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April 30, 2020

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BY E-FILING

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E. Street, S.W.
Washington, DC 20423-0001

ENTERED
Office of Proceedings
April 30, 2020
Part of
Public Record

Re: *Tri-City Railroad Company, LLC – Petition for Modification of Trackage Rights Agreement – Port of Benton County, WA, BNSF Railway Company, and Union Pacific Railroad Company (Docket No. FD 36396)*

Dear Ms. Brown:

The Port of Benton, WA respectfully submits the enclosed Motion to Dismiss in the above referenced docket. If you have any questions, please let me know.

Respectfully,



Justin J. Marks

Counsel for the Port of Benton

Before the
SURFACE TRANSPORTATION BOARD

STB Docket No. FD 36396

TRI-CITY RAILROAD COMPANY, LLC
- PETITION FOR MODIFICATION OF TRACKAGE RIGHTS AGREEMENT –
PORT OF BENTON COUNTY, WA, BNSF RAILWAY COMPANY,
AND UNION PACIFIC RAILROAD COMPANY

PORT OF BENTON, WA MOTION TO DISMISS PETITION

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Attorneys for Port of Benton, WA

Dated: April 30, 2020

Before the
SURFACE TRANSPORTATION BOARD

STB Docket No. FD 36396

TRI-CITY RAILROAD COMPANY, LLC
- PETITION FOR MODIFICATION OF TRackage RIGHTS AGREEMENT –
PORT OF BENTON COUNTY, WA, BNSF RAILWAY COMPANY,
AND UNION PACIFIC RAILROAD COMPANY

PORT OF BENTON, WA MOTION TO DISMISS PETITION

The Port of Benton, WA (the “Port”) respectfully requests that the Board dismiss the Petition for Modification of Trackage Rights Agreement (“TCRY Petition”) filed by Tri-City Railroad Company, LLC (“TCRY”).¹ In support thereof the Port states as follows:

BACKGROUND

On April 10, 2020, TCRY filed the TCRY Petition asking the Board to modify the terms of a trackage rights agreement (“TRA”) currently between the Port, BNSF Railway Inc. (“BNSF”), and Union Pacific Railroad (“UPRR”), despite the fact that TCRY is not a party to the TRA. The TRA is part of a 1947 contract, as amended in 1948, originally between the United States Atomic Energy Commission, Northern Pacific Railway Company, Oregon-Washington Railroad & Navigation Company, and Union Pacific Railroad Company. Copies of the contract and the amendment are attached to the TCRY Petition as Appendices 1 and 2. TCRY does not assert that it is a party to the TRA, but has filed the TCRY Petition based on its alleged interest in the TRA as the tenant under a 2002 lease with the Port (the “Lease”) and its responsibilities under the Lease for maintenance of the rail line subject to the TRA. A copy of

¹ The Port reserves the right to submit a Reply to the TCRY Petition in the event that the Board denies the Port’s Motion to Dismiss and institutes a proceeding.

the Lease is attached to the TCRY Petition as Appendix 5. However, the Lease does not assign any rights under the TRA to TCRY.

The history and background of the trackage, the TRA, the Lease and some of the disputes between TCRY and the Port are well known to the Board, and are summarized in *Port of Benton County, Wash. – Adverse Discontinuance of Rail Service – Tri-City Railroad Company, LLC*, AB 1270 (served Oct. 31, 2019) (“*TCRY Discontinuance Decision*”), slip op. at 2-3. The TCRY Petition fails to mention the *TCRY Discontinuance Decision*, or to advise the Board that there are ongoing disputes between TCRY and the Port regarding the status of the Lease and TCRY’s continued right to occupy and operate the TRA line.

In the *TCRY Discontinuance* proceeding at AB 1270, the Port filed an Application for Adverse Discontinuance with the Board to remove the Board’s exclusive and primary jurisdiction over TCRY’s operating authority and to allow the Port to pursue eviction under state law due to the Port’s view that TCRY is in breach of the Lease. *TCRY Discontinuance Decision*, slip op. at 5. In that decision, the Board granted the adverse discontinuance, but declined to interpret or enforce the disagreements between TCRY and the Port over the Lease stating that “such issues are for an appropriate court to decide.” *Id.* at 5.

The Board should be aware that since the Board issued the *TCRY Discontinuance Decision*, there have been a number of developments in the ongoing state and federal litigation between TCRY and the Port, including:

- The parties had been litigating the breach of contract issue and assorted federal claims brought by TCRY before the United States District Court for the Eastern District of Washington. In a series of decisions, the District Court dismissed all

of TCRY's federal law (*qui tam* and 42 U.S.C. §1983) claims.² TCRY appealed the dismissal to the Ninth Circuit Court of Appeals.³ On March 12, 2020, the District Court subsequently dismissed TCRY's remaining state law claims and the Port's state law counterclaims,⁴ and TCRY amended its appeal to include that decision.⁵

- Given the dismissal of the federal court action in which the parties were litigating various breach of Lease issues, on March 17, 2020, the Port initiated the state law process for evicting TCRY from the premises by posting the required 30-day Notice that TCRY either cure the breach of the Lease or vacate the premises.⁶
- In apparent response to the Notice, on April 9, 2020, TCRY filed a complaint against the Port in Benton County Superior Court regarding breaches of the Lease.⁷

² See for example, Exhibit 1, *Randolph Peterson and Tri-City Railroad Co. LLC., v. Port of Benton County*, NO. 2:17-CV-0191-TOR (E.D. Wash. Oct. 8, 2019) (noting that the reduced rent for the line, a building that TCRY subleases and the laydown yard all presented TCRY with opportunities for additional revenue that it could apply towards its maintenance obligations, dismissing the *qui tam* claims as frivolous, and awarding attorneys' fees to the Port).

³ See Exhibit 2, Verification of TCRY's Ninth Circuit Appeal and Time Schedule Order, *Randolph Peterson and Tri-City Railroad Co. LLC., v. Port of Benton County*, Docket No. 2:17-CV-0191-TOR (9th Cir. Jan. 3, 2020).

⁴ See Exhibit 3 *Randolph Peterson and Tri-City Railroad Co. LLC., v. Port of Benton County*, NO. 2:17-CV-0191-TOR (E.D. Wash. Mar. 12, 2020).

⁵ See Exhibit 4, Amended Notice of Appeal, *Randolph Peterson and Tri-City Railroad Co. LLC., v. Port of Benton County*, No. 2:17-CV-0191-TOR (filed Mar. 20, 2020).

⁶ See Exhibit 5, Port of Benton Notice to Comply or Vacate.

⁷ See Exhibit 6, Complaint, *Tri-City Railroad Company, LLC v. Port of Benton County*, No. 20-2-00649-03 (Filed Apr. 09, 2020) (Benton County Superior Court).

Thus, when TCRY filed the current petition before the Board on April 10, 2020, there were, and continue to be, active proceedings in the state and federal courts regarding the interpretation and enforcement of the Lease.

ARGUMENT

The Board should examine the TCRY Petition and the Port's Motion to Dismiss in a similar manner to how it examines complaints and motions to dismiss. Under 49 U.S.C. §11701(b), the "Board may dismiss a complaint it determines does not state reasonable grounds for investigation and action." The Board will dismiss a complaint when it "finds that there is no basis upon which it could grant the relief sought." *Bell Oil Terminal, Inc. v. BNSF Railway Co.*, slip op. at 3 (served Nov. 4, 2011). When reviewing a motion to dismiss, the Board will view all factors "in the light most favorable to the complainant." *Id.*

Even considering the allegations of the TCRY Petition in the light most favorable to TCRY, it is clear that TCRY Petition does not provide any reasonable ground for Board action given that TCRY has no standing to seek the relief requested, the relief requested raises issues of contract interpretation that is best determined by state courts, the relief requested involves matters already being litigated in other forums.

1. TCRY is not a party to the TRA and therefore lacks standing to seek the relief requested in the TCRY Petition.

The TCRY Petition seeks modification of the terms of the TRA. However, TCRY acknowledges it is not a party to the TRA. The mere fact that TCRY is the tenant of a party to the TRA (the Port) does not give TCRY any standing to seek modifications to the terms of the

TRA. In fact, the Lease makes it very clear the TCRY is prohibited from seeking such modifications:⁸

7.4 The Tenant shall not take any actions which will amend, modify terminate or invalidate any existing contracts which the Port has with any other railroad carrier, without the Port's prior written consent....

Thus, TCRY has not established any standing to seek a Board order modifying terms of the TRA, and there is no basis upon which the Board could grant the relief sought.

Granting the Port's Motion to Dismiss would be consistent with Board (and ICC) precedent when a petitioner, not a party to a trackage rights agreement, seeks modification of its terms. *See Mexrail, Inc. v. Union Pacific Railroad Company*, 1994 WL 643473 (ICC served Nov. 17, 1994) ("*Mexrail. v. UPRR*"). In *Mexrail v. UPRR*, the petitioner, Mexrail asserted that it was entitled to rental payments from UPRR for the use of the northern portion of the International Bridge that crosses from Mexico into the United States. The ICC acknowledged that it had jurisdiction over carrier operations, rental, and sharing of expenses of the bridge under the trackage rights agreement. *Mexrail v. UPRR*, at *1-*2. However, the ICC granted UPRR's motion to dismiss and explained:

[t]here are two ways that Mexrail can come before this Commission and request a change in any of the terms of the agreement... First, if Mexrail were a party to that agreement, or perhaps to the proceeding then, or had since succeeded to Tex Mex's interest in the agreement, it could do so. Mexrail does not qualify under either of these scenarios.

*Id. at *4.* TCRY has not cited to any precedent in which the Board or ICC has found that an entity other than a party to a trackage rights agreement has standing to seek modifications to that agreement. The "jurisdictional" decisions cited by TCRY (TCRY Petition at 7) do not hold any

⁸ The filing of the TCRY Petition in and of itself appears to be another breach of the Lease by TCRY.

differently – the claims in each of those proceedings seeking modification of trackage rights provisions were brought by a party to the agreement.

Here, TCRY Petitions the Board for a change to the terms of the TRA when it is neither a party to the agreement nor a successor in interest to a party of the agreement. TCRY's only claim to standing is that it has maintenance responsibilities under the Lease, and therefore that it has an interest in modifying the terms of the TRA to require payments be made by BNSF and UPRR towards that maintenance. However, the Lease does not entitle TCRY to any payments made under the TRA even if the requested modifications were ordered. Moreover, pursuant to the *TCRY Discontinuance Decision*, the Port has initiated eviction proceedings against TCRY that once complete will remove TCRY entirely from the TRA line. Consequently, the Board should find that TCRY does not have standing to seek modification of the terms of the TRA, and should grant the Port's Motion to Dismiss.

2. The TCRY Petition raises contractual claims the type of which the Board leaves for courts to decide.

The TCRY Petition raises contractual claims and therefore, the Board should grant the Motion to Dismiss and allow those issues to be heard before a court competent to interpret Washington state contract law. As the Board stated in the *TCRY Discontinuance Decision*, "the Board does not undertake to interpret or enforce contracts, as such issues are for an appropriate court to decide." *TCRY Discontinuance Decision*, slip op. at 6.

TCRY is not a party to the TRA. TCRY asserts that its interest is based on its acknowledged obligation to pay for maintenance of the subject rail line under the Lease. *TCRY Petition* at 4. Thus, the issue of TCRY's right to seek modifications to the TRA is based on the terms of the Lease. As noted above, the Port believes it is clear that TCRY does not have any right under the Lease to seek modifications of the TRA. But, in any event, any issues TCRY has

regarding the interpretation or enforcement of provisions in the Lease are clearly matters of state contract law. Indeed, TCRY acknowledged as much in the complaint that it filed in the Benton County Superior Court, one day prior to filing the TCRY Petition with the Board, seeking to litigate breaches of the Lease. Further, the Port has begun the state court eviction process by posting the Notice alleging breach of the Lease by TCRY.⁹

The Board should grant the Port's Motion to Dismiss because TCRY's issues arise from its disputes regarding its obligations and rights under the Lease and not the TRA. As such, any determination of rights that TCRY seeks is for an appropriate court to decide under state contract law.

3. The Board should dismiss the petition because the relevant issues of TCRY's rights and obligations under the Lease are currently the subject of ongoing state court proceedings.

The Board should follow its precedent in other petition proceedings in which the Board has declined to institute a proceeding because the dispute is already pending in another forum. *See Adrian & Blissfield R.R. – Petition for Declaratory Order*, STB Finance Docket 36148, slip op. at 4 (served Jan. 31, 2018); *Ingredion Inc. – Petition for Declaratory Order*, STB Finance Docket 36014, slip op. at 3 (served Sept. 30, 2016); *Norfolk Southern Railway – Petition for Declaratory Order*, STB Finance Docket 35950, slip op. at 4 (served Feb. 29, 2016).

The Board should grant the Port's Motion to Dismiss because, as discussed above, the underlying issues relate to TCRY's maintenance obligations and rights under the Lease. Those issues are already before the Benton County Superior Court based on TCRY's own complaint.

⁹ The breach of contract claims had been before the United States District Court for the Eastern District of Washington, but the court dismissed the state law contract claims after having dismissed all of TCRY's federal court claims. *See* Exhibit 3, *Randolph Peterson and Tri-City Railroad Co. LLC, v. Port of Benton County*, NO. 2:17-CV-0191-TOR (E.D. Wash. Mar. 12, 2020).

See Exhibit 6. Further, following the Board's issuance of the *TCRY Discontinuance Decision*, the Port has initiated eviction proceedings to remove TCRY from the subject rail line, which, if successful, will terminate any interest of TCRY (including its operating authority) in the subject rail line.

CONCLUSION

The Board should grant the Port's Motion to Dismiss because TCRY is not a party to the TRA and has no standing to seek modifications to the TRA. To the extent that the underlying claims in the TCRY Petition relate to the interpretation and enforcement of TCRY's obligations under the Lease which are already the subject of litigation in the courts, the Board should dismiss the TCRY Petition pending resolution of those claims under state law in the proper forums. Finally, the Board should dismiss the TCRY Petition because of the state law eviction proceedings which if granted would sever TCRY's already tangential relationship to the TRA and moot the relief requested in the TCRY Petition.

For all of the foregoing reasons, the Port requests that the Board dismiss the TCRY
Petition.

Respectfully submitted,

/s/ Eric M. Hocky

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Attorneys for Port of Benton, WA

Dated: April 30, 2020

VERIFICATION

I hereby verify on behalf of the Port of Benton, WA, under penalty of perjury, that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Verification.

Executed on April 30, 2020.

A handwritten signature in black ink, appearing to read 'David J. Billetdeaux', is written over a horizontal line.

David J. Billetdeaux
Port of Benton, Attorney

EXHIBIT 1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA, ex
rel., RANDOLPH PETERSON and
TRI-CITY RAILROAD COMPANY,
LLC,

Plaintiffs,

v.

PORT OF BENTON COUNTY, et al.,

Defendants.

NO. 2:17-CV-0191-TOR

ORDER GRANTING DEFENDANT
THE PORT OF BENTON'S MOTION
FOR PARTIAL SUMMARY
JUDGMENT RE: *QUI TAM* ACTION

BEFORE THE COURT is Defendant the Port of Benton's Motion for Partial Summary Judgment to Dismiss Plaintiffs' *Qui Tam* False Claims Act Claims (ECF No. 148). A hearing was held on October 7, 2019. The Court has reviewed the record and files herein, heard oral argument and is fully informed. For the reasons discussed below, the motion (ECF No. 148) is granted.

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ORDER GRANTING DEFENDANT THE PORT OF BENTON'S MOTION FOR
PARTIAL SUMMARY JUDGMENT RE: *QUI TAM* ACTION ~ 1

BACKGROUND¹

This case arises out of a *qui tam* claim asserted by Tri-City Railroad Company, LLC, (“TCRY”) and Randolph Peterson (collectively “Plaintiffs”) based on Plaintiffs’ contention that Defendant the Port of Benton (“the Port”) perpetrated a fraud on the United States Government. The Port is a public port district under Washington law and its primary, and statutorily-defined, purpose is to foster economic growth in its district. ECF No. 148 at 13. TCRY is a private company that operates a short line railroad owned by Plaintiff Randolph Peterson.

The material facts are relatively simple and are not in dispute. The Port acquired land and trackage from the Department of Energy in 1998 (the “Amendment to Indenture” agreement). Pursuant to the Amendment to Indenture, the Port agreed to devote all lease payments or other sources of revenue from the real property and railroad to first cover maintenance of the railroad; any surplus revenue can be used at the Port’s discretion. ECF No. 148 at 19. The Port also agreed to honor BNSF Railway Company’s (“BNSF”) operating rights previously established by contract. ECF No. 152-4 at 8.

¹ While the admissible and material facts must be construed in favor of TCRY as the non-moving party, the fundamental facts are not in dispute. Accordingly, the Court cites to the Port of Benton’s briefing for many undisputed facts.

1 The Port first contracted with Livingston Rebuild Center (“Livingston”) for
2 the maintenance and operation of the trackage in order to fulfill the Port’s duty to
3 maintain the trackage. ECF No. 152-4 at 2. Livingston subsequently assigned its
4 rights and obligations under the agreement to TCRY. In 2002, the Port entered
5 into a new agreement with TCRY to lease to TCRY trackage, a large building, and
6 acreage for a laydown yard for \$2,000 a month, subject to periodic consumer price
7 index adjustments. ECF No. 148 at 19; *see* ECF No. 78-4 (2002 Lease
8 Agreement). In return for the minimal rental payment—before the 2002 lease
9 agreement, TCRY was paying \$288,000 per year to lease the same property—
10 TCRY agreed to maintain the trackage *at its sole expense*. ECF No. 148 at 19-20.
11 This agreement was in effect at all times relevant to this dispute.

12 Between 2002 and 2015, the Port leased additional acreage to TCRY for a
13 laydown yard at a reduced rate with the intent of providing additional funding for
14 TCRY to maintain the trackage—over the course of the lease for this property,
15 TCRY paid \$2,295,231 in rent while collecting \$4,630,186 from its subtenant.
16 ECF No. 148 at 20.

17 Between 2000 and 2009, TCRY was the only railroad that operated on the
18 trackage. In 2009, BNSF asserted its rights to use the trackage pursuant to its
19 contractual right granted by the DOE long before TCRY came onto the scene.
20 ECF Nos. 148 at 14; 152-4 at 1-2. TCRY requested the Port terminate BNSF’s

1 operating rights, which was within the Port's prerogative. ECF No. 148 at 14. The
2 Port declined, finding such would be determinantal to the Port's stated goal of
3 promoting economic growth. ECF No. 148 at 14-15.

4 In July 2009, TCRY erected a physical barrier to block BNSF's access; in
5 response, BNSF filed suit against TCRY in the United States District Court for the
6 Eastern District of Washington. See ECF No. 152-4 at 4. The Honorable Edward
7 F. Shea held that BNSF and Union Pacific ("UP") had "full rights to operate" on
8 the trackage, and TCRY's lease was subject to those rights. *BNSF Ry. Co. v. Tri-*
9 *City & Olympia R.R. Co. LLC*, No. CV-09-5062-EFS, 2012 WL 12951546, at *8
10 (E.D. Wash. Feb. 14, 2012); see ECF Nos. 148 at 15; 152-4 at 4. The Court
11 ordered and approved an Operating Plan designating the Port as the arbitrator of
12 disputes between TCRY, BNSF, and UP. ECF No. 148 at 15.

13 In 2012, the Port applied for and was awarded a Washington State
14 Appropriations grant to complete large-scale improvement projects on the
15 trackage, to which the Port replaced an old, wood-constructed railroad bridge with
16 a steel bridge and upgraded a three-mile portion of curved track by replacing non-
17 conforming ballast (rock), re-aligning the rails, and replacing ties. ECF No. 148 at
18 21. At this time, the Port became aware of a high percentage of tie failures in the
19 area, to which TCRY attributed to heavier trains operating on the rail line and the
20 non-conforming ballast; according to the Port, the Port later learned that TCRY

1 deferring maintenance was the source of the problem.² ECF No. 148 at 21-22.

2 The Port repeatedly requested maintenance records from TCRY, but TCRY
3 refused. ECF No. 148 at 22.

4 In September 2016, TCRY lodged a complaint with the Railroad Retirement
5 Board's ("RRB") Office of Inspector General fraud hotline alleging that the Port
6 was defrauding the government by not paying Railroad Retirement Act ("RRA")
7 taxes and for not paying into the railroad unemployment insurance fund pursuant
8 to the Railroad Unemployment Insurance Act ("RUIA"). ECF No. 148 at 16.

9 If the Port were a "covered employer" it would have to pay taxes and pay
10 into the unemployment insurance fund under the Railroad Retirement Tax Act
11 ("RRTA"). The RRB is the United States entity that determines whether a railroad
12 is a covered employer; the IRS assesses and collects RRRTA taxes and pursues
13 remedies when an entity fails to pay the required tax. ECF No. 148 at 11-12.

14 Importantly, an entity that leases or contracts with another for the operation of the
15 rail line is not a "covered employer" if the entity (1) does not have a primary
16 business purpose to profit from railroad activities; (2) does not operate or retain the
17 capacity to operate the rail line, which is met if (a) another entity is the certified
18

19 ² The Court provides this information for context. TCRY disputes the cause
20 of the problems, but the dispute is not material to this Order.

1 operator of the rail line and actually conducts the railroad service or (b) the entity
2 leases out the rail line and does not retain control over the day-to-day operations of
3 the line; and (3) the operator/lessee of the rail line is already a covered employer or
4 would be found to be covered under the RRTA, the RUIA, and RRA. ECF No.
5 148 at 13.

6 In arguing the Port is a covered employer, TCRY represented to the RRB
7 Office of Inspector General that the Port controlled the operations, specifically
8 identifying the Operating Plan, the Port's control over demurrage and tariffs, the
9 Port's negotiations with the City of Richland for railroad easements and crossing,
10 and the Port's undertaking of capital improvement projects on the trackage, among
11 other things. ECF No. 148 at 17.

12 The RRB looked into the matter and, on April 9, 2018, the RRB reaffirmed
13 its 2001 decision (previously finding the Port was not a "covered employer") and
14 declared that the Port was (still) not a covered employer, finding the Port "did not
15 engage in control over the day-to-day operations of the rail line and does not
16 operate nor has the capacity to operate the rail line" and that TCRY was "a covered
17 employer" that operated the rail line. ECF No. 148 at 18.

18 In September 2018, the Port applied for a Freight Rail Assistance Program
19 grant and a Freight Rail Investment Bank loan from the State of Washington; in the
20 application, the Port cited to the Amendment to Indenture, this lawsuit, and

1 TCRY's alleged failure to abide by its maintenance obligations.³ ECF No. 148 at
2 22. On January 15, 2018, counsel for TCRY sent a letter to the State, advising it of
3 "potential inaccuracies" in the Port's application, referencing this lawsuit and the
4 Port's alleged failure to comply with the Amendment to Indenture. ECF No. 148
5 at 23. Despite TCRY raising the alarm, the State of Washington granted the Port's
6 2018 application. Plaintiffs conceded at oral argument that they have no proof that
7 any federal dollars are involved in the grants.

8 **PROCEDURAL HISTORY**

9 Plaintiffs brought this action on June 5, 2017, asserting a *qui tam* action
10 under 31 U.S.C. §§ 3729-3737 based on alleged "false or fraudulent claims" and
11 "false records and statements" used "to obtain payment (and double payment) or
12 approval for payment in violation of the Federal False Claims Act" ECF No.
13 1 at ¶ 5.2. Because Plaintiffs asserted a Federal False Claims Act cause of action,
14 the United States of America was provided with notice and an opportunity to
15 intervene. See ECF No. 2. On May 25, 2018, the United States of America
16 declined to intervene. ECF Nos. 9; 10.

17
18 ³ The 2018 award is only relevant for demonstrating the State continued to
19 approve applications for State grants in full awareness of TCRY's assertions of
20 malfeasance.

1 On January 24, 2019, Peterson and TCRY requested the Court enter partial
2 summary judgment holding the Port “liable for retaliating against Peterson and
3 TRCY (for associating with Peterson) for Peterson’s petition against the Port for
4 unconstitutional conduct.” ECF No. 61 at 2. The Court denied the motion, finding
5 the underlying, complained-of threat to file a counter-claim was based on a
6 “facially plausible concern that TCRY is, indeed, not paying a sufficient amount of
7 [Lease Excise Taxes]” given TCRY was only paying the tax on the minimal
8 amount of rent—which was “grossly disproportionate to the value of the property
9 (at least \$25M) at issue”—and not the substantial value of the obligation to
10 maintain the trackage. ECF No. 85 at 21.

11 On March 22, 2019, Peterson and TCRY requested the Court enter summary
12 judgment against the City of Richland based on alleged retaliation for opposing the
13 Center Parkway crossing project. ECF No. 87. The Court, again, denied the
14 motion, concluding:

15 In sum, despite Plaintiffs’ mostly-bald assertions otherwise, the evidence
16 does not establish the City of Richland took any action out of retaliation
17 against TCRY. Plaintiffs point to (1) an Options List that was not created by
18 the City of Richland and has nothing to do with the Center Parkway
19 crossing, (2) the City of Richland pursuing its contractual rights towards a
20 well-defined goal established in 2001, and (3) off-hand comments – taken
out of context – that merely demonstrate the attorney for the City of
Richland viewed TCRY as unscrupulous, at most. As such, despite claiming
the existence of “express” language detailing such, Plaintiffs have failed to
present any concrete evidence of retaliatory intent.

1 ECF No. 108 at 20-21.

2 Plaintiffs also requested approval from the Court to temporarily dismiss
3 certain claims and to file an amended complaint to reassert the temporarily
4 dismissed claims. The Court approved the request in part. ECF No. 85 at 2-6.
5 Plaintiffs subsequently filed the Third Amended Complaint, which the Court struck
6 because it went beyond what was requested and approved. Plaintiffs filed the
7 Fourth Amended Complaint – the operative complaint – on August 28, 2019. ECF
8 No. 167.

9 The Port’s motion for summary judgment on Plaintiffs’ *qui tam* action is
10 now before the Court. ECF No. 148.

11 **STANDARD OF REVIEW**

12 A movant is entitled to summary judgment if “there is no genuine dispute as
13 to any material fact and that the movant is entitled to judgment as a matter of law.”
14 Fed. R. Civ. P. 56(a). A fact is “material” if it might affect the outcome of the suit
15 under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248
16 (1986). An issue is “genuine” where the evidence is such that a reasonable jury
17 could find in favor of the non-moving party. *Id.* The moving party bears the
18 “burden of establishing the nonexistence of a ‘genuine issue.’” *Celotex Corp. v.*
19 *Catrett*, 477 U.S. 317, 330 (1986). “This burden has two distinct components: an
20 initial burden of production, which shifts to the nonmoving party if satisfied by the

1 moving party; and an ultimate burden of persuasion, which always remains on the
2 moving party.” *Id.*

3 Per Rule 56(c), the parties must support assertions by: “citing to *particular*
4 parts of the record” or “showing that the materials cited do not establish the
5 absence or presence of a genuine dispute, or than an adverse party cannot produce
6 admissible evidence to support the fact.” (emphasis added). The court is not
7 obligated “to scour the record in search of a genuine issue of triable fact;” rather,
8 the nonmoving party must “identify with reasonable particularity the evidence that
9 precludes summary judgment.” *Keenan v. Allan*, 91 F.3d 1275, 1279 (9th Cir.
10 1996) (brackets omitted) (quoting *Richards v. Combined Ins. Co.*, 55 F.3d 247, 251
11 (7th Cir. 1995))

12 Only admissible evidence may be considered. *Orr v. Bank of America, NT*
13 *& SA*, 285 F.3d 764 (9th Cir. 2002). The nonmoving party may not defeat a
14 properly supported motion with mere allegations or denials in the pleadings.
15 *Liberty Lobby*, 477 U.S. at 248. The “evidence of the non-movant is to be
16 believed, and all justifiable inferences are to be drawn in [the non-movant’s]
17 favor.” *Id.* at 255. However, the “mere existence of a scintilla of evidence” will
18 not defeat summary judgment. *Id.* at 252.

19 For a *qui tam* action, “[t]o survive summary judgment, the relator must
20 establish evidence on which a reasonable jury could find for the plaintiff.” *United*

1 *States ex rel. Kelly v. Serco, Inc.*, 846 F.3d 325, 330 (9th Cir. 2017) (citation
2 omitted). “If the facts make a claim ‘implausible,’ the non-movant must present
3 ‘more persuasive evidence than would otherwise be necessary’ in order to defeat a
4 summary judgment motion.” *Id.* (citation omitted).

5 **DISCUSSION**

6 The Port argues it is entitled to summary judgment on Plaintiffs’ *qui tam*
7 claim, which involves a direct and indirect *qui tam* action. ECF No. 148. The
8 Court agrees.

9 **A. Direct *Qui Tam* Action**

10 The crux of Plaintiffs’ contention for their direct *qui tam* claim is that the
11 Port (1) fraudulently obtained money (the 2012 award from the State of
12 Washington) to perform maintenance without disclosing that they were
13 contractually required to fund the maintenance with revenue from leasing the
14 subject property and (2) committed fraud by failing to maintain the trackage
15 despite agreeing to do so in the Amendment to Indenture. Ironically, TCRY
16 admits it is TCRY’s duty to maintain the trackage pursuant to the 2002 lease
17 agreement. *See* ECF No. 168 at 10-11. The Court notes at the outset that the 2012
18 award was acquired and used for *capital* improvements, not simple maintenance.

19 Pursuant to the False Claims Act, “Any person who knowingly presents or
20 causes to be presented, a false or fraudulent claim for payment or approval; is

1 liable to the United States Government for a civil penalty” 31 U.S.C. §
2 3720(a)(1)(A). “A claim under the False Claims Act requires a showing of ‘(1) a
3 false statement or fraudulent course of conduct, (2) made with the scienter, (3) that
4 was material, causing (4) the government to pay out money or forfeit moneys
5 due.’” *United States ex rel. Campie v. Gilead Scis., Inc.*, 862 F.3d 890, 899 (9th
6 Cir. 2017) (quoting *U.S. ex rel. Hendow v. Univ. of Phoenix*, 461 F.3d 1166, 1174
7 (9th Cir. 2006)).

8 The Port raised a series of issues with Plaintiffs’ claim. ECF No. 148.

9 **1. Lack of *federal* funds**

10 The FCA defines a “claim” as: “any request or demand . . . for money or
11 property that is presented to an officer, employee, or agent *of the United States*; or
12 is made to a contractor, grantee, or other recipient . . . *if the United States*
13 *Government provides or has provided any portion of the money . . . requested or*
14 *demanded.*” 31 U.S.C. §3729(b)(2) (emphasis added).

15 The Port contends it has not received any federal funds, so the federal False
16 Claims Act does not apply. ECF Nos. 148 at 38; 179 at 3-4 (noting Peterson
17 testified that he simply believes the 2012 grant from the State of Washington
18 included federal funds). The Port is correct. Plaintiffs have provided no evidence
19 the Port ever received federal funds based on a false representation. In an attempt
20 to tie the receipt of the 2012 grant funds (from the State of Washington) to the

1 United States Government, Plaintiffs (1) identify two alleged actions by the Port:
2 (a) the Port made false certifications to the State of Washington and (b) the Port
3 failed to maintain the trackage while placing lease revenue into the Port's general
4 fund; and then (2) assert that "[t]hese actions patently constitute a fraud on the
5 United States Government and the Department of Energy". ECF No. 168 at 14.
6 Neither supports Plaintiffs' *qui tam* action.

7 First, and quite obviously, certifications to the State of Washington do not
8 have any bearing on alleged fraud against the United States Government. While
9 Peterson testified that he "believes" some of the funding from the State of
10 Washington came from the federal government, there is absolutely no evidence for
11 this, and Peterson could not cite to any in his deposition, *see* ECF No. 180 at 34-
12 35, nor do Plaintiffs cite to any now, despite repeatedly stating the Port received
13 federal funds, *see, e.g.*, ECF No. 168 at 18 ("it is apparent that the Port
14 intentionally withheld the truth in order to obtain federal grant funding for capital
15 improvements"; "Dezember signed a Vendor's Certificate on behalf of the Port
16 certifying under penalty of perjury that the federal grant funds totaling
17 \$2,029,815.00 were . . . proper charges"⁴).

18
19 ⁴ Plaintiffs cite to ECF No. 153, ¶ 71, which specifically states the payment
20 was from the State of Washington.

1 **2. Remaining elements**

2 The Court further finds that the Port has conclusively established that
3 Plaintiffs have failed to meet their burden in demonstrating even one of the
4 remaining elements of their direct *qui tam* claim. Although the Court need not
5 delve into a detailed analysis of the remaining issues to address this claim, the
6 Court will do so for the sake of demonstrating the frivolous nature of Plaintiff's
7 other arguments.

8 Plaintiffs' claim that the Port made false certifications to the State of
9 Washington has no basis in fact. In support of their claim that the Port "repeatedly
10 made factually false certifications to the government by representing that it has
11 complied with the Indenture and the Amendment thereto", ECF No. 168 at 14,
12 Plaintiffs cite, without any pin cite or further explanation, to ECF Nos. 150-5; 150-
13 6; 150-7; and 150-9. As with many of Plaintiffs' claims in their previous motions
14 and submissions to the Court, these citations do not support their claims.

15 ECF No. 150-5 is a two-page description of the railroad bridge replacement
16 project that does not mention the alleged false statement. ECF No. 150-6 is a **90-**
17 **page** exhibit with the terms for the 2012 Direct Appropriations Agreement
18 between the Port and the State of Washington. Without a pin cite, there appears to
19 be no such claim in the agreement—upon review, the Court could not find any
20 mention of maintenance of the trackage or any mention of the indenture agreement

1 or compliance thereof. ECF No. 150-7 is a one-page voucher that does not
2 mention the alleged false statement. ECF No. 150-9 is a **41-page** exhibit that
3 appears to be a part of the application for the 2018 grant, which is not the basis for
4 this suit. Irrespective, the first page of the exhibit specifically states that the Port
5 contracted with TCRY to maintain the trackage and that TCRY has failed to
6 maintain the track—directly contradicting Plaintiffs’ claim the Port made a false
7 statement.

8 Second, Plaintiffs’ claim that the Port has placed lease revenue into its
9 general fund rather than devote it to maintain the track, at most, amounts to an
10 argument that the Port breached the Amendment to Indenture agreement.
11 Interestingly, the Port contracted with TCRY to maintain the trackage. *See* ECF
12 No. 168 at 14. However, a mere breach of contract does not give rise to a claim
13 under the FCA. *See Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d
14 1047, 1057 (9th Cir. 2011). Rather than support a claim that the Port intended to
15 defraud the federal government, the evidence clearly shows the Port made an effort
16 to comply by forgoing millions of dollars in lease revenue in exchange for TCRY’s
17 promise to maintain the trackage at TCRY’s sole expense. Curiously, Plaintiffs’
18 argument appears to concede that TCRY is in breach of its obligations to the Port
19 to properly maintain the trackage (placing TCRY in essentially the same position
20 as the Port because TCRY is receiving a property interest – the lease – while

1 failing to maintain the trackage).

2 Importantly, Plaintiffs do not point to any certification of compliance to the
3 United States government. Nor is there any evidence that the Port intended to
4 defraud the United States overnment by entering into the Amendment to Indenture.
5 Rather, Plaintiffs simply wish to apply a post-hoc claim of fraud based on events
6 that happened *after* the Port received the property and after the Port attempted to
7 comply with its obligations.

8 In trying to demonstrate the Port made an implied false certification,
9 Plaintiffs again attempt to blur the lines between receiving funds from the State of
10 Washington and obtaining “federal grant funding”. ECF No. 168 at 16-17 (for
11 example, characterizing the receipt of payment for the 2012 award from the State
12 of Washington as “federal grant funds”). Plaintiffs argue the Port should have
13 included in its 2012 application (for a capital improvement to the trackage) the fact
14 that the Port is contractually obligated to devote lease payments *first* to
15 maintaining the trackage. ECF No. 168 at 16-17. Even setting the issue of federal
16 funding aside, this argument is patently without merit—the grant was for capital
17 improvements, not maintenance. Further, it is not clear how this would be material
18 (especially in light of the fact that the State of Washington continued to provide
19 funding despite being made aware of such).

20 Plaintiffs’ other examples of the Port’s allegedly false statements fare no

1 better. See ECF No. 168 at 17-21 (alleging the Port: failed to disclose the short
2 line operator was responsible for recruiting new industrial development to the area;
3 represented that the receipt of payment was for proper charges; falsely asserted
4 TCRY was obligated to keep the rail line to the Class 3 FRA standards; falsely
5 asserted that improvements are urgently needed; and failed to disclose BNSF and
6 UP operate “rent free”, *inter alia*). Notably, most of Plaintiffs’ arguments on this
7 point are based on the Port’s 2018 application, ECF No. 168 at 17-20, but this is
8 not even the basis for their suit (which predates the 2018 application)—not to
9 mention the State still granted the 2018 application with full awareness of
10 Plaintiffs’ purported concerns.

11 Incredibly, Plaintiffs’ entire argument that the allegedly false statements
12 were material is limited to the bare conclusions that the Port “knew its
13 misrepresentations . . . were material” and that the Port “acted intentionally to
14 influence the government and persuade it to provide it money for work that it had
15 already promised the DOE it would pay for with lease revenue from the DOE’s gift
16” ECF No. 168 at 21-22. Plaintiffs conflate capital improvements with
17 maintenance, and again conflate receiving funds from the State of Washington
18 with funds from the United States. ECF No. 168 at 22. Moreover, Plaintiffs fail to
19 even address the fact that the State of Washington granted the 2018 application
20 after being alerted to the very issues Plaintiffs raise here, including the existence of

1 this lawsuit.

2 In sum, Plaintiffs' direct *qui tam* claim is blatantly frivolous, and their
3 learned counsel should have been well aware of this from the start. Indeed, the
4 strained nature of their arguments lends support to a finding that this litigation is
5 vexatious and completely unfounded. Plaintiffs' indirect *qui tam* claim further
6 supports this finding, as addressed in detail below.

7 **B. Indirect *Qui Tam* Claim**

8 The crux of Plaintiffs' indirect *qui tam* claim is that Port avoided its
9 obligations to pay the RRA tax and pay into the unemployment insurance fund by
10 lying to the RRB when the RRB was evaluating whether the Port was a "covered
11 employer" in 2016. ECF No. 168 at 25. Specifically, Plaintiffs argue that the Port
12 falsely represented to the RRB that there have been no material changes since the
13 RRB's previous determination in 2001⁵ that the Port was not a "covered
14 employer". The Court disagrees.

15 The False Claims Act contains a provision known as the "reverse false
16 claim" provision, which provides:

17 Any person who knowingly makes, uses, or causes to be made or used, a

18 ⁵ Plaintiffs state the decision was from 2000, but it appears the decision was
19 made on October 10, 2001. ECF No. 151-3 (decision dated October 10, 2001).

20 Irrespective, the exact date is not material.

1 false record or statement material to an obligation to pay or transmit money
 2 or property to the Government, or knowingly conceals or knowingly and
 3 improperly avoids or decreases an obligation to pay or transmit money or
 4 property to the Government, is liable to the United States Government

5 31 U.S.C. § 3729 (a)(1)(G). “To sustain a reverse false claim action, relators must
 6 show that the defendants owed an obligation to pay money to the United States at
 7 the time of the allegedly false statements.” *U.S. ex rel. Matheny v. Medco Health*
Sols., Inc., 671 F.3d 1217, 1223 (11th Cir. 2012).

8 **1. Alleged false statements**

9 Plaintiffs argue the Port made “numerous, knowing false statements to the
 10 RRB”. ECF No. 168 at 26. Plaintiffs assert: “Most telling is the Port’s
 11 representation” in 2016 – after TCRY “attempted to invoke the Board’s class
 12 exemption procedures” – that “there has been no relevant material changes in
 13 circumstances warranting Board action, and certainly none requiring invocation of
 14 a class exemption” since the RRB’s 2001 determination. ECF No. 168 at 26
 15 (citing ECF No. 152-6 at 3). Plaintiffs argue that the Port’s representation is false
 16 because “the Port’s activities and control have drastically change[d]” since the
 17 2001 decision. ECF No. 168 at 25.⁶ Plaintiffs then identify what they perceive as

18 ⁶ Without any citation to evidence, Plaintiffs disparagingly assert that this “is
 19 why the Port refused to respond to the RRB”. To the contrary, however, the RRB
 20 specifically stated they received responses from the Port, as demonstrated by

1 relevant, material changes.

2 First, Plaintiffs point to the Port's 2009 decision "*not* to cancel [the] 1947
3 Agreement with BNSF and UP" and to "*continue* to allow BNSF and UP to use the
4 trackage for free." ECF No. 168 at 26 (emphasis added). It is unclear how
5 Plaintiffs could believe that maintaining the contractually-determined status quo is
6 an example of a "drastic change" supporting a change in designation. Further, the
7 Port specifically stated in their letter to the RRB that the rights and obligations of
8 BNSF, UP and TCRY have not changed since the 2002 lease with TCRY "even
9 though the precise form of operations each carrier arranges to provide on the line
10 may have been adjusted over the years", which is true. ECF No. 152-6 at 4.

11 Second, Plaintiffs point to a letter from the Port to TCRY stating that "the
12 railroads will agree upon rules and regulations governing the movement of
13 engines, cars and equipment over the railroad" and directing "the parties who wish
14 to use the Port railroad to enter into an operations agreement covering the use of
15 the Port railroad." ECF No. 168 at 26-27. Plaintiffs also highlight general
16 statements by the Port that it "retains general control, management and
17

18 Plaintiffs' own exhibit. *See* ECF No. 169-51 at 5; *see also* ECF Nos. 153 at 14-17,
19 ¶¶ 36-38 (detailing the Port's submissions to the RRB); 170 at 16, ¶¶ 36-38
20 (Plaintiffs not disputing the fact that the Port responded to the RRB).

1 administration of the railroad” and that it “retained overall control and
2 management” of the trackage. ECF No. 168 at 26-27. However, mere governance
3 of general terms of use as the owner of the property at issue does not come close to
4 operating the railroad. Further, these general statements are not evidence of any
5 actual control of the operations, as opposed to mere administration and
6 management of the railroads.

7 Third, Plaintiffs point to the 2011 Operating Plan, ECF No. 168 at 27, but, in
8 the complained-of letter, the Port specifically cited to the *BNSF v. TCRY* litigation
9 and the Operating Plan, ECF No. 152-6 at 2, so there was full disclosure on this
10 point. In any event, the Operating Plan allowing the Port to approve changes and
11 resolve disputes between TCRY, BNSF, and UP does not demonstrate the Port is
12 operating the rail line. The Port is the owner of the trackage at issue and was
13 simply designated as the official arbitrator between TCRY, BNSF, and UP—which
14 is an unremarkable result given the Port’s position as the owner of the rail line.
15 Further, the mere ability to approve changes and settle disputes does not exemplify
16 a “drastic change” that is relevant to the operations of the rail line.

17 Fourth, Plaintiffs assert that, “[i]n 2015, the Port exerted control over the
18 trackage by determining that UP[,] BNSF, and TCRY all had the right to
19 nonexclusive use of the trackage” and that “the Port asserted control over TCRY’s
20 ability to charge tariffs and demurrage”, ECF No. 168 at 27, but this

1 “determination” is merely a recognition of the rights already established (as
2 recognized by the federal courts in 2011)—a far cry from a “drastic[] change”.
3 Further, the ability to determine rates as the owner, especially where BNSF and UP
4 had previous rights to use the trackage, does not support a showing that the Port is
5 the operator of the rail line.

6 Fifth, Plaintiffs argue that (1) “the Port asserted unprecedented control over
7 work performed on the railroad, telling TCRY that it would be using non-union
8 labor for capital improvements”; (2) created the Southern Connections Option List,
9 which contained a *potential* option of selling the railroad; and (3) began
10 negotiating directly with BNSF and UP. ECF No. 168 at 27-28; see ECF No. 108
11 at 8. Plaintiffs assert that this amounts to “exercis[ing] control over TCRY’s every
12 move and most importantly, [that this] stymied TCRY’s ability to make any
13 meaningful income because the Port refused to allow TCRY to impose tariffs or
14 other fees” ECF No. 168 at 28. The Court disagrees. Completing capital
15 improvements and governing who works on a project for capital improvements is
16 not operating the rail line. The Options List simply listed selling the line as one
17 *option* (that was not selected) out of fifteen (one of which was to do nothing)—
18 which contradicts Plaintiffs’ representation to this Court that the “express reason[]
19 for [the] Southern Connections Options List was to sell the railroad”. Further, the
20 Port simply negotiating directly with BNSF and UP is completely irrelevant, as is

1 Plaintiffs' complaint regarding TCRY's ability to make money.

2 This falls woefully short of proving a "drastic change" that would warrant
3 the Port's status to change to a "covered employer".

4 Plaintiffs further argue the merits of their claim that the Port is a covered
5 employer. ECF No. 168 at 35-36. Plaintiffs argue the Port "has a primary
6 business to profit from a railroad" because (1) the Port created the Options List "in
7 an effort to rid itself of TCRY" and (2) the Port "began negotiating directly with"
8 BNSF and UP and "discussed having [] BNSF and UP pay it directly". ECF No.
9 168 at 35-36 (emphasis added). Plaintiffs assert that carrying on business as a
10 short line railroad (which did not happen) and negotiating with BNSF and UP
11 (which included a mere discussion about direct payment) "would" turn the Port
12 into an entity that has a primary purpose of profiting from railroad activities. ECF
13 No. 168 at 35-36 (emphasis added). This (hypothetical) argument, like Plaintiffs'
14 other arguments, is completely frivolous and not based on the evidence. Notably,
15 the Port generates \$4.5 million per year in lease revenue, but only approximately
16 \$6,000 per month from the leased trackage; the Port otherwise does not derive
17 direct revenue from railroad operations. See ECF No. 150 at 2-3, ¶ 4.

18 Plaintiffs' final argument under the heading "the operator of the rail line is
19 already covered or would be found to [be] covered under the Acts administered to
20 the Board" is baffling, at best:

1 The Port admits that it is and would be covered under the act but for the
2 Railroad Ventures exception. It is considered a common carrier by the STB.
3 (Decl. of R. Peterson, Ex. 52, filed herewith). The Port is no longer exempt
pursuant to Railroad Ventures and must contributed (sic) pursuant to the
RRA.

4 ECF No. 168 at 36.

5 In sum, Plaintiffs arguments that the Port made a false assertion to the RRB
6 (which blends with their argument that the Port is a covered employer—which is
7 only incidentally relevant to the actual issue of whether the Port *intended* to
8 defraud the government) is completely frivolous, at best. Indeed, the Plaintiffs
9 repeated attempts to push the issue based on such baseless claims supports a
10 finding of bad faith, if anything. See ECF Nos. 150 at 3, ¶ 5; 150 at 5. Notably,
11 Plaintiffs’ substantive arguments that the Port is a covered employer have been
12 tried and tested before the RRB (*after TCRY raised the issues asserted here*), who
13 is responsible for this very determination, and it found the argument lacking.

14 2. Remaining elements and defenses

15 Plaintiffs’ arguments addressing the remaining elements are even more
16 deficient, as they are based on pure conclusory statements.

17 First, Plaintiffs argue the scienter element is met based on the bald assertion
18 that the Port “knew that if it honestly answered the questions posed by the RRB
19 that the RRB would find that the Port is a covered employer” and that “[i]nstead,
20 the Port knowingly chose not to answer the RRB’s questions and knowingly

1 minimized the relevant and material changes that have occurred since the RRB's
2 original determination in 2000, as set forth above.” ECF No. 168 at 29-30.
3 However, Plaintiffs make no attempt to detail what questions were answered
4 dishonestly. Rather, Plaintiffs, without any other explanation, generally cite to
5 ECF No. 169-46, which is a letter dated December 6, 2017, from the Port's counsel
6 to TCRY's counsel that has nothing to do with the RRB inquiry. Further, the Port
7 responded to the RRB's inquiry and the RRB did not request additional
8 information from the Port. ECF No. 153 at 16, ¶ 38; 170 at 16, ¶ 38 (Plaintiffs do
9 not dispute this fact).

10 Second, Plaintiffs argue the obligation element is met because “the Port had
11 a duty to make contributions”, speculating, without evidence, that “the RRB made
12 its decision without reviewing all of the relevant information before it” and that
13 had the Board considered “TCRY's evidence of the dramatic change in the Port's
14 exertion of control over the railroad, the RRB would have made a different
15 determination”. ECF No. 168 at 30-31. Plaintiffs generally cite to ECF No. 169-
16 51 without further explanation. ECF No. 169-51 is the RRB's Response to
17 TCRY's request to supplement the record on appeal to the Ninth Circuit of the
18 RRB's determination that the Port is not a covered employer. This does not
19 provide any affirmative evidence that the RRB did not consider all of the relevant
20 evidence upon which Plaintiffs now rely.

1 Indeed, as noted above, the RRB specifically reviewed the summary of
2 Plaintiffs’ allegations, which mirror the allegations here, including the allegation
3 that (1) the Port asserted the “right to review and approve TCRY’s transportation
4 rates”; (2) pursuant to the Operating Plan, “the Port must approve any changes to
5 operations and will make the final determination of any dispute upon the track”;
6 (3) “[t]he Port exerts control over tariffs and demurrage charged on the track”; (4)
7 “[t]he Port exclusively conducts capital improvements on the track, uses its own
8 (non-union) employees for the construction”; (5) “[t]he Port is involved in [the]
9 dispatch of all BNSF unit trains that operate on the track”; (6) “[t]he Port
10 negotiates with other railroads, including the City of Richland Railroad,
11 concerning changes to the track including easements, crossing, and dispatch of
12 BNSF unit trains”; and (7) “the Port and Port employees conduct regular
13 operations and maintenance meeting with TCRY”. ECF No. 150-1 at 5.

14 Clearly, the RRB was well aware of Plaintiffs’ assertions, as the RRB
15 specifically noted that it “reviewed [TCRY’s] allegations, and requested additional
16 information from the Port of Benton based on those allegations” *after* receiving
17 TCRY’s summary of allegations from the Office of Inspector General. ECF No.
18 169-51 at 8-9.

19 Third, Plaintiffs devote one sentence to their argument that the materiality
20 element is met: “The Port’s 2016 statement to the RRB was material because its

1 sole intent was to influence the RRB to not inquire further into the significant and
2 material changes in the Port's influence and control over the [] trackage." ECF
3 No. 168 at 31. Without any other explanation, Plaintiffs cite to ECF No. 169-46
4 (as above), which is a letter dated December 6, 2017, from the Port's counsel to
5 TCRY's counsel that has nothing to do with the RRB inquiry. These allegations
6 could not have been material because the RRB was aware of them and still
7 determined the Port was not a "covered employer".

8 **ATTORNEYS' FEES AND EXPENSES**

9 31 U.S.C. § 3730(d)(4) provides: "If the Government does not proceed with
10 the action and the person bringing the action conducts the action, the court may
11 award to the defendant its reasonable attorneys' fees and expenses if the defendant
12 prevails in the action and the court finds that the claim of the person bringing the
13 action was clearly frivolous, clearly vexatious, or brought primarily for purposes of
14 harassment.

15 The Court finds that the Port has prevailed in the *qui tam* action—the Court
16 need not find the defendants have prevailed on every other claim asserted by the
17 relators. As noted above, the Court finds the action was clearly frivolous and the
18 evidence supports the finding that the action was also vexatious and brought
19 primarily for the purpose of harassment. Given the frivolous nature of the claim
20 and the attending briefing, the Court will award attorney fees and expenses for

work pertaining to defending the *qui tam* action.

ACCORDINGLY, IT IS HEREBY ORDERED:

1. Defendant the Port of Benton's Motion for Partial Summary Judgment (ECF No. 148) is **GRANTED**.
2. Defendant the Port of Benton's request for attorneys' fees and expenses is **GRANTED**. Within 21 days of this order, the Port of Benton is directed to submit an accounting of the reasonable attorneys' fees and expenses related to defending the *qui tam* action, bearing in mind the Court will closely scrutinize the reasonableness of the time billed. The billing must justify the rate and hours sought. Block billing is not acceptable.
3. A response and reply may be filed according to LCivR 7.
4. The Court will consider the motion for attorney fees and expenses without oral argument on **November 27, 2019**.

The District Court Executive is directed to enter this Order and furnish copies to the parties.

DATED October 8, 2019.




THOMAS O. RICE
Chief United States District Judge

EXHIBIT 2



Office of the Clerk
United States Court of Appeals for the Ninth Circuit
Post Office Box 193939
San Francisco, California 94119-3939
415-355-8000

Molly C. Dwyer
Clerk of Court

January 03, 2020

No.:	20-35004
D.C. No.:	2:17-cv-00191-TOR
Short Title:	Randolph Peterson, et al v. Port of Benton County, et al

Dear Appellant/Counsel

A copy of your notice of appeal/petition has been received in the Clerk's office of the United States Court of Appeals for the Ninth Circuit. The U.S. Court of Appeals docket number shown above has been assigned to this case. You must indicate this Court of Appeals docket number whenever you communicate with this court regarding this case.

Please furnish this docket number immediately to the court reporter if you place an order, or have placed an order, for portions of the trial transcripts. The court reporter will need this docket number when communicating with this court.

The due dates for filing the parties' briefs and otherwise perfecting the appeal have been set by the enclosed "Time Schedule Order," pursuant to applicable FRAP rules. These dates can be extended only by court order. Failure of the appellant to comply with the time schedule order will result in automatic dismissal of the appeal. 9th Cir. R. 42-1.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

JAN 03 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

RANDOLPH PETERSON, qui tam as
Relator; TRI-CITY RAILROAD
COMPANY LLC, a Washington limited
liability company; as a Washington
corporation and as relator,

Plaintiffs - Appellants,

and

UNITED STATES OF AMERICA,

Plaintiff,

v.

PORT OF BENTON COUNTY, a
Washington State Municipal Entity;
SCOTT KELLER, individually and as
Executive Director of Port of Benton,
PETER ROGALSKY, individually and
as Public Works Director of the City of
Richland; CITY OF RICHLAND, a
Washington State Municipal entity,

Defendants - Appellees,

and

ROBERT LARSON, individually and as
Commissioner of Port of Benton; ROY
KECK, individually and as

No. 20-35004

D.C. No. 2:17-cv-00191-TOR
U.S. District Court for Eastern
Washington, Spokane

TIME SCHEDULE ORDER

Commissioner of Port of Benton; JANE HAGERTY, individually and as Commissioner of the Port of Benton; JOHN DOES, 1-99; employees, officers, directors, agents of the Port of Benton,

Defendants.

The parties shall meet the following time schedule.

If there were reported hearings, the parties shall designate and, if necessary, cross-designate the transcripts pursuant to 9th Cir. R. 10-3.1. If there were no reported hearings, the transcript deadlines do not apply.

- | | |
|-------------------------------|--|
| Fri., January 10, 2020 | Appellant's Mediation Questionnaire due. If your registration for Appellate CM/ECF is confirmed after this date, the Mediation Questionnaire is due within one day of receiving the email from PACER confirming your registration. |
| Mon., February 3, 2020 | Transcript shall be ordered. |
| Mon., March 2, 2020 | Transcript shall be filed by court reporter. |
| Mon., April 13, 2020 | Appellant's opening brief and excerpts of record shall be served and filed pursuant to FRAP 31 and 9th Cir. R. 31-2.1. |
| Wed., May 13, 2020 | Appellee's answering brief and excerpts of record shall be served and filed pursuant to FRAP 31 and 9th Cir. R. 31-2.1. |

The optional appellant's reply brief shall be filed and served within 21 days of service of the appellee's brief, pursuant to FRAP 31 and 9th Cir. R. 31-2.1.

Failure of the appellant to comply with the Time Schedule Order will result in automatic dismissal of the appeal. See 9th Cir. R. 42-1.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: Ruben Talavera
Deputy Clerk
Ninth Circuit Rule 27-7

EXHIBIT 3

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

RANDOLPH PETERSON and TRI-
CITY RAILROAD COMPANY LLC,

Plaintiffs,

v.

PORT OF BENTON COUNTY,

Defendant.

NO. 2:17-CV-0191-TOR

ORDER OF DISMISSAL

BEFORE THE COURT are the parties' responses to the Court's Order to Show Cause. The Court has reviewed the record and files herein, and is fully informed. ECF Nos. 348, 349. For the reasons discussed below, the Court hereby **dismisses** the remaining state law claims with leave to re-file pursuant to 28 U.S.C. § 1367.

BACKGROUND

This case arises out of a dispute over the use and management of railroad tracks and surrounding property owned by Defendant and leased by Plaintiffs. The

1 Court has summarized the factual history of this case in several prior orders. *See*
2 ECF Nos. 85, 108, 196, 198, 249, 307, 310. Plaintiffs' Fourth Amended
3 Complaint, which is the current operative Complaint, alleges federal question
4 jurisdiction is present based on Plaintiffs' *qui tam* and 42 U.S.C. § 1983 claims.
5 ECF No. 167. However, this Court has dismissed all of Plaintiffs' federal claims.
6 ECF Nos. 196, 198, 237, 249, 307, 310, 335. Because this case has been narrowed
7 to only state law claims, the Court ordered the parties to show cause why this
8 matter should not be dismissed with leave to re-file the remaining matters in state
9 court. ECF No. 335. The parties timely responded. ECF Nos. 348, 349.

10 DISCUSSION

11 A. Supplemental Jurisdiction

12 “Federal courts are courts of limited jurisdiction.” *Kokkonen v. Guardian*
13 *Life Ins. Co. of America*, 511 U.S. 375, 377 (1994). A federal court may exercise
14 original jurisdiction over cases involving a question of federal law or between
15 parties of diverse citizenship. 28 U.S.C. §§ 1331, 1332. A federal court may also
16 exercise supplemental jurisdiction over pendent claims “that are so related to the
17 claims in the action within such original jurisdiction that they form part of the
18 same case or controversy.” 28 U.S.C. § 1367(a). However, if a district court has
19 dismissed all of the claims over which it has original jurisdiction, it may decline to
20 exercise supplemental jurisdiction over a related claim. 28 U.S.C. § 1367(c)(3).

1 The Ninth Circuit has reaffirmed the discretionary nature of a district court's
2 exercise of supplemental jurisdiction. *Acri v. Varian Assocs., Inc.*, 114 F.3d 999,
3 1000 (9th Cir. 1997), *supplemented*, 121 F.3d 714 (9th Cir. 1997), *as amended*,
4 (Oct. 1, 1997). "[A] federal court should consider and weigh ... the values of
5 judicial economy, convenience, fairness, and comity in order to decide whether to
6 exercise jurisdiction over a case brought in that court involving pendent state-law
7 claims." *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 (1988), *superseded*
8 *by statute on other grounds as stated in Stanford v. MemberWorks, Inc.*, 625 F.3d
9 550, 561 (9th Cir. 2010) (citing *United Mine Workers of America v. Gibbs*, 383
10 U.S. 715 (1966)). "[I]n the usual case in which all federal-law claims are
11 eliminated before trial, the balance of factors to be considered under the pendent
12 jurisdiction doctrine ... will point toward declining to exercise jurisdiction over the
13 remaining state-law claims." *Carnegie-Mellon*, 484 U.S. at 350 n.7.

14 **B. Remaining Claims**

15 As an initial matter, it is unclear whether the Court could exercise
16 supplemental jurisdiction over the current breach of contract claims. To support
17 supplemental jurisdiction, "state and federal claims must derive from a common
18 nucleus of operative fact." *Gibbs*, 383 U.S. at 725. As Defendant accurately notes
19 in its Response, Plaintiffs' claims have been ambiguously pled and argued, and
20 their factual theory of the case has evolved several times. ECF No. 349 at 6-7.

1 Plaintiffs’ federal claims involved factual issues of tax collection practices, third-
2 parties’ usage of the railroad tracks at issue, terminated parties’ actions taken on
3 adjacent property, and the receipt and use of state grant money. The current breach
4 of contract claims center on the meaning of a term in the maintenance provision of
5 the contract. While these claims involve the same parties and the same railroad
6 tracks, they do not clearly derive from the same common nucleus of operative fact.

7 Even if the Court can properly exercise supplemental jurisdiction over the
8 breach of contract claims, values of judicial economy, comity, fairness, and
9 convenience weigh in favor of allowing the state court to resolve these claims.
10 This case has not yet proceeded to trial and therefore falls among the “usual cases”
11 in which a federal court should decline to exercise supplemental jurisdiction over
12 remaining state law claims. *Carnegie-Mellon*, 484 U.S. at 350 n.7.

13 Defendant objects to dismissal on the grounds that this case “is literally at
14 the one-yard line,” with the trial date one month away. ECF No. 349 at 2.
15 Although the calendar date is approaching, much work remains to be done in this
16 case. Plaintiffs’ breach of contract claim is currently subject to Defendant’s
17 pending motion for summary judgment. ECF No. 337. Defendant’s breach of
18 contract counterclaim is currently subject to Defendant’s own pending motion for
19 summary judgment, ECF No. 275, and Plaintiffs’ motion for partial summary
20 judgment on statute of limitations grounds, ECF No. 272. Plaintiffs have also

1 raised twelve affirmative defenses to Defendant's counterclaim, eleven of which
2 are currently the subject of Defendant's pending motion for summary judgment.
3 ECF No. 278. These pending motions will involve substantial application of state
4 law and are better suited for resolution in state court.

5 Defendant also objects to dismissal on the grounds that this Court has
6 invested significant resources into this case already and the parties will be
7 burdened if required to start again in state court. ECF No. 349 at 11-13. While
8 Defendant is correct that this Court has disposed of several claims in this case, it is
9 also true that these claims are largely unrelated, legally and factually, to the current
10 breach of contract claims. Indeed, this case has been reduced to a relatively
11 narrow set of questions: (1) what obligations are imposed by the maintenance
12 provision of the parties' contract; (2) whether those obligations are being met; and
13 (3) what damages, if any, have resulted from noncompliance. That this Court has
14 extensive familiarity with the circumstances of Plaintiffs' separate *qui tam* and
15 takings claims does not put it in a better position than the state court to resolve
16 these contract questions. Additionally, the work the parties have already done on
17 the breach of contract claims can be re-submitted in state court with relative ease.

18 Finally, Defendant objects to dismissal on the grounds that the railroad
19 tracks at issue in this case are deteriorating, which Defendant argues poses safety
20 risks. ECF No. 349 at 13. However, Defendant has the option to pursue

1 immediate relief in state court, which could potentially address these concerns
2 sooner than the current federal trial date.

3 On balance, values of judicial economy, comity, fairness, and convenience
4 weigh in favor of allowing the state court to resolve the breach of contract claims.
5 This Court declines to exercise supplemental jurisdiction over the parties' breach
6 of contract claims.

7 **ACCORDINGLY, IT IS HEREBY ORDERED:**

- 8 1. The remaining state law claims are **DISMISSED** without prejudice and
9 with leave to re-file in state court pursuant to 28 U.S.C. § 1367(d).
10 2. All currently pending motions are **DENIED AS MOOT**. All hearings
11 and other deadlines, including the trial date, are **STRICKEN**.
12 3. The District Court Executive is directed to enter this Order, furnish
13 copies to counsel, and **CLOSE** the file.

14 **DATED** March 12, 2020.



Thomas O. Rice
THOMAS O. RICE
Chief United States District Judge

EXHIBIT 4

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
AT SPOKANE

UNITED STATES OF AMERICA ex rel.;
RANDOLPH PETERSON, individually; TRI-
CITY RAILROAD COMPANY, LLC, a
Washington limited liability company,

Plaintiffs,

NO. 2:17-cv-0191-TOR

AMENDED NOTICE
OF APPEAL

vs.

PORT OF BENTON COUNTY, et al.,

Counterclaim-Defendant.

Plaintiffs Randolph Peterson and Tri-City Railroad Company, PLLC previously appealed to this Court of Appeals from the Order Granting Defendant the Port of Benton's Motion for Partial Summary Judgment re: *Qui Tam* Action, Dkt. 196, entered October 8, 2019, the Order Approving *Qui Tam* Attorneys Fees, Dkt. 238, entered December 6, 2019, the Judgment in a Civil Action, Dkt. 239, entered December 6, 2019. Subsequently, the district court entered an Order of Dismissal, Dkt. 351, on March 12, 2020, and Judgment in a Civil Action, Dkt. 352, on March 12, 2020. The plaintiffs amend their notice of appeal to encompass those orders and any orders leading the entry of the final judgment.

Pursuant to Circuit Rule 3-2(b), a representation statement is attached.

Amended Notice of Appeal - 1

Talmadge/Fitzpatrick
2775 Harbor Avenue SW
Third Floor, Suite C
Seattle, WA 98126
(206) 574-6661

1 DATED this 20th day of March, 2020.

2
3 /s/ Philip A. Talmadge

4 Philip A. Talmadge, WSBA #6973

5 Talmadge/Fitzpatrick

6 2775 Harbor Avenue SW

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10 Nicholas D. Kovarik, WSBA #35462

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16 Attorneys for Plaintiffs

17 Randolph Peterson and

18 Tri-City Railroad Company, LLC

REPRESENTATION STATEMENT

The parties in this action and their counsel are as follows:

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Amended Notice of Appeal - 3

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Amended Notice of Appeal - 4

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DECLARATION OF SERVICE

On said day below I electronically filed a true and accurate copy of the following document, **Amended Notice of Appeal** in Cause No. 2:17-cv-0191-TOR, with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all associated counsel of record.

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: March 20, 2020 at Seattle, Washington.

/s/ Matt J. Albers

Matt J. Albers, Legal Assistant
Talmadge/Fitzpatrick

EXHIBIT 5

NOTICE TO COMPLY OR VACATE

TO: Tri-City Railroad Company, LLC

PREMISES: The real and personal property described in the Port of Benton Tri-City Railroad Company Railroad Lease (the “Lease”) including but not limited to the railroad known as the Southern Connection.

Tri-City Railroad Company, LLC is hereby notified that it is in material breach of the Lease for failure to maintain the railroad known as the Southern Connection, as required by Article 8 of the Lease.

Pursuant to RCW 59.12.030(4) and Section 14.3 of the Lease, Tri-City Railroad Company, LLC has thirty (30) days from the date of service of this Notice to either comply with its obligations under the Lease or to vacate the Premises. Tri-City Railroad Company, LLC’s failure to comply with this Notice will result in it being in unlawful detainer of the Premises and judicial proceedings will be instituted for its eviction.

DATED this 17th day of March, 2020.

KELLER ROHRBACK L.L.P.

By s/ Rob J. Crichton
Rob J. Crichton, WSBA #20471

By s/ Holly E. Lynch
Holly E. Lynch, WSBA #37281

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Attorneys for the Port of Benton

EXHIBIT 6

APR 09 2020

FILED

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
COUNTY OF BENTON

TRI-CITY RAILROAD COMPANY,
LLC, a Washington limited liability
company;

Plaintiff,

v.

PORT OF BENTON COUNTY, a
Washington State Municipal Entity;

Defendant.

NO. 20-2-00649-03

COMPLAINT

Plaintiff Tri-City Railroad Company, LLC, by and through its attorneys of record,
Piskel Yahne Kovarik, PLLC, hereby alleges as follows:

I. PARTIES, JURISDICTION, AND VENUE

1. Tri-City Railroad Company, LLC ("TCRY") is a Washington limited liability company. Its principal place of business is located in Benton County, Washington.

2. Defendant Port of Benton (the "Port") is a port district established pursuant to RCW Title 53, *et seq.*, which is situated within Benton County, Washington.

3. This matter involves transactions occurring in Benton County, Washington.

4. Jurisdiction and venue are proper in Benton County Superior Court.

COMPLAINT - 1



Piskel Yahne Kovarik, PLLC
522 W. Riverside Avenue Ste. 700
Spokane, Wa 99201
P 509.321.5930 / F 509.321.5935

II. SUMMARY OF FACTS

This case arises out of the Port's breach of TCRY's lease of railroad trackage in Benton County, Washington. For years, the Port, owner of the railroad trackage and landlord, acted pursuant to a concerted plan to remove its tenant, TCRY, from the trackage. These efforts are without valid cause and are evidenced by the Port depriving TCRY of revenue, fabricating bases for default under the lease, revoking TCRY's ability to negotiate with Class I railroads, pursuing an adverse discontinuance before the Surface Transportation Board, and most recently, serving a fabricated notice to comply or vacate on March 17, 2020. TCRY has suffered and continues to suffer extraordinary losses as a result of the Port's actions.

III. FACTS

5. In 1996, the Port commissioned Banks Traffic and Transportation Services to evaluate the feasibility of acquiring the railroad trackage at issue known as the Southern Connection of the DOE/Hanford Rail Line. Banks created a report stating that the Atomic Energy Commission (predecessor of the Department of Energy ("DOE")) "*is obligated to at all times to keep this track in good condition and repair and suitable for the business of the Railroads [referring to the predecessors of BNSF Railway Company ("BNSF") and Union Pacific Railroad Company ("UP")].*" In addition, Banks noted the

age on the majority of this rail is pre-1935 and was therefore not given the proper tempering for longevity . . . The age of this equipment will eventually obsolete itself as it becomes more difficult to find replacement parts. Upgraded and newer replacements will have to be substituted over the next 25 years. The ballast is crushed rock over round rock . . . There are 27,496 ties with 15,801 having been replaced over the last 20 years . . . The remainder of the ties have been in the ground for over 45 years and will experience

1 high levels of deterioration within the next 5 years. The
2 average life span of a tie is 35 years. Again, weather, traffic
3 and physical plant conditions serve to stretch the life of the
4 ties.

5 6. The Port also commissioned an appraisal in 1998. That appraisal
6 determined the "As Is" value, "*i.e. the market value of the rail system as of date of*
7 *appraisal . . . [is] \$1,000,000.*"

8 7. On August 17, 1998, the Port sent a letter to the Surface Transportation
9 Board ("STB") stating that the DOE and the "*Port of Benton have agreed to transfer*
10 *operation and maintenance of the 16-mile Hanford Site Rail System, Southern*
11 *Connection owned by the DOE, to the Port . . .*" The Port also certified "*that projected*
12 *revenues will not exceed those that would qualify it is a Class III carrier under 49 CR,*
13 *Part 1201 . . .*"

14 8. In the late summer/early fall of 1998, the Port and the DOE executed an
15 Indenture that became effective on October 1, 1998. That Indenture gave the Port
16 property known as the 1100 Area and Southern Connection. The DOE's "*conveyance*
17 *[was] in consideration of the assumption by [the Port] of all DOE's maintenance*
18 *obligations . . .*" "*All buildings, utilities, and other property conveyed [were]*
19 *transferred in 'as is' and 'where is' condition as at the signing hereof, without any*
20 *warranty or guarantee . . .*" Most importantly, the Port agreed that "*[f]or so long as*
21 *Grantee continues to maintain and/or operate the Railroad (or Grantee's similarly*
22 *situated successor(s)), Grantee shall maintain the Railroad, including all*
23 *structures, improvements, facilities and equipment in which this instrument conveys*
24 *any interest, at all times in safe and serviceable condition . . .*" (emphasis added).
25 The Indenture also assigned the "Livingston Rebuild Center, Inc. ("LRC") lease for

1 equipment repair services in building 1171. . . [and] two agreements, a supplemental
2 agreement, and permit made among and by the [AEC]; [BNSF]; . . . [UP] governing
3 access to the Railroad.”

4 9. On September 30, 1998, the Port and the DOE executed an Amendment
5 to Indenture that added a new sentence regarding the funding of the railroad: “Grantee
6 agrees to devote all lease payments or other sources of revenue from the Real
7 Property and Railroad to first cover maintenance of the Railroad; provided, however,
8 that any surplus lease payments or other sources of revenue shall be used at the
9 discretion of the Grantee.”

10 10. On October 1, 1998, the Port entered into a Contract for Operation and
11 Maintenance of Railroad (“Maintenance Contract”) with Livingston Rebuild Center
12 (“LRC”), TCRY’s predecessor.

13 11. TCRY was created on or about October 25, 1999.

14 12. In 1999, LRC assigned the Maintenance Contract to TCRY.

15 13. In May of 2000, BNSF and TCRY entered into an Interchange Agreement.
16 Pursuant to the express terms of the Richland Junction Interchange Agreement, BNSF
17 and TCRY agreed to interchange rail traffic at TCRY’s Richland Junction siding.

18 14. On September 12, 2000, the Port sent a letter to then President of TCRY,
19 John Haakenson, stating that,

20
21 *The Port received the railroad property from the United*
22 *States. The Port is currently paying TCRC to maintain the*
23 *railroad. The contract with TCRC provides that you*
24 *will develop revenue from the operation of the*
25 *railroad and a portion of the income from*
operation will be paid to the Port to offset the cost
of the maintenance. *The Port is aware that [UP]*
continues to use the Port of Benton railroad to service its
customers in north Richland, but is not paying

1 *compensation for the use of the railroad nor is it providing*
2 *maintenance to the Port's railroad. **Therefore, the Port***
3 ***hereby directs TCRY to give written notice to [UP]***
 terminating its rights to use the Port of Benton
 track.

4 (emphasis added). The Port acknowledged it was responsible for maintaining the track
5 and that Class I Railroads, such as UP, could not use the Port of Benton Railroad
6 without paying for or providing maintenance.

7 15. On or about December 1, 2000, TCRY executed an Interchange
8 Agreement with UP. The purpose of the agreement was to interchange rail cars at
9 Richland Junction.

10 16. TCRY generated revenue by charging BNSF and UP tariffs and
11 interchange fees, and other customers demurrage, car storage, and intraplant and
12 interplant switch fees.

13 17. In addition, TCRY generated revenue by charging customers for its
14 transloading services.

15 18. Over the summer of 2002, TCRY and the Port negotiated a new contract
16 because the Port received an inquiry from the Railroad Retirement Board ("RRB"). The
17 Port did not want to be obligated to pay taxes and retirement benefits to the RRB so it
18 needed to ensure that TCRY was the operating railroad and that TCRY was responsible
19 for negotiating with the Class I railroad carriers, BNSF and UP.
20

21 19. While TCRY agreed to be responsible for maintaining the trackage, the
22 responsibility for capital improvements remained with the Port.

23 20. On August 1, 2002, the Port and TCRY executed the Railroad Lease
24 ("Lease").
25

1 21. TCRY accepted the trackage as is and the Lease subject to the restrictions
2 contained in the Indenture.

3 22. TCRY explicitly negotiated its maintenance obligation with the Port prior
4 to executing the Lease drafted by the Port's attorney, Tom Cowan.

5 23. The Lease explicitly provides that TCRY is to maintain the trackage less
6 reasonable wear and tear.

7 24. TCRY never agreed to maintain the track to an FRA "Class 3 track"
8 standard under the Lease. Instead, TCRY agreed to comply with all applicable Federal
9 Railroad Administration ("FRA") regulations and maintain the Southern Connection in
10 a "safe and serviceable condition."

11 25. The most significant changes between the Maintenance Contract and the
12 Lease include the following:

13 i. Maintenance obligation: under the Maintenance Contract, TCRY
14 was required to maintain the trackage to an FRA Class 3 track
15 standard, whereas the Lease requires TCRY to maintain the
16 trackage as a Class III railroad (an STB accounting provision) and
17 in accordance with the Indenture.

18 ii. Direct negotiations with Class I railroads: the Port desired to
19 contractually ensure it was TCRY that was responsible for directly
20 negotiating with the Class I railroads, not the Port.

21 iii. Payment: under the Maintenance Contract, the Port paid TCRY
22 \$325,000 annually to maintain the trackage, whereas under the
23 Lease, TCRY assumed full responsibility to maintain the trackage
24 and was required to pay a monthly rental amount.
25

1 iv. Profit sharing: under the Maintenance Contract, the Port and
2 TCRY shared the revenues generated from operation of the
3 railroad, whereas under the Lease, TCRY alone was entitled to the
4 revenues generated from operation of the railroad.

5 v. Reporting requirements: under the Maintenance Contract, TCRY
6 was required to provide maintenance records to the Port, whereas
7 under the Lease, TCRY was absolved of this requirement.

8 vi. Insurance: under the Maintenance Contract, the Port paid for
9 insurance to cover the railroad trackage at a cost of more than
10 \$100,000 per year, whereas under the Lease, TCRY assumed the
11 insurance cost.

12 26. On January 26, 2000 and again on April 5, 2000, then TCRY President
13 John Haakenson sent the Port letters showing that TCRY maintained the track to an
14 FRA Class 2 track standard.

15 27. In July of 2009, BNSF gave TCRY notice that it would begin operating
16 directly on the Southern Connection.

17 28. Litigation ensued and BNSF began operating directly shortly thereafter.

18 29. This caused TCRY to lose a large portion of its revenue.

19 30. On July 29, 2009, the Port sent a letter to BNSF requesting that any
20 future operating agreement should detail how BNSF would reimburse TCRY for the
21 costs of operating and maintaining the trackage.

22 31. Yet, the ultimate operating agreement did not include a requirement that
23 the Port reimburse TCRY for the cost of operating and maintaining the trackage.
24
25

1 32. On August 27, 2009, TCRY's general counsel, Paul Petit, sent a letter to
2 the Port ensuring that there was no confusion as to TCRY's position on how to interpret
3 the lease:

4 *the attorney for BNSF repeatedly asserted in a number of*
5 *cross examination questions that under paragraph 8.1 of*
6 *the Lease TCRY 'contractually obligated to maintain that*
7 *track to Class 3 standards.' That assertion is wrong . . .*
8 **TCRY's Lease obligation to operate a 'class 3**
 railroad' is not an obligation to maintain its track
9 **as 'class 3 track.' The two standards have nothing**
 to do with each other.

10 (emphasis added).

11 33. Then, on September 24, 2009, TCRY sent the Port copies of FRA
12 inspections from February 2008 through June 2009 showing that the track was
13 inspected to an FRA Class 2 track standard and that the speed limit was 20 MPH.

14 34. Over the years, TCRY issued a variety of timetables with speeds ranging
15 from 5 to 20 MPH.

16 35. In 2009, the Port commissioned Jerry A. Pinkepank to inspect the
17 Southern Connection. Mr. Pinkepank determined that the main line generally met
18 Track Class 3 standards.

19 36. In 2010, the Port began negotiating directly with BNSF and drafted a
20 proposed operating agreement under which BNSF would pay the Port for use of the
21 trackage.

22 37. In 2015, the Port commissioned Rick Franklin to inspect the Southern
23 Connection. Mr. Franklin's company found that for the most part, the track "*was in*
24 *good condition*" and would inspect to a Class 3 track standard. Even noting that, "[t]he
25

1 *inspectors were quite impressed by the condition of the railroad as short lines often do*
2 *not have track structure in this state of health."*

3 38. Beginning in early September of 2016, the Port began discussing a plan to
4 *"rid itself of TCRY" via email.*

5 39. Weeks later a Port meeting agenda item provided the Port was discussing
6 ways in which it could concoct a TCRY default under the lease.

7 40. In fact, the Port hired attorney Robert Wimbish to devise strategies the
8 Port could utilize to execute its plan to rid itself of TCRY.

9 41. At the end of September 2016, the Port, by and through its third-party
10 consultants, created a document titled the *"Southern Connections Options List."*

11 42. This List identified a number of plans and options that the Port could
12 utilize to further its goal of ridding itself of TCRY.

13 43. Those options included:

14 i. *"UP resume[s] direct service over the Southern Connection*
15 *pursuant to the 1947-48 Agreement."*

16 ii. *"Terminate 2002 Lease Agreement without TCRY's consent, and*
17 *pursue corresponding involuntary termination of TCRY's*
18 *operating rights/obligations via adverse discontinuance at the*
19 *STB."*

20 iii. *"Identify a TCRY default under the terms of the 2002 Lease and,*
21 *in accordance with the Lease terms, effect termination of TCRY's*
22 *leasehold interest."*

23 44. The Port has attempted and is currently attempting to utilize each of the
24 above strategies to rid itself of TCRY with the hope of a *"prospective future relationship*
25

1 among the Port, BNSF and UP.” Assuming that “TCRY has been, or will be, dealt with
2 by - . . . (b) successful conclusion of TCRY’s involuntary “eviction” (if possible).”

3 45. In the fall of 2017, the City of Richland, with the support of the Port,
4 forced UP to terminate its relationship with TCRY and operate directly on the Southern
5 Connection without using TCRY’s services.

6 46. This nearly eliminated TCRY’s revenue stream.

7 47. On March 16, 2018, the Port sent TCRY a notice of default based upon
8 perceived “deferred maintenance” alleging that “the track presents an unacceptable
9 safety risk.”

10 48. Yet, the Port never shut down operations due to the alleged safety risk it
11 posed to the public and train operators.

12 49. Likewise, neither Class I railroads operating over the line ever stopped
13 operating on the Southern Connection due to such “safety risk.”

14 50. The Port also claimed that the default was based upon 116 defects found
15 in an FRA inspection; yet, the FRA’s own subsequent inspection confirmed that the 116
16 defects were remedied:

17
18 *WALKING RE-INSPECTION OF FRA REPORTS #23, 27, 37,*
19 *13 & 3 DATED 2-27-18 & 3-1-18, **ALL DEFECTS NOTED***
20 ***IN THESE REPORTS WERE CORRECTED.***
21 *INSPECTION ACCOMPANIED BY TCRY TRACK*
22 *EMPLOYEE. WALKED FROM MP 26.04 TO THE TAIL OF*
23 *THE WYE SWITCH AND ALL TRACKES AND SWITCHES*
24 *IN THIS AREA.*

25 (emphasis added).

51. Just months earlier on December 6, 2017, Paul Gangstad, an FRA
inspector, noted that:

1 WALKING/HY-RAIL INSPECTION FROM MP 23.6 TO MP
2 29. INSEPTION WAS ACCOMPANIED BY JOSE
3 ROMERO. NOTE 1: TRACK STRUCTURE LOOKED IN
4 GREAT SHAPE FOR CLASS 1 & 2 TRACK, COULD BE
5 CLASSIFIED AS CLASS 3 TRACK; ONE OF THE BETTER
6 SHOR LINE/INDUSTRIAL LEADS THAT I HAVE LOOKED
7 AT IN A LONG TIME. NOTE 2: COULD AS ALWAYS USE
8 MORE TIES, BUT THE JOINES AND SRUFACE IS IN
9 EXCELLENT SHAPE FOR JOINT TRACK. KEEP UP THE
10 GOOD WORK.

11 52. TCRY has always promptly complied with any FRA defect notices.

12 53. Despite this, the Port sent TCRY a Notice of Termination of the Lease on
13 December 19, 2018.

14 54. To make matters worse, the Port altogether refused to approve any TCRY
15 tariffs thereby gutting TCRY's ability to generate revenue.

16 55. This was all part of the Port's concerted plan to starve TCRY of revenues
17 with the hope of driving the level maintenance down.

18 56. Yet, despite the Port's efforts, TCRY continued to maintain the trackage in
19 a safe and serviceable condition in compliance with the Lease.

20 57. On February 22, 2019, the Port filed a verified application for adverse
21 discontinuance of rail service by TCRY causing TCRY to incur extreme expense in
22 defending itself against the action.

23 58. On October 31, 2019, the Port's adverse discontinuance application was
24 granted. The STB explicitly ruled that the "*granting of the Port's application for
25 adverse discontinuance alone does not prevent Tri-City from continuing to operate;
there would have to be, for example, an adverse court judgment evicting Tri-City
from the Line . . .*"

59. On March 17, 2020, the Port served TCRY with a Notice to Comply or Vacate that states, TCRY *"is in material breach of the Lease for failure to maintain the railroad known as the Southern Connection, as required by Article 8 of the Lease."*

60. This Notice to Comply or Vacate is an objectively baseless attempt to evict TCRY. TCRY has always complied with Article 8 of the Lease by maintaining the railroad as a Class III railroad and maintaining the Southern Connection in a safe and serviceable condition.

III. CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF **(Breach of Contract)**

61. Plaintiff incorporates by reference the allegations above as if fully set forth herein.

62. TCRY and the Port entered into a valid Lease in 2002.

63. TCRY performed all of its obligations under the Lease.

64. The Port of Benton breached the Lease in many ways, including, but not limited to: 1) developing a plan and carrying out the plan to eliminate TCRY as an operating railroad thereby rendering TCRY's lease rights valueless, and 2) failing to allow direct negotiations with the Class I railroads.

65. In breaching the Lease by developing a plan to eliminate TCRY as an operating railroad, the Port developed a plan to *"rid itself of TCRY."* That plan included filing for adverse discontinuance at the STB, refusing to approve tariffs, fabricating a default claiming that TCRY failed to meet its maintenance standards, and concocting a false notice to comply or vacate.

1 66. In breaching the Lease by failing to allow direct negotiations with the
2 Class I railroads, the Port stripped TCRY of a very valuable express contract right that
3 ultimately prevented TCRY from directing cancellation of the 1947 Agreements and
4 from obtaining significant revenue.

5 67. The Port's breach of the Lease has directly and proximately caused TCRY
6 damages in an amount to be proven at trial.

7 **SECOND CLAIM FOR RELIEF**
8 **(Breach of the Implied Covenant of Good Faith and Fair Dealing)**

9 68. Plaintiff incorporates by reference the allegations above as if fully set
10 forth herein. TCRY and the Port entered into a valid Lease in 2002.

11 69. TCRY performed all of its obligations under the Lease.

12 70. The Port breached the implied covenant of good faith and fair dealing
13 found in the Lease by acting in bad faith as set forth herein.

14 71. The Port's breach of the implied covenant of good faith and fair dealing
15 has directly and proximately caused TCRY damages in an amount to be proven at trial.

16 **IV. PRAYER FOR RELIEF**

17 WHEREFORE, Plaintiff Tri-City Railroad Company, LLC prays for relief against
18 the Defendant Port of Benton as follows:

19 1. For judgment in favor of Plaintiff and against Defendant in an amount to
20 be proven at the time of trial;

21 2. For pre-judgment interest on Plaintiff's damages to the fullest extent
22 allowed by law;

23 3. For post-judgment interest on any judgment entered in favor of Plaintiff
24 herein to the fullest extent of the law;
25

4. For Plaintiff's attorney fees and costs pursuant to the Lease, RCW 4.84.330 and all other applicable law;

5. For leave to amend Plaintiff's complaint as necessary; and

6. For other such and further relief as the Court deems just and equitable.

DATED this 11 day of April 2020.

PISKEL YAHNE KOVARIK, PLLC

NICHOLAS D. KOVARIK, WSBA #35462

WHITNY L. NORTON, WSBA #46485

Attorneys for Plaintiff Tri-City Railroad Company,
LLC

CERTIFICATE OF SERVICE

I hereby certify that on this date a copy of the foregoing document was served by email
on the following persons:

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Justin J. Marks

Dated: April 30, 2020