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**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**FINANCE DOCKET NO. 35960**

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**PETITION OF UNION PACIFIC RAILROAD COMPANY  
FOR DECLARATORY ORDER**

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**REPLY IN OPPOSITION TO PETITION FOR DECLARATORY ORDER**

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- Exhibit 3: Defendant Union Pacific Railroad Company's Demurrer to Complaint in the Contract Action
- Exhibit 4: U.S. Department of Transportation, Pipeline and Hazardous Materials Safety Administration's General Pipeline FAQs, available at <http://phmsa.dot.gov/portal/site/PHMSA/menuitem.6f23687cf7b00b0f22e4c6962d9c8789/%20?vgnextoid=a62924cc45ea4110VgnVCM1000009ed07898RCRD&vgnnextchannel=f7280665b91ac010VgnVCM1000008049a8c0RCRD&vgnextfmt=print>

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SFPP, L.P (“SFPP”) respectfully submits this Reply in Opposition to Union Pacific Railroad Company’s (“UP”) Petition for Declaratory Order (“Petition”).

## **I. INTRODUCTION AND SUMMARY**

UP’s request for the Surface Transportation Board (“STB” or “Board”) to intervene in a discrete, state law contract dispute should be summarily denied as inappropriate, unwise, and unnecessary. There is no controversy or uncertainty that could be resolved by the issuance of a declaratory order in this proceeding. The sole basis for the Petition is SFPP’s California state court complaint seeking rescission of a contract between SFPP and UP and restitution for amounts SFPP paid to UP under the contract (the “Contract Action”). This does not fit into the framework of preemption under the ICC Termination Act (“ICCTA”).

Under a contract between the parties, the Amended and Restated Easement Agreement (“AREA”), UP purported to grant SFPP subsurface pipeline easements under its railroad right-of-way. In exchange, SFPP agreed to pay UP millions of dollars in rent and other expenses. In November 2014, however, the California Court of Appeal held that UP did not have sufficient property interests in its right-of-way acquired by 19th century Congressional Act to grant easements to SFPP, or to collect rent from SFPP for those purported easements (the “COA Opinion”). In so holding, the Court of Appeal recognized, but did not decide, that the AREA may be invalid. In response, SFPP filed the Contract Action to rescind the AREA and recover restitution for rent and expenses paid pursuant to the AREA.

Supported only by speculation, UP is now attempting to embroil the Board in a longstanding, continuing dispute that is properly before the California state courts. UP seeks to obtain and use a declaratory order from the Board to circumvent the COA Opinion and avoid SFPP’s state court Contract Action. In these circumstances, UP’s request for a declaratory order is improper and should be denied outright.

A declaratory order proceeding will not “terminate a controversy or remove uncertainty” here. UP does not satisfy the indispensable threshold requirement of demonstrating the existence of a real, live, concrete controversy. Instead, UP relies solely upon a hypothetical, future controversy, or alleged past controversies it claims are somehow enough to invoke ICCTA preemption now. Indeed, UP makes several illogical leaps to manufacture its theory that Board involvement is allegedly warranted. UP argues that, *if* the AREA is rescinded in its entirety, an unknown future project *could* be impacted, *if* SFPP’s pipeline is located under the relevant right-of-way and requires relocation, and *if* SFPP does something it has never done before: refuse to relocate. This is entirely speculative, and there is no reason to believe that SFPP would refuse to relocate; SFPP has always moved its pipeline to accommodate the railroad. UP has even taken the position in other litigation that it can force relocation of SFPP’s pipeline, absent the AREA. UP’s hypothesized doomsday scenario does not warrant issuance of a declaratory order. The Board interprets its jurisdiction narrowly, and does not intervene in state law contract disputes like this one. The state court can, and should, resolve the issues raised by the Contract Action.

Additionally, although UP does not mention it, SFPP is a federal common carrier pipeline regulated under the Interstate Commerce Act (“ICA”), 49 U.S.C. § 1(1)(b) (1988). Like UP, SFPP has a common carrier obligation to serve the public on reasonable request. *Id.* § 1(4) (1988). This fact alone provides a compelling reason for the Board to exercise caution and restraint, and decline to institute a declaratory order proceeding at this time. Especially given the presence of two federal regulatory regimes, SFPP respectfully submits that the Board should be wary of allowing UP to use the auspices of the Board to initiate a proceeding that would enable it to impinge upon the operations of another common carrier under the jurisdiction of another federal agency (the Federal Energy Regulatory Commission (“FERC”)).

Even if the Board considers the merits of the Petition, it should find no preemption. The Contract Action is an ordinary contract dispute, not the type of “regulation” required to establish preemption. UP’s arguments to the contrary are premised on mischaracterizing the Contract Action. To be clear, the Contract Action seeks only to rescind a contract and recover restitution. SFPP is not seeking a court order to regulate UP’s activities or acquire portions of the right-of-way to the exclusion of UP.

Moreover, UP has not shown and cannot show actual unreasonable interference with its operations. SFPP’s routine, non-invasive subsurface pipeline has coexisted with the railroad for decades, which UP admits. As the Verified Statement of Harvey H. Stone, P.E. (“V.S. Stone”) explains, such co-located facilities are common, railroads and co-users find it relatively easy to co-exist, and SFPP’s presence in no way creates an ongoing, unreasonable interference with UP’s ability to maintain its infrastructure, operate, or engage in capital improvement projects.

UP cites prior relocations between the parties, but **omits** that SFPP has never refused to relocate its pipeline to accommodate a UP request. Tellingly, UP did not raise ICCTA preemption arguments in any of the prior relocation matters, likely because no possibility of unreasonable interference has ever existed. To the extent there have been disputes about relocation, they were solely about the standards and cost allocation. These matters were all litigated in California state court, including in cases filed by UP, without UP running to the Board. Further, as explained in detail in the Verified Statement of Ronald McClain (“V.S. McClain”), SFPP has not delayed a UP project, and has always agreed to relocate its pipeline after UP’s request. The fact that UP can cite only a handful of relocations and an alleged **single instance** in the past where SFPP allegedly disrupted UP’s operations demonstrates that there is no unreasonable interference.

In short, UP has not met its burden to demonstrate circumstances warranting issuance of a declaratory order, nor has it established a basis for a finding of preemption. Accordingly, the Petition should be denied.

## **II. FACTUAL BACKGROUND**

### **A. SFPP's Pipeline: A Critical Public Service**

SFPP is an indirect wholly-owned subsidiary of Kinder Morgan, Inc. and an energy infrastructure company, whose pipelines transport refined petroleum products. V.S. McClain at 2. The pipelines function like a toll road allowing major oil companies, energy producers and shippers, and local distributors across many industries to transport fundamental energy products throughout the United States. *Id.* Transportation of these energy products is a critical public service, which is under the jurisdiction of the Department of Transportation (“DOT”), FERC, and California Public Utilities Commission (“CPUC”), among others. *Id.* Neither SFPP nor any products pipeline owned or operated by SFPP is subject to the jurisdiction of the STB. *Id.*

SFPP has approximately 2,400 miles of pipeline in six Western states – California, Oregon, Nevada, Arizona, New Mexico, and Texas. *Id.* Where located under railroad right-of-way, the pipeline is typically more than 25 feet from the centerline of mainline railroad track, except when the pipeline is crossing underneath the railroad track, and is typically buried at a depth of approximately 4 feet. *Id.* at 3. The pipeline was first installed in the subsurface of the right-of-way here in the 1950s. Pet. at 8.

### **B. The AREA Between SFPP And UP**

In 1994, SFPP and UP entered into the Amended and Restated Easement Agreement (“AREA”). In the AREA, UP purported to grant SFPP subsurface pipeline easements “in, upon, along and across the **property of Railroad,**” in exchange for payment of rent and other

expenses. Pet. Exhibit 4 (AREA) § 1(a) (emphasis added). SFPP has paid more than \$132 million in rent under the AREA, and continues to pay rent to this day.

### **C. The COA Opinion**

The AREA provides that, every ten years, UP can seek a rent increase from SFPP. Pet. Exhibit 4 § 2(b)(i)(A). UP filed the first ten-year rental proceeding in 1994, and the second in 2004, both in California state court. *Union Pac. R.R. Co. v. Santa Fe Pac. Pipeline, Inc.*, 231 Cal. App. 4th 134, 152-53 (2014) (“*COA Opinion*”). After trial in the 2004 proceeding, the court set the annual rental value of the purported subsurface pipeline easements at over \$14 million, and entered a \$100 million judgment in UP’s favor. *Id.* at 154.

SFPP appealed, and this \$100 million judgment was reversed. The Court of Appeal rendered its decision on November 5, 2014, holding that: “(1) the pre-1871 and 1875 Congressional Acts [through which UP acquired a portion of its right-of-way], by themselves, did not convey a sufficient property interest to the Railroad to justify its collecting rent on the Pipeline’s subsurface easements; and (2) the Railroad has the burden to prove what parcels were the ‘property of the railroad’ from January 1, 2004, through December 31, 2013, before it can collect rent from the Pipeline for easements traversing those parcels during that period of time.” *Id.* at 207-10.

Although it had raised the validity of the AREA, in a request for supplemental briefing, the Court of Appeal ultimately left this issue for another day, stating: “we make no global ruling as to the validity of the AREA or the 1994 settlement agreement as a whole. When one portion of an agreement is invalid, its valid parts may be enforced.” *Id.* at 209 (citing Cal. Civ. Code § 1599 on severability of invalid contracts). The Court of Appeal remanded the case for a determination of UP’s ownership interests and a decision as to the rent due for the portions of the right-of-way where UP had sufficient interests to grant an easement to SFPP. *Id.* at 178, 208-10.

UP filed a petition for rehearing in the California Court of Appeal and a petition for review in the California Supreme Court, both of which were summarily denied. Exhibit 1 at \*4. UP did not petition for review in the U.S. Supreme Court. *Id.* Accordingly, the COA Opinion is now law of the case and binding between SFPP and UP. *See Searle v. Allstate Life Ins. Co.*, 38 Cal. 3d 425, 434 (1985); *Kay v. City of Rancho Palos Verdes*, 504 F.3d 803, 808 (9th Cir. 2007).

The case is now proceeding on remand in Los Angeles Superior Court. *See Union Pac. R.R. Co. v. Santa Fe Pac. Pipelines, Inc., et al.*, Case No. BC319170.

#### **D. The Contract Action**

SFPP filed the “Contract Action” on June 8, 2015 in Los Angeles Superior Court. *See SFPP, L.P. v. Union Pac. R.R. Co.*, Case No. BC584518; Pet. Exhibit 5. The Contract Action is predicated on the COA Opinion, which raised – but did not decide – the validity of the AREA. In the Contract Action, SFPP seeks to rescind the AREA between SFPP and UP for, among other reasons, failure of consideration. SFPP seeks a declaration of rescission, and it also seeks restitution for rent, expenses, and costs that SFPP paid to UP under the AREA.

UP requested that SFPP stay the Contract Action. SFPP declined. On September 24, 2015, the day before its deadline to respond to the complaint in the Contract Action, UP filed the Petition. The next day, UP filed a demurrer and a motion to stay the Contract Action pending resolution of the Petition by the Board. Although UP argues in the demurrer that the complaint should be dismissed, it tellingly does not raise preemption. Exhibit 3.

#### **E. SFPP’s History Of Pipeline Relocation**

On numerous occasions, SFPP has relocated its pipeline under UP’s right-of-way, at a cost of approximately \$43 million. *V.S. McClain* at 5-8. Despite the fact that SFPP’s pipeline was first installed under the right-of-way more than sixty years ago, the Petition points to a mere handful of relocations. To the extent that there have been disputes about relocation, they were

not about whether SFPP would move its pipeline – SFPP has never refused to relocate. *Id.* Rather, they have only been about allocation of expenses and the standard to be applied. *Id.* Notably, UP did not run to the Board a single time when litigating these matters in state court.

**Beaumont Hill:** The “Beaumont Hill” matter involved UP’s demand that SFPP relocate a 9.4-mile section of pipeline in an area in Riverside County, California known as Beaumont Hill. *See Union Pac. R.R. Co. v. SFPP, L.P.*, Riverside Superior Court Case No. INC055339, California Court of Appeal Case Nos. E062255 and E062823. SFPP agreed to perform the relocation, but reserved the right to litigate responsibility for the cost of relocation. V.S. McClain at 6. SFPP completed the Beaumont Hill relocation in October 2007. *Id.* Meanwhile, the parties litigated over cost allocation. *Id.* SFPP and UP ultimately entered into a confidential settlement of Beaumont Hill, without any admission of liability. *Id.*

**Pomona:** The “Pomona” matter involved UP’s demand that SFPP relocate two pipelines, each 0.3-mile sections, in Pomona, California, to accommodate UP’s installation of new track as part of a project by the Alameda Corridor-East Construction Authority (“ACE”). *See Union Pac. R.R. Co. v. SFPP, L.P.*, Riverside Superior Court, Case No. PSC1402455. Evidence during the litigation showed that UP’s project with ACE was not delayed in any way by SFPP, *i.e.*, the relocation of pipeline. V.S. McClain at 6. UP also stated in sworn discovery responses, and in representations by its counsel, that it had no damages, delay or otherwise, in connection with the pipeline relocation. *Id.* The relocation that UP demanded was not possible until January 2015, when UP acquired the property necessary to complete the relocation. *Id.* Once UP acquired the property, the parties entered into an agreement whereby SFPP agreed to perform the relocation requested by UP, without any admission of liability. *Id.*

**Alhambra**: On February 23, 2015, SFPP filed a declaratory judgment action, in Los Angeles Superior Court, related to UP's demand that SFPP relocate, under the AREA, approximately 9 miles of pipeline in Ontario and Fontana, California, under Union Pacific's Alhambra Subdivision, at an estimated cost in excess of \$22 million ("Alhambra"). *See SFPP, L.P. v. Union Pac. R.R. Co.*, Case No. BC573396. The Alhambra matter does not involve the issue of whether or not SFPP will relocate its pipeline. In fact, SFPP did not refuse to relocate. *V.S. McClain* at 7. Instead, SFPP seeks a declaration that, to invoke the relocation provision in the AREA, UP must prove sufficient property interests related to its right-of-way in Alhambra. *Id.* UP filed a counterclaim asserting that it can require SFPP to relocate regardless of the AREA. According to UP, it "possesses sufficient right and title in its railroad right of way, specifically including property granted under the Congressional Acts, to enforce its rights to require relocation of SFPP's pipeline." Exhibit 2; *see also* Exhibit 1 at \*1.

In an attempt to keep the Alhambra matter from the same California appellate district that issued the COA Opinion, UP removed the Alhambra case to federal district court on March 17, 2015. On June 3, 2015, however, the federal court granted SFPP's motion to remand the case to state court, finding that it was inappropriate to proceed in federal court "when California courts have been analyzing the AREA for many years." Exhibit 1 at \*12 ("*Alhambra Remand*"). After its failed attempt at removal, UP requested that SFPP agree to stay the Alhambra case. *V.S. McClain* at 7. The case has been stayed – at UP's request – since July 2015. *Id.* SFPP and UP are currently in settlement discussions for this relocation. *Id.*

### **III. LEGAL STANDARDS**

#### **A. Declaratory Order**

As the party petitioning the Board for a declaratory order, UP bears the burden of proof. 5 U.S.C. § 556(d); *Eastern Alabama Ry. LLC – Pet. for Decl. Order*, FD 35583, at 4 (STB served Mar. 9, 2012) (“*Eastern Alabama*”).

The Board has broad discretionary authority to issue a declaratory order to “terminate a controversy or remove uncertainty.” 5 U.S.C. § 554(e). In exercising its discretion, the Board considers, among other things, “the issue’s significance to the industry, the ripeness of the controversy, and whether past decisions establish adequate guidelines.” *Georgia-Pacific Corp. – Pet. for Decl. Order*, MC-C-30202, at 1 (ICC served Sept. 22, 1992); *see also Delegation of Auth. – Decl. Order Proceedings*, 5 I.C.C.2d 675, 676 (ICC served June 30, 1989). The Board may deny a petition that is premature, *i.e.*, where it is not shown that such a proceeding is necessary to terminate an active controversy. *USX Corp., U.S. Steel Grp. – Pet. for Decl. Order*, MC-C-30205, at 2 (ICC served Nov. 9, 1992) (“*USX Corp.*”).

#### **B. Preemption**

Under 49 U.S.C. § 10501(b), the remedies provided by ICCTA “with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.” There are two types of ICCTA preemption – categorical and as-applied. *Mid-America Locomotive & Car Repair – Pet. for Decl. Order*, FD 34599, at 2-3 (STB served June 6, 2005) (“*Mid-America*”). UP concedes that categorical preemption does not apply. *Pet.* at 20. To establish as-applied preemption, UP must demonstrate: (1) a regulation; (2) that unreasonably burdens or interferes with; (3) rail transportation. *Id.* (citing *Thomas Tubbs – Pet. for Decl. Order*, FD 35792, at 4 (STB served Oct. 31, 2014) (“*Tubbs*”). By its nature, an “as-applied”

test necessarily entails a fact-bound, case-specific determination. *See Franks Inv. Co. LLC v. Union Pac. R.R. Co.*, 593 F.3d 404, 413-16 (5th Cir. 2010) (en banc).

Additionally, “areas of law traditionally reserved to the states . . . are not to be disturbed absent the ‘clear and manifest purpose of Congress.’” *New Orleans & Gulf Coast Ry. Co. v. Barrois*, 533 F.3d 321, 334 (5th Cir. 2008); *see also Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (“[W]e have long presumed that Congress does not cavalierly pre-empt state-law causes of action.”). To overcome this “presumption against preemption,” a party bears a heavy burden. *De Buono v. NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S. 806, 814 (1997). The applicable preemption provision must be read narrowly in light of the presumption, and the scope of preemption, if any, is to be determined while keeping the presumption against preemption in mind. *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 518 (1992); *Medtronic*, 518 U.S. at 485.

#### **IV. ARGUMENT**

##### **A. The Petition Should Be Denied Outright Because UP Has Not Met Its Burden To Establish Grounds Warranting A Declaratory Order.**

###### **1. The Matter Is Not Ripe For Board Involvement.**

UP’s Petition fails out of the gate because there is no actual controversy. As the Petition itself demonstrates, the matter is not ripe for issuance of a declaratory order.

The main thrust of Petition is that, *if* the AREA is rescinded, due to the Contract Action, UP *may* no longer be able to force relocation of SFPP’s pipeline. The AREA has not yet been rescinded, however, and the Contract Action has only just begun. Nothing has happened yet, and thus there is no controversy for the Board to resolve. Instead, the Petition is premised on a litigation outcome that has not occurred, and would not occur until potentially years in the future.

Further, there are a number of possible outcomes of the Contract Action, only one of which is that the AREA will be completely rescinded. The COA Opinion indicated that at least

part of the AREA is invalid. *COA Opinion*, 231 Cal. App. 4th at 209 (citing Cal. Civ. Code § 1599). Whether that will amount to rescission of the AREA in its entirety, or partial rescission, is for a California court to decide, and is much too speculative for issuance of a declaratory order. Other outcomes of the Contract Action include payment of restitution to SFPP, or SFPP and UP entering into a new agreement.<sup>1</sup> All of these issues are matters in which the state court, and not the Board, is capable and has jurisdiction to resolve. *Infra* § IV.A.2.

Even assuming that SFPP prevails in the Contract Action, the AREA is rescinded in its entirety, and SFPP and UP reach no new agreement, before there could be a controversy ripe for Board involvement, an attenuated chain of events would have to occur:

- First, UP would have to undertake a future railroad construction project;
- Second, the future project would have to be on right-of-way under which SFPP's pipeline is located;
- Third, the future project would have to require relocation of SFPP's pipeline, which UP concedes is only "sometimes necessary" (V.S. Hovanec at 5);
- Fourth, SFPP would have to take a position that it has **never taken before**, *i.e.*, that it would not relocate its pipeline; and
- Fifth, this would have to prevent the future project from going forward.

Of these, it is particularly unreasonable to assume that SFPP will – for the first time – refuse to relocate its pipeline, which again, it has never done. To reiterate: SFPP has consistently and repeatedly relocated its pipeline to accommodate UP's rail construction projects. V.S. McClain at 5-8. No action SFPP has taken delayed a UP construction project. *Id.* But even if this unforeseen and hypothetical chain of events were to occur, *then* UP could raise the issue with the Board at the appropriate time. That time is not now.

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<sup>1</sup> Notably, UP states that other litigation between the parties could be resolved "by mutual agreement." Pet. at 32. The parties resolved both Beaumont Hill and Pomona by agreement, and they are currently in active settlement talks in Alhambra. V.S. McClain at 6-7.

UP's own Petition demonstrates that it is premised on a theoretical future scenario. The Petition postulates that “[i]f SFPP were successful in voiding [the AREA], UP would have no way **in the future** to require SFPP to relocate pipeline that obstructed construction projects on the right-of-way, and necessary infrastructure improvements **might never be built.**” Pet. at 27-28; *see also id.* at 29 (“SFPP’s state causes of action, **if successful**, would substantially interfere with UP’s operations”) (emphasis added). This is not a present controversy or uncertainty.

UP itself does not even believe that this doomsday scenario will ever occur. Contrary to its arguments in the Petition, UP has asserted in litigation in California that it has a right to require relocation of SFPP’s pipeline, separate and apart from the AREA. UP filed a counterclaim against SFPP in the Alhambra case asserting just that. Exhibit 2. UP cannot have it both ways.

Further, the provisions of the AREA labeled as “Railroad Right-Of-Way Protections” by UP are not the only source of UP’s rights concerning its right-of-way. Even if the AREA is rescinded, UP will still be entitled to all applicable protections from this Board and the ICCTA.

Preemption questions should be addressed only in the context of a live, concrete, ongoing controversy and an adequate factual record, and not in the abstract as UP requests. “**Speculative harm . . . is not an appropriate basis for declaratory relief.**” *USX Corp.*, at 2 n.1 (emphasis added). UP’s theory of potential future interference is much too speculative to warrant Board involvement. *See Am. Bus Ass’n – Pet. for Decl. Order*, MC-C-30224, at 1 (ICC served Feb. 27, 1995) (although Greyhound suggested it would implement self-help measures, which petitioner challenged, the matter was not ripe because “there is nothing of record to suggest that Greyhound is intent on implementing any of these self-help measures now or in the future”); *USX Corp.*, at 2

(same, “no indication that an active controversy or sufficient uncertainty actually exists now or will exist” where agency had not stated an intent to enforce the challenged interpretation).

Finally, it is worth noting that the state court has not requested the Board’s assistance. Nor has UP raised preemption to the state court as a defense, despite filing a demurrer challenging the complaint on other grounds. Exhibit 3. Under these circumstances, Board involvement is not warranted. *See Int’l Tradeshow Consultants, Inc. – Pet. for Decl. Order*, MC-C-30228, at 2 (ICC served Mar. 16, 1995) (declaratory order proceedings generally limited to “court referred disputes”); *Pejepscot Indus. Park, Inc. – Pet. for Decl. Order*, FD 33989, at 15 (STB served May 15, 2003) (by not referring preemption issues to the Board, the court “reserved those matters to itself” and it would “serve no useful purpose” for the Board to weigh in).

**2. The Petition Raises State Law Contract Issues, Which Courts Are Well-Suited To Address, And Does Not Justify Board Involvement.**

UP pitches the Petition as presenting only a “narrow question” with respect to preemption. Pet. at 32. In reality, however, UP is improperly requesting the Board to interfere with a preexisting California state court action, presenting questions that the Board has consistently made clear should be left to the courts.

Two predicate questions underlie the Petition: (1) whether, as a matter of contract law, the AREA is rescinded; and (2) whether rescission of the AREA implicates preemption. Both of these questions can – and should – be resolved by the California state court.

With respect to the first question, the Board has repeatedly emphasized that “courts, not the STB, are the proper forum for contract disputes.” *PCS Phosphate Co., Inc. v. Norfolk S. Corp.*, 559 F.3d 212, 220 (4th Cir. 2009) (“PCS”) (citing Board orders); *see also Township of Woodbridge, NJ v. Consolidated Rail Corp., Inc.*, Docket No. 42053, at 5 (STB served Dec. 1,

2000) (“It would be inappropriate for us to rule on the merits of the contract disputes in this case. Such matters are best addressed by the courts.”).

In particular, the Board holds that claims to rescind a contract, such as SFPP’s rescission claim in the Contract Action, properly belong in the courts. For example, in one action, there were already two lawsuits proceeding in California state court regarding termination of leases for use of a rail line, when the railroad filed a petition with the Board, arguing that the attempt to terminate the railroad’s rights under the leases was preempted. *Fillmore & W. Freight Serv., LLC – Emergency Pet. for Decl. Order*, FD 35813, at 1-2 (STB served Mar. 12, 2015). The Board denied the petition: “[T]he state courts are currently resolving . . . whether [the leases were] wrongfully terminated. . . . It is not necessary, nor would it be appropriate, for the Board to attempt to interpret the leases governing use of the Line or to attempt to resolve whether termination of the leases was lawful. Those issues are best left to the state courts, and can proceed independently, without the need for a declaratory order from the Board.” *Id.* at 3. The Board also reasoned that “[i]ssues involving federal preemption under 49 U.S.C. § 10501(b) can be decided either by the Board or the courts in the first instance.” *Id.*

The Board has repeatedly found that its involvement is not warranted in actions pertaining to rescission of a contract. *See PCI Transp., Inc. v. Fort Worth & W. R.R. Co.*, Docket No. 42094 (Sub-No. -1), at 6 (STB served Apr. 25, 2008) (finding that “the Board is not the proper forum to determine whether a contract has been properly terminated under its express terms and/or applicable contract law” and stating that if a court later determined that the contract was lawfully cancelled, *then* the Board could get involved); *Gen. Ry. Corp. – Exemption for Acquisition of R.R. Line*, FD 34867, at 4 (STB served June 15, 2007) (“Any dispute regarding the validity of th[e] agreement, or ownership of the Line, involves questions of state contract and

property law. The Board is not the proper forum to resolve such disputes. Rather, these matters are best left for state courts to decide.”); *EPCO Carbon Dioxide Prods., Inc. v. Canadian Nat’l Ry. Co.*, 2009 WL 2143750, at \*5 n.11 (W.D. La. July 17, 2009) (stating that the Board has “repeatedly declined” to “determine the existence of a contract or interpret such contract”); *Cleveland-Cliffs Iron Co. v. ICC*, 664 F.2d 568, 591 (6th Cir. 1981) (stating that determining the existence, validity, and interpretation of a contract is a “purely judicial task” and noting that the ICC “never before has claimed any expertise as to the existence and interpretation of contracts”).

Similarly, here, the Contract Action seeks to rescind the AREA and recover restitution. Although UP claims it is not asking the Board to interpret the AREA (Pet. at 32), it is asking the Board to tell a California state court that it **cannot** interpret the AREA, or rule on the validity of that contract, or award SFPP restitution. This contravenes the Board’s explicit holding that these matters should proceed in the courts, and are not appropriate for Board involvement. Also weighing against Board involvement is the presence of parallel state court proceedings. As noted *supra*, a federal court granted SFPP’s motion to remand the Alhambra case to state court because it was inappropriate for a federal court to insert itself “when California courts have been analyzing the AREA for many years.” *Alhambra Remand*, at \*12.

In an attempt to manufacture a basis for a declaratory order, UP argues that there is a “small subset” of contracts that “once entered into with a federally licensed common carrier . . . become infused with the greater public interest” and therefore cannot be terminated without Board approval. Pet. at 19 (citing *Thompson v. Tex. Mex. Ry. Co.*, 328 U.S. 134 (1946), *Pinelawn Cemetery – Pet. for Decl. Order*, FD 35468 (STB served Apr. 21, 2015) (“*Pinelawn*”); *Wis. Dep’t of Transp. – Pet. for Decl. Order*, FD 35455 (STB served Nov. 10, 2011) (“*Wisconsin*

*DOT*). Rather than support issuance of a declaratory order here, however, UP's authority clearly favors SFPP.

UP's first case, *Thompson*, involved a cause of action to terminate a contract with a railroad that was already in bankruptcy proceedings. 328 U.S. at 137. The state action was not preempted, but merely postponed until certain aspects of the bankruptcy had been completed. *Id.* at 145. The Supreme Court stressed that this "[did] not mean that [the plaintiff] would be burdened with [the] agreement in perpetuity." *Id.* *Thompson* also did not involve the presence of a second, federally regulated common carrier as is the case here. *Infra* § IV.A.3. Similarly, in *Pinelawn*, although a suit to eject a railroad for failure to renew its lease was preempted, the Board made clear that the state court could "issu[e] a ruling on the validity of the [lease] [and prescribe] remedies that do not interfere with rail operations." *Pinelawn*, at 11 n.30. Finally, *Wisconsin DOT* had nothing to do with preemption, but stated only that if a rail carrier defaulted, service "could not end until another carrier is put into place." *Wisconsin DOT*, at 5.

Contrary to these cases, which held that agreements with railroads can, in fact, be terminated, under UP's theory of preemption, SFPP could be trapped in the AREA indefinitely with no remedy. This is completely unsupported and nonsensical. Further, although UP seeks a finding of preemption, only one of its cited cases actually involved preemption (*Pinelawn*), and that case made clear that the state court could still rule on validity and prescribe appropriate remedies. *Pinelawn*, at 11 n.30.

Moreover, the Board declines to institute declaratory order proceedings when, like here, preemption is contingent on the outcome of a state law determination. The state law determination in this case is rescission of the AREA. The Board should decline to short-circuit ongoing court proceedings to rescind and award restitution, and let the California state court

make a determination. *See, e.g., Mid-America*, at \*4-5 (declining to rule on preemption so court could first resolve whether there was a prescriptive easement under state law); *Allegheny Valley R.R. Co. – Pet. for Decl. Order*, FD 35388, at 2-4 (STB served Apr. 25, 2011) (declaratory order to determine preemption not warranted when court action involved state property law issues).

As to the second question underlying the Petition – whether rescission of the AREA implicates preemption – the California state court is capable of resolving this issue as well (should UP decide to raise it in the Contract Action). As the Board has explained, courts are “well-suited” to address whether easements, such as SFPP’s, interfere with railroad operations such that preemption could apply. *See, e.g., Maumee & W. R.R. Corp. & RMW Ventures, LLC – Pet. for Decl. Order*, FD 34354, at 1-2 (STB served Mar. 3, 2004) (“*Maumee*”) (declaratory order on preemption not necessary or appropriate in action to condemn easement for subsurface utilities under right-of-way; such cases “are typically resolved in state courts”); *Lincoln Lumber Co. – Pet. for Decl. Order*, FD 34915, at 3 (STB served Aug. 13, 2007) (“*Lincoln Lumber*”) (Board involvement not needed on preemption issue for action to condemn longitudinal easement under right-of-way for a storm sewer; “Courts can, and regularly do . . . make determinations as to whether proposed eminent domain actions such as this would interfere with railroad operations”); *Jie Ao & Xin Zhou – Pet. for Decl. Order*, FD 35539, at 8 (STB served June 6, 2012).

In short, the Contract Action is a quintessential state law dispute best handled by the state courts and thus UP’s request for a declaratory order is improper. Notably, UP has not argued that the parties’ prior disputes – all of which were litigated in California state court – are preempted by ICCTA. Since the COA Opinion, however, UP has openly maneuvered to avoid the state court that rendered the COA Opinion. First, UP tried to get a second bite by removing

the Alhambra case from California state court to federal court. UP's attempt to manufacture federal jurisdiction failed, however, and Alhambra was remanded. *Alhambra Remand*. Now, in its latest gambit to avoid California state court, UP pitches preemption to the Board. The Petition is a transparent attempt to forum shop and escape state court action, in an area that the Board has consistently held should be handled in state court.

UP cannot use the Board to "shield" itself from the Contract Action, and on this basis alone, the Petition for a declaratory order should be denied. *See Paulsboro Ref. Co., LLC v. SMS Rail Serv., Inc.*, 2012 WL 6652798, at \*7 (D.N.J. Dec. 19, 2012) ("The STB's jurisdiction may not be used to shield a rail line from a legitimate state law action."); *PCS*, 559 F.3d at 222, 225 (railroad "cannot escape its obligation[s] by . . . hiding behind the ICCTA").

**3. UP's Arguments Are Inapposite, And Ignore That SFPP Is A Federally Regulated Common Carrier Pipeline.**

UP raises only two arguments for issuance of a declaratory order (Pet. at 30-32), both of which miss the mark.

UP's first argument, that the issuance of a declaratory order is needed here because its Petition presents an "important preemption issue," is a strawman, premised on a mischaracterization of the Contract Action. Pet. at 31. Contrary to UP's contention, the purpose of the Contract Action is **not** to "nullify" purported "Railroad Right-Of-Way Protections" or to "enable the pipeline to remain on a railroad's operating property indefinitely without the railroad's agreement or consent." *Id.* In actuality, the Contract Action seeks to rescind a contract, and collect restitution for rent and expenses paid under that contract. With respect to relocation, there is no question of whether SFPP will relocate its pipeline in the future if necessitated by railroad operations, but rather, whether SFPP should be held to the terms of the AREA's specific relocation provision. UP's attempt to re-frame the issue is mistaken.

Mischaracterizations aside, there are no unique or novel questions appropriate for Board involvement. The Petition presents the type of state law contract issues and preemption questions that the Board has repeatedly found should be handled by courts. *Supra* § IV.A.2. The same should be the result here, especially in the absence of both an actual controversy requiring the Board's resolution and a request by the state court for Board assistance.

UP's second argument, that issuance of a declaratory order "would promote the National interest in growing our interstate rail network" (Pet. at 31), also fails. The Contract Action would not prevent UP from expanding in the future. As Harvey H. Stone, P.E., an expert in railroad track planning, design, and operations, explains in his Verified Statement, "railroads and utilities have found it is relatively easy to co-exist," and any potential conflicts "are regularly dealt with and resolved in the ordinary course of business, usually without issue." V.S. Stone at 8. SFPP has always relocated its pipeline when demanded by UP. V.S. McClain at 5-8. The Contract Action does not change that. Further, UP does not explain why allowing it to circumvent preexisting state court litigation would supposedly serve the national interest, which it would not.

In truth, granting UP's Petition would **negatively** impact the national interest. The Petition overlooks that SFPP provides the public with critical energy transportation services, and that SFPP, like UP, is a federally regulated common carrier. V.S. McClain at 2. One of the goals underlying ICCTA is to "foster sound economic conditions in transportation and to ensure effective competition and coordination between rail carriers and other modes." 49 U.S.C. § 10101. UP's demand for a "right to eject" another federally regulated common carrier (Pet. at 7), does not promote this goal or the national interest. *See Reading Blue Mountain & N. R.R. Co. v. UGI Utils., Inc.*, 2012 WL 251960, at \*6 (M.D. Pa. Jan. 25, 2012) (denying railroad's request

for an injunction to prevent installation of pipeline under right-of-way; “the public interest would be better served by denying the injunction so Defendant’s customers can have access to gas”).

The Petition also raises potential conflict between two federal regulatory schemes. Both the Board and the courts have held that Section 10501(b) must be harmonized with other federal statutes. *CSX Transp., Inc. – Pet. for Decl. Order, FD 34662, at 9* (STB served Mar. 14, 2005); *New England Transrail, LLC – Constr., Acquisition & Operation Exemption, FD 34897, at 9, 20* (STB served July 10, 2007); *Tyrrell v. Norfolk S. Ry.*, 248 F.3d 517, 523 (6th Cir. 2001).

Here, SFPP is a common carrier pipeline regulated under the ICA, 49 U.S.C. § 1(1)(b) (1988).<sup>2</sup> *V.S. McClain* at 2. SFPP has the same common carrier obligations to serve the public as does UP. 49 U.S.C. § 1(4) (1988) (“It shall be the duty of every common carrier subject to this chapter to provide and furnish transportation upon reasonable request therefor.”); *see also SFPP, L.P. Mobil Oil Corp.*, 80 FERC ¶ 63014, 65155 (Sept. 25, 1997); *BP W. Coast Prods., LLC v. F.E.R.C.*, 374 F.3d 1263, 1297 (D.C. Cir. 2004).

Congress did not intend that the Board’s authority over common carriers under ICCTA, such as UP, would supersede FERC’s authority over common carriers under the ICA, such as SFPP. *See, e.g., Tyrrell*, 248 F.3d at 523 (“[Federal] agencies’ complementary exercise of their statutory authority accurately reflects Congress’s intent for the [statutes] to be construed *in pari materia*.”). This is particularly true given the importance of pipelines, like SFPP. As the Pipeline and Hazardous Materials Safety Administration has emphasized: (1) “hundreds of

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<sup>2</sup> In 1977, Congress transferred the Interstate Commerce Commission’s authority over oil pipelines to FERC. *See* Department of Energy Reorganization Act, Pub. L. No. 95-91, § 402(b), 91 Stat. 565, 584 (codified in substance at 49 U.S.C. § 60502). The next year, Congress repealed much of the ICA, but provided that transportation of oil by pipeline companies would be subject to “[t]he laws . . . as they existed on October 1, 1977.” Act of Oct. 17, 1978, Pub. L. No. 95-473, § 4(c), 92 Stat. 1337, 1470.2. Citations to the ICA are to the 1988 edition of the U.S. Code, which is the last such edition that reprinted the ICA. A copy of the ICA may be found at <http://www.ferc.gov/legal/maj-ord-reg/ica.pdf>.

billions of ton/miles of liquid petroleum products” are shipped by pipeline each year; (2) such pipelines are “essential” because “the volumes of energy products they mode are well beyond the capacity of other forms of transportation,” including railroads; and (3) “[p]ipeline systems are the safest means to move these products.” Exhibit 4.

There is no valid reason why UP’s operations should be prioritized over those of SFPP. Nor would this serve the national interest. UP’s bare argument to the contrary is no reason to grant the Petition, and the fact that there are two common carriers at issue here greatly favors agency restraint and caution, and is a compelling reason for the Board to decline to institute a declaratory order proceeding. The Petition should be denied, and the Board need go no further.

**B. UP Has Not Met Its Burden To Show That ICCTA Preempts The Contract Action.**

**1. The Contract Action Is Not “Regulation” Preempted By ICCTA.**

Even if the Board considers the merits of the Petition, it should find no preemption. UP tries to shoehorn this dispute into the rubric of as-applied preemption, but the entire premise of UP’s argument – that SFPP “Asks A State Court . . . To Proclaim That The Pipeline May Under State Law Remain At Its Present Location Indefinitely” (Pet. at 21, 22, 25) – is false.

UP relies on two lines of authority, both of which are inapposite. First, UP cites cases holding that a state law cause of action constitutes regulation of rail transportation when it would result in a party securing a right to use property on the surface of the railroad’s right-of-way. Pet. at 21-26.<sup>3</sup> SFPP’s pipeline, however, is **underground**, not on the surface, and is a

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<sup>3</sup> Citing, e.g., *City of Lincoln – Pet. for Decl. Order*, FD 34425 (STB served Aug. 11, 2004) (condemnation of 20-foot strip of right-of-way); *Union Pac. R.R. Co. v. Chi. Transit Auth.*, 647 F.3d 675 (7th Cir. 2011) (“CTA”) (condemnation of 40% of right-of-way to operate trains); *Wichita Terminal Ass’n – Pet. for Decl. Order*, FD 35765 (STB served June 23, 2015) (vehicle crossing over tracks and court order requiring railroad to construct a permanent road crossing); *Pinelawn* (claim to evict railroad from railroad yard); *B&S Holdings, LLC v. BNSF Ry. Co.*, 889 F. Supp. 2d 1252 (E.D. Wash. 2012) (adverse possession to acquire a portion of right-of-way).

nonexclusive use, completely different from taking a portion of a railroad's surface right-of-way to the exclusion of the railroad. Further, unlike the cases that UP cites, SFPP does not request to secure a right to use property at all. It merely seeks to rescind a contract and recover restitution.

Second, UP cites cases involving state law tort claims that seek to impose liability on a railroad for its operations, which are uniformly distinguishable from and inapplicable to the instant Petition. Pet. at 23-24 nn.21-22.<sup>4</sup> Unlike these cases, SFPP does not seek a remedy for harm directly related to UP's operations, such as the design, construction, or operation of track or related facilities. Again, the Contract Action is about a contract, and whether that contract should be rescinded and SFPP should be awarded restitution. Adjudicating this action in state court would not have the effect of managing or governing rail transportation. In any event, the inspection and maintenance work on SFPP's pipeline does not disrupt UP's rail operations. V.S. Stone at 5-6.

Contrary to UP's arguments, the cases actually demonstrate that the Contract Action is not a "regulation" preempted by ICCTA. Federal preemption decisions under ICCTA "mostly have involved situations where state or local governments seek either to regulate when and where railroads can conduct their rail transportation activities, or to acquire railroad track or

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<sup>4</sup> Citing, e.g., *Pace v. CSX Transp., Inc.*, 613 F.3d 1066 (11th Cir. 2010) (nuisance action, alleging that railroad's construction and operation of side track caused increase in noise and smoke); *Kiser v. CSX Real Prop., Inc.*, 2008 WL 4866024 (M.D. Fla. Nov. 7, 2008) (nuisance action, seeking to prohibit railroad from developing parcel of land for railway facility); *Mark Lange – Pet. for Decl. Order*, FD 35037 (STB served Jan. 28, 2008) (trespass suit to eject railroad and seek tort damages for harm arising from railroad operations); *Maynard v. CSX Trans., Inc.*, 360 F. Supp. 2d 836 (E.D. Ky. 2004) (nuisance action, alleging that railroad permitted side track to be blocked by trains, preventing plaintiffs from accessing their property); *Guckenberg v. Wis. Cent. Ltd.*, 178 F. Supp. 2d 954 (E.D. Wis. 2001) (nuisance action, alleging that railroad's operations unreasonably interfered with use and enjoyment of plaintiff's property); *Tubbs* (claims for trespass, nuisance, negligence, inverse condemnation, and statutory trespass, seeking compensation stemming from rail carrier's actions in designing, constructing, and maintaining an active rail line).

right-of-way that is needed for rail operations under eminent domain powers.” *Mid-America*, at 3-4. Neither of these circumstances is present here. Instead, this is a contract action, seeking rescission and restitution, to which preemption does not apply. *Supra* § IV.A.2.

For example, in *Paulsboro*, after a refining company gave notice of termination of the defendant’s rail service contract, it filed suit to establish the defendant’s contractual obligation to pay the cost of seeking approval to abandon the rail line. 2012 WL 6652798, at \*1. The court found the defendant’s preemption arguments “inapposite”: “Plaintiff’s requested relief is not an abandonment order; it is a declaration that [defendant] must pay costs and the costs themselves arising from [its] breach of the parties’ contract. Preemption does not apply.” *Id.* at \*7.

In *PCS*, a mine owner brought suit against a railroad to enforce a contract provision requiring the railroad to relocate at its own expense when the mine owner deemed it necessary. 559 F.3d at 216. The Fourth Circuit held that the action was not preempted, reasoning that a consensual agreement usually reflects a “market calculation” by the parties that the benefits of the arrangement exceed the costs of any current or future obligations, and therefore do not unreasonably interfere with rail transportation. *Id.* at 221.

UP attempts to distinguish *PCS* on the ground that the Contract Action seeks to void, rather than enforce, an agreement. Pet. at 25. However, just as a railroad may not invoke ICCTA to extricate itself from obligations that it entered into freely and knowingly, neither may a railroad invoke ICCTA to **compel** another party to **remain in** a contract. To prevent a state court from relieving a party of its obligations under such an agreement would violate the party’s original “market calculation” and would not further interstate commerce or the policy goals of ICCTA. *See PCS*, 559 F.3d at 222. Further, there is no reason to find that SFPP’s claim for

restitution could somehow amount to regulation. SFPP's Contract Action is not the type of "regulation" preempted by ICCTA.

**2. The Contract Action Does Not Prevent Or Unreasonably Interfere With Rail Transportation.**

UP also cannot demonstrate unreasonable interference due to rescission of the AREA or an award of restitution to SFPP under the Contract Action.

"For state and local actions that are not preempted on their face, § 10501(b) preemption analysis requires a factual assessment of whether that action would have the effect of preventing or unreasonably interfering with rail transportation." *Jie Ao & Xin Zhou*, at 5. Establishing unreasonable interference is a high bar. UP cannot meet it.

In analyzing unreasonable interference, the Board distinguishes between surface and subsurface use. *See, e.g., Eastern Alabama*, at 5 (emphasizing that the requested condemnation was for "subterranean water and sewer pipes"). The Board also recognizes that an "easement does not take railroad property outright, and it is often possible for an easement that crosses over, under, or across a right-of-way, to co-exist with active rail operations without necessarily interfering with the latter." *Jie Ao & Xin Zhou*, at 7; *see also id.* at 3 ("a prescriptive easement or other state law property interest permitting access to portions of a railroad ROW, unless exclusive, does not typically unreasonably interfere with the present or future use of the property for activities that are part of railroad transportation").

Indeed, local regulation may impose "some hardship or inconvenience" to a railroad without "trigger[ing] preemption." *Native Vill. of Eklutna v. Alaska R.R. Corp.*, 87 P.3d 41, 57 (Alaska 2004); *see also N.Y. Susquehanna & W. Ry. Corp. v. Jackson*, 500 F.3d 238, 254 (3d Cir. 2007) ("As for the unreasonably burdensome prong, the most obvious component is that the

substance of the regulation must not be **so draconian** that it prevents the railroad from carrying out its business in a sensible fashion.” (emphasis added)).

The Board and courts have routinely found that pipelines, which are considered “non-invasive utilities,” and other underground utilities do not unreasonably interfere with railroad operations. *See Reading Blue*, 2012 WL 251960, at \*4 (no unreasonable interference from installing gas pipeline under railroad right-of-way (citing Board orders)); *Eastern Alabama*, at 4-5 (underground water and sewer pipelines would not unreasonably interfere with railroad operations); *Louisville Water Co. v. CSX Transp., Inc.*, 2012 WL 4098981, at \*3 (W.D. Ky. Sept. 17, 2012) (same for underground water main); *Maumee*, at 2 (“routine, non-conflicting uses, such as non-exclusive easements for at-grade road crossings, wire crossings, sewer crossings, etc., are not preempted so long as they would not impede rail operations or pose undue safety risks”); *Lincoln Lumber*, at 3 (stressing that petitioner’s concerns were “common and of the type that the courts are well-suited to address”).

Thus, UP’s claim that “[t]he mere presence of SFPP’s pipeline on the right-of-way creates ongoing challenges for railroad maintenance, repair, and construction activities” (Pet. at 5-6) is mere fiction. SFPP’s pipeline is approximately 4 feet **under** the right-of-way, not “on” the right-of-way, and in some places, the pipeline is buried as deep as 40 to 60 feet. *COA Opinion*, 231 Cal. App. 4th at 169. SFPP’s pipeline does not negatively impact UP’s operations or maintenance, and SFPP is not aware of any such complaint by UP, except in the Petition. *V.S. McClain* at 3-5; *V.S. Stone* at 2-8 (concluding that “the inspection and maintenance work on the SFPP pipelines do not disrupt UP rail operations,” nor does SFPP’s presence interfere with UP’s maintenance or capital improvement initiatives). Further, of the decades that the pipeline has existed under the right-of-way, UP identifies only a **single instance** where there

allegedly was a disruption to UP's operations. V.S. Hovanec at 4. This alone demonstrates that there is no unreasonable interference.<sup>5</sup> See *Eastern Alabama*, at 6 (“sporadic incidents . . . do not rise to the level of unreasonably interfering with rail operations”).

Lacking facts of actual, present interference, UP “postulates a fear of the unknown.” See *Louisville Water Co.*, 2012 WL 4098981, at \*4. UP's interference argument is entirely based on its worry that, if the AREA is rescinded, it may have “no way **in the future** to require SFPP to relocate.” Pet. at 27-28 (emphasis added). This contravenes UP's position in California court that it can require SFPP to relocate without the AREA. Exhibit 2. Additionally, an as-applied challenge, such as UP's, must state **specific facts** about how a particular use interferes with railroad operations, and cannot rely solely upon allegations of speculative future harm, as UP does. See, e.g., *Franks*, 593 F.3d at 415; *Reading Blue*, 2012 WL 251960, at \*2; *Louisville Water Co.*, 2012 WL 4098981, at \*3 (no unreasonable interference where “purported ‘undue safety risk’ is wholly non-specific and hypothetical”); *Bayou DeChene Reservoir Comm'n v. Union Pac. R.R. Corp.*, 2009 WL 1604658, at \*4 (W.D. La. June 8, 2009) (no preemption where railroad provided only “vague and unsubstantiated statement” that access road would interfere with railroad operations); *Buddy & Holley Hatcher – Pet. for Decl. Order*, FD 35581, at 7 (STB served Sept. 21, 2012) (no preemption when railroad made “no arguments and provide[d] no facts supporting a finding that the state court action should be preempted under an as-applied analysis”).

UP's own cases prove as much, finding preemption when there was actual, non-speculative evidence that the challenged action would reduce railroad capacity or interfere with

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<sup>5</sup> To the extent UP argues about increased costs (V.S. Hovanec at 7), such allegations, even if true, do not establish unreasonable interference with rail operations. See, e.g., *Fla. E. Coast Ry. Co. v. City of W. Palm Beach*, 266 F.3d 1324, 1338 n.11 (11th Cir. 2001) (ICCTA does not preempt “action[s] which prevents an individual firm from maximizing its profits”).

the railroad. Pet. at 28-30 (citing *CTA*, 647 F.3d 675 (action to condemn 40% of the right-of-way, which would prevent railroad from using the land itself for new railroad tracks), *Wichita Terminal*, 2015 WL 3875937 (evidence that installation of a crossing over railroad track would reduce capacity, thereby impeding rail operations), *14500 Ltd., LLC*, FD 35788, at 4-6 (STB served June 5, 2014) (adverse possession of portion of rail yard would prevent railroad from using land to accommodate projected traffic growth)). Further, in these cases, unlike here, the plaintiffs' claims sought to deprive the railroad of the use of its surface property.

In a case much closer to these facts, *Reading Blue*, the court rejected the railroad's argument that ICCTA preempted state condemnation proceedings granting the defendant a gas pipeline easement under the railroad's right-of-way. 2012 WL 251960, at \*2. The railroad stated that it would permit installation of the pipeline if the defendant would sign a licensing agreement, the terms of which would give the railroad the right to direct the defendant to relocate the pipeline at the defendant's cost. *Id.* The "crux" of the railroad's preemption argument was that "absent the License Agreement, [the railroad] cannot require Defendant to move its gas pipeline should [the railroad] decide to make changes to its tracks in the future." *Id.* at \*5.

The court gave short shrift to this argument, explaining that the railroad had failed to identify "specific facts" that asserted "more than just the mere possibility of changes of grade or alignment of the railroad tracks in the future." *Id.* at \*3. The court could not find that railroad operations would be burdened unreasonably by the installation of the gas pipeline where "there would be no present disruptions of the railroad's operations and where the most that can be said is that future track upgrades may possibly be impeded by the presence of the gas line." *Id.*

Similarly here, UP's preemption argument, which relies on the mere possibility that "necessary infrastructure improvements **might never be built**" (Pet. at 27 (emphasis added)), is

too speculative to establish unreasonable interference. The only purported evidence UP offers that harm *might* occur is a handful of matters – in the past – involving relocation. *Id.* at 13, 26-27; *see also* V.S. Hovanec 7-10. As discussed earlier, SFPP has always agreed to relocate its pipeline to accommodate UP’s development plans. V.S. McClain at 5-8. And SFPP has not delayed UP’s projects. *Id.* These prior relocations do not demonstrate that the Contract Action would unreasonably interfere with rail transportation.

In the Petition, UP cites the relocations at Beaumont Hill, Pomona, and Alhambra as examples of supposed interference by the pipeline. All three of these examples are impermissible. SFPP and UP resolved both the Beaumont Hill and Pomona matters in a confidential settlement, without any admission of liability by SFPP or UP. *Id.* at 6. As for Alhambra, that action has been stayed since July 2015 – at UP’s request. *Id.* at 7.

The Petition also mischaracterizes these relocations. Although UP claims that the Beaumont Hill project “was delayed by several years,” due to SFPP’s pipeline (Pet. at 27), this is false. SFPP completed the Beaumont Hill relocation in October 2007. V.S. McClain at 6. The litigation continued thereafter, but the issue was about which party was responsible for the costs. *Id.* The relocation itself had long since taken place. *Id.*

With respect to Pomona, UP’s claim that the project “was delayed for several years” (Pet. at 27) is factually impossible. The relocation UP demanded could not occur until January 2015, when UP acquired the property necessary to complete the relocation. V.S. McClain at 6. Once UP secured the property, SFPP agreed to relocate its pipeline. *Id.* Any claim of delay is contradicted by UP’s own sworn discovery responses, and representations of counsel, in the Pomona action, stating that UP had **no damages**, delay or otherwise, in connection with the

pipeline relocation. *Id.* Indeed, UP has never once obtained delay damages from SFPP in connection with a pipeline relocation. *Id.* at 5.

Finally, UP misconstrues SFPP's complaint in the Alhambra action. SFPP is **not** "seeking to prevent" the Alhambra relocation, and is not disputing whether or not the relocation will occur. *Id.* at 7. SFPP filed a declaratory judgment action solely to determine whether UP could require that the relocation be performed under the specific terms of the AREA. *Id.* Notably, UP filed a counterclaim, asserting that it can force the relocation even without the AREA. Exhibit 2. UP also omits that the parties are actively working, in good faith, towards a mutual agreement that could resolve this matter. V.S. McClain at 7.

The accompanying Verified Statement of Ronald McClain contains additional information about these and the other relocations that UP identifies, none of which support the Petition. *Id.* at 5-8. For example, UP boasts that the 760-mile "Sunset Corridor" double tracking project did not require a single relocation of SFPP's pipeline, but this only demonstrates that UP's Petition, predicated on hypothesized future relocations, is impermissibly speculative. The paucity of relocation matters – in which SFPP did not even refuse to relocate – during the parties' decades long history demonstrates that there is no unreasonable interference. *See id.*

There is nothing to support the notion that SFPP has interfered in the past or will interfere in the future, even absent the AREA. Nor can UP argue that an award of restitution, as SFPP requests in the Contract Action, would be an unreasonable interference. UP's preemption argument is wholly non-specific and hypothetical, and should be rejected.

### **3. A Finding Of Preemption Would Produce Absurd Results.**

UP's view that the Contract Action is preempted should also be rejected because it leads to absurd results. *See Emerson v. Kan. City S. Ry. Co.*, 503 F.3d 1126, 1132 (10th Cir. 2007) (interpreting ICCTA's preemption clause to avoid absurd results).

A finding of preemption, under UP's theory, could allow UP to side-step an ongoing state court action, when UP has been filing lawsuits against SFPP in California courts for decades. *See Alhambra Remand*, at \*2-4 (describing state court litigation); *COA Opinion*, 231 Cal. App. 4th at 152-53. Although UP may want to avoid the Contract Action, this is not a basis for Board involvement. Further, if the Board were to find the Contract Action preempted, this would contravene the COA Opinion, which expressly raised and left open the possibility that the AREA is invalid. *See COA Opinion*, 231 Cal. App. 4th at 209. SFPP filed the Contract Action as a direct result of the COA Opinion. UP's interpretation of ICCTA, however, could prevent SFPP's efforts to effectuate the COA Opinion, and could leave SFPP with no remedy. It would be absurd and unfair to allow UP to use ICCTA to hold SFPP to a contract, the validity of which the California Court of Appeal has raised and put at issue. That is not what ICCTA is for.

UP's attempt to end run the state court through its Petition also leads to absurd results because, notwithstanding the longstanding and unquestioned exclusive role that states have played in the area of contract law, UP's position on preemption seemingly has no end. Railroads such as UP could simply seek to unilaterally write and rewrite contracts affecting all pipelines, utilities, telecommunications lines, or other crossings to their liking and force their favored terms upon any coexisting entity located near UP's lines. Under UP's interpretation, the only recourse for affected conflicting users such as SFPP apparently would be to go the Board *post hoc* and attempt to argue that the actions violate state law and are not preempted in areas where the agency has no experience or particular expertise. This would create the real potential for nonsensical and irrational results. *See Emerson*, 503 F.3d at 1132 (definition of "transportation" should be read in a way that avoids absurd results).

Moreover, given the vast number of underground utilities existing in the United States, UP's Petition, if accepted by the Board, presents the real threat of overburdening the Board with an unending stream of similar declaratory order requests. As explained above, in the event of a ripe, actual controversy requiring a preemption determination, which is not the case here, the Board has repeatedly held that actual disputes can and should be resolved by the courts. This is important, because if the Board were required to step in to resolve all of the controversies, a "crush of cases" would "overburden the Board's resources":

To date, only a few preemption cases involving railroad/private road or sewer crossings have been brought to the Board (*i.e.*, *Maumee*; *Mid-America*; and *Lincoln Lumber*). That is because the Board consistently has made it clear that states continue to play their traditional role in resolving disputes in this area. If the Board had to resolve all crossing disputes, the crush of cases would significantly overburden the STB's resources. This is so, not only because of the sheer number of cases that could be brought given the thousands of crossings that exist throughout the country, but also because the Board has no particular expertise or familiarity with the property laws of each state.

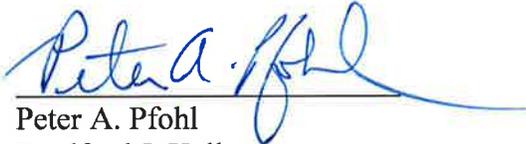
En Banc Brief of Amicus Curiae STB at 17-18, *Franks*, 592 F.3d 404, 2009 WL 6297302 at \*17-18; *see also PCS*, 559 F.3d at 219 (noting that a "broad reading of the [ICCTA] preemption clause would make it virtually impossible to conduct business").

UP's Petition presents far-reaching and absurd results that SFPP respectfully submits, the Board should seek to avoid. As such, the Petition should be denied.

**V. CONCLUSION**

For the reasons stated above and in the attached verified statements, SFPP respectfully requests that the Board deny UP's Petition for a Declaratory Order. Alternatively, SFPP requests that the Board find that the Contract Action is not preempted by ICCTA.

Respectfully submitted,



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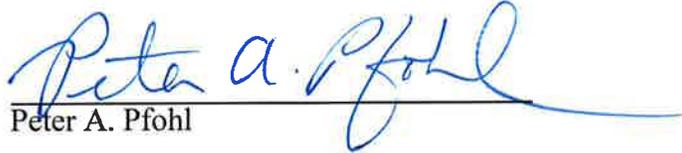
Counsel for SFPP, L.P.

Dated: November 13, 2015

## CERTIFICATE OF SERVICE

I hereby certify, that I have this 13th day of November caused to be served copies of the above Reply in Opposition to Petition for Declaratory Order by e-mail and U.S. Mail, or more expeditious means, upon outside counsel for Petitioner Union Pacific Railroad Company, as follows:

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Peter A. Pfohl

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**FINANCE DOCKET NO. 35960**

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**VERIFIED STATEMENT  
OF  
RONALD McCLAIN**

**VERIFIED STATEMENT  
OF  
RONALD McCLAIN**

My name is Ronald McClain. I am the President of Products Pipelines for Kinder Morgan, Inc. (“Kinder Morgan”). SFPP, L.P. (“SFPP”) is an indirect wholly-owned subsidiary of Kinder Morgan. This statement briefly describes SFPP, its pipeline running beneath Union Pacific Railroad Company’s (“UP”) right-of-way, and the pipeline’s coexistence with the railroad. This statement responds to the assertions contained in the statements of John J. Hovanec, Assistant Vice President of Engineering Design for Union Pacific Railroad, and Tony K. Love, Assistant Vice President of Real Estate for Union Pacific Railroad.

I have worked for Kinder Morgan for more than 30 years and have held various operating and engineering positions in both the Products and Natural Gas pipelines businesses. I was named Vice President of Operations and Engineering for the Products Pipelines group in 2005 and was named President of Products Pipelines in 2013. As the President of Products Pipelines, I have the primary responsibility for overseeing the nation’s largest independently owned refined petroleum products pipeline system, which transports refined petroleum products, crude oil, and condensate through approximately 9,000 miles of pipelines.

Section I of this statement provides a brief overview of SFPP’s business and operations. Section II responds to UP’s claim that the pipeline purportedly interferes with railroad maintenance and operations. Section III describes SFPP’s history of relocating its pipeline under UP’s right-of-way and the specific relocations identified in the Verified Statement of John Hovanec.

## **I. SFPP's Business and Operations**

SFPP is an energy infrastructure company, whose pipelines transport refined petroleum products. SFPP transports refined petroleum products under the jurisdiction of the Department of Transportation ("DOT"), Federal Energy Regulatory Commission ("FERC"), and the California Public Utilities Commission ("CPUC"), among others. Neither SFPP, nor any products pipeline owned or operated by SFPP, is subject to the jurisdiction of the Surface Transportation Board ("STB"). To my knowledge, the STB has never asserted that it has jurisdiction over SFPP or its pipeline(s). Additionally, SFPP is a federal common carrier pipeline regulated under the Interstate Commerce Act, 49 U.S.C. § 1(1)(b) (1988). SFPP has a common carrier obligation to serve the public on reasonable request. Based on my long experience, we have always respected UP's obligation to operate as a common carrier without interference to its operations, and so too has UP respected SFPP's obligation to operate as a common carrier without interference to its operations.

SFPP owns and operates approximately 2,400 miles of pipeline in six Western states – California, Oregon, Nevada, Arizona, New Mexico, and Texas. The pipelines function like a toll road allowing major oil companies, energy producers and shippers, and local distributors across many industries to transport fundamental energy products throughout the United States. Transportation of these energy products is a critical public service.

Of the 2,400 miles of SFPP's pipeline, approximately 1,400 miles lie beneath UP's right-of-way. The pipeline segments under UP's right-of-way are not contiguous, i.e., SFPP does not have one long, continuous easement. The segments run longitudinally, typically at the edges of the right-of-way, but also frequently cross under the right-of-way and into other lands. The easement is made up of approximately 496 fragmented segments which are located intermittently

throughout UP's right-of-way. The fragmented segments range in length from 100-200 foot track crossings up to an approximately 71.8-mile segment.

The pipeline serves a vital public interest – in many geographical areas, SFPP's pipeline delivers all of the refined petroleum products (gasoline) used by the public. SFPP takes petroleum products from refineries located at various points in California, including Carson, California, and Concord, California, and transports by pipeline the petroleum products to numerous end user locations where the petroleum products are ultimately distributed for consumer use. In many communities, every drop of petroleum products used is provided through SFPP's pipeline. Furthermore, numerous military bases and facilities get gasoline and jet fuel from SFPP's pipeline. SFPP plays a critical role in the economies of countless cities in California, and indeed, the six Western states through which the pipeline passes.

SFPP's pipeline is typically located more than 25 feet from the centerline of mainline railroad track, except when the pipeline is crossing underneath the railroad track, and is typically buried at a depth of approximately 4 feet. The minimum depth and distance (from the centerline of mainline railroad track), as well as other safety and maintenance requirements, are determined by regulations promulgated by the DOT (49 CFR Part 195).

There are numerous other pipelines and utilities with facilities in the subsurface of UP's right-of-way. On information and belief, based on the experience of field personnel who report to me, I am aware that numerous fiber optics companies (including AT&T, Sprint, Level 3, and Quest Communications), water and utilities companies, and other petroleum pipelines, have facilities that run in or cross through the subsurface of UP's right-of-way, often in close proximity to SFPP's pipeline.

## **II. Purported Interference with Railroad Maintenance and Operations**

On page 3 of his Verified Statement, Mr. Hovanec states: “We have less room for maintenance crews and equipment in places where the SFPP pipeline includes aboveground facilities such as markers, vent pipes and maintenance access ports.” To the extent that these facilities exist, they are minimal and always kept at a distance from the railroad track. To date (aside from Mr. Hovanec’s Verified Statement), I am aware of no complaint by UP that these above-ground facilities negatively impact UP’s operations or maintenance. Importantly, SFPP has never argued that, without the Amended and Restated Easement Agreement (“AREA”), it would be able to maintain these facilities without compensation to UP.

Mr. Hovanec also states: “The Pipeline also impacts our operations when pipeline employees need to enter onto our right-of-way to work.” However, SFPP employees are “rules qualified” by UP and can enter the railroad property without assistance from the railroad. Although SFPP employees notify UP that they will be on the right-of-way, UP typically does not require SFPP personnel to be accompanied by UP personnel. To my knowledge, UP has never before argued that the mere presence of SFPP personnel on the railroad right-of-way interferes with railroad operations.

Finally, Mr. Hovanec states that “[i]n areas where the pipeline is close to the track, we may have to slow down our trains or supply a flagger to notify passing trains that workers are in the area.” On almost all occasions, SFPP personnel work in a manner that is not disruptive to UP’s operations or maintenance. In the rare instances when UP determines that a flagger is necessary, the cost of the flagger is allocated based on which party is requiring the associated work – i.e., if the work is for SFPP’s benefit, SFPP pays for the flagger, and if the work is for UP’s benefit, UP pays for the flagger. This allocation of costs is not derived from the AREA;

but rather, UP imposes these costs pursuant to its track maintenance criteria. In other words, even absent the AREA, SFPP will continue working in a manner not disruptive to UP, and where necessary, will continue to pay for a flagger when SFPP work is being performed.<sup>1</sup>

### **III. SFPP's History of Pipeline Relocation**

UP has made numerous requests to SFPP to relocate or otherwise further protect the pipeline (i.e., protect-in-place). SFPP has **never** refused to relocate its pipeline to accommodate a UP request. SFPP has performed numerous relocations, pursuant to UP's request, and SFPP is currently working cooperatively with UP on additional relocations. To the extent there have been disagreements between the parties over relocation, it was not about whether SFPP would agree to move its pipeline, but instead, only about the standard to be applied to the relocation (so-called "depth and distance" requirements) and the allocation of relocation expenses. I am not aware of SFPP delaying UP's projects. I am likewise unaware of UP obtaining delay damages from SFPP in connection with any pipeline relocation.

The projects mentioned in Mr. Hovanec's Verified Statement are discussed below:

**Sunset Corridor**: The massive Sunset Corridor project Mr. Hovanec references in his Verified Statement does not demonstrate an inherent conflict between UP's rail operations and SFPP's pipeline; but rather, it shows how rare it is for the pipeline to interfere with the operation or maintenance of the railroad. Mr. Hovanec is correct that, throughout this stretch of right-of-way, not a single relocation was required. UP has requested numerous relocations through the years, but there were no such conflicts requiring relocation here. SFPP facilitated the project by coordinating inspectors and doing "pothole" testing, to mark the exact location of the pipeline.

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<sup>1</sup> Mr. Hovanec also references one supposed pipeline incident that allegedly "disrupted Union Pacific's operations" for "several hours." Mr. Hovanec does not provide a date or specific location of this alleged incident, and from the information provided, I could not identify it.

The cost for these tasks was borne entirely by SFPP, not UP. I am not aware, and UP did not apprise me, of any delays caused by SFPP in connection with this project.

**Beaumont Hill:** The Beaumont Hill relocation involved UP's demand that SFPP relocate an approximately 9.4-mile section of pipeline in an area in Riverside County, California known as Beaumont Hill. *See Union Pac. R.R. Co. v. SFPP, L.P.*, Riverside Superior Court Case No. INC055339, California Court of Appeal Case Nos. E062255 and E062823. SFPP agreed to perform the relocation, but reserved the right to litigate responsibility for the cost of relocation. SFPP completed the Beaumont Hill relocation in October 2007. To my knowledge, there was no delay in the project. UP sought no "delay damages" (which it alleged, but later dismissed, in other actions). Meanwhile, the parties continued to litigate over cost allocation. SFPP and UP ultimately entered into a confidential settlement of Beaumont Hill, without any admission of liability.

**Pomona:** The Pomona relocation involved UP's demand that SFPP relocate two pipelines, each 0.3-mile sections, in Pomona, California, to accommodate UP's installation of new track as part of a project by the Alameda Corridor-East Construction Authority ("ACE"). *See Union Pac. R.R. Co. v. SFPP, L.P.*, Riverside Superior Court Case No. PSC1402455. Evidence during the litigation showed that UP's project with ACE was not delayed by the dispute between UP and SFPP, i.e., the relocation of pipeline. UP also stated in sworn discovery responses, and in representations by its counsel, that it had no damages, delay or otherwise, in connection with the pipeline relocation. Indeed, the relocation that UP demanded was not possible until January 2015, when UP acquired the property necessary to complete the relocation. Once UP acquired the property, the parties entered into an agreement whereby SFPP agreed to perform the relocation requested by UP, without any admission of liability.

**Montclair Yard:** The Montclair Yard relocation involved less than a quarter-mile of pipeline in Los Angeles County. SFPP made clear that it was willing to perform the relocation, pending subsequent resolution of certain cost allocation issues. UP failed, however, to take the necessary steps to move the project forward. After further discussions, SFPP completed the relocation in October 2014. As Mr. Hovanec states in his Verified Statement, this relocation dispute was resolved without litigation; however, any delay in the project was a result of UP's inaction, not SFPP. SFPP never refused to relocate the pipeline at Montclair Yard, and SFPP stood willing to perform the relocation at any time.

**Alhambra:** On February 23, 2015, SFPP filed a declaratory judgment action, in Los Angeles Superior Court, related to UP's demand that SFPP relocate, under the AREA, approximately 9 miles of pipeline in Ontario and Fontana, California, under UP's Alhambra Subdivision, at an estimated cost in excess of \$22 million. *See SFPP, L.P. v. Union Pac. R.R. Co.*, Los Angeles Superior Court Case No. BC573396. Alhambra does not involve the issue of whether or not SFPP will relocate its pipeline. SFPP did not refuse to relocate. SFPP seeks a declaration that, to invoke the relocation provision in the AREA, UP must prove sufficient property interests related to its right-of-way in Alhambra. In June 2015, UP requested that SFPP agree to stay the Alhambra matter. SFPP agreed, and the Court entered the stay in July 2015. The Alhambra matter has been stayed – at UP's request – since that time. The parties are presently engaged in detailed settlement discussions for this relocation.

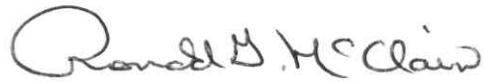
**Casa Grande:** The Casa Grande proposed relocation project relates to approximately one mile of pipeline in Casa Grande, Arizona. UP raised this proposed project at approximately the same time as it raised the Alhambra project, and UP indicated that it would address this relocation contemporaneously with the Alhambra relocation. SFPP stood willing to perform the

requested relocation. To my knowledge, UP has not raised the proposed Casa Grande relocation since 2014. SFPP has not delayed the proposed relocation of the Casa Grande pipeline.

**VERIFICATION**

I, Ronald McClain, verify under penalty of perjury that the foregoing statement is true and correct. Further, I certify that I am qualified and authorized to file this statement.

Executed on November 12, 2015

A handwritten signature in cursive script that reads "Ronald B. McClain".

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Ronald McClain

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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FINANCE DOCKET NO. 35960

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VERIFIED STATEMENT OF  
HARVEY H. STONE, P.E.

My name is Harvey Stone and I am Executive Vice President of Stone Consulting, Inc. a consulting firm that specializes in railroad track planning, design, operations, appraisals and railroad bridges.

I have been a licensed professional engineer for 45 years and have worked in the railroad industry for more than 25 years. I am licensed as an engineer in 31 states. Since 2001, I have been accepted as an expert witness on railroad construction and maintenance on a number of coal rate cases against UP, BNSF, CSX and NS. I have been retained by numerous railroads throughout the country to provide and manage bridge design, bridge inspections, rail feasibility studies, rail design, rail inspection, NLV appraisals and rail equipment appraisals.

My firm is currently employed by Carload Express, which operates three railroads in two states to provide railroad occupancy permit review and approvals for all three of its railroads. In addition to providing this service for Carload Express, we have been retained by a number of clients over the years to obtain railroad occupancy permits from both short line and Class 1 railroads throughout the country. My full background and experience is reflected in Exhibit A.

I have been asked by counsel for SFPP, L.P. (SFPP) to respond to the statement of John J. Hovanec, Assistant Vice President of Union Pacific Railroad. Mr. Hovanec seeks to describe

“specific ways in which the presence of the SFPP pipeline in and along our right-of-way interferes with Union Pacific’s railroad operations.”

### **I. Purported Pipeline Interference with Railroad Maintenance and Operations**

In his Verified Statement, Mr. Hovanec discusses the purported impact of the SFPP pipeline on railroad maintenance operations, and concludes that “the presence of the SFPP pipeline on our right-of-way creates ongoing interference with Union Pacific’s maintenance and railroad operations.” (Page 1; see also Page 2.) While it is true that all occupancies in and along railroad rights-of-way have some impact on railroad maintenance and operations, just as railroad maintenance and operations have some impact on other occupancies, the impacts here are minor. Mr. Hovanec has singled out the SFPP pipeline as causing an “ongoing interference” with UP’s maintenance and operations. Based on my experiences, all underground utilities including pipelines of various types and sizes, fiber optic lines and underground electric lines cause similar if not identical impacts, yet all are able to coexist without any such “ongoing interference” as claimed by Mr. Hovanec.

On page 3 of his Verified Statement, Mr. Hovanec states that there is less room for maintenance crews where the pipeline includes aboveground facilities such as markers, vent pipes, and maintenance access ports. All underground utilities require these items, not only the SFPP pipeline. These items actually make up a very small part of the pipeline occupancy: no more than a fraction of 1% of the pipeline’s length is accompanied by aboveground items.

Utilities occupying the areas where maintenance, repair or construction is taking place are notified and requested to locate their underground structures, pipes, etc., before excavation will occur. Where utilities are known to occupy railroad right-of-way along locations where construction, ditch cleaning, tree removal or any construction type operation is taking place, it is

common practice to protect them with timber mats or steel plates. This is a minor, common measure undertaken by the railroads, and UP would have to take these measures irrespective of SFPP's pipeline, i.e., because of the other occupants in the subsurface, these measures would be required even if SFPP's pipeline were not present.

Railroads such as UP market their excess right-of-way. UP itself claims to “serve as a ready access to a single-source of railroad rights-of-way to connect major metropolitan cities and other geographic regions generally west of the Mississippi River.”<sup>1</sup> Of course, enabling third party access and use of the excess right-of-way provides significant revenues for the railroad. Not only does the railroad collect a permit fee for issuing permission to occupy the railroad right-of-way, it also collects a yearly rental which, according to UP in its on-line permit procedure section 7, is based upon the value of the land occupied.<sup>2</sup>

The FORM 10-Q filing for Union Pacific Corporation<sup>3</sup> for the quarterly period ended September 30, 2015 shows sources and amounts of income. On page 12 of the filing under Section 6 “Other Income” it shows 2015 3rd quarter income of \$25 million for Rental Income. With the first three quarters showing \$71 million, the year-end is likely to be approximately \$96 million in total rental income.

To give an idea of how many occupancies there are in the six states cited by Mr. Hovanec (Oregon, California, Arizona, Nevada, New Mexico and Texas), I reviewed the FRA database for the number of road crossings there are in those six states, i.e., where roads cross the UP and its predecessor lines. There are 17,387 grade crossings (both at-grade and grade separated), just

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<sup>1</sup> <https://www.up.com/aboutup/community/telecom/overview/index.htm>

<sup>2</sup> [https://www.up.com/real\\_estate/utilities/pipeline/pipeline\\_procedure/index.htm](https://www.up.com/real_estate/utilities/pipeline/pipeline_procedure/index.htm)

<sup>3</sup> [http://www.up.com/cs/groups/public/@uprr/@investor/documents/investordocuments/pdf\\_up\\_10q\\_10222015.pdf](http://www.up.com/cs/groups/public/@uprr/@investor/documents/investordocuments/pdf_up_10q_10222015.pdf)

in those six states on the UP lines.<sup>4</sup> (See Table I-1) Generally, there are one or more utility crossings or occupancies associated with each of the grade crossings. As there is no way for me to determine the actual number of utility occupancies there are on the UP lines, this is just an indicator of the order of magnitude with which we are dealing.

UNION PACIFIC GRADE CROSSING INVENTORY TOTALS			
All Crossings - Including Private and Pedestrian (UP open only)			
		At-Grade	
	All Crossings	Crossings	Grade Separated
AZ	617	511	106
CA	4,179	3,293	886
NV	548	421	127
NM	140	113	27
OR	1,186	909	277
TX	<u>10,717</u>	<u>6,532</u>	<u>4,185</u>
Total	17,387	11,779	5,608

**TABLE I-1 UPRR Grade Crossing Inventory**

Regarding pipelines in those six states, according to the Pipeline & Hazardous Materials Safety Administration website, the below quantity of gas and hazardous liquid pipelines is registered. (See Table I-2) These are solely gas and hazardous liquid pipelines and do not include non-hazardous materials, such as water pipelines that also occupy large sections of railroad right-of-way.<sup>5</sup>

<sup>4</sup> For Texas Grade Crossings see <http://safetydata.fra.dot.gov/OfficeofSafety/publicsite/crossing/XingLocResults.aspx?state=48&countycity=&railroad=UP&reportinglevel=INDIVIDUAL&radionm=County&street=&xingtype=%&xingstatus=%&xingpos=1>

<sup>5</sup> [http://opsweb.phmsa.dot.gov/primis\\_pdm/pipeline\\_miles\\_facilities\\_2010up.asp](http://opsweb.phmsa.dot.gov/primis_pdm/pipeline_miles_facilities_2010up.asp)

PIPELINE AND HAZARDOUS MATERIAL SAFETY ADMINISTRATION			
Pipelines in Miles			
	Gas	Liquid	Total
AZ	46,215	587	46,802
CA	212,123	7,144	219,267
NV	19,990	276	20,266
NM	26,618	6,490	33,108
OR	29,508	416	29,924
TX	<u>201,847</u>	<u>58,289</u>	<u>260,136</u>
Total	536,301	73,202	609,503

**TABLE I-2 PHMSA Pipeline Inventory**

Although there is no way to know how many of these miles of pipeline occupy railroad right-of-way, as I understand this information is not publicly available, I believe that a significant amount of the pipeline inventory is located on property owned by railroads. I have determined that pipelines owned by PG&E, Chevron, All Plains, and CalPine, cross UP's right-of-way at a number of locations. Further, within UP's right-of-way, AT&T, Sprint Fiber Optics, Level 3 Fiber Optics, and Quest Communications have subsurface infrastructure near the SFPP pipeline.

Mr. Hovanec continues on page 3 that “[t]he Pipeline also impacts our operations when pipeline employees need to enter onto our right-of-way to work.” Actually, pipeline employees are typically “rules qualified” by UP and can enter UP property without assistance or escort from the railroad. SFPP personnel are required to notify the dispatcher when they will be on the railroad right-of-way, but normally slow orders are not required of the trains and flaggers are not required from the railroad. The mere presence of SFPP personnel on the railroad right-of-way is not an interference with rail operations. It only requires notification that they are present.

While it is possible that work on an SFPP pipeline could disrupt operations of the railroad for a short period of time due to, for example, work in very close proximity to a mainline, these are isolated instances and normally the inspection and maintenance work on the SFPP pipelines

do not disrupt UP rail operations. Mr. Hovanec cites only one such instance (page 4), which apparently had minimal impact on the railroad. Additionally, when UP determines that a flagger will be necessary for SFPP projects, flaggers are used at no cost to UP and SFPP is invoiced for the flagger time.

Similarly, railroad maintenance activities and train accidents can temporarily disrupt operations of the pipeline or other occupant. For example in 2009, the Cherry Valley, IL train derailment occurred, caused by the railroad's failure to notify the train crew of a known washout in time to stop the train.<sup>6</sup> The derailment caused underground pipeline damage, although the pipeline did not breach.<sup>7</sup> Such incidents are very rare, with only five reportable incidents since 1984, according to the National Transportation Safety Board (NTSB).<sup>8</sup> However, “[g]iven the prevalence both of underground pipelines and aboveground railroad tracks, the two must, of necessity, cross at numerous locations,” requiring close coordination and communications between the two operators.<sup>9</sup>

## **II. The Pipeline's Purported Effect on Railroad Capacity Projects**

All of the Class 1 railroads are looking for ways to increase capacity on certain line segments in high demand as it gets more economical to ship goods by rail and rail traffic is picking up. Many of the capacity projects being constructed today are on lines where there was originally double track that was removed when traffic was low.

Mr. Hovanec, in his Verified Statement, maintains that capacity improvements are directly affected by the presence of third-party facilities on the UP operating right-of-way. Through the years, UP and its predecessor railroads have granted the use of their rights-of-way to

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<sup>6</sup> <http://www.nts.gov/safety/safety-recs/recletters/R-12-005-008.pdf>

<sup>7</sup> *Ibid.* pages 9-10.

<sup>8</sup> *Ibid.* page 10.

<sup>9</sup> *Ibid.*

third parties. Now that the railroad wants to increase its throughput by adding additional tracks, extending sidings and building more facilities, Mr. Hovanec states that the occupancies UP allowed through the years may be impacting its ability to maintain and expand its facilities.

Mr. Hovanec states that UP typically requires pipelines to be located no less than 25 feet from the centerline of the closest track and goes on to state that “If a pipeline encroaches on the safe distance from the new track, then it should be relocated.”<sup>10</sup>

Mr. Hovanec goes on to state that a pipeline may have to be relocated or protected if it is too close to the surface in a project area. UP’s own requirements for the strength of structures in their right-of-way require them to meet only H-20 highway loading requirements.<sup>11</sup> Most of the facilities that have been installed along the railroad right-of-way meet these requirements.

On page 5, paragraph 2, of his Verified Statement, Mr. Hovanec maintains that after the railroad has decided to make a capacity improvement, it then looks at third party facilities located near the area of the project and that it is the railroad’s preference to avoid having to relocate existing facilities and they modify the track project to minimize the impact on third party facilities. At a recent seminar held by AREMA titled “Environmental Permitting of Construction Projects,” Dava Kaitala, Senior Supervisory Attorney and General Director of Construction Planning for BNSF stated that the biggest holdup to moving construction projects for BNSF is environmental permitting, not underground utilities.<sup>12</sup>

Based on my experience, these types of co-located facilities are common, and might present occasional engineering challenges, but any such potential conflicts caused by the presence of the co-users are a regular occurrence with all underground utilities including

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<sup>10</sup> Verified Statement of John V. Hovanec, Pg. 6 Ln. 2

<sup>11</sup> [https://www.up.com/real\\_estate/drainage/encroachment/index.htm](https://www.up.com/real_estate/drainage/encroachment/index.htm) Section 7

<sup>12</sup> AREMA Conference Seminar, October 4, 2015 “Environmental Permitting Issues in Railroad Construction Projects”

pipelines of various types and sizes, fiber optic lines and underground electric lines, and are regularly dealt with and resolved in the ordinary course of business, usually without issue.<sup>13</sup> There may be occasional disputes and temporary disruptions where major maintenance or infrastructure work is being performed. However, this has not caused “ongoing interference” of the nature alleged by Mr. Hovanec with any of the involved common carriers (*e.g.*, pipeline or rail) or other occupants’ ability to maintain their infrastructure, operate, serve their customers, and expand when necessary.

To sum up, in my experience with railroad projects throughout the country, utilities located along railroad rights-of-way are usually something that has to be dealt with during construction and sometimes during maintenance projects. It is commonplace to experience this and the railroads and utilities have found it is relatively easy to co-exist. As such, Mr. Hovanec vastly overstates the purported impact that pipelines, in particular SFPP, has on the operation and maintenance of UP’s railroad.

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<sup>13</sup> In many instances, instead of requiring relocation, all that is required is protection of the utilities during construction to avoid the massive costs of utility relocation.

**VERIFICATION**

I, Harvey H. Stone, verify under penalty of perjury that the foregoing statement is true and correct. Further, I certify that I am qualified and authorized to file this statement.

Executed on November 13, 2015



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Harvey H. Stone

# **EXHIBIT A**

to

**Verified Statement of  
Harvey H. Stone, P.E.**

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**Finance Docket No. 35960**



#### Affiliations & Memberships

American Council of Engineering Companies, Member  
Past Chairman, Quality Committee  
American Railway Engineering & Maintenance of Way  
Association (AREMA), Member  
APTA Vintage Streetcar Committee, Member

#### Registrations

Professional Engineer :

AR; CO; FL; GA; IL; MD; ME; MI; MN; MO; MT; NC; NH;  
NY; OK; PA; TN; TX; UT; VA; WI; IA; MA; NE; NV; OR;  
RI; SC; VT; WA; WY;  
Land Surveyor: PA, 1968

Years of Experience 50

Years with Firm 19

#### Education

B.S.C.E., Civil Engineering

Rensselaer Polytechnic Institute, 1964

Continuing Education courses from among others, the  
University of Wisconsin at Madison

#### Professional Experience

Mr. Stone was employed by the US Army Corps of Engineers for more than two years overseas as well as in the US. After the COE he worked as a project engineer for a construction contractor. From 1968 to 1996 he was employed as an engineer by Northwest Engineering, Inc., a general engineering firm, where he rose to the position of president in 1981 and remained president until he left the firm in 1996. During his tenure with Northwest Engineering, he designed railroad tracks, roads, industrial parks, bridges, water lines, storm water lines, sewer lines and sewage treatment plants.

In 1996 Mr. Stone established Stone Consulting and Design, Inc. to provide a consulting service to the industrial development, and rail industries. Three of the four people that started Stone Consulting & Design, Inc. with Mr. Stone are still with Stone Consulting, Inc. Stone Consulting & Design, Inc. merged with TranSystems in 2007 and was reestablished as Stone Consulting, Inc. in 2010.

During Mr. Stone's many years of experience, he has designed railroad track, streetcar track and bridges and he has inspected numerous vehicle and railroad bridges. He is frequently called upon to prepare preliminary engineering feasibility studies for industrial development projects and rail projects involving federal and state grants, many of which have been funded and constructed.

Mr. Stone has many railroad design, rehabilitation and inspection projects that he has supervised over his many years of experience. In 2004 he began assisting in writing engineering and maintenance testimony for coal-rate cases before the Surface Transportation Board (STB). In 2006 he was accepted by the STB as an expert witness in railroad design, construction and maintenance and since then has provided the engineering and maintenance testimony on eight coal rate cases that have been adjudicated before the STB.

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He has designed at-grade railroad crossings and has provided in-street track design for several streetcar projects including those in Tampa, Kenosha and St. Louis.

Mr. Stone has prepared expert witness reports for cases in Federal and State courts.

Mr. Stone is an active member of the American Council of Engineering Companies (ACEC), APTA Vintage Streetcar Committee, PA Economic Development Assoc. and the American Railway Engineering and Maintenance of Way Association. His membership in the ACEC has enabled him to obtain invaluable exposure to the many changes in engineering technology over the years as well as continued awareness of the constantly changing rules, regulations and grant programs on all governmental levels. He is a past chairman of ACEC's Quality Committee on which he served for more than ten years and is currently on the Curriculum Committee.

### **Project Experience**

#### **Allegheny Valley Railroad, (Carload Express) Pittsburgh, PA**

Capital improvements grant for \$5.4 million project replacing worn jointed rail with Class 1 welded rail along 6 miles of AVRR Main; track rehabilitation of the 7-mile Brilliant Branch, Pittsburgh Branch and Main Line; Design of a Pittsburgh Strip District rail siding; preliminary design for an industrial park rail access spur; complete rebuild of the Indian Run Branch. Inspection of bridges in Verona, PA.

Re-design of Glenwood Rail Yard including rail and deck replacement for a bridge, new sidings for car staging, and car storage. This is a \$5 million job that is being completed in phases with phase 1 complete and phase 2 funded and currently in design.

#### **Carload Express, Pittsburgh, PA**

Review and approval of railroad right-of-way occupancy permit applications on behalf of the three railroad lines owned by Carload Express.

#### **Western New York & Pennsylvania Railroad, Falconer, New York**

Mr. Stone provided the engineering design for \$9.3 million track rehabilitation program including tie and rail replacement, surfacing, geometry testing and 11 miles of CWR replacement. Rehabilitation of several concrete bridge structures as well as design of a replacement structure after a flood washed it away.

#### **Main Street Bridge Rehabilitation, Jamestown, NY**

Rehabilitation of a very deteriorated concrete railroad bridge for the City of Jamestown. Included inspection, preparation of plans and specifications, cost estimate and construction observation.

#### **New York Mandated Annual FRA Railroad Bridge Inspections and Reports**

Railroad Bridge inspections for New York & Ogdensburg Railroad, Arcade & Attica Railroad, Owego & Harford Railroad and Western New York & Pennsylvania Railroad.

#### **Meridian Southern Railroad, Meridian, Mississippi**

Three rounds of bridge inspections, 86 timber bridges and several concrete and steel truss structures were inspected. Stone has also provided load ratings and bridge repair and reinforcement design services.

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**Kenosha Harborfront Trolley, Kenosha, Wisconsin**

Design of a \$2,800,000 trolley system for downtown trolley loop to run from the harborfront to the railroad station, including steel and concrete ties with new welded rail and overhead wire.

**Greater Erie Industrial Development Corporation, Erie, Pennsylvania**

Erie bio-diesel plant, rail yard, storage track, rail car loading facilities and unloading facilities, spill containment area and bridge rehabilitation. This was a \$3.4 million project.

**SPEDDCORP Business Park, Berwick, Pennsylvania**

Project Engineer for a new industrial park located on a Brownfield site. The project includes demolition and cleanup of over 200,000SF of structurally unsound buildings and the design of several new buildings, access roads and parking facilities.

**United Refining Corporation, Warren, Pennsylvania**

Design and construction observation for new Ethanol unload facility included track, unloading racks and spill containment. Design of bulk unloading facility for crude oil tank car unit trains in the Buffalo, NY area.

**Schmalbach-Lubeca, Erie, Pennsylvania**

SC&D led a design/build team on this \$3 million project for design and construction of a new state-of-the-art 57,000SF Machine Shop & Plastic Blow Mold Facility.

**San Antonio Historic Trolley Study, San Antonio, Texas**

Working as a sub-consultant for Bender Wells Clark, produced a study for the implementation of a trolley project to connect the River Walk with the Alamo and other attractions.

**Bionol Clearfield, LLC**

Design of rail access, loading & unloading facilities for an ethanol plant. Project also included additional yard track and rehabilitation of an existing yard siding to accommodate unit trains of corn.

**Consol Energy, Canonsburg, PA**

Preliminary site planning and design of 13 mile railroad line to access a proposed coal mine in West Virginia. Design approved by NS Railroad and submitted to STB for review and approval.

# **EXHIBIT 1**

**to**

**Reply in Opposition to Petition of  
Union Pacific Railroad Company  
for Declaratory Order**

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**Finance Docket No. 35960**

2015 WL 3536881

Only the Westlaw citation is currently available.  
United States District Court,  
C.D. California.

SFPP, L.P.

v.

UNION PACIFIC RAILROAD COMPANY, et al.

No. LA CV15–01954 JAK (PLAx). | Signed June 3,  
2015.

#### Attorneys and Law Firms

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Monica, CA, Michael L. Whitcomb, Union Pacific  
Railroad Company, Roseville, CA, for Union Pacific  
Railroad Company, et al.

#### Proceedings: (IN CHAMBERS) ORDER RE PLAINTIFF'S MOTION TO REMAND (DKT.25)

JOHN A. KRONSTADT, District Judge.

\*1 Andrea Keifer, Deputy Clerk.

#### I. Introduction

SFPP, L.P. (“Plaintiff”) brought this action in the Los Angeles Superior Court against Union Pacific Railroad Company (“Defendant”). The Complaint seeks declaratory relief in the form of the appropriate interpretation of certain terms of the operative contract between the parties. Specifically, Plaintiff seeks a determination that Defendant must establish its ownership rights to certain real property on which Plaintiff has an easement for the placement of underground pipelines, before Defendant can require Plaintiff to relocate them. Dkt. 1, Ex. 1. Defendant disputes this interpretation of the contract.

Defendant removed the action pursuant to 28 U.S.C. §§

1331 and 1441. Although the complaint does not present a federal cause of action, Defendant contends that there is federal jurisdiction as to Plaintiff’s claim because its resolution will involve the interpretation of federal law about which the parties disagree. Dkt. 1. Following removal, Defendant filed a counterclaim against Plaintiff seeking declaratory relief as to its rights pursuant to the contract between the parties. Specifically, Defendant seeks a determination that certain 19th Century actions by Congress granted to Defendant ownership rights to the real property at issue and that such rights provide a sufficient basis for it to require Plaintiff to relocate its pipelines. Dkt. 10, 29.

Plaintiff filed a Motion to Remand (the “Motion”). Dkt. 25. Defendant filed an opposition (Dkt.30) and Plaintiff replied (Dkt.32). A hearing on the Motion was conducted on May 18, 2015, at the conclusion of which the matter was taken under submission. Dkt. 37. For the reasons stated in this Order, the Motion is **GRANTED**.

#### II. Factual Background

##### A. The Allegations in the Complaint

Plaintiff is a successor entity to Santa Fe Pacific Pipeline, Inc. and Southern Pacific Pipelines, Inc. Compl., Dkt. 1, Ex. 1 ¶ 6. Defendant is the successor entity to Southern Pacific Transportation Company and Southern Pacific Railroad Corporation. *Id.* ¶ 7. On July 29, 1994, these predecessor entities entered into a contract that is titled, “Amended and Restated Easement Agreement” (the “AREA”).*Id.* ¶ 2. Section 1(a) of the AREA granted to Plaintiff’s predecessors a “perpetual and non-exclusive easement and right to construct, reconstruct, renew, maintain, and operate a pipe line and appurtenances ... in, upon, along, and across the property of Railroad.”*Id.* ¶ 10; *see also id.*, Ex. A. It is undisputed that the rights granted by the AREA are now held by Plaintiff. Section 3 of the AREA provides that

in the event that Railroad shall at any time deem necessary, [Plaintiff] shall, upon receipt of written notice so to do, at [Plaintiff’s] sole cost and expense, change the location of said pipe line, its adjunct or appurtenances, on railroad property to such point or points thereon as Railroad shall designate and reconstruct or reinforce the same.

\*2 *Id.* ¶ 11; *see also id.*, Ex. A.

On August 19, 2014, Defendant provided written notice of its request that Plaintiff relocate its pipeline (the “Alhambra Pipeline”). Defendant stated that the relocation was necessary due to Defendant’s installation of a second main line railroad track over its Alhambra Subdivision in the Los Angeles area (the “Alhambra Property”). *Id.* ¶ 18. Defendant has “threatened SFPP with costs and damages if SFPP failed to relocate the Alhambra Pipeline.” *Id.* ¶ 19.

On December 3, 2014, Plaintiff responded through a letter requesting that, “in light of [a] recent court ruling [by the California Court of Appeal in a related action],” Defendant demonstrate, pursuant to the AREA, that it has sufficient ownership interest in the property on which the Alhambra Pipeline is located to justify the requested relocation. *Id.* ¶ 21; *see also id.*, Ex. D. On February 6, 2015, Defendant replied by letter stating that Plaintiff’s “duty to relocate under the AREA or otherwise is not affected by the recent Court of Appeal decision regarding payment of rent.” *Id.* ¶ 22; *see also id.*, Ex. E. Defendant also repeated its demand that Plaintiff relocate the Alhambra Pipeline. *Id.* On February 18, 2015, Plaintiff sent another letter to Defendant in which it again requested that Defendant explain why it is entitled to require either the relocation of the portions of the Alhambra Pipeline *from* property that Defendant does not own, and/or their relocation *to* property that Defendant does not own. *Id.* ¶ 23.

When this action was filed the parties remained at an impasse. Defendant maintains that Plaintiff is required to relocate the Alhambra Pipeline, and Plaintiff responds that, before requiring such an action by Plaintiff, Defendant must demonstrate that it has sufficient title to the Alhambra Property. *Id.* ¶ 24.

Plaintiff filed this action in the Los Angeles Superior Court on February 23, 2015. Dkt. 1, Ex. 1. On March 12, 2015, Plaintiff filed a notice of related case, requesting that this action be transferred to the Superior Court judge to whom a related action had been assigned. Request for Judicial Notice (“RJN”), Dkt. 25–9, Ex. 6.<sup>3</sup> On March 17, 2015, which was five days later, Defendants removed the action.<sup>3</sup>

## B. Prior Litigation

Three other cases in which Plaintiff and Defendant are adverse parties are now pending in California courts: (i) *Union Pacific Railroad Company v. Santa Fe Pacific Pipelines, Inc. et al.*, Los Angeles County Superior Court, BC 319170, California Court of Appeal, B242864,

California Supreme Court, S223179 (the “Rental Action”); (ii) *Union Pacific Railroad Company v. SFPP, L.P.*, Riverside County Superior Court, INC 055339, California Court of Appeal E062255 and E062823 (the “Beaumont Hill Action”); and (iii) *Union Pacific Railroad Company v. SFPP, L.P.*, Riverside County Superior Court, PSC 1402455 (the “Pomona Action”). Dkt. 17. Because certain issues in these actions are related to certain of those presented here, each of the actions is described.

### 1. The Rental Action

\*3 In the Rental Action, Defendant sought a determination of the amount of rental payments due from Plaintiff under the AREA for the use of its pipeline easement between 2004 and 2014. Defendant’s claim concerned rent as to all 1800 miles of pipeline easements that Defendant purported to grant to Plaintiff under the AREA. This includes those easements that are at issue in this action as well as others. After a bench trial in the Los Angeles Superior Court, it was determined Defendant was entitled to annual rental payments from Plaintiff of more than \$14 million per year. *UPRC*, 231 Cal.App.4th 134, 145, 180 Cal.Rptr.3d 173 (2014). An appeal followed. On November 5, 2014, the California Court of Appeal for the Second District issued its opinion (the “COA Opinion”). *Id.* The COA Opinion affirmed the ruling by the trial court that collateral estoppel did not apply, but reversed and remanded as to all other issues.

The COA Decision determined that the 1875 Congressional Act, 43 U.S.C. §§ 934–939, “did not provide the railroad with sufficient property interests to justify its collecting rent on the pipeline’s subsurface easements.” *Id.* at 160, 180 Cal.Rptr.3d 173. After analyzing case law regarding railroad property rights pursuant to the 1875 Congressional Act, the appellate court determined that

the railroad’s rights to the land underneath its rights-of-way granted by the 1875 Act were limited to what was necessary to support the railroad itself. Otherwise, the rights to the subsurface remained with the owner of the servient estate.<sup>4</sup> Put another way, the 1875 Act granted the Railroad substantial rights to the surface of the land over which it operates its trains, but it did not make the subsurface the “property of the railroad.” [¶] Therefore, the

Railroad's right to collect rent from the Pipeline for use of its subsurface easements cannot be based solely on acquisitions obtained via the 1875 Act or its progeny.

*Id.* at 164–65, 180 Cal.Rptr.3d 173.

The COA Decision also determined that the Congressional Acts that were adopted prior to 1871 “did not provide the railroad with sufficient property interests to justify its collecting rent on the pipeline’s subsurface easements.”*Id.* at 165, 180 Cal.Rptr.3d 173. It concluded that

The Railroad may use the subsurface underlying its pre–1871 rights-of-way for things that support the construction and operation of their railroad-i.e., for railroad purposes. But it cannot use the subsurface for other purposes. Renting out the subsurface to a third party from a different industry for private gain cannot reasonably be considered a railroad purpose. [¶] Therefore, the Railroad’s right to collect rent from the Pipeline for use of subsurface easements under the Railroad’s “right-of-way property” cannot be based solely on acquisitions obtained via the pre–1871 Acts.

*Id.* at 170, 180 Cal.Rptr.3d 173.

The appellate court also concluded that

the case must be remanded to the trial court for further proceedings to determine which pipeline easements ran through the “property of the railroad” between January 1, 2004, and December 31, 2013. Rent may be charged by the Railroad only on those easements. Rent may not be charged on easements that ran through rights-of-way acquired by the Railroad solely via the Congressional Acts.

\*4 *Id.* at 178, 180 Cal.Rptr.3d 173. The COA Opinion

then stated:

We merely hold that (1) the pre–1871 and 1875 Congressional Acts, by themselves, did not convey a sufficient property interest to the Railroad to justify its collecting rent on the Pipeline’s subsurface easements; and (2) the Railroad has the burden to prove what parcels were the “property of the railroad” from January 1, 2004, through December 31, 2013, before it can collect rent from the Pipeline for easements traversing those parcels during that period of time.

*Id.* at 209, 180 Cal.Rptr.3d 173. Defendant filed a petition for rehearing with the Court of Appeal. It was denied on December 5, 2014. RJN, Dkt. 25–3, Ex. 1. Defendant then filed a petition for review in the California Supreme Court. It was denied on January 21, 2015. *Id.* Ex. 2. Defendant did not file a Petition for Certiorari seeking review by the United States Supreme Court.

## 2. *The Beaumont Hill Action*

This action relates to Defendant’s request that, pursuant to the AREA, Plaintiff relocate a 9.4 mile section of pipeline in Riverside County. Following a trial, the Superior Court entered judgment for Defendant that required Plaintiff to pay relocations costs. This matter is currently on appeal to the California Court of Appeal for the Fourth District. On February 4, 2015, based on the COA Opinion issued in the Rental Action, Plaintiff filed a Petition for Writ of Error *Coram Vobis* in the Court of Appeal for the Fourth District requesting that the judgment of the Riverside County Superior Court be vacated. Specifically, Plaintiff requested a determination that Defendant’s title in the property at issue, which was obtained by a Congressional Act, was not per se a sufficient basis to entitle Defendant to require or grant Plaintiff the pipeline easements. Plaintiff instead argued that, under the COA Opinion, Defendant was required to prove what parcels were the “property of the railroad” in Beaumont Hill pursuant to the AREA. RJN, Dkt. 25–7, Ex. 4. On February 19, 2015, the Court of Appeal for the Fourth District issued an order to show cause why the requested relief should not be granted. *Id.*, Ex. 5.

## 3. *The Pomona Action*

This action, which is pending in the Los Angeles Superior

Court at its Pomona Courthouse, arises from Defendant's request that, pursuant to the terms of the AREA, Plaintiff relocate a section of its pipeline in Pomona, California. It is presently set for a jury trial this summer. No issues are presented as to land granted to Defendant pursuant to Congressional Acts.

### III. Analysis

#### A. Whether the Court Has Subject Matter Jurisdiction over this Action

##### 1. Legal Standard

Federal courts have limited jurisdiction. See *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994). Therefore, a determination of subject matter jurisdiction must be made before the merits of a case can be addressed. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998). If at any time before final judgment the court determines that it is without subject matter jurisdiction, a removed action shall be remanded to the state court in which it was originally filed. 28 U.S.C. § 1447(c).

\*5 The party removing an action bears the burden of establishing federal jurisdiction. *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir.1992). "Where doubt regarding the right to removal exists, a case should be remanded to state court," because "it is well established that the plaintiff is master of her complaint and can plead to avoid federal jurisdiction." *Matheson v. Progressive Specialty Ins. Co.*, 319 F.3d 1089, 1090 (9th Cir.2003).

Federal courts have original jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. In general, a case arises under federal law when "federal law creates a cause of action." *Wander v. Kaus*, 304 F.3d 856, 858 (9th Cir.2002).

Federal question jurisdiction may also arise when a "substantial, disputed question of federal law is a necessary element of one of the well-pleaded state claims." *Id.* (quoting *Franchise Tax Bd. of State of Cal. V. Constr. Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 13, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983)). This is a "'special and small category' of cases in which arising under jurisdiction still lies." *Gunn v. Minton*, — U.S. —, —, 133 S.Ct. 1059, 1064, 185 L.Ed.2d 72 (2013) (citing *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 699, 126 S.Ct. 2121, 165 L.Ed.2d 131 (2006)). Thus, "federal jurisdiction over a state law claim

will lie if a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *Gunn*, 547 U.S. at 1065 (citing *Grable & Sons Metal Products, Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 310, 125 S.Ct. 2363, 162 L.Ed.2d 257 (2005)). "Where all four of these requirements are met ... jurisdiction is proper because there is a 'serious federal interest in claiming the advantages thought to be inherent in a federal forum,' which can be vindicated without disrupting Congress's intended division of labor between state and federal courts." *Id.* This doctrine "captures the commonsense notion that a federal court ought to be able to hear claims recognized under state law that nonetheless turn on substantial questions of federal law, and thus justify resort to the experience, solicitude, and hope of uniformity that a federal forum offers on federal issues[.]" *Grable*, 545 U.S. at 312.

Determinations about "federal jurisdiction require sensitive judgments about congressional intent, judicial power, and the federal system." *Merrell Dow Pharms. Inc. v. Thompson*, 478 U.S. 804, 810, 106 S.Ct. 3229, 92 L.Ed.2d 650 (1986). Under the "'well-pleaded complaint rule,' federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987).

##### 2. Application

Because the Complaint does not allege a federal cause of action, Defendant relies on the second basis for federal jurisdiction. Thus, it contends that the action raises a substantial, disputed question of federal law that is a necessary element of Plaintiff's declaratory relief claim.

##### a) Whether a Federal Question is "Necessarily Raised"

\*6 Defendant contends that Plaintiff's declaratory relief claim necessarily raises a question of federal law—whether property rights granted pursuant to the pre-1871 and 1875 Congressional Acts conveyed to Defendant, or its predecessors, sufficient interest in the relevant real property to support Defendant's demand that Plaintiff relocate its pipelines. Accordingly, it argues that the determination of the declaratory relief claim will require interpretation of one or more Acts of Congress.

The pre-1871 and 1875 Congressional Acts are "necessarily raised" by the Complaint. It alleges that

Defendant does not have a sufficient property interest to the Alhambra Property to warrant its demand for relocation of the pipelines. Compl., Dkt. 1, Ex. 1 ¶¶ 13–16. The basis for these allegations is Plaintiff’s assertion about the limited interest in the Alhambra Property that was granted to Defendant pursuant to the pre–1871 and 1875 Congressional Acts. Plaintiff contends that these Acts did not convey a sufficient property interest to entitle Defendant to grant subsurface pipeline easements to Plaintiff. That this is a basis for Plaintiff’s claims is confirmed by the allegations in the Complaint about the COA Opinion. Thus, the Complaint alleges that the Court of Appeal held that the pre–1871 and 1875 Congressional Acts did not per se convey a sufficient property interest to Defendant to justify its charging rent to Plaintiff for its subsurface easements. Instead, the Complaint alleges that the COA Opinion held that, on remand, Defendant would be required to prove what parcels were the “property of the railroad” before it could collect rent from Plaintiff. Compl., Dkt. 1, Ex. 1 ¶¶ 13–16. The Complaint also alleges that because

a substantial portion of [Defendant’s] right-of-way at issue in the proposed Alhambra relocation was obtained by [Defendant’s] predecessors via Congressional Act, including the pre–1871 Acts and the 1875 Act. [Plaintiff] therefore alleges, on information and belief, that [Defendant] does not have sufficient title in this property to invoke the relocation provision under the AREA.

*Id.* ¶ 20.

Plaintiff argues that no federal issue is raised on the face of the Complaint. It contends that the declaratory relief sought does not ask for a determination about the extent of the property interest granted by the pre–1871 and 1875 Congressional Acts. Nor does the Complaint seek any particular determination as to Defendant’s title to the Alhambra Property.<sup>5</sup> Instead, according to Plaintiff, the Complaint seeks only a declaration that, pursuant to the terms of the AREA, Defendant is required to prove that it has title to the Alhambra Property before it can require Plaintiff to relocate its pipelines. That issue will turn on an interpretation of the AREA. Plaintiff argues that issue is distinct from whether Defendant actually has title to the property. Therefore, no analysis of the Congressional Acts is required to determine the appropriate declaratory relief. Rather, the Complaint raises questions of contract

interpretation, which is a state law issue.

\*7 Plaintiff is correct that the Complaint raises substantial issues about the interpretation of the AREA. Thus, a determination that the AREA does not require Defendant to prove its ownership of the Alhambra Property as a condition to requiring Plaintiff to relocate its pipelines, would be dispositive of Plaintiff’s request for declaratory relief and would not necessarily require an interpretation of federal law. But, the analysis may not necessarily be cabined in this way. For example, it appears that the AREA assumed that Defendant owned the property that was the subject to the contract. That is the basis on which Defendant’s predecessor granted the easements through the AREA. Similarly, one or both parties could have been mistaken about land ownership at the time that they entered the AREA. An analysis of that issue could require a consideration of their respective understandings as to the property interests conveyed to Defendant by the pre–1871 and 1875 Congressional Acts. That issue has been addressed in detail in the COA Opinion in which these statutes were interpreted.<sup>6</sup>

The letters by Plaintiff’s counsel, which preceded the filing of the Complaint, are consistent with this view. The initial letter states:

The California Court of Appeal recently ruled that Union Pacific must prove that it has sufficient ownership interests in its railroad right-of-way to collect rent from SFPP for subsurface pipeline easements pursuant to the AREA. Union Pacific’s demand that SFPP relocate its pipeline at the Alhambra Subdivision is entirely predicated on the AREA and Union Pacific’s grant of subsurface pipeline easements to SFPP pursuant to the AREA. Accordingly, in light of this recent court ruling, SFPP requests that Union Pacific demonstrate, for any affected segment of pipeline, that it is the full fee owner of the right-of-way before SFPP will go forward with any relocation plans.

Dkt. 1–1, Ex. D. The second letter from Plaintiff’s counsel adds:

Mr. Hovenac [counsel for Defendants] mischaracterizes the Court of Appeal Opinion

(“Opinion”). Importantly, the Opinion does not merely relate to the payment of rent. The Opinion held that, with respect to the right-of-way Union Pacific acquired via the pre-1871 and 1875 Congressional Acts (“Congressional Act right-of-way”), Union Pacific does not have sufficient ownership interests in the subsurface property to convey pipeline easements to SFPP or require rental payments. Thus, the subsurface of Congressional Act right-of-way is not “property of [the] Railroad,” and the AREA does not govern these easements. Further, if Union Pacific cannot convey easements under Congressional Act right-of-way, it certainly cannot require relocation of those pipelines.

Dkt. 1–1, Ex. F.

For these reasons, a question of federal law is raised by the Complaint. The COA Opinion was an important predicate for Plaintiff’s request for an interpretation of the AREA. That decision relied on an interpretation of federal law. The interpretation of the AREA may well require a consideration of these or similar issues.

#### **b) Whether a Federal Question is Actually Disputed**

\*8 To raise a federal issue that is “actually disputed,” a state cause of action must “really and substantially involve[e] a dispute or controversy respecting the validity, construction or effect of [federal] law.” *Grable*, 545 U.S. at 313. The COA Opinion analyzed and determined the scope of the property rights granted to Defendant by the pre-1871 and 1875 Congressional Acts. *See UPRC*, 231 Cal.App.4th at 164–65, 180 Cal.Rptr.3d 173 (“the railroad’s rights to the land underneath its rights-of-way granted by the 1875 Act were limited to what was necessary to support the railroad itself. Otherwise, the rights to the subsurface remained with the owner of the servient estate. Put another way, the 1875 Act granted the Railroad substantial rights to the surface of the land over which it operates its trains, but it did not make the subsurface the “property of the railroad.”) (“The Railroad may use the subsurface underlying its pre-1871 rights-of-way for things that support the construction and operation of their railroad—i.e., for railroad purposes. But

it cannot use the subsurface for other purposes. Renting out the subsurface to a third party from a different industry for private gain cannot reasonably be considered a railroad purpose.”).

Based on these legal conclusions, the core federal issue presented here—the standard for determining the scope of Defendant’s ownership of the property—has been determined by the COA Opinion, which applies to the parties to this action. Thus, in its opinion, the Court of Appeal determined that the Defendant’s rights pursuant to the pre-1871 and 1875 Congressional Acts is limited to the real property that is used for railroad purposes or is necessary to support the railroad. Under these circumstances, this element has less force in connection with determining whether to exercise federal jurisdiction.

#### **c) Whether a Federal Question is Substantial**

“The substantiality inquiry under *Grable* looks [ ] to the importance of the issue to the federal system as a whole.” *Gunn*, 133 S.Ct. at 1066; *see also Grable*, 545 U.S. at 313 (“federal jurisdiction [over state action] demands not only a contested federal issue, but a substantial one, indicating a serious federal interest in claiming the advantages thought to be inherent in a federal forum.”). Interpretation of the pre-1871 and 1875 Congressional Acts presents an issue important to the federal system as a whole. *See Nicodemus v. Union Pac. Corp.*, 440 F.3d 1227, 1234 (10th Cir.2006) (interpretation of pre-1871 Congressional Act presented substantial federal issue under *Grable* because “[t]he statutes at issue granted to Union Pacific the right to construct a railroad and telegraph line in order to “secure the safe and speedy transportation of the mails, troops, munitions of war, and the public stores” to the West. *See, e.g.*, Act of July 1, 1862, ch. 120, § 3, 12 Stat. 489. Under subsequently enacted statutes, the United States has a reversionary interest in the lands when no longer used for their designated purposes. *See* 43 U.S.C. §§ 912, 913 and 16 U.S.C. § 1248(c). Thus, the government has a direct interest in the determination of property rights granted to the railroad.”).

\*9 Plaintiff argues that a determination of any federal issue will be tethered to the AREA. If this were a sufficient basis for federal jurisdiction, it would be based on a “fact-bound and situation-specific” question. Plaintiff contends that the Supreme Court has cautioned against applying the *Grable* exception in this manner, and cites *Empire Healthchoice Assur., Inc. v. McVeigh*, 547 U.S. 677, 701, 126 S.Ct. 2121, 165 L.Ed.2d 131 (2006). There, a health insurance carrier that provided coverage for federal employees brought an action against the estate

of a former insured. In that action it sought reimbursement of insurance benefits that it had paid because the insured had recovered damages for his injuries in a state court tort action. *Empire* distinguished *Grable*, as a case that presented “a nearly pure issue of law” whose resolution would be “both dispositive of the case and would be controlling in numerous other cases.” *Id.* at 700 (internal quotation marks omitted). In contrast, the Court concluded that the claim in *Empire*, “[wa]s fact-bound and situation-specific” and one that would turn on a determination of the particular charges by the health care providers and whether services were properly attributable to specific injuries caused by a specific set of circumstances. *Id.* at 701.

A resolution of the federal issue here would not be dispositive of this action. Significant factual issues would remain as to the interpretation and application of the AREA. They would include a determination as to what property is reasonably necessary for the Defendant’s railroad operations and how that overlaps with the land in which the pipelines are located. That factual issue is framed by the legal analysis as to what was conveyed to Defendant by the operative Congressional Acts.

On balance, the federal issue is substantial.

d) Whether Resolution Would  
Disrupt the Federal–State  
Balance

The resolution of this action in this court would disrupt the federal-state balance. “[E]ven when the state action discloses a contested and substantial federal question, the exercise of federal jurisdiction is subject to a possible veto. For the federal issue will ultimately qualify for a federal forum only if federal jurisdiction is consistent with congressional judgment about the sound division of labor between state and federal courts governing the application of [28 U.S.C.] § 1331.” *Grable*, 545 U.S. 308 at 313–14, 125 S.Ct. 2363, 162 L.Ed.2d 257.

As the Ninth Circuit has explained,

The exercise of federal jurisdiction must not “disturb [ ] any congressionally approved balance of federal and state judicial responsibilities.” [*Grable*, 545 U.S.] at 314, 125 S.Ct. 2363, 162 L.Ed.2d 257. The Supreme Court has instructed federal courts to approach 28 U.S.C. § 1331 “with an eye to practicality and necessity.” “*Merrell Dow*, 478 U.S. at 810, 106 S.Ct. 3229, 92 L.Ed.2d 650 (quoting *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 20, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983)). The Court has “consistently emphasized that, in exploring the outer

reaches of § 1331, determinations about federal jurisdiction require sensitive judgments about congressional intent, judicial power, and the federal system.” *Id.*

\*10 *Nevada v. Bank of Am. Corp.*, 672 F.3d 661, 675–76 (9th Cir.2012).

The questions of contractual interpretation presented by this action are at least as significant as the federal issue presented. The significance of the underlying federal issue will turn on the interpretation of the contract. Moreover, the contractual interpretation issues presented are complex. For example, if some form of mistake were shown to have occurred at the time of the entry of the AREA, substantial issues of appropriate remedies, which would arise under California law, would be presented. Such matters are best left to California courts.

Further, there has been a substantial amount of litigation between these parties in California courts. Three separate actions involving the parties are currently pending in California courts. The California Court of Appeal for the Second District has thoroughly examined the two congressional acts at issue and made determinations regarding their application to the AREA. That analysis will substantially inform the present matter. Should this matter proceed in the Los Angeles Superior Court where it was originally filed, the Superior Court would be bound to apply that interpretation. In addition, the application of the test established in the COA Opinion will occur in the Rental Action. It makes sense to have the similar related issues presented here, resolved by the same Superior Court.

Furthermore, the federal issue presented here, i.e., whether Defendant has sufficient property interest from the Congressional Acts to require Plaintiff to relocate pursuant to the AREA, is currently before the California Court of Appeal for the Fourth District. Should it reach a determination that is different from what was decided by the Second District in the COA Opinion, the California Supreme Court could elect to resolve the dispute. Thereafter, were substantial federal issues presented, a petition for review could be filed with the U.S. Supreme Court.

Finally, Plaintiff and Defendant have been litigating interrelated matters in California courts for more than two decades. California courts have already substantially analyzed the contractual relationship between these parties, as well as the AREA that underlies this action. Given the scope of overlap in the operations of the parties, more litigation is likely to occur in the future. Were the interpretation of the federal issues presented

here deemed sufficient to establish federal jurisdiction, it would likely lead to a migration of all future disputes to the federal system. This would upset the appropriate federal-state balance in which disputes as to real property rights as well as competing business needs and objectives are best left for state courts to decide.

“*Grable* emphasized that it takes more than a federal element “to open the ‘arising under’ door.” *Empire*, 547 U.S. at 701. As in *Empire*, “[t]his case cannot be squeezed into the slim category *Grable* exemplifies.” *Id.* This determination is made “with an eye to practicality and necessity.” *Bank of Am. Corp.*, 672 F.3d at 675–76 (quoting *Merrell Dow*, 478 U.S. at 810).

\* \* \*

\*11 For these reasons, the Motion is GRANTED. Plaintiff requests an award of costs and fees incurred as a result of the removal of this action by Defendant. This request is DENIED.

## B. Whether the Court Should Abstain from Adjudicating this Action

Plaintiff contends that even if the Court had subject matter jurisdiction over this action, it should decline to exercise it pursuant to the doctrine of declaratory relief abstention.

The goals for a district court to follow in deciding whether to exercise jurisdiction in a declaratory judgment action when a parallel action<sup>7</sup> is pending in state court are: (1) to avoid needless determination of state law issues, (2) to discourage litigants from filing declaratory actions as a means of forum-shopping, and (3) to avoid duplicative litigation (the “*Brillhart* factors”). *Gov’t Employees Ins. Co. v. Dizol*, 133 F.3d 1220, 1225 (9th Cir.1998); see *Brillhart v. Excess Ins. Co. of America*, 316 U.S. 491, 62 S.Ct. 1173, 86 L.Ed. 1620 (1942). In applying this test, a district court must “balance concerns of judicial administration, comity, and fairness to the litigants.” *Chamberlain v. Allstate Ins. Co.*, 931 F.2d 1361, 1367 (9th Cir.1991). “A district court, therefore, when deciding whether to exercise its jurisdiction under the Declaratory Judgments Act, must balance concerns of judicial administration, comity, and fairness to the litigants.” *Id.*

The “*Brillhart* factors remain the philosophic touchstone for the district court.” *Government Employees Ins. Co. v. Dizol*, 133 F.3d 1220, 1225 (9th Cir.1998). “The district

court should avoid needless determination of state law issues; it should discourage litigants from filing declaratory actions as a means of forum shopping; and it should avoid duplicative litigation.” *Id.* “If there are parallel state proceedings involving the same issues and parties pending at the time the federal declaratory action is filed, there is a presumption that the entire suit should be heard in state court.” *Id.* Although “[t]he pendency of a state court action does not, of itself, require a district court to refuse federal declaratory relief[, it] should generally decline to entertain reactive declaratory actions.” *Id.* *Dizol* recognizes that a district court “is in the best position to assess how judicial economy, comity and federalism are affected in a given case.” *Id.* at 1226.

The *Brillhart* factors are not the exclusive ones that are to be considered in making a determination as to abstention. The Ninth Circuit has identified other considerations,

such as whether the declaratory action will settle all aspects of the controversy; whether the declaratory action will serve a useful purpose in clarifying the legal relations at issue; whether the declaratory action is being sought merely for the purposes of procedural fencing or to obtain a ‘res judicata’ advantage; or whether the use of a declaratory action will result in entanglement between the federal and state court systems. In addition, the district court might also consider the convenience of the parties, and the availability and relative convenience of other remedies.

\*12 *Id.* at n. 5.

The *Brillhart* factors support abstention in this action even if there were subject matter jurisdiction. First, this action would involve a needless determination of state law. It would require decisions about California rules of contractual formation and interpretation, many of which may be complex and novel.

Second, the Beaumont Hill Action and Pomona Action each presents issues that correspond to the one presented here—Defendant’s request that Plaintiff re-locate certain pipelines pursuant to the AREA. Although each of these three actions concerns different real property, each involves the same parties and is governed by the same contract. “If there are parallel state proceedings involving the same issues and parties pending at the time the federal

declaratory action is filed, there is a presumption that the entire suit should be heard in state court.”*Gov’t Employees Ins. Co. v. Dizol*, 133 F.3d 1220, 1225 (9th Cir.1998).“The pendency of a state court action, however, does not of itself require a district court to refuse declaratory relief in federal court.”*Chamberlain v. Allstate Ins. Co.*, 931 F.2d 1361, 1367 (9th Cir.1991).

Finally, having this action proceed in federal court when California courts have been analyzing the AREA for many years would result in potential for conflicts in decision-making by the federal and state court systems. Moreover, determining the federal issue presented would not settle all aspects of the controversy.

### C. Reviewability of this Order by the Ninth Circuit

At the hearing on the Motion, counsel for Defendant requested that, should the Court grant the Motion, it certify the order for appeal to the Ninth Circuit. Defendant cited no legal authority pursuant to which this appeal would be proper.

28 U.S.C. § 1447(d) provides

An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1442 or 1443 of this title shall be reviewable by appeal or otherwise.

“Despite this broad prohibition, the Supreme Court has held that § 1447(d) must be read together with § 1447(c) such that § 1447(d) precludes review only of remands made pursuant to a ground enumerated in §

1447(c).”*Aguon–Schulte v. Guam Election Comm’n*, 469 F.3d 1236, 1240 (9th Cir.2006) (citing *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 345–46, 96 S.Ct. 584, 46 L.Ed.2d 542 (1976)).“Section 1447(c) states that remand may be ordered either for lack of subject matter jurisdiction or for ‘any defect’ in the removal procedure.”*Id.* (citing 28 U.S.C. § 1447(c)).“Therefore, a remand order is not reviewable if (1) the district court lacked subject matter jurisdiction, or (2) the moving party filed a timely motion raising any defect other than a lack of subject matter jurisdiction.”*In re Blatter*, 241 F. App’x 371, 373 (9th Cir.2007) (“because we conclude that [the district court] remanded the case on the basis that it lacked subject matter jurisdiction, we do not have jurisdiction to review the petition [for writ of mandamus].”);

\*13 Because this case is remanded due to a lack of subject matter jurisdiction, the Ninth Circuit does not have jurisdiction to review this order. See *Thermtron*, 423 U.S. at 343–51 (“If a trial judge purports to remand a case on [a] ground [covered by 1447(c)] his order is not subject to challenge in the court of appeals by appeal, by mandamus, or otherwise.”).

### IV. Conclusion

For the reasons stated in this Order, the Motion is **GRANTED**. This action is remanded to the Los Angeles Superior Court in its Stanley Mosk Courthouse.

**IT IS SO ORDERED.**

### All Citations

Not Reported in F.Supp.3d, 2015 WL 3536881

### Footnotes

- 1 *Union Pacific Railroad Co. v. Santa Fe Pacific Pipelines, Inc. et al.* (“UPRC”), 231 Cal.App.4th 134, 180 Cal.Rptr.3d 173 (2014). This decision is discussed in Section II.B.1, *infra*.
- 2 Matters of public record are properly subject to judicial notice. This includes court records. *Galvan v. City of La Habra*, 2014 WL 1370747, at \*12 (C.D.Cal. April 8, 2014) (citing *Reyn’s Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 n. 6 (9th Cir.2006)). Accordingly, the request for judicial notice of the documents filed in the RJN is GRANTED.
- 3 California Rules of Court 3.300(g) provides that any opposition to a notice of related case must be filed within five days of the filing of the initial notice.
- 4 The servient estate was identified earlier in the opinion as “the federal government or its grantee.”*Id.* at 160.

- 5 As noted, Defendant's Counterclaim (Dkt.10), and its First Amended Counterclaim (Dkt.29), each seeks declaratory relief on these issues. But, "a counterclaim ... cannot serve as the basis for 'arising under' jurisdiction." *Holmes Grp., Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 831, 122 S.Ct. 1889, 153 L.Ed.2d 13 (2002).
- 6 Plaintiff's argument that Congressional Acts do not provide bases for federal question jurisdiction is unpersuasive. *Virgin v. Cnty. of San Luis Obispo*, 201 F.3d 1141, 1143 (9th Cir.2000). In *Virgin*, the Ninth Circuit relied on a Supreme Court opinion which stated that:  
[a] suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction or effect of such a law, upon the determination of which the result depends. This is especially so of a suit involving rights to land acquired under a law of the United States. If it were not, every suit to establish title to land in the central and western states would so arise, as all titles in those states are traceable back to those laws.  
*Id.* (citing *Shulthis v. McDougal*, 225 U.S. 561, 569–70, 32 S.Ct. 704, 56 L.Ed. 1205 (1912)). *Virgin* rejected the argument that a federal issue was necessarily raised simply "because one of the parties to [a controversy in respect of lands] has derived his title under an act of Congress." *Id.* (quoting *Shulthis*, 225 U.S. at 570). That is not the case here. This action is one in which there is a dispute regarding the "construction or effect of" a law "which takes its origin in the laws of the United States." *Id.* at 1143.
- 7 For actions to be considered parallel, "[i]t is enough that the state proceedings arise from the same factual circumstances." *Golden Eagle Ins. Co. v. Travelers Companies*, 103 F.3d 750, 755 (9th Cir.1996) *overturned on other grounds by Gov't Employees Ins. Co. v. Dizol*, 133 F.3d 1220 (9th Cir.1998).

# **EXHIBIT 2**

**to**

**Reply in Opposition to Petition of  
Union Pacific Railroad Company  
for Declaratory Order**

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**Finance Docket No. 35960**

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15  
16 **UNITED STATES DISTRICT COURT**  
**CENTRAL DISTRICT OF CALIFORNIA**  
17 **WESTERN DIVISION**

18 SFPP, L.P.,

19 Plaintiff,

20 vs.

21 UNION PACIFIC RAILROAD  
22 COMPANY, and DOES 1-10, inclusive,

23 Defendants.  
24  
25

Case No.: 2:15-cv-01954-JAK-PLA

Assigned to: Judge John A. Kronstadt  
Referred to: Magistrate Judge Paul L. Abrams

**DEFENDANT UNION PACIFIC  
RAILROAD COMPANY'S FIRST  
AMENDED COUNTERCLAIM**

26 Complaint Filed: February 23, 2015  
27 Trial Date: None set  
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UNION PACIFIC RAILROAD  
COMPANY,  
  
                    Counterclaimant,  
  
          vs.  
  
SFPP, L.P.,  
  
                    Counterclaim Defendant.

1 For its Counterclaim against Plaintiff SFPP, L.P. (“SFPP”), Defendant Union  
2 Pacific Railroad Company (“Union Pacific” or the “Railroad”) alleges as follows:

3 **JURISDICTION AND VENUE**

4 1. The Court has jurisdiction over this action under 28 U.S.C. § 1331, as it  
5 arises under federal law, and 28 U.S.C. § 1367(a). A portion of the property at issue  
6 originally was granted to Union Pacific or its predecessors under certain Acts of  
7 Congress. SFPP claims in its Complaint that the pre-1871 Acts and 1875 Act  
8 (“Congressional Acts”), as a matter of federal law, do not provide Union Pacific  
9 sufficient title to enforce certain rights against SFPP. Pursuant to Local Rule 11-  
10 3.9.1, Union Pacific is informed and believes SFPP is referring to the Act of July 1,  
11 1862 (37 Cong. Ch. 120, §§ 1-20, July 1, 1862, 12 Stat. 489), the Act of July 2,  
12 1864 (38 Cong. Ch. 215, July 2, 1864, 13 Stat. 356, *as amended* 38 Cong. Ch. 216,  
13 §§ 1-22, July 2, 1864, 13 Stat. 356), the Act of March 3, 1871 (41 Cong. Ch. 122,  
14 §§ 1-23, March 3, 1871, 16 Stat. 573), and the Act of March 3, 1875 (43 Cong. Ch.  
15 152, §§ 1-6, March 3, 1875, 18 Stat. 482, 43 U.S.C. § 934, *et seq.*).

16 2. Resolution of this action will depend primarily on construction of the  
17 rights conveyed by one or more federal statutes. Union Pacific contends that it  
18 possesses sufficient right and title in its railroad right of way, specifically including  
19 property granted under the Congressional Acts, to enforce its rights to require  
20 relocation of SFPP’s pipeline which is located and operates in Union Pacific’s right  
21 of way. Union Pacific is informed and believes that SFPP contends Union Pacific’s  
22 rights under the Congressional Acts do not extend to the relocation of SFPP’s  
23 pipeline in the Union Pacific right of way.

24 3. The claim for relief in this Counterclaim is closely related to SFPP’s  
25 claim in its Complaint and forms part of the same case or controversy for purposes  
26 of 28 U.S.C. § 1367(a).

27 4. Venue is proper because the property at issue is located in this District.

28 //



1 accommodate the Alhambra Project. Union Pacific disagrees with SFPP's  
2 contention.

3 22. SFPP's contention that it is not required to perform the Alhambra  
4 Relocation rests on an incorrect interpretation of several 19th Century Congressional  
5 statutes granting property to Union Pacific, and this case therefore presents federal  
6 questions within the Court's jurisdiction.

7 23. The parties are at an impasse, and it is within this Court's authority to  
8 resolve the controversy pursuant to the Declaratory Judgment Act, 28 U.S.C.  
9 §§ 2201-2202 and federal question jurisdiction under 28 U.S.C. § 1331.

10 24. A proper and uniform interpretation of the Congressional Acts is  
11 critically important for railroad operations and interstate commerce. Railroad rights  
12 of way granted by the Congressional Acts cover tens of thousands of miles, criss-  
13 crossing public and private lands throughout the western United States. The  
14 Supreme Court recently stressed the "special need for certainty and predictability  
15 where land titles are concerned." *Marvin M. Brandt Revocable Trust v. United*  
16 *States*, 134 S. Ct. 1257, 1268 (2014) (quoting *Leo Sheep Co. v. United States*, 440  
17 U.S. 668, 687 (1979)).

18 25. Union Pacific desires a judicial determination of its rights under the  
19 Congressional Acts and the parties' respective rights and duties under the Amended  
20 Easement, specifically that i) Union Pacific has sufficient title and interest in the  
21 rights of way granted by the Congressional Acts to enforce its right to require SFPP  
22 to perform the Alhambra Relocation, and ii) Union Pacific owns any property  
23 granted under the pre-1871 Congressional Acts in "limited fee" and can authorize  
24 any activities, in the subsurface and on the surface, that are not inconsistent with  
25 railroad operations.

26 26. A judicial declaration is necessary and appropriate at this time for the  
27 parties to ascertain Union Pacific's rights and SFPP's obligations with respect to the  
28 Alhambra Relocation.

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WHEREFORE, Union Pacific prays for Judgment as follows:

27. For a declaration that,

A. Union Pacific has sufficient title and interest in the rights of way granted by the Congressional Acts to enforce its right to require SFPP to perform the Alhambra Relocation; and

B. Union Pacific owns any property granted under the pre-1871 Congressional Acts in “limited fee” and can authorize any activities, in the subsurface and on the surface, that are not inconsistent with railroad operations.

28 For costs of suit incurred herein, including reasonable attorneys’ fees and expenses; and

29. For any further or other relief as the Court deems just and proper.

Dated: April 14, 2015

Respectfully submitted,

**BRYAN CAVE LLP**

By: /s/ John R. Shiner

Attorneys for Defendant and Counterclaimant

UNION PACIFIC RAILROAD COMPANY

# **EXHIBIT 3**

**to**

**Reply in Opposition to Petition of  
Union Pacific Railroad Company  
for Declaratory Order**

---

**Finance Docket No. 35960**

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16 Railroad Company

17 SUPERIOR COURT OF CALIFORNIA  
18 COUNTY OF LOS ANGELES

19 SFPP, L.P.,

20 Plaintiff,

21 vs.

22 UNION PACIFIC RAILROAD  
23 COMPANY, and DOES 1-100, inclusive,

24 Defendants.

) Case No. BC584518

) Judge: Hon. Rafael Ongkeko  
) Dept.: 73

) **DEFENDANT UNION PACIFIC  
) RAILROAD COMPANY'S DEMURRER  
) TO COMPLAINT**

) Date: December 2, 2015  
) Time: 8:30 a.m.  
) Dept.: 73

) **RES ID: 150925072636**

) [Filed concurrently with Request for Judicial  
) Notice, and [Proposed] Order]

) Complaint filed: June 8, 2015

25 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

26 PLEASE TAKE NOTICE that on December 2, 2015 or as soon thereafter as the  
27 matter may be heard by the Honorable Rafael Ongkeko, in Department 73 of the Los  
28 Angeles County Superior Court, 111 N. Hill Street, Los Angeles, California, defendant

1 Union Pacific Railroad Company (“Union Pacific”) will demur to the complaint of plaintiff  
2 SFPP, L.P. (hereinafter “plaintiff”). Union Pacific Railroad Company’s (“Union Pacific”)  
3 demurrer is brought pursuant to Code of Civil Procedure section 430.10, subdivision (e), on  
4 the grounds that plaintiff’s complaint fails to state facts sufficient to state a cause of action  
5 against Union Pacific.

6 This demurrer is based upon this notice, the attached memorandum of points and  
7 authorities in support thereof, the concurrently filed request for judicial notice, all pleadings  
8 and documents on file in this matter, and such oral or written evidence and argument as may  
9 be introduced at, or prior to, the hearing on this demurrer.

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Dated: September 25, 2015

SHOOK, HARDY & BACON LLP.

By: \_\_\_\_\_



Douglas W. Robinson  
Brian P. Ziska  
Attorneys for Defendant  
Union Pacific Railroad Company

1 **DEMURRER TO COMPLAINT**

2 Defendant Union Pacific Railroad Company (hereinafter "Union Pacific") demurs to  
3 each and every cause of action in plaintiff's complaint ("Complaint") as follows:

4 **All Causes of Action**

5 1. Plaintiff's Complaint in its entirety, including all causes of action alleged in the  
6 Complaint, fails to state facts sufficient to constitute a cause of action against Union Pacific.  
7 (Code Civ. Proc., § 430.10, subd. (e).)

8 **First Cause of Action ("For Rescission")**

9 2. Plaintiff's cause of action for rescission fails to state facts sufficient to  
10 constitute a cause of action against Union Pacific. (Code Civ. Proc., § 430.10, subd. (e).)

11 **Second Cause of Action ("For Unjust Enrichment")**

12 3. Plaintiff's cause of action for unjust enrichment fails to state facts sufficient to  
13 constitute a cause of action against Union Pacific. (Code Civ. Proc., § 430.10, subd. (e).)

14 **Third Cause of Action ("For Declaratory Relief")**

15 4. Plaintiff's cause of action for declaratory relief fails to state facts sufficient to  
16 constitute a cause of action against Union Pacific. (Code Civ. Proc., § 430.10, subd. (e).)

17 WHEREFORE, Union Pacific prays its demurrer to plaintiff's Complaint be sustained  
18 without leave to amend, and for such other relief as the Court may deem just and proper.

19  
20 Dated: September 25, 2015

SHOOK, HARDY & BACON L.L.P.

21  
22 By: 

Douglas W. Robinson  
Brian P. Ziska

Attorneys for Defendant Union Pacific  
Railroad Company

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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. INTRODUCTION

3 Plaintiff SFPP, L.P. (“SFPP”) seeks to rescind the Amended and Restated Easement  
4 Agreement (“AREA”) entered between SFPP and Union Pacific Railroad Company (“Union  
5 Pacific”) more than two decades ago. Contingent on certain conditions and obligations SFPP  
6 agreed to, the AREA permits SFPP to maintain its petroleum products pipeline on hundreds  
7 of miles of Union Pacific’s railroad right-of-way, and grants SFPP the “privilege of entry”  
8 across Union Pacific’s property to build and work on its pipeline.

9 Rescission cannot be granted because the Complaint alleges SFPP cannot return the  
10 benefits it received under AREA or restore Union Pacific to its status quo. On the contrary,  
11 SFPP seeks to improperly retain all the benefits of the AREA, while shedding the obligations  
12 it deems unfavorable. California law does not permit the partial rescission SFPP seeks.

13 SFPP’s rescission claim also is precluded because SFPP did not raise it as a  
14 compulsory cross-claim in *Union Pacific Railroad Co. v. Santa Fe Pacific Pipelines, Inc.*  
15 Case No. BC319170 (the “2004 Rent Case”). (See Compl. ¶ 20.) The 2004 Rent Case arose  
16 out of the same contract SFPP now seeks to rescind (the AREA). But SFPP did not to assert  
17 a cross-claim to rescind that contract. Its attempt to assert this claim now is precluded.

18 In addition, SFPP’s rescission claim is barred by the statute of limitations, laches, and  
19 waiver. SFPP did not timely seek rescission after becoming aware of facts alleged in support  
20 of its alleged right to rescind. SFPP’s contentions on appeal of judgment in the 2004 Rent  
21 Case and the reported appellate decision remanding that case show SFPP has been aware of  
22 the facts it alleges in support of its rescission claim at least since “the first ten-year rental  
23 proceeding in 1994” trial (“1994 Rent Case”) (see Compl. ¶ 18) and throughout the 2004  
24 Rent Case.

25 SFPP’s unjust enrichment claim duplicates and depends in large part on its alleged  
26 right to rescission, and should fail for the same reasons. Unjust enrichment is not a cause of  
27 action. Even if SFPP were permitted to pursue it as an independent cause of action, SFPP’s  
28 allegations fail to allege the essential element – that Union Pacific retained an “unjust”

1 benefit. Any benefit Union Pacific retained was pursuant to a written contract between the  
2 parties and California judicial determinations.

3 Similarly, the declaratory relief cause of action fails for the same reasons as the  
4 rescission claim, and because it presents the identical issues as its first two causes of action.

## 5 **II. LEGAL STANDARD FOR DEMURRER**

6 The purpose of a demurrer is to test the legal sufficiency of factual allegations in a  
7 complaint—“whether it states facts sufficient to constitute a cause of action upon which  
8 relief may be based.” (*Young v. Gannon* (2002) 97 Cal.App.4th 209, 220; see also  
9 *Rakestraw v. Cal. Physicians’ Serv.* (2000) 81 Cal.App.4th 39, 43.) If there is no  
10 “reasonable possibility” that the plaintiff can cure a defective complaint by amendment, the  
11 court should sustain the demurrer without leave to amend. (*Heckendorn v. City of San*  
12 *Marino* (1986) 42 Cal.3d 481, 486.) The burden of proving that a reasonable possibility  
13 exists “is squarely on the [p]laintiff.” (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; see also  
14 *Rakestraw, supra*, 81 Cal.App.4th at p. 44.)

15 A defendant may demur if a complaint fails to assert sufficient facts to maintain a  
16 cause of action. (Code Civ. Proc., §§ 430.10, subd. (e), 430.50, subd. (a).) A court is to  
17 “treat a demurrer as admitting all material facts properly pleaded, but not contentions,  
18 deductions, or conclusions of fact and law.” (*Blank, supra*, 39 Cal.3d at p. 318.)  
19 Accordingly, essential facts must be stated directly and in a non-conclusory manner.  
20 (*Ankeny v. Lockheed Missiles & Space Co.* (1979) 88 Cal.App.3d 531, 537.) SFPP has not  
21 met this burden.

## 22 **III. SFPP’S RESCISSION CLAIM FAILS ON MULTIPLE GROUNDS**

### 23 **A. The Rescission Claim Fails Because SFPP Alleges It Cannot Restore** 24 **Benefits Received under the AREA.**

25 When a contractual party alleges a right to rescind a contract, it must follow the  
26 procedures established by Civil Code Section 1691. (*Neet v. Holmes* (1944) 25 Cal.2d 447,  
27 457.) “[S]ection 1691 requires the party seeking rescission to give notice to the other party  
28 ‘as to whom he rescinds’ and to restore all consideration or ‘everything of value which he

1 has received' under the contract.” (*Village Northridge Homeowners Ass’n v. State Farm*  
2 *Fire & Cas. Co.* (2010) 50 Cal.4th 913, 921–922.) “With certain exceptions . . . [section  
3 1691] generally requires that the rescinding party return any consideration received as a  
4 condition of rescission before judgment in the rescission action.” (*Id.* at p. 922.) Civil Code  
5 Section 1693 “modifies the timing requirement” of Section 1691. (*Id.* at p. 918, fn. 1.) It  
6 permits a delay in making a restoration offer in some circumstances, but it does not permit  
7 SFPP to avoid restoration altogether. (Code Civ. Proc., § 1693.) SFPP must restore  
8 contractual benefits before a court’s judgment operates to rescind a contract.

9 “Rescission is not allowable where the party demanding it cannot or does not restore  
10 the other party to the condition he would have been in but for the contract.” (*Joshua Tree*  
11 *Townsite Co. v. Joshua Tree Land Co.* (1950) 100 Cal.App.2d 590, 596.) Courts sustain  
12 demurrers where, as here, the complaint shows the party seeking rescission cannot, or will  
13 not, restore the value it received under the contract. (See *Olson v. Cohen* (2003) 106  
14 Cal.App.4th 1209, 1216; *Beeler v. Beeler* (1954) 125 Cal.App.2d 41, 43–44; see also  
15 *Ramirez v. Wells Fargo Bank, N.A.* (No. C 10-05874 WHA, N.D. Cal. Apr. 27, 2011) 2011  
16 WL 1585075, 2011 U.S. Dist. LEXIS 45700 [dismissing rescission claim because “[plaintiff]  
17 has not alleged tender or the ability to tender”].) In *Olson*, the plaintiff sued to rescind fees  
18 agreements made with a professional law corporation that had not registered with the state  
19 bar. (*Olson, supra*, 106 Cal.App.4th at p. 1212.) The trial court sustained the defendant’s  
20 demurrer and dismissed without leave to amend. (*Id.*) The Court of Appeal affirmed  
21 because the plaintiff “cannot restore to respondents the services which he has received from  
22 them under the fee agreements.” (*Id.* at p. 1216.) Likewise, in *Beeler*, the Court affirmed a  
23 demurrer without leave to amend because the party seeking rescission received value under  
24 the contract, but failed to offer to restore the value received, and affirmatively alleged that  
25 she did not intend to and would not return the value received. (*Beeler, supra*, 125  
26 Cal.App.2d at pp. 43–44.)

27 According to its Complaint, SFPP cannot satisfy this essential element of its  
28 rescission claim. SFPP not only fails to offer to restore central benefits obtained under the

1 AREA – including the right to enter onto Union Pacific’s railroad property for purposes of  
2 constructing and maintaining its pipeline – it also affirmatively alleges that it cannot and will  
3 not restore significant benefits it has received under the AREA. (Compl. ¶¶ 9, 22, 30.)

4 SFPP’s Complaint fails to offer to restore any of the benefits it has received and  
5 continues to enjoy under the AREA, and it fails to offer even conditional restoration subject  
6 to the Court’s authority under Section 1693. For example, SFPP’s allegations show one  
7 benefit it receives under AREA is easements through “long, continuous segments of  
8 subsurface ideal for installing pipelines to transport fuels and other energy products.”  
9 (Compl. ¶ 9.) SFPP does not offer to restore any portion of this “ideal” benefit of the AREA.  
10 To the contrary, SFPP seeks to maintain this benefit in its entirety – including easements  
11 through property that Union Pacific owns in fee – even if the AREA were rescinded. (See  
12 Compl. ¶¶ 22, 30.) The Complaint also alleges that SFPP receives the benefit of “privilege  
13 of entry” across Union Pacific’s property for the purpose of “constructing, reconstructing,  
14 renewing, maintaining and inspecting” the pipeline. (See Compl., Ex. A [AREA], ¶ 3.)<sup>1</sup> But  
15 SFPP fails to plead an offer to restore that benefit.

16 Moreover, SFPP affirmatively alleges that it cannot and will not restore any of the  
17 “ideal” continuous pipeline easement benefit it has received under the AREA. (Compl. ¶  
18 30.) SFPP also alleges it “cannot remove its pipeline network . . . regardless of whether  
19 property is owned by Union Pacific or third parties. . . .” (*Id.*) Thus, according to SFPP, it  
20 cannot and will not restore Union Pacific to status quo.

21 SFPP does not merely seek to delay its obligation to restore the value and benefits  
22 received under the AREA, or to condition restoration on the court’s ultimate judgment.  
23 Rather, it affirmatively alleges that it seeks to retain the benefits it received under the AREA  
24 (see Compl. ¶¶ 9, 22, 30), and these allegations demonstrate SFPP cannot satisfy essential  
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26 <sup>1</sup> SFPP’s Complaint refers to and attaches the AREA (Compl. ¶ 20, Ex. A [AREA]), which  
27 may therefore be considered on demurrer. (See *City of Pomona v. Superior Court* (2001) 89  
28 Cal.App.4th 793, 800 [“Where written documents are the foundation of an action and are  
attached to the complaint and incorporated therein by reference, they become a part of the  
complaint and may be considered on demurrer.”].)

1 elements of its rescission claim. As a result, SFPP’s claim for rescission is fatally flawed,  
2 and Union Pacific’s demurrer should be sustained without leave to amend.

3 **B. California Law Does Not Recognize The Partial Rescission SFPP Seeks.**

4 California law does not permit a party to partially rescind an indivisible contract.  
5 (*Simmons v. Cal. Inst. of Tech.* (1949) 34 Cal. 2d 264, 275; *IMO Dev. Corp. v. Dow Corning*  
6 *Corp.* (1982) 135 Cal.App.3d 451, 458–459.)

7 A contract is indivisible “where there is a showing that it was the intention of the  
8 parties to treat the agreement as an entire contract, and where it appears that their  
9 engagements would not have been entered into except upon the clear understanding that the  
10 full object of the contract should be performed . . . .” (*IMO Dev. Corp. v. Dow Corning*  
11 *Corp.* (1982) 135 Cal.App.3d 451, 458–459.) And whether a contract is divisible may be  
12 decided on the pleadings. (*Id.* at p. 459.)

13 SFPP alleges:

- 14 • “The AREA does not contain a severability clause, which reflects the parties’  
15 mutual intent that the AREA not be severable.” (Compl. ¶ 16.)
- 16 • “The AREA requires SFPP to pay Union Pacific rent for the entire easement  
17 network . . . .” (Compl. ¶ 12.)
- 18 • “[T]he rent required by Union Pacific under the AREA for this entire network  
19 of easements is a single, annual rental payment. Likewise other privileges  
20 granted and obligations required under the AREA, including the relocation  
21 provision in Section 3, apply to the entire easement network as a whole.”  
22 (Compl. ¶ 15.)

23 Accepting SFPP’s allegations as true, the AREA is an indivisible contract as a matter  
24 of law for purposes of this demurrer. (*IMO Dev. Corp., supra*, 135 Cal.App.3d at pp. 458–  
25 459; see also *Simmons, supra*, 34 Cal.2d at p. 275 [“if the consideration is single, the  
26 contract is entire”].)

27 An indivisible contract must be rescinded as a whole or not at all:

28 The general rule is that one must rescind all of his contract and may not retain  
rights under it which he deems desirable to have and repudiate the remainder  
of its provisions. The theory underlying such a rule is that retention of only the  
benefits of the transaction amounts to unjust enrichment and binds the parties  
to a contract which they did not contemplate.

1 (*Simmons, supra*, 34 Cal.2d at p. 275 (internal citations omitted).) “The settled rule is that  
2 one who would rescind for fraud or other reason cannot cling to the portion of the deal which  
3 he deems favorable and reject the balance. He must rescind the contract as a whole or not at  
4 all.” (*Hayutin v. Weintraub* (1962) 207 Cal.App.2d 497, 509.) SFPP cannot assert a  
5 rescission claim that attempts to “cling to the portion of the deal which [SFPP] deems  
6 favorable and reject the balance.” (*Id.*; see also *Neet, supra*, 25 Cal.2d at p. 457 [“[A] party  
7 to a contract who wishes to rescind cannot play fast and loose. He cannot conduct himself so  
8 as to derive all possible benefit from the transactions and then claim the right to rescind”].)

9 But SFPP’s Complaint seeks to accomplish exactly what California law does not  
10 allow. SFPP seeks to retain the rights it deems advantageous: the right to enter onto Union  
11 Pacific’s property to construct and maintain a continuous pipeline network and possession of  
12 the railroad subsurface. (Compl. ¶¶ 9, 22, 30.) According to SFPP’s own allegations, its  
13 rescission claim seeks to discard only the obligations it views as unfavorable: e.g., its  
14 obligation to pay rent and its obligation to relocate its pipeline as necessary to avoid  
15 interfering with Union Pacific’s railroad operations. (See Compl. ¶¶ 23, 32, 46.) This Court  
16 should reject SFPP’s attempt to use this action to ensure its pipeline will remain indefinitely  
17 beneath hundreds of miles of railroad, but to shed the obligations upon which Union  
18 Pacific’s consent to the pipeline were conditioned.<sup>2</sup>

19 Because SFPP seeks an impermissible partial rescission of an agreement it alleges is  
20 indivisible, it fails to state a cause of action for rescission. (See *IMO Dev. Corp., supra*, 135  
21 Cal.App.3d at p. 458 [rescission count failed to state a claim where plaintiff “alleged its  
22 entitlement to the benefit of the sales agreement and sought a declaration that it was free of  
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25 <sup>2</sup> Union Pacific has filed its Petition of Union Pacific Railroad Company for Declaratory  
26 Order (“Petition”) with the Surface Transportation Board (“STB”), asking that federal  
27 agency to declare SFPP’s causes of action for rescission and declaratory relief are preempted  
28 by the Interstate Commerce Commission Termination Act. Contemporaneously with this  
Demurrer, Union Pacific has moved this court to stay all proceedings in this case under the  
primary jurisdiction doctrine, pending the STB’s ruling on Union Pacific’s Petition. (See  
Union Pacific’s Motion to Stay Proceedings Pending Decision on the Petition of Union  
Pacific Railroad Company for Declaratory Order to the Surface Transportation Board.)

1 the obligations contained in the waiver of claim provision.”].) Union Pacific’s demurrer  
2 should be sustained without leave to amend.

3 **C. The Rescission Claim Is Precluded Because It Was A Compulsory Cross-**  
4 **Complaint That Must Have Been Brought In The 2004 Rent Case.**

5 SFPP’s rescission claim fails because it was not brought as a compulsory cross-  
6 complaint in the 2004 Rent Case. A cross-complaint is compulsory if the cross-complainant  
7 has a cause of action (at the time of serving its answer to the complaint) against the party  
8 who brought the original complaint or cross-complaint that “arises out of the same  
9 transaction, occurrence, or series of transactions or occurrences as the cause of action alleged  
10 by plaintiff in the complaint.” (Code Civ. Proc., §§ 426.10, subd. (c), 426.30, subd. (a).)  
11 The purpose of this compulsory cross-complaint statute is to avoid piecemeal litigation.  
12 (*Align Technology, Inc. v. Tran* (2009) 179 Cal.App.4th 949, 959 (“*Align Tech.*”).) The  
13 California Supreme Court has explained that the “law abhors a multiplicity of actions, and  
14 the obvious intent of the Legislature in enacting the counterclaim statutes . . . was to provide  
15 for the settlement, in a single action, of all conflicting claims between the parties arising out  
16 of the same transaction.” (*Flickinger v. Swedlow Engineering Co.* (1955) 45 Cal.2d 388, 393  
17 [referring to predecessor to § 426.30]; *Align Tech., supra*, 179 Cal.App.4th at p. 959 (same).)

18 “Because of the liberal construction given to the statute to accomplish its purpose of  
19 avoiding a multiplicity of actions, ‘transaction’ is construed broadly; it is not confined to a  
20 single, isolated act or occurrence but may embrace a series of acts or occurrences logically  
21 interrelated.” (*Align Tech., supra*, 179 Cal.App.4th at p. 960 (internal quotation and  
22 alteration marks omitted); see also *Currie Medical Specialties, Inc. v. Bowen* (1982) 136  
23 Cal.App.3d 774, 777 (“*Currie Medical*”) [“California courts have . . . adopted the expansive  
24 logical relation test[.]”].) The logical relation test does not require “an absolute identity of  
25 factual backgrounds for the two claims, but only a logical relationship among  
26 them.” (*Currie Medical, supra*, 136 Cal.App.3d at p. 777.)

27 “In the breach of contract context, the rule means any claims the defendant has  
28 against the plaintiff based on the same contract generally must be asserted in a cross-

1 complaint, even if the claims are unrelated to the specific breach or breaches that underlie the  
2 plaintiff's complaint." (*Frog Creek Partners, LLC v. Vance Brown, Inc.* (2012) 206  
3 Cal.App.4th 515, 538.) When there is a claim for rescission and damages, a separate claim  
4 for money owed based on the same contract is a compulsory cross-complaint. (See  
5 *Brunswick Drug Co. v. Springer* (1942) 55 Cal.App.2d 444 [applying predecessor to §  
6 426.30]; see also *Sylvester v. Soulsburg* (1967) 252 Cal.App.2d 185 [where purchaser of land  
7 claims that he has been wronged by the seller in not complying with the terms of the  
8 contract, the whole controversy and all its parts relate collectively to a single "transaction"].)

9 The 2004 Rent Case arose out of the contract SFPP now seeks to rescind (the AREA).  
10 Union Pacific's complaint in the 2004 Rent Case sought a determination as to the value of  
11 the easements covered by the AREA and the rent due for those easements pursuant to the  
12 AREA. (Request for Judicial Notice ("RJN"), Ex. A [2004 Rent Case Complaint], ¶ 15.)  
13 But SFPP failed to assert a cross-claim to rescind the AREA. SFPP is trying to collaterally  
14 attack the Court of Appeal's decision<sup>3</sup> in the 2004 Rent Case by now seeking rescission  
15 while the Rent Case is on remand to determine the amount of rent SFPP owes to Union  
16 Pacific. The compulsory cross-complaint requirement precludes such piecemeal litigation,  
17 and Union Pacific's demurrer should be sustained without leave to amend.

18 **D. Because Of Its Delay, SFPP's Claim For Rescission Is Barred By The**  
19 **Statute Of Limitations, Laches, And Waiver.**

20 The statute of limitations for a claim to rescind a contract is four years. (Code Civ.  
21 Proc., § 337, subd. (3).) "The time begins to run from the date upon which the facts that  
22 entitle the aggrieved party to rescind occurred. Where the ground for rescission is fraud or  
23 mistake, the time does not begin to run until the discovery by the aggrieved party of the facts  
24 constituting the fraud or mistake." (*Id.*) According to SFPP, the facts serving as the alleged  
25 basis to rescind the AREA have been known to SFPP at least since 1994. SFPP asserted in  
26 the 2004 Rent Case appeal, "SFPP has been disputing UP's title since 1994, when the AREA

27 <sup>3</sup> SFPP's Complaint refers to and attaches the Court of Appeal decision (Compl. ¶ 20;  
28 Compl. Ex. B [2004 Rent Case Appellate Decision]), which may therefore be considered on  
demurrer. (See *City of Pomona, supra*, 89 Cal.App.4th at p. 800.)

1 was signed.” (RJN, Ex. B [Appellants’ Supplemental Brief], at p. 11; see also, Compl., Ex.  
2 B [2004 Rent Case Appellate Decision], at p. 3, 8–9, 11–14, 21.) The statute of limitations,  
3 therefore, bars SFPP’s rescission claim.

4 Furthermore, California Civil Code Section 1691, subject to Section 1693, requires  
5 the rescinding party to provide notice “promptly upon discovering the facts which entitle him  
6 to rescind.” The defense of laches may be raised by demurrer where the facts constituting  
7 laches are apparent on the face of the complaint. (*Neet, supra*, 25 Cal.2d at p. 460.) And:

8 [u]nlike the statute of limitations it does not require any specified period of  
9 delay. Courts of equity will refuse relief even where the statutory time of  
10 limitation has not run, if in addition to mere passive neglect there is a showing  
11 of facts amounting to acquiescence in the acts complained of, or other  
circumstances which, coupled with the delay, render the granting of relief  
inequitable.

12 (*Id.* (citations omitted).) “There have been many cases in which delays for much shorter  
13 periods than a year have been held to be fatal to the right to rescind.” (*Estrada v. Alvarez*  
14 (1952) 38 Cal.2d 386, 391.) For example, a “delay from 1954 when this court’s construction  
15 of the property settlement agreement put appellant on notice of the correct construction of his  
16 agreement until 1958 is fatal.” (*Taliaferro v. Taliaferro* (1960) 180 Cal.App.2d 159, 162.)  
17 A two-year and three-year delay, unexplained, precludes relief. (*Leeper v. Beltrami* (1959)  
18 53 Cal.2d 195.)

19 Here, there is no alleged explanation for the delay in the Complaint filed by  
20 SFPP. But based on SFPP’s own statements and according to the Court of Appeal decision  
21 SFPP attached to its Complaint, SFPP has been aware of the facts it alleges to support its  
22 rescission claim since 1994. (RJN, Ex B, at p. 11–12 [Appellants’ Supplemental Brief];  
23 Compl., Ex. B [2004 Rent Case Appellate Decision], at p. 3, 11–12.) Yet, SFPP delayed  
24 more than ten years to bring the instant case seeking to rescind the AREA.

25 In addition, “[t]he right to rescind may be waived. It is waived by recognition of the  
26 existence of the contract after the right to rescind was created. Waiver of a right to rescind  
27 will be presumed against a party who, having full knowledge of the circumstances which  
28 would warrant him in rescinding, nevertheless accepts and retains benefits accruing to him

1 under the contract.” (*Neet, supra*, 25 Cal.2d at p. 458 (citations omitted); accord *Saret-Cook*  
2 *v. Gilbert, Kelly, Crowley & Jennett* (1999) 74 Cal.App.4th 1211, 1226.) Parties may not  
3 “derive all possible benefit from the transaction and then claim the right to rescind.” (*Saret-*  
4 *Cook, supra*, at p. 1226.) Thus, *Saret-Cook*, for example, held that a plaintiff cannot  
5 prejudice a defendant by accepting the benefits of a settlement agreement for five months,  
6 and then attempt to rescind the agreement. (*Id.* at pp. 1225–1228.) Further, when “the  
7 rights of others have intervened and circumstances have so far changed that rescission may  
8 not be decreed without injury to those parties and their rights, rescission will be denied and  
9 the complaining party left to his other remedies.” (*Conservatorship of O'Connor* (1996) 48  
10 Cal.App.4th 1076, 1099, quoting *Beckwith v. Sheldon* (1913) 165 Cal. 319, 324.)

11 SFPP has obtained the benefit of the bargain by maintaining and continuing to operate  
12 its pipeline on an “ideal” easement pursuant to the AREA. (See Compl. ¶ 9.) SFPP has  
13 accepted the benefits of the AREA for more than ten years before seeking rescission, even  
14 though it is now challenging Union Pacific’s title to the property subject to that easement.  
15 SFPP continues to accept those benefits while simultaneously seeking to rescind its  
16 corresponding obligations. It also seeks to retain those benefits if rescission is granted. By  
17 accepting and retaining the benefits of the AREA for so long, SFPP has waived its right to  
18 rescind.

19 **IV. UNJUST ENRICHMENT IS NOT AN INDEPENDENT CAUSE OF ACTION**  
20 **AND NONETHELESS FAILS**

21 SFPP’s unjust enrichment cause of action fails on several grounds. There is no cause  
22 of action in California for unjust enrichment. (*Melchior v. New Line Productions, Inc.*  
23 (2003) 106 Cal.App.4th 779, 793; *Durell v. Sharp Healthcare* (2010) 183 Cal.App.4th 1350,  
24 1370.) The demurrer should thus be sustained on this ground alone.

25 If the Court were to construe SFPP’s unjust enrichment claim as a claim for  
26 restitution, SFPP must establish: (1) receipt of a benefit; (2) unjust or wrongful retention of  
27 the benefit; and (3) at the expense of another. (*Lectrodryer v. SeoulBank* (2000) 77  
28 Cal.App.4th 723, 726.)

1 SFPP first alleges that it “seeks restitution based on the rescission of the AREA” and  
2 “equitable principles because Union Pacific has been unjustly enriched by collecting rent for  
3 the use of subsurface property that it does not own in fee.” (Compl. ¶ 35.) This claim fails  
4 because SFPP’s first alleged basis for restitution is explicitly based on rescission of the  
5 AREA, and fails for the same reasons as the rescission cause of action fails. This claim also  
6 duplicates the cause of action for rescission, so it adds nothing to the complaint and the  
7 demurrer should be sustained. (*Hood v. Superior Court* (1995) 33 Cal.App.4th 319, 324.)

8 SFPP’s second alleged basis for restitution rests on Union Pacific allegedly being  
9 “unjustly enriched by collecting rent for the use of subsurface property that it does not own  
10 in fee” and also fails. (Compl. ¶ 35.) SFPP’s Complaint does not allege facts sufficient to  
11 show that Union Pacific’s retention of any benefit is “unjust.”

12 The amount of rent collected by Union Pacific is governed by the terms of the parties  
13 express agreements in the AREA. An unjust enrichment theory is inapplicable where, as  
14 here, plaintiff alleges the parties entered into an express contract. (*Durell, supra*, 183  
15 Cal.App.4th at p. 1370.) Pursuant to the express terms of paragraph 10 of the AREA, which  
16 is incorporated by reference into the Complaint and thus may be considered on demurrer:

17 The easements granted herein are subject to all valid and existing contracts,  
18 leases, liens or encumbrances or claims of title which may affect the property,  
19 and the word “grant” as used herein shall not be construed as a covenant  
against the existence of any thereof.

20 (Compl., Ex. A [AREA], ¶ 10.) This express contractual provision establishes that the  
21 parties knowingly bargained for the possibility that there may be competing claims  
22 challenging validity of Union Pacific’s title to property covered by the AREA. As part of  
23 this agreement, SFPP received as much interest in the right-of-way pipeline easement as  
24 Union Pacific could convey, expressly subject to potential title issues. There is nothing  
25 unjust in retaining the benefits of an express contract that was knowingly bargained for.

26 Not only have the parties entered into the AREA specifically governing the collection  
27 of rent by Union Pacific, the amount of rent from 1994 through 2004 has already been  
28 judicially determined in the 1994 Rent Case (see Compl., Ex. B [2004 Rent Case Appellate

1 Decision], at p. 12), and the amount of rent from 2004 through 2014 is being determined in  
2 the 2004 Rent Case, which is on remand to determine how much rent is owed to Union  
3 Pacific. (See Compl., ¶¶ 18–20; Compl., Ex. B [2004 Rent Case Appellate Decision].)  
4 Collecting rent pursuant to judicial determinations is not unjust, and any defenses to such  
5 determinations should have been brought in those actions. (See, *supra*, Section III.C.)  
6 SFPP’s restitution claim is another improper collateral attack on the 1994 Rent Case and the  
7 2004 Rent Case appellate decision.

8 SFPP’s third alleged basis for restitution is that it was required to relocate its pipeline  
9 at its sole cost and expense. (Compl. ¶ 36.) The Complaint, however, alleges only that  
10 SFPP incurred the expense when it was required to relocate pursuant to “onerous” standards  
11 and cover the costs. (Compl. ¶ 13.) SFPP cannot show any relocation benefit was unjust for  
12 similar reasons as the rent benefit. Relocation obligations were bargained for and reduced to  
13 a written contract. (See Compl., ¶ 13, Ex. A [AREA], ¶ 3.) Furthermore, to the extent SFPP  
14 is seeking restitution for specific instances where it has been required to pay for relocation  
15 subject to final judgments entered by California courts, this alleged basis for its claim  
16 equally fails. (RJN, Ex. C [Judgment in *Union Pacific Railroad Co. v. SFPP, L.P.*, Case No.  
17 BC236852]; RJN, Ex. D [Judgment in *Union Pacific Railroad Co. v. SFPP, L.P.*, Case No.  
18 INC055339].) Without the essential element of an alleged unjust retention of a benefit, the  
19 cause of action necessarily fails.

20 **V. THE DECLARATORY RELIEF CLAIM IS REDUNDANT AND FAILS FOR**  
21 **THE SAME REASONS AS THE OTHER CLAIMS**

22 The elements of a claim for declaratory relief include a request for a declaration of his  
23 or her rights or duties with respect to another and an actual controversy. (Code Civ. Proc., §  
24 1060; *Ludgate Ins. Co. v. Lockheed Martin Corp.* (2000) 82 Cal.App.4th 592, 605–606.)

25 The declaratory relief cause of action in SFPP’s Complaint merely duplicates the  
26 rescission and unjust enrichment causes of action. A declaratory relief cause of action  
27 should not be used to decide identical issues presented in another cause of action.

28 (*California Ins. Guarantee Assn. v. Superior Court* (1991) 231 Cal.App.3d 1617, 1623–

1 1624; *General of America Ins. Co. v. Lilly* (1968) 258 Cal.App.2d 465, 470–471.) “The  
2 object of the statute is to afford a new form of relief where needed and not to furnish a  
3 litigant with a second cause of action for the determination of identical issues.” (*General of*  
4 *America Ins. Co., supra*, 258 Cal.App.2d at p. 470.)

5 SFPP’s action for declaratory relief entirely duplicates its action for rescission. First,  
6 because it depends on SFPP’s right to rescission, it fails for the same reasons the rescission  
7 cause of action fails. It also fails because it presents identical issues presented in SFPP’s  
8 other claims. The first judicial determination sought is “[t]hat the AREA is void and is thus  
9 rescinded and extinguished in its entirety.” (Compl. ¶ 43(a).) This allegation duplicates the  
10 issue presented in the rescission cause of action whether “the entire AREA must be  
11 rescinded.” (Compl. ¶ 32.) The second judicial determination sought is that SFPP and its  
12 predecessors have “no obligation to perform under the AREA” (Compl. ¶ 43(b)), which  
13 duplicates the rescission count allegation “that there is no legally enforceable or binding  
14 contract between the parties.” (Compl. ¶ 27.)

15 The third judicial determination sought is “[t]hat SFPP is entitled to restitution for all  
16 amounts paid in rent to Union Pacific under the AREA, or alternatively for all amounts paid  
17 in rent to Union Pacific under the AREA for easements on property that Union Pacific does  
18 not own in fee” (Compl. ¶ 43(c).), and the fourth and final judicial determination sought is  
19 “[t]hat SFPP is entitled to restitution for all amounts paid to Union Pacific under the AREA  
20 for relocation expenses, or other costs, fees, or expenses required under the AREA.”  
21 (Compl. ¶ 43(d).) The third and fourth determinations sought duplicate the rescission  
22 allegations that SFPP “seeks restitution for all amounts paid to Union Pacific under the  
23 AREA, including rent, relocation expenses, and other amounts paid since July 29, 1994, and  
24 prejudgment interest thereon” (Compl. ¶ 33), and also duplicate its unjust enrichment  
25 allegation seeking restitution for rent, relocation, and other expenses. (Compl. ¶ 38).

26 The declaratory relief cause of action is thus unnecessary and superfluous, and the  
27 demurrer should be sustained without leave to amend. (*Hood v. Superior Court* (1995) 33  
28 Cal.App.4th 319, 324; *General of America Ins. Co., supra*, 258 Cal.App.2d 465; see also

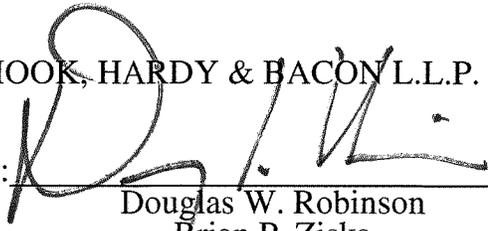
1 *Holcomb v. Wells Fargo Bank, NA* (2007) 155 Cal.App.4th 490, 501 [holding duplicative  
2 allegations are insufficient to support a separate cause of action].)

3 **VI. CONCLUSION**

4 Based on the foregoing, Union Pacific respectfully requests that the Court sustain  
5 without leave to amend its demurrer to plaintiff's Complaint in its entirety.

6  
7 Dated: September 25, 2015

SHOOK, HARDY & BACON L.L.P.

8  
9 By: 

Douglas W. Robinson  
Brian P. Ziska  
Attorneys for Defendant  
Union Pacific Railroad Company

# **EXHIBIT 4**

**to**

**Reply in Opposition to Petition of  
Union Pacific Railroad Company  
for Declaratory Order**

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**Finance Docket No. 35960**

## General Pipeline FAQs

**Last Updated: Jan 23, 2013**

Basic information about the use of pipelines and their contents.

1. [What are the major sources of energy in the United States?](#)
2. [What kinds of products are transported through energy pipelines?](#)
3. [What is 'crude oil'?](#)
4. [How is oil used?](#)
5. [How is natural gas used?](#)
6. [What can you tell me about our nation's pipelines?](#)
7. [How big is our pipeline infrastructure: how many miles of what kinds of pipelines are there in the United States?](#)

1. [What are the major sources of energy in the United States?](#)

The biggest source of energy is petroleum, including oil and natural gas. Together, they supply 65 percent of the energy we use. According to the U.S. Energy Information Administration, oil furnishes 40 percent of our energy, natural gas 25 percent, coal 22 percent, nuclear 8 percent, and renewables make up 4 percent.

2. [What kinds of products are transported through energy pipelines?](#)

Natural gas pipelines transport natural gas. Liquid petroleum (oil) pipelines transport liquid petroleum and some liquefied gases, including carbon dioxide. Liquid petroleum includes crude oil and refined products made from crude oil, such as gasoline, home heating oil, diesel fuel, aviation gasoline, jet fuels, and kerosene. Liquefied ethylene, propane, butane, and some petrochemical feedstocks are also transported through oil pipelines.

3. [What is 'crude oil'?](#)

Crude oil is liquid petroleum that is found underground. Depending on where it is found and the conditions under which it was formed, crude oil can vary widely in density, viscosity, and sulfur content. Crude oil is processed by oil producing companies to make refined products that we can use, such as gasoline, home heating oil, diesel fuel, aviation gasoline, jet fuels, and kerosene.

4. [How is oil used?](#)

A vast number of products that are used in our daily lives are made possible through the use of oil. Oil products fuel our transportation, whether it is by plane, train, car, truck, bus, or motorcycle. Oil is used to heat our homes and provide the energy that powers our factories. Chemicals made from oil are used to make a wide variety of products, ranging from clothing to cosmetics to pharmaceuticals. Modern plastics made from oil are used extensively in producing numerous products that are used daily in all facets of our lives.

5. [How is natural gas used?](#)

Natural gas supplies 25 percent of all the energy Americans consume. It's our second largest source of energy. Only oil provides more energy than natural gas. Natural gas has many different uses. For example, power companies use it to generate electricity, industries use it for heat and as a source of power, and millions of households rely on natural gas for heating and cooking. Liquid propane gas and compressed natural gas, which are produced from natural gas, provide the convenience of natural gas to locations where pipeline distribution is not available.

6. [What can you tell me about our nation's pipelines?](#)

The nation's pipelines are a transportation system. Pipelines enable the safe movement of extraordinary quantities of energy products to industry and consumers, literally fueling our economy and way of life. The arteries of the Nation's energy infrastructure, as well as one of the safest and least costly ways to transport energy products, our oil and gas pipelines provide the resources needed for national defense, heat and cool our homes, generate power for business and fuel an unparalleled transportation system.

The nation's more than 2.6 million miles of pipelines safely deliver trillions of cubic feet of natural gas and hundreds of billions of ton/miles of liquid petroleum products each year. They are essential: the volumes of energy products they move are well beyond the capacity of other forms of transportation. It would take a constant line of tanker trucks, about 750 per day, loading up and moving out every two minutes, 24 hours a day, seven days a week, to move the volume of even a modest pipeline. The railroad-equivalent of this single pipeline would be a train of 75 2,000-barrel tank rail cars everyday.

Pipeline systems are the safest means to move these products. The federal government rededicated itself to pipeline safety in 2006 when the PIPES Act was signed. It mandates new methods and makes commitments for new technologies to manage the integrity of the nation's pipelines and raise the bar on pipeline safety.

Pipeline systems consist of a few major components:

1. Pipelines that collect products from sources, such as wells on land (gathering lines) or offshore, or from shipping, such as tankers for oil or liquefied natural gas (LNG). These systems move the product to storage, processing (such as treatment for gas or refining of petroleum).
2. Transmission pipelines that transport large quantities of hazardous liquids or natural gas over longer distances; transmission lines deliver natural gas to distant power plants, large industrial customers and to municipalities for further distribution; petroleum transmission lines deliver crude oil to distant refineries or refined products to distant markets, such as airports or to depots where fuel oils and gasoline are loaded into trucks for local delivery.
3. Distribution lines are a part of natural gas systems, and consist of main lines that move gas to industrial customers, down to the smaller service lines that connect to businesses and homes throughout a municipality.

Along these pipelines are pump stations for liquids and compressor stations for natural gas, storage and distribution facilities and automated control facilities to manage the product movement and maintain safety. Should a pipeline fail, a drop in pressure normally triggers systems that close valves to isolate the failed pipeline.

The federal authority for pipeline safety is PHMSA, the Pipeline and Hazardous Materials Safety Administration of the U.S. Department of Transportation. PHMSA's Office of Pipeline Safety is responsible for regulating the safety of design, construction, testing, operation, maintenance, and emergency response of U.S. oil and natural gas pipeline facilities.

7. [How big is our pipeline infrastructure: how many miles of what kinds of pipelines are there in the United States?](#)

In 2003, there were over 2.3 million miles of pipelines in the U.S. carrying natural gas, and hazardous liquids (chiefly petroleum and refined petroleum products, as well as chemicals and hydrogen). Here is a breakdown:

Type of pipeline	Mileage	Total
Hazardous Liquid (2003)	160,868	160,868
Natural Gas Transmission		
Gathering lines	19,864	
Transmission lines	278,269	
<b>Total</b>		<b>298,133</b>
Natural Gas Distribution (2001)		
Distribution Mains	1,119,430	
Distribution Service Lines	729,550	
<b>Total</b>		<b>1,848,980</b>
	<b>Grand Total:</b>	<b>2,307,981</b>

PHMSA safety jurisdiction over pipelines covers more than 3,000 gathering, transmission, and distribution operators as well as some 52,000 master meter and liquefied natural gas (LNG) operators who own and/or operate approximately 1.6 million miles of gas pipelines, in addition to over 200 operators and an estimated 155,000 miles of hazardous liquid pipelines.

Review an [expansive discussion of pipelines](#) or read more [Pipeline FAQs](#).

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**CERTIFICATE OF SERVICE**

I hereby certify, that I have this 13th day of November caused to be served copies of SFPP L.P.'s Reply in Opposition to Petition for Declaratory Order by U.S. Mail upon the following:

Mark Christoffels  
Alameda Corridor-East Construction Authority  
4900 Rivergrade Rd., Suite A120  
Irwindale, CA 91706



Peter A. Pfohl