

<p>DENVER COUNTY DISTRICT COURT, COLORADO 1437 Bannock Street Denver, Colorado 80202 (720) 865-8301</p>	
<p>PLAINTIFF: DENVER TRANSIT PARTNERS, LLC, a Delaware limited liability company,</p> <p>v.</p> <p>DEFENDANT: REGIONAL TRANSPORTATION DISTRICT, a political subdivision of the State of Colorado.</p>	<p>▲COURT USE ONLY▲</p>
<p>Attorneys for Plaintiff: Tiffanie D. Stasiak, No. 21535 Thomas W. Snyder, No. 33106 Thomas A. Isler, No. 48472 Kutak Rock LLP 1801 California Street, Suite 3000 Denver, CO 80202 (303) 297-2400 Tiffanie.Stasiak@KutakRock.com Thomas.Snyder@KutakRock.com Thomas.Isler@KutakRock.com</p>	<p>Case No.:</p> <p>Div.:</p>
<p>COMPLAINT AND JURY DEMAND</p>	

Denver Transit Partners, LLC (“DTP”), by and through its counsel, Kutak Rock LLP, hereby submits its Complaint and Jury Demand, and in support thereof states the following:

PARTIES, JURISDICTION, AND VENUE

1. Plaintiff DTP is a Delaware Limited Liability Company registered to do business in the State of Colorado. Its principal place of business is located at 701 West 48th Avenue, Denver, Colorado 80226.

2. Defendant Regional Transportation District (“RTD”) is a public body corporate and politic and a political subdivision of the State of Colorado, duly organized

and existing under the laws of the State of Colorado, pursuant to the Regional Transportation District Act, C.R.S. §32-9-101, et seq., as amended.

3. This Court has jurisdiction over this civil action pursuant to C.R.S. § 13-1-124(1)(g) because DTP and RTD transacted business, the Property is located in, and an agreement was executed and performed in Denver County, Colorado.

4. Venue is also proper in this judicial district pursuant to C.R.C.P. 98 because the alleged claims involve real property located in Denver County, Colorado.

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

GENERAL ALLEGATIONS

Introduction and Background Facts

6. This matter involves the RTD FasTracks Project, known as the Eagle P3 commuter rail project (the “EAGLE Project” or “Project”). The Project was awarded by RTD to DTP and memorialized by a Concession and Lease Agreement dated July 9, 2010 (“CA”).

7. The Project is the first public-private partnership (“P3”) project for commuter rail in the US. It includes the financing, design, construction, and long-term operation and maintenance of three new commuter rail lines from Denver Union Station to: Denver International Airport (the “A-Line”), south Westminster (the “B-Line”), and Arvada and Wheat Ridge (the “G-Line”). The Project also includes a new Commuter Rail Maintenance Facility and Operations Control Center, and Rolling Stock fleet of 66 Commuter Rail Vehicles. It includes 16 new commuter rail stations, some with park and ride facilities, along with other transit amenities.

8. DTP claims breach of contract, violation of the covenant of good faith and fair dealing and declaratory relief against RTD for RTD’s wrongful refusal to accept Change in Law¹ and Force Majeure claims made by DTP under the CA during the design/build phase of the Project. This action also constitutes a contractual appeal *de novo* from a Dispute Resolution Panel (“DRP”) determination that did not result in a settlement. DTP seeks declaratory relief, monetary damages, and extensions of time to which it is entitled under the CA (but which RTD has refused to give) arising out of the occurrence of

¹ Capitalized terms not defined herein have the same meaning as in the CA, which is attached hereto as Exhibit A and incorporated by reference.

the Change in Law and Force Majeure Events described below. DTP seeks the relief that should have been granted by RTD in accordance with the applicable CA provisions, the CA's express obligations of good faith and Colorado's implied covenant of good faith and fair dealing.

9. The CA included Change in Law and Force Majeure provisions that are typical in P3 contracts. These provisions define in detail the risks undertaken not only by the Concessionaire, but also by public bond and equity holders under financing arranged by the Concessionaire. These defined risks are also passed through by the Concessionaire to a Construction consortium of highly experienced global contractors to provide final design and construct the facilities, and upon construction completion, to an O&M consortium of experienced global contractors to operate the new railroad lines for the duration of a concession period (approximately 26 years from the completion of construction in this case).

10. Under the CA, Change in Law is defined as virtually any issuance of an order, any new interpretation, and any deviation from established process that impacts Project schedule or costs, whether or not driven by threats to public safety or unforeseen or uncontrollable circumstances.

11. Under the CA, Force Majeure is generally defined as “[T]he occurrence of action (including Change in Law) taken by any Relevant Authority, including FRA [the Federal Railroad Administration].....in response to a threat to, or event affecting, the public health, safety, security or the Environment, in each case, the effect of which is to suspend, delay or disrupt the performance by [DTP] of its obligations under the CA and any other event outside the reasonable control of [DTP], and which was not reasonably foreseeable by [DTP] which prevents or delays [DTP] from performing any of its obligations under the CA.

12. The two phases of a P3 project (Construction and Operations) are frequently demarked by an Independent Engineer's (“IE”) certification stating construction obligations have been met, at which time the operating period would normally begin. The normal demarcation did not occur in this case because the parties agreed to commence operations before the IE had issued a completion certificate due to the fact that certain testing had not been completed and the project had been affected by a late Change in Law by the Colorado Public Utilities Commission (“CPUC”). Subsequently, additional Change in Law and Force Majeure Events occurred that extended the original Change in Law and imposed additional delays.

13. The relief requested in this case includes relief due to the Concessionaire which would flow down to the Construction and Operations consortiums under the P3 structure. The Concessionaire is required by contract to pursue recovery pursuant to the Dispute Resolution Provision of the CA for the benefit of the bond and equity holders and the Construction and Operations consortiums. If the relief requested is not forthcoming,

the final step in the Dispute Resolution Procedure requires the submission of the dispute to this Court on a *de novo* basis, as indicated above.

DTP Decision to Use At Grade Crossings

14. In 2009, RTD issued a Request for Proposals (“RFP”) for the EAGLE Project to three prequalified Concessionaire teams. The contract contained in the RFP included the Change in Law and Force Majeure provisions that RTD has refused to honor in clear breach of its obligations under the CA.

15. The RFP specified the use of At-Grade Crossings--locations where railroad tracks intersect with another transportation mode (automobile, truck, etc.) and where efforts must be undertaken to permit the safe transit and safety at the crossing. RTD specified these At-Grade Crossings in lieu of grade separated crossings, which would have required the construction of additional bridges, significantly increasing RTD’s costs. Due to RTD’s specification of At-Grade Crossings, the RFP included requirements to equip the crossings to allow for the creation of “Quiet Zones,” which would satisfy the Final Environmental Impact Statement mitigation requirements accepted by RTD. Quiet Zones must satisfy the Train Horn Rule promulgated by the FRA, including a requirement to provide four-quadrant gates and, where practical, “Constant Warning Time” (“CWT”) devices, both of which were required by the RFP. See, 49 CFR Part 22. Additionally, the RFP required use of Positive Train Control (“PTC”)—computerized systems that enforce train speed limits and provide emergency protection measures.

16. The DTP Proposal met the RFP requirement for equipping crossings with CWT devices by using a Wireless Crossing Activation System (“WCAS”) that uses the wireless communication and global positioning (“GPS”) subsystems of PTC.

17. The required use of At-Grade Crossings was an RTD decision, and the risk of regulatory actions against such crossings, including changes in standards, practices or guidelines to evaluate At-Grade Crossings and related systems, was contractually assumed by RTD through the broad Change in Law and Force Majeure provisions in the CA. At-Grade Crossings have been seen increasingly as a threat to public safety and subjected to more intense regulatory scrutiny, driven by high profile events since the CA was signed, with at least one State now prohibiting new At-Grade Crossings altogether for certain commuter railroad lines.

18. The FRA has exclusive preemptive jurisdiction to regulate the safety of operating commuter railroads engaged in interstate commerce. It prescribes certain standards and approves Quiet Zones. The CPUC has responsibility for oversight of the specific configuration and design of public highway-rail crossings in the State of Colorado.

19. Throughout the regulatory approval process, pursuant to the express terms of the CA, RTD managed both the CPUC and FRA interface, approved and filed all

applications and submissions to regulatory agencies and provided all legal counsel appearances before the CPUC.

20. The crossing-specific designs for the Project were completed by DTP on time, approved by RTD, submitted by RTD for approval to the CPUC and approved by CPUC Orders issued from April 18, 2013 through November 15, 2013. At that point, the Project had all required CPUC “Permits” required by the CA and the IE. Similarly, the detailed train control system design for PTC, including WCAS, was completed by DTP on time, approved by RTD, submitted by RTD for approval by the FRA, and approved by the FRA in the normal course of development.

21. The CPUC-approved designs included the installation of four-quadrant gates consistent with FRA regulations for equipping crossings for Quiet Zones. Four-quadrant gates entail putting a crossing arm on both sides of the tracks in both directions of road travel to discourage motorists from attempting to beat the crossing arms or from circumventing the crossing arms after stopping.

First Change in Law/Force Majeure-Bicycle Detection and Exit Gate Delay

22. Following the construction of the CPUC-approved designs, DTP conducted testing in accordance with an approved FRA testing plan in June and July of 2015 to verify the proper operation of crossing safety features and crossing activation. This plan was approved by the FRA and performed by an independent testing firm. By protocol, the CPUC staff and FRA inspectors were invited to observe the testing.

23. Immediately upon witnessing the testing, the CPUC staff allowed the commencement of freight railroad operations at the crossings without any additional safety requirements and without the presence of crossing guards. DTP operations were not scheduled to commence until April of 2016. While observing the testing in June and July of 2015, one CPUC staff member expressed concern that the four-quadrant gates would be “confusing” to a bicyclist. This prompted the CPUC staff member to subsequently request that additional equipment be added to the already-approved design to provide for the detection of bicycles.

24. The approved designs contained standard motor vehicle detection loops that operate magnetically and are not intended to detect bicycles, which have a smaller magnetic footprint than a motor vehicle. In addition, bicycle detection was not required by the RFP or the CA. Further, bicycle detection was not identified as a design requirement during the original design and review approval process.

25. There were no known detection devices for bicycles that are usable with FRA-regulated railroad crossing activation systems and none have been approved by the FRA.

26. Over the objection of DTP, RTD offered to the CPUC implementation of a pre-programmed exit gate timing delay approach to provide additional time for any vehicle, including bicycles, to exit an intersection. RTD referred to that solution as a temporary measure and undertook to keep the CPUC informed of potential new technology developments in the future that might someday provide the bicycle detection envisioned by the CPUC staff member, but which was neither required by governing law nor a reasonably foreseeable requirement by the parties at the time they execute the CA, as evidenced by the fact that bicycle detection was not included in or required by RTD in its RFP.

27. In response to RTD's agreement to provide an exit gate delay, the CPUC unexpectedly required RTD to amend the original design applications (which had been previously approved in 2013 and upon which DTP had based its proposal to RTD). Historically, the CPUC allowed minor changes with only the requirement to submit as-built drawings upon completion. Amending the original design applications had the effect of reopening the entire design process and exposing the Project to additional notice and comment periods that jeopardized the opening of the A-Line and, as would be seen, resulted in additional delays from unprecedented actions by CPUC and FRA.

28. On December 18, 2015, DTP issued a Change in Law Notice reserving all rights under Section 37 ("Change in Law") of the CA relative to RTD's decision to agree to add a bicycle exit gate delay and to re-open the previously approved design-construction applications. Under the CA, an order that changes a prior order is a Change in Law. The CPUC staff member's insistence that an exit gate delay be employed at the Project was based upon misinterpretation of Colorado traffic law, which provides that bicyclists must obey traffic rules. The reinterpretation/misinterpretation by the CPUC staff member of an inapplicable law to require the deployment of technology at railroad crossings that did not exist is a Change in Law under the CA.

29. To facilitate the scheduled opening of the A-Line on April 22, 2016 and the implementation of a programmed exit gate timing delay, RTD offered to the CPUC to post crossing guards to assist cyclists at the crossings until the exit gate timing delay could be completed.

30. On March 30, 2016, the CPUC issued Orders (the "March 30, 2016 CPUC Order") requiring that RTD post guards at the crossings 24 hours/day until RTD could certify safe, complete and correct crossing operations in writing, including a final inspection by the CPUC staff. The requirement for guards on an operating commuter railroad is beyond CPUC Rules and jurisdiction. The FRA has exclusive preemptive jurisdiction to regulate the safety of operating commuter railroads engaged in interstate commerce, while the CPUC has responsibility for design approval only of public highway-rail crossings in the State of Colorado that are under federal operational jurisdiction. The ordering of guards and the requirement for a final inspection not called for in the CPUC

Rules were additional Changes in Law, and were imposed in response to a public safety threat or event, both a Change in Law and Force Majeure Event under the CA.

31. The reopening of CPUC-approved designs for bicycle exit gate timing delays also reflected a change in CPUC practice (by requiring amendments to the previously approved applications), and the inappropriate application of a Colorado statute. This was a producing cause of and contributed to a two-plus year delay for DTP, and subsequently exposed DTP to millions of dollars in unanticipated costs, and the unreasonable imposition of the default terms under Project contract documents.

32. The reopening of the CPUC-approved designs caused the CPUC applications to still be pending during the time of the scheduled April 2016 opening of the A-Line.

A-Line Opens for Passenger Service—April 2016

33. The A-Line and B-Line entered operations on time on April 22, 2016 and July 25, 2016, respectively. With respect to both lines, RTD has enjoyed the benefits of a railroad that opened on time, has delivered exceptional service to the public, higher than expected ridership and therefore higher than expected revenues to RTD from the outset on the A Line and B Line.

34. As stated above, the CA required CWT devices. Historically, CWT devices were not available for electrified railroads like the A,B and G Lines for technical reasons and are therefore not a firm requirement for Quiet Zones under FRA regulations. More specifically, Quiet Zones may be approved by the FRA even if CWT devices are not present if the crossings achieve a high enough safety score based on quad gates and other safety measures at specific crossings, as reviewed and scored on a crossing by crossing basis.

35. The Project is able to have CWT devices, as promised by RTD to its stakeholders and as required by the CA specifications, because of DTP's innovative use of wireless communications and GPS that enable WCAS and the PTC system.

36. The WCAS was still under normal pre-startup testing just prior to the commencement of operations in April 2016. For that reason, the FRA suggested that it would allow initial passenger operations with the WCAS switched off and without the CWT device functionality in operation. A CWT device reprograms the crossing signal activation system dynamically based on actual train speed. Operating without WCAS meant that crossings would activate with the assumption that trains are traveling at the maximum speed limit and with the effect that if they are actually traveling slower, crossing gates will be down for a longer period of time while the more-slowly moving train approaches.

37. A formal "waiver" from the FRA "Maintenance Rule" is required anytime any equipment is turned off, just as it is during any testing with trains in operation, to begin

passenger operations. The waiver issued by the FRA in this instance required, among other things, that RTD maintain crossing guards and comply with the CPUC Order, which also required crossing guards pending final implementation of the bicycle timing delay and a final CPUC inspection of the civil works. The functioning of safety devices, including the CWT device, is performed solely under an FRA-approved test plan.

38. Within a few days after commencing operations, the FRA allowed operations with WCAS turned on and thereafter conditionally certified PTC, of which WCAS is a part. Since PTC overall is a new technology, it will not be finally certified until a later stage. For purposes of this case, this was the point at which the CWT devices were operational. At this point, the FRA waiver effectively expired; however, no formal action needed to be taken by DTP and the crossing guards were still in place pending the CPUC inspection/approval process. The FRA waivers simply remained in place even though not technically needed. A waiver protects the railroad from fines or penalties should the railroad desire to operate while under testing or with certain equipment out of commission.

39. Prior to the April 2016 opening of the A-Line, DTP was pressured in writing by RTD to commence passenger service before the IE's issuance of the Revenue Service Commencement Certificate ("RSCC") for the A-Line, which the CA contemplates as a condition precedent to entering passenger service for any line. The issuance of the RSCCs prior to the commencement of passenger service allows the Project to move into the Operations Phase from the Design/Build Phase, as defined under the CA. The failure to issue RSCCs leaves the Project in a perpetual Design/Build phase, which benefits only RTD through threatened defaults and monetary assessments against DTP.

40. RTD indicated in writing that it would direct DTP to commence A-Line passenger operations on schedule and deduct money from Service Payments due to DTP for any unfinished aspects. In order to open on April 22, 2016, DTP agreed in good faith to proceed under a separate agreement ("A-Line Side Agreement"), which provided for the issuance of the RSCC upon the completion of the WCAS. At that time, the Parties reasonably anticipated a delay of less than a month in receiving final FRA systems approval and a short period of providing crossing guards at crossings pending CPUC staff inspections. The A-Line Side Agreement set the deductions RTD had threatened to take at the amount of \$250,000/month if the RSCC still had not been issued by June 30, 2016. As the Project progressed, RTD deducted over \$6,000,000 from DTP, with no corresponding damages to RTD, all the while enjoying exceptional ridership on the A-Line.

41. The reopening of CPUC-approved designs for bicycle exit gate timing delays and the CPUC staff member's insistence that an exit gate delay be employed at the Project was based on a misinterpretation of Colorado law, which provides that bicyclists must obey traffic rules. The reinterpretation/misinterpretation by the CPUC staff member of an inapplicable law to require the deployment of technology at railroad crossings that did not exist constituted a Change in Law under the CA. Ultimately, as set forth below, after the opening of the A-Line, the CPUC staff member became focused on the warning

times at the A-Line crossings. With the open applications, the CPUC's focus turned to other issues, including "inconsistent and excessive" warning times. Because the previously approved applications were reopened due to the bicycle delay Change in Law, the CPUC was able to delay approvals based upon issues ("inconsistent and excessive" warning times) unrelated to the original bicycle detection issue, as explained below.

42. On June 9, 2016, DTP issued another Change in Law/Force Majeure Notice to RTD. The June 9, 2016 Change in Law/Force Majeure Notice reasserted the Change in Law notice issued by DTP on December 18, 2015 and further documented the impacts to DTP regarding the reopening of the previously CPUC approved design applications. The Change in Law/Force Majeure Notice also asserted that the CPUC's actions, as well as the IE's refusal to issue RSCCs due the existence of crossing guards, constituted a Change in Law and Force Majeure under the CA. DTP requested that RTD not commence the \$250k deductions contemplated in the A-Line Side Agreement because the sole grounds for the deduction, the IE's refusal to issue the RSCCs until final FRA and CPUC approval had been obtained, was contrary to the terms of the CA.

Second Change in Law/Force Majeure Event: Warning Times

43. On or about May 18, 2017, DTP learned that FRA inspectors operated from an unknown, unpublished internal guidance memorandum, not available to DTP or the industry, which provided that notices of violations of the FRA Maintenance Rule should be issued by inspectors if performance is not within 10% of design warning time. Thus, while no level of performance is required by published FRA regulations, inspectors were to apply a 10% standard, but not tell the railroad what they were doing. DTP later learned that inspectors actually apply the unpublished memo with the use of a stopwatch test on existing railroads only once annually in coordination with the railroad, with a single test train operating under ideal test conditions, not actual dynamic operating conditions. DTP found no record of the FRA ever applying such a test prior to approving new crossings and no evidence of any scientific basis for such a test. No such test was required by the FRA in approving the test plan for the Project. Scientifically, no railroad can guarantee that the design time will be achieved on each and every activation because the train is under human control and conditions vary. Once signals start flashing, no system can alter that fact. Also, no system can cause the human operator to maintain a certain speed to reach the crossing at the precise warning time. This is clearly understood in all design regulations and by scientists, mathematicians, design engineers and regulators in the industry. In this case, regulators would only say that they were not happy with the results, even though the non-human elements of system had been shown to function in accordance with all historically mandated FRA test regulations.

44. Warning time consistency with human factors present during actual operations on the Project is and was exemplary as compared to prescribed design times and as compared to similar railroads. This has been borne out by a comparison of data developed in actual operations on the A and B Lines to the available data of other railroads

studied by DTP during the course of achieving CPUC and FRA satisfaction, including a comparison to similar crossings approved in the past by the CPUC. RTD formally declared its satisfaction with the WCAS to the FRA in a letter dated May 25, 2017, stating, in part:

The wireless system is new technology developed for RTDC in order to provide a safe consistent constant warning time on our system, minimize disruption to the street network, and maximize efficiency (144 crossing activations/day on the A-Line) while providing the appropriate safe warning to the traveling public....RTDC's system is designed with a single warning time to meet the 20 second FRA minimum plus the CPUC approach time and a wireless crossing system buffer time of 15 seconds consisting of the adjacent crossing factors, station stop factors and the allowable acceleration....RTD does realize that our safe warning system utilizes new technology. The system does meet the intent of and is allowed by existing regulatory requirements-providing safe warning at rail/highway at-grade crossing. We meet all the time requirements and provide the required safe warning requirements outlined by the federal regulations.

45. The May 26, 2017, DTP Change in Law/Force Majeure notice was issued to RTD in reaction to the FRA's unwritten and unknown standards and in response to RTD's prior Change in Law denials. It had become clear that no efforts to satisfy regulators could assure timely receipt of RSCCs by the CA default date, and that regulators were acting out of an increased concern for public safety not addressed in their existing rules or known to the industry in the exercise of Good Industry Practice, as defined under the CA. It was not clear if the crossings would ever win favor with regulators or if the unprecedented resistance would require that the crossings be replaced with grade separated crossings.

46. DTP completed the A Line crossings by adding the exit gate timing delays required by the CPUC and certifying that the crossings were complete and in conformity with all legal and contractual requirements. These certifications were completed by DTP from June 3, 2016 through June 14, 2016. At that time, because DTP had fulfilled its requirements under the A-Line Side Agreement, and had completed WCAS testing to the FRA's satisfaction, the IE was consulted and asked to issue the RSCC. At the same time, RTD refused to certify the crossings to the CPUC, as required in the March 30, 2016 CPUC Order, because by then, the CPUC staff and FRA field inspectors had identified yet another new, and unprecedented, requirement for DTP to meet: remedying allegedly "inconsistent" and "excessive" warning times at the At-Grade Crossings. RTD was reticent to approach the CPUC staff for final construction inspections at a time when the CPUC staff was asserting new issues. Additionally, RTD refused to agree to the IE's issuance of the RSCC. The IE took the unprecedented position that it could not say all systems had been completed

as required by the CA if crossing guards were still in place, indicating for the first time that something must not be working correctly even though all previously identified requirements for RSCC issuance had been met. The IE would not act based on the official testing plan having been successfully completed due to RTD's objection. The new "inconsistent" and "excessive" warning time issue could only be observed during live passenger operations, not pre-RSCC testing during the normal P3 Construction period. Accordingly, inconsistent and excessive warning times during operation were never and could never be a requirement for the issuance of RSCCs under the CA.

47. On June 9, 2016, DTP issued another Notice of Change in Law and Force Majeure under the CA stating that the CPUC's actions, as well as the IE's refusal to issue RSCCs due the existence of crossing guards, constituted a Change in Law under the CA. The notice stated that RTD should not commence the \$250k deductions contemplated in the A-Line Side Agreement because the sole grounds for the deduction, the IE's refusal to issue the RSCCs until final FRA and CPUC approval had been obtained, was contrary to the terms of the CA. RTD refused and began taking for itself \$250,000/month from DTP's service payments.

48. RTD took \$250,000/month from DTP's revenue service payments through August 13, 2018. Further, DTP has paid for all crossing guards since the CPUC March 2016 Orders, while claiming a right to reimbursement from RTD. The A-Line Side Agreement preserved DTP's rights arising from any future Change in Law and Force Majeure, including an outright contractual prohibition against the taking of revenue service payment deductions during an event of Force Majeure. The unprecedented change in practice and standards regarding "inconsistent" and "excessive" warning times was a Change in Law/Force Majeure Event, as defined by the CA which arose after the execution of side agreements for both the A and B Lines.

49. Within days after passenger service commenced on the A-Line and WCAS had been approved based upon all historically-required and known industry standard testing, FRA inspectors for the first time asserted that in order for crossings to "operate as designed" (as required by the FRA "Maintenance Rule"), actual crossing warning times experienced during operations must be reasonably consistent relative to the design warning times approved by the CPUC in its original 2013 crossing design approval orders. The FRA inspectors did not and could not articulate any standard or means of measurement from which they would conclude when warning times were consistent enough, nor did they give DTP notice of any applicable legal requirement (because none exists). They also had no comparable data from other similar railroads. Under the circumstances, DTP had no alternative to mitigate the situation other than to request that RTD seek an extension of the FRA waiver, which RTD did and the FRA approved, with additional conditions.

50. Per-trip run time performance has been of a very high standard on the Project from the commencement of passenger service in April 2016, and near perfect since early 2017. This would not be the case if trains were running so slowly as to cause

significant excess wait times after crossing activations. The run time performance data confirmed that trains were not routinely slowing down more than expected or stopping longer than expected at stations that lie within crossing activation zones.

51. As noted earlier, published FRA regulations provide no metric for crossing warning time consistency. Nor does the CA. It does require that an alarm sound at the control center for warning times in excess of two (2) minutes, which would be important for dispatchers to know, and may or not be a sign of trouble or problems to be addressed. There are CA performance metrics for all areas of performance deemed important by RTD. DTP has achieved superior results from the very beginning of operations. Superior performance has resulted in the payment of bonuses to DTP, in accordance with the CA, which have been negated by the service payment deductions taken by RTD under the Side Agreements.

G-Line Impacts from Change in Law and Force Majeure Events

52. Although the A Line opened on time, the completion of testing on the G-Line was prohibited by the regulators. On June 1, 2016 the CPUC initially issued an Order to allow G Line testing with crossing guards, but then prohibited testing because new applications for bicycle exit gate timing had not yet been filed. Thus, the G-Line was impacted by the same Changes in Law and Force Majeure Events as the A-Line. Testing of the B-Line was ongoing and not impacted by the CPUC bicycle detection/exit gate delay issue, because it does not have any public crossings, only a single private crossing.

53. On June 9, 2016, DTP reported in writing to RTD that the CPUC was additionally now preventing G-Line testing until new G-Line applications with bicycle exit gate timing delays were filed and approved for each crossing on the G-Line (just as was done with the A-Line).

54. The CPUC Order required that RTD (and therefore DTP) maintain crossing guards on the G-Line even though commuter rail trains were not allowed to test. The CPUC had allowed freight operations since the original testing in June 2015, but had not then required crossing guards. Only when DTP was ready to test the G-Line crossings did the CPUC require guards for freight movements over the crossings. The crossing guards were required 24 hours/day 7 days/week even though freight trains only moved through two or three times per day using traditional grade crossing activation in common use across the country. The freight railroad warning times under actual operating conditions were never called into question by the CPUC or the FRA, thereby making the CPUC's order for guards on the G-Line a Discriminatory Change in Law, as defined in the CA.

55. On September 1, 2016 all testing was shut down by the CPUC and FRA on the G-Line, until the perceived A-Line WCAS issues were resolved. The G-Line was scheduled to commence operations on October 26, 2016. The G-Line did not open for service on October 26, 2016, although DTP was ready to commence service at that time

and would have commenced service but for the refusal of the CPUC and FRA to grant the requisite approvals.

B-Line Impacts from Change in Law/Force Majeure Events

56. Because regulatory inquiries had expanded and were unresolved, the FRA required a waiver for operation of the B-Line before it began operations. This meant that the IE would not issue an RSCC for the B-Line again, based solely on the presence of guards. A second side agreement was entered into for the B-Line on July 23, 2016 (“B-Line Side Agreement”) with Service Payment deductions set at \$100,000 per month if the RSCC for the B-Line was not received before September 30, 2016. By this point, it appeared that A-Line warning times had become more consistent due to human operator experience and system optimizations undertaken by DTP in attempts to satisfy the regulators. There was again no expectation of a prolonged delay in satisfying at least the FRA, which had been responding favorably to efforts to make operational improvements. Only the FRA has jurisdiction over the B-Line. The B-Line is not jurisdictional to the CPUC because it has no public crossings. The B-Line has only one private road crossing.

57. Neither the CPUC nor FRA passed new rules or regulations on warning time consistency. Instead, during DTP’s performance of the CA, the CPUC and FRA took increased disfavor toward commuter railroad At-Grade Crossings. They reinterpreted design requirements and regulations pertaining to At-Grade Crossings, Quiet Zones regulations and PTC train control systems after designs had already been approved and after construction was completed.

58. Specifically, the CPUC and the FRA claimed the Project’s WCAS was not working as intended because FRA and CPUC representatives observed what they described as “inconsistent” and “excessive” warning times.

59. The FRA and CPUC do not and have not defined a standard for these two criteria (inconsistent and excessive) and DTP has incurred substantial costs, by way of imposed crossing guard costs and deductions from service payments in an attempt to satisfy regulatory authorities’ unprecedented, unknown and undefined “maximum warning time” regulation. Further, the FRA changed its practice relative to how it measured crossing activation systems, by failing to account for human and operational factors in the operation of the trains.

60. The FRA changed the way it conducted testing on the WCAS after the system had been approved and tested and placed into revenue service, due to the “observations” referenced above. Industry standard relies upon the FRA testing the mechanical and electrical components of a warning system by use of (1) calculation and simulation, or (2) observing the system using electronic devices or stopwatches under controlled test conditions with adjustment for human train operator factors. When DTP’s warning times were observed, after revenue service, the PUC and FRA did not adjust for operational or human factor influences to the observed times. This served to artificially

increase the variability of warning time results they observed. Only the influence of human factors and conditions could be questioned since the mechanical operation of equipment had been fully tested per established FRA procedures and inspectors did not desire to repeat those tests. No test procedure existed for the influence of human factors and variable conditions, or how to improve human performance under variable conditions, particularly not as it pertained to meeting the CA requirements for the issuance of RSCCs prior to the commencement of operations. The FRA and CPUC were in uncharted territory and DTP was held to undetermined standards.

61. From April 2016 through September 2017, DTP attended many meetings with FRA representatives in an attempt to obtain a waiver to operate without the threat of warning time violations against unwritten standards and undefined regulatory expectations. FRA regulations carry steep financial penalties for violations and enhanced penalties for knowing violations, with regulatory provisions to direct these at individuals as well as entities. Only through reliance on the FRA waiver process could DTP continue to operate once FRA inspectors asserted that crossing warning times were not in compliance with regulations whether real, imagined, new or newly interpreted.

62. RTD understood and was on written and actual notice that the FRA requirements and criteria for evaluating the warning time was unclear, even to the FRA. RTD managed the interface and with the FRA and observed the differences of opinion being expressed between regional and Washington, DC officials. Ultimately, RTD collaborated with DTP to propose a -5/+15 second standard and testing method in the hopes of proactively working with the regulators to define what they wanted. The -5/+15 second proposal was based on a confidence band developed from actual operating data with human operators without adjustment for weather, time of day, traffic or particular crossing location or train movement complexity. This was an effort to establish criteria which could be tested under normal operating conditions, subject to adjustment for human operator factors.

Third Change in Law/Force Majeure-2015 FAST Act Application

63. On or about September 2016, FRA representatives raised yet another new issue at the Project. They asserted that the PTC system did not comply with FAST Act requirements, even though the PTC system was in operation under FRA authority and conditional approval. The FRA interpreted the FAST Act to require a decoupling of automatic train control (“ATC”) and PTC for speed control messaging to operators, while leaving the PTC penalty braking function in place for speeding and collision prevention. This added to trip run times and made crossing warning times less consistent because operators now had less guidance for train handling and were additionally required to control speed according to a block approach. Reprogramming also frustrated and added time and complexity to implementing any improvements to address warning time concerns. The FAST Act itself was passed after the CA was signed and is, in and of itself, a Change in Law. Everyone, including the FRA, concluded initially that it did not apply to the Project only to later apply it at the worst possible time. This is a further Change in Law and Force

Majeure Event. The FRA’s action only compounded and contributed to the costs and delays arising from the bicycle detection and warning time consistency issues.

64. A Change in Law notice was sent to RTD dated October 21, 2016 with respect to the application of the FAST Act and requirements to decouple ATC and PTC. RTD instructed DTP to proceed with its implementation as planned at that time—rejecting the Change in Law Notice.

FRA and CPUC Approvals

65. On September 28, 2017 the FRA issued a 5-year waiver finding that the WCAS operated within acceptable parameters based on the -5/+15 second testing standard proposed much earlier by RTD in collaboration with DTP. The FRA released RTD from the crossing guard requirement, subject to the filing of a crossing guard removal plan to educate the public to no longer rely on crossing guards. The FRA imposed additional conditions and has since issued a clarification letter, the potential impacts of which are not fully understood and which, despite the urging of DTP, have not been questioned by RTD.

66. One day prior to the issuance of the FRA 5-year waiver, the CPUC rejected the 15 second standard and recommended the replacement of WCAS, with other unspecified technology, requiring the continuation of crossing guards on the A and G Lines. The CPUC had ruled on the matter based solely on presentations by the CPUC.

67. The FRA 5-year waiver was accepted by the IE as adequate approval for RSCC purposes; however the RSCC for the A-Line was not issued due to the CPUC continuing to require crossing guards. The IE promptly issued an RSCC for the B-Line, which is not under CPUC jurisdiction. Service payment deductions from DTP under the B-Line Side Agreement ceased on October 19, 2017, but continued to be taken by RTD under the A-Line Side Agreement.

68. After filing Motions and attending a hearing with the CPUC, the CPUC, on April 25, 2018 issued a Final Order and Concurring Opinions (“Final Order”) that finally approved the WCAS operation, which it had previously denied due to the “excessive” and “inconsistent” warning times. When presented with unfiltered (by CPUC staff) evidence, approval was achieved. The Commissioners ultimately understood and applied existing law in relation to actual warning time. The CPUC, including the CPUC staff, has since proactively supported completion, including conducting the final inspections on an expedited basis. The CPUC operates under procedural rules that limit how fast it can go; however, since April 25, 2018, both the CPUC and the CPUC staff appear to have expedited progress whenever possible under their rules.

69. In its Final Order, the CPUC found: “The evidence now in the record establishes there is no fixed federal or state maximum warning time. As to when warning time becomes “excessive,” the evidence in the record based upon a single study with limited applicability, and is not compelling. The evidence shows that, in the event a driver

becomes frustrated with the warning time, the A-Line and G-Line crossings are equipped with four-quadrant gates and other improvements to prevent violation.” The CPUC had refused approval previously based upon a requirement that did not exist in the industry and that DTP was not required to comply with pursuant to the CA.

70. The CPUC concurring Commissioner, noting the regulatory mistake which had resulted in the delayed approval stated, “However, the Commission still takes no responsibility for the delay and lack of evidence, which means we will likely repeat these types of regulatory mistakes in the future.” The CPUC Commissioner also admitted that there was no support for the delay of approvals based upon “constant warning time” and “maximum warning time” interpretations.

71. The CPUC concurring Commissioner also stated, “However, it is my belief, and the evidence produced at the hearings establish that the Commission had no evidence to support our earlier conclusion that the extra 15 seconds of downtime for the gates presented a safety problem. Our unnecessary lengthy process and lack of due process has delayed resolution of these matters and damaged our citizens and damaged the reputation of this Commission.”

72. Notably, the CPUC Concurring Commissioner questioned RTD’s refusal to request the release of flaggers previously on the A-Line: “I note that RTD failed to file any requests of this Commission to release the flaggers from the period we first ordered them on April 22, 2016 until RTD’s request on September 5, 2017. At some point, I would be interested in understanding why RTD did not file its Motion to Amend earlier and why Denver Transit Partners never filed a Motion to intervene in these proceedings.” But, DTP could not intervene in the proceeding, as RTD controlled all communication with regulators on the project, pursuant to the CA. When DTP certified its crossings in June 2016, RTD could and should have submitted DTP’s certifications to the CPUC, regardless of the lone CPUC staff member’s opinions. At that time, DTP was substantially complete with its obligations under the Design/Build phase of the Project, as defined under the CA. RTD’s failure to submit the certifications and its failure to take detrimental CPUC staff positions to the Commission itself contributed to the delay in approvals and continuing presence of crossing guards.

73. The Second Concurring Commissioner said of RTD, “RTD did little to promote the merits of the relief it sought. Instead, RTD provided no new facts or information, instead focusing a portion of its efforts on redirecting public dissatisfaction with the current A-Line and G-Line operations toward the Commission.”

Continuing Impacts of Changes in Law and Force Majeure

74. It is undisputed that DTP, not RTD, was paying for the crossing guards at the Project. In addition, RTD was taking service payment deductions for the benefit of its own budget. As such, RTD had no urgency surrounding the removal of the crossing guards. The G-Line remains unopened and the FRA again required testing beyond the testing

required by existing law and beyond the testing required prior to the commencement of operations on the A and B Lines.-Decisions that would normally be made at a regional or division level within the FRA have been referred to the FRA safety board with associated delays. Under the CA, RTD, as manager of the FRA relationship, is to bear commercial responsibility for such delays.

75. The FRA and CPUC treated the post-operational retesting of the DTP system on the A and B lines in an unprecedented, and entirely different manner, than testing of other similar systems, thereby satisfying the CA's definition of a Discriminatory Change in Law and Force Majeure event. Now the FRA is treating the pre-operational testing of the DTP system on the G-Line (which has the same system as the A and B Lines) in an unprecedented, and entirely different manner, than testing of other similar systems, thereby satisfying the CA's definition of a Discriminatory Change in Law and Force Majeure Event.

76. Significant approval delays and an inability of the CPUC and FRA to articulate the new unwritten requirements and RTD's objections to the issuance by the IE of RSCCs, have resulted in potential Default and significant continuing damages to DTP.

77. During the Project DTP claimed Change in Law/Force Majeure Events under the CA²; relating to the general categories of 1) bicycle detection, 2) inconsistent and excessive warning time standards, and 3) FAST Act requirements. RTD denied all three Change in Law/Force Majeure Events and refused to provide DTP with relief as required under the CA, thereby necessitating this action.

78. None of the claimed Change in Law/Force Majeure Events were caused by the actions of DTP. In any event, per the CA terms, any fault or failure to notify or mitigate would only reduce, not eliminate, the amount of relief available to DTP.

79. The CA sets forth a comprehensive Dispute Resolution Procedure requiring the parties to participate in management and executive negotiation, and submit unresolved issues to a Dispute Resolution Panel.

80. After exhausting management and executive level negotiations, the parties submitted the dispute herein to a Dispute Resolution Panel from February 2018 through June 27, 2018.

81. The Dispute Resolution Panel decision did not thereafter result in a negotiated settlement.

² DTP issued several Change in Law/Force Majeure Notices during the project which are not in dispute for the purposes of this proceeding.

82. The CA requires: Decisions of a Dispute Resolution Panel that are referred to the District Court of Colorado for the City and County of Denver...shall be reviewed and judged by the District Court of Colorado for the City and County of Denver, *de novo*.

FIRST CLAIM FOR RELIEF
(Breach of Contract)

83. Plaintiff incorporates the allegations in paragraphs 1 through 82 as if fully set forth herein.

84. DTP and RTD entered into the CA described above, which provides commercial protections for DTP from Changes in Law and Force Majeure Events.

85. DTP has experienced the Change in Law and Force Majeure Events, as described above.

86. RTD has refused to provide extensions of critical dates, including the RSDD, to avoid default under the CA as well as reimbursement for costs incurred by DTP caused by the three Change in Law and Force Majeure Events.

87. RTD has breached the CA by failing to provide extensions of critical dates, including the RSDD, to avoid default under the CA as well as failing to reimburse costs incurred by DTP caused by the three Change in Law and Force Majeure Events, and by taking revenue service payment deductions and not modifying future obligations.

88. DTP has substantially performed its duties pursuant to the CA. Any non-performance by DTP under the strict terms of the CA or side agreements is due to unforeseen events beyond the control of DTP.

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

SECOND CLAIM FOR RELIEF
(Violation of the Covenant of Good Faith and Fair Dealing)

90. Plaintiff incorporates the allegations in paragraphs 1 through 89 as if fully set forth herein.

91. Every contract in the State of Colorado contains an implied covenant of good faith and fair dealing requiring the parties to act in good faith and to deal fairly with each other in performing or enforcing the express terms of the contract.

92. DTP's performance under the CA and Side Agreement allowed for the discretion of RTD, giving RTD the power to control the terms of DTP's performance by accepting or rejecting Change in Law/Force Majeure Events, and taking deductions from revenue service payments, threatening default and refusing to comply with the CA's requirements to discuss and agree on extension of Revenue Service Target Dates (as defined under the CA).

93. RTD did not apply the CA consistent with the agreed common purpose of the CA or within the reasonable expectations of the parties. A price for services was obtained from DTP by RTD on the promise of adjustments for Changes in Law and Force Majeure Events as defined under the CA. This is a standard contracting approach for public or quasi-public agencies procuring large projects. It assures important protections for public by removing from pricing the risk of changes while assuring that the procuring agency pays only for changes that actually occur. It also prevents any commercial tension over the implementation of new laws intended to benefit the public at large. The covenant of good faith and fair dealing applies to the CA and the side agreements.

94. The CPUC insisted on a need to protect cyclists after it had already approved crossing designs. That such a change benefits the public is not for a contractor like DTP to question. The change arose after construction was completed and had a significant impact to DTP requiring an adjustment in the price and other obligations.

95. Similarly, the CPUC ultimately came to realize that CPUC staff's insistence on consistent warning times were not based on the articulation of any existing laws or standards to DTP. The CPUC recognized that mistakes in understanding existing law were made at great cost to taxpayers and are likely to be repeated in the future given the nature of regulatory processes. Under the specific terms of the CA, it was not the place of DTP to argue against the CPUC or FRA in their efforts to, in their opinion, better protect the public. The covenant of good faith and fair dealing required RTD to pursue CPUC and FRA approvals in a manner so as to not cause harm to DTP. RTD failed to do so and instead continued to take revenue service deductions from DTP while DTP carried the costs for crossing guards at the Project.

96. Specifically, RTD had the power and obligation to extend CA deadlines prior to the issuance of RSCCs once the IE refused to issue RSCCs due solely to the presence of guards, rather than apply the compliance check list as developed prior to the completion of construction and contemplated under the CA. When RTD understood that the Project was subject to changed practices and undefined regulations on the part of the FRA and CPUC, it was required to accept and act upon Change in Law and Force Majeure claims by DTP. RTD violated the covenant of good faith and fair dealing when it refused to accept DTP's Change in Law and Force Majeure claims, while also writing to the FRA urging that the system under review by regulators was fully compliant with applicable law.

97. RTD also had the obligation to act with good faith and fair dealing under the side agreements when it knew the system was operating as designed, including the

cessation of deductions from DTP's service payments and reimbursement of DTP payments for crossing guards. RTD violated the covenant of good faith and fair dealing by: continuing to take deductions from A and B-Line revenue service payments to DTP, failing to commence G-Line Revenue Services Payments, requiring DTP to assume all costs for crossing guards, failing to pay FAST Act reimbursements, refusing to alter run-times due to FAST Act application, and failing to act to prevent default under the bond financing and equity lock up.

98. To meet its obligations of good faith and fair dealing, it was and is incumbent upon RTD to grant relief and to acknowledge the three Change in Law and Force Majeure Events under the CA. RTD has refused to do so, violating the covenant of good faith and fair dealing.

99. RTD's violation of the covenant of good faith and fair dealing caused damages to DTP in an amount to be proven at trial.

THIRD CLAIM FOR RELIEF
(Declaratory Relief)

100. Plaintiff incorporates the allegations in paragraphs 1 through 99 as if fully set forth herein.

101. A dispute has arisen between DTP and RTD regarding the existence of Change in Law and Force Majeure Events under the CA.

102. DTP asserts that three Change in Law/Force Majeure Events, as defined under the CA have occurred and DTP is owed costs and extension of time relief from RTD under the CA and construction of contract terms regarding future costs and obligations arising from such events. RTD disagrees.

103. DTP requests that the Court declare (a) three Change in Law/Force Majeure Events, as defined in the CA, have occurred at the Project, (b) the Change in Law/Force Majeure Events were not caused by the actions of DTP, and (c) DTP is owed extensions of time, including an extension of the RSDD for each of the Lines, as well as costs and/ or monetary relief under the CA as a result of the Change in Law/Force Majeure Events to date and in the future.

JURY DEMAND

DTP hereby demands a trial to a jury on all issues.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Denver Transit Partners, LLC respectfully requests:

1. That the Court enter judgment against Regional Transportation District, and in favor of Plaintiff Denver Transit Partners on its above claims for relief in an amount of damages to be determined at trial, and for pre-judgment and post-judgment interest, costs, fees and attorney's fees, and for such other and further relief as the Court deems just and proper.
2. For a declaratory judgment to declare, adjudge, and order that three Change in Law/Force Majeure Events have occurred at the Project, which were not caused by the actions of DTP and to the extent the Court so finds, that DTP is entitled to an extension of the RSDDs for each Line and reimbursement of its incurred costs and/or monetary damages are due and owing from RTD now and in the future.

Dated this 19th day of September, 2018.

KUTAK ROCK LLP

s/ Tiffanie D. Stasiak

Tiffanie D. Stasiak, No. 21535

Thomas W. Snyder, No. 33106

Thomas A. Isler, No. 48472

*Attorneys for Plaintiff Denver Transit
Partners, LLC*