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April 14, 2010

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FILED ELECTRONICALLY

Honorable Anne K. Quinlan
Acting Secretary
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423

ENTERED
Office of Proceedings

APR 14 2010

Part of
Public Record

226811

Re: Finance Docket No. 35304: *San Francisco Bay Railroad-Mare Island – Operation Exemption – California Northern Railroad*

Finance Docket No. 35360: *San Francisco Bay Railroad-Mare Island – Petition for Declaratory Order – Lennar Mare Island LLC, and Pursuant to 49 U.S.C. §11123 and 49 C.F.R. §1146.1 for Expedited Relief due to Unauthorized Cessation of Operations*

226810

Dear Acting Secretary Quinlan:

Enclosed for filing in the above-referenced docket is the Response of Lennar Mare Island LLC to San Francisco Bay Railroad-Mare Island's Reply to Petition to Revoke Exemption.

Respectfully,



Karen E. Escalante

cc:

John F. McHugh, Esq.
Thomas Sheaff
Frederick G. Soley, Esq.
Claudia M. Quintana, Esq.
Charles A. Spitulnik, Esq.
Allison I. Fultz, Esq.

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 35360

226810

**SAN FRANCISCO BAY RAILROAD-MARE ISLAND –
PETITION FOR DECLARATORY ORDER – LENNAR
MARE ISLAND LLC, AND PURSUANT TO 49 U.S.C. § 11123
AND 49 C.F.R. § 1146.1 FOR EXPEDITED RELIEF
DUE TO UNAUTHORIZED CESSATION OF OPERATIONS**

FINANCE DOCKET NO. 35304

226811

**SAN FRANCISCO BAY RAILROAD-MARE ISLAND –
OPERATION EXEMPTION – CALIFORNIA NORTHERN
RAILROAD**

**RESPONSE OF LENNAR MARE ISLAND LLC TO
SAN FRANCISCO BAY RAILROAD-MARE ISLAND'S
REPLY TO PETITION TO REVOKE EXEMPTION**

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April 14, 2010

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 35360

**SAN FRANCISCO BAY RAILROAD-MARE ISLAND –
PETITION FOR DECLARATORY ORDER – LENNAR
MARE ISLAND LLC, AND PURSUANT TO 49 U.S.C. § 11123
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FINANCE DOCKET NO. 35304

**SAN FRANCISCO BAY RAILROAD-MARE ISLAND –
OPERATION EXEMPTION – CALIFORNIA NORTHERN
RAILROAD**

**RESPONSE OF LENNAR MARE ISLAND LLC TO
SAN FRANCISCO BAY RAILROAD-MARE ISLAND'S
REPLY TO PETITION TO REVOKE EXEMPTION**

Lennar Mare Island LLC (“LMI”) submits this response to San Francisco Bay Railroad-Mare Island’s (“SFBRR’s”) Reply to LMI’s Petition to Revoke Exemption, filed April 7, 2010 (“SFBRR Reply”). SFBRR’s “Reply” includes a significant amount of argument that responded to material in LMI’s Reply to SFBRR’s Petition for Declaratory Order, and as such constitutes an improper “reply to a reply.” See 49 C.F.R. § 1104.13(c). Indeed, SFBRR is explicit in stating that its “Reply” addresses the “submissions of LMI in this matter and in opposition to SFBR-MI’s petition for a declaratory order.” SFBRR Reply, p. 13. LMI does not seek to strike SFBRR’s

improper reply to a reply so long as LMI is permitted to make the following points in response to SFBRR's Reply. The Board should also permit LMI to make this response to protect the integrity of the record in these proceedings, as SFBRR's Reply – like its original Notice of Exemption – is rife with misleading and incorrect statements.

- First, SFBRR cites the City of Vallejo's reply in opposition to SFBRR's petition for an emergency service order for the proposition that Mare Island was conveyed to LMI "for the limited purpose of resolving environmental conditions," as if to suggest that SFBRR only needed to reach agreement with the City of Vallejo in order to obtain the right to operate on LMI-owned trackage on Mare Island. SFBRR Reply, p. 6. This suggestion is preposterous. As LMI has demonstrated, its role as landowner and developer of Mare Island gives it responsibility for all aspects of the Island's comprehensive and complex redevelopment, including massive investment in new and reconfigured infrastructure, the parcelization of land formerly operated as a unitary U.S. Navy Shipyard, and the management and accommodation of numerous potentially conflicting new land uses.¹ As SFBRR is well aware, the City of Vallejo neither received nor retained any rail easement permitting it to grant access to the trackage on Mare Island. In its own Board filings SFBRR concedes that it requires LMI's agreement in order to conduct such operations.² Indeed, SFBRR recognized that it needed to reach an

¹ See Reply of Lennar Mare Island LLC in Opposition to Petition for Emergency Service Order Pursuant to 49 U.S.C. § 11123 ("LMI ESO Reply"), STB Finance Docket No. 35360 (filed Mar. 22, 2010), Sheaff V.S. ¶ 36-49.

² E.g., San Francisco Bay Railroad – Mare Island – Petition for Declaratory Order – Lennar Mare Island, and Pursuant to 49 U.S.C. § 11123 and 49 C.F.R. § 1146.1(b)(1)(i) for Expedited Relief Due to Unauthorized Cessation of Operations, STB Finance Docket No. 35360 (filed Mar. 15, 2010).

agreement with LMI *even before* SFBRR filed its Notice of Exemption in September 2009 (without notice to LMI), in which it misleadingly implied that no such agreement was necessary. The City of Vallejo had informed SFBRR that it must reach agreement with LMI, in addition to any agreement it might enter into with the City, and SFBRR thus was on notice of the need to deal with LMI when it proceeded “in haste” (SFBRR Reply, p. 11) to file a Notice of Exemption that misleadingly implied there was no need to obtain any rights from LMI. *See* Reply of City of Vallejo in Opposition to Request for Expedited Relief, STB Finance Docket No. 35360 (filed Mar. 22, 2010), p. 4.³

- Second, SFBRR inexplicably refuses to acknowledge the status of California Northern’s operations on Mare Island. LMI submitted the sworn testimony of California Northern explaining that California Northern had never obtained Board permission to operate on Mare Island,⁴ yet SFBRR continues to contend that California Northern’s 2002 Notice of Exemption showed the “line from Vallejo to Mare Island as part of the leasehold transferred to California Northern.” SFBRR Reply, p. 14. That is simply false, as Ms. Franger’s testimony establishes. LMI ESO Reply, Franger V.S., ¶ 8. However, SFBRR’s incorrect assertion is consistent with SFBRR’s pattern of at-best casual attention to the facts in this matter.

- Third, SFBRR accuses LMI of having “refuse[d] to negotiate in good faith” over SFBRR’s access to rail trackage on Mare Island. SFBRR Reply, p. 18. SFBRR wrongly equates LMI’s unwillingness to accede to each and every one of SFBRR’s demands with bad faith. LMI engaged in good faith discussions with SFBRR

³ The factual statements herein are verified by Thomas Sheaff of LMI.

⁴ LMI ESO Reply, Franger V.S. ¶ 8.

about the potential for SFBRR to operate on Mare Island in a manner consistent with redevelopment (including the many agreements, entitlements and obligations that LMI has undertaken in connection with that redevelopment), and it was SFBRR's intransigence on these issues – and its utter disinterest in and disregard for the complexities of the ongoing redevelopment – that led LMI to conclude that it needed to seek an alternative rail service provider. Quite simply, and as LMI has repeatedly explained, LMI was not prepared – and is not required – to give SFBRR a blank check allowing it to operate as it pleases on the Island in conflict with the highly complex redevelopment project in which LMI, the City of Vallejo, the State of California, the federal government and numerous other stakeholders have been engaged for many years.⁵

LMI submits that SFBRR's disregard for the complexity of the redevelopment project is confirmed by its Reply. SFBRR baldly asserts (at page 19 of its Reply) that “[t]he fact that the presence of the railroad is inconsistent with a landowner's plans or even with a municipality's plans is immaterial,” confirming that it intends to disregard those plans. Similarly, SFBRR suggests (at page 17 of its Reply) that “temporary embargoes” are all that is needed to make potential rail service compatible with the redevelopment of Mare Island. But there is nothing “temporary” about SFBRR's insistence that it have the *permanent* and *constant* right to provide rail service, regardless of the imperatives occasioned by the Island's redevelopment. SFBRR cannot explain how its demand for the permanent right – as common carrier – to move railcars, operate

⁵ E.g., Lennar Mare Island LLC's Petition to Revoke Exemption (“LMI Petition to Revoke”), STB Finance Docket No. 35304 (filed Mar. 19, 2010), p. 8; LMI ESO Reply, p. 4 & Sheaff V.S. ¶¶ 22-26; Reply of Lennar Mare Island LLC in Opposition to Petition for Declaratory Order (“LMI Declaratory Order Reply”), STB Finance Docket No. 35360 (filed Apr. 5, 2010), p. 9 & Sheaff Apr. 5. V.S., ¶ 74.

transload facilities, and store cars anywhere on the Island it wishes would allow LMI to complete the redevelopment of Mare Island because SFBRR has no interest in, and has made little or no effort to understand, the complexities involved in that redevelopment.

- Finally, SFBRR asserts (at page 9 of its Reply) that it obtained “permission from the FRA to flag unprotected crossings until protective devices could be repaired” on the segment between Flosden Acres and Mare Island. Like so many of SFBRR’s other representations, however, this statement is inaccurate. Such “permission” could only come in the form of an official waiver from FRA. LMI has been informed that the FRA has provided no such waiver.

CONCLUSION

SFBRR requests that the Board accept this Response, grant LMI’s Petition to Revoke Exemption, and deny all of the relief SFBRR requests in its Petition for an Emergency Service Order and for Declaratory Order.

Respectfully submitted,



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Attorneys for Lennar Mare Island, LLC

April 14, 2010

CERTIFICATE OF SERVICE

I, Karen E. Escalante, certify that on this date a copy of the Response of Lennar Mare Island, LLC to SFBRR's Reply to Petition to Revoke Exemption, filed on April 14, 2010, was served by email and by first-class U.S. mail, postage prepaid, on all parties of record, specifically:

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Karen E. Escalante

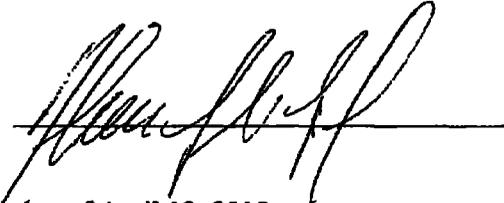
Dated: April 14, 2010

VERIFICATION

State of California)
)
)
)
)
County of Solano)

SS

Thomas Sheaff, being duly sworn, deposes and says that he has read the foregoing statement and Response of Lennar Mare Island LLC to San Francisco Bay Railroad-Mare Island's Reply to Petition to Revoke Exemption, knows the facts asserted therein are true and that the same are true as stated.



Subscribed and sworn to before me this 13th day of April 13, 2010.


Notary Public

Notary Public of SOLANO

My Commission expires: 1774375

