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San Francisco County Superior Court

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7 WEBCOR/OBAYASHI JOINT VENTURE

8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

9 **COUNTY OF SAN FRANCISCO**

10 WEBCOR/OBAYASHI JOINT VENTURE, a
11 joint venture,

12 Plaintiff,

13 v.

14 TRANSBAY JOINT POWERS AUTHORITY
15 and DOES 1 through 100, inclusive,

16 Defendants.

Case No. **CC0-18-570621**

**COMPLAINT OF WEBCOR/OBAYASHI
JOINT VENTURE, FOR:**

- 1) **Breach of Contract; and**
- 2) **Declaratory Relief**

JURY TRIAL DEMANDED

17 Plaintiff WEBCOR/OBAYASHI JOINT VENTURE ("WOJV"), hereby complains and
18 alleges as follows:

19 **PARTIES**

20 1. WOJV is now, and at all times herein mentioned was, a California joint venture
21 qualified to do business, and doing business, in the State of California.

22 2. Upon information and belief, Defendant TRANSBAY JOINT POWERS
23 AUTHORITY ("TJPA") is a joint powers authority created under public section 6500, *et seq.*, of
24 the California Government Code. TJPA is empowered to develop, design, construct, renovate,
25 rehabilitate, improve, operate, manage, and maintain a new regional transit terminal known as the
26 Salesforce Transit Center located in San Francisco, California (the "Transbay Terminal").

27 3. Defendants DOES 1 through 100, inclusive, are sued herein under fictitious names,
28 as WOJV is informed and believes, and thereon alleges, DOES 1 through 100, inclusive, are in

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1 some fashion legally responsible for, and proximately caused, injuries and damages to WOJV
2 alleged herein, and/or each otherwise has an interest in the matters adjudicated herein. WOJV is
3 ignorant of the true names or capabilities of the defendants sued herein under the fictitious names
4 DOES 1 through 100 inclusive. When their true names and capacities are ascertained, WOJV will
5 amend this Complaint by inserting their true names and capacities.

6 **VENUE**

7 4. Venue in this Court is proper because (i) performance of the contracts at issue
8 occurred, in part, in San Francisco County, California, (ii) the TJPA has its principal place of
9 business in San Francisco County, California, and (iii) because many of the breaches of the contracts
10 at issue took place in San Francisco County, California.

11 **FACTUAL BACKGROUND**

12 5. On information and belief, TJPA has undertaken a \$6 billion infrastructure project
13 to: (i) replace the former Transbay Terminal with a modern transportation hub servicing 11 transit
14 systems including AC Transit, BART, Caltrain, Golden Gate Transit, Greyhound, Muni, SamTrans,
15 WestCAT Lynx, Amtrak, Paratransit and future High Speed Rail; (ii) extend Caltrain service
16 underground to a new below-ground terminal within the replacement Transbay Terminal; and (iii)
17 create a new neighborhood with homes, offices, parks, and shops surrounding the replacement
18 Transbay Terminal.

19 6. The present matter arose from the demolition of the former Transbay Terminal and
20 the design and construction of the Transbay Transit Center Project in its place (the "Project").

21 7. The original scope of work on the Project was split into two phases and was to be
22 constructed in a "top down" manner whereby Phase 1 would include the design and construction of
23 all above-grade elements of the Transbay Terminal, the ramps for bus access, and the ground slab
24 and foundation systems necessary to allow for the future Phase 2 work. Phase 2 was to be comprised
25 of the below-grade elements of the Transbay Terminal, including the station passenger platform
26 level and the train mezzanine level (collectively the "Train Box").

27 8. The Transbay Terminal was to consist of six levels that spanned more than one
28 million square feet, and to include several signature elements such as a 5.4-acre rooftop garden, a

1 “Grand Hall”, and a “Light Column” that would allow daylight into the Transbay Terminal.

2 9. During the course of the Project, elected officials, transit advocates and the news
3 media pilloried TJPA for its management failures, numerous errors, cost overruns, and exorbitant
4 travel costs for the TJPA’s CFO, among many other issues. The situation became so critical and
5 out of control that the TJPA Board of Directors terminated the contract of TJPA executive director
6 Maria Ayardi-Kaplan with a confidentiality agreement and a significant “golden parachute,” despite
7 her presiding over a major budget shortfall and causing significant delays and impacts to the overall
8 Project during her tenure. At that point, approximately two years ago, elected and regional leaders
9 summoned the City of San Francisco’s Department of Public Works (“DPW”) to assume
10 management of the Project, tapping into DPW’s extensive experience managing large and complex
11 public projects in San Francisco. But unfortunately the damage was largely already done, and
12 despite DPW’s commendable efforts, DPW and WOJV were unable to fully overcome the
13 significant Project delay and cost overruns. TJPA now, unjustifiably, seeks to pass on responsibility
14 for these delays and cost overruns to WOJV and its subcontractors by both (i) denying WOJV’s
15 requests for additional Contract Time and payment of additional costs incurred, and (ii) threatening
16 to assess liquidated damages against WOJV for late completion of the Project.

17 10. TJPA was unable to fulfill its key contractual duties including making the critical
18 decisions required to keep the Project on time and on budget. This led to WOJV and its
19 subcontractors being forced to issue more than 12,000 Requests for Information (“RFIs”) on the
20 Project, many of which were necessary to correct errors or omissions in the TJPA’s Project design.
21 The TJPA’s responses to these RFIs were often late and included design clarifications, code updates,
22 and significant design progressions/revisions. The Construction Drawings were obviously
23 incomplete. In breach of the Contract, TJPA provided late responses to over 3,500 (more than 28%)
24 of the RFIs WOJV issued on the Project, with some TJPA responses delayed by as many as 296
25 days.

26 11. Over the course of the Work, WOJV issued over 1,603 Change Order Requests,
27 many of which were necessary to correct errors or omissions in the Project design prepared by the
28 TJPA Design Team. In breach of the Contract, the average time taken for TJPA to resolve Change

1 Order Requests and issue a Contract Change Order (“CCO”) was 129 days, and in some instances
2 TJPA took up to 930 days to resolve a single Change Order Request.

3 12. The need for an excessive number of RFIs and Change Order Requests to remedy
4 errors or omissions in the Project design prepared by the TJPA Design Team, as well as TJPA’s
5 delayed responses to RFIs and Change Orders Requests, directly impacted the critical path of the
6 Project and caused significant delays to the Project. WOJV and its subcontractors made every effort
7 to address these issues and overcome TJPA’s mismanagement, failures and delays in order to keep
8 the Project on track and, in fact, reduced the potential delay significantly through its efforts.

9 A. **Contractual Background**

10 13. On information and belief, on or about March 20, 2008, TJPA contracted with Pelli
11 Clarke Pelli Architects (“PCPA”) to act as the lead architect, to among other things, provide
12 construction plans and specifications and the overall architectural and engineering design (the
13 “Contract Documents”) for the Project.

14 14. Upon information and belief, PCPA’s contractual responsibilities included providing
15 a Project design that was full, complete, coordinated, accurate, and sufficient for its intended
16 purpose, and to provide such designs in a timely manner.

17 15. Upon information and belief, PCPA contracted with Thornton Tomasetti to serve as
18 the engineer of record, to among other things, prepare the structural engineering elements of the
19 Contract Documents for the Project.

20 16. Upon information and belief, PCPA, Thornton Tomasetti, and others under contract
21 directly and/or indirectly with TJPA formed the design team for the Project and operated under
22 TJPA’s management and direction (the “TJPA Design Team”).

23 17. On or about July 8, 2008, TJPA released a Request for Qualifications (the “RFQ”)
24 seeking proposals from companies to provide certain pre-construction and construction services for
25 the Project, pursuant to which WOJV was subsequently selected by TJPA as a qualified bidder.

26 18. On or about October 21, 2008, TJPA issued a Request for Proposals (the “RFP”) to
27 the qualified bidders, including WOJV, requesting that each submit a proposed price to perform the
28 work described therein.

1 19. On or about March 12, 2009, TJPA and WOJV entered into Contract No. 08-04-
2 CMGC-000 (the "Contract") whereby WOJV agreed to provide certain pre-construction services
3 (the "Pre-Construction Services"), to serve as the construction manager/general contractor, and to
4 manage/administer subcontracts with trade subcontractors (the "Trade Subcontractors") who would
5 construct Phase 1 of the Project in accordance with the Contract Documents (collectively the
6 "Construction Work") for a not-to-exceed price of \$600,000,000 (the "Contract Price"). A true and
7 correct copy of the Contract, including the Contract Agreement and General Conditions, is attached
8 hereto as Exhibit A and incorporated by reference as though set forth in full, except that the exhibits
9 and reference documents have not been attached here in order to conserve filing capacity.

10 20. The Contract provides that the Pre-Construction Services would include, among
11 other tasks:

12 (a) WOJV's periodic review of the evolving Project design prepared by the TJPA
13 Design Team with regards to means and methods of construction (within WOJV's
14 capacity as a general contractor);

15 (b) WOJV's preparation of a trade work package plan outlining the timeline for
16 procurement of subcontracts with the Trade Subcontractors to perform each of the
17 trade work packages (the "Trade Work Package Plan"); and

18 (c) WOJV's execution of the Trade Work Package Plan, including procurement
19 of the Trade Subcontractors based on the finalized construction documents prepared
20 by the TJPA Design Team and issued by TJPA (the "100% CDs"). (See Contract,
21 Section 00 05 20 at Article 2.)

22 21. Pursuant to the procurement plan set forth in the Contract, TJPA developed work
23 scopes and bid documents, and discrete scopes of work were then put out to bid by WOJV according
24 to TJPA's direction. TJPA thereafter selected the Trade Subcontractor for each scope of work
25 following a competitive bidding process, and directed WOJV to enter into a subcontract with the
26 awardee accordingly. As the construction manager/general contractor for the Project, WOJV did
27 not self-perform any work on the Project.

28 22. Under the terms of the Contract, WOJV is to be compensated for the Pre-

1 Construction Services based on an hourly rate set forth in the Contract up to a maximum number of
2 hours performed. (See Contract, Section 00 05 20 at Article 5.01(A).)

3 23. The Contract provides that the Construction Work would include, among other tasks,
4 management and administration of the work of the Trade Subcontractors, including: submittal and
5 coordination of Requests for Information (“RFIs”), Change Order Requests, and other submittals;
6 submittal of monthly progress reports to the TJPA; and, acting as liaison between the Trade
7 Subcontractors, TJPA, the TJPA Design Team, and TJPA’s inspectors. (See Contract, Section 00
8 05 20 at Article 3.)

9 24. Under the terms of the Contract, WOJV is to be compensated for the Construction
10 Work based on its direct costs of performing the work (“Direct Costs”), plus a fixed fee that includes
11 WOJV’s overhead, profit and general conditions fee. For any approved Direct Costs in excess of
12 the Contract Price performed within the Contract Time, WOJV is entitled to be paid for the Direct
13 Costs plus a mark-up of 3.5% (the “WOJV Mark-up”). (See Contract, Section 00 05 20 at Article
14 5.01(B)(1),(2), and (4).)

15 25. The Pre-Construction Services and the Construction Work (collectively the “Work”)
16 was to originally occur within 1,825 consecutive calendar days, or approximately five years (the
17 “Contract Time”). (See Contract, Section 00 05 20 at paragraph 4.01.)

18 26. In or around June 2010, TJPA revised and greatly expanded the Phase 1 scope,
19 including design and construction of the Train Box in Phase 1. TJPA also directed that the Work
20 was to be altered to be performed using a “bottom up” approach where the below-ground Phase 2
21 components of the Work were to be constructed first, in a complete reversal of the original plan. In
22 addition, TJPA elected to defer completion of certain Phase 1 elements until later in the Project
23 timeline. To account for TJPA’s directions, TJPA and WOJV amended the Contract Time to 2,555
24 consecutive calendar days (approximately seven years), and increased the not-to-exceed Contract
25 Price to \$994,517,600.

26 27. TJPA issued WOJV the notice to proceed for the Construction Work on October 26,
27 2010, with the original contractual Substantial Completion date set for October 23, 2017.

28 28. Beginning in or about October 2010, WOJV conducted competitive bidding

1 processes with potential Trade Subcontractors and entered into numerous subcontracts with Trade
2 Subcontractors to perform the Construction Work.

3 29. WOJV and TJPA entered into a settlement agreement on April 2, 2015 that extended
4 the Project's Substantial Completion date by 60 calendar days to December 22, 2017 due to
5 acknowledged excusable delays incurred during the excavation and shoring work.

6 30. Substantial Completion of the Project was achieved on July 12, 2018, at which point
7 the Contract Price, as amended from time to time by the parties, was approximately \$1,461,222,078.

8 **B. TJPA Has Materially Breached the Contract by Failing to Extend the Contract**
9 **Time to Account for Delays Caused by TJPA and/or TJPA's Design Team**

10 31. In January 2011, WOJV and TJPA agreed upon a baseline schedule (the "Baseline
11 Schedule"), which included the Trade Work Package Plan, and stipulated that the 100%
12 Construction Drawings would be issued to WOJV (and hence available for procurement of the trade
13 packages) no later than October 28, 2011.

14 32. After agreement on the Baseline Schedule, WOJV experienced extensive delays,
15 extra work, disruptions, and impacts due to events beyond its control that led to compensable
16 increased costs of the Work under the Contract and entitled WOJV to an extension of the Contract
17 Time.

18 33. During the course of the Work, TJPA caused delays and additional costs to WOJV
19 arising from or relating to, without limitation: (a) late delivery and defective condition of design
20 documents (including, but not limited to, errors and omissions in the Contract Documents prepared
21 by the TJPA Design Team under TJPA's management and direction, and piecemeal delivery of
22 drawings); (b) delay and extension of the bidding process resulting from re-scoping and re-bidding
23 of certain critical trade packages at the direction of TJPA; (c) conversion of several trade packages
24 from a "bid-build" basis to a design-build basis, (d) enhancement and expansion of the Risk and
25 Vulnerability Assessment (the "RVA Criteria") which greatly impacted the delivery of the Contract
26 Documents as well as significantly transformed signature elements of the Project; (e) failure by
27 TJPA to grant full access to the Project site when required; (f) delayed responses of RFIs and Change
28 Order Requests by TJPA and/or the TJPA Design Team, many of which were requested by the TJPA

1 and/or the TJPA Design Team or other for whom TJPA is contractually responsible in order to
2 correct design errors and omissions; (g) ill-fated and poorly thought-out TJPA-directed code
3 compliance decisions, made in its role as the Authority Having Jurisdiction (AHJ) on the Project,
4 which the Project inspectors could not support, thus forcing TJPA-directed code compliance
5 revisions at or near the conclusion of the Project – some after the contractual Substantial
6 Completion date of December 22, 2017 – rather than at the beginning when WOJV could have
7 implemented these measures while avoiding additional impacts; and (h) failure by TJPA to facilitate
8 the timely closeout of the Project (collectively the “Project Delays”).

9 34. Each of these impacts, changes, and delays adversely affected WOJV’s ability to
10 achieve Substantial Completion by December 22, 2017.

11 1. TJPA’s Late Delivery and Defective Condition of the Project Design

12 35. Contrary to the Baseline Schedule, design delays caused by TJPA and/or the TJPA
13 Design Team resulted in the Construction Drawings not being issued to WOJV until December 2014
14 (Architect’s Supplemental Instruction (“ASI”) No. 128), over 37 months late (the “Late Design
15 Delivery Delay”). However, these Construction Drawings were not fully complete as the design
16 continued to be developed through the issuance of additional ASIs through December 2016 when
17 the final ASI, ASI No. 150, was issued by TJPA and its design team.

18 36. The primary, but not sole, driver of the Late Design Delivery Delay was the decision
19 made solely by TJPA in July 2011 to revisit the RVA, upon which years of Project design
20 development had already been based, and to revise the various criteria contained therein (the
21 “Revised RVA Criteria”) which in many cases resulted in a complete scrap and redesign of early
22 and major design elements. The glass and awning packages in particular were both rebid and
23 redesigned multiple times to meet (i) increasing RVA requirements and, later, (ii) tightening
24 budgetary considerations in an escalating market. As an example, it was TJPA’s own continuing
25 real estate sales in the immediate area that caused ever-increasing demands on local construction
26 resources thus escalating Project costs.

27 37. The Contract relied upon an RVA performed by URS Corporation for TJPA in 2009.
28 However, as WOJV was ramping up its procurement and construction activities, TJPA

1 commissioned a new and greatly revised RVA study, notwithstanding the fact an RVA already had
2 been performed and its criteria had been incorporated into the existing Project design and schedule.
3 This expanded version of the RVA would take at least one year to incorporate and impose radically
4 different design criteria into the Project directly and significantly impacting both the schedule, costs,
5 and oversight required to complete the Project.

6 38. The Revised RVA Criteria impacted the design of significant, signature components
7 of the Project, each of which required extensive design verification processes followed by lengthy
8 lead times to procure materials. TJPA's delays pushed this work later into the construction period
9 which then coincided with other construction projects in the area, many of which were constructed
10 on land sold by TJPA.

11 39. The ramifications of the enhanced Revised RVA Criteria directly and substantially
12 impacted the critical path of the Project, delaying completion of the 100% Construction Drawings,
13 and consequentially the start of procurement for certain critical components of the Project by nearly
14 two years.

15 40. At the same time, TJPA delayed the start of structural steel construction. The original
16 structural steel package bid process was initially delayed by the issuance of multiple addenda during
17 bidding, and was further impacted by TJPA decisions to (i) rebid the package, and (ii) remove
18 procurement of the steel cast nodes from the package and directly procure them. TJPA had expressly
19 assumed responsibility for many of these risks by contract modification with WOJV when it decided
20 to directly procure the cast nodes in an effort to mitigate the previous TJPA-caused delays associated
21 with bidding the structural steel package.

22 41. Further significant causes of the Late Design Delivery Delay include, without
23 limitation:

24 (a) failure by TJPA to produce a basis of design in compliance with the Federal
25 Transit Administration's Buy America requirements, including obtaining the
26 standard project specific waivers for non-domestic procurements, ensuring a basis of
27 design that was domestically sourced, and/or failure by TJPA to remedy this issue in
28 a timely manner; and

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(b) failure by TJPA to timely issue a complete design to WOJV for, without limitation:

- (i) the fire management system;
- (ii) the lighting system;
- (iii) the below grade waterproofing system;
- (iv) the buttress shafts;
- (v) the lower concourse concrete deck layout;
- (vi) the escalator supports;
- (vii) the bus deck crash rail;
- (viii) the escalator openings and pit dimensions;
- (ix) the area of refuge;
- (x) the permanent power and water systems;
- (xi) other design elements to be identified at or before trial; and

(c) failure by TJPA to remedy such incomplete designs (including numerous and significant design errors and omissions) in a timely and responsive manner.

2. Extension of the Bidding Process at the Direction of TJPA

42. The Baseline Schedule provided timelines for procuring bids for the 31 trade packages called for by the Project design, of which only two were designated as a “design-build” package where the Trade Subcontractor would be asked to design and build the component of the Project described in the trade package. The remaining trade packages were to be procured on a “bid-build” basis in which the Trade Subcontractor would bid and construct the trade package based on the 100% CDs (also referred to as the Issued for Construction “IFC” set) prepared by the TJPA Design Team.

43. However, for a number of the trade packages, the bids by the Trade Subcontractors were significantly higher than the estimates provided by the TJPA Design Team. In response, TJPA cancelled numerous initial procurement efforts, directed that certain of the trade packages be split into multiple packages and that the smaller packages be re-bid, and further directed that certain trade packages be converted from bid-build packages to design-build packages. This just compounded

1 the delay problems on a project that had already incurred a two year delay due to the RVA Criteria
2 changes.

3 44. For example, the comprehensive enhancement by TJPA to the RVA criteria
4 referenced above began in late 2011, which was concurrent with the bidding period for the TG08.1
5 (Building Enclosure) package. As part of the RVA update, the security subject matter experts
6 recommended pre-bid testing of the W-1 Exterior Awning System in order to provide enhanced
7 information to the bidders. Therefore, in January 2012, TJPA suspended the bidding process for
8 package TG08.1 to allow for the fabrication and testing of prototypes for the W-1 Exterior Awning
9 System to evaluate the performance of alternative glazing materials and attachment system designs.

10 45. As a result of TJPA's directions, the number of trade packages rose from 31 to 47,
11 many of which TJPA directed to be re-bid multiple times in hopes of reducing the presentation of
12 the costs through re-packaging, scope division, and redesign. This trend of forced re-bid by the
13 TJPA delayed several long lead and critical procurements, such as the glass and exterior awning,
14 which resulted in loss of bidding interest from the subcontractor community. Meanwhile, the
15 number of design-build packages increased from two to eight. As a direct consequence of TJPA's
16 decisions and directions, the bidding process took significantly longer than planned for in the
17 Baseline Schedule and caused significant impacts to the critical path of the Project (the "Bid
18 Extension Delay").

19 46. WOJV incurred millions of dollars in additional costs when it was required to
20 augment its project staff to manage and administer the multiple late issued design packages that
21 forced multiple major trades to perform construction in a stacked and concurrent manner, in many
22 cases rather than the orderly sequence contemplated under the Contract at award and execution.

23 24 3. Delayed Responses to RFIs and Change Orders Requests

25 47. Pursuant to the Contract, in the event that WOJV noted a discrepancy in the Contract
26 Documents, had questions concerning the meaning or intent of the Contract Documents, or if
27 TJPA's comments on trade submittals transmitted by WOJV appeared to change the requirements
28 or scope of the Contract Documents, WOJV was directed by TJPA to submit an RFI, and to provide

1 TJPA a reasonable time to reply before WOJV proceeded with the affected Work. (See Contract,
2 Section 00 07 00 at paragraph 6.02.)

3 48. As noted above, over the course of the Work, WOJV had cause to issue over 12,000
4 RFIs necessary to correct errors and omissions in TJPA's Project design. Despite WOJV's best
5 efforts to rectify the design errors, TJPA compounded the problems by failed to timely respond to
6 the RFIs, providing late responses to over 3,500 (more than 28%) of the RFIs, with some responses
7 up to 296 days late. This only served to compound the cost overruns and Project delays.

8 49. Similarly, the Contract requires that where a direction by TJPA materially exceeds
9 or changes the requirements of the Contract Documents, WOJV shall submit a Change Order
10 Request to TJPA, who shall render a determination within ten days, or else will be deemed to have
11 rejected the Request unless TJPA notifies WOJV that it requires more time. (See Contract, Section
12 00 07 00 at paragraph 6.03.) As noted above, WOJV issued over 1,603 Change Order Requests,
13 many of which sought to correct the TJPA and the TJPA Design Team's design errors and
14 omissions. As with the RFIs, TJPA's resolution of Change Order Requests was untimely, in some
15 cases taking 930 days to resolve a single Change Order Request.

16 50. Each of these issues directly impacted the critical path of the Project and caused
17 significant delays to the Project (the "RFI/COR Delay").

18 4. TJPA Has Refused to Extend the Contract Time to Account for the Project
19 Delays

20 51. Many of the Project Delays are Unavoidable Delays as that term is defined in the
21 Contract, which are compensable as they were each caused by TJPA, impacted the critical path of
22 the Work, and were not concurrent with any WOJV-caused delays.

23 52. WOJV duly informed TJPA of all delays to the critical path of the Project, as required
24 by the Contract. WOJV additionally kept TJPA continually apprised of the progress of the Work,
25 both orally and in writing.

26 53. TJPA had actual knowledge of the basis for all of the Project Delays.

27 54. Although WOJV has on numerous occasions properly requested extension of the
28 Contract Time in accordance with the Contract, TJPA has unreasonably breached the Contract by

1 failing to extend the Contract Time asserting that the unavoidable delays should have been
2 anticipated or were a result of required WOJV coordination activities. In fact, to date WOJV has
3 received only two extensions of time over the 10 year Project duration, specifically at the (1)
4 addition of the train box and (2) an early sub-tier subcontractor negotiated settlement.

5 55. Upon information and belief, TJPA's failure to extend the Contract Time as required
6 under the terms of the Contract has been undertaken in an effort by TJPA to avoid its responsibility
7 for the significant costs associated with the TJPA-caused Project Delays.

8 56. As a result of the excusable and compensable delays caused by TJPA, WOJV has
9 incurred millions of dollars in extended general conditions costs, for which TJPA is liable under the
10 Contract, but which TJPA has failed to pay.

11 C. **TJPA Has Materially Breached the Contract by Failing to Increase the**
12 **Contract Price on Account of WOJV's Acceleration of the Work at TJPA's**
13 **Direction**

14 57. With knowledge of the reasons for the Project Delays, and despite multiple requests
15 by WOJV, TJPA has refused to extend the Contract Time and instead repeatedly directed WOJV to
16 complete the Work by the Substantial Completion and Final Completion dates in the Baseline
17 Schedule.

18 58. While WOJV has not been able to accelerate the Work to mitigate all of the Project
19 Delays, WOJV did mitigate a substantial number of days of compensable and/or excusable delays
20 such that Substantial Completion was achieved on or about July 12, 2018, only 202 calendar days
21 after the contractual date of December 22, 2017, despite TJPA being responsible for more than 388
22 days of delay to the Project.

23 59. Pursuant to the Contract, WOJV is entitled to reimbursement from TJPA for its
24 reasonable costs of complying with TJPA's directions. (See Contract, Section 00 07 00 at paragraph
25 7.01(H).)

26 60. WOJV's acceleration efforts entitle it to recovery of, among other costs, additional
27 WOJV staffing required to address: (1) the compressed schedule for completion of the work by the
28 Trade Subcontractors; (2) the additional Construction Work necessitated by TJPA-directed changes
in the bidding process; and, (3) the additional Construction Work necessitated by the modifications

1 to the Project design.

2 61. Despite the myriad of TJPA-caused delays throughout the Project's eight-year
3 construction phase, and an increase in the Contract Price to \$1,461,222,078 (a more than 140%
4 increase over the life of the Project), WOJV's extraordinary efforts had this Project completing
5 within only seven months of the current contract substantial completion date of December 22, 2017.

6 62. WOJV is entitled to the additional costs it has incurred to accelerate the Work at
7 TJPA's direction.

8 63. Upon information and belief, TJPA's failure to increase the Contract Price as
9 required under the terms of the Contract has been undertaken in an effort by TJPA to avoid its
10 responsibility for the significant costs associated with the acceleration and schedule mitigation
11 efforts undertaken by WOJV and its subcontractors in connection with the TJPA-caused Project
12 Delays.

13 **D. TJPA Materially Breached the Contract by Failing to Issue Contract Change**
14 **Orders**

15 64. Throughout the Project, pursuant to the Contract, WOJV has submitted Change
16 Order Requests to TJPA where it is entitled to additional compensation pursuant to the terms of the
17 Contract.

18 65. In some circumstances, months passed without TJPA issuing any Contract Change
19 Orders ("CCO"), resulting in a growing backlog of changed work that remains unpaid to WOJV and
20 its Trade Subcontractors. TJPA's failure to issue CCOs has also increased staffing demands on
21 WOJV that could not have been anticipated at the time of bid.

22 66. TJPA has repeatedly and wrongfully breached the Contract by failing to issue CCOs
23 in response to legitimate Change Order Requests and by doing so, refused to adjust the Contract
24 Price where WOJV is contractually entitled to additional compensation.

25 67. Upon information and belief, TJPA's failure to increase CCOs as required under the
26 terms of the Contract has been undertaken in an effort by TJPA to avoid its responsibility for the
27 significant costs associated with the changed and additional work performed by WOJV and its
28 subcontractors on the Project.

1 E. **TJPA Materially Breached the Contract by Inappropriate and Impermissible**
2 **Use of Contingency Funds and Must Replenish the Contingency Fund**

3 68. The TJPA Project Budget includes a contingency fund for use by WOJV (the
4 “CM/GC Contingency”) equal to four percent (4%) of the aggregate sum of awarded Trade
5 Packages, or approximately \$51 million. (See Contract, Section 00 05 20 at Article 6.)

6 69. The CM/GC Contingency is a separate contingency from the TJPA Design Team or
7 TJPA contingency funds. It is expressly not a design contingency and is not to be used for changes
8 in the scope of the Work, for upgrades in the quality of the Work as reflected in the Contract
9 Documents, or for acceleration efforts required by TJPA for TJPA’s benefit. (See Contract, Section
10 00 05 20 at Article 6.)

11 70. The CM/GC Contingency is only to be used for specific categories of costs
12 enumerated in the Contract (the “CM/GC Contingency Categories”). WOJV is required to apply to
13 TJPA for use of the CM/GC Contingency and TJPA is to confirm that the proposed use falls within
14 the CM/GC Contingency Categories. If so, TJPA is to decide whether to approve the request, which
15 approval was not to be unreasonably withheld. Critically, WOJV is not entitled to a mark-up on any
16 expenditure from the CM/GC Contingency. (See Contract, Section 00 05 20 at Article 6.02.)

17 71. Upon achieving Final Completion, WOJV is entitled to 50% of the remaining
18 CM/GC Contingency. Conversely, should the CM/GC Contingency be fully depleted then any
19 additional Work would be expected to be performed by WOJV at no additional cost to TJPA.

20 72. Throughout the Project, TJPA wrongfully, unilaterally, and in breach of the Contract
21 used the CM/GC Contingency for costs outside of the CM/GC Contingency Categories in an effort
22 to avoid its responsibility for cost overruns on the Project and improperly pin them on WOJV and
23 its subcontractors. Among other improper uses, TJPA used the CM/GC Contingency to fund the
24 costs of acceleration efforts required by TJPA for its benefit and changes in the scope of the Work,
25 including but not limited to design ramifications related to the Revised RVA Criteria, and funding
26 the logistical support of the direct work for the extended work period. WOJV was forced to fund
27 these logistical requirements from the CM/GC Contingency to ensure a safe, clean, orderly, and
28 OSHA-compliant work environment for trade workers for all work after December 22, 2017.

1 73. WOJV continually and duly notified TJPA that its improper usage of the CM/GC
2 Contingency was in violation of the Contract terms and demanded that TJPA replenish the CM/GC
3 Contingency. TJPA's failure to do so constitutes a continuing breach of the Contract.

4 74. Further, the CCOs issued by TJPA that wrongfully applied funds from CM/GC
5 Contingency did not include the contractual WOJV Mark-up. As such CCOs should have been
6 approved additional Direct Costs performed within the Contract Time, WOJV is entitled to the value
7 of the WOJV Mark-up on such CCOs in an amount to be proven at trial.

8 75. Upon information and belief, TJPA's impermissible use of the CM/GC Contingency
9 has been undertaken in an effort by TJPA to avoid its responsibility for the significant cost overruns
10 and schedule delays on the Project.

11 **F. WOJV Has Been Damaged by TJPA's Various Contract Breaches**

12 76. As a result of TJPA's various breaches set forth above, WOJV has been damaged in
13 amounts to be proven at trial.

14 77. WOJV is entitled to an increase in the Contract Price for amounts due and owing
15 related to WOJV's additional staffing costs, extended general conditions costs, and pending Change
16 Order Requests.

17 78. WOJV is also entitled to all unpaid, earned Contract balance owed by TJPA,
18 including the Contract retention currently held by TJPA.

19 79. To date, WOJV's total claimed damages are **not less than \$140 million.**

20 80. Additionally, pursuant to its previously submitted time extension request, WOJV is
21 entitled to an extension of the Contract Time of at least 180 calendar days for delays experienced
22 through February 26, 2018, as well as additional delays experienced after that date, along with a
23 corresponding increase in the Contract Price as a result of TJPA's responsibility for such delays.

24 81. Finally, TJPA is obligated to replenish the CM/GC Contingency for the amounts it
25 inappropriately used in an amount to be proved at trial, but which WOJV reasonably believes and
26 therefore asserts will be **approximately \$10 million.**

27 **G. TJPA is Liable for Pass-Through Claims by Trade Subcontractors**

28 82. WOJV has received pass-through claims from several Trade Subcontractors seeking

1 payment for additional costs incurred on the Project arising from TJPA's acts or omissions (the
2 "Trade Subcontractor Claims"). More Trade Subcontractor Claims are expected going forward due
3 to TJPA's lack of diligence in fulfilling its obligations under the Contract relating to the closeout of
4 the Project.

5 83. In all appropriate and necessary cases, WOJV followed the claim-handling
6 requirements set forth in the Contract, and submitted Trade Subcontractor Claims to TJPA for
7 review and an ultimate determination of merit. By contrast, in the vast majority of cases, TJPA
8 breached the Contract by failing to follow the procedures for review of the Trade Subcontractor
9 Claims, including review by senior project staff, TJPA, and a Dispute Resolution Advisor. (See
10 Contract, Section 00 07 00 at paragraph 13.02(II)(D), (E), and (F).) TJPA further breached the
11 Contract by failing to increase the Contract Price for numerous substantiated Trade Subcontractor
12 Claims.

13 84. In addition to these specific examples, nearly every major Trade Subcontractor has
14 asserted, or has indicated its intent to assert, claims against WOJV based on TJPA's various breaches
15 of Contract enumerated herein.

16 85. As a result of TJPA's actions, WOJV has been forced to defend itself against lawsuits
17 filed by Trade Subcontractors seeking payment. Additional lawsuits filed by Trade Subcontractors
18 are expected.

19 86. TJPA retains ultimate responsibility under the terms of the Contract for any and all
20 Trade Subcontractor Claims either under the Contract or in equity to the extent that any Trade
21 Subcontractors establish entitlement to additional compensation pursuant to their work under the
22 respective subcontracts. WOJV has incurred and will continue to incur significant damages as a
23 result of the acts and omissions of TJPA including, without limitation, fees and costs associated with
24 defending the Trade Subcontractor Claims.

25 87. WOJV has fully complied with all statutory prerequisites to filing suit against TJPA,
26 including submission of a claim under California Government Code Sections 900 *et seq.* WOJV
27 timely filed this Complaint after the denial of its claim by TJPA.

28 88. WOJV has fully complied with all contractual prerequisites and fulfilled all

1 contractual conditions precedent to filing suit against TJPA.

2 **FIRST CAUSE OF ACTION**

3 **(Breach of Contract – Against TJPA and DOES 1-100)**

4 89. WOJV incorporates by reference all of the above paragraphs as if each were fully
5 alleged herein.

6 90. WOJV and TJPA entered into a valid and binding contract, the Contract, including
7 any legally valid and enforceable amendments thereto, as set forth herein.

8 91. WOJV has fully performed its obligations under the Contract, including fulfillment
9 of all notice provisions in the Contract, or has otherwise been excused from performance.

10 92. TJPA failed to perform, or properly perform, its obligations under the Contract as set
11 forth herein and, therefore, has breached the Contract.

12 93. Pursuant to the Contract, TJPA had an obligation and duty to, *inter alia*:

- 13 a) provide full, complete and accurate plans and specifications for the Project;
14 b) provide the completely designed and constructible Project plans and
15 specifications in a timely manner;
16 c) review RFIs and Change Order Requests in a timely manner;
17 d) issue CCOs increasing the Contract Price and extending the Contract Time for
18 changed, extra and delayed work, pursuant to the terms and conditions set forth
19 therein; and
20 e) otherwise honor the terms and conditions of the Contract.

21 94. TJPA breached the Contract when it failed to, *inter alia*:

- 22 a) ensure the delivery or production of timely and accurate designs and
23 specifications for the Project, or grant equitable adjustments to account for
24 inefficiencies resulting from delays in issuing, or errors or omissions in, the
25 designs or specifications for the Project;
26 b) issue CCOs for changes, modifications, and increases in the contractual scope
27 of work, including acceleration of the Work;
28 c) pay WOJV and the Trade Subcontractors for extra, changed, and modified

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- work;
- d) timely grant time extensions and/or adjust the Contract Price for unavoidable delays in the Project schedule (including delays caused by TJPA), inefficiencies caused by TJPA, and accelerations of the Project schedule by TJPA, other excusable delays, other compensable delays, and other unforeseen matters beyond the control of WOJV;
- e) provide timely responses to WOJV's submittals, RFIs, requests for time extensions, requests for payment, Change Order Requests, and other submissions;
- f) administer the Contract in good faith by, among other things, issuing CCOs to increase the Contract Price and to extend the Contract Time where appropriate;
- g) misappropriate portions of the CM/GC Contingency for uses other than those authorized by the Contract;
- h) review the merits all Trade Subcontractor Claims passed through to TJPA by WOJV; and
- i) otherwise honor the terms and conditions of the Contract.

95. Every contract, including the Contract, includes an implied warranty of good faith and fair dealing such that the parties to a contract will deal with each other fairly and in good faith, so as not to deprive the right of the other party to receive the benefits of the contract.

96. TJPA breached the implied covenant of good faith and fair dealing by refusing to grant an extension of the Contract Time and an increase in the Contract Price where it was obligated by the Contract to do so. TJPA's failures are in conscious disregard, or are in deliberate disregard, of WOJV's rights under the Contract, and the TJPA's failures frustrate the very benefits that WOJV is entitled to receive.

97. TJPA also breached the implied warranty of correctness regarding the designs, including the plans and specifications, provided under the Contract.

98. As a direct and proximate result of TJPA's breaches of the Contract, WOJV has

1 sustained, and will continue to sustain, damages in an amount to be more particularly proven at trial,
2 but reasonably believes and therefore asserts to be **not less than \$140 million.**

3 99. TJPA's material breaches of contract were a substantial factor in causing harm to
4 WOJV.

5 100. Many of TJPA's material breaches identified above are continuing.

6 101. WHEREFORE, WOJV prays for relief as hereinafter set forth.

7 **SECOND CAUSE OF ACTION**

8 **(Declaratory Relief – Against TJPA and DOES 1-100)**

9 102. WOJV incorporates by reference all of the above paragraphs as if each were fully
10 alleged herein.

11 103. An actual controversy has arisen and now exists between WOJV, TJPA, and DOES
12 1-100, in that WOJV contends, and TJPA denies, that WOJV is entitled to reimbursement and
13 replenishment of the CM/GC Contingency funds improperly misused by TJPA during the course of
14 the Project, and that WOJV is entitled to recovery of 50% of the CM/GC Contingency amount under
15 the Contract after TJPA replenishes the improperly used amounts in question as well as the WOJV
16 Mark-up on the value of CCOs inappropriately issued using CM/GC Contingency funds.

17 104. WOJV contends, and TJPA denies, that the CM/GC Contingency was to be used
18 solely for the types of work specified in the Contract, and TJPA's unilateral decision to use the
19 CM/GC Contingency for other types of work, including, without limitation, design work,
20 acceleration costs due to TJPA delays, logistical support of the extended work period which directly
21 resulted from TJPA-derived delays, and changes in the scope of the Work ordered by TJPA. WOJV
22 contends that TJPA must reimburse and replenish the CM/GC Contingency funds in an amount to
23 be proven at trial, but which WOJV reasonably believes and therefore asserts will be **approximately**
24 **\$10 million.**

25 WHEREFORE, WOJV prays for a judicial determination of the respective rights and duties
26 of WOJV, TJPA, and DOES 1-100 with respect to WOJV's entitlement to the reimbursement and
27 replenishment of the CM/GC Contingency, entitlement to 50% of the remaining CM/GC
28 Contingency after replenishment, and the WOJV Mark-up on appropriate CCOs.

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PRAYER

WHEREFORE, Plaintiff prays for relief against Defendants, and each of them, as follows:

As to the First Cause of Action:

1. For compensatory damages, general and special, in an amount according to proof at trial but not less than \$140 million;
2. For interest at the legal rate as permitted by law; and
3. For such other and further relief as the Court may deem proper.

As to the Second Cause of Action:

1. For judicial declaration, decrees, or orders establishing that:
 - a. TJPA is required to replenish or reimburse the CM/GC Contingency due to its improper misuse of those funds; and
 - b. WOJV is entitled to recovery of 50% of the CM/GC Contingency remaining under the Contract after TJPA replenishes or reimburses those misused amounts as well as the WOJV Mark-up on the value of CCOs inappropriately issued using CM/GC Contingency funds; and
2. For such other and further relief as the Court deems just and proper.

Dated: October 16, 2018

VARELA, LEE, METZ & GUARINO, LLP

By:



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