 2000, ABL filed this lawsuit in Alameda County Superior Court. (I-JA 1-25.) In 2002, the court granted summary judgment in favor of ABL. This Court reversed the judgment and remanded the case for trial. (*Alameda Belt Line v. City of Alameda* (2003) 113 Cal.App.4th 15 (*ABL I*).) The case went to court trial (Judge Jon S. Tigar, presiding) in April 2006. (IV-JA 960.)

## THE TESTIMONY AT TRIAL

### A. ABL's Witnesses.

ABL presented four witnesses. The first was Phillip Copple, superintendent of ABL from 1970 until he retired in 2004. (I-RT

76:8-16, 79:23-80:7.) Copple testified regarding the operations of ABL. (I-RT 76:7-249:24.)

Copple testified that in the railroad industry, the railyard was also referred to interchangeably as the switching yard, main yard or classification yard. (I-RT 166:19-167:3.) He testified that the extensions included trackage, grade crossings, grade crossing protection, signal houses and the land underneath the trackage. (I-RT 209:19-211:14, 220:11-21.) He testified that the main track running through the railyard and the twelve switching tracks in the yard were all extensions. (I-RT 170:8-172:1.)

ABL's second witness was Michael Valley. (I-RT 251:1-267:7.) Valley testified that in 1999 on behalf of Sun Country Partners he proposed a contingent offer for the railyard. (I-RT 253:13-20.) The sale did not occur. (I-RT 256:20-257:15.)

ABL's third witness was Jennifer Ziegler. Ziegler is a certified public accountant. (I-RT 269:22-270:4.) Ziegler was retained by ABL as an expert witness. (I-RT 268:20-299:1, II-RT 310:11-352:28.) Ziegler testified to her efforts to compute the purchase price under Paragraph 14 and the amount of interest that she added to the purchase price. (I-RT 268 to II-RT 352; Exhibits 112, 236A, 236B; see VI-JA 1470-1471 [statement of decision].) Ziegler testified

that her approach "was to add up what cash went out the door." (II-RT 325:15-23; VI-JA 1470.)

ABL's fourth witness was Joseph Pattison. (II-RT 356:11-373:4.) Pattison started with ABL in 1971 as a relief clerk, and worked in a variety of jobs with ABL. (II-RT 356:23-358:14.) He testified about some of ABL's daily operations and documents. (II-RT 358:15-363:28, 368:25-371:3.)

B. The City's Witnesses.

The City presented four witnesses. Flavio Barrantes, an assistant engineer employed by the City, gave testimony that included a map that he prepared of the belt line railroad properties. The map showed the properties purchased by ABL to extend the railroad. (Exhibit 602 [map]; II-RT 384:21-391:13, 396:6-13, 404:10-405:9; see Exhibits 548-549 [deeds].) During ABL's former superintendent Copple's testimony, Copple verified the City's map (I-RT 173:24-175:13) and corrected it in a few small details which were confirmed by Barrantes as accurate (I-RT 174:5-175:13; II-RT 393:9-395:1).

The City's second witness was Thomas C. Crowley, president of L.E. Peabody & Associates, an economic consulting firm specializing in transportation matters, primarily rail transportation.

(III-RT 444:6-17.) Crowley has over 35 years of direct experience in railroad financial and accounting practices. (Exhibit 693; III-RT 446:19-462:5, 476:24-477:14.) Crowley has worked with both shippers and railroads. On railroad matters, he has testified before Congress and the courts as an expert witness, and has testified 200-250 times before the ICC and its successor agency, the Surface Transportation Board. (Exhibit 693; III-RT 446:4-461:17.) He was qualified in this case as an expert in current and historical railroad accounting, investments, financial determinations, and ICC accounting rules, regulations and terms. (III-RT 461:18-462:5.) Crowley provided expert testimony on the definitions, meaning and usage of the terms in Paragraph 14 in the railroad industry. (III-RT 444:2-568:9; Exhibits 550, 551, 552, 626, 687, 688, 690 [slides 4-12], 693.)

Crowley explained that railroad accounting is prescribed by the accounting classification and Uniform System of Accounts first adopted by the ICC in 1914. (III-RT 468:26-474:26; Exhibit 626.) All railroads are required to use this uniform accounting system. No deviations are allowed. (III-RT 469:6-21.) Crowley reviewed the 1924 Agreement and determined that the purchase price for the property stated in Paragraph 14 could be reliably and accurately

determined. (III-RT 465:6-467:25, 481:14-27, 505:1-12.) Crowley testified that the terms were certain and standard within the railroad industry, and that the price could be confirmed and cross-checked through several different approaches. (III-RT 462:6-485:20.) Crowley, assisted by other Peabody experts, reviewed ABL's records, ABL's filings with the ICC, and trial balance sheets and annual balance sheets, along with the tax returns and correspondence produced in discovery. (III-RT 463:4-464:25.) He also reviewed the results of searches at the federal archives that "produced a number of missing [ABL] annual reports that allowed us to complete our analysis" (III-RT 464:16-25), and reviewed records from the California Railroad Commission (III-RT 464:26-465:5).

Crowley explained that the 1924 Agreement's terms were standard and accepted railroad industry terminology used at the time of the Agreement and still in use today, and that these terms made it clear how the City's purchase right would be determined (III-RT 467:2-468:10). Crowley testified that the key purchase terms were explained in light of the nature of the contract (railroad properties, accounting, and operations) and the circumstances under which the parties created the agreement. (III-RT 467:2-474:26, see VI-JA 1467, 1468.)

Crowley testified regarding investments, extensions and repairs based on mandatory railroad accounting definitions and rules as prescribed by the ICC. (III-RT 468:29-499:21; Exhibit 626.) These were defined in the ICC Uniform System of Accounts starting in 1914. (*Ibid.*) Crowley presented the definitions of investments, extensions, addition, betterment, and repairs in slides 5 through 13, contained in Exhibit 690. (III-RT 472:19-498:6.) While the ICC definitions changed over the years, Crowley determined that none of the changes was material in regard to the terms used in Paragraph 14. (III-RT 474:1-482:12.)

Crowley testified that starting in 1914 railroads were required by the ICC to file an annual verified report describing in detail the kind and cost of their investments. (III-RT 477:15-478:7.) These reports "included an accurate account of the cost of additional investments and extensions on a year-by-year basis." (III-RT 481:19-21.)

Crowley testified that in 1924, investment was defined in the ICC Uniform System of Accounts to mean the "cost of original road, original equipment, road extensions, additions and betterments." (III-RT 475:2-476:16, 484:4-9].) "Road" means "[r]ail and all the assets that are below the wheels." (III-RT 475:17-21.)

Crowley testified that "extensions" as used in the ICC Uniform System of Accounts refers to the land and the fixed improvements of a railroad. (III-RT 485:11-486:13; Exhibit 690, slide 9.) The current definition of "extension" is consistent with the definition in 1914 when the ICC rules were published, and the definition in 1924 when Paragraph 14 was written. (III-RT 487:3-10.) "Extension" and "railroad extension" are terms used interchangeably in the railroad industry. (III-RT 485:14-20.) The ABL railyard (including its land, main track and twelve extension tracks) "would be either an extension or addition betterment." (III-RT 488:15-489:1; see VI-JA 1466.) Crowley included the railyard real property in his expert determination of the property to be purchased by the City under Paragraph 14. (III-RT 488:15-489:1.) ABL's witness, Phillip Copple, had also testified that the railyard is an "extension." (I-RT 170:26-171:15.) ABL presented no evidence to contradict the statements by Crowley and Copple that the railyard is an extension.

Crowley testified that long-term agreements spanning decades are common in the railroad industry. He provided examples of railroad agreements spanning decades or more. (III-RT 498:7-500:18; Exhibits 552, 687.)

Crowley explained that the repurchase provisions of the 1924 Alaska Packers contract also used common ICC terms. (III-RT 502:2-503:6; Exhibit 508.)

Crowley was able to determine the Paragraph 14 purchase formula calculations with accuracy and certainty, using the language of the Agreement and the commonly used trade language, customs, and regulations in effect in 1924 and over the years since then. (III-RT 505:1-508:26; Exhibit 690, slide 19.) He testified that "[a]s of December 31, 2005, the ABL repurchase price equals $966,027." (III-RT 505:8-9.)

Crowley testified that his calculations and ABL's calculations of ABL's "investments" and "extensions" as they existed in 1948 resulted in essentially the same number. (III-RT 519:12-521:21.) Crowley explained that the difference in his calculations and ABL's 1948 calculations was only $53, probably due to a retirement between January 1 and January 31, 1948. (III-RT 521:24-522:1-4; see Exhibits 529, 530, 683, 690 [slides 25-26].)

Crowley testified regarding his disagreement with the evidence and opinions offered by ABL's expert, Ziegler. Crowley testified that Ziegler's analysis and opinions were inconsistent with railroad standards, and that Crowley's were consistent with generally

accepted railroad standards and with the language of Paragraph 14. (III-RT 516:9-524:12.) Crowley listed Ziegler's analytical and computational errors. (III-RT 529:19-537:4; 539:23-545:3; see Exhibit 690, slides 29-39.) Crowley testified that Ziegler further erred by failing to take into account retirements, by improperly adding investments, and by improperly adding parent company contributions of over $2 million. (III-RT 533:28-534:4, 539:23-545:3.) Crowley also disputed Ziegler's inclusion of interest because (1) Paragraph 14 does not contain an interest provision, and (2) inclusion of interest would be irrational from an economic standpoint because ABL would receive double compensation.[4] (III-RT 522:20-22; 524:13-528:6.)

The City's third witness was Paul Benoit, former Deputy City Manager. (II-RT 411:1-412:20.) Benoit testified that because the City is essentially an island, access to and from the mainland limits the City's transportation options. (II-RT 413:7-419:17.) Benoit explained the value of maintaining the transportation corridor along or connecting to the ABL corridor for possible rail, light rail, or other transportation uses in the future. (II-RT 422:13-428:20.)

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[4] The trial court's findings on the conflicts of the testimony of the two experts are stated in the statement of decision at VI-JA 1465-1471.

The City's fourth witness was Colette Meunier, former City Planner. (IV-RT 635:19-642:17.) Meunier testified in response to ABL's claims about Valley's contingent offer for the railyard. (IV-RT 636:14-637:1.) She explained that Valley's proposal was inconsistent with the zoning ordinances and general plan. (IV-RT 637:2-638:18.)

The parties also submitted into evidence the record of CRC and ICC proceedings from 1924 to 1926 when the Alameda Belt Line company was created and financed, and the City's belt line railroad was sold to ABL. (Exhibit 624.)

## STATEMENT OF THE CASE

### A. In 1999, ABL Files Suit to Prevent the City's Purchase of the Railroad Property.

ABL responded to the City's 1999 notice of intent to exercise its purchase right by filing this lawsuit. (I-JA 1-25.) The City filed an amended cross-complaint, seeking a declaration that Paragraph 14 gave the City a valid present contractual right to purchase the railroad and its extensions. (I-JA 50-58.)

In 2002, the parties filed cross-motions for summary adjudication as to their causes of action for declaratory relief. ABL sought a declaration that Paragraph 14 was unenforceable. (I-JA 95-135.) The City sought a declaration that Paragraph 14 was

enforceable. (I-JA 74-94.) The trial court granted summary judgment in favor of ABL. The City appealed. (I-JA 253.)

B. The Court of Appeal Decides in Favor of the City.

In its opinion issued November 6, 2003, this Court of Appeal reversed the judgment and remanded the case for further proceedings. (*ABL I, supra*, 113 Cal.App.4th 15.) The Court held that the purchase provision of the 1924 Agreement does not violate the statute of frauds, and that extrinsic or parol evidence coming into existence after the contract was executed may be used to show the boundaries of the land in question. (*Id.*, at 21-25.)

The Court rejected ABL's contention that the contract applies only to land held by the parties in 1924, and that the statute of frauds bars the application of the contract to subsequently-acquired property. The Court held that the contractual language of "said belt line railroad including all extensions thereof" is sufficiently clear to allow a trier of fact to identify the property subject to Paragraph 14. In addition, the Court rejected ABL's claim that the property, especially the term "extensions thereof," was insufficiently described, and therefore Paragraph 14 could not be enforced. (*Id.,* at 23-25.)

On January 30, 2004, the case was remanded for further proceedings. (I-JA 267.)

C. The Surface Transportation Board Rules in Favor of the City.

ABL asserted as an affirmative defense that the California courts did not have subject matter jurisdiction over the City's purchase right. ABL argued that the Surface Transportation Board (STB) had exclusive jurisdiction over all railroad operations and ownership issues. (I-JA 70.)

On December 9, 2005, the City filed with the STB a verified Notice of Exemption to acquire the belt line railroad from ABL. (Exhibit 600, p. 2.) On April 3, 2006, the STB ruled that "ABL's arguments are without merit." (Exhibit 600, p. 4.) The STB held that the California court, not the STB, is to decide the City's contract claims, flatly rejecting "ABL's effort to use the Board's processes to undercut the court case . . . ." (*Ibid.*)

D. Trial in Superior Court.

On April 7, 2006, the case was assigned to the Honorable Jon S. Tigar, Judge of the Alameda County Superior Court, for trial. (IV-JA 960.) Trial began on April 24, 2006. (I-RT 42-75.) Testimony was received from April 24 to May 2, 2006. (I-RT 75:15 to II-RT 373:4, II-RT 384:21 to IV-RT 642:27.) On May 2, 2006, Judge Tigar conducted a site visit to the ABL property. (IV-JA 1091; IV-RT 666:3-

8, 667:5-11.) Closing arguments were presented on May 22, 2006. (IV-RT 683:4-768:20.)

On May 22, 2006, the City moved to reinstate its cause of action for specific performance. (V-JA 1272-1311.) The trial court granted the City's motion. (V-JA 1332-1333.)

On August 8, 2006, the trial court filed its statement of intended decision (V-JA 1335-1357) upholding the City's purchase right. On August 17, 2006, ABL filed a statement of controverted issues. (V-JA 1358-1372.)

On November 13, 2006, the trial court filed its Statement of Decision. (VI-JA 1457-1481.) The trial court made its detailed findings and ruled in favor of the City, directing ABL to convey the properties to the City for $966,027. (VI-JA 1457-1481.) The trial court found and determined that (1) the Agreement was not uncertain as to the property to be purchased by the City (VI-JA 1463-1467), (2) the price to be paid by the City under the Agreement was properly calculated under Paragraph 14 (VI-JA 1467-1471), (3) Paragraph 14 had not expired or been extinguished (VI-JA 1472-1474), (4) Paragraph 14 was not made unenforceable by the doctrines of impracticability or frustration of purpose (VI-JA 1474-1476), (5) the City is not equitably estopped (VI-JA 1476-1478), and

(6) the City has not waived its repurchase right (VI-JA 1478-1480). As part of its Statement of Decision, the trial court adopted the "Description of Property" filed by the City. (VI-JA 1480, n. 12.)

On April 23, 2007, the trial court entered a final Judgment in favor of the City. (VI-JA 1535-1601.) On May 18, 2007, ABL filed a motion for new trial. (VI-JA 1669-1690.) The trial court denied the motion. (VII-JA 1706-1718.)

On July 26, 2007, ABL filed a Notice of Appeal. (VII-JA 1719.)

## ARGUMENT

### I.

### EXTRINSIC EVIDENCE AT TRIAL CONFIRMED THAT THE LANDS IN QUESTION COULD BE ACCURATELY IDENTIFIED WITHIN THE MEANING OF PARAGRAPH 14.

ABL's primary argument in this case from 2000 to 2003 was that the City's purchase right was invalid because the 1924 Agreement was not sufficiently certain to satisfy the requirements of the statute of frauds. The issue was decided against ABL by this Court of Appeal in 2003 in *ABL I*.

In *ABL I*, this Court held that extrinsic or parol evidence coming into existence after the contract was created could be used to show the boundaries of the lands in question. (*ABL I, supra,* 113 Cal.App.4th 15, 25.) As this Court held, the Agreement language

authorizing the City to purchase "said belt line railroad including all extensions thereof" is specific enough to serve as a "means or key" to define the property subject to the provision. (*Id.,* at p. 21.) Pointing to the deeds, legal descriptions, and conveyance documents for railroad property held by ABL, this Court agreed with the City that the property could be made identifiable in compliance with the statute of frauds. (*Id.*, at pp. 22-23.)

At trial, the City presented the evidence of the railroad property by way of deeds (Exhibits 548, 549) and maps (Exhibit 602 [map]; V-JA 1396-1409 [City's Property Description]). The evidence established the exact properties, fee interests, and rights of way held by ABL for railroad properties, including the properties acquired for railroad purposes including "extensions" of the railroad. The City presented detailed expert testimony as to the meaning and applicability of the pertinent railroad terms in the 1924 Agreement, the property subject to Paragraph 14, and the price to be paid under the Paragraph 14 formula. (III-RT 448-568.) The trial court found on the basis of substantial evidence that the properties were adequately defined in accord with the decision in *ABL I* and within the meaning of Paragraph 14 and the Agreement. (VI-JA 1463-1467.)

The property to be acquired is sufficiently certain, and the 1924 Agreement should be given the interpretation that gives effect to the contract. The property identified in the judgment is the ABL property subject to the City's purchase right. The judgment should be affirmed.

## II.

## THE TRIAL COURT'S INTERPRETATION OF PARAGRAPH 14 IS SUPPORTED BY SUBSTANTIAL EVIDENCE PRESENTED AT TRIAL.

ABL's principal argument on this appeal is that the railyard property is not within the property included in Paragraph 14.[5] (AOB 29-46.) The City asserts that the railyard property is included in the purchase provision of Paragraph 14, as the trial court found, based on substantial evidence. (VI-JA 1464-1467.)

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[5] In its trial brief, ABL argued, in order: (1) federal law and the dormant commerce clause deprived California courts of jurisdiction; (2) the repurchase right expired; (3) the repurchase right terminated in 1999; (4) the purchase price cannot be ascertained; (5) the City was required by the 1924 Agreement to operate a railroad; (6) the railroad is not operating, and (7) waiver, laches, unclean hands, unjust enrichment, the rule against perpetuities, forfeiture, and equity bar enforcement of Paragraph 14. (III-JA 602-647.) ABL's inverse condemnation claim was dismissed on summary adjudication before trial. (III-JA 579-580.) On appeal, ABL presents two arguments: the definition of "extensions" (AOB 29-46) and a claim of "frustration of purpose" (AOB 47-51).

A. What Paragraph 14 Says.

The property to be transferred to the City by ABL is described in Paragraph 14. (Exhibit 523.) It includes "said belt line railroad including all extensions thereof, for a sum equal to the original cost, together with the cost of any and all additional investments and extensions made therein. . . ." Excluded from "investments" are the costs of "upkeep and repairs." (*Ibid.*)

The trial court found that the language of Paragraph 14 was ambiguous (VI-JA 1464). Therefore, the parties were entitled to present extrinsic evidence consistent with interpretations to which the language of the Agreement is reasonably susceptible. (VI-JA 1464, *ABL I, supra*, 113 Cal.App.4th at p. 25.)

B. Extrinsic Evidence: ABL's Presentation.

At trial, ABL's presentation of evidence on the meaning of Paragraph 14 (Exhibits 193-211, 233, 234) consisted of portions of the 1924-1926 record before the CRC and ICC. ABL also presented the testimony of an expert, Jennifer Ziegler, to contest and counter the testimony to be presented by the City's expert, Thomas Crowley, on the meaning and application of the terms in Paragraph 14.

ABL's position, as presented through Ziegler's testimony, was that the terms in Paragraph 14 generally meant that ABL could add

up what it spent on belt line acquisitions and operations, without regard for trade or industry usage, and without reliance upon railroad accounting standards. (I-RT 268 to II-RT 352.) Ziegler calculated ABL's claim for $28,000,000 in interest. (I-RT 286:9-19.) Ziegler testified that ABL was entitled to be paid by the City an additional $2,124,510 from "contributions to fund operations" by ABL's parent companies. (I-RT 293:14-22.) Ziegler's opinions were inconsistent with those offered by Crowley. (VI-JA 1465-1471.)

On cross-examination, Ziegler acknowledged that she had no experience in railroad accounting, had no knowledge of railroad accounting rules, and had no information about the ICC's definitions of extensions, investments and retirements. (II-RT 311:18-312:4, 315:20-317:28, 319:5-321:9, 322:20-323:3.) Ziegler did not investigate the meanings of the key terms used in the 1924 Agreement. (II-RT 324:9-325:14.) Ziegler admitted, "I don't understand railroad accounting." (II-RT 324:13-15.)

ABL presented no expert testimony that the property to be transferred under Paragraph 14 was limited to easements, rights of way, or trackage, which is a claim ABL now asserts on appeal (AOB 29-46).

C. Extrinsic Evidence: The City's Presentation.

The City first presented the 1924-1926 record of CRC and ICC proceedings (Exhibit 624) that included the testimony of witnesses to ABL's application to operate a railroad (*id.*, at ABL 19054-19792), recommendation of the CRC and report of an ICC examiner (*id.*, at ABL 19794-19814), and briefing, testimony and arguments before the ICC (*id.*, at ABL 19057-19126, 19815-20191).

The 1924-1926 record shows that all parties understood that the Agreement provided for the immediate extension of the rail line and also allowed the City to purchase the railroad including the extensions at any time. (See Civ. Code, §§ 1636 [mutual intention of parties], 1647, 1649.) Western Pacific and Atchison Topeka, referring to the Alameda City Manager's testimony, told the ICC that the Agreement was understood to be "the best means of effecting [the] extension without expense to the city and with the [City having] the privilege of repurchasing the railroad if it so desired." (Exhibit 700, sec. 4, ABL 20080.) Southern Pacific observed that the Agreement had "three objectives" for the City, which included (1) extension of the railroad "at once," (2) the City being relieved of the expense of the extensions, and (3) the City having "the privilege of

acquiring the railroad back" in the future. (Exhibit 700, sec. 5, ABL 20166.)

The City presented the maps (Exhibit 602) and deeds (Exhibits 548, 549) of the railroad property including the extensions. The City presented the expert witness testimony of Crowley, who provided a comprehensive analysis of the ABL property described under Paragraph 14, the extensions and betterments, the historical and accounting setting for the repurchase provision, and the basis for classifying the belt line property under Paragraph 14. (III-RT 443:21-568:12; Exhibits 550, 551, 552, 626, 687, 688, 690, 693.)

The trial court relied upon Crowley's testimony. (VI-JA 1465-1471.) The court found that Crowley's approach, analysis, and definitions were persuasive and consistent with ABL's own records, the history of the proceedings, and the intent of the parties, and purpose of the 1924 Agreement as a whole. (VI-JA 1465-1471.) The court found that the railyard was an extension included under Paragraph 14. (VI-JA 1464-1467.)

Crowley's testimony and the documentary evidence upon which he relied are substantial evidence for the trial court's findings. The substantial evidence, as cited in the findings, included:

1. The railyard was an "essential" part of the belt line railroad (VI-JA 1464), "integral to the asset described by the contract" (VI-JA 1467, fn. 7), and it is part of the property described in Paragraph 14, which is consistent with the language and fundamental purpose of the entire contract (VI-JA 1464-1467).

2. The term "extensions" applies to the extending of a rail line, as testified to by Crowley and by ABL's Copple. (VI-JA 1465-1466.)

3. The interpretation of Paragraph 14 offered by the City is supported by specialized knowledge of railroad accounting terms. (VI-JA 1465-1471.) ABL presented no expert testimony to the contrary, and the testimony of ABL's expert undermined ABL's arguments. (VI-JA 1470-1471.)

4. The record of the 1924-1926 proceedings was consistent with the testimony of Crowley that the railyard was part of the property subject to purchase under Paragraph 14. ABL's acquisition and construction of the belt line railroad included the construction of the

proposed extensions, including the railyard. (VI-JA 1465-1470.)

The trial court properly assessed the credibility of the witnesses, judging Crowley's expertise, credibility, and depth of experience, and resolved the interpretation issues contrary to ABL's position. The credibility of expert witness testimony is a question of fact. (*Williams v. Volkswangenwerk Aktiengesellschaft* (1986) 180 Cal.App.3d 1244, 1265.) The trial court's findings and its interpretation of the contract are supported by substantial evidence, and should be affirmed. (*Warner Constr. Corp. v. City of Los Angeles* (1970) 2 Cal.3d 285, 289, cited with approval in *City of Hope, supra,* 43 Cal.4th 375, 395-396.)

On appeal, ABL brushes aside the trial court's careful and detailed analysis of the testimony presented at trial, and fails to credit the substantial evidence that supports the judgment. (AOB 43-44; but see VI-JA 1457-1480.) The effort is unavailing, and the judgment should be affirmed.

## III.

## ALTERNATIVELY, IF THIS COURT INDEPENDENTLY REVIEWS AND WEIGHS THE EVIDENCE, THE COURT SHOULD REACH THE CONCLUSION THAT THE PARAGRAPH 14 PURCHASE RIGHT INCLUDES THE RAILYARD PROPERTY ACQUIRED AS PART OF THE BELT LINE RAILROAD INCLUDING ALL EXTENSIONS THEREOF.

### A. Introduction.

The evidence presented by the City proved the enforceability of the purchase right and reliably calculated the purchase price under the 1924 Agreement. The trial court's decision harmonized the key terms in the Agreement with the 1924-1926 record of proceedings, with the parties' expressed intention, railroad industry practices and usage of language, and with the overall meaning of the entire Agreement.

On appeal, ABL urges an interpretation that the repurchase provision requires an interpretation limiting it to "trackage" or solely to extensions of the City's trackage, even though Paragraph 14 does not say so. The interpretation is not credible and is not supported by the weight of the evidence. If this Court of Appeal reviews the case de novo, it should affirm the judgment.

B. Paragraph 14 Provides for Acquisition of the Belt Line Railroad, Including Extensions.

1. The Trial Court Correctly Concluded that the Railroad Property Includes the Railyard and Other Railroad Properties Including Extensions.

Paragraph 14 describes the property to be transferred to the City as "said belt line railroad including all extensions thereof." (Exhibit 523, Paragraph 14.) The City asserts that the railyard (switching yard) and other railroad properties acquired and used for the railroad are (1) part of "said belt line railroad" and (2) part of "all extensions thereof." The City asserts that the properties are fundamental components of the belt line railroad, and also would be classified as additional investments under Paragraph 14. ABL contends that those railroad properties are not part of "said belt line railroad," nor an "extension thereof."

The trial court found in favor of the City. First, the court found "the railyard was an essential part" of the railroad. Looking at the intention of the parties, the Court found that the "fundamental purpose" of operating the railroad would be impossible without the railyard. (VI-JA 1464-1465.) Second, as shown by the testimony at trial, the railyard is an extension under the accepted trade, industry and accounting meaning of that term. (VI-JA 1465.) The trial court expressly referenced the expert testimony of Crowley that the land

and fixed improvements constituted extensions if included in the original plan, or as an additional investment if not in the original plan. In either instance, the railyard was still an essential component of ABL's construction and operation of a belt line railroad. (VI-JA 1465-1466.) In addition, the court cited to a portion of the 1926 ICC order authorizing the acquisition and construction of the railroad as including "the construction of the proposed extensions," including the "switching, and side tracks." (VI-JA 1466, citing to Exhibit 624, ABL 19878 [105 ICC 349, 355].) The trial court's interpretation is amply supported in the record.

ABL's argument plucks words and phrases out of various places and strips them of their context and meaning. The 1924-1926 proceedings demonstrate that the Agreement was negotiated by sophisticated railroad companies and approved in CRC and ICC contested hearings. Although the Agreement's key provisions are based upon railroad accounting terms, at trial ABL offered no expert evidence of railroad industry practice, custom and usage. Parties "are presumed to contract pursuant to a fixed and established usage and custom of the trade or industry." (*Southern Pacific Transportation Co. v. Santa Fe Pacific Pipelines, Inc.* (1999) 74 Cal.App.4th 1232, 1244; Civ. Code, §§ 1644, 1645.) The only expert

presented by ABL, Ziegler, admitted that she knew nothing about railroad accounting, and made no effort to obtain a definition from her clients or anyone else. (VI-JA 1470 [trial court finding], II-RT 311:18-325:23.) ABL's efforts on appeal to interpret Paragraph 14 (AOB 29-33, 38-42) outside the context of railroad industry usage are neither compelling nor logical. Where the City presented the evidence in its context, giving meaning to all of Paragraph 14, ABL made no such effort at trial or in its opening brief in this Court.

2. ABL's Definition of the Belt Line Railroad Is Incorrect.

ABL's argument begins with a false assertion that "[b]oth sides agree that 'said belt line railroad'" in Paragraph 14 refers to the City's rail line existing in 1924. (AOB 29.) From there, ABL posits several false choices, and mis-states the trial court's holding without citations to the record.[6] (AOB 29.) The trial court did not, as ABL claims, "conclude[] that all of ABL's property falls within the option, drawing no distinction between the corporation (ABL), the railroad and rights it had purchased from the City, and other property it came to own"

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[6] Many of ABL's misstatements, descriptions and claims are unsupported by page references to the record and testimony, starting with the introduction and continuing throughout the brief. (AOB 1-52.) The City asks that this Court disregard all unsupported facts and representations in the AOB. (Rules of Court, rule 8.204(a)(C) [appellate brief must support any reference to a matter in record by a citation to the record].)

(AOB 29). The trial court specifically found that the railyard was subject to acquisition by the City under Paragraph 14 (VI-JA 1463-1467). At trial, ABL made no objection to the map, deeds, and property description of the railroad properties subject to Paragraph 14 (VI-JA 1480, fn. 12). The property to be acquired was addressed extensively in the Crowley and Barrantes testimony. (V-JA 1373-1376; VI-JA 1480, fn. 12).

Contrary to ABL's unsupported claim at AOB 29, the trial court did not transfer, and the City did not seek to acquire, the "corporation (ABL)" properties other than those railroad properties covered by Paragraph 14 and shown on ABL's books as such. (VI-JA 1480, fn.12; see VI-JA 1535, 1569-1582.) ABL's bank accounts, stock, holdings in other companies, non-rail property investments, and other interests were outside the scope of this case. Contrary to ABL's claims (AOB 29-30), there is a difference between the "ALAMEDA BELT LINE" corporation, the properties ABL acquired to provide extensions of its railroad, and the rail line it acquired from the City.

ABL's next critical error lies in its claim about the railroad properties to be purchased under Paragraph 14. (AOB 29.) ABL defines the "belt line railroad" to be only the original rail line acquired

from the City and extensions to that rail line as stated in Paragraph 1 of the 1924 Agreement. This is not the proper definition of the properties to be acquired by the City under the Agreement. Paragraph 1 calls for the organization of a corporation to be known as the "ALAMEDA BELT LINE" (ABL) which would own and operate a railroad in the City of Alameda. The 1924 Agreement specifically states that ABL was created for:

> . . . the acquisition, construction and operation of a belt line railroad to serve the industrial areas and water front of said City, by steam or other lawful motive power, over, along and upon the line of the existing railroad belonging to the City of Alameda . . . and, in addition thereto, over, along and upon these certain streets in said City . . .

(Exhibit 523, Paragraph 1.)

The Agreement calls for ABL to acquire, construct and operate "a" belt line railroad[7] in the City of Alameda, contrary to ABL's argument on appeal that the Agreement was limited to the line of rail originally built by the City across City streets. The new belt line railroad to be developed by ABL was to include the City's original

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[7] The CRC decision approving the transaction also refers to the creation of "a belt line railroad," and not "the belt line railroad." (Exhibit 506, CRC Decision at 803.)

existing rail line as well as other investments, including extensions and other necessary assets. ABL was expected to extend the railroad "at once," as the City pointed out in the ICC proceedings in 1925. (Exhibit 624, ABL 19157:8-15.) In short, "said belt line railroad" referenced in Paragraph 14 is not limited to the rail line acquired from the City, as ABL now argues (AOB 29-30), but rather a new, larger railroad to be developed by ABL, which would include the original rail line and also other properties.[8] As explained by City Manager Hickok in 1925, the City's purchase rights were absolute:

> [W]e also, in our studies and investigations, came to the conclusion that the City of Alameda would be protected in the future by having the power to buy back this property, so we finally arrived at this agreement, which attained those three objectives, that is, that the railroad must be extended at once, that the City of Alameda should be relieved of the immediate

[8] The 1924 Agreement is consistent in calling the original rail line owned by the City the "existing railroad" or "existing line" to differentiate it from ABL's railroad. This Court's decision in *ABL I* has this fact at its center. The repurchase right, as the Court explained, included properties to be acquired in the future as the railroad grew. (*ABL I*, *supra*, 113 Cal.App.4th 15, 25.) That future growth is what triggered the statute of frauds claim by ABL on the first appeal. ABL's argument on this appeal is inconsistent with the rationale of the holding in *ABL I*.

> expense, and that we should have the privilege of acquiring the railroad back.

(Exhibit 624, ABL 19157:8-15.)

Paragraph 2 of the 1924 Agreement is consistent with the interpretation that "said belt line railroad" is a new operation and not the City's original rail line. (Exhibit 523, Paragraph 2.) The City's rail line was wholly owned by the City. ABL, on the other hand, was to issue stock to finance the railroad. (*Id.*, Paragraph 3.) The fact that Paragraph 2 discusses the sharing of the "said belt line railroad's" stock clearly points out that the "said belt line railroad" is ABL's railroad, and not the City's rail line.

C. The CRC Decision Only Specifies the General Route and Not the Extent of the Original Extensions.

ABL argues that the CRC Decision (Exhibit 506) defined what the parties understood by "extension" and explicitly limited the meaning of "extension" geographically to the physical line of railroad. (AOB 30.) The assertion is inaccurate. The CRC Decision describes the route of the proposed railroad, but does not dictate the physical dimensions, interests in land, or the type of investment. (Exhibit 506.) For example, in describing the route along which ABL would eventually build the railyard, the CRC Decision states as follows:

> . . . and also running from a convenient point on said proposed line located about 1000 feet southerly from said proposed freight ferry slip, in a general westerly direction over private rights of way and crossing all intervening streets to the westerly side of Webster Street at or near the so-called "segregation line"[9] . . .

(Exhibit 506, at p. 803.)

The CRC Decision generally describes the location of the proposed extensions. It does not even attempt to describe, much less constrain, ABL's means of extending the railroad, or limit ABL to specific amounts or forms of property or the number of rail lines to be constructed. (*Id.* at pp. 803-805.)

D. The ICC Decision Approving the Sale of Alameda's Rail Line Confirms that the Railyard Is Part of the Railroad Property and Extensions Subject to Paragraph 14.

The purchase terms of the 1924 Agreement were well known and understood by the ICC, as shown by the references to Paragraph 14 in the 1926 ICC decision:

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[9] The term "segregation line" referred to the City's then-existing shoreline as shown on an official map segregating the dry land from the swamp lands and overflowed lands. (See *Wright v. Roseberry* (1887) 121 U.S. 488, 511-513; see also, *People v. Ward Redwood Co.* (1964) 225 Cal.App.2d 385, 390.)

> The city reserves the right to purchase the Belt Line's railroad at any time upon paying therefor the original cost, plus the cost of any additional investments and extensions.

(Exhibit 615, ABL 19877 [105 ICC 349, 353].)

The ICC Decision statement that the City had the right to purchase ABL's "railroad" confirms Crowley's testimony about Paragraph 14. (III-RT 474:12-476:16.) Just as "investment" and "extension" had specific meanings in the railroad industry and with the ICC, the term "railroad" also had a well defined meaning to the industry and the ICC:

> The term "railroad" as used in [the Interstate Commerce Act] shall include . . . all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement or lease, and also all switches, spurs, tracks, terminals and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds used or necessary in the transportation or delivery of any such property.

(49 U.S.C. § 1(3) [Interstate Commerce Act definitions], amended and renumbered as 49 U.S.C. § 10102(6) (2008).)

Thus, the term "railroad" was not just a term for an isolated piece of track, but rather meant all railroad properties, including yards, grounds, switches, side tracks, etc. A "railroad" includes all the investments necessary to operate a common carrier railroad, such as ABL's railroad. By stating that the City had the right to purchase "said belt line railroad," the 1924 Agreement gave the City the right to purchase the property of the railroad used or necessary for the belt line.

This understanding that "railroad" as used by the ICC includes all rail-related assets is further supported in the 1926 ICC Decision. The Interstate Commerce Act required common carrier companies to obtain approval from the ICC before raising capital for use for railroad purposes. (See Exhibit 615 [105 ICC 349, 358].) In discussing ABL's securing of funds to meet its requirements to build ABL's railroad, the ICC Decision stated:

> To secure funds for the acquisition of the existing line and for the construction of the proposed extensions, with the necessary spur, industrial, team, switching and side tracks . . . .

(Exhibit 615, ABL 19878 [105 ICC 349, 355], underlining added.) The ICC included the necessary assets in its discussion of funding of ABL's railroad. These "additional investments" – including the railyard – were part of the railroad.

The Interstate Commerce Act's broad meaning of "railroad" – including real property used for railroad purposes -- is fully consistent with California law as it existed in 1924 to 1926, and as exists now. Public Utilities Code section 229 defines "railroad" to mean "and each branch or extension thereof . . . together with all . . . yards, grounds, . . . all other real estate, fixtures, and personal property of every kind used in connection therewith . . . ." Section 229's predecessor statute in effect in 1924 uses essentially the same definition of "railroad." (Stats. 1919 ch. 304 § 1.)

ABL cites to the 1926 ICC Decision as support for its claim about extensions being limited to the line of railroad (AOB 31), but the Decision does not provide support for the claim. The ICC Decision states that the proposed extensions will extend from the City's existing rail line, but does not describe or limit the size or the specifications of the extensions. ABL applied for

> (b) the construction of an extension of said line of railroad in a westerly and northerly direction to a proposed car-ferry slip at the

> foot of Morton Street (if projected), with a further westerly extension to the shore line of San Francisco Bay, a distance of 14,600 feet.

(Exhibit 615, ABL 19876 [105 ICC 349, 350].)

As Crowley testified, the ICC defined "extension" in 1924 as the land and fixed improvements provided and arranged for in the original plan for the construction of extensions of existing main lines, additional branch lines, and the extensions of existing branch lines. (V-JA 1255, slide 9; III-RT 485:11-489:1.) ABL presented no evidence or expert testimony to contradict Crowley's testimony.

E. The Intent of Paragraph 14 Was to Allow the City to Purchase the Entire Railroad, Including the Railyard.

The intent of Paragraph 14 is shown both in its description of property and in the purchase terms stated in the same sentence as the description of property. Under Paragraph 14, the City is obligated to purchase the entirety of ABL's railroad. The City is not given the right to purchase selected ABL properties and exclude others to the financial detriment of ABL. If the City elects to purchase the railroad including all extensions, the City is required to reimburse ABL what ABL paid for those same properties. Thus, if ABL bought easements for railroad purposes, the City would pay for

easements. If ABL bought land for railroad purposes, the City would pay for land. The fact that the phrase "all additional investments" is listed in addition and separate from "all extensions" shows that the parties to the Agreement understood the ABL could make additional investments in the railroad. (III-RT 484:19-489:1; Exhibit 690, slides 5-7, 19-21; VI-JA 1463-1466 [statement of decision].) Paragraph 14 allowed ABL's owners the opportunity to recoup their investment in these properties.

It makes no sense to assume that the parties to the 1924 Agreement intended the City to be able to purchase the new railroad in a piecemeal fashion, or intended that the City would be required to pay ABL for ABL's investments without receiving those same investments from ABL.[10] Nor does it make sense to assume that the City's repurchase was limited to easements over land owned by ABL, which would leave the City at ABL's mercy in negotiating the terms of use. ABL presented no evidence to support such constructions of Paragraph 14. As the trial court found, "the parties'

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[10] The City stated at trial that if the railroad held personal property listed as "investments" in the ABL accounting records, the City would pay for them in accordance with the terms of Paragraph 14, despite their actual lack of value. (V-JA 1389.) ABL described the personal property only as "signals and other standard equipment as shown on ABL's books, listed at $72,490." (*Ibid.*) Under Paragraph 14, the City is required to purchase these investments.

intent was to fully compensate ABL for its investments in constructing the belt line railroad if the City decided to repurchase the railroad." (VI-JA 1470.) The Agreement does not allow the City to purchase only a selected piece of the railroad or trackage across land owned and controlled by ABL, or require the City to pay ABL for its investment in land but in return receive only a lesser right, such as a trackage or easement right. Such constructions are inconsistent with the parties' intention and with the railroad industry usage of the language in Paragraph 14.

As ABL stated in its 1950 letter, "the City has the right under the Agreement to buy back the belt line as extended." (Exhibit 531, ABL 05053.)

F. ABL's Claim About Extensions to the "Original Plan" Is Not Supported by the Weight of the Evidence.

The "original plan" for the railroad referred to by ABL (AOB 29-33) is derived from Crowley's testimony that ABL's extensions of the ICC-approved plan were "extensions" under Paragraph 14 (II-RT 467:2-482:12, 485:11-489:1). The 1924 Agreement does not require that ABL expand only by easements, or only by trackage rights, or that the City's purchase right would become limited to trackage. It was up to ABL to decide the type of property interests to acquire. Under Paragraph 14, if the City exercised its purchase rights, the

City would be obligated to repay ABL for its investments in railroad property including extensions.

ABL's claim now that only easements – and not land – are covered by Paragraph 14 (AOB 36-37) is not supported by the evidence. ABL's acquisition of land for the railroad was not prohibited by the 1924 Agreement, and ABL proceeded immediately to acquire such land from the beginning. The ICC's 1928 valuation indicated that ABL acquired significant amounts of land. That 1928 valuation shows that ABL owned and used 25.14 acres of land. (Exhibit 674, ABL 07436; Exhibit 690, slide 30; III-RT 532:2-19.)

ABL also asserts that there was nothing in the CRC and ICC decisions or the acquisition and construction plan referenced in the 1924 Agreement that would mean that "extensions" include land and rail investments outside of the original line of railroad. (AOB 30, 31.) ABL concludes that property ABL acquired for railroad purposes through the years is not within the City's purchase right. (AOB 33.)

There are several errors in ABL's assumptions, selective claims, and conclusion. First, Paragraph 14 does not limit ABL or the City to acquiring only limited numbers of extensions. Paragraph 14 gives the City the right to purchase all of the railroad "including all extensions." As the trial court understood, the City has the right to

purchase all extensions constructed by ABL regardless of whether the extension was in the original plan of extension as outlined in Paragraph 1 of the 1924 Agreement. (VI-JA 1464-1467.)

Second, even if the railyard was not included in an ICC-approved extension, the City has the right to purchase the railroad, including "any and all" additional investments in the railroad, including railyards. The evidence was uncontradicted: the railyard is an additional investment to the belt line railroad. (III-RT 488:15-489:1.) The railyard was included by ABL in its investment calculations in ABL's financial statements (III-RT 477:21-481:27, 486:14-489:1, 505:13-509:18; Exhibit 690 [slides 5-11, 19]) and remained an investment on ABL's books.

As explained above, the definition of a railroad included the main rail line used by the railroad, as well as all supporting facilities and infrastructure, including switches and railyards used or necessary to operate the railroad. (*Ante*, at pp. 40-51.) There was no need for the parties to specify each individual investment included in the railroad plan because the "belt line railroad" included the mainline track, spurs, switching tracks, railyards, and all investments classified under the ICC rules. (III-RT 487:11-489:5, 505:13-506:1, 513:6-514:3.) ABL's operation of a railroad meant that the railroad

accounting and operations would classify and document all necessary additional investments in accordance with ICC rules. (See Civ. Code, §§ 1641, 1645.) ABL presented no evidence to the contrary.

ABL cites two cases, *Detroit & M. Ry. Co. v. Boyne City, G. & A.R. Co.* (E.D.Mich. 1923) 286 F. 540 (*Detroit*) and *Nicholson v. Missouri Pacific Railroad Co.* (1982) 366 ICC 69 (*Nicholson*) for broad propositions of ICC approvals. (AOB 34.) Neither case is material here.

In *Detroit*, the question was whether the ICC could regulate a railroad company's proposal to build a 3.75-mile connection with an interstate main line. The trial judge held that the line was an extension of the interstate line and not a spur. (*Detroit, supra,* 286 F. 540 at 543, 547.) The court held that the line extended the company's operations and therefore was subject to ICC jurisdiction.

In *Nicholson*, the question was whether the construction of a switching yard by Missouri Pacific was subject to ICC jurisdiction. In that case, no rail traffic was to travel across the yard, and the railroad was not extending its line beyond the yard. (*Nicholson, supra,* 366 ICC 69 at 73.) The ICC stated in *Nicholson* that "No shippers are located in the vicinity of the yard or will be directly served from the

yard" (*ibid.*) as a way to differentiate Missouri Pacific's investment from investments under ICC authority.

In contrast, ABL's main track ran into the railyard and was an extension of the belt line to the west, as testified to by ABL's witness, Copple (I-RT 170:8-172:12). (See *Texas & P. Ry. v. Gulf, Colo. & S.F. Ry.* (1926) 270 U.S. 266, 278 [extension under ICC rules is determined by whether the line extends the line of a carrier, even by a short distance].)

ABL also cites *City of Manhattan Beach v. Superior Court* (1996) 13 Cal.4th 232 (AOB 35). There, the Court interpreted a deed as a fee conveyance. (13 Cal.4th at 246-250.) The decision emphasizes that the intent to convey a fee interest can be manifested in different ways, and is ascertained on a case-by-case basis. (*Id.*, at pp. 249-250.) Here, ABL presented no evidence of any easement obtained by ABL for an extension. In any event, ABL made no argument in the trial court that the railyard and other railroad properties were anything other than a fee interest. (See, *Severns v. Union Pacific Railroad* (2002) 101 Cal.App.4th 1209, 1217 [easement conveyed only when the granting clause limits the interest].)

ABL did not present any evidence that the railyard was not an essential part of the belt line railroad. ABL did not present any evidence that the railyard was not an extension as that term was understood by the parties. (Civ. Code, §§ 1636, 1637, 1641, 1644, 1645.)

G. ABL's Further Distortions of Crowley's Testimony.

ABL distorts Crowley's testimony regarding what constitutes an "extension." (AOB 22, 23, 31, 32.) In making the statement that "the original plan is the key to an extension," Crowley distinguished between those later investments that might be considered "extensions" under railroad accounting and regulatory rules, and those that would be considered "additions" or "betterments." (III-RT 486:3-488:26.)

A reasonable analysis of Crowley's testimony requires an assessment of the whole testimony, rather than only the selected statements isolated and highlighted by ABL (AOB 22, 32). The line of questioning referenced by ABL (AOB 31-32) began with Crowley developing and explaining the term "investment" under the railroad accounting rules in effect in 1924. (Exhibit 690, slides 5-6; III-RT 472:23-473:28.) Crowley read the ICC's definition of "investment": "the cost of original road, original equipment, road extensions,

additions and betterments." (III-RT 473:1-2; Exhibit 690, slides 5-6.) All the items identified in the definition -- "original road, original equipment, road extensions, additions and betterments" – are investments.

Crowley's testimony discussed the definition of specific investments, including "extensions," which led to the following exchange:

Q: And this is the definition of extension that was defined by the ICC in – applicable in 1924?

A: It would have been in force in 1924, yes.

Q: Been around for about ten years?

A: Yes.

Q: Has been used by the railroads in their accounting in railroad practices?

A: Yes.

Q: And they were universally accepted and understood railroad terms at that time in 1924?

A: In 1924 and today.

Q: And "extensions" meaning the land and the fixed improvements, correct?

A: Well the key point of an extension is the land and fixed improvement provided and arranged for in the original plan. The original plan is the key to an extension . . . .

(III-RT 486:3-19.)

Crowley stated that depending upon whether the investment was included in the application to the ICC determines whether the investment is originally classified for accounting purposes as original property, an extension or an additional investment. Crowley made this distinction because the antecedent question "And 'extensions' meaning the land and the fixed improvements, correct?" did not differentiate between the land and fixed improvements being made to an extension or to the original railroad property. (III-RT 486:14-15.) To the question "It [the railyard] would be classified as an additional investment?", Crowley answered, "Yes. That would be either an extension or addition betterment." (III-RT 488:25-26.) ABL presented no expert testimony or evidence to the contrary.

The judgment correctly resolves the interpretation and application of the 1924 Agreement. The judgment should be affirmed.

## IV.

## THE CITY'S REPURCHASE RIGHT IS NOT MADE UNENFORCEABLE BY THE DOCTRINE OF FRUSTRATION OF PURPOSE.

ABL's second and final argument is that the City's repurchase right is unenforceable. ABL makes a confusing claim under the doctrine of frustration of purpose. (AOB 47.)

A. The Trial Court's Findings.

The trial court considered and rejected the frustration of purpose argument made by ABL.[11] (VI-JA 1474-1476.) After stating the applicable rule (Rest.2d Contracts, § 265, com. a; VI-JA 1475), the trial court found as follows:

> The dominant purpose of the 1924 Agreement as a whole was to allow ABL to extend and operate a belt line railroad that the City had already built. (See, e.g., Exh. 622 (testimony of Allan P. Matthew on

[11] ABL's thirty-first affirmative defense was "Commercial Impracticability, Impossibility, Frustration or Changed Circumstances." (I-JA 66.) ABL confused and merged pieces from different doctrines. (*Ibid.*, IV-JA 1122-1132; IV-RT 684:5-11, 710:21-713:27.) On appeal, ABL cites to the Restatement (AOB, p. 47) and refers in general to the "elements of [the frustration] doctrine."

> behalf of the City of Alameda) at ABL 20132-33.) Thus, ABL is correct that when ABL ceased switching operations in 1998, the 1924 agreement lost some of its purpose. But the operation of a beltline railroad was an assumption of the *agreement as a whole*, not of Paragraph 14 in isolation. When ABL ceased switching operations in 1998, ABL stopped serving the purpose that had allowed it to purchase the belt line railroad in the first place. That does not suggest that ABL's performance of the 1924 Agreement was "frustrated" as set forth in the Restatement. If anything, it suggests that the equities favor the City's exercise of the repurchase option in Paragraph 14.

(IV-JA 1476, fn. omitted, italics in original.)

On appeal, ABL does not discuss the substantial evidence that supports the trial court's findings. Nor does ABL cite any applicable case law supporting ABL's claims. As the trial court found, ABL failed to prove its claim. (VI-JA 1474-1476.)

B. The Cases Cited by ABL Do Not Support ABL's Claim.

The cases cited by ABL (AOB 47, 48) did not find frustration of purpose and do not support ABL's argument. In *Cutter Laboratories*

*v. Twining* (1963) 221 Cal.App.2d 302, the court held that the frustration doctrine did not apply to a stock purchase agreement. (221 Cal.App.2d 302 at 315.) ABL's reliance upon *U.S. v. Grayson* (9th Cir. 1989) 879 F. 2d 620 (AOB 48) also is off the mark. There, the trial court and the appellate court rejected defendants' frustration claim.

Here, the City performed its part of the bargain by conveying its railroad to ABL, who operated it for many years. ABL received the benefit of the bargain; ABL now cannot claim that ABL's purpose was substantially frustrated. The City's purchase right – a material part of the 1924 Agreement – remains a legal right of the City under the express terms of the Agreement. ABL has no basis to deprive the City of the City's rights under the contract.

C. ABL Misstates the Record in Trying to Create a Claim of Frustration.

ABL makes claims without citing to the record for support for its factual statements (e.g., AOB 47-51). (*Green v. City of Los Angeles* (1974) 40 Cal.App.3d 819, 835 [duty to refer court to portion of record supporting appellant's position].) This Court should disregard each of ABL's many unsupported statements.

When ABL's selective quotations from the record are put in their appropriate context, they do not support ABL's position. For

example, the trial court's statements quoted at page 48 of the AOB addressed ABL's arguments about the City's possible future use of the property, the construction of housing on some former belt line tracks (IV-RT 704:12-22), and that the City was unlikely to put a railroad through someone's home.[14] That issue was not disputed and was, as the trial court referred to it, a "softball[]" for ABL (IV-RT 705). As the trial court held, the City's future use of the property is of no material significance. (IV-RT 704:23-705:12; VI-JA 1476, n. 11.) The trial court properly refused to add contractual provisions that were not negotiated by the parties or made part of the 1924 Agreement. (Code Civ. Proc., § 1858; *Safeco Ins. Co. of America v. Robert S.* (2001) 26 Cal.4th 758, 764 ["courts are not to insert that which has been omitted (in a contract)"].)

ABL also cites only part of City Manager Hickok's 1925 testimony (AOB 49). ABL fails to place Hickok's testimony in context: while the expansion of the industrial area was the "immediate necessity" for the Agreement, Hickok testified that "the

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[14] As to the location now occupied by housing, the City required the developer to dedicate to the City a transportation corridor around the housing to preserve the opportunity for future public transportation projects. (II-RT 427:28-430:9; V-JA 1160-1161.) Thus, the transportation corridor along the spine of Alameda could be recreated when the City's purchase is completed. (II-RT 424:4-13.)

purpose of negotiating this contract" was that the City "also, in our studies and investigation, came to the conclusion that the City of Alameda would be protected in the future by having the power to buy back the property." (Exhibit 700, sec. 1, ABL 19156-19157; see V-JA 1146-1147.) As Western Pacific and Atchison Topeka stated to the ICC, Hickok identified two key provisions in the Agreement: (1) the contract was "the best means of affecting [the] extension" of the railroad; and (2) the contract gave the City the "privilege of repurchasing the railroad if it so desired." (Exhibit 700, sec. 4, ABL 20080; see, Exhibit 700, sec. 5, ABL 20166 [Hickok quoted as explaining that the contract meant that the railroad "must be extended at once" and that the City "should have the privilege of acquiring the railroad back."].) There can be no doubt that the City's purchase right was bargained for by the parties as part of the entire agreement. (See Civ. Code, § 1641.)

The City cooperated with ABL to ensure smooth operations of the railroad for more than 70 years. (V-JA 1170-1171.) The City did not, as ABL claims without acknowledging the trial court's findings to the contrary, "preside[] over the closure" of the railroad (AOB 50) or in any way exercise plenary or meaningful control. (See VI-JA 1461-1462 [statement of decision]; V-JA 1155-1156, 1178-1179.) ABL's

parent companies controlled ABL and deliberately withheld information about ABL from the City. (E.g., Exhibit 585, ABL 04536; I-RT 200:4-201:19.) ABL ignores the trial court's detailed findings and analysis of the substantial evidence supporting the trial court's determination (VI-JA 1461-1462).

D. ABL Failed to Prove that the Doctrine of Frustration of Purpose Applies to the Repurchase Provision at Issue Here.

In any event, ABL failed to prove frustration of purpose. There are three requirements for application of the doctrine of frustration: (1) The purpose that is frustrated must have been a principal purpose of that party in making the contract. The object must be so completely the basis of the contract that, as both parties understand, without it the transaction would make little sense. (2) The frustration must be substantial, and so severe that it is not fairly to be regarded as within the risks that the party assumed under the contract. (3) Non-occurrence of the frustrating event must have been a basic assumption on which the contract was made. (Rest.2d Contracts, § 265, com. a.) ABL failed to prove any of the requirements.

First, the principal purpose of the parties making the contract was for an extended belt line railroad with a right of repurchase. (VI-JA 1476; Exhibit 700, sec. 1, ABL 19156-19157.) That purpose was met. The purpose of Paragraph 14 was to protect the City in the

future by giving the City the right to purchase the belt line railroad "at any time." (Exhibit 700, sec. 1, ABL 19156-19157, sec. 3, ABL 19727, sec. 4, ABL 20071, 20080, sec. 5, ABL 20166.) That purpose has not been frustrated, because the City is exercising its right. The City's purchase right is not subject to the doctrine of frustration as a result of ABL's voluntary act to cease operations.

Second, the City's purchase right was not conditioned upon ABL's continued operation of the railroad. The Agreement does not provide that the City may purchase the railroad "only while trains are in service." Instead, the parties used the phrase, "at any time." The trial court properly ruled against ABL on that issue. (VI-JA 1476.)

The "at any time" language was fully consistent with the City's obligations under the case law applicable to the transfer of public property to private parties. Consistent with *Egan v. City of San Francisco* (1913) 165 Cal. 576 (*Egan*) and *County of Los Angeles v. Dodge* (1921) 51 Cal.App. 492 (*Dodge*), the City was required to protect the public interest in public land that was transferred to a non-public entity.[15] Here, the City prudently placed adequate

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[15] Participating in the unanimous *Egan* decision was Associate Justice Frank M. Angellotti (later Chief Justice from 1915-1921.) In 1924-1926, Justice Angellotti played a major role as general counsel for ABL's parent company Western Pacific Railroad during the CRC and ICC proceedings (e.g., Exhibit 700, sec. 3, ABL 19682-19693).

controls on the transfer of its rail line in order to protect its public duties and responsibilities. (Cf., *Dodge*, *supra*, 51 Cal.App. at p. 507.) The repurchase right was "shrewdly drawn" (Exhibit 700, sec. 3, ABL 19727), and served as a "fail safe" for the City, as ABL acknowledged in *ABL I*. (V-JA 1170 [ABL's Petition for Review of *ABL I* before California Supreme Court, 2003].)

Third, ABL did not prove that ABL's cessation of activities was an unexpected occurrence that neither party could anticipate, and that the cessation of railroad operations was such a fundamental frustration of the purpose of the 1924 Agreement that the repurchase cannot go forward. As explained above and by the trial court (VI-JA 1472-1474), the Agreement provided for the City's purchase "at any time," without specifying any purpose or event that limited or controlled the City's exercise of its right. If the railroad stopped operating, or if ABL started to sever and sell off parts of the railroad, the Agreement provided the City with a remedy: purchase "at any time." Relying on its unilateral action to cease operations, ABL seeks now to deprive the City of the City's contractual right. As the trial court found, "if anything, [ABL's cessation of rail operations] suggests that the equities favor the City's exercise of the repurchase option in Paragraph 14." (VI-JA 1476.)

ABL failed to prove its claim. The trial court's findings are supported by substantial evidence, and the judgment is legally correct.

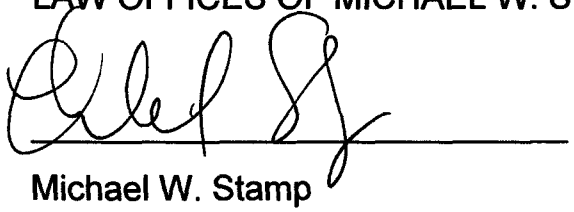
## CONCLUSION

The trial court properly entered judgment in favor of the City. For each of the reasons stated above, and in the interests of justice, the judgment should be affirmed.

Respectfully submitted,

Dated July 29, 2008

LAW OFFICES OF MICHAEL W. STAMP



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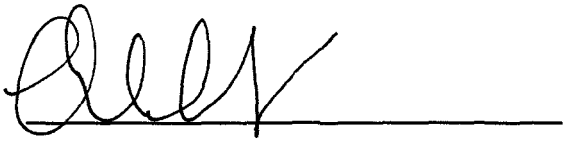
## Certificate of Counsel

(Calif. Rules of Court,
rule 8.204(c))

I certify that the word count of this **BRIEF OF RESPONDENT** is 13,630 words, including footnotes, according to the word count of the computer program used to prepare the document.

Dated July 29, 2008

LAW OFFICES OF MICHAEL W. STAMP



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## PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF MONTEREY

I am employed in the County of Monterey, State of California. I am over the age of 18 and not a party to the within action. My business address is 479 Pacific Street, Ste. 1, Monterey, CA 93940.

On July 29, 2008, I served the foregoing document entitled:

**BRIEF OF RESPONDENT**

on the parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as shown below, and placing the envelope for collection and mailing on the date and at the place shown below following our ordinary business practices. I am readily familiar with this business practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with first class postage fully prepaid.

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Executed and mailed on July 29, 2008, at Monterey, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Olga Mikheeva