

ROSENBERG CALICA & BIRNEY LLP

ATTORNEYS AND COUNSELORS AT LAW

100 GARDEN CITY PLAZA, SUITE 408

GARDEN CITY, NEW YORK 11530

TELEPHONE (516) 747-7400

FACSIMILE (516) 747-7480

WWW.RCBLAW.COM

RONALD J. ROSENBERG*
ROBERT M. CALICA
WILLIAM J. BIRNEY
EDWARD M. ROSS*
LESLEY A. REARDON
KENNETH E. ANESER*
JOHN S. GIULLA

JUDAH SERFATY
PETER J. WILLIAMS*
ROBERT J. HOWARD
DIANA G. ATTNER
JOSHUA M. LIEBMAN†
GEORGE B. KORDAS
RYAN J. McMAHON*

TAMIR M. YOUNG
KENNETH J. WEINSTEIN
RICHARD A. ROSS
OF COUNSEL

*ALSO ADMITTED FL
*ALSO ADMITTED CT
*ALSO ADMITTED CT, NJ, DC
*ALSO ADMITTED MD
*ALSO ADMITTED NJ

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May 22, 2014

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May 27, 2014

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Surface Transportation Board
395 E Street, SW
Washington DC 20423

**Update Submission of Town of Brookhaven, New York Concerning Pending Court
Preliminary Injunction Proceeding Against Brookhaven Rail Terminal**

Re: (1) U S Rail Corporation–Brookhaven Rail Terminal,
STB F.D. No. 35141

(2) Brookhaven Rail Terminal and Brookhaven Rail, LLC,
STB F.D. No. 35819

Dear Board:

We are attorneys for the Town of Brookhaven, New York (“Town”). The Town recently filed in the first-entitled proceeding (FD 35141) an Update and Correction of Misstatements of Fact on May 15, 2014, and filed in the second entitled proceeding (FD 35819) the Town’s Reply/Answer in opposition to the Declaratory Petition on May 19, 2014.

We respectfully write to supplement the Town’s submissions in both proceedings by providing a copy of the full Federal Court Hearing Transcript and relevant Exhibits from the preliminary injunction hearing which occurred May 19, 2014 and May 20, 2014 before the United States District Court for the Eastern District of New York (Hon. Gary R. Brown, USMJ) in connection with the pending Federal Court action by the Town against the Brookhaven Rail Terminal (BRT) parties. Exhibit A. Self-evidently, a copy of Court Transcript from May 20, 2014 and the Exhibits received into evidence at that time were not available at the time we filed the Town’s Reply/Answer, which did however include as an exhibit most of the transcript of the May 19th testimony.

The Town respectfully incorporates its Reply/Answer filed in FD 35819, and the exhibits accompanying it, as an update and supplement in FD 35141 as well. That Reply summarizes

numerous documents and admissions disclosed and made by BRT during the recent Federal Court hearing.

The hearing testimony and exhibits fully confirm that the BRT parties have engaged in shockingly brazen, illegal and environmentally destructive “*sand mining*” operations at the 93 acre BRT site without any review or approval either from this Board, or the Town, and that such illegal sand mining operations do not fall within the scope of federal preemption.

BRT’s own CFO, Daniel Miller, confirmed that BRT’s railway operating revenues from the site (approximately \$10 million per year) are now being supplemented by \$9-\$10 million in “*sand mining*” revenue which are wholly unrelated to any genuine railroad activities. BRT’s CFO Miller further acknowledged that BRT’s “*concept plan*” includes Parcel “D” which is not even owned by BRT, and that the “*concept plan*” for Parcels B and C have never been reviewed or approved for any purported railroad activities by this Board. In addition, Mr. Miller utterly failed to confront the indisputable fact that various ownership and operational levels of non-railroad entities and investors are de facto controlling and operating the Brookhaven Rail Terminal, in whole or in part, on behalf of various non-railroad financial investors and participants whose recently produced emails and interests have largely focused on earning revenues from the illegal and unauthorized sand mining operations¹. Indeed, Mr. Miller was evasive at best in describing the BRT parties’ non-railroad activities and relationship, including, *inter alia*, with respect to the Ground Lease entered into between Sills Expressway Associates, LLC and Sills Road Realty, LLC for Parcel B (among other things, the Ground Lease addresses the lucrative non-railroad and sand mining operations at the site).²

On hearing the disturbing evidence, the Court criticized the manner by which the BRT parties have already massively excavated the newly acquired 93 acre site (Parcels B and C) and depleted them of native sand and soil for lucrative resale to BRT’s “*sand customers*” before any final design plan and while still at the “*conceptual engineering stage*” – with no clear indication

¹ See, copies of Hearing exhibits 20, 31, and 32 from the Federal Court Hearing, attached as Exhibit B.

² The Ground Lease for Parcel B (approximately 20 acres), which was introduced into the Record at the Federal Court Hearing, is annexed Exhibit C hereto. The Ground Lease contains the overt admission that the non-railroad operator landlord of Parcel B, Sills Expressway Associates, is conducting sand mining activities (a minimum of 600,000 cubic yards) at the site. As quoted at p. 299 of the May 20, 2014 Hearing Transcript, the Lease admits:

Lessor [Sills Expressway Associates] at Sills Expressway shall be obligated at all costs to dig, load and weigh the minerals, at the sole cost and expense, and lessor [Sills Expressway Associates] shall provide at its sole cost and expense all trucking necessary for removing the minerals from the property.

whether a definitive track plan or building plan has even been formulated, much less even been reviewed or approved either by this Board or the Town, and without going through any formal design, review or approval process. BRT's own lead counsel, Yonaton Aronoff, Esq, admitted on the Record that "*We still only have a concept plan*" (Tr. at 370) (emphasis added). However, the indisputable fact that BRT merely has a "*concept plan*", which was never reviewed or approved by this Board or the Town, did not stop the BRT parties from engaging in massive and brazenly illegal "*sand mining*" operations which are bringing the grade of the entire site from as much as 100 feet to only 50 feet, and with no environmental review to protect the Sole Source Aquifer system underlying the Parcels.

Accordingly, at the conclusion of the hearing, the Court ordered to continuation of the Temporary Restraining Order ("TRO") against the BRT parties, and further noted the following on the Record (see enclosed Exhibit A, 5/20/14 Transcript at 362-372):

1. The Court stated that "*Sand Mining*" is being conducted on Parcels B and C (the 93 Acre Parcel) and "*that sand mining, the excavation, the purification and sale, has little or no connection to the construction of a rail spur, assuming this is a rail spur*" (Tr. 363). The Court stated that the mining and sale of sand is not railroad construction.

2. The sand mining is occurring without licensure and "*largely without notice to the Town*" (Tr. 363).

3. The Town "*has certain authority to monitor activities on the property consistent with its police powers.*" In addition, while the Court expressed some concern over whether the N.Y.S. Department of Environmental Conservation ("DEC") is in charge of licensing, we explained the jurisdictional limits of DEC licensing under the N.Y. Environmental Conservation Law applicable only to Nassau and Suffolk Counties and that the DEC's power can be delegated to the Town (Tr. 363-364). See e.g. N.Y. Environmental Conservation Law § 55-0101, and the McKinney's Practice Commentary thereto.

4. The Court cited to the trial testimony of BRT's own current railway engineer, Robert Humbert, P.E. of AECOM that BRT's excavation "*could have been done in a more surgical method*", i.e., limited to track, which further reinforced the Court's observation that "*the entire mining of the center of the property as such had to do with selling sand and not with the design of track*" (Tr. 365).

5. The Court noted that BRT's CFO, Dan Miller, testified that BRT will earn \$10 million in annual revenue from "*sand mining*" which "*is a critical part of the business plan, not incidental*" (Tr. 366), especially in light of testimony of BRT's President, Jim Newel, indicating

that as “a class three railroad operation . . . [BRT] has gross revenues of [no greater than] [20 million dollars]”³ (Tr. 368).

6. The Court also noted that sand mining and “the clearing and sale of the material began well before the [current O-]track was designed” in November 2013 (when AECOM was retained) (Tr. 366).

7. Defendants’ Exhibit GGGG, which included reports describing the activity by BRT on Parcels A, B and C, shows that the BRT parties were conducting a “mining operation” on Parcel A and since BRT’s CFO Dan Miller testified that the “*identical*” activity is occurring on Parcels B and C, BRT has thus admitted sand mining on Parcels B and C (Tr. 366).

8. The Court stated that sand sifting (screening) occurring at the site has “*little or no connection to the construction of the railway*” (Tr. 366-67). The Court stated that it is a BRT “*business model*” to offset construction costs but is not “*an integral part*” of railway construction. The Court analogized the activity to drilling for oil on the site and “*say[ing] it is part of the business plan because oil will pay for all the train cars and track, but it would not be integral to the rail operation*” (Tr. 367).

9. The Court credited Ex. 31 showing a grade reduction occurring across the entire site from as much as 100 feet to 50 feet as “*only relat[ing] . . . to the sale of sand*” (Tr. 367). The Court further cited to the several other Miller exhibits (Exs. 20, 29-31 and 33), which “*make[] it clear that the mining was a critical economic consideration in connection with its project*” (Tr. 367).

10. The Court observed that excavation was occurring which “*ha[d] nothing to do with a J track*”, but was “*something entirely different*” (Tr. 367). There was only “*some notice*” to the Town, but “*it not clear as to exactly what was going on*” (Tr. 368).

11. The Court observed that what is occurring is a “*separate subsidiary [mining] operation*” that “*happens to be conducted by the same company construction [a railroad]*” and again used the drilling for oil on site analogy when BRT’s counsel claimed how the railroad “*financ[es] and stages its construction falls within the deference given to the railroad*” (Tr. 368).

³The Transcript contains an obvious transcription error by the Court Reporter how erroneously transcribed that BRT, as a Class III railroad carrier, has gross revenues of \$120 million; however, as I was personally present during the Hearing, I can confirm that Magistrate Judge Brown recited the correct gross revenue of a Class III rail carrier of \$20 million, as established by this Board (49 CFR Part 1201, Subpart A, General Instruction 1-1). Moreover, BRT’s classification as a Class III railroad carrier with gross revenues of less than \$20 million was confirmed by BRT’s President, Jim Newel (Tr. 348).

Surface Transportation Board
May 22, 2014
Page 5

12. The Court observed that there are “*very serious*” environmental impacts in the evidence before it (Tr. 370).

13. The Court also observed that BRT was “*mining the sand before [BRT] had the plan for the track*” and that the current grading does not have “*any necessary relation to any of those plans*” for railroad construction (Tr. 370-71).

14. In addition to continuing the TRO until the filing of Briefs on May 29, 2014, the Court responded to BRT’s request for a Bond by saying that the delay on railway construction is having a “*minimum impact*” and that the only observable impact of the TRO on BRT is on the sale of sand (Tr. 372).

We appreciate the Board’s consideration and attention to these matters.

Respectfully,

ROSENBERG CALICA & BIRNEY LLP



Robert M. Calica

RMC:emr

Attachments: Exhibits A-C

cc: Service as per attached Certificate of Service

CERTIFICATE OF SERVICE

I, JUDAH SERFATY, hereby certify that on the 19th day of May, 2014, I caused to be served the within **SUBMISSION OF TOWN OF BROOKHAVEN WITH UPDATE TO BOARD AND CORRECTING MISSTATEMENTS OF FACT MADE BY BROOKHAVEN RAIL TERMINAL** upon the attorneys/parties by Emailing same to their email addresses and by electronically filing same with the Surface Transportation Board:

TO: Vanessa L. Miller, Esq.
Foley & Lardner LLP
Attorneys for US Rail Corporation & Brookhaven Rail Terminal (in F.D. No. 35141)
and for Brookhaven Rail Terminal and Brookhaven Rail, LLC (in F.D. No. 35819)
One Detroit Center
500 Woodward Ave, Suite 2700
Detroit, MI 48226
VMiller@foley.com

Yonaton Aronoff, Esq.
Foley & Lardner LLP
Attorneys for US Rail Corporation & Brookhaven Rail Terminal (in F.D. No. 35141)
and for Brookhaven Rail Terminal and Brookhaven Rail, LLC (in F.D. No. 35819)
90 Park Avenue, 37th Floor
New York, NY 10016
YAronoff@foley.com

Dated: May 22, 2014



JUDAH SERFATY

EXHIBIT A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - X

TOWN OF BROOKHAVEN, :
Plaintiff, : 14 CV 02286

-against- : U.S. Courthouse
Central Islip, N.Y.

SILLS ROAD REALTY LLC :
BROOKHAVEN RAIL LLC f/k/a :
U S RAIL NEW YOUR LLC, :
BROOKHAVEN TERMINAL OPERATIONS, :
OAKLAND TRANSPORTATION HOLDINGS: :
LLC, SILLS EXPRESSWAY :
ASSOCIATES, WATRAL BROTHERS, :
INC., and PRATT BROTHERS, INC., :
Defendant. : TRANSCRIPT OF HEARING
May 19, 2014
- - - - - X 9:30 a.m.

BEFORE:

HONORABLE GARY R. BROWN, U.S.M.J.

Court Reporter: HARRY RAPAPORT, CSR
United States District Court
100 Federal Plaza
Central Islip, New York 11722
(631) 712-6105

Proceedings recorded by mechanical stenography.
Transcript produced by computer-assisted transcription.

HARRY RAPAPORT, CERTIFIED REALTIME REPORTER
OFFICIAL COURT REPORTER

2 APPEARANCES: For the Plaintiff: ROSENBERG CALICA & BIRNEY 100 Garden City Plaza, Suite 408 Garden City, New York 11530 BY: ROBERT M CALICA, ESQ. GEORGE B. KORDAS, ESQ. ANNETTE EADERESTO, ESQ. Brookhaven Town Attorney 1 Independence Hill Farmingville, New York 11763 For the Defendants: FARRELL FRITZ For Sills Expressway 1320 RXR Plaza Uniondale, New York 11556 BY: KEVIN P. MULRY, ESQ. For remaining Defendants: FOLEY & LARDNER, ESQ. 90 Park Avenue New York, New York 10016 By: YONATON ARONOFF, ESQ. VANESSA L. MILLER, ESQ. ALISHA L. MCCARTHY, ESQ. M O R N I N G S E S S I O N 18 19 THE COURT: Good morning. 20 THE CLERK: Calling 14 CV to 02286. Brookhaven 21 against Sills Road Realty. 22 MR. CALICA: Good morning. Rosenberg Calica & 23 Birney by Robert M. Calica and George B. Kordas. 24 We are appearing as counsel for Brookhaven Town 25 Attorney, Annette Eaderesto, who is also seated here. HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER	4 1 matters over the weekend? 2 MR. CALICA: I think we were successful. 3 Neither had an opportunity to review the other's 4 documents, we placed 2,900 documents on line and provided 5 them and made them available. 6 I will indicate to your Honor that it is all of 7 the exchanges outside of the Town. We did invoke 8 deliberative privilege within the Town under the 9 Shinnecock case, which is Judge Bianco's case, which cites 10 a New York Supreme Court case, which makes clear that 11 governmental officials in forming policy are -- 12 THE COURT: I am familiar with the issue. 13 MR. CALICA: So we produced 2,900 documents. 14 We also had a town investigator and our 15 environmental consultant geologist, Stephanie Davis, out 16 on site on Saturday. Photographs were taken. 17 Those that could be opened I provided to 18 Mr. Aronoff. That's all I can open. 19 The Town is converting under its IT system the 20 remaining photographs which were not in a form that can be 21 sent by email until they are converted. 22 Mr. Aronoff 's office posted on line, maybe 23 about 1:00 o'clock in the morning -- we did ours about 24 7:00 in the morning, some 1,500 pages of documents. We 25 assume it is a responsive search and we will review it. HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER
3 1 THE COURT: Good morning. 2 Have a seat. 3 MR. ARONOFF: Nice to see you again, your Honor. 4 Appearing for all the defendants except Sills Expressway. 5 My name is Yonaton Aronoff, and with me is Vanessa Miller 6 and Alisha McCarthy. 7 MR. MULRY: Good morning. 8 Kevin Mulry from Farrell Fritz for Sills 9 Expressway Associates. 10 THE COURT: Good morning. 11 Nice to see you again. 12 I have one matter before we get started. 13 I spent a lot of time reviewing the papers which 14 was very helpful and I appreciate everyone's work in that 15 regard. 16 I notice the last time there was a similar issue 17 before Judge Boyle. The DEC appears to have been involved 18 in some level. 19 Does the DEC have a position here? Are they 20 going to weigh in? Does anyone know? 21 MR. CALICA: They may, your Honor. They have 22 been recently alerted, and they have not yet taken a 23 position. 24 THE COURT: All right. Issue one. 25 Issue two, how did we do with the discovery HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER	5 1 THE COURT: Anything? 2 MR. ARONOFF: I would like to address a couple 3 of things there. 4 As Mr. Calica said, we received from him this 5 morning about 2,800 pages of documents at 8:05 a.m. 6 THE COURT: How were those? 7 MR. ARONOFF: Exactly. I understand we didn't 8 have a chance to review. However, I don't have the 9 opportunity to review. I will cross-examine his witnesses 10 without those documents, and my witnesses go on tomorrow, 11 he will have the benefit to review those documents. I 12 don't know how much we can do about that. But I wanted -- 13 THE COURT: It is simple. If it is something 14 within the 2,900 you need to have the witness reappear, we 15 will recall the witness. 16 MR. ARONOFF: As to the privilege issue, we have 17 not had an opportunity to review that issue. The first 18 I'm hearing about it. I don't know if it applies if the 19 town is making policy, and I would say injecting its 20 positions into the issues in this case, I don't think it 21 is able to hide behind the privilege at the same time as 22 doing that. That is another thing I would like to reserve 23 the right to challenge and perhaps brief, your Honor. 24 THE COURT: Sure. 25 How much time do you think your entire HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER

6 1 presentation is going to require? How many days will you 2 be doing this? 3 MR. CALICA: One day. 4 THE COURT: How about your case? 5 MR. ARONOFF: The same. 6 THE COURT: Good. 7 Let's get started. 8 MR. CALICA: Your Honor, we have a further 9 application related to the search — the inspection, the 10 site inspection that went on on Saturday. And Ms. Davis 11 is here and will testify to it. 12 They observed — we had made a claim in our 13 complaint which was denied that materials being brought 14 from off-site, construction and demolition material, and 15 dumped on-site. They denied it. 16 The photographs and the notes and the 17 observations of Ms. Davis, who will be on the stand, says 18 she observed, and she will testify in a moment, about 19 30,000 cubic yards of what looks like construction and 20 demolition material brought in from other areas of the 21 type we see in New York City excavation. 22 We made our claim officially before Judge Bianco 23 on the record, that the trucks are coming in, or some 24 coming in full, dumping and taking virgin sand that is 25 being sold and removed. HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER	Davis-Direct/Calica 8 1 MS. MILLER: Thank you. 2 MR. CALICA: The first witness is Stephanie 3 Davis, your Honor. 4 THE COURT: Ms. Davis, please come up. 5 MR. CALICA: I observe that my poster board is 6 not out yet since we don't have a document camera. May I 7 take a moment for my associate to do that? 8 THE COURT: Sure. 9 10 STEPHANIE DAVIS, 11 called as a witness, having been first 12 duly sworn, was examined and testified 13 as follows: 14 THE CLERK: Please be seated. 15 State and spell your name for the record. 16 THE WITNESS: Stephanie, S-T-E-P-H-A-N-I-E, 17 Davis, D-A-V-I-S. 18 THE COURT: Go ahead. 19 Please pull the microphone nice and close so we 20 can hear you. 21 THE WITNESS: Is that better? 22 THE COURT: Excellent. 23 24 25 HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER
7 1 We are now requesting an opportunity to have 2 someone go back today and take samples of the dumping. 3 Ms. Davis will testify that if it is the type of 4 material she observed which is mixed with ash, tiles, 5 linoleum, what have you, it is material to be required by 6 law to be dumped in an approved landfill, or a DEC 7 approved 360 facility. If in fact that material is here, 8 there will be a DEC report and probably a DEC engagement. 9 But we need the Court's specific permission to have 10 somebody sample the materials that were observed 11 yesterday. And we have the photographs . 12 THE COURT: Let's stop you there. Let's come 13 back to that. Because I don't think you will be able to 14 have complete samples and results at the hearing. So 15 let's get started with the hearing. 16 MR. CALICA: Maybe, your Honor, the testing can 17 be done expeditiously, and we would like to reserve -- 18 THE COURT: Why not get started. 19 MR. ARONOFF: One more issue, we have pro hoc 20 issues here for Ms. Miller and my colleague who is not 21 here today. They have been before Judge Tomlinson, but 22 they are in order. 23 THE COURT: I will grant them temporarily for 24 today's purposes, but I would like to take a look at them 25 first. HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER	Davis-Direct/Calica 9 1 DIRECT EXAMINATION 2 BY MR. CALICA: 3 Q Good morning, Ms. Davis. What is your profession or 4 occupation? 5 A I am a hydrogeologist. 6 Q Would you tell his Honor, please, in more 7 conventional terms what that means? 8 THE COURT: The acoustics are terrible without 9 the microphone. 10 A By education, I have two degrees in geology, which is 11 the study of the earth, and in the last 20 years plus I 12 have been practicing hydrogeology, which is the study of 13 soils and ground water and environmental conditions. 14 Q Where did you obtain your degrees and when? 15 A I obtained my bachelor's of science in geology at 16 Bucknell University in 1981, and master's of science in 17 geology at USC in 1984. 18 Q Are there any states or jurisdictions that recognize 19 licenses in geology? 20 A A number of states do. But New York State is not 21 among them. 22 Q Are you licensed in any states that recognizes your 23 license in geology? 24 A Yes, the states of California and Pennsylvania. 25 Q Would you tell his Honor what your professional and HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER

Davis-Direct/Calica 10 1 business experience was after you obtained your degrees in 2 geology? 3 A For nine years after I obtained my master's degree I 4 worked for Chevron Corporation; for three of those years 5 in material exploration, and three of those years in 6 petroleum production, and for the final years in doing 7 environmental investigation and clean-up work in the San 8 Francisco Bay area for Chevron. 9 THE COURT: Are you proffering this witness as 10 an expert? 11 MR. CALICA: Yes, your Honor. 12 THE COURT: Is there any objection to her 13 testimony as an expert today? 14 MS. MILLER: No objection. 15 MR. MULRY: No objection, your Honor. 16 THE COURT: Please proceed. 17 Q Ms. Davis, would you tell his Honor who you are 18 employed by now and what position you occupy and what you 19 do with the company that now employs you. 20 A Okay. 21 I have been employed since 1993 by FPM Group, 22 located in Ronkonkoma. I have worked my way up from 23 starting position of hydrogeologist to eventually as 24 department manager, currently a vice president working on 25 hydrogeology problems. HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER	Davis-Direct/Calica 12 1 I also worked with a number of redevelopment 2 sites in New York City metro area where we have literally 3 centuries of waste left behind and a lot of redevelopment 4 presently going on. 5 Q Did you have any role with what has been referred to 6 in the news as the Cero Wire factory site and adjacent 7 parcel purchased from the Town of Oyster Bay by Simon, the 8 owner of Roosevelt Field? 9 A Yes. We were engaged to do environmental 10 investigation there for Simon Properties prior to the 11 purchase. 12 Q What was your role in that? 13 A I basically led the investigation, helped design the 14 protocols, reviewed the results, and provided them to 15 counsel and client and helped interpret them. 16 Q Did you have any involvement in the construction of 17 what is now the Tanger Mall or The Arches Mall in Deer 18 Park? 19 A Yes. 20 It is another former aerospace site with a 21 legacy of contamination. 22 I was involved in the comprehensive 23 investigation of that site on behalf of a purchaser. And 24 then I helped design the remedial program. 25 Q Who engaged you to assist my law firm or the Town in HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER
Davis-Direct/Calica 11 1 Q Does FPM Group have an engineering section as well? 2 A Yes, we have several engineering sections as well 3 with the hydrogeology department. 4 Q Do you work -- would you identify the engineers at 5 FPM with whom you have been working as it concerns the 6 Brookhaven assignments? 7 A I have been working with Ritu, R-I-T-U, Mody, 8 M-O-D-Y, and Kevin Loyst, L-O-Y-S-T. 9 Q Are both of those individuals, if you know, licensed 10 professional engineers? 11 A Yes, they are both licensed professional engineers. 12 Q Okay. 13 In your tenure for 20 years with FRM, have you 14 been involved in clean-ups and remediations of sites? 15 A Yes, I have. 16 Q Would you just tell his Honor from an experience 17 standpoint some of the larger remediation and clean-up 18 activities you have been involved with on Long Island -- 19 in the Long Island area. 20 A Yes. 21 I worked at a wide variety of sites, some of the 22 larger ones are some of our former aerospace engineering 23 firms retired since World War II and left us a legacy of 24 fairly significant environmental problems, many of them 25 having to do with ground water. HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER	Davis-Direct/Calica 13 1 this matter? 2 A We were retained through your law firm. 3 Q Okay. 4 Have you and I had prior professional dealings? 5 A Yes. 6 Q Was the first of them as -- representing adverse 7 parties about a dozen years ago? 8 A Yes, it was. 9 Q Did you ever provide any services for a homeowners' 10 association of which I am the president? 11 A Yes, I did, as well. 12 Q Other than that, have we had any business, 13 professional, or personal engagement? 14 A None of which I'm aware of. 15 Q Okay. 16 When you were called upon by my firm to provide 17 services to the Town, what materials were provided to you? 18 A There have been a number of materials provided, 19 including some site plans for the subjects we will be 20 discussing today. 21 The law and environmental overview report, and 22 there was various items of correspondence. 23 Q Are you familiar with a document known as a 24 preliminary injunction motion? 25 A Umm, I'm not sure. HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER

Davis-Direct/Calica 14 1 Q More specifically, were you provided with a copy of 2 the declaration of Brookhaven Town Attorney Annette 3 Eaderesto and the exhibits to it? 4 A Yes, I did. 5 Q And did you review all of those? 6 A Yes, I did. 7 Q And were you provided with copies by me of some 8 proposed hearing exhibits? 9 A Yes, I was. 10 Q All right. 11 Until this Saturday, had you ever seen the 93 12 acre site itself? 13 A I had not seen it other than in area photographs, no. 14 Q Okay. 15 Are you acquainted as a geologist with the area 16 or region in which the 93 acre site as we refer to it is 17 located? 18 A Yes, I am. 19 Q Okay. 20 When we refer to the 93 acre site, I'm referring 21 both to the aerial photograph, Exhibit B, and Exhibit B-1. 22 Are we referring to the same parcel? 23 A Yes. 24 Q Incidentally, on Exhibit B-1 appears to be an overlay 25 in green dotted material. <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>	Davis-Direct/Calica 16 1 Q And what do you understand it represents? What is 2 superimposed on that area? 3 MS. MILLER: Asked and answered. 4 THE COURT: I will allow it. 5 A That represents the outlines of three parcels, I 6 understand, parcel A, B and C, and the proposed alignment 7 of a railroad spur. 8 Q You mean track? 9 A Yes. 10 Q Okay. 11 Let me ask you this: 12 The aerial photograph itself, do you know what 13 the source of that is or was? 14 A I'm not sure. 15 Q The one with the track overlay, where it came from? 16 A The aerial photograph? 17 Q Yes. 18 A I think it came from Google Earth. 19 Q Do you know the timeline of the Google Earth photo 20 that was used to create the overlay? 21 A I believe it was an area photograph taken last fall, 22 if I'm not mistaken. 23 Q 2013? 24 A I believe that's correct. 25 Q And -- thank you. <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>
Davis-Direct/Calica 15 1 Do you know what that overlay is, what it 2 represents and how it was created? 3 A I have been given to understand that green dye area 4 shows the outline for where a railroad spur is supposed to 5 be constructed. 6 Q Where was Exhibit B-1 created? 7 A Where was it created? 8 Q At FPM? 9 A It was not created at FPM, I don't believe. 10 Q Were you requested at some point to have your office 11 prepare a track overlay over the area? 12 A Yes. 13 Now that you point that out, I can barely see 14 that across the room. But, yes, it does look to be an FPM 15 product. 16 Q You had some problems recognizing it from the 17 distance? 18 A Yes. 19 I do wear glasses, as you know. 20 Q Okay. 21 Did you have any role in the creation of that 22 overlay, Exhibit B-1, now that you can see it without your 23 glasses? 24 A Yes, I did. I worked with the draftsman who put 25 that together. <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>	Davis-Direct/Calica 17 1 Do you know what the term sole source aquifer 2 is? 3 A Yes. 4 Q Would you tell the Court what the term sole source 5 aquifer means as it references Long Island and the area in 6 which the 93 acre parcel is located. 7 A Long Island, and most particularly Nassau and Suffolk 8 Counties, draws all of its water from the aquifers beneath 9 which we are sitting today. We have no other source of 10 drinking water other than the aquifers that are beneath 11 us. 12 THE COURT: Are you saying aquifer or aquifers? 13 THE WITNESS: Aquifers. 14 THE COURT: There is more than one. 15 THE WITNESS: There are three primary aquifers 16 from which ground water is removed and used to provide 17 drinking water and as well as water from other sources -- 18 Q What are the aquifers located on Long Island? 19 A The other aquifer is called the Upper Glacial 20 aquifer. 21 THE COURT: Upper Glacial? 22 THE WITNESS: Yes. 23 The aquifer below that is called the Magothy, 24 M-A-G-O-T-H-Y, aquifer, and the deepest aquifer is called 25 the Lloyd aquifer. <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>

Davis-Direct/Calica 18 1 Q Are all three aquifers located throughout Long 2 Island? 3 A Not completely. 4 The Upper Glacial aquifer is largely absent 5 along the north shore where it has been eroded away. 6 Q It has been what? 7 A Eroded. 8 Q All right. 9 A The aquifers sit on an angle on the ground. They are 10 not perfectly flat. On the north shore, because of the 11 slope of the aquifers, the Upper Glacial has been exposed 12 and in places eroded away. 13 Q In terms of source of drinking water, would you 14 explain to his Honor where drinking water comes from those 15 aquifers, in other words, how it is obtained throughout 16 Nassau and Suffolk Counties? 17 A The drinking water is obtained from wells that are 18 drilled into the aquifers and then are pumped. And the 19 water is stored in water tanks and then enters into the 20 distribution systems. 21 In Suffolk County, the Suffolk County Water 22 Authority provides most of its water through this system. 23 In Nassau County there are a number of individual water 24 districts that provide the water through the system of 25 wells and tanks and distribution lines. HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER	Davis-Direct/Calica 20 1 generally 6,000 years or older, and it is our last resort. 2 Q Do you know, did there come a time when some federal 3 body arranged for a study of the aquifers and the 4 classification of the land located above Long Island's 5 aquifers? 6 A Yes. 7 The Safe Drinking Water Act of 1974 has certain 8 provisions with respect to sole source aquifers. That is, 9 aquifers that are the only supply of drinking water. On 10 Long Island and Nassau and Suffolk Counties we are fully 11 dependent upon sole source aquifers for our water supply. 12 Therefore, there was a study undertaken in -- I 13 think finished in 1978, and it is called the 208 study and 14 it examined a number of issues. But one of the things 15 that came out of the 208 study, and that refers to the 16 section, I believe, of the Safe Drinking Water Act that is 17 associated with it. 18 Out of the 208 study came a map which shows the 19 various hydrogeologic zones of Long Island. 20 Of most importance for water supply are what is 21 called deep recharge zone. These are the zones from which 22 water infiltrates downward from the surface and the Upper 23 Glacial aquifer, and where the head, the pressure in the 24 Upper Glacial aquifer is higher than the head in the 25 Magothy aquifer. Therefore, because of the pressure HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER
Davis-Direct/Calica 19 1 Q As among the three aquifers you described, the Upper 2 Glacial, the Magothy and the Lloyd, is there any 3 allocation of use or where the drinking water comes from? 4 A In general, the first aquifer that is tapped is the 5 Upper Glacial aquifer. It is the shallowest and the least 6 expensive to use. 7 Unfortunately, because it is the shallowest, it 8 is also the first aquifer generally to become contaminated 9 through a variety of contamination sources. 10 The deeper aquifer, the Magothy aquifer, is more 11 expensive to produce water from because the wells of 12 necessity have to be deeper. But it is also generally 13 cleaner because it takes longer for contaminants to work 14 the way down and into the Magothy aquifer, generally 15 speaking. 16 In Suffolk County we still receive, I believe, 17 about 50 percent of our water from the Upper Glacial and 18 50 percent from the Magothy. 19 In Nassau County, which has a longer history of 20 development and industrial use, most of the ground water 21 comes from Magothy at this point from -- for water supply 22 purposes. 23 The Lloyd is seldom used. In fact, it requires 24 a special permit to that aquifer. Because it is the 25 deepest and the cleanest, the water in the Lloyd is HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER	Davis-Direct/Calica 21 1 differential, there is water that moves from the Upper 2 Glacial aquifer and recharges underlying the other 3 aquifer. 4 The recharge is important for the long-term 5 health of the Magothy aquifer. 6 The 208 study established the number of 7 hydrogeologic zones, and in this particular area this 8 falls within hydro zone three, which is a deep recharge 9 zone. 10 Q Before you continue with your narrative, you filed a 11 report in this case referred to the Clean Water Drinking 12 Act, not the Safe Water Drinking Act. 13 Are you amending that reference? 14 A Yes. The correct reference is the Safe Water. 15 Q Now, you indicated that there is a hydrological zone 16 three. Are there other zones created by this 17 classification of the 208 study? 18 A Yes. 19 There are other zones. 20 Q All right. 21 Would you describe the hydrological zone three, 22 which is called a deep recharge zone, in terms of its 23 characteristics and importance? 24 A The characteristics are that it generally has a 25 fairly thick Upper Glacial aquifer. The potentiometric. HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER

Davis-Direct/Calica 22 1 The potentiometric head, if you would, the 2 pressure. 3 The pressure in the Upper Glacial aquifer in 4 hydro zone three is generally greater than the underlying 5 Magothy aquifer. Therefore, there is a tendency for 6 vertical ground water flow in a downward direction from 7 the Upper Glacial to the Magothy aquifer, potentially 8 recharging the Magothy. 9 Q In terms of the type of hydrogeological concerns you 10 would consider in designing or evaluating a project, what 11 considerations would you bear in mind in dealing with a 12 project located in a hydrological zone three deeply 13 charged area? 14 A There are a number of considerations. 15 One of which – I guess the overlying one – 16 overriding one of which is that measures should be taken 17 to preserve the ability of the aquifer to recharge, and to 18 recharge high quality ground water so that its function in 19 terms of recharging the Magothy is not compromised. 20 For example, you would want to retain as much 21 clean material above the aquifer as possible. You would 22 want to retain the ability to infiltrate water to the 23 aquifer as much as possible. And you would want to reduce 24 or eliminate potential contaminants of the aquifer as much 25 as possible. HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER	Davis-Direct/Calica 24 1 The light colored material on these poster 2 boards is native sand. 3 Q And when you were at the site physically this 4 weekend, May 17th? 5 A Yes, Saturday afternoon, yes. 6 Q And did you observe that type of sand at the site? 7 A Yes, I did. 8 Q All right. 9 Now, what is the consequence in terms of 10 recharge of water into the Upper Glacial aquifer that you 11 in your opinion associated with removal of sand in a 12 hydrological zone three or deep recharge area such as you 13 see in Exhibit B? 14 A Well, there are several different factors here. 15 First of all, the removal of the native forest 16 out there, which is primarily oak woods, with a small 17 understory of top soil out there. The removal of those 18 materials will reduce the amount of infiltration and also 19 cleansing of the storm water. 20 THE COURT: You have to slow down a second here. 21 THE WITNESS: Yes. 22 THE COURT: Why? 23 You are talking about how the sand filters 24 everything. Why is having dirt and trees on top of the 25 sand helpful? HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER
Davis-Direct/Calica 23 1 Q Okay. 2 Are you acquainted with the term native sand or 3 virgin sand? 4 A Yes. 5 Q What is that? 6 A Umm, native sand in this particular area is sand that 7 was essentially brought in by the glaciers. There are two 8 glacial advances onto the Long Island area. These 9 occurred ten, fifteen thousand years ago. They left 10 behind two terminal moraines, M-O-R-A-I-N-E-S, I believe. 11 In front of those moraines are outwashed plains. 12 THE COURT: You said plains? 13 THE WITNESS: Yes. 14 That is what they look like. They are generally 15 plan features with a very gradual slope to the south. 16 They are formed almost exclusively by very clean sand and 17 gravel, with very little in the way of fine material, clay 18 or silt. They are beautiful deposits, bearing blue 19 organic material in them, and very transmissive. They 20 allow ground water, infiltrating storm water and rain 21 water to infiltrate and recharge the aquifer. 22 Q Is the type of sand material seen in poster board 23 Exhibit B the type of native sand or virgin sand you just 24 described? 25 A Yes. HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER	Davis-Direct/Calica 25 1 THE WITNESS: The trees, as growing things, take 2 up nutrients, including nutrients that are present in 3 rainfall. 4 If you have water going through a root cell, you 5 remove a number of those nutrients. The water coming out 6 of the bottom is cleaner. 7 The same thing happens when you put water 8 through an organic rich layer, like the top soil beneath 9 the trees. That also acts as a filter. 10 If there is just bare sand out there, there is 11 less of a filtering capacity than if you have forest and 12 top soil. 13 Furthermore, the removal simply of the thickness 14 of the sand -- 15 Q Let me stop you. 16 Are you acquainted with any Town of Brookhaven 17 zoning requirement in terms of the amount of vegetation 18 that is required to remain in place in any hydrological 19 zone three area? 20 A I have been informed that there is a retention of 30 21 percent, if I'm not mistaken, of vegetative material. 22 Q With the value of the vegetative area, would it be 23 that which you just described in terms of facilitating 24 recharge water? 25 A That is my understanding of the attempt, yes. HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER

Davis-Direct/Calica 26 1 Q Do you agree that that would be accomplished by 2 retaining natural vegetation and natural top soil beneath 3 the plants and trees? 4 A Yes, I would agree it would help with the water 5 quality. 6 Q Would you tell his Honor what type of ground water 7 impact you would understand professionally to be 8 associated with removing sand in an area, a deep recharge 9 area where there is a great deal of that sand? 10 A Okay. 11 The removal of the sand, putting aside the 12 vegetation and top soil, will remove another thickness of 13 material through which infiltrating storm water will 14 percolate before it enters the aquifer. The less sand you 15 have, the less filtering capacity you have before that 16 water recharges the aquifer. 17 Q All right. 18 Have you seen and have you been provided with 19 copies of 2014 grading elevations that show the pre- 20 construction elevations on the westerly side of the 93 21 acre parcel and the levels which the Brookhaven railroad 22 terminal are excavating and grading the property? 23 A Yes, I have. 24 Q Would you tell his Honor in terms of -- on the 25 westerly side of the parcel adjacent to the 28 acre HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER	Davis-Direct/Calica 28 1 down from 75 feet, 70, 65 feet, 60 to 50 feet as well? 2 A Yes. 3 Q And how much of the site falls into that category? 4 A I would say at least half of the site. 5 Q All right. 6 So it would be a correct summary then that half 7 the site is being brought down from 100 feet or 80 feet or 8 60 feet, down to a level of 50? 9 A Yes. 10 Q Okay. 11 Would you tell his Honor what impact or concern 12 would be associated with the removal of that volume of 13 native sand from a hydrological zone three, recharge area, 14 for purposes of track construction, in your position as a 15 hydrogeologist, and in terms of what your opinions are as 16 it relates to ground water characteristics. 17 A I would say that the removal of the sand, as 18 mentioned before, is going to reduce the filtering 19 capacity of this parcel for any storm water, rain water 20 that is going to infiltrate through it. 21 The excavation and eventual compaction of that 22 surface to facilitate whatever activities they are going 23 to have in that area is also going to reduce the amount of 24 infiltration just through compaction. 25 The removal of the forest and the associated top HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER
Davis-Direct/Calica 27 1 facility, as we described the existing rail facility, what 2 level are they starting at and what level are they 3 excavating down to? 4 A The excavation alone of the western portion of that 5 parcel is about 100 feet above mean sea level, the 6 excavation I understand is to be taken to an elevation of 7 about 50 feet or a little bit below. 8 Q And over how much of the westerly side of the parcel 9 is this occurring, that is to say where there is the 100 10 foot level? What level is it where the reduction of grade 11 at 50 feet is occurring? 12 A As you can see from the excavation and the slopes 13 there, it looks like the area that is to be taken 50 feet 14 will include much of the western side of that parcel as 15 well as the central portion. 16 Q Okay. 17 What portion of the overall site would you 18 estimate is at an elevation of 80 to 100 feet? 19 A I would say that is probably a third of it. 20 Q And that is being brought down to 50 feet? 21 A That is my understanding. 22 Q And based upon reading the grading plan? 23 A Yes. 24 Q All right. 25 And are there other areas that are being brought HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER	Davis-Direct/Calica 29 1 soil is also going to reduce the filtering and the 2 contaminant removal capacity from the parcel. 3 Q At what level do you believe the Upper Glacial 4 aquifer is located beneath the 93 acre site? At what mean 5 sea level elevation? 6 A It is from -- from the documents I reviewed, it 7 appears the top of the water table aquifer within the 8 Glacial is about 35 feet. 9 Q So if they excavate 50 feet, they will be within 15 10 feet? 11 A They would be then at 15 foot separation between the 12 top surface of the parcel and the water table. 13 Q What if they excavate below that for construction 14 purposes? 15 A Then there would be even less. 16 Q All right. 17 Are any impacts on the ground water, do you 18 know, associated with industrial operations such as the 19 loading and unloading of trains, railway cars? 20 A Yes. 21 In your generally considered industrial 22 activities, there can be associated released of petroleum, 23 of where the materials are coming in on the rail cars, 24 whether materials are associating with the trucking, 25 etcetera. There is a wide -- there could be a wide HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER

Davis-Direct/Calica 30 1 variety of contaminants associated with the site. 2 Q I'm not asking you to be hypothetical. I'm asking 3 you to express your opinion as to what the consequence is 4 going to be on the Upper Glacial aquifer in this area if 5 BRT completes its plan to excavate down to 50 feet above 6 mean sea level and install what they describe as an O 7 track across a parcel that has been uniformly lowered to a 8 grade of 50 feet, and assume they are planning on 9 constructing some 1.2 million square feet of various types 10 of warehousing manufacturing facilities? 11 MS. MILLER: Objection. It calls for 12 speculation. Improper expert testimony. And there is no 13 foundation for the witness to be testifying to all this. 14 MR. CALICA: Your Honor, I will withdraw it and 15 offer some exhibits in evidence. 16 THE COURT: While he is looking, I have a 17 question. 18 You testified a moment ago about the 19 introduction of, let's call them contaminants, by the 20 operation of a railway in this area. 21 THE WITNESS: Yes. 22 THE COURT: Petroleum, coal, tar, whatever. 23 Isn't it fair to say that that would be a 24 problem irrespective of how much sand is underneath it? 25 THE WITNESS: Yes. <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>	Davis-Direct/Calica 32 1 witness. 2 THE COURT: You are referring to 9-B? 3 MR. CALICA: Yes, your Honor. 4 THE COURT: I have a tab that says Exhibit 9. 5 MS. MILLER: I believe it is 8-B. 6 MR. CALICA: Any objection to the offer? 7 THE COURT: Any objection to 8-B? 8 MS. MILLER: No objection. 9 THE COURT: 8-B is admitted. 10 (Whereupon, Plaintiff's Exhibit 8-B was received 11 in evidence.) 12 Q Ms. Davis, have you been provided with a copy of 13 Exhibit 8-B, the Brookhaven Rail Terminal, Proposed 14 Expansion, parenthesis, parcels B and C, close 15 parenthesis, Environmental Overview prepared by Gannette 16 G-A-N-N-E-T-T-E, Fleming, F-L-E-M-I-N-G, dated February 17 2014? 18 A Yes. 19 Q Did you observe page one, the introduction that says 20 this environment overview evaluates the environmental 21 setting and potential resource concerns associated with a 22 proposed expansion of the existing Brookhaven rail 23 terminal in the village of Yaphank, Town of Brookhaven, 24 Suffolk County, New York? 25 THE COURT: Do you see, that is the question. <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>
Davis-Direct/Calica 31 1 THE COURT: So does the excavation matter for 2 those purposes? 3 THE WITNESS: The excavation matters in that 4 there will be less opportunity to filter out contaminants 5 and more opportunity for contaminants to be introduced to 6 the aquifer. 7 And to give you an example, our health 8 department has requirements for separation between the 9 bottom of leaching facilities that leach the ground water 10 and the water table surface. And that is to allow for, 11 hopefully, enough filtration before whatever is recharging 12 through that recharge facility to enter the water table. 13 So our own regulations under which we operate in 14 Suffolk County take into account the ability of greater 15 amounts of sand and soil to provide for more filtration of 16 contaminants. 17 THE COURT: So basically there is a potential 18 outcome if there is more sand, you wind up with more dirty 19 sand unless it gets to the water. Is that the idea? 20 THE WITNESS: Generally, yes. 21 MR. CALICA: I would like to offer in evidence a 22 document pre-marked in our binder as Exhibit 9-B, it is 23 the Brookhaven Rail Terminal Advisory Overview prepared by 24 the defendants by their consultant, Gannette Fleming, and 25 I have an exhibit binder for the Court and one for the <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>	Davis-Direct/Calica 33 1 A Yes, I do. 2 Q Did you observe the cover sheet of the environmental 3 overview? 4 THE COURT: Counsel, it is in evidence. You can 5 move along. 6 Q When you testified a few moments ago and were asked 7 to assume the type of structures that are planned to be 8 constructed and associated with what we referred to as an 9 O track, were you assuming the construction or creation of 10 those types of buildings that are shown on the first page 11 of the environmental overview? 12 A Yes. 13 Q Okay. 14 THE COURT: Why don't you go back to your 15 question. 16 MR. CALICA: Okay. 17 Q Now, what type of impact on ground water would you be 18 of the opinion would be associated with the grading of the 19 site from the existing elevations of between 100 feet and 20 60 feet down to 50 feet, and the portions that are at that 21 level, and the construction of the type of manufacturing, 22 warehousing, various loading, and even storage facilities 23 that are shown in Exhibit 8-B? 24 A I would expect that there would be certain discharges 25 associated with these activities, either direct or <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>

Davis-Direct/Calica 34 1 indirect, and that those discharges would have a potential 2 to impact the aquifer. 3 Q In what way? Is it a hypothetical, or is it 4 something you have an opinion about? 5 A No. 6 My opinion would be that it would negatively 7 impact the aquifer in terms of water quality. 8 Q To what extent? 9 A It is hard to say to what extent. It would certainly 10 perhaps reduce its ability to be used for drinking water 11 purposes. 12 Q Do you believe it would reduce or eliminate its 13 potability? 14 A It certainly would eliminate its potability without 15 treatment, yes. 16 Q Without what type of treatment? 17 A The type of treatment would really depend on the 18 amount or the kinds of contamination involved. Certainly 19 water treatment is often necessary for impacts associated 20 with commercial and industrial development. 21 Q Now, assuming the facility was constructed in a 22 different manner, and there has been some testimony where 23 I will ask you to assume and provide you a document that a 24 track entered -- 25 MS. MILLER: Objection. HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER	Davis-Direct/Calica 36 1 A Yes. This shows a different design. 2 Q Would it be correct to describe it as a J track in 3 resembling the letter J? 4 A I guess, yes. 5 Q Okay. 6 Where does it enter the site? 7 A It enters the site at the southeast corner -- 8 southwest corner, excuse me. 9 THE COURT: Are we going to get a color picture 10 at this point? 11 MR. CALICA: Yes, your Honor. 12 Q Based on your review of the elevation data, what is 13 the height elevation at that location? 14 A Somewhere at a hundred feet. 15 Q Does the track continue along the southern portion to 16 the southeast corner? 17 A Yes, it does. 18 Q And what is, as you recall, the natural elevation in 19 that corner? 20 A I believe the natural elevation in that area is 21 somewhere around 55 or 60 feet. 22 Q Okay. 23 And does it then continue north right up to what 24 appears to be the Long Island Expressway? 25 A Yes. HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER
Davis-Direct/Calica 35 1 THE COURT: Don't object until he finishes, I 2 need to hear the whole thing. 3 MR. CALICA: I will withdraw it and offer 4 Exhibit 1 in evidence. 5 THE COURT: Exhibit 1 is -- 6 MR. CALICA: It is an email from Brookhaven Rail 7 Terminal, Mr. Andy Kaufman, sent to Matthew Minor, the 8 Town of Brookhaven's director of operation, who is also 9 the Commissioner of the Department of Solid Waste 10 Management. And it encloses a proposed plan, phase two 11 track work design dated June 26th, 2012, designed by 12 Systra, S-Y-S-T-R-A, Engineering, Inc. And then there is 13 an actual proposed track illustration that is part of the 14 document. 15 THE COURT: Any objection to Exhibit 1? 16 MR. ARONOFF: No. 17 THE COURT: There being no objection, Exhibit 1 18 is admitted. 19 (Whereupon, Plaintiff's Exhibit 1 was received 20 in evidence.) 21 Q Have you had an opportunity to review Exhibit 1 22 before today, Ms. Davis? 23 A Yes, I have. 24 Q And does that show a proposed track design that 25 differs from what we have referred to as an O track? HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER	Davis-Direct/Calica 37 1 Q And does it end there? 2 A It looks to me like it ends there. 3 THE COURT: Did you say it was a J or a double 4 J? 5 MR. CALICA: A J. 6 THE COURT: All right, sorry. 7 Q And what is the natural elevation in that area? 8 A The natural elevation in that area is between 55 and 9 50 feet. 10 Q Okay. 11 Now, the cover letter sent to Mr. Kaufman, 12 president of Brookhaven Rail Terminal, by Systra 13 Engineering begins with the sentence, quote, a summary of 14 our conceptual track plan layout prepared on 5/1/12, also 15 known as the J track option, is as noted above -- below. 16 Would you say that is a correct description to 17 call it a J track? 18 MS. MILLER: Objection. This witness has no 19 foundation to be testifying to -- as an expert to rail 20 track layout or design. She is not qualified in -- in an 21 expert of hydrology -- 22 THE COURT: I will allow it by way of background 23 only. 24 Continue, counselor. 25 Q Is that term used by Systra the same term you used in HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER

Davis-Direct/Calica 38 1 describing the track design as looking like the letter J? 2 A It certainly can look like the letter J, yes. 3 Q And it is describing the letter as having a total 4 length of track as approximately 5,600 feet. 5 Based upon your observation of the various plan 6 documents you have seen, is that consistent with the track 7 that runs along the southerly border and then goes up 8 north on the easterly border and ends at the Long Island 9 Expressway? 10 MS. MILLER: Objection, your Honor. It is 11 beyond background information where we get into the 12 substance of the track design. 13 THE COURT: It is all right. I will allow it. 14 My question to you counsel is: Is this to 15 respond to the arguments as to whether or not the Town had 16 notice or does this go to your bigger point that you don't 17 think it is really a track? 18 MR. CALICA: Both, your Honor. 19 We will prove this is all they presented. And 20 secondly, as an offer of proof that if they had followed 21 that, then there would be no need or ability or 22 justification to mine the rest of the site. 23 THE COURT: All right. 24 Q Based upon -- incidentally, Ms. Davis, do you read 25 site plans professionally? <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>	Davis-Direct/Calica 40 1 Assuming that to be true, if we began at the 100 2 foot elevation on the western end, and at a 1.25 percent 3 slope, what would it be on the eastern? Do you have any 4 idea? 5 THE WITNESS: I assume it is somewhere around 50 6 feet. I haven't calculated that. 7 THE COURT: Thank you. 8 Go ahead, counsel. 9 Q Have you been provided with a copy of the Bowne 10 Engineering grading plan? 11 A Yes. 12 MR. CALICA: I will offer it in evidence. What 13 number is it? 14 It is Exhibit 5 in the binder of the pre-marked 15 documents. It is Bowne, B-O-W-N-E. 16 THE COURT: Exhibit 5 is a picture. 17 MR. CALICA: It shouldn't be. 18 MR. KORDAS: It is right there. 19 THE COURT: All right. 20 Q Have you seen that document before? 21 A Yes, I have. 22 MR. CALICA: Is there any objection to it? 23 MR. ARONOFF: Which document? 24 THE COURT: Exhibit 5, which I believe is a 25 single drawing, which looks a lot like the one on the big <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>
Davis-Direct/Calica 39 1 THE COURT: Move on, counsel. 2 MR. CALICA: Okay. 3 Q Does a length of 5,600 feet in your opinion equate 4 with the track that runs just along the southerly border 5 of the 93 acre site and then along -- north along the 6 easterly border to the Long Island Expressway? 7 A It would seem about right. But I have not measured 8 this out specifically to answer that question. 9 Q Okay. 10 Assuming that the track had been constructed or 11 was planned to be constructed in the configuration shown 12 in Exhibit 1, 5,600 feet long, entering on the southwest 13 corner at 100 feet following the existing elevation to the 14 southeast corner, and then going straight north and ending 15 at the Long Island Expressway, would there be the types of 16 ground water impacts on the aquifers that you described 17 associated with a track configuration as shown on 18 Exhibit 1? 19 THE COURT: No matter what she says to that 20 question, I don't understand the question so it will not 21 help. 22 I have a question. 23 Right here on the letter you are looking at, it 24 says the track would be on a descending 1.25 grade from 25 west to east. <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>	Davis-Direct/Calica 41 1 board that we have. 2 MS. MILLER: This document, Exhibit 5, I believe 3 was also the blowup, the exhibit that we were reviewing 4 earlier. 5 THE COURT: That is what exhibit? 6 MS. MILLER: B. But I don't believe it has been 7 marked. It was intended for settlement purposes. We 8 would object to the use of this. 9 THE COURT: I'm confused. 10 This is the old track? 11 MR. CALICA: Your Honor -- 12 THE COURT: Isn't this what we looked at on 13 Friday as the plan? Am I wrong about that? 14 MR. ARONOFF: I'm confused what document he is 15 talking about. 16 The document he has blown up is what we gave -- 17 (Counsel confer.) 18 MR. CALICA: Your Honor, let me make this 19 statement on the record. 20 After the lawsuit was filed the Town was 21 provided with plans. 22 We then have a stipulation that -- before the 23 record in which the parties agreed to try to agree upon an 24 acceptable track construction plan for stand still 25 purposes. <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>

Davis-Direct/Calica 42 1 We had a meeting at the offices of FPM 2 Engineering. It is referred to the declaration of 3 Ms. Davis' engineering colleague -- 4 THE COURT: Stop. 5 Are you suggesting it was prepared for 6 settlement purposes? If it wasn't then it is fully 7 discoverable. 8 MS. MILLER: We are not talking about what is 9 shown in the plan. But just as to anything discussed at 10 those meetings. 11 THE COURT: We are admitting it, but obviously 12 settlement discussions are not to be referred to. 13 MR. CALICA: To be clear, and to make a record, 14 I explicitly said to Mr. Aronoff, we are here at the 15 offices with our engineers and your engineers to create a 16 document under a signed stipulation. 17 It is not privileged as it relates to track 18 design. 19 THE COURT: Counsel, what are you trying to show 20 me with the document? We don't have a jury here. Answer 21 the question. 22 MR. CALICA: I don't want it subject to any 23 privilege. 24 THE COURT: Counsel, the document is going in 25 for all purposes. The settlement discussions should not <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>	Davis-Direct/Calica 44 1 construction, but the BRT defendant -- would that entail 2 the type of grading and fill removal that is associated 3 with the O track and the various exhibits that are before 4 you? 5 A Certainly the J track design did not show the extent 6 of grading that is indicated on these plans. 7 Q Did the Systra design J track from Exhibit 1, from 8 2012, show the track following more or less the natural 9 slope and grade of the property as it entered the 10 southeast corner of the 93 acre parcel and followed the 11 natural contours from the southwest to the southeast? 12 A Yes. It appeared to follow the natural contours, 13 more or less. 14 Q Okay. 15 Could you quantify your opinion as to the type 16 of ground water impacts that you would consider 17 professionally to be associated with a track design of the 18 Systra J track option as compared with the type of O track 19 shown in Exhibits 4 and 5? 20 A Certainly the grading for the J track design did not 21 show the extent of removal of overburdened material. 22 Q What does that mean in your terms? 23 THE COURT: In this context, what does that 24 mean? 25 THE WITNESS: Overburden in this case means the <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>
Davis-Direct/Calica 43 1 be elicited. If you elicit anything relating to 2 settlement discussions I will not consider it. 3 So go ahead. 4 MR. CALICA: I will also supplement the offer 5 with the -- what number is it -- the AECOM plan, and the 6 binder which is Exhibit 4. 7 THE COURT: Any objection to Exhibit 4? 8 MS. MILLER: No, your Honor. 9 THE COURT: All right. 10 4 and 5 are admitted. 11 (Whereupon, Plaintiff's Exhibits 4 and 5 were 12 received in evidence.) 13 Q Have you reviewed the AECOM plan dated January 2014 14 and the Bowne plan dated April 2014 before? 15 A Yes, I have. 16 Q And do they show the preexisting elevations and 17 grades throughout the 93 acre parcel? 18 A Yes, they do. 19 Q And in your professional experience as a hydrologist, 20 you read grading data and elevation data? 21 A Yes, I do. 22 Q All right. 23 Going back to my question about the Systra 24 design J track, if the Systra design J track in Exhibit 1 25 were the track being constructed or planned for <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>	Davis-Direct/Calica 45 1 unsaturated soil, the sand, the gravel, the forest and 2 associated top soil overlying, if you will, the aquifer. 3 The J track design does not show the extent of removal as 4 this other design. 5 Q And how would you quantify or compare the ground 6 water impacts on the aquifer as you described them with 7 the O plan, O track plan excavated to 50 feet, and 8 construction of the J track ending in the northeast corner 9 by the Long Island Expressway? 10 A I'm not sure that I can quantify it. But I can 11 certainly say I expect the impacts on the aquifer to be 12 far more significant with this O track design, with the 13 associated excavation and removal of the native materials. 14 Q Has this recharge area, apart from the Safe Water 15 Drinking Act of 1974, been identified by any other 16 governmental agencies? Yes or no. 17 A Yes. 18 Q Is one of them the US Geological Survey? 19 A Yes. 20 Q What is the United States Geological Survey? 21 THE COURT: That is my question. But I know 22 what it is. Go ahead. 23 Q Did the US Geological Survey actually prepare a 24 survey map of this area in the year 1967? A survey of 25 this area. <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>

Davis-Direct/Calica 46 1 A There happens to be surveys of this area by the USGS, 2 yes. 3 Q Would you look at Exhibit 18 in the binder in front 4 of you. 5 THE COURT: Any objection to Exhibit 18? 6 MS. MILLER: No. 7 THE COURT: Exhibit 18 is admitted, counsel. 8 (Whereupon, Plaintiff's Exhibit 18 was received 9 in evidence.) 10 Q What is Exhibit 18 now that it has been admitted? 11 A Exhibit 18 is topographic map prepared by the USGS, 12 and it is dated 1967. 13 Q All right. 14 And is that a type of document that is used by 15 you in your profession as a geologist performing 16 professional services on Long Island? 17 A Yes, it is. 18 Q And would you tell his Honor what it shows in terms 19 of the area in which the 93 acre parcel is located? 20 A What it shows is that that particular area is 21 underlain by material that has an elevation of -- very 22 difficult to read this. This is usually printed much 23 larger. But it is underlain by material with an elevation 24 of 80, 90 feet, 80 feet and -- 25 Q We have a blowup that was made in your office that HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER	Davis-Direct/Calica 48 1 This relates back to the discussion we were 2 having earlier about the outwash plain, and the extensive 3 thickness of the gravel deposits. 4 Q Is this an important area in terms of it's important 5 to recharge and water production capacity for the Upper 6 Glacial aquifer? 7 A Yes, it is. 8 Q Now, is there an area known as the Carmans River 9 located nearby? 10 A Yes. The Carmans River is located to the east. 11 Q And is that the blue body of water that eventually 12 goes down to what is shown as Bellport Bay? 13 A Yes. 14 Q Okay. 15 And would you tell his Honor something about the 16 Carmans River, its classification, what it does, and where 17 its water flows? 18 A Yes. 19 The water flows from north to south generally in 20 the river. I understand that the river is classified as a 21 scenic and recreational river. The river receives ground 22 water discharges from the Upper Glacial aquifer. And the 23 river is basically sitting in a river plain area that has 24 been eroded down into the Glacial outwash deposits. 25 Q Is there an area known as the Carmen 's River HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER
Davis-Direct/Calica 47 1 may assist in your reference. 2 A Thank you. 3 Q But we only have one. 4 Can you see the Long Island Expressway located 5 on this US Geological Survey drawing? 6 A Yes, I can. 7 Q Does it run approximately through the middle, from 8 left to right? 9 A Yes, it extends from left to right, or west to the 10 east across this topographic map. 11 Q All right. 12 What is the level of sand or earth elevation 13 associated with the area of, let's say, on the 93 acre 14 site and around it? 15 A On the 93 acre site, the elevation shown here starts 16 at about elevation 60. And since there is an area a 17 little bit below that and it is a ten foot contour area, 18 perhaps 55. And extending on to 105, perhaps 110 on the 19 very western portion of the 93 acre parcel. 20 Q Okay. 21 And as you continue to the west, does that area 22 of high elevation continue? 23 A Yes. 24 The area of high elevation continues perhaps a 25 mile, a mile and a half. HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER	Davis-Direct/Calica 49 1 watershed? 2 A Yes, I understand that there is. 3 Q All right. 4 Do you know whether or not the Town of 5 Brookhaven itself has adopted any type of preservation or 6 conservation program for the Carmen's River watershed? 7 A I understand they have, yes. 8 Q And have you had a chance to review it? 9 A Yes. I have reviewed portions of it. 10 MR. CALICA: Your Honor, I would ask that the 11 Court judicially notice, and I can provide an excerpted 12 copy of the Carmans River Conservation and Management 13 Plan. It has the effect of the local law, it was adopted 14 by resolution of the Town Board in late 2013. It appears 15 on its website. And rather than use an inch and a half 16 thick proper that has schedule and appendicis, I have made 17 copies that I wanted to include for the witness' 18 attention. 19 I'm offering it to your Honor. 20 THE COURT: Is it one of the exhibits marked? 21 MR. CALICA: It may not have been. But we 22 provided counsel with copies. 23 THE COURT: What is the defendant's position on 24 this? 25 MS. MILLER: Let us review it quickly to make HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER

Davis-Direct/Calica 50 1 sure that it is the same as the copy I previously 2 received. 3 Is the piece of property in issue within the 4 scope of this plan? 5 MR. CALICA: I will ask the witness to explain. 6 THE COURT: I'm asking you. 7 Is this piece of property part of the plan? 8 MR. CALICA: It runs off into it. 9 THE COURT: I don't know what that means. 10 MR. CALICA: Yes. 11 I'm getting the answer from the Town Attorney 12 who saw the environmental impact statement. I didn't, 13 your Honor. 14 THE COURT: All right. 15 MS. MILLER: Your Honor, we don't object to the 16 use of this document. But we will make a note that the 17 Court should take judicial notice that the document should 18 be noticed in its entirety as it is on the website, and 19 not just the excerpted portion that we have here today. 20 THE COURT: Are there other portions you expect 21 to be speaking to? 22 MS. MILLER: Maybe in a closing brief, your 23 Honor. But for today's purposes, no. 24 THE COURT: I think counsel is offering the 25 whole thing. If you feel I should acknowledge the HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER	Davis-Direct/Calica 52 1 Roman numeral III, colon, highest grade reservoir. It 2 reads, ground water in this zone is generally of excellent 3 quality, the ground water resource in this zone offers a 4 large potential for further development of public water 5 supplies provided that measures are taken to ensure the 6 protection of ground water quality. 7 Do you agree as a professional matter with the 8 that recommendation? 9 A Yes. 10 I would agree that ground water in this zone 11 should be protected. 12 Q Where does the water that enters the Carmans River 13 flow to? And you can see it on Exhibit 18. But perhaps 14 you can explain to his Honor what other areas or impacts 15 are associated with runoff into the Carmans River? 16 A The Carmans River eventually discharges to Bellport 17 Bay which is part of the Great South Bay. 18 Q Do you have any opinion as to whether runoff from the 19 BRT facility on the 93 acre parcel would enter the Carmans 20 River? 21 A Yes. From what I have reviewed, I understand the 22 runoff would enter the river. 23 Q Where would it flow once it enters the river? 24 A It would flow with the flow of the river which is to 25 Bellport Bay and Great South Bay. HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER
Davis-Direct/Calica 51 1 existence of the Town plan, I will do that. 2 It is so noticed. 3 MR. CALICA: Thank you, your Honor. 4 Q Ms. Davis, would you look at page 73 of the document. 5 MR. CALICA: Your Honor, can I assign a high 6 number to it since I have -- the next number would be 27, 7 if we can assign that number. 8 THE COURT: The excerpt from the plan is 9 Exhibit 27; is that correct? 10 MR. CALICA: Yes. 11 THE COURT: For the purposes of the hearing, 12 correct? 13 MR. CALICA: Yes. 14 Q There is a line says -- there is a bullet point 15 reading, control storm water runoff, period. To the 16 extent feasible, surface runoff should be intercepted and 17 disposed of as close as possible to the source. And then 18 it continues. 19 Would there be storm water runoff into the 20 Carmans River watershed associated with the type of 21 development on the 93 acre parcel that the BRT defendants 22 plan shows? 23 A I expect it would be since the parcel is within the 24 watershed and there would be storm water runoff. 25 Q Directing your attention to the part that says zone HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER	Davis-Direct/Calica 53 1 Q Do you have an opinion of the impact of the waters in 2 the Bellport Bay and Great South Bay would be from the 3 type of runoff you would expect to associate with the BRT 4 rail facility on this 93 acre parcel? 5 MS. MILLER: Objection. Lack of foundation. 6 THE COURT: I will sustain the objection for a 7 different reason. 8 Explain something to me. 9 If we built anything on that property, a parking 10 lot, a courthouse, there would be storm water runoff, 11 meaning it is not going into the sand, it is running off 12 the asphalt? Is that what we are talking about here? 13 THE WITNESS: No. 14 THE COURT: Good. 15 Explain to me what you are talking about. 16 THE WITNESS: Say you would have a parking lot 17 out there. There would be storm water when it rains. It 18 would need to be managed. You couldn't leave it sitting 19 out in the parking lot. It needs to be leached. 20 Typically we have storm water leaching pools to collect 21 the storm water and it is discharged into the ground from 22 the parking lot. From there it migrates downward, enters 23 the water table. In this area ground water is flowing 24 toward the river. 25 So there would be storm water discharge to the HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER

Davis-Direct/Calica 54 1 aquifer which then flows to and discharges to the river. 2 THE COURT: Does the aquifer discharge into the 3 river? 4 THE WITNESS: The Upper Glacial aquifer in this 5 area, the flow is lateral and the flow is vertical. There 6 is a component of vertical flow downward. But there is 7 also a flow of lateral flow. 8 THE COURT: So what you are saying is when it 9 rains, water runs off whatever we are going to build there 10 and we build something? 11 THE WITNESS: Yep. 12 THE COURT: And it goes into the ground, into 13 the aquifer and into the river? 14 THE WITNESS: Eventually, yes. 15 THE COURT: And does the elevation matter, if we 16 dig out 50 feet of soil, or does it go back to the first 17 point that more sand is better? 18 THE WITNESS: It goes back to the first point. 19 The more filtration, regardless of the quality of the 20 storm water here, the more filtration the better. 21 THE COURT: Counsel, we can move along. I have 22 the idea which is your point. There are contaminants that 23 go into the aquifer, and that is not good, right? Because 24 either way it is not great, is that fair? 25 MR. CALICA: Yes, Judge. HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER	Davis-Direct/Calica 56 1 Q Is salt itself a contaminant that has in fact 2 impacted the portions of the Upper Glacial aquifer? 3 A Yes. 4 In several different contexts, salt 5 contamination has occurred both in the Upper Glacial and 6 places in the Magothy aquifer. 7 Q In the areas where salt intrusion has occurred, is 8 the water any longer potable, that is, usable for drinking 9 purposes? 10 A Not potable without treatment, no. 11 Q Would it be suitable for a water district or a 12 pumping for drinking purses? 13 A Not without treatment, no. 14 Q And do you have any concerns as a hydrogeologist as 15 to what type of salt water impact or intrusion might be 16 associated with constructing a 39,000 covered salt 17 building of the type covered in Exhibit 8-B? 18 A In this case it wouldn't be salt water intrusion, 19 because salt water intrusion is generally associated with 20 intruding salt water from water bodies like the Great 21 South Bay or the Atlantic Ocean. 22 In this case it is the concern of discharges 23 from its facility directly to the ground water and 24 probably a resultant plume of salt water from the 25 facility. HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER
Davis-Direct/Calica 55 1 THE COURT: All right. 2 Q Ms. Davis, one of the structures shown on Exhibit B, 3 the environmental overview, is a covered salt storage 4 building and it looks like 39,000 square feet on the south 5 end of the 93 acre parcel. 6 A Which exhibit is that? 7 Q The cover sheet, 8-B. 8 A Yes. 9 Q Do you have any environmental concerns about salt 10 storage? 11 A Yes. 12 Q And could you relate what that concern is to the 13 location shown on the 93 acre parcel. 14 A Salt storage almost invariably has salt that ends up 15 outside of the covered storage area. Salt being very 16 soluble. And at the time rain water hits it, it dissolves 17 and carries the salt down and enters the aquifer. 18 I had experience with a number of salt storage 19 facilities and associated birne, B-I-R-N-E, highly 20 concentrated salty water that ends up being so treated 21 with these facilities. 22 So the presence of salt storage or future 23 presence of salt storage, the potential, on this parcel, 24 and particularly in an area where a lot of sand is being 25 removed, would present concern. HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER	Davis-Direct/Calica 57 1 Q What in your opinion would result in the potability 2 or drinkability of the water in that location? 3 A It most likely would no longer be potable. 4 THE COURT: It is clear to say the drinking 5 water supply, sticking with Suffolk County for a moment, 6 which you say goes to the Suffolk County Water Authority, 7 is it already subject to treatment? 8 THE WITNESS: It is subject -- the raw water 9 coming straight out of the ground is subject to testing. 10 If testing demonstrates the presence of 11 contaminants, then there would be treatment requirements 12 if the contaminants exceed certain levels, there would be 13 treatment requirements before it is put into the 14 distribution system or distribution to customers. 15 THE COURT: Is it fair to say that those 16 treatment facilities are already in place, meaning that we 17 wake up tomorrow morning and somebody in the Suffolk 18 County Water Authority, nothing to do with this, something 19 else, says holy smoke, salt in the water, and do they just 20 click on a machine that is already there? 21 THE WITNESS: Salt is very difficult and 22 expensive to remove from water. Generally what happens if 23 there is salt water intrusion, which is the most common 24 problem, that is the end of those wells for water supply 25 purposes. HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER

Davis-Direct/Calica 58 1 There are other kinds of contaminants which are 2 often found in the ground water that are subject to much 3 less expensive treatment. And for those kind of 4 contaminants the water authority would treat the water. 5 THE COURT: Thank you. 6 THE WITNESS: Yes. 7 Q Ms. Davis, did you inspect the site physically 8 yesterday? 9 A On Saturday I did, yes. 10 Q Okay. 11 Did the site appear as -- did it generally 12 appear, except for the perspective as shown in the post 13 water marks Exhibit B, and the one we marked as 14 Exhibit 16? 15 A I would say it generally appeared as you would see it 16 in Exhibit B or 16, yes. 17 MR. CALICA: I will offer both in evidence, if 18 they are not already. 19 THE COURT: Any objection? 20 MS. MILLER: No. 21 THE COURT: So admitted. 22 Exhibit B and Exhibit 16. 23 (Whereupon, Plaintiff's Exhibits B and 16 were 24 received in evidence.) 25 MR. CALICA: 16 is in the pre-marked binder. HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER	Davis-Direct/Calica 60 1 York City area very frequently. 2 Historic fill generally consists of soil. It 3 can contain ash. It usually contains a variety of 4 anthropogenic or human associated debris. 5 THE COURT: What does that mean? Garbage or 6 something else? 7 THE WITNESS: Some of it may have originated as 8 garbage. But what happens in the areas of New York City, 9 which is surrounded by water and which historically, and 10 I'm talking about a very long time ago, had wetlands and 11 other low lying areas, these areas would fill with 12 development. A lot of times they would fill with waste 13 materials, often ash from burning garbage. 14 When dealing with environmental sites in the New 15 York City area, we often have to evaluate historic fill to 16 determine if it can be remaining on site or has to be 17 disposed of elsewhere. 18 Q Did you observe what you considered to be material 19 that would -- that was brought in from off-site and placed 20 or dumped on the 93 acre site? 21 A I observed three areas where it appears that soil 22 that was clearly not native, and that contained 23 anthropogenic debris, had been placed on the surface of 24 the site. 25 Q And where? Can you show it on Exhibit 21 and 16? HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER
Davis-Direct/Calica 59 1 And B is now 21. I apologize. Those were the markings 2 from the preliminary injunction -- 3 THE COURT: Exhibit B, a/k/a Exhibit 21, is 4 admitted. 5 (Whereupon, Government's Exhibit B was received 6 in evidence.) 7 THE COURT: Does Exhibit 16 have an a/k/a? 8 MR. CALICA: No, it is 16. 9 I apologize, your Honor. We did several 10 presentations referring -- 11 THE COURT: Counsel, that is fine. Just keep 12 moving. 13 MR. CALICA: Okay. 14 Q Were you on the ground at the site? 15 A Yes, I was. 16 Q And did you observe anything on the site in addition 17 to excavated natural aversion of the sand? 18 A Yes. 19 Q What else did you observe? 20 A I observed some piles of asphalt. I observed some 21 piles of what is generally termed as historic fill. 22 Q What is historic fill? 23 A Historic fill is materials that were historically 24 used as fill. Primarily in the New York City metro area, 25 we run into it when we are dealing with sites in the New HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER	Davis-Direct/Calica 61 1 A This is modified a little from what I saw on 2 Saturday. But over on this side of the site I observed 3 two general areas where there are piles of -- 4 THE COURT: Why don't you take that with you and 5 take it up to the witness stand. This way you can show us 6 all and we will be able to hear you better. 7 THE WITNESS: This portion of the photograph 8 right here (indicating), there was a large pile of what 9 appeared to be soil fill. And then there were two areas 10 in this area of the photograph where I observed piles of 11 what seemed to be historic fill. 12 THE COURT: If you can help her out to move it 13 around. 14 In the photo there are some dark mounds there, 15 and there you saw some piles of anthropogenic debris? 16 THE WITNESS: The dark mounds here, some 17 pronounced, some are mounds and some are appearing to be 18 mounds, and this appeared to be asphalt material. 19 THE COURT: When you say that, does it look like 20 fresh virgin asphalt they use in construction, or old 21 chopped roadway? 22 THE WITNESS: The piles of material appeared to 23 be old chopped roadway, what I would call asphalt 24 millings. 25 There appeared to be an area here where perhaps HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER

Davis-Direct/Calica 62 1 millings were incorporated in more typical asphalt 2 material to make road bearing surfaces on which to drive. 3 That area extends down and along this apparent roadway, 4 and then along the line of the track here. 5 THE COURT: Is it fair to say that it is 6 perfectly legitimate be use for asphalt fillings? 7 THE WITNESS: To build a surface for travel of a 8 vehicle, yes. 9 Q Now, would you direct your attention to what you 10 described as historic fill. 11 A Okay. 12 On this portion of the photograph, which would 13 be the lower left of the photograph, which is toward the 14 eastern and central portion, there is a pile of this soil 15 that was non-native and contained anthropogenic, human 16 materials. 17 In the area of the western portion of the 93 18 acre parcel here (indicating), I observed two more piles 19 of soil that was not native to the area and it contained 20 anthropogenic debris. 21 THE COURT: Is there a construction purpose for 22 anthropogenic debris? 23 THE WITNESS: When the material likely was 24 originally placed for its original purpose somewhere else, 25 I think it was a matter of disposing of this material and <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>	Davis-Direct/Calica 64 1 or linoleum tile. 2 I observed pieces of metal, pieces of glass, 3 pieces of bone, pieces of pipe. There is kinds of pipe, 4 plastic pile pipe, metal pipe, some clay pipe. I observed 5 china. A wide variety of material. 6 I observed a Metro card in the pile, one of the 7 piles. 8 Q Are you familiar with the term C&D? 9 A Yes. 10 Q What is C&D material? 11 A It is anthropogenic material, typically building 12 materials that have been removed during demolition 13 process. 14 Q What does C&D stand for? 15 A Construction and demolition. 16 Q Is what you saw and what you described consistent 17 with what is known as C&D, construction and demolition 18 material? 19 A I would say the anthropogenic materials I observed in 20 these piles, some would be consistent with C&D. 21 Q And are you able to form an opinion as to whether 22 this material existed on the site and was uncovered during 23 excavation, or whether it is the type of non-native 24 material that would have had to have been brought to the 25 93 acre site? <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>
Davis-Direct/Calica 63 1 simply using it as fill. 2 I have no idea what the purpose is of placing it 3 here. 4 THE COURT: In your professional opinion could 5 there be a legitimate purpose? 6 THE WITNESS: My experiences in dealing with 7 historic fill, the kinds of materials we are talking about 8 in these three soil piles, is that I typically have them 9 tested, and it is typically required by a regulatory 10 agency that they be tested to determine whether they are 11 suitable from a contamination standpoint to remain on site 12 that I'm dealing with. 13 My experiences have been that materials 14 typically are contaminated to the level where they are not 15 suitable for the purpose for which the site is going to be 16 used and, therefore, the materials have to be excavated 17 and properly disposed of off-site and then approved for a 18 facility. 19 In this case we have not tested any of the 20 materials. I don't know what the environmental quality is 21 and if they contain contaminants. But they are certainly 22 the kind of materials I would expect to be tested before 23 they are placed essentially in an uncontrolled facility. 24 Q Did you observe pieces of linoleum tile in there? 25 A I did observe two pieces of what appeared to be vinyl <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>	Davis-Direct/Calica 65 1 MS. MILLER: Objection, speculation, no 2 foundation to speculate. 3 THE COURT: I will hear the answer. 4 A I can certainly comfortably say it is not from this 5 location. The kinds of materials in the soil, 6 irrespective of the anthropogenic materials, are the kinds 7 of materials that simply don't occur in this area 8 geologically. These are the kinds of soils I would expect 9 to see from somewhere else. 10 THE COURT: You can certainly tell us that from, 11 say, the area to the 19th century the materials were not 12 there, and you don't know if someone dumped them at some 13 point at some time in the past. 14 THE WITNESS: I didn't observe the dumping 15 myself. But certainly the configuration of the piles of 16 these materials on the surface would be consistent with 17 them having been dumped there as opposed to them naturally 18 occurring there. 19 THE COURT: And were the piles in the area that 20 have been recently excavated, if you know? 21 THE WITNESS: The piles were in an area where 22 there is no longer topsoil on the surface, where the 23 forest has been removed. They were not at the bottom of 24 the pit, if you will. 25 THE COURT: Is this a good opportunity to take a <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>

Davis-Direct/Calica 66 1 break? 2 MR. CALICA: No. 3 I would like to just offer the photographs 4 taken -- were they nine photographs -- the nine 5 photographs taken yesterday. 6 THE COURT: You mean Saturday, I believe. 7 Would you show it to counsel. 8 MR. CALICA: I have provided a copy. 9 THE COURT: Would you have the witness tell us 10 if they are her photos? 11 MR. CALICA: It is Exhibit 26. 12 Off the record, my compliments to Mr. Kordas 13 getting them inserted this morning. 14 THE COURT: Are these the photographs you took 15 on Saturday? 16 THE WITNESS: We had a town representative with 17 me. I didn't take the photos. He took the photos. But 18 they do appear to be the photos taken on Saturday. 19 THE COURT: They are not numbered, but I assume 20 there is -- it is page 9. There is some kind of a card 21 there. Is that the Metro card? 22 THE WITNESS: It is the Metro card. 23 THE COURT: All right. 24 MR. CALICA: This would be a good point to take 25 the break. HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER	Davis-Direct/Calica 68 1 BY MR. CALICA: 2 Q Ms. Davis, do you have the photographs marked 3 Exhibit 23 in front of you? 4 A Yes, I do. 5 Q Looking at the first of them, does it fairly and 6 accurately depict what you observed at the site over the 7 weekend? 8 THE COURT: It is already in evidence, 9 counselor. 10 MR. CALICA: All right. 11 Q Do you see the right side of the first photograph, it 12 is the darker material. 13 Would you tell his Honor what that depicts? 14 A The material out here, as best as I can tell since 15 the photographs are not real clear, that it indeed looks 16 to be the historic fill we were discussing. 17 Q What about the second photograph, the dark material, 18 the dark brown? 19 A I believe it also shows some historic fill, but not 20 completely clear. 21 Q And what about the fourth photograph? 22 A Yes. That photograph does show some of the historic 23 fill. 24 THE COURT: What is the banana shaped item in 25 the middle of the photograph. HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER
Davis-Direct/Calica 67 1 THE COURT: Any objection to Exhibit 26? 2 MS. MILLER: No objection. 3 THE COURT: Exhibit 26 is admitted. 4 (Whereupon, Plaintiff's Exhibit 26 was received 5 in evidence.) 6 We will take a five minute break. 7 8 (Whereupon, a recess was taken.) 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER	Davis-Direct/Calica 69 1 THE WITNESS: I believe it is a piece of pipe. 2 THE COURT: Okay. 3 Q And the last photograph? 4 A The very last photograph shows the anthropogenic 5 material, the Metro card, and pieces of brick in there. 6 Q Were you able to estimate the volume of non-native or 7 historic fill with the various ingredients as you 8 described them? 9 A Yes. 10 After looking at my notes, it would be somewhere 11 in the order of perhaps 12 to 15,000 cubic yards, more or 12 less. 13 Q Okay. 14 Now, do you have an opinion as to whether or not 15 any of that historic material, whether it is pipe, whether 16 it is a Metro card, whatever, could have been uncovered in 17 the course of excavating the site as shown in, I think it 18 is Exhibit 21, which we understand according to the Systra 19 document was originally completely vegetative? 20 A Certainly the historic fill is not native to this 21 parcel, so I would not have expected it to be underneath 22 the apparent wooded area, virgin wooded area shown in that 23 photograph. 24 Q Is it at all consistent with the type of virgin sand 25 material you testified as from the preceding glacial some HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER

Davis-Direct/Calica 70 1 15,000 years ago? 2 A No, it is not consistent with that sand and gravel 3 material. 4 Q Does the historic fill of the type you described, 5 assuming it came from New York City or some other area, 6 and assuming it has -- I can't pronounce the word, whether 7 it was athro something, you said, ash and burning garbage, 8 bones, whatever else you said was in there, does that 9 itself have any capacity to impact ground water? 10 MS. MILLER: Objection. Misstates the witness' 11 prior testimony. 12 THE COURT: I will allow it. 13 A Certainly, it could have the capacity to impact the 14 ground water. 15 Typically historic fill does contain 16 contaminants. So the common contaminants are various 17 kinds of metals, semi-volatile organic compounds. 18 PCBs are a contaminant. 19 When we encounter the historic fill at sites, 20 and we are meaning to excavate it, we are required to test 21 typically for a wide variety of contaminants. 22 Q Based on your observations and experience, would you 23 expect the fill be historically observed to contain the 24 type of contaminants you just described, metals, PCBs, 25 other items as you testified to? HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER	Davis-Cross/Miller 72 1 A That's correct. 2 MS. MILLER: May my colleague approach the 3 witness with copies of the declaration? 4 THE COURT: Yes. 5 Can you identify the exhibits? 6 MS. MILLER: Yes, Exhibit H and Exhibit L. 7 MR. ARONOFF: These are all of the defendant's 8 exhibits. 9 THE COURT: Thank you. 10 I want to thank counsel for increasing my muscle 11 mass. 12 Q I have handed you Exhibit H. 13 Do you recognize that document? 14 A Yes, I do. 15 Q What is it? 16 A It is a declaration. 17 Q And how about Exhibit L? 18 A It is a reply declaration. 19 THE COURT: I have H. I have not seen L. Hold 20 on. 21 MS. MILLER: Volume two. 22 Q And these are prepared -- 23 A Yes. 24 Q You reached an opinion as to environmental harm you 25 would believe occurred as a result of activity on the HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER
Davis-Cross/Miller 71 1 A It certainly has the potential to contain these 2 contaminants. We certainly have seen pieces of metal in 3 it. And that would suggest that metals could be a 4 contaminant. 5 Q Is that why this type of material is required to be 6 placed only in authorized landfills and DEC licensed 7 facilities? 8 A Yes. 9 If it is excavated at sites which are under some 10 form of regulatory oversight, it is typically required to 11 be tested. If the test results dictate it is required to 12 be disposed in an authorized facility such as a landfill. 13 MR. CALICA: Thank you. 14 I have no further questions. 15 THE COURT: Excellent. 16 Cross-examination. 17 18 CROSS-EXAMINATION 19 BY MS. MILLER: 20 Q Afternoon, Ms. Davis. 21 Before Saturday you had not visited Brookhaven 22 Rail Terminal; is that correct? 23 A That's correct. 24 Q You submitted two declarations in support of the 25 Town's motion; is that correct? HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER	Davis-Cross/Miller 73 1 site; is that correct? 2 A I have reached an opinion regarding potential 3 environmental harm that could occur, yes. 4 Q Potential environmental harm. 5 You found there is potential threats to the 6 aquifer? 7 A Yes. 8 Q And do you know before the Town filed this motion, do 9 you know whether anyone from the Town ever expressed any 10 concerns to any of the Brookhaven Rail Terminal defendants 11 regarding the aquifer? 12 A I don't know whether any such opinion was expressed. 13 Q Let's talk about the sites specifically. 14 Brookhaven Rail Terminal is located in Suffolk 15 County; is that correct? 16 A Yes. 17 Q All of Suffolk and Nassau County are situated on top 18 of the aquifer? 19 A All of Suffolk and Nassau County are situated on top 20 of some of the aquifer, yes. 21 Q The aquifers underlie all of Nassau and Suffolk 22 County may be a better way to ask that. 23 A Yes, more or less. 24 Q There are, of course, properties in Suffolk County 25 over the aquifer that sit naturally at elevations of 50 or HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER

Davis-Cross/Miller 74 1 lower; is that correct? 2 A Yes. 3 Q Specifically there are commercial or industrial 4 properties throughout Suffolk County that are at an 5 elevation of 50 or lower? 6 A Correct. 7 Q You haven't conducted any analysis as to whether 8 these commercial or industrial properties were natural 9 elevations of 50 or lower or whether there was grading 10 done at those properties; is that correct? 11 A Unless I was involved in an evaluation of a specific 12 property, no, I wouldn't. 13 Q You spent some time talking about the fact that 14 Brookhaven Rail Terminal is located in what is referred to 15 as hydrogeologic zone three; is that correct? 16 A Yes. 17 Q And that zone was set by a zoning board; is that 18 accurate? 19 A The zone as I understand it was established in the 20 208 study. It may have subsequently been implemented by 21 some sort of regulatory body. 22 Q It was assigned zone three in approximately 1978; is 23 that correct? 24 A That is my understanding of when the 208 study was 25 published, yes. HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER	Davis-Cross/Miller 76 1 A I would say that there has been excavation occurring 2 on the property. I would say that there has been 3 placement of piles of material on the property that did 4 not originate on the property, such as the historic fill 5 we have been discussing, as well as piles of asphalt. 6 Q Let's focus on the grading or activation, okay? 7 You are taking issue with the loss of filtering 8 capacity; is that correct? 9 A That is one of my focus, yes. 10 Q And vegetation is removed and sand comes out of the 11 property, and then there is less filtration to the surface 12 of the land and the aquifer; is that correct? 13 A That is the general context, yes. 14 Q Any grading whatsoever removes filtration. Would you 15 agree with that? 16 A I think you and I perhaps use the term "grading" 17 differently. 18 Grading to me means modifying elevation. It 19 doesn't necessarily mean removing material. 20 Q How about any excavation whatsoever removes 21 filtration; is that correct? 22 A Any excavation of clean native material reduces the 23 amount of filtration. 24 Q And in your experience do most construction projects 25 involve excavation? HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER
Davis-Cross/Miller 75 1 Q And zone three is referred to as the deep flow 2 recharge area? 3 A I believe that is the terminology, yes. 4 Q How large is this zone three area? 5 A It is quite extensive. 6 Q Can you approximate the site? 7 A I'm not sure I could assign a number of square miles 8 to it. But I know it extends from the eastern or western 9 portion of Suffolk County onto the Shinnecock inlet. 10 Q Would you agree that there are other commercial or 11 industrial properties in Suffolk County located at zone 12 three? 13 A I would, yes. 14 Q For purposes of your testimony today, you haven't 15 conducted any analysis as to whether there are other 16 commercial or industrial properties within zone three that 17 are elevation of 50 or lower? 18 A Not specifically with respect to the matter at hand, 19 no. 20 Q You understand that the only current activity taking 21 place on the site is grading; is that correct? 22 A I would not characterize that as only grading, no. 23 Q Is it fair to say you have no evidence if other 24 activity is going on -- occurring on the front aside from 25 grading? HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER	Davis-Cross/Miller 77 1 A Most construction projects involves some earth 2 moving. In some cases there are excavations. In other 3 cases there is an increase in elevation. 4 Q Many construction projects involve excavating 5 material out, for example, to lay a foundation, or to lay 6 a subsurface; is that correct? 7 A Yes. 8 Q Removal of filtration is only an issue if there are 9 contaminants present? 10 THE COURT: Repeat your question. 11 Q Removal of filtration is only a danger to the aquifer 12 if there is contaminants present that can penetrate the 13 aquifer? 14 THE COURT: Can you answer that? 15 A Removal of filtration is important if there are 16 introduced contaminants. Filtration is also important for 17 contaminants that naturally occur in storm water. 18 Q But the act of excavation by itself does not 19 introduce contaminants to the aquifer? 20 A If we observe the maintenance of excavation 21 equipment, I'm not sure we can make that statement. 22 In a typically clean world the excavation itself 23 would not introduce contaminants. 24 The introduction of heavy equipment needed for 25 excavation often introduces contaminants. HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER

Davis-Cross/Miller 78 1 Q So in that situation it is the equipment itself that 2 poses a threat of contamination? 3 A The maintenance of that equipment, yes. 4 Q But the act of adding sand or soil to a site doesn't 5 actually prevent the contamination of the aquifer? 6 A Adding of clean materials could, you know, avoid some 7 contaminations. 8 Q But just add four layers — more layers of 9 filtration. Is that correct? 10 A If you added clean materials you could add more 11 layers of filtration. 12 Q Turn to your first declaration, please, which is 13 Exhibit H. 14 I want to direct your attention to page 3. And 15 in the carry-over paragraph you refer to eventual 16 commercial/industrial activity to be conducted within 17 parcel C. Do you see that? 18 A Yes, I do. 19 Q And that at the end of that carry-over paragraph you 20 mention again, certain eventual uses of the BRT site will 21 also likely impact the aquifer. 22 Do you see that? 23 A I do. 24 Q And you are saying "eventual" there because there are 25 currently no commercial activities or industrial HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER	Davis-Cross/Miller 80 1 A Yes. 2 Q And you include a definition of incompatible uses 3 reading, incompatible uses include uses of hazardous waste 4 or substances including petroleum that may ultimately be 5 discharged to ground water or the storage of such 6 substances may contaminate ground water. 7 Do you see that? 8 A Yes. 9 Q You have no specific knowledge of any hazardous waste 10 or substances located on the property, right? 11 A Certainly not hazardous waste, but the equipment I 12 saw contains hazardous substances. 13 Q And we will get to that. 14 Focus on the hazardous waste section. You have 15 no knowledge of hazardous waste being stored there? 16 A That's correct. 17 Q These concerns that you referenced here in your 18 declaration in Exhibit H are future concerns and not 19 current concerns? 20 A That would be correct in terms of uses, yes. 21 Q And in that same paragraph at the end you note that 22 these activities may be in contravention of federal and/or 23 New York environmental laws. 24 Do you see that? 25 A Yes. HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER
Davis-Cross/Miller 79 1 activities being conducted at the site; is that correct? 2 A I would assume that the excavation and grading, 3 screening of sand could potentially be considered an 4 industrial activity. But my statement in this case refers 5 to future uses, yes. 6 Q And you have no specific knowledge of any future 7 commercial activity that will be conducted on the 8 property; is that correct? 9 A Other than my understanding that there is going to be 10 a railroad track constructed on the property and 11 presumably operated as such, no. 12 Q You have no knowledge of when the railroad track will 13 begin operation; is that right? 14 A That's correct. 15 Q Let's turn back to your declaration in the next 16 paragraph. 17 You talk about incompatible uses. 18 THE COURT: What is the next paragraph? 19 MS. MILLER: The next paragraph is Exhibit H -- 20 THE COURT: What page? 21 MS. MILLER: Three. 22 THE COURT: All right. 23 Q It is the first full paragraph referring to 24 incompatible uses. 25 Do you see that? HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER	Davis-Cross/Miller 81 1 Q Until you know what activities are actually 2 occurring, you can't reach a determination that they will 3 impact the ground water? 4 A I would say that that is correct. I don't know when 5 that is going to happen. 6 Q You can't reach a determination that they will 7 violate federal or New York environmental laws? 8 A Not at this time, not without knowing the specific 9 use. 10 Q Take a look at page 5 of your declaration in the 11 carry-over paragraph. At the top of page 5, the second 12 full sentence. 13 A Yes. 14 Q It starts: Removal of the forest and up to 50 feet 15 of the unsaturated zone sand above the aquifer will 16 significantly reduce the effectiveness of removal of 17 nitrogen, pathogen and other deleterious materials 18 typically present in sanitary and other wastes that are 19 discharged to on-site, underground injection control, UIC 20 systems. 21 Do you see that? 22 A Yes. 23 Q Putting aside your claim about the 50 feet being 24 removed, and I want to focus on the nitrogen, pathogen and 25 other deleterious materials. HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER

Davis-Cross/Miller 82 1 You have not done any soil testing at the site; 2 is that correct? 3 A Yes. 4 Q And not any elevation, whether 50 or a hundred feet? 5 A I have not performed any at the site. 6 Q You have not collected any water samples from the 7 site; is that correct? 8 A Yes. 9 Q What are the reference to nitrogen, pathogen and 10 other deleterious materials? 11 A Those references go back to the discussion above 12 concerning the sanitary waste reference. 13 Q Concerning future activities at the site? 14 A Correct. 15 Q You attended an inspection at the site on Saturday? 16 A Yes. 17 Q And you were there for roughly two hours? 18 A Yes. 19 Q And how many photos were taken at that inspection? 20 A I know there were quite a few. I don't know 21 precisely how many. 22 Q More than a hundred? 23 A I have no idea. 24 Q We looked at Exhibit 26, which is nine of those 25 photos; is that correct? <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>	Davis-Cross/Miller 84 1 A I don't have any specific knowledge about that, no. 2 Q I hand you what is marked as Exhibit III. 3 THE COURT: I see a fourth I. 4 MS. MILLER: IIII. 5 I would ask the Court to take judicial notice 6 that this is a printout from the New York State Department 7 of Transportation website. 8 THE COURT: Any objection? 9 MR. CALICA: None, your Honor. 10 THE COURT: It is in evidence for purposes of 11 the hearing. 12 (Whereupon, Defendant's Exhibit IIII was 13 received in evidence.) 14 Q Turn to the fourth page of Exhibit IIII. 15 The reference is to construction practices to 16 reduce idling and congestion. 17 Do you see that? 18 A Yes. 19 Q And it talks there about use of recycled materials in 20 construction; is that correct? 21 A Yes. 22 Q It says the NYSDOT -- 23 THE COURT: Rather than read it, I will accept 24 the New York State Department of Transportation encourages 25 such use. <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>
Davis-Cross/Miller 83 1 A I believe there are nine in there, yes. 2 Q Those photographs depict the -- are those the best 3 depictions of your current concerns on the site? 4 A I'm not sure how to answer that question. 5 Q Out of the many photographs that were taken, the ones 6 that are included as Exhibit 26, do those represent your 7 concerns -- your current concerns at the site? 8 THE COURT: The same objection as to form. I'm 9 not sure how she could answer that. 10 Q Were you involved in selecting the photographs that 11 would be discussed today? 12 A Only very peripherally. 13 Q Who selected the photographs? 14 A I'm not sure who selected the photographs. 15 Q Talk about the asphalt milling. 16 There is nothing improper about having asphalt 17 on a construction site; is that correct? 18 A I would say specifically no. 19 Q And they are often used in construction facilities? 20 A Asphalt is used in many facilities. 21 Q And asphalt millings are recycled materials; is that 22 correct? 23 A That is my understanding, yes. 24 Q Do you know whether the New York State Department of 25 Transportation encourages the use of recycled asphalt? <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>	Davis-Cross/Miller 85 1 Q It specifically lists asphalt. 2 Do you see that? 3 A Yes, I do. 4 Q Asphalt is often used as a top fill on roads; is that 5 correct? 6 A I would assume so, yes. I'm not an expert in road 7 construction. 8 Q And it is commonly used for temporary roads at 9 construction sites? 10 A I'm not sure I can speak to that. 11 Q Did you see asphalt in use on parcel B and C for 12 temporary roads? 13 A I did see asphalt in use for what would be temporary 14 roads. 15 Q It creates a stable surface for vehicles to travel 16 across; is that correct? 17 A Presumably that is the purpose. 18 Q More stable than sand, for example? 19 A I would assume so. 20 Q Are you familiar with Bowne, B-O-W-N-E? 21 A In terms of -- 22 Q Are you familiar with the construction firm, Bowne? 23 A Yes. 24 Q And have you worked with them before? 25 A I don't recall any specifics of that. <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>

Davis-Cross/Miller 86 1 Q Are you aware that Bowne was hired by the Brookhaven 2 Rail Terminal defendants to provide construction -- were 3 you aware that the Brookhaven Rail Terminal retains Bowne 4 to provide construction expertise on parcels B and C? 5 A I'm aware that there is a plan, a site plan, and that 6 it has the Bowne name affiliated with it. That is the 7 extent of my knowledge. 8 Q Do you know that Bowne was providing twice a month 9 updates to the Town regarding the construction on parcels 10 B and C? 11 A I would have no knowledge of that. 12 Q Have you reviewed any reports provided to the Town 13 from Bowne regarding the construction of parcel B and C? 14 A Not that I'm aware of. 15 Q You have it in your report in which Bowne indicates 16 that the site is well maintained? 17 A I haven't seen any reports to that effect or any 18 other effect. 19 Q Are you surprised that Bowne has not taken any issue 20 with the present asphalt on the site? 21 MR. CALICA: Objection. 22 THE COURT: Objection sustained. 23 Let's move on. 24 Q Let's talk briefly about the discharge. 25 Are you familiar with the zoning ordinances HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER	Davis-Cross/Miller 88 1 Q And this is the I 495 basin present in some of the 2 plans that you reviewed; is that correct? 3 A Yes. 4 Q And the highway storm water retention basin is to 5 collect and recharge roadway runoff; is that correct? 6 A That is the primary function. 7 THE COURT: In that context, what do you mean by 8 recharge? 9 THE WITNESS: What I'm talking about is the 10 recharging of storm water runoff from the highway to the 11 aquifer primarily as a means to recharge quantity of water 12 and to manage storm water from the roadway. Obviously you 13 can't leave the storm water sitting on the roadway. That 14 would be a hazard. 15 Q The state built the basin; is that correct? 16 A I have no idea who built the basin. Presumably 17 whoever built 495 built it. 18 Q As you consider whether the basin poses more concern 19 for a long-term entry point for potential contaminants 20 into the aquifer than the current -- 21 A That is a very big question. But I think in the case 22 of this we are talking about a very small storm water 23 basin relative to the surface area of parcels B and C. 24 Q But the basin is located within five feet of the 25 water table; is that correct? HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER
Davis-Cross/Miller 87 1 within the Town of Brookhaven? 2 A I'm not familiar with any specific zoning ordinances. 3 Q Are you familiar with the concept of the zoning 4 ordinances? 5 A Yes. 6 Q And are you aware that parcel B and C are zoned as 7 industrial properties? 8 A I was not aware of the zoning, no. 9 Q And is that something you would want to look at when 10 you are conducting an analysis on -- as to the 11 environmental uses of the property? 12 THE COURT: Objection sustained. 13 Move on. 14 Q Even though -- well, other industrial sites aside 15 from parcel B and C, they are also located in zone three, 16 face issue with respect to ground water; is that correct? 17 A I would assume that any zone or any parcel in hydro 18 zone three would have issues with respect to that. 19 Q Are you familiar with the I 495 storm water retention 20 basin located nearby? 21 A I'm aware that there is a storm water retention basin 22 presumably associated with I 495. 23 THE COURT: Is that the square cutout on the 24 north quarter of the property? 25 THE WITNESS: Yes. HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER	Davis-Cross/Miller 89 1 A I don't know what the elevations of the basin is. 2 And I don't know what the material is at the bottom of the 3 basin either. 4 Q Do you know whether it is lower than the current 5 proposed 50 foot elevation grade at parcel B and C? 6 A I don't know that. 7 Q How about the Long Island Rail Road -- were you aware 8 of the Long Island Rail Road going down to an elevation of 9 69.4 at the southeast corner of parcel C? 10 A I was aware that the Long Island Rail Road decreases 11 in elevation towards the southeast corner. I didn't know 12 exactly what elevation it is presently at the southeast 13 corner. 14 Q The Long Island Rail Road is actually running rail 15 cars right now? 16 A I'm not out there to observe that. But I would 17 assume that that would be the case. 18 Q As opposed to future running of rail cars that you 19 are concerned about in parcels B and C? 20 A It is not just the future running of rail cars. It 21 is the entire collection of industrial activity that would 22 be the concern. 23 Q Do you consider whether the expansion proposed by the 24 Long Island Rail Road is greater than the threat posed of 25 the current activity at the Brookhaven Rail Terminal? HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER

Davis-Cross/Miller 90 1 A Are you asking me, did I observe that or should I 2 opine on that. 3 Q Did you consider that? 4 A I didn't consider that question specifically. 5 Q Are you aware that there is a farm immediately to the 6 east of the Brookhaven Rail Terminal site? 7 A I was aware that there is an agricultural property to 8 the east. 9 Q The storm water infiltrating to the water table from 10 the Brookhaven rail site is unlikely to contain more 11 contaminants than the farm; would you agree? 12 A I think it would be a highly speculative comment 13 without examining what went on in the farm relative to 14 what is going to go on at the rail terminal site. 15 Q You would have to know what is going to occur just 16 like what is going to occur at the farm property? 17 A I would have to know what is going to occur if I were 18 going to opine about specific contaminants on the 19 Brookhaven Rail Terminal site. But it is obvious the site 20 is going to be developed with a railroad use, which 21 involves contaminants. And I don't think that this is 22 happening in residential use out there. I presume it 23 would be a commercial or industrial use. 24 Q In your declaration you refer to the Caithness 25 Energy facility; is that correct? HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER	Davis-Cross/Miller 92 1 other document, I believe. 2 Q So the SWPPS is something you did not consider? 3 A I'm aware there was a storm water prevention plan. 4 Q Are you aware that there is a spill prevention and 5 containment plan? 6 A I'm not aware at this time. 7 Q And that thereby is not something you considered in 8 your analysis? 9 A I'm not aware of it, no. 10 Q If you knew that there was a SWPPS, could it change 11 your plan? 12 A As I didn't see much out there in the way of measures 13 that I would expect to see implemented under a stop water 14 improvement prevention plan. I'm not sure it would change 15 my opinion. 16 Q You have not looked at one? 17 A I would have to look first. But I did look to see 18 what measures were out there when I did the site 19 inspection on Saturday. 20 Q You referred throughout the declaration to removing 21 up to 50 feet of clean sand; is that correct? 22 A I believe I have, yes. 23 Q Do you know whether there are areas on the site that 24 exist at a natural elevation of between 50 and 60 feet 25 elevation? HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER
Davis-Cross/Miller 91 1 A Yes. 2 Q You use it as a comparative point? 3 A I would have to refresh myself to exactly what I 4 said. 5 Q It is page 5 of your declaration. 6 A Yes. 7 Q The Caithness facility is located just next to the 8 Brookhaven Rail Terminal; is that correct? 9 A I understand it is in close proximity. 10 Q With regard to the construction that occurred at 11 Caithness, the soil was disrupted? 12 A Presumably soil was disrupted. 13 Q But there were a number of engineering and 14 operational controls that were put in place -- let me ask 15 it again. 16 There were a number of countermeasures in place? 17 A I understand they reuse the soil they excavated as 18 fill and topsoil to the extent that they could. 19 Q Did you look at any specific countermeasures in place 20 at Brookhaven Rail Terminal at parcels B and C? 21 A I'm not sure what you mean by specific 22 countermeasures. 23 Q Did you look at a storm water pollution prevention 24 plan referred to as a SWPPS? 25 A I don't believe I have, unless it was part of some HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER	Davis-Cross/Miller 93 1 A Yes. There are such areas. 2 Q And for those areas they would be lowered by ten feet 3 or less? 4 A Presumably. 5 Q And those are already naturally less filtration 6 than -- in those areas than higher elevation? 7 A There is less filtration of the thickness of the sand 8 and gravel. But there are the existing force and natural 9 topsoil at the surface that would provide the filtration, 10 and presumably would be removed during construction. 11 Q Do you know what percent of the property currently 12 has been cleared of vegetation? 13 A I would have to look at an aerial photograph showing 14 the current situation to estimate that. 15 Q Do you have a -- 16 A I would say approximately half. 17 Q Are you aware that only 30 percent of the site would 18 be subject to greater than 20 feet of sand removal? 19 A I haven't done that particular calculation. 20 Q Have you looked to see whether less than 15 percent 21 of the site would require 50 feet of removal? 22 A I hadn't looked at that specific question. 23 THE COURT: You are saying less than 15 percent 24 would be subject to 50 feet? And what did you say? 25 MS. MILLER: One five, 15 percent. HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER

Davis-Cross/Miller 94 1 THE COURT: Would be what? There are too many 2 negatives in there. 3 MS. MILLER: Would require 50 feet of removal. 4 THE COURT: Got it. 5 Q Let's turn to the Carmans River. 6 A Yes. 7 Q It is fed by ground water? 8 A Primarily fed by ground water, yes. 9 Q Do you know how long the flow path to the river is 10 from the Brookhaven Rail Terminal site? 11 A It appears to be somewhere between a mile and two 12 miles. 13 Q And there are a number of intervening lands between 14 the Brookhaven Rail Terminal site and the Carmans River; 15 is that correct? 16 A Correct. 17 Q Among those are Caitheness, C-A-I-T-H-E-N-E-S-S, 18 Energy Facility closest to the Carmans River? 19 A I would need to have you show me that on the map. 20 But my understanding is that the Caitheness is not in the 21 direct path as well. 22 Q How did you reach that understanding? 23 A By knowing the direction of the ground work flow onto 24 the area. 25 Q The Suffolk County farm is closer to the Carmans HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER	Davis-Cross/Miller 96 1 these regulations? 2 A Well, it specifically amends the zoning ordinances to 3 include site clearance regulations that limit the extent 4 of law, but it -- I believe it is or should be lawn, 5 L-A-W-N, areas. 6 So my understanding how to read this would be 7 the limiting of the extent of lawn areas, not a site 8 clearance. 9 Q You believe that is referring to grass? 10 A Yes. 11 Q And that is just a typo? 12 A Yes. 13 Q Let's turn to page 78. 14 At the top bullet point it says that the Town of 15 Brookhaven should implement the following zoning 16 recommendations: 17 Eliminate spot zoning in order to prevent the 18 juxtaposition of non-compatible land uses such as high 19 intensity uses within the historic district, the scenic 20 i.e. Carmans, Peconic, or next to public open space lands, 21 and certain commercial and industrial uses adjacent to 22 residential areas? 23 It goes on to adopted restricted categories for 24 restricted and commercial uses. 25 Do you see that. HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER
Davis-Cross/Miller 95 1 River; is that correct? 2 A That is correct. 3 Q So any rain water would enter any of these nearby 4 properties could enter the ground and ultimately get 5 discharged into the Carmans River? 6 A In the shallow water table, yes. 7 Q Are you aware that the Long Island Rail Road runs 8 directly over the Carmans River? 9 A Yes. 10 Q Let's take a look at Exhibit 27, which is the excerpt 11 from the Carmans River Conservation and Management Plan. 12 A Is that provided to me? 13 Q It should be among the Town's exhibits. 14 A This one? 15 Q Yes. 16 Please turn to page 77. 17 Do you see where it says the third paragraph 18 down, unless zoning ordinances are amended in -- I think 19 it should be to include, site clearance regulation that 20 limits the extent of law area, future nitrate lows in the 21 recharge water may receive six milligrams a year. 22 Do you see that? 23 A Yes. 24 Q Currently, at least as of the date of this document, 25 that is October 2013, the Town's ordinances do not include HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER	Davis-Cross/Miller 97 1 A I do. 2 Q So as of October 2013, this was just a recommendation 3 to adopt more restrictive zoning? 4 A I would assume that is the case, yes. 5 THE COURT: Does any of this apply to -- the 6 parcel of land in question, would it be in one of these 7 areas, the scenic, the river space corridor, etcetera, 8 does it affect this piece of land, that legislation? 9 THE WITNESS: My understanding is that this 10 piece of land is not within the corridor. But it is very 11 closely adjoining. 12 THE COURT: Okay. 13 Counsel, are you almost done? 14 MS. MILLER: A few more questions. 15 Q Are you familiar with the term "time of travel to 16 Carmans River"? 17 A Yes. 18 Q And this is a measure of the time the water travels 19 from the time it enters the ground water system as 20 recharged, where it is discharged into the Carmans River; 21 is that correct? 22 A That would be for ground water, I believe, traveling 23 in the uppermost portion of the Upper Glacial. 24 Q And there is a study done to determine how long it 25 takes water to travel from different areas in the county; HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER

Davis-Cross/Miller 98 1 is that correct? 2 A Different areas the discharge to the Carmans River. 3 Q Would you please turn to Exhibit HHHH. 4 (Handed to the witness.) 5 THE COURT: Is triple H a photograph? 6 MS. MILLER: Quadruple H. 7 THE COURT: I apologize, quadruple H. 8 Q Are you familiar with the environmental impact study 9 performed for the Caithness Energy Center? 10 A I had occasion to review portions of it. 11 Q Within the Town of -- 12 THE COURT: Counsel, move on. 13 Q Take a look at figure 12-6. 14 A Yes. 15 THE COURT: Is there a page on that? 16 MS. MILLER: There is no page number. 17 It is this colored -- 18 THE COURT: How about a BRT number? 19 THE WITNESS: It is five pages after 12-9. 20 Q Figure 12-6 has the time travel for water to the 21 Carmans River in zones by color; is that correct? 22 A It depicts, as I understand it, the time of travel 23 for ground water for the uppermost portion of the Upper 24 Glacial. 25 Q And figure 12-6 shows the -- in red outlining the <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>	Davis-Cross/Miller 100 1 A To the right is parcel B and C. 2 Q And those are in the light blue area, which is 10 and 3 25 years for time of travel; is that correct? 4 A That is correct. 5 Q Have you heard the term, the zone of concern? 6 A I am not familiar with it as you are using it. 7 Q Is it true that the area of concern for sites located 8 for time of travel to Carmans River is five years or less? 9 A I'm not sure what context you are using that in. 10 Q Looking at the red area in this image and the yellow 11 area, those are much closer than the Carmans River; is 12 that correct? 13 A That is correct. 14 Q It is more concerned if the site was in the red or 15 yellow area; is that correct? 16 A Not from a hydrogeologic perspective. It really 17 depends on the kinds of contaminants we are talking about. 18 If we are talking about contaminants that degrade in a 19 short period of time, that may be true. But if we are 20 talking about contaminants that have a long resident time 21 in the aquifer, that is simply not true. Salt, for 22 example, is one of the contaminants that has a very long 23 residence time and does not degrade with the time. So the 24 time of travel is almost immaterial. 25 Q There is no salt currently located on parcels B and <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>
Davis-Cross/Miller 99 1 Caithness Energy facility? 2 A Yes. 3 Q And that is over the blue -- the darker blue zone of 4 25 to 50 years? 5 THE COURT: For your reference, mine is black 6 and white, so I have little idea what you are talking 7 about. 8 Is it the point that Caithness is in the way 9 between this site and the river? 10 MS. MILLER: The Brookhaven terminal is directly 11 before Caithness. 12 THE COURT: And looking at that, does it tell 13 you whether or not Caithness is closer to the river? 14 THE WITNESS: I can tell you that looking at 15 that diagram and the one before, that with respect to the 16 direction of ground water flow, Caithness is not down 17 from the Brookhaven terminal, not down radiant. It is 18 cross radiant. 19 Q For purposes of the time of travel to the Carmans 20 River, Brookhaven Rail Terminal site is the triangle 21 located -- do you see that triangle above the Caithness 22 facility? 23 A The triangle would be parcel A. 24 Q And to the left of that is parcel B and C; is that 25 right? <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>	Davis-Cross/Miller 101 1 C; is that correct? 2 A I didn't observe any piles of salt. But I haven't 3 seen the site plan -- I have seen a site plan that shows 4 potential salt storage. 5 Q In the future; is that correct? 6 A Yes, in the future, yes. 7 THE COURT: How much more do you have, counsel? 8 MS. MILLER: Maybe ten more minutes, your Honor. 9 THE COURT: Okay. 10 Q You mentioned that you are informed that the zoning 11 requirements for our investigation is 30 percent; is that 12 correct? 13 A Yes. 14 Q And you are currently on the 93 acre site, and how 15 much vegetation remains as a percentage? 16 A Maybe 50 percent, maybe less. 17 Q And you say you were informed, and informed by whom? 18 THE COURT: As to what? 19 MS. MILLER: The zoning requirement. 20 A I believe I was informed by counsel. 21 Q And you don't have any opinion as to whether 22 Brookhaven Rail Terminal is subject to the rail ordinance? 23 THE COURT: Objection sustained. 24 Move on. 25 Q We were talking about Exhibit 8-B earlier when you <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>

Davis-Cross/Miller 102 1 were talking with counsel about it. And that is the 2 Gannette Flemming environmental overview. 3 You notice that it is hard to say as to what 4 percent there would be a negative impact. Do you recall 5 that? 6 A I believe there was some such testimony. 7 Q Any type of countermeasures needed would depend on 8 what type of facilities are ultimately built on the site; 9 is that correct? 10 A Typically you do the countermeasures depending on 11 what is constructed. 12 Q We talked about the track configuration earlier this 13 morning. And you were referring to the J track design. 14 Do you recall that? 15 A Yes. 16 Q And that was the designed J track; is that correct? 17 A I heard it called the J track design. 18 Q You said you could not quantify the environmental 19 impact from the J track design. Do you remember that? 20 A That's correct, I have not calculated the impact. 21 Q But you felt it would be less of an issue with the J 22 track than the O track; is that right? 23 A Certainly the J track design showed far less 24 excavation and removal of forest, removal of soil, removal 25 of native sand and gravel. HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER	Davis-Cross/Miller 104 1 A I did not see any salt stored at the site. I have no 2 idea what happened during this winter in terms of salt 3 application to the surface. 4 Q Let me turn to the anthropogenic debris. 5 A Yes. 6 Q There are two separate areas where you noted debris? 7 A There were three piles, three areas of piles. 8 Q And you don't know how the debris arrived at the 9 site; is that correct? 10 A Presumably it didn't fly in. So I assume it was 11 brought in by truck. 12 Q You are not aware of what the plans are for debris; 13 is that correct? 14 A No. 15 Q In the area where you viewed the piles, do you know 16 whether those are at final grade? 17 A I don't know they are at the final grade, depending 18 on what eventual final grade is decided here. But they 19 appear to be on portions of the site that may not be fully 20 excavated yet. 21 Q And how about a sampling of the debris as to whether 22 there are actual contaminants in the debris; is that 23 correct? 24 A I did observe the anthropogenic material we 25 discussed, the metal, the glass, the bone, whatever, the HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER
Davis-Cross/Miller 103 1 Q Is there any imminent harm to allow the Brookhaven 2 Rail Terminal defendants to continue operating in the J 3 track area? 4 A The J track area includes area currently forested. 5 They are not cleared. The soil has not been removed. 6 So in my opinion, yes, there could be harm from 7 continued clearing in the J track area. 8 Q Are you aware of any regulations, statutes or 9 ordinances that forbid the Brookhaven Rail Terminal 10 defendants from grading the track area? 11 A I'm not aware of any such ordinances. 12 Q You talked about the presence of the salt storage 13 facility; is that correct? 14 A We did discuss potential salt storage facility shown 15 on the plans. 16 Q Would you say you did not see any construction of the 17 salt construction facility? 18 A I did not. 19 Q So there is no current salt inclusion in the present 20 BRT site? 21 A I have no way of knowing if salt was applied to the 22 surface to the BRT site, for example, during the winter we 23 just experienced. So I have no way of saying one way or 24 another. 25 Q Whether there is currently salt at the site? HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER	Davis-Cross/Miller 105 1 pipe. But without sampling, I wouldn't know if there are 2 particular levels of compounds or metals in the soil. 3 Q You are concerned about potential contaminants, but 4 you have no evidence of actual contaminants at the site? 5 A I have no chemical analytical data regarding 6 contaminants in the historic fill at the site. 7 MS. MILLER: No further questions. 8 THE COURT: I have a question for you. 9 You mentioned something about sand sifting 10 before, or sand interpretation activities. 11 Did you observe such things or are you supposing 12 such things? 13 THE WITNESS: What I observed are I believe four 14 setups of screens and trammels. These are pieces of 15 equipment that are used to segregate sand from larger 16 materials, such as gravel or cobbles, or trees, or 17 whatever. 18 There were piles of sand separated from gravel 19 beneath certain portions of this equipment where I would 20 normally expect to see, if the equipment had been 21 operated. 22 I did not see any operation going on at the time 23 I was there. 24 THE COURT: On Saturday? 25 THE WITNESS: On Saturday. HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER

106 1 THE COURT: Good. 2 You can step down. 3 We will take a lunch break. Before we do, I 4 would like to know who is your next witness. 5 MR. CALICA: I'm going to call Commissioner 6 Minor, and then I will call their witness -- 7 MR. ARONOFF: No, Judge. 8 It is our understanding he will finish the case 9 and we will call our witness, we will call Mr. Humbert as 10 part of our defense. I don't understand why he is taking 11 him out of turn. It is our expert. 12 THE COURT: It is his burden of proof -- you say 13 it is your expert? 14 MR. ARONOFF: Our expert, sir. 15 THE COURT: Your expert for the case or expert 16 in connection with this project? 17 MR. ARONOFF: The answer is both. He helped to 18 do the track design. He is also our expert on the 19 engineering behind it. 20 THE COURT: He can call him if he wants. 21 So you have those two witnesses and that is it? 22 MR. CALICA: No. I believe that I may have one 23 or two of the engineers that have been identified. I 24 identified Town engineer Greg Kelsey, and I have 25 identified Kevin Loyst, and I may or may not require his HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER	108 1 Then we were going to call Mr. Humbert, our 2 expert. 3 THE COURT: Okay. 4 MR. ARONOFF: And that is it. 5 THE COURT: Good. 6 Let's reconvene at 2:00 o'clock. 7 (Luncheon recess.) 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER
107 1 testimony after I examine Mr. Humbert. 2 THE COURT: Commissioner Minor you are calling 3 for what purpose or purposes? 4 MR. CALICA: To show what track plan is shown to 5 the Town. 6 THE COURT: And should be pretty short. 7 MR. CALICA: Yes. 8 THE COURT: The defendant's expert you will 9 call -- 10 MR. CALICA: To establish what they are doing 11 and what they are building. We have no other means of 12 doing it. 13 THE COURT: And the other two gentlemen would 14 relate to communications? 15 MR. CALICA: No. Commissioner Kelsey would be 16 incidental to the two -- sorry, Town engineer Kelsey might 17 address certain engineering aspects of the testimony, and 18 also notice to the Town because he was directly involved 19 in interactions with the BRT defendants. 20 THE COURT: After that who are you going to 21 call? 22 MR. ARONOFF: We are going to call Can Miller 23 and Jim Newell. We will call Jim Newel first. 24 THE COURT: One is the CFO. 25 MR. ARONOFF: Yes, Dan Miller. HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER	Miner-Direct/Calica 109 1 AFTERNOON SESSION 2 3 4 MR. CALICA: The plaintiff now calls Matthew J. 5 Minor. 6 THE COURT: Please step up to the witness stand 7 to be sworn in. 8 THE CLERK: Please raise your right hand. 9 10 MATTHEW MINER, 11 called as a witness, having been first 12 duly sworn, was examined and testified 13 as follows: 14 THE CLERK: Please state and spell your name for 15 the record. 16 THE WITNESS: Matthew, M-A-T-T-H-E-W, Miner, 17 M-I-N-E-R. 18 THE COURT: Please proceed. 19 20 DIRECT EXAMINATION 21 BY MR. CALICA: 22 Q Good afternoon, Mr. Miner. 23 Do you hold an appointed position or positions 24 in -- with the plaintiff? 25 A Yes, Commissioner of Waste Management and also the HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER

Miner-Direct/Calica 110 1 Chief of Operations, in-house designation, but I am 2 appointed as Commissioner of Waste Management. 3 Q What are your duties and responsibilities as chief of 4 operations? 5 A Assist in the day-to-day operations of the 6 supervisor's office, administration of the Town, working 7 with both department heads throughout the Town. 8 Q For how long have you held that position? 9 A Since January 2010. 10 Q Have you held a prior position in the Brookhaven Town 11 government in prior years? 12 A Yes. 13 In approximately 2004 to 2006 I held several 14 positions, including Waste Management Commissioner, 15 Building Commissioner and Deputy Supervisor. 16 Q And in your professional career, have you also held 17 administrative positions in any other towns on Long 18 Island? 19 A Yes. 20 I was in the Town of North Hempstead for about 21 14 years with various titles, including Public Works 22 Commissioner, Waste Management Commissioner and the 23 Director of Operations. And for Suffolk County I was the 24 Deputy Commissioner of the Health Department. 25 Q Did you have any role in the original litigation HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER	Miner-Direct/Calica 112 1 Q Is that the 28 acre parcel that now operates as the 2 Brookhaven Rail Terminal? 3 A Yes, sir. 4 Q Did there come a time that you had some interactions 5 with representatives of the Brookhaven Rail Terminal 6 concerning possible additional activities on the adjacent 7 parcel of what we referred to this morning as the 93 acre 8 parcel, but also named as parcels B and C on certain of 9 the documents in evidence? 10 A Yes. 11 Q Okay. 12 What was your role insofar as the Town was 13 concerned in dealing with the BRT representatives? 14 A The representatives would come into the office, into 15 the supervisor's conference room periodically and show 16 various concepts as to what they were working on in terms 17 of a vision for the next parcels -- annexed parcels. 18 Q With whom did you react to at the Brookhaven Rail 19 Terminal? 20 A Jim Pratt, and to a lesser degree Andrew Kaufman and 21 Jake Watral. 22 MR. CALICA: W-A-T-R-E-L? 23 A I think A-L. 24 Q All right. 25 Did any engineer representatives from Brookhaven HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER
Miner-Direct/Calica 111 1 between the BRT and the Town that went on from let's say 2 2007 to 2009? 3 A In that time period? 4 Q Did there come a time that you became involved in 5 prior pending litigation involving the BRT and the Town of 6 Brookhaven? 7 A Yes. 8 In early 2010. 9 Q And at whose request did you become involved? 10 A Former Supervisor Mark Lesko, and former Town 11 Attorney Robert Quinlan. 12 Q Were you involved in what ultimately became the 13 September 2010 settlement of the prior federal court 14 litigation between -- brought by the BRT against the Town? 15 A Yes, sir. 16 Q Did you attend proceedings before the Surface 17 Transportation Board in Washington? 18 A Yes. 19 Q And did you consult with the Town's outside counsel 20 on that settlement? 21 A Outside counsel at that time, yes. 22 Q What parcel was involved in the September 2010 prior 23 settlement? 24 A It is the triangle wedge I believe referred to as 25 parcel A immediately on Sills Road. HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER	Miner-Direct/Calica 113 1 Rail Terminal come to meet with you? 2 A Not that I recall. 3 Q Okay. 4 Were you present in court this morning when 5 there was testimony concerning a so-called J track option? 6 A Yes, sir. 7 Q Did there come a time that representatives of BRT 8 presented to you as the chief of operations of the Town 9 any documentation concerning a J track option? 10 A Yes. 11 Q There should be a binder or looseleaf holder of 12 exhibits in front of you, Commissioner Miner, and I will 13 ask that you look at the first page of Exhibit 1. 14 It is an mail from Andy Kaufman from the 15 Brookhaven Rail Terminal dated June 26th, 2012. 16 A Yes, sir. 17 Q Did you receive that email from Mr. Kaufman at BRT in 18 or about June of 2012? 19 A Yes, I think I did, yes. 20 Q It refers to Jim asked that I forward the attached. 21 When you turn to the next page, there is a 22 letter dated June 26th, 2012 in evidence from Systra 23 Engineering, Inc. to Mr. Kaufman. 24 Is that the document that was attached to the 25 email sent to you? HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER

1 **A To the best of my recollection, yes.**

2 **Q** Now, the first sentence says: The summary of our
3 conceptual track layout prepared on 5/1/12 also known as
4 the J track option.

5 Do you recall having received from BRT
6 representatives a document that described the track layout
7 as a J track option?

8 **A Yes.**

9 **Q** Okay.

10 If you continue forward in the same exhibit two
11 pages forward, you will see a color photograph attached.

12 Is that attached to the letter from Systra
13 provided by Andy Kaufman from BRT?

14 **A I believe so, yes.**

15 **Q** And did you understand that to be a J track option as
16 described in the letter?

17 **A Yes.**

18 **Q** The previous letter says the total lengths of track
19 is approximately 6,600 feet, see attached drawing or
20 reference.

21 What was your understanding based upon the
22 receipt of these documents as to where the track was going
23 to come from in terms of parcel A, the 28 acre parcel, and
24 where it was going to enter parcels B and C, the 93 acre
25 parcel, and where it was going to end?

*HARRY RAPAPORT, CERTIFIED REALTIME REPORTER
OFFICIAL COURT REPORTER*

1 **A It was going to come in on the southeast corner of**
2 **parcel A, entering parcel B in the southwest corner, and**
3 **proceed easterly along the southern perimeter of parcel B**
4 **and C, and then hook northward along eastern perimeter of**
5 **parcel C and proceed northward up toward the expressway.**

6 THE COURT: Do you happen to know, sir, how wide
7 is parcel B and C also?

8 THE WITNESS: In feet, no. I know it is 93
9 acres. I could measure it out.

10 THE COURT: The question is this: The letter
11 that is attached here suggests the entire length of track
12 is 6,600 feet.

13 Does that represent the length and width of the
14 L?

15 THE WITNESS: That is what I took it to
16 understand, the J or L referred to, yes.

17 **Q** Commissioner Miner, did you observe that the letter
18 you received contained in the next to the last paragraph
19 the sentence ending, the limited regrading work is
20 necessary to set the track at proper grades and elevation
21 for its use as well as -- as potential future connection
22 the tracks south of the LIRR in parcel B? Did you observe
23 that that line was there?

24 **A Yes.**

25 **Q** And did you have an understanding as to what

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1 Mr. Kaufman of BRT was proposing to you in terms of the
2 amount of regrading work?

3 **A The purpose -- I believe the purpose of that**
4 **paragraph was based on the discussions I had had with**
5 **Mr. Pratt and perhaps Mr. Kaufman about limiting the**
6 **amount of clearing needed to put down the track.**

7 I had suggested 75 foot on the center. They
8 went back and forth. And we agreed on 150 foot pathway
9 along the track, which would be used to install track,
10 access for heavy equipment necessary to install the track.
11 It was a very limited area that would be disturbed on
12 parcel B and C.

13 **Q** By 150, do you mean 75 feet on each side and center?

14 **A Originally. I believe the final approval was based**
15 **on 150 feet, seeing in some areas it would be 60 and 90,**
16 **or 80 and 70. But the intent was to have a center line of**
17 **the track and allow them to work on either side to**
18 **facilitate track installation in that limited J track**
19 **area.**

20 **Q** After --

21 THE COURT: When you say approval of the
22 condition on that, whose approval and when did that issue
23 arise?

24 THE WITNESS: I would say there was a qualified
25 approval by me that said subject to all regulatory

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1 compliance. They still had not shown us anything from the
2 Surface Transportation Board or from NEPA.

3 THE COURT: And what kind of approval was it?
4 Zoning? What kind of approval are you giving them?

5 THE WITNESS: It was authorization to allow them
6 to install that limited track area subject to NEPA and STP
7 approval. It was my understanding that at the time we had
8 limited oversight. But the STP and the NEPA would look at
9 all the other federal requirements. And we only
10 authorized the clearing of that very limited portion of
11 both B and C.

12 THE COURT: And what is the nature -- the nature
13 of your discussions, was it such that you were under the
14 belief that whatever supporting buildings or warehouses or
15 whatever would go along with this track would be within
16 that 150 foot zone?

17 THE WITNESS: No. It was only for track
18 purposes, BRT had various concepts, and the concepts kept
19 evolving. They never really had a firm plan as to what
20 they were going to put in the majority area of parcel B
21 and C.

22 It was pretty clear they were going to install
23 the J track area. So subject to the approval of STP and
24 NEPA, the limited amount of clearing approval to be
25 authorized, we allowed that narrow band to proceed.

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Miner-Direct/Calica 118 1 Q Did there come a time when Mr. Pratt or the 2 representatives of Brookhaven Rail Terminal told you they 3 were going to proceed to install the J track on parcels B 4 and C? 5 A Yes, shortly after, yes. 6 Q Would you look at Exhibit B – Exhibit 2 in the 7 binder in front of you, please. 8 THE COURT: Is it already in? 9 MR. CALICA: Yes, the June 29th letter. 10 Q It is addressed to you – 11 MR. KORDAS: Offer it first? 12 MR. CALICA: I offer it now. 13 THE COURT: No objection? 14 All right. Received. Exhibit 2. 15 (Whereupon, Plaintiff's Exhibit 2 was received 16 in evidence.) 17 Q Mr. Miner, is that the letter you received from BRT 18 advising you and the Town that the construction of track 19 on parcel B and C by BRT was going to start? 20 A Yes, sir. 21 Q Let me direct your attention to the second paragraph. 22 Construction in this phase will begin with the 23 clearing and grading of the track right-of-way and 24 installation of track in accordance with the proposed, 25 quote, J track, close quote, layout, the 75 foot buffer HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER	Miner-Direct/Calica 120 1 I'm limiting my offer of Exhibit 2. 2 MR. ARONOFF: Judge, I don't mind putting in the 3 drawing that came with it. We will do it anyway. 4 THE COURT: Why not just move along and see what 5 happens. 6 MR. CALICA: I will withdraw it because I can't 7 attest to the way the documents connected the way it was 8 presented with that attachment that way. So for the 9 interest of accuracy, I will limit my offer of Exhibit 2 10 to the first page. 11 Q Now, Mr. Miner, this was not the first discussion and 12 track proposal that you had with BRT representatives, was 13 it? 14 A In terms of installation? 15 Q In terms of their track plans. 16 A They had various concepts. I don't know if any had 17 any great detail. But there were various concepts that 18 Mr. Pratt or Mr. Kaufman, or in combination, they would 19 come in and discuss throughout, I guess, 2012. 20 Q And would you look at Exhibit 22 in the binder in 21 front of you. 22 Do you see that in the binder? 23 A Yes. 24 Q It is an email dated March 29th, 2012, addressed to 25 Jim. And it appears that that is Jim Pratt, the HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER
Miner-Direct/Calica 119 1 will remain along the east property line as well as a 50 2 foot buffer at the north end track terminus. 3 Did anybody at that time from BRT tell you that 4 they were installing or constructing other than the J 5 track as described in Exhibits 1 and 2? 6 A No, sir. 7 Q If you look at the second page, is that essentially a 8 black and white picture of – that is very similar to 9 Exhibit 1 in terms of showing what you described as a J 10 track entering the 93 acre parcel in the southwest corner, 11 going along the southern boundary and ending at the Long 12 Island Expressway? 13 A The quality of the photo is relatively poor, but I 14 believe so. 15 MR. ARONOFF: Then I object now to putting the 16 exhibit in in this way. This is not what was attached to 17 that letter. 18 MR. CALICA: I will withdraw that. 19 MR. ARONOFF: You are withdrawing the exhibit? 20 MR. CALICA: No, maybe anything other than the 21 letter. It may be the way it was assembled in our files. 22 I don't want to authenticate anything other than the 23 letter at this point. 24 THE COURT: So you are striking the diagram? 25 MR. CALICA: Correct. HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER	Miner-Direct/Calica 121 1 individual you identified as the BRT representative. 2 Did you send that email to Mr. Pratt? 3 A Yes. 4 Q In and about the end of March 2012? 5 A Yes. 6 Q Okay. 7 At the time, was that a period of time when you 8 were requesting more detail, project plan or concept plan 9 from BRT? 10 A Yes. 11 We needed something more definitive as to what 12 they were going to do. 13 Q Okay. 14 As of March 29th, 2012, had they provided any 15 such details to you? 16 I'm directing your attention to the sentence 17 reading, details are necessary. 18 A Yes. 19 They may have provided something. But we were 20 asking for more information. A lot of times they would 21 submit something that was more conceptual in nature. 22 Q At about that time did you read anything about the 23 possible use of the 93 acre parcel as a casino for the 24 Shinnecock Indians? 25 A Yes. HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER

Miner-Direct/Calica 122 1 Q And who told you about this? 2 THE COURT: That strikes me -- there is no claim 3 here that it is for a casino, right? 4 MR. CALICA: Your Honor, their position is they 5 provided this information. 6 We will show that they provided us with a casino 7 plan. 8 So when we say as an offer of proof the J track 9 was a specific representation of what they are building. 10 And I said, other than that showing a casino is 11 the only other type of information they were doing at this 12 time. 13 THE COURT: Okay. 14 Q Did they provide you with some type of illustration 15 showing the possible construction of a casino by the use 16 of the Shinnecock Indians at the site? 17 A They shared with me a drawing. I don't think they 18 allowed us to keep it. But they shared it at some point 19 for a casino and water park. 20 MR. ARONOFF: If he is describing a drawing of a 21 picture he doesn't have, I object. 22 THE COURT: Show him the picture of the casino. 23 I don't know if it is a train stop at the casino. It is 24 really far afield. 25 MR. CALICA: It was the subject of the discovery HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER	Miner-Direct/Calica 124 1 THE COURT: Ask the witness if he recognizes it. 2 What is that? 3 THE WITNESS: This is a conceptual plan. It 4 appears the north end of it has been cut off, your Honor. 5 It actually extended further north. You can see a partial 6 of the building is cut off. But the J track is still 7 there along the southern end of the property, and 8 proceeding north along the westerly end, into a parking 9 garage. The casino is located right above the parking 10 garage. There was a water park and hotel proposed, as 11 well as a tribal -- historical tribal section in the lower 12 right-hand corner. 13 THE COURT: Is there an exhibit number on this? 14 MR. ARONOFF: No. 15 MR. CALICA: I would request, your Honor, it be 16 marked as Exhibit 28. 17 I do understand -- 18 THE COURT: Exhibit 28 for identification. 19 Do you recognize that as the plan shown to you 20 or substantially similar to the casino plan shown to you? 21 THE WITNESS: Yes, sir. 22 MR. CALICA: Your Honor, when we subpoenaed the 23 plans, because of the accelerated discovery it was 24 explained to me they had large documents they could not 25 produce in copies or PDF. HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER
Miner-Direct/Calica 123 1 agreement. I had to have it sent by photograph because 2 they said they couldn't produce it. 3 THE COURT: You have it? 4 MR. CALICA: Yes, it was provided by 5 Mr. Aronoff. 6 (Counsel confer.) 7 MR. CALICA: I will provide a copy of a 8 photograph presented by Mr. Aronoff's office. 9 May I provide a copy to your Honor? 10 THE COURT: Please. 11 MR. ARONOFF: This is not one of their exhibits. 12 I don't know if he is impeaching his own witness with a 13 document. It certainly wasn't given to us as an exhibit 14 before. 15 THE COURT: He got it from you? 16 MR. CALICA: Yes, Judge. 17 MR. ARONOFF: I don't see a Bates designation on 18 this, your Honor. 19 THE COURT: Did he send you a picture of a 20 casino, in fairness? 21 MR. ARONOFF: If I knew off the top of my head. 22 THE COURT: I don't know how the imaginary 23 casino -- 24 MR. ARONOFF: I am told we produced it at some 25 point. HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER	Miner-Direct/Calica 125 1 THE COURT: I don't care. He has it and he has 2 seen it. 3 MR. CALICA: I'm just refreshing Mr. Aronoff's 4 memory -- 5 THE COURT: Mr. Aronoff is not testifying. The 6 witness recognizes the plan. We have the plan. I can see 7 the casino. 8 Though, in fact I was kidding, it does show the 9 plan covers a train to the casino. 10 So continue. 11 Q Does the document shown to you in 2012 show the 12 location of the proposed track and where on Exhibit 28 was 13 it expected to end? 14 A The document is cut off on the northern end. My 15 recollection is it went up into the casino building which 16 is immediately north of the parking garage. 17 Q Would that have been in the corner near the Long 18 Island Expressway? 19 A The northeast corner, yes. 20 Q Was the proposed track to be -- shown to be located 21 in any O track type of fashion? And by that I mean moving 22 around the remainder of the parcel? 23 A The track might have shown that. I don't recall 24 without seeing the top being cut off. But I don't recall 25 an O track. HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER

Miner-Direct/Calica 126 1 THE COURT: Are you offering Exhibit 28? 2 MR. CALICA: Excuse me, your Honor? 3 THE COURT: Are you offering Exhibit 28? 4 MR. CALICA: Yes, your Honor. 5 THE COURT: It is admitted. 6 (Whereupon, Plaintiff's Exhibit 28 was received 7 in evidence.) 8 Q Mr. Miner, during 2012, did the BRT representatives 9 propose any further or different uses of the 93 acre 10 parcel to or in your meetings with them? 11 A 2012? 12 Q Yes. 13 A They had some early concepts. They had the J track 14 plan, the casino. At one point it was the rendering of an 15 arena. I believe it was the five hour energy arena. I 16 don't know if there was a formal track layout plan for 17 that, but proposed use for the site. 18 Q Was that illustration shown to you? 19 A It was shown to me, yes. 20 Q Was a copy left with you? 21 A No, not that I recall. 22 Q Now, did you have other written communications with 23 the BRT representatives concerning the details for the 24 type of activities they were planning on the 93 acre site? 25 A I had requested documentation from the Surface HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER	Miner-Direct/Calica 128 1 specifically what portion of BRT. 2 Q Did you send the portion of the first page of 3 Exhibit 24 that reads as follow's: Quote, also while the 4 background and long-term regional plan are important and 5 would be helpful, the immediate need is for BRT to provide 6 the Town with documentation from the STP which supports 7 and authorizes the expansion to the east? 8 A Yes, sir. 9 Q Did they ever provide you with documentation from the 10 Surface Transportation Board authorizing the expansion 11 needs? 12 A No. 13 Q And is that something you or the Town was seeking 14 from BRT? 15 A Consistently; yes. 16 MR. CALICA: I will offer that portion only of 17 Exhibit 24 at this time, your Honor. 18 THE COURT: Any objection? 19 MR. ARONOFF: No. 20 THE COURT: Admitted. 21 (Whereupon, Plaintiff's Exhibit 24 was received 22 in evidence.) 23 Q If you will continue to the last page of the email 24 comprising Exhibit 24, it begins, Matt Miner, 9/25, 2012. 25 There are three lines and it ends Jim Pratt at Pratt HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER
Miner-Direct/Calica 127 1 Transportation Board and for environmental review. 2 Q Would you look at Exhibit 24 in the binder, please. 3 Do you see the email at the top of that page? 4 A Yes, sir. 5 Q Okay. 6 MR. ARONOFF: There are two separate emails 7 included in what we have as Exhibit 24. It is not really 8 an objection. 9 (Counsel confer.) 10 THE COURT: Are those emails all between you and 11 Pratt? 12 MR. CALICA: Give me a moment, your Honor, 13 because in my set I seem to have combined something under 14 24. 15 (Whereupon, at this time there was a pause in 16 the proceedings.) 17 MR. CALICA: Because I included an email chain, 18 I will ask the witness to identify a particular email and 19 make the offer discretely addressed to the portion. 20 Q Mr. Miner, does the section that says, also while the 21 background and long-term regional plan are important, 22 etcetera, is that -- whose email is that? 23 A That is my email. 24 Q And who is Ted Mills? 25 A A gentleman connected with BRT, I don't know HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER	Miner-Direct/Calica 129 1 Brothers. 2 Is that a copy of an email from you to Jim Pratt 3 that you identified as a BRT representative? 4 A Yes, sir. 5 Q And was it sent on or about September 25, 2012? 6 A Yes. 7 Q All right. 8 Did you include the following sentence in your 9 letter to the BRT representative: 10 Thanks, Jim, dash, I appreciate the update, 11 period. 12 Have you written to or received any 13 correspondence from the STP or support agencies regarding 14 the expansion to the east? Paren, or do you need Gannette 15 Fleming to complete that portion first, question mark. 16 Did you send that? 17 A Yes. 18 Q And did you ever receive any correspondence provided 19 by the Surface Transportation Board to the BRT regarding 20 its expansion to the east? 21 A No. 22 Q Were you provided with any environmental review at 23 that point, or was the Town, by any planned activities by 24 BRT on the 93 acre parcel? 25 A Not in 2012, no. HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER

Miner-Direct/Calica 130 1 Q Did you have other communications with BRT 2 representatives requesting an environmental review in 3 2012? 4 A Verbal conversations with Mr. Pratt. There may have 5 been similar emails. 6 Q Did you ever receive any environmental review of any 7 BRT activities for planned activities on the 93 acre site? 8 A Not until 2014. 9 Q Okay. 10 Would you look at Exhibit 25 in the binder in 11 front of you. 12 Again, because of the format, it says Matt Miner 13 10/9 dash 2012, 9:02 a.m., addressed to Jim and signed 14 thanks, Matt, and it lists Jim Pratt as the recipient. 15 Is that an email you sent to Mr. Pratt, a 16 representative of BRT, in or about October of 2012? 17 A Yes, sir. 18 Q But this time it is correct you already received the 19 Systra J track drawing; is that correct? 20 A Yes. 21 Q And you already received the June 2012 letter from 22 Mr. Pratt indicating that they were proceeding to 23 construct the J track; is that correct? 24 A Yes. 25 Q Your email reads as follows: <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>	Miner-Direct/Calica 132 1 Q Did you receive a Gannette Fleming environmental 2 review -- 3 A Not in 2013, no. 4 Q You started requesting in 2012, and you have gone 5 through the emails and you requested it several times, you 6 didn't receive it in 2012 and didn't receive it in 2013 to 7 the end of that year; is that correct? 8 A Yes. 9 Q Incidentally, were you involved at all in any 10 unrelated Town activities that concerned dewatering or 11 some removal of materials from the Carmans River? 12 A Yes, that is technically part of the Carmans River, 13 Yaphank Lakes. Yes. 14 MR. CALICA: I will make an offer of proof. 15 Q What was being taken out of the Yaphank Lakes? 16 A Fresh spoils. 17 Q Is that part of the environmental remediation being 18 undertaken by the Town? 19 A Yes. It was to clean up the Yaphank Lakes and the 20 Carmans River, remove the invasive species that populated 21 within that lake, and remove the soft sediment within the 22 lakes. 23 Q Did it become necessary to find the location to place 24 the removed material? 25 A Yes. We needed a dewatering site. <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>
Miner-Direct/Calica 131 1 Please provide the Town w/ -- please provide the 2 Town with an update as to your progress on the 3 environmental review, parenthesis, Gannette, 4 G-A-N-N-E-T-T-E, Flemming, spelled with two Ms here, close 5 paren, and your communication with the STB. 6 Did you receive any progress report from BRT 7 regarding any environmental review of the activities on 8 the 93 acre site in 2012? 9 A I don't recall specifically. But I do recall 10 Pratt -- Mr. Pratt telling me that Gannette Fleming was 11 working on it, but we didn't receive anything. 12 Q And did you receive any communications as requested 13 from BRT concerning its interactions with the Surface 14 Transportation Board? 15 A No. 16 Q Did you receive any communications from BRT in 2013, 17 the entire calendar year, that was responsive to your 18 request that BRT show some communication or authorization 19 from the Surface Transportation Board? 20 A No, sir. 21 Q Did you or the Town receive any environmental review 22 or assessment from or on behalf of BRT concerning its 23 actions or planned actions on the 93 acre parcel, 24 Exhibits B and C? 25 A Nothing with respect to the NEPA analysis, no. <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>	Miner-Direct/Calica 133 1 THE COURT: The anticipation is killing me. 2 Tell me what this has to do with anything. 3 MR. CALICA: There was a discussion about using 4 this site and the Town said we can't use it because it is 5 vegetated. So they used a clear site because they didn't 6 know it had already been cleared. 7 Q Did you have any discussion concerning the using of 8 the 93 acre site for the dewatering materials? 9 A Yes. There was a couple of meetings in a conference 10 room in Town Hall. 11 Q What was the outcome of that? 12 A It was concluded we could not use that area because 13 it would need to be cleared. There was no SEQRA analysis 14 or NEPA analysis, and there was no way to get a permit to 15 allow the fresh spoils to be staged there in a timely 16 aspect, that the dredge project was going to go on because 17 BRT had yet to complete its environmental review. 18 Q And did the Town locate the materials elsewhere? 19 A Yes. To a facility to the northeast that was already 20 cleared. 21 Q About what time in 2013 did this discussion regarding 22 putting the dewatering staging site there? 23 A April. 24 Q 2013? 25 A April, May. <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>

Miner-Direct/Calica 134 1 THE COURT: Is all of this testimony going to 2 the issue of when the Town -- 3 MR. CALICA: It is in both sides' exhibits, 4 Judge. 5 THE COURT: I'm a fact-finder. And I need to 6 understand the issues. 7 All of this goes to whether or not they told you 8 earlier; is that the idea? 9 MR. CALICA: Yes, Judge. 10 THE COURT: All right. 11 Q Did you know that the BRT operator had cleared 12 vegetation from the site on the locations shown on 16 and 13 21, starting in the second half of 2013? 14 A No, not until I saw the photos very recently. 15 Q And do you know when those photos were taken? 16 A I believe in 2014. 17 Q When for the first time did the Town -- was the Town 18 provided with any type of environmental review of the 93 19 acre site by BRT? 20 A There was an environmental report, and I believe it 21 was dated January 2014, and I believe the Town received it 22 at a meeting we had in February of 2014. 23 Q Would you look at Exhibit 8-A in the binder, is that 24 the document you are referring to dated January 14th, and 25 it states environmental overview, and as prepared by <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>	Miner-Direct/Calica 136 1 subsequent actions upon or involving the subject property. 2 Did you observe that that sentence was in there 3 when Mr. Pratt provided the document to you in February of 4 2014? 5 A Yes. 6 Q And what did you tell him? 7 A I reacted I guess fairly strongly, saying that this 8 doesn't comply with NEPA. We have been waiting all this 9 time for a NEPA document. 10 He said he paid a lot of money for this 11 document. 12 And I said, you didn't get your money's worth. 13 Q Did you ask him for further environmental clearance? 14 A Yes. They said they were going to revise the 15 document. 16 Q Did you receive a revision from Mr. Pratt or anyone 17 from the BRT after you received Exhibit 8-A? 18 A Yes. Probably four or five days later. 19 Q Would you look at Exhibit B, the environmental 20 overview, this one dated February 2014, Exhibit 8-B in 21 evidence. 22 A Yes, sir. 23 MR. CALICA: If it is not, I will move it in 24 evidence. 25 THE COURT: It is. <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>
Miner-Direct/Calica 135 1 Gannette Fleming? 2 A Yes, it was hand delivered by Mr. Pratt. 3 Q When? 4 A In the middle of February 2014. 5 Q Although dated in January? 6 A I believe so, yes. 7 MR. CALICA: I offer 8-A in evidence. 8 THE COURT: Any objection? 9 MR. ARONOFF: No objection. 10 THE COURT: It is in. 11 (Whereupon, Plaintiff's Exhibit 8-A was received 12 in evidence.) 13 Q Directing your attention to the first numbered 14 page four pages in. 15 Do you see the fourth paragraph of the 16 introduction? 17 A Yes, sir. 18 Q I will just read it into the record and then ask a 19 question. 20 This environmental overview and any associated 21 documentation is not intended to fulfill requirements for 22 completion with the National Environmental Policy Act, the 23 New York State Environmental Quality Review Act, or any 24 other federal, state or local environmental or land-use 25 statute or regulation which may be applicable to <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>	Miner-Direct/Calica 137 1 MR. CALICA: Okay. 2 Q Is that the revised document you received? 3 A It appears to be, yes. 4 Q And directing your attention to the first numbered 5 page under introduction, the fourth paragraph, did you 6 observe the sentence reading as follows: The scope of 7 this environmental review generally parallels the 8 environmental factors and resource analysis typically 9 performed to comply with the National Environmental Policy 10 Act and the New York State Environmental Quality Review 11 Act. Do you recall if it included that? 12 A Yes, it is in there. 13 THE COURT: I have a question for you. 14 Assuming hypothetically, right now you are not 15 an expert witness, but assuming the documents were given 16 to you that were fully consistent and complaint with NEPA 17 and SEQRA and everything else, what action would that 18 prompt on the part of the Town to issue a building permit? 19 What is it that they are asking from you is what I don't 20 understand. 21 THE WITNESS: I think from my standpoint what we 22 were looking for was something, is this rail related or is 23 it not? And we needed a document from the Surface 24 Transportation Board to definitively state the Town, you 25 don't have any jurisdiction or you do have jurisdiction. <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>

Miner-Direct/Calica 138 1 THE COURT: Assume you do. Assume it is a 2 casino, and it is -- so what? 3 THE WITNESS: There would be a site plan, it 4 would be according to SEQRA, and building permits would be 5 issued. 6 THE COURT: By whom? 7 THE WITNESS: The Town of Brookhaven building 8 department, fire prevention, our planning department, we 9 would all be involved in both the environmental review and 10 the review of structures. 11 THE COURT: So your understanding in the 12 ordinary course of business before one could be engaged in 13 this sort of construction project, if it was something 14 that fell within the county's authority, there were 15 certain permits and approvals you needed to obtain? 16 THE WITNESS: You had to have the right zoning, 17 and a site plan approved, whatever railings you need, 18 building permits, fire prevention. I don't think highway 19 because it is on the county and state road. But any 20 permits required whether you are building a house or 21 commercial building. 22 THE COURT: Going back to parcel A for a moment 23 since you were around when this was happening, were there 24 any approvals or variances or permits issued by the Town 25 in connection with that track? <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>	Miner-Cross/Aronoff 140 1 THE COURT: Right. 2 MR. ARONOFF: And what we hear today is relating 3 to parcel C and B only. 4 I don't think the stipulation has any relevance 5 in this preliminary injunction issue and I object on that 6 basis. 7 THE COURT: I will take it for what it is worth. 8 (Whereupon, Plaintiff's Exhibit 9 was received 9 in evidence.) 10 MR. CALICA: I did respond to your Honor's 11 question -- 12 THE COURT: Yes. 13 Q Was it only a matter of, say, about ten days after 14 the Town received the second environmental overview at the 15 end of February 2014 from BRT that this litigation was 16 filed by the Town against BRT? 17 A Yes, give or take. 18 MR. CALICA: Nothing further. 19 THE COURT: Your witness. 20 21 CROSS-EXAMINATION 22 BY MR. ARONOFF: 23 Q Good afternoon, Mr. Miner 24 A Good afternoon. 25 Q You told us you have two titles. You are the <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>
Miner-Direct/Calica 139 1 THE WITNESS: The way I understand it, the 2 stipulation agreement that the STP helped to facilitate, 3 the Town could do inspections for health and safety, 4 including building inspections. But that BRT was not 5 required for that parcel to specifically get permits. But 6 we didn't have any documentation from Washington from the 7 STP saying that that held through for another parcel, and 8 thus the questioning. 9 THE COURT: Got it. 10 MR. CALICA: I would respectfully move in 11 evidence Exhibit 9, which is the so-ordered stipulation in 12 the prior action which set forth what was the approved 13 reference site plan and activity on the 28 acre parcel, 14 and a copy of the STP's order decided December 7, 2010, 15 which is Exhibit 10, and does spell out how both the Town 16 and in a stipulation so ordered by this Court, and the STP 17 addressed the oversight of construction on the 28 acre 18 parcel. 19 THE COURT: Leaving aside counsel's 20 characterization of the documentation, any objection to 21 the document? 22 MR. ARONOFF: My objection is on relevance 23 grounds, your Honor. 24 The first thing this witness testified to is the 25 fact that the stipulation only had to do with parcel A. <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>	Miner-Cross/Aronoff 141 1 Commissioner of Waste Management and the Chief of 2 Operations for the Town? 3 A Yes. 4 Q And you are not an engineer, sir, are you? 5 A I have an engineering degree, but I'm not a licensed 6 engineer, no. 7 Q Do you have any training or experience in rail 8 engineering? 9 A No, sir. 10 Q You don't have any experience in geology? 11 A Geology, no. 12 Q Hydrology? 13 A Limited as my role as the Waste Management 14 Commissioner and the ground water mediation at the Port 15 Washington landfill. 16 Q Beyond that you have no hydrology training? 17 A No. 18 Q And you testified that you have been familiar with 19 the BRT project, the terminal, going back to the year 20 2010? 21 A Yes. 22 Q Do you recall in your declaration you submitted in 23 this case, you described yourself as the Town's principal 24 liaison with PRS? 25 A The. <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>

Miner-Cross/Aronoff 142 1 Q And that was since 2010 you had that role? 2 A It was more so in the early years. Certainly in 2010 3 when everything was being negotiated. 4 Q Well, let's take a look at your declaration, which is 5 Exhibit K. 6 A What page? 7 Q The first page. 8 This is the declaration you submitted; is that 9 correct? 10 A Yes. 11 Q And I'm referring to the first paragraph, the last 12 sentence of the first paragraph, you wrote: In addition, 13 since at least the year 2010 I have been the Town's 14 principal liaison with the ever-changing group of 15 individuals and entities which have represented themselves 16 to the Town to be the owners or operators of the 17 Brookhaven Rail Terminal. 18 You see that? 19 A Yes. 20 Q Since 2010 you have been the principal liaison with 21 BRT? 22 A Yes. 23 Q You took that role seriously? 24 A I tried to. 25 Q You made yourself available to BRT's representatives HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER	Miner-Cross/Aronoff 144 1 A It had numerous concept plans. One of which included 2 salt storage, yes. 3 Q You understood in 2012 that BRT was considering salt 4 storage as an activity? 5 A One of their plans, yes, had that. 6 Q And propane off-loading and storage, that was 7 something you were made aware of in 2012 as a possibility? 8 A Yes. 9 Q And refrigerated and dry storage warehousing, you 10 knew that in 2012? 11 A As a concept plan, yes. 12 Q Automobile trains loading and storage? 13 A As a concept plan, yes. 14 Q And take a look at Exhibit U. 15 MR. ARONOFF: I would like to move to put his 16 declaration in, Exhibit K. 17 THE COURT: Any objection? 18 MR. CALICA: No, your Honor. 19 THE COURT: K is admitted. 20 (Whereupon, Defendant's Exhibit K was received 21 in evidence.) 22 Q Do you have Exhibit U in front of you, Mr. Miner? 23 A Yes. 24 Q And it is an email chain, the top email is dated 25 March 29th, 2012? HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER
Miner-Cross/Aronoff 143 1 over the years? 2 A Yes. 3 Q You made sure to provide them with any information 4 they requested of you? 5 A Did my best. 6 Q You made sure to let BRT know if there was any 7 information the Town needed from BRT? 8 A Yes. 9 Q And the firm opened for business in – the terminal 10 opened for business in 2011, you recall that, or 11 thereabouts? 12 A Yes. 13 Q And as far as you know it has been successful? 14 A As far as I know, yes. 15 Q It was so successful that you learned at some point 16 that BRT was interested in expanding? 17 MR. CALICA: Objection to form. 18 THE COURT: You may answer. 19 A That is my understanding. 20 Q And the expansion was to occur on the adjacent 21 parcels of property referred to as B and C? 22 A Yes. 23 Q And you understood as early as 2012 that some of the 24 activities that BRT was contemplating undertaking on 25 parcels B and C included salt storage; is that right, sir? HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER	Miner-Cross/Aronoff 145 1 A Yes, sir. 2 Q And the subject line on the emails, all of the 3 emails, is Brookhaven Rail Terminal Phase 2 Uses. 4 Do you see that? 5 A Yes. 6 Q And the bottom email, the first email in the chain, 7 that is an email that Andy Kaufman sent to Jim Pratt and 8 Jake Watral; is that right? 9 A Yes. 10 Q And then the next email up, it was forwarded to you 11 by Mr. Pratt? 12 A Yes. 13 Q And Mr. Pratt writes: Matt, that is you, attached is 14 a preliminary list of activity for the BRT expansion. 15 Do you see that? 16 A Yes. 17 Q And if you turn to the next page, there was an 18 attachment included with Mr. Pratt's email. Do you see 19 that? 20 A Yes, sir. 21 Q And the title of that document is: Brookhaven Rail 22 Terminal, railroad related activities, expansion property. 23 It states: The rail related activities 24 contemplated on the expansion property include, but are 25 not limited to, the following, and it lists nine items; is HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER

Miner-Cross/Aronoff 146 1 that right? 2 A Yes, sir. 3 Q And one of those items is road salt offloading and 4 storage, number three? 5 A Yes. 6 Q And you reviewed this list when you got it? 7 A Yes. 8 Q Right? 9 A Yes. 10 Q When you wrote back in that email earlier, you wrote 11 back to Mr. Pratt on March 29th, acknowledging that you 12 had some documentation from him; is that right? 13 A And I asked for more details, yes. 14 Q Right. 15 First you acknowledged you had documentation 16 from him; is that? 17 A Yes. 18 Q And in the first full paragraph you wrote: Before 19 the Town can make a determination, additional 20 documentation/details are necessary. Specifically, the 21 Town requests that BRT provide a more detailed phase 2 22 concept plan. 23 That is what you wrote, right? 24 A Yes. 25 MR. ARONOFF: I would move the admission of <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>	Miner-Cross/Aronoff 148 1 pages you are offering? 2 MR. ARONOFF: Yes. 3 MR. CALICA: No objection. 4 (Whereupon, Defendant's Exhibit V was received 5 in evidence.) 6 Q Mr. Pratt writes, Matt, attached is a concept plan of 7 what we have envisioned as of this date. 8 Then he states: Please keep in mind that this 9 is truly conceptual, as we have probably a year or more 10 prep time to get to the actual building construction 11 portion. This time will be used for site preparation. 12 Do you see that? 13 A Yes. 14 Q And if you look at the attachment, that is the 15 concept plan you requested in your March 29th email; is 16 that right? 17 A Yes. 18 Q What is the shape of the track depicted on B and C in 19 that concept plan? 20 A Three-quarter of a circle. 21 Q It is an O track, isn't it right, sir? 22 A It is not a complete O. 23 Q Mostly O? 24 A Three-quarters. 25 Q Okay. <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>
Miner-Cross/Aronoff 147 1 Exhibit U. 2 THE COURT: No objection? 3 MR. CALICA: No objection. 4 THE COURT: Admitted. 5 (Whereupon, Defendant's Exhibit U was received 6 in evidence.) 7 Q I would like to refer you to Exhibit V. 8 (Handed to the witness.) 9 Q Did you recognize what we have marked as Exhibit V, 10 Mr. Miner? 11 A Yes. 12 Q It is an April 6, 2012 email from Mr. Pratt to you. 13 Is that right, sir? 14 A Yes. 15 Q With an attachment? 16 A Yes, sir. 17 Q And you recall receiving this, don't you? 18 A Yes. 19 MR. ARONOFF: I will move the admission of 20 Exhibit V. 21 THE COURT: Any objection? 22 MR. CALICA: Let me read it. 23 (Whereupon, at this time there was a pause in 24 the proceedings.) 25 THE COURT: It is very clear -- to be clear, two <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>	Miner-Cross/Aronoff 149 1 The site plan also indicates building 2 structures; is that correct? 3 A Yes. 4 Q There are five of them -- six of them? 5 A Six with the ancillary -- 6 Q Yes. 7 You understood they were proposed structures 8 that BRT might ultimately build on its expanded parcel; is 9 that right? 10 A It was a concept plan that kept evolving. 11 Q But you understood when you saw this, these were 12 structures that BRT was considering putting in at some 13 point? 14 A One of the plans among consideration. 15 Q This was among those plans? 16 A One of the plans. 17 Q You see the bottom structure there it says covered 18 salt structure building? 19 A Yes. 20 Q And you understood, sir, based on your engineering 21 experience, your landfill experience, certainly you knew 22 that the extent that those structures were ever going to 23 be built, they would have to be built on level surfaces, 24 right? 25 A Yes. <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>

Miner-Cross/Aronoff 150 1 Q Meaning to the extent the ground was not already 2 level, that level -- it would have to be brought to level 3 in order to put structures on generally; is that correct? 4 A Generally. Not excavation -- 5 Q You understood the ground would have to be leveled at 6 some point if those structures were to be put on the 7 property, right? 8 A Yes. But there was no grading plan here. 9 (Handed to the witness.) 10 Q You recognize Exhibit W? 11 A Between myself and Mr. Pratt, an email. 12 Q And on the bottom is the exhibit we looked at as 13 Exhibit V? In other words, the exchange contains your 14 remarks; is that right, sir? 15 A The bottom -- the top of the second page, you're 16 talking about? 17 Q Yes. 18 A Yes, the bottom is from Mr. Pratt, yes. 19 THE COURT: W is admitted. 20 (Whereupon, Defendant's Exhibit W was received 21 in evidence.) 22 Q So you responded to Mr. Pratt's email, Exhibit V we 23 just looked at, you responded on April 19th, you see that, 24 two weeks after? 25 A Yes. HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER	Miner-Cross/Aronoff 152 1 you received it; do you see that? 2 A Yes. 3 Q It is not the first time you asked for a full sized 4 copy to be dropped off, it happened from time to time? 5 A Yes. I'm sure. It is easier to review a full set 6 than a smaller email. 7 Q So you asked for a full sized copy and you asked PRT 8 to provide it and they did so? 9 A Yes. 10 THE COURT: Let me see counsel at the sidebar 11 for a moment here. 12 13 (Whereupon, at this time the following took 14 place at the sidebar.) 15 THE COURT: I am patiently listening to a 16 tremendous amount of testimony versus the J and the O 17 track argument. 18 In light of Exhibit V, is there any question in 19 anyone's mind that the Town was made aware of the O track 20 in adjacent buildings in 2012? Is there any question 21 here? 22 MR. CALICA: Yes. 23 Because they said it is an extremely concept 24 plan. 25 THE COURT: You are kidding me. You are kidding HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER
Miner-Cross/Aronoff 151 1 Q You wrote, Jim, I apologize for the delay in getting 2 back to you. I had reviewed the plan and at first glance 3 it appears to have -- to address most if not all of my 4 initial concerns. 5 Do you see that? 6 A Yes. 7 Q That is what you wrote? 8 A Yes. 9 Q And then you wrote, may I forward it to engineering, 10 parenthesis, Greg. 11 You are referring to Mr. Kelsey? 12 A Yes. 13 Q And Mr. Pratt wrote back, absolutely. We are anxious 14 to get started over there. 15 You see that? 16 A Yes. 17 Q And Mr. Pratt gave you permission to forward it to 18 the Town engineer? 19 A The assistant engineer, yes. 20 Q And you did so, I assume? 21 A I believe so. 22 Q And then you wrote back and asked, if you had a full 23 sized paper copy or two that would be helpful; thanks. 24 And Mr. Pratt confirmed that he would drop off a 25 full sized paper copy with the secretary and you confirmed HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER	Miner-Cross/Aronoff 153 1 me. 2 After I heard so much argument, it is a J, they 3 didn't say anything about the O? We had testimony this 4 morning about the limited area, 75 feet. It is the entire 5 box. 6 MR. CALICA: June 29th, three months after this 7 they filed the J track plan. You will see the sequence. 8 THE COURT: In my mind at this point the issues 9 have been sharply reduced to the grading issue. 10 I don't know what the evidence is on that. I 11 haven't heard any of it yet. When did the Town know there 12 was a 100 or 50 foot hole in the ground. That is a 13 significant issue. 14 There are lots of issues here, including that 15 there is one e-mail saying this time will be used for site 16 preparation. I'm not sure it means we will knock down the 17 forest. 18 MR. ARONOFF: They could have asked for that. 19 THE COURT: It may be an assumption of risk, 20 counsel. 21 Sure, if someone -- 22 MR. ARONOFF: I understand. 23 THE COURT: Hold on. 24 And it is regulated by the Town and it may be 25 completely on them, as they say. That I don't know. HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER

Miner-Cross/Aronoff 154 1 But I'm astonished by seeing this document. 2 So can we get to the grading part now? 3 MR. CALICA: We can. But I will remind your 4 Honor that it was three months later when he asked for the 5 detailed plan, they filed the J plan and they said they 6 would do limited grading. 7 THE COURT: It is a procedural plan for a casino 8 that exists other than in someone's mind. So there was 9 lots of concepts. But it looks like some of those 10 concepts involved clearing the entire parcel. 11 MR. CALICA: The Systra plan included -- 12 THE COURT: Some of the plans like I'm holding 13 in my hand included the clearing of the entire parcel. 14 You understand that? 15 MR. CALICA: Yes. 16 THE COURT: Try now to speed up the things. 17 MR. ARONOFF: Yes, I understand. And I think 18 I'm coming up to that anyway. 19 THE COURT: Excellent. 20 21 (Whereupon, at this time the following takes 22 place in open court.) 23 Q I would like to show you what is marked as CC. 24 (Handed to the witness.) 25 Q You recognize this document, Mr. Miner? <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>	Miner-Cross/Aronoff 156 1 Q And there are three subjects listed. The first one 2 is scheduling. Do you see that? 3 A Yes. 4 Q And under scheduling, letter A, it says in order to 5 meet the development goals established, clearing and 6 grubbing of the southern portion of parcels B and C should 7 begin no later than June 1, 2012. 8 Do you see that, sir? 9 A Yes. 10 Q And then it says in the length item, B, grading on 11 the southern 150 foot, and some parenthetical, should 12 begin approximately two weeks after grubbing and clearing 13 operations have been initiated. 14 Do you see that? 15 A Yes. 16 Q Under C, it says that work should proceed from the 17 west to the east and then around a 400 radius from to the 18 north ending approximately 100 south of the northern 19 property line. You see that? 20 A Yes. 21 Q And that was provided to you -- 22 A Yes, I don't know if it was approved at that point, 23 but that is typical. 24 Q And the next category, number two, is grading, you 25 see that? <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>
Miner-Cross/Aronoff 155 1 A Yes. 2 Q Okay. 3 It contains an email string between you and 4 Mr. Pratt? 5 A Yes. 6 Q And an attachment? 7 A Yes. 8 MR. ARONOFF: I move for its admission. 9 MR. CALICA: Can I have a moment? 10 THE COURT: Take your time. 11 (Whereupon, at this time there was a pause in 12 the proceedings.) 13 MR. CALICA: No objection, John. 14 THE COURT: It is admitted. 15 (Whereupon, Defendant's Exhibit CC was received 16 in evidence.) 17 Q The subject line of the E-mail is Track Installation, 18 the top email is from Pratt to you. And it says, Matt, 19 does this analysis of the schedule suffice. You see that? 20 A Yes. 21 Q You see the attachment dated April 16th, 2012? 22 A Yes. 23 Q The document is entitled Track Installation, 24 Brookhaven Rail Terminal, phase 2; is that right? 25 A Yes. <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>	Miner-Cross/Aronoff 157 1 A Yes. 2 Q It says beginning at station two, establish sub grade 3 elevation of 89. Do you see that? 4 A Yes. 5 Q And you understood what that meant, right? 6 A Yes. 7 THE COURT: Let me stop you there because I 8 don't understand what it means. 9 What does it mean? 10 THE WITNESS: The elevation at that station, at 11 that point on the plan, would be an elevation of 89. 12 THE COURT: Is that 89 feet above sea level? 13 THE WITNESS: Yes. 14 Q You understood that station 2 was about where the 15 track from parcel A connected to the expansion track on 16 parcel B and C. 17 Do you see that? 18 A Yes. 19 Q The elevation there was approximately 89, right? You 20 knew that? 21 A Roughly. 22 Q And it says in parenthetical, TOR, 92, and that is 23 top of rail, right, sir? 24 A I believe that is correct. 25 Q And that indicated to you the top of rail elevation <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>

Miner-Cross/Aronoff 158 1 at the connect point would be 92 feet above sea level? 2 A Yes. 3 Q And it says proceeding east to station 17 at grade 4 minus 1.25 percent. 5 Is that right, sir? 6 A Yes. 7 Q And you understood that the expansion track was going 8 to connect to parcel A at elevation 89, and then proceed 9 down a grade, a slope, of 1.25 percent; is that right? 10 A For this limited area, yes. 11 Q For this phase of the construction? That is what 12 they were telling you they were going to do? 13 A Uh-huh. 14 Q Is that right, sir? 15 A Yes. 16 Q And item D under grading, it says continue around a 17 400 foot radius curve to the north at grade minus 1.25 18 percent. 19 It is telling you the grade was going to 20 continue to slope down around the curve; is that right? 21 A Yes. 22 THE COURT: And let me ask you a question here. 23 Is it fair to say a descending scale of 1.25 24 percent, it is fair to say you were going down a a foot 25 and a quarter? HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER	Miner-Cross/Aronoff 160 1 A Yes. 2 Q I will ask you to take a look at what is marked as 3 BB. 4 (Handed to the witness.) 5 Q You have it in front of you? 6 A Yes. 7 Q You recognize this document, Mr. Miner? 8 A Yes, sir. 9 Q And the email is between you and Mr. Pratt, dated 10 June 21, 2012? 11 A Yes. 12 MR. ARONOFF: I move for it to be admitted. 13 MR. CALICA: No objection. 14 THE COURT: Admitted. 15 (Whereupon, Defendant's Exhibit BB was received 16 in evidence.) 17 Q This is in response to Mr. Pratt's production 18 schedule? 19 A In the center of the document, yes. 20 Q In the center paragraph is your response, and you 21 wrote: You should have a cover letter on either your or 22 your engineer's letterhead and a drawing with the proposed 23 areas appropriately marked shaded. 24 You see that? 25 A Yes. HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER
Miner-Cross/Aronoff 159 1 THE WITNESS: Yes. 2 Q Item two -- item C under grading, continue to station 3 41 plus 81 at grade minus 1.25 percent; is that right. 4 A Yes. 5 Q Item D, at station 31 plus 70, parenthetical, sub 6 grade elevation 53, proceed down at grade minus 1.25 to 7 the southern property line. 8 And you understood, sir, that sub grade 9 elevation 53 meant 53 feet above sea level? 10 A Yes. 11 Essentially the tracks was following the 12 existing contours along the southern and eastern line -- 13 property lines. 14 Q And the grading was going to be done to establish 15 that, those levels indicated in this document; is that 16 right? That is what it said? 17 A But only for 150 feet. 18 Q And then under truck access, item three, item A under 19 three says, clear, grub and grade a 50 foot access road 20 aligned with the northern easement from LIPA, L-I-P-A, in 21 a southeasterly direction. You saw that as well, sir? 22 A Yes. 23 Q And Mr. Pratt, if you recall in his email, asked you 24 if you confirm if that schedule is what you needed; is 25 that correct? HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER	Miner-Cross/Aronoff 161 1 Q And Mr. Pratt responded, okay, we are on it? 2 THE COURT: Isn't there a sentence he wrote 3 before, you should have a cover letter? What is that 4 buffer? 5 Q You asked a question about the buffer? 6 A Yes, sir. 7 THE COURT: And it also says: You should -- it 8 should probably state that you propose to clear and 9 regrade only 75 feet from the center line of the proposed 10 track. 11 MR. ARONOFF: Yes. 12 THE WITNESS: That's correct. 13 Q You didn't ask Mr. Pratt in your email what 14 procedures they would be using to excavate sand? 15 A No, sir. 16 Q You didn't ask him any questions about the depth of 17 the grade that they were contemplating? 18 A No. Because the track was consistent, or relatively 19 consistent with the concourse, the existing concourse 20 along the south and the east. 21 Q You understood they were going to do grading? 22 A Very limited. 23 In fact, I asked for grading of only 75 foot on 24 the center line. 25 Q Right. But you didn't raise any question about the HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER

Miner-Cross/Aronoff 162 1 depth of the grading is my question? 2 A No, because the grade was relatively consistent with 3 the existing track. 4 Q Now, we saw Mr. Pratt's response to your request for 5 the cover letter from the engineering, right? And that is 6 Exhibit A to your declaration that we looked at earlier. 7 Your declaration is Exhibit K, if you want to find it. 8 A I have it, Exhibit A. 9 THE COURT: Exhibit K through A, we will call 10 sub-Exhibit K, and it looks like a picture. 11 MR. CALICA: It is actually the Systra track 12 plan in evidence as Exhibit 1. 13 THE COURT: Is that the response to the cover 14 letter? 15 MR. ARONOFF: I want him to refer to what he 16 submitted along with his declaration, the same document. 17 Q Do you have it in front of you, Mr. Miner? 18 A Exhibit A and K, yes. 19 Q And the first page of that is an email from 20 Mr. Kaufman? 21 A Yes. 22 Q You write -- he wrote, Matt, Jim asked that I forward 23 the attached? 24 A Yes. 25 Q And the first attached -- the first page of the <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>	Miner-Cross/Aronoff 164 1 A I believe it was referenced in a document previous. 2 Q Okay. 3 So you knew exactly what the elevation was that 4 it would end up at? 5 A You are talking about the northern end of the 6 property, the northeast corner? 7 Yes, I was -- it was generally following the 8 existing contour. 9 Q You could evaluate the connection between the top 10 corner of parcel B and the end of that phase of the 11 construction on the northeast corner of parcel C, the 12 elevation; is that right, sir? 13 A Yes. 14 Q And take a look at your declaration, paragraph four, 15 referring to 4-A specifically. You are with me? 16 A Yes. 17 Q And you are referring in 4-A to the Exhibit A to your 18 declaration, which is, as just discussed, included 19 Mr. Kaufman's email, and included the Systra letter, and 20 included what we refer to today as the J track, but you 21 refer to it in your declaration as an L track, but that is 22 the exhibit we are talking about? 23 A Yes. 24 Q And you state in your declaration at the end of it 25 where they add, the J track or L track picture that <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>
Miner-Cross/Aronoff 163 1 attachment is the letter from Systra we looked at earlier? 2 A Yes. 3 Q And that is the engineer's letter requested? 4 A Yes. 5 Q And if you look at the letter in the middle of that 6 paragraph, it talks about the scope of the track. It says 7 the track would be on a descending 1.25 percent grade from 8 west to east? 9 A Yes. 10 Q As we talked about earlier on direct, the last 11 sentence of that paragraph reads, the total length of the 12 track is approximately 600 feet. 13 Do you see that? 14 A Yes. 15 Q And you understood that the connection point to 16 parcel B from parcel A would be an elevation of 17 approximately 89; is that right? 18 A Approximately, yes. 19 Q And you understood that the track would extend 5,600 20 feet from there? 21 A Yes. 22 Q At a grade of 1.25 percent? 23 A Yes. 24 Q Did you do any calculations to determine what the 25 final elevation would end up at along that slope? <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>	Miner-Cross/Aronoff 165 1 Mr. Kaufman provided to you showed no apparent elevations 2 of the proposed additional trackage at all. 3 You see that? 4 A Yes. 5 Q And that is not accurate, is it, sir? 6 A I don't believe the drawing showed elevations. At 7 least it wasn't legible, the elevations. 8 Q Are you saying now that the elevations were there but 9 they weren't legible to you? 10 A I think it was the letter that referenced the 11 elevation, if I recall correctly. 12 Q I'm asking a different question, sir. 13 A I'm sorry. 14 Q Exhibit A to your declaration, the last page of that 15 exhibit is what we were referring interchangeably to the J 16 and L track; is that right? 17 A Yes. 18 Q It was a picture provided to you by Mr. Kaufman? 19 A Yes. 20 Q With a cover letter from Systra; is that right? 21 A Yes. 22 Q And you state in your declaration that that document 23 shows no apparent elevations of the proposed trackage at 24 all. 25 And I'm asking you if that is accurate. <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>

Miner-Cross/Aronoff 166 1 A I can't read this copy. 2 Q This is the copy you submitted in connection with 3 your declaration, Mr. Miner? 4 A I believe there was a clearer copy when I made that 5 declaration. 6 Q And do you recall that the clearer copy did have 7 track elevations on it? 8 A I don't recall. 9 Q Do you recall that it didn't? 10 A I don't believe it did. But I don't recall. 11 MR. ARONOFF: We have an enhanced copy I would 12 like to bring into evidence. 13 THE COURT: When this was provided to you, was 14 it this size? 15 THE WITNESS: If I recall correctly, it was an 16 electronic copy, a PDF, which you can enlarge. I don't 17 recall the letter or the drawing. 18 (Counsel confer.) 19 MR. ARONOFF: Judge, this is Exhibit XX that I 20 had blown up for the Court. 21 THE COURT: Is there a suggestion that it is 22 comparable to Exhibit K or A? 23 MR. ARONOFF: I would like to explore that for 24 the witness. 25 MR. CALICA: Can we have an offer of proof? HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER	Miner-Cross/Aronoff 168 1 took -- this is expanded. And that is all it is supposed 2 to depict, what it is. 3 And this here expanded that. The arrow just 4 reflects where it came from. 5 This is this expanded. 6 THE COURT: Yes. 7 MR. ARONOFF: The same thing. 8 Here the same thing. 9 The witness testified he received it in 10 electronic format. He could have printed it out larger or 11 zoomed in. And this is exactly what we have done. I have 12 three more of these, Judge. 13 THE COURT: You can ask him about this. 14 MR. ARONOFF: If he wants to say I couldn't read 15 it myself, and I didn't do anything about it for two 16 years, that is the Town's testimony. 17 THE COURT: I don't think he examined it in that 18 level of detail. 19 MR. ARONOFF: That is fair. 20 All I want to establish for the record is that 21 there were track elevations on here. 22 THE COURT: I note you have it expanded to 23 approximately three by four foot size. And in that size I 24 can read the elevations. 25 MR. ARONOFF: Correct. HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER
Miner-Cross/Aronoff 167 1 (Counsel confer.) 2 MR. ARONOFF: Let me explain. 3 We took Exhibit A to Mr. Miner's declaration. 4 We took that document attached to it, the so-called J 5 track, and we just blew up portions of that document that 6 clearly reflect the track elevation levels, which 7 Mr. Miner just testified -- 8 THE COURT: Bring that to the sidebar. 9 MR. CALICA: May I join counsel? 10 THE COURT: Of course. 11 12 (Whereupon, at this time the following took 13 place at the sidebar.) 14 THE COURT: The reason I asked for the sidebar 15 so we are out of the witness' hearing. 16 I would note that the size of this document as 17 presented in the declaration, which I have seen before, if 18 these are elevation numbers, Superman could not read them 19 if they are this size. 20 MR. ARONOFF: Yes. 21 THE COURT: What you are about to show him, I 22 note that there are bright white arrows scattered through 23 the document. And they are not appearing on this one. 24 MR. ARONOFF: Yes. 25 We created this document from that. We just HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER	Miner-Cross/Aronoff 169 1 This is standard for engineering. And this is 2 the site plan. If you recall the earlier e-mail, where he 3 said can you please drop off a full size. And he said 4 they did it frequently. And this is the size they would 5 have provided it to. 6 THE COURT: You can ask. 7 MR. CALICA: They not only blew it up to three 8 by five, so they blew up this as well. 9 MR. ARONOFF: You can read it without it. 10 MR. CALICA: I would like to indicate the 11 blowups, you start with a three by five blowup, and the 12 areas they try to show, it looks like they are blown up 13 again another five times. 14 THE COURT: Okay. 15 You can ask him and we will see what happens. 16 MR. ARONOFF: It is admitted then, Judge? 17 THE COURT: No. 18 19 (Whereupon, at this time the following takes 20 place in open court.) 21 THE COURT: What is the marks for 22 identification? 23 MR. ARONOFF: XX. 24 THE COURT: SS? 25 MR. ARONOFF: Two X's. HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER

Miner-Cross/Aronoff 170 1 Q I'm showing you what is marked as Exhibit XX, 2 Mr. Miner. 3 What I would like to do is ask you to take a 4 look at it and compare it to the last page of Exhibit A of 5 the declaration. 6 Other than the red box and white arrows, does it 7 appear to be the same photograph as in the last page of 8 Exhibit A to your declaration? 9 A The box depicted the blowup of the recharge basin, I 10 do not believe was in this exhibit. 11 Q Other than the blowups, the boxes with the blown up 12 portions, and the arrows pointing to those boxes, does it 13 appear to be the same photograph? 14 A It appears to be. I can't definitively tell you, but 15 it appears to be. 16 Q Okay. 17 What I would like to refer you to. 18 If you look to the blowup box to the east, do 19 you see that? 20 A Yes. 21 Q You do need to look at the box, sir. You can see the 22 arrow from where it is coming, right? 23 A Yes. 24 Q And you can get out of the witness stand if it helps, 25 but what I would like you to do is to go over to the <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>	Miner-Cross/Aronoff 172 1 Q You understood that you could have printed out the 2 electronic copy to whatever sizes you wanted? 3 A If there was a PDF, I believe so, yes. 4 Q You could have given it to Mr. Kelsey, the Town 5 engineer, to do the same? 6 A Yes. 7 MR. ARONOFF: I will move the admission of XX, 8 Judge. 9 MR. CALICA: Objection, your Honor, it is a 10 demonstrative exhibit. It doesn't demonstrate what the 11 witness saw or looked at. 12 THE COURT: If it was a jury trial I would admit 13 it for a limited purpose for being an aid to the jury. 14 But it is not really evidence in the sense. 15 So I will take it for what it is worth. 16 Marked as XX as a demonstrative, in evidence, 17 loosely stated. 18 (Whereupon, Defendant's Exhibit XX was received 19 in evidence.) 20 Q I want to refer you to Exhibit EE. 21 (Handed to the witness.) 22 Q Do you recognize this document? 23 A Yes, sir. 24 Q And it contains your response to Mr. Kaufman's email 25 that we just saw? <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>
Miner-Cross/Aronoff 171 1 yellow section to the east and tell me what it says about 2 the elevation level there. 3 It says E-L equals something. Do you see that? 4 A Yes. 5 TOR EL, 91.98. 6 Q Can you point to where you are reading from? 7 A Elevation 56.49. 8 Q That is referring to the track on the eastside of 9 parcel C? 10 A Yes. 11 THE COURT: So the record is clear, what you are 12 looking at right now, XX for identification, is a large 13 scale printout of a document provided to you that we 14 talked about earlier; is that correct? 15 THE WITNESS: Yes. 16 THE COURT: Did you ever blow it up to this 17 size? 18 THE WITNESS: I can't say that I did, no. 19 THE COURT: All right. 20 Let's proceed. 21 Q Mr. Miner, can you sitting here today definitively 22 testify that you did not receive this document from BRT in 23 this size? 24 A I believe I would have received an electronic copy, 25 to the best of my recollection. <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>	Miner-Cross/Aronoff 173 1 A Yes. 2 MR. ARONOFF: I would move for the admission of 3 Exhibit EE. 4 THE COURT: Hang on. I'm still catching up. 5 MR. ARONOFF: Sorry. 6 (Whereupon, at this time there was a pause in 7 the proceedings.) 8 MR. CALICA: No objection. 9 THE COURT: I will allow it in. It is admitted. 10 (Whereupon, Defendant's Exhibit EE was received 11 in evidence.) 12 Q So you responded to Mr. Kaufman and Mr. Pratt. 13 Jim and Andy. 14 Generally this looks good. Before I speak with 15 the Town Attorney, I have a couple of questions. 16 You ask two questions about the offer. Do you 17 see that? 18 A Yes. 19 Q And you ask for a storm water management plan 20 provided? 21 A Yes. 22 Q You didn't ask any question about the track elevation 23 levels on what they provided to you? 24 A No. 25 Q And you didn't ask any questions about the amount of <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>

Miner-Cross/Aronoff 174 1 sand they intended to remove? 2 A No. 3 Q I want to show you what is marked as Exhibit GG. 4 (Handed to the witness.) 5 Q Do you recognize this, Mr. Miner? 6 A Yes. 7 Q It is a June 29th, 2012 email from you to Mr. Pratt. 8 A Yes. 9 Q Attaching a draft letter? 10 A Yes. 11 MR. ARONOFF: I move for the admission of this 12 document in evidence. 13 MR. CALICA: No objection. 14 THE COURT: In evidence. 15 (Whereupon, Defendant's Exhibit GG was received 16 in evidence.) 17 Q You wrote to Mr. Pratt: Jim, once we have a 18 finalized letter that addresses SWPP, and you have it in 19 parenthetical, storm-water management plan, the Town is 20 prepared to issue the following. 21 Do you see that, sir? 22 A Yes, sir. 23 Q And the following refers to the following email, the 24 draft letter that you included with your email; is that 25 right? <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>	Miner-Cross/Aronoff 176 1 Q And that was a true statement as far as you knew as 2 well? 3 MR. CALICA: Objection to form. 4 THE COURT: Sustained. 5 Q You were advised by the Town Attorney, Mr. Quinlan; 6 is that correct, sir? 7 A Yes. 8 Q And the reason you were asking BRT for a SWPP plan 9 prior to issuing your letter is because you wanted to make 10 sure that BRT was taking appropriate measures to protect 11 against water contamination; is that right, sir? 12 A Erosion control and water. 13 Q And BRT responded by providing you with a SWPP plan, 14 right? 15 A I believe they did. 16 Q Let's take a look at it. It is Exhibit FF. 17 (Handed to the witness.) 18 Q Have you had a chance to review Exhibit FF? 19 A Yes. 20 Q And do you recall receiving this letter from 21 Mr. Pratt, don't you, sir? 22 A Yes. 23 Q And the attachment to it, right? 24 A Yes. 25 MR. ARONOFF: I move the admission of FF in <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>
Miner-Cross/Aronoff 175 1 A Yes. 2 Q And let's take a look at your draft letter dated 3 June 29th. 4 The second sentence: The Town understands 5 Brookhaven Rail Terminal's position that the phase 2 6 expansion is ancillary to the operation of the rail line 7 which was authorized by the Surface Transportation Board. 8 Do you see that? 9 A Yes. 10 Q That is what you wrote? 11 A Yes. 12 Q And you understood at the time that it was BRT's 13 position that the expansion was an exempt spur. Is that 14 what that refers to? 15 A We did ask in the next paragraph as to NEPA and the 16 federal law compliance. 17 Q But you understood it was an exempt spur at the time? 18 A The track -- 19 Q You continue, as long as the work relates to the 20 construction and operation of the rail line, it would 21 appear that Brookhaven's authority is limited as its Town 22 code and New York State law would be superseded by federal 23 law. 24 Do you see that? 25 A Yes. That is what I was advised. <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>	Miner-Cross/Aronoff 177 1 evidence. 2 MR. CALICA: No objection. 3 THE COURT: All right. 4 I need a magnifying glass for this. 5 (Whereupon, Defendant's Exhibit FF was received 6 in evidence.) 7 Q Mr. Pratt wrote to you on June 29th: 8 Please be advised as to our ongoing 9 conversations, we will commence the construction of 10 phase 2 expanse of the existing STB finance document, 11 number FD 35141, served on September 9th, 2010, 12 authorizing Brookhaven Rail Terminals facility. 13 Then you wrote, since the expansion is clearly 14 ancillary to the operation of the line of rail authorized 15 by the Board, the construction and operation qualifies 16 under 49 USC 10906 as excepted from the need for further 17 authorization. 18 Do you see that? 19 A Yes. 20 Q You understood it was BRT's position? 21 A Yes. 22 Q And you wrote, then construction in this phase will 23 begin with the clearing and grading of the track 24 right-of-way and installation of track, in accordance with 25 the proposed J track layout. You see that? <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>

Miner-Cross/Aronoff 178 1 A Yes. I understood it to be the 100 foot to 75 foot 2 buffer -- 3 Q You then conclude, we have also attached a SWPP 4 drawing for the track construction phase. You see that? 5 A Yes. 6 Q That was the SWPP plan you requested of him? 7 A Yes. 8 Q And that was the plan you requested in order to sign 9 the draft letter we looked at and send it to BRT; is that 10 right? 11 A Yes. 12 Q Let's take a look at II. 13 You recognize Exhibit II? 14 (Handed to the witness.) 15 A Yes, sir. 16 Q And it is an email from you to Mr. Pratt dated 17 July 3rd, 2012, with a letter attached to it? 18 A Yes, sir. 19 MR. ARONOFF: I move the admission of II into 20 evidence. 21 MR. CALICA: Just give me a moment. We have the 22 wrong document. 23 No objection, your Honor. 24 THE COURT: So admitted. 25 (Whereupon, Defendant's Exhibit II was received <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>	Miner-Cross/Aronoff 180 1 Q And you understood the BRT expected to be able to 2 rely on the July 3rd letter? 3 A Yes. 4 Q Mr. Quinlan, the County Attorney, blessed your letter 5 before it went out? 6 MR. CALICA: Objection. 7 THE COURT: Sustained -- objection sustained. 8 MR. ARONOFF: He said he got advice on it -- 9 THE COURT: Counsel, objection is sustained. 10 MR. ARONOFF: We can stop here. 11 THE COURT: We will take a five minute bathroom 12 break, and we will be back. 13 14 (Whereupon, a recess was taken.) 15 16 17 18 19 20 21 22 23 24 25 <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>
Miner-Cross/Aronoff 179 1 in evidence.) 2 Q You wrote in your email, Jim, please see the 3 attached. Should you have any questions, please feel free 4 to contact Greg or me. And that is Greg Kelsey? 5 A Yes. 6 Q And attached to that is a signed version of the draft 7 we looked at earlier, dated July 3, 2012? 8 A Yes. 9 Q And BRT never requested this letter from you; is that 10 right? 11 A I believe they did. But I'm not positive on that. 12 Q You believe they did, in return you requested from 13 BRT a SWPP plan. Right? You saw that earlier? 14 A Yes. 15 THE COURT: Counselor, is this a good time to 16 break? 17 MR. ARONOFF: Two minutes and I will wrap up 18 this line. 19 Q The SWPP plan was important to the Town, which is why 20 you requested it; is that right? 21 A Yes. 22 Q And you expected to be able to rely on BRT's 23 assurances to you that it will be complying with the SWPP 24 plan; is that right, sir? 25 A Yes. <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>	Miner-Cross/Aronoff 181 1 THE COURT: Are we almost done here? 2 MR. ARONOFF: I hope, so. 3 THE COURT: What does that mean? 4 MR. ARONOFF: I think 20 minutes, 30 tops. 5 THE COURT: Keep it to 20 minutes. 6 MR. ARONOFF: All right. 7 BY MR. ARONOFF: 8 Q Mr. Miner, you recall testimony earlier today about 9 the sediment removal project, you were asked that earlier 10 by your counsel? 11 A Yes. 12 Q And as part of that project in the Town commission, 13 it was contemplated to put a dredging pond on the BRT 14 site; is that right? 15 A One of the sites being looked at, yes. 16 MR. CALICA: I will show you what is marked as 17 Exhibit DDDD and also EEEE. 18 (Handed to the witness.) 19 Q Do you recognize these documents, Mr. Miner? 20 Let me ask you this: These are documents 21 associated with the sediment removal project we have been 22 talking about? 23 A Associated with the study of the sediment, not the 24 big document, but the study. 25 THE COURT: For the record, my binder seems to <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>

Miner-Cross/Aronoff 182 1 jump from quadruple D to quadruple F. 2 MR. ARONOFF: Sorry about that, your Honor. We 3 will get it to you right away. 4 THE COURT: It happens. 5 (Handed to the Court.) 6 THE COURT: I now have quadruple D and E. 7 Q The Town's permission confirmed Nelson NP&V to assist 8 with the project, you recall that, Mr. Miner? 9 A Yes. 10 Q And you participated in discussions with BRT about 11 the possibility of locating the dredging pond on BRT site. 12 Do you recall that? 13 A I joined that discussion very late in the process 14 when we had a couple of meetings at Town Hall reviewing 15 options with Nelson and Pope, yes. 16 Q If you look at Exhibit EEEE. 17 Is that in front of you, sir? 18 A Yes, sir. 19 Q And that depicts where on the BRT site the dredging 20 pond was to be located; is that accurate? 21 A I believe so, yes. 22 Q And it indicates it was a 20 acre area? 23 A Yes. 24 Q And Exhibit DDDD is a letter from NP&V, the firm, to 25 the Town; is that right, sir, on behalf of the Town? HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER	Miner-Cross/Aronoff 184 1 BRT plans to make 20 acres of land available. 2 This land is already approved to be cleared in connection 3 with proposed improvement at BRT. 4 Do you see that, sir? 5 A It is not accurate. 6 Q It is not accurate? 7 A It wasn't approved to be cleared. 8 Q Sir, this is on the letterhead of a consultant firm 9 hired by the Town, and you are saying that that statement 10 is not accurate? 11 A There is no approval -- 12 Q Did you tell NP&V there is no approval and to take it 13 out of their letter? 14 A At the meeting we had when I became involved in this 15 project, the dredging project, we had a meeting in Town 16 Hall where we told both a consultant and NP&V that a tree 17 clearing permit would be necessary, and they had to go 18 through SEQRA and/or NEPA in order to obtain a tree 19 clearing permit. And the BRT site was ruled almost 20 immediately out as a viable option. And we then looked 21 elsewhere. 22 Q Did you ever see an amended portion of this letter 23 that removed this sentence? 24 A I seen bid documents that don't have this location in 25 there. HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER
Miner-Cross/Aronoff 183 1 A Yes. It wasn't addressed to me. I don't know who it 2 went to. 3 MR. ARONOFF: I move for the admission of these 4 two documents, EEEE and DDDD. 5 THE COURT: Any objection? 6 MR. CALICA: Objection to DDDD. It is not a 7 person authorized to make speaking admissions. It is an 8 outside environmental consultant circulating a proposal. 9 THE COURT: Overruled. I will allow it. 10 (Whereupon, Defendant's Exhibits DDDD and EEEE 11 were received in evidence.) 12 Q I would like you to turn to page 6 of DDDD. 13 You understood that NP&V was provided with 14 information about the project by the Town; is that 15 correct? 16 A The Town's consultant was examining options for the 17 dredging. 18 Q Right, and the Town provided certain information to 19 NP&V in connection with that project? 20 A I assume that they did. 21 Q Okay. 22 So you have page 6 in front of you? 23 A Yes. 24 Q The second full paragraph, and I will read it into 25 the record. HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER	Miner-Cross/Aronoff 185 1 Q It is your testimony that the Town pulled the plug on 2 installing the pond as the site and not the other way 3 around? 4 A Yes. 5 Q Let's turn back to your declaration, Exhibit K. I 6 want to call your attention to paragraph 4(b) -- sorry, 7 4(d). 8 Are you with me? 9 A D or B? 10 Q D, as in dog. 11 You wrote: Some months later, and this was 12 after the Systra letter we were talking about earlier from 13 June, I was provided with yet a different proposed track 14 plan by the BRT defendants prepared by PW Grosser, 15 G-R-O-S-S-E-R, consulting engineers, dated December 2012. 16 Do you see that? 17 A Yes. 18 Q And you wrote, this one showing us the proposed June 19 track, J track configuration in a completely different 20 area than the prior L track. 21 Do you see that? 22 A Yes. 23 Q And you are referring to Exhibit B to your 24 declaration, if you can take a look at it. 25 THE COURT: B, as in boy? HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER

Miner-Cross/Aronoff 186 1 MR. ARONOFF: To his declaration. Exhibit B to 2 Exhibit K. 3 A Yes. 4 Q And that is what you were referring to in your 5 declaration in that paragraph; is that right? 6 A Yes. 7 Q And the shape of the track depicted in Exhibit B is a 8 partial O, isn't it? It loops around, doesn't it, 9 Mr. Miner? 10 A There is a loop. Whether it is a track or not, but 11 it is a loop. 12 Q Is it your testimony that you were not sure it was a 13 track depicted there? 14 A There is a loop, yes, a partial. 15 Q A partial loop? 16 A Yes. 17 Q And this is from December of 2012 according to your 18 declaration? 19 A Yes. 20 Q And you conclude in that paragraph 4(d) of your 21 declaration, again, showing no apparent elevations of the 22 proposed trackage. 23 Do you see that? 24 A Yes. 25 Q Are you saying that that tracking attached as B to <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>	Miner-Cross/Aronoff 188 1 MR. ARONOFF: Yes, your Honor. 2 THE COURT: I just wanted it to be clear. 3 Q I will show you what we have marked as triple A, and 4 I want you to compare it to Exhibit D to your declaration, 5 and my question is the same as my question to you earlier, 6 which is: Other than the red boxes, does it appear to be 7 the same document that was attached to your declaration 8 and referred to as the PW Grosser plan? 9 A Yes. 10 THE COURT: It is admitted with the same limited 11 purpose as the other enlargement. 12 (Whereupon, Defendant's Exhibit AAA was received 13 in evidence.) 14 Q Sir, I would like you to stand up if it is easier for 15 you. Do you want to go over to the drawing. 16 (The witness steps down.) 17 Q The blowup that we provided all the way to the west 18 of parcel C, are you with me? 19 Please point to it so we are on the same page. 20 The western most blowup. Go down. 21 Right there. 22 Yes, sir. 23 You see we have blown up the vertical lines that 24 run down the border of parcel B and C. Do you see that? 25 A Yes. <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>
Miner-Cross/Aronoff 187 1 your declaration shows no apparent elevations? 2 MR. CALICA: Objection to form, it says no track 3 elevations. 4 MR. ARONOFF: I will ask that. 5 Q Does that document attached as B to your declaration 6 show any proposed grading elevations? 7 A On the drawing in front of me, I can't read any 8 elevations. 9 Q How was the drawing provided to you, sir, do you 10 recall? 11 A No. 12 Q It may have been provided to you in full size like 13 the earlier drawing you looked at? 14 A It may have been electronic. I don't recall 15 specifically. 16 Q It may have been electronic, and it may have been 17 delivered to your secretary in full size as well; is that 18 right? 19 A Perhaps. 20 Q I want to show you what is marked as Exhibit AAA? 21 THE COURT: Show it to counsel, please. 22 (Whereupon, at this time there was a pause in 23 the proceedings.) 24 THE COURT: Triple A is your representation that 25 it is an enlargement of sub Exhibit B to Exhibit K? <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>	Miner-Cross/Aronoff 189 1 Q And can you read these numbers that are depicted in 2 each vertical line? 3 A 50, 55, 60, 65, 70, 75. 4 Q When you received the document in or about December 5 of 2012, you understood that those were proposed grade 6 lines; is that right, sir? 7 A Yes, sir. 8 Q Right. 9 And take a look, and this one we didn't blow up, 10 sir, if you look at the eastern-most red box depicted on 11 the diagram. 12 No, up there. Right there. 13 We put a circle around it and there is an E-L, 14 equals? 15 A Yes. 16 Q What does it equal? 17 A 56.12. 18 Q And you understood it was a track elevation level; is 19 that right, sir? 20 A Track elevation, yes. 21 Q You can take a seat. Thank you. 22 (Whereupon, at this time there was a pause in 23 the proceedings.) 24 MR. ARONOFF: Almost done, Judge. Promise. 25 Q Turning back to your declaration, paragraph 4(e). <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>

Miner-Cross/Aronoff 190 1 A Yes. 2 Q Are you with me? 3 A 4(e), yes. 4 Q You wrote: As noted above, it was not until well 5 after the Town filed the instant litigation against the 6 BRT defendants in March 2014 and issued its stop work 7 order that the Town was belatedly provided with the 8 so-called AECOM, A-E-C-O-M, all caps, dated January 2014, 9 and a parenthetical, and then you wrote, which again shows 10 no apparent elevations of the proposed additional track. 11 Do you see that? 12 A Yes. 13 Q And that refers to Exhibit C of your declaration? 14 I will show you -- 15 THE COURT: Let's save some time, I believe and 16 I will note that there is elevations on there marking -- 17 MR. ARONOFF: Elevations of 50 above zero. 18 THE COURT: If you blow it up, we will see the 19 elevations. 20 MR. CALICA: Your Honor, that is blown up twice. 21 The document is blown up to a three by five, and the areas 22 in the detail are blown up again by another multiple of 23 five. 24 THE COURT: Yes. 25 I'm not sure if it matters, in the three by four <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>	Miner-Redirect/Calica 192 1 before that. 2 Q And even as to that approval, is it correct that you 3 said it was subject to being provided with a NEPA review? 4 A Yes. 5 The Town had assumed that any NEPA or other 6 federal regulation and laws would be complied with. 7 Q All right. 8 When somebody had shown you Exhibit V three 9 months earlier -- actually, it is on April 6th, 2012, you 10 recall that the language was that attached is a concept 11 plan of what we envisioned as of this date. Please keep 12 in mind that this is truly conceptual. 13 Do you recall having been advised that the 14 document sent to you on April 6th, 2012 was truly 15 conceptual? 16 A Yes. 17 Q But the document that was sent to you on June 29, 18 2012, the Systra track plan, that wasn't conceptual, they 19 were asking for actual approval; is that correct? 20 A That was my understanding. 21 Q And that was the J track; is that correct? 22 MR. ARONOFF: Objection to the characterization 23 of what they were asking for. 24 THE COURT: I will allow it. 25 Q They were asking to include an actual J track <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>
Miner-Redirect/Calica 191 1 you can see elevations, and I'm not sure that it is blown 2 up in this one. And I believe I have all the facts. 3 MR. ARONOFF: With that, I have no further 4 questions. 5 THE COURT: Excellent. 6 Do you want to call your next witness? 7 MR. CALICA: No, I would like to do redirect, 8 please. 9 THE COURT: Very brief. 10 11 REDIRECT EXAMINATION 12 BY MR. CALICA: 13 Q Mr. Miner, did Defendant's Exhibit AAA, the PW 14 Grosser plan, say on its face that you have -- and you 15 have a blowup there, that it was a track plan? 16 A The plan reports to be a fire safety analysis, and 17 there is a sub caption that says overall plan. 18 Q Does the word "track" appear anywhere in the document 19 as you read it or as you read it today? 20 A Not that I see. 21 Q We do know you sent a letter indicating some sort of 22 approval to the Systra J track that was provided to you on 23 June 29th, 2012, and you responded by letter dated July 3, 24 2012; is that right? 25 A Yes, I believe the Systra was dated a couple of days <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>	Miner-Redirect/Calica 193 1 configuration; is that correct? 2 A Yes, consistent with the Systra plan. 3 Q And they said it would be 5,600 feet long; is that 4 correct? 5 A Yes. 6 Q And they had said it would follow the natural contour 7 to the south of the property, enter from the west to the 8 east and go up and end in the Long Island Rail Road, and 9 follow the natural contour where the property is 10 approximately 50 to 55 feet; is that correct? 11 A I don't think their letter said that. But in reality 12 that is what -- 13 Q Didn't the cover letter provided to you by Systra say 14 that it was limited regrading? 15 A Yes, sir. 16 Q And didn't you follow up with an email saying, please 17 provide me with the justification for the limited 18 regrading? 19 A Yes, sir. 20 Q Did you get it? 21 A I believe we did in one of these exhibits. 22 Q 75 feet on each side of the track. Is that correct? 23 A That is what I asked for. Altogether it is what we 24 agreed to, going back and forth with Mr. Pratt, was 150 25 foot to give him a little flexibility on either side of <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>

1 the center line of the track.

2 Q Okay.

3 And on Exhibit CC when you were asked to run the
4 courses of the grading as shown on Jim Pratt's June 21,
5 2012 email to you, with its attached track installation,
6 isn't it correct that you went through the proposed
7 grading on that document, that it showed the grading
8 following the existing contour of the property along the
9 south side, entering in the southwest corner, and at maybe
10 90 or 100 feet, following the contour of the property down
11 to the westerly side, continuing up north and ending at
12 the Long Island Rail Road; is that correct?

13 A Generally followed the contour.

14 Q And that is the track installation and grading detail
15 that was provided to you by Mr. Pratt in 2012; is that
16 correct?

17 A Correct. That is the one I approved.

18 Q And did he provide you with anything to show that he
19 was going to excavate this part of the property where
20 there is no track down to the level shown in this
21 photograph?

22 A Not to my recollection, no.

23 Q Did he give you anything to show that he was going to
24 excavate this part of the westerly end of the property
25 down to the level shown?

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OFFICIAL COURT REPORTER

1 MR. ARONOFF: Your Honor, since we proposed to
2 put him on as part of our case, I would ask since
3 Mr. Humbert lives in Philadelphia, we can span my cross
4 beyond the scope of the cross so to get him out of the --
5 off the stand today if possible?

6 THE COURT: Sure.

7 MR. CALICA: Just that it would be deemed as his
8 part of the case there.

9 THE COURT: All right.

10 Please retrieve all the documents there.

11
12 ROBERT HUMBERT,

13 called as a witness, having been first
14 duly sworn, was examined and testified
15 as follows:

16 THE CLERK: Please state and spell your name for
17 the record.

18 THE WITNESS: Robert Humbert, H-U-M-B-E-R-T.

19
20 DIRECT EXAMINATION

21 BY MR. CALICA:

22 Q Good afternoon, Mr. Humbert.

23 What is your profession?

24 A I am in AECOM, A-E-C-O-M, in the transportation
25 business line. Specifically, I'm in the freight rail

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1 A The bigger document shows some excavation, but it
2 wasn't approved by the Town.

3 Q Did he ever tell you, Mr. Pratt, Mr. Kaufman,
4 Mr. Watral, any engineer associated with them, that what
5 they were planning on doing is bringing in excavators,
6 bringing the 100 foot and 90 and 80 foot areas down to 50
7 feet, streaming it on site, excavating and removing the
8 material?

9 A No.

10 They only had authorization for that 150 feet.

11 Q Of a J track running along the south, and going up
12 the easterly side and ending at the Long Island Rail Road;
13 is that correct?

14 A And close to the expressway.

15 Q And you did not know differently until the Town got
16 the documents in 2014 and began suit, is that correct?

17 A Right around 2014.

18 MR. CALICA: Nothing further.

19 THE COURT: You may step down.

20 (Whereupon, the witness leaves the witness
21 stand.)

22 THE COURT: Who do you propose to call as the
23 next witness?

24 MR. CALICA: Mr. Humbert, your Honor.

25 THE COURT: Call him.

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1 market sector.

2 Q Are you a licensed professional engineer?

3 A I am.

4 Q And in what jurisdiction?

5 A Pennsylvania and Virginia.

6 Q What about the State of New York?

7 A Not a licensed engineer in New York.

8 Q Does New York recognize licenses in New York State?

9 A There is reciprocity.

10 Q Does that mean that you are authorized to sign and
11 certify as a professional engineer licensed elsewhere,
12 plans in New York State?

13 A Not in New York State.

14 Q So what does reciprocity include?

15 A It means that because I'm licensed in Pennsylvania
16 and in Virginia, I have the ability to get a license in
17 the State of New York because of my background.

18 Q But you haven't done so?

19 A No, sir.

20 Q Okay.

21 Would you look at Exhibit 4 in the binder in
22 front of you?

23 A Unfortunately I don't have that binder in front of
24 me.

25 THE COURT: You cleaned up too much.

HARRY RAPAPORT, CERTIFIED REALTIME REPORTER
OFFICIAL COURT REPORTER

Humbert-Direct/Calica 198 1 Q You have Exhibit 4? 2 A Yes. 3 Q Do you know what that document is? 4 A I believe I do. 5 Q What is it? 6 A It is the representation that AECOM developed with 7 respect to understanding the principles of the operation 8 and came up with that particular plan. 9 Q Does it have a date? 10 A I believe it is in January, but I cannot read 11 anything from it. 12 Q I will represent to you on a larger copy that it is 13 January 2014. 14 Did you have any role in preparing this 15 document? 16 A Yes, I did. 17 Q And what was your role? 18 A I was responsible for developing it along with my 19 staff. 20 Q Does the document have a title? 21 A Yes. 22 I think it reads Lot B and C Base Plan. 23 Q And what does that mean? 24 A We developed a full build-out plan with the idea that 25 we would carry it back depending on the staging and the HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER	Humbert-Direct/Calica 200 1 with any track plans, site plans, overview plans, fire 2 safety plans, Systra track plans in 2012, that had nothing 3 to do with AECOM; is that correct? 4 A AECOM did not provide those plans. 5 Q All right. 6 Let me ask you this, sir: 7 In addition to yourself, were you assisted by 8 any professional engineers licensed in the State of New 9 York? 10 A No, sir. 11 Q Assuming that one would actually want to construct a 12 railway on the 93 acre parcel, would it be necessary for 13 there to be a licensed plan by a New York State engineer? 14 A Typically the site plan has to be signed and sealed 15 by a New York professional engineer. It can be assisted 16 by track design that is not necessarily signed and sealed. 17 We do plenty of work that is not signed and sealed for 18 many clients. 19 Q Who is the New York State licensed engineer that you 20 are associating with for purposes of designing this track? 21 A When we get to that stage I can let you know. We are 22 not at that stage right now. It is a conceptual operation 23 design plan. 24 Q And are you assisted by any other professional 25 engineers who are not licensed in New York? HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER
Humbert-Direct/Calica 199 1 need for additional capacity. 2 Q When did you first participate in preparing the 3 document that is now Exhibit 4? 4 A I believe we began working under BRT in October of 5 2013. 6 Q All right. 7 MR. CALICA: Incidentally, your Honor, I move it 8 in evidence. 9 THE COURT: So moved. 10 (Whereupon, Plaintiff's Exhibit 4 was received 11 in evidence.) 12 Q Would it be correct, if you began working on this 13 project in October of 2013, that it wasn't even a gleam in 14 anybody's eye in 2012 when Mr. Miner, as you heard him 15 testify, was presented with a J track plan? 16 MR. ARONOFF: Now I object. 17 THE COURT: Can you rephrase that. A gleam in 18 an eye I don't believe is an engineering art. 19 Q Did your company have any role in the Brookhaven Rail 20 Terminal in 2012? 21 A No. 22 Q When for the first time did you provide any services 23 to the Brookhaven Terminal? 24 A We started in October of 2014 (sic). 25 Q So it would be correct that if Mr. Miner was provided HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER	Humbert-Direct/Calica 201 1 A We have a full contingent of licensed engineers in 2 the State of New York, sir. 3 Q On this project, are you being assisted by any New 4 York State licensed engineer? 5 A We have the ability to call them as we need them. 6 Q My question, sir, is: From the time you started in 7 October 2013 until today, have you been assisted in 8 formulating what is now Exhibit 4 in evidence, the B and C 9 plan, by any New York State licensed professional 10 engineer? 11 A No, sir. 12 Q And what about a -- any geologist or hydrogeologist? 13 A No, sir. 14 Q And do you know an individual known as Nelson Abrams? 15 A Yes. 16 Q Who is Nelson Abrams? 17 A He works at AECOM and he is involved in the project. 18 To be honest with you, I only met him once. 19 Q So he didn't provide any assistance with -- to you in 20 connection with formulating lot B and C; is that correct? 21 A No, sir. 22 Q And when Mr. Abrams filed a declaration in this case, 23 would you agree that he was providing litigation 24 assistance to the case but he was not providing track 25 design services to BRT? HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER

Humbert-Direct/Calica 202 1 A I'm not sure. You have to ask that again. 2 Q Let me read the first sentence of the declaration 3 into the record, and I will ask the Court to judicially 4 notice it. 5 A Mr. Nelson's declaration? 6 Q Correct. 7 Filed April 30, 2014. 8 I am a certified professional geologist and 9 senior project manager at AECOM USA. AECOM had been 10 retained to advise and assist Foley and Lardner LLP in 11 connection with the above captioned litigation as it 12 relates to the ongoing and planned construction and 13 development activities at the Brookhaven Rail Terminal 14 site. 15 Did you review that? 16 A I have seen it, but I have not reviewed it. 17 Q Mr. Abrams doesn't work for you on this project? 18 A No. 19 Q So he only works for BRT lawyers as the declaration 20 says? 21 THE COURT: I got it. 22 Q Are there any geological considerations as you know, 23 sir, as a licensed professional engineer in several 24 jurisdictions, that are impacted by the type of excavation 25 and regrading and alteration of grades of this property? <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>	Humbert-Direct/Calica 204 1 A No, sir, I did not. 2 Q So then you gave no consideration, is it correct, to 3 any impact on the Glacial aquifer or any other aquifer as 4 a result of any of the excavation grading and track design 5 functions you performed, correct? 6 A I developed a concept plan that met the operational 7 objectives. 8 Q And what was the operational objection -- objectives? 9 A I can go through them. There are a number in my 10 declaration. Do you wish me to do so? 11 Q Was it to achieve a uniform level of 50 feet so that 12 the westerly side of the site that has been -- had an 13 original elevation of 100 feet aligns with the close to 50 14 foot elevation, natural elevation, at the east end of the 15 site? 16 A Absolutely not. Never considered. 17 Q Then referring to your declaration, what were your 18 considerations? 19 A The train that can be received at this site is 20 limited by 35 cars. To do so, it is important that we 21 receive that train off the Long Island Rail Road in its 22 totality. 23 So the first 2,500 feet of track that is 24 proposed is considered an arrival track, bringing the 25 track off of the Long Island Rail Road and having it <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>
Humbert-Direct/Calica 203 1 A I did not consider that within my purview. I was 2 hired to look at a train operation and develop a concept 3 plan. That was the objective. 4 Q All right. 5 Were you in court today when Stephanie Davis 6 testified? 7 A Yes. 8 Q And you read her declaration in this lawsuit? 9 A Yes, I have. 10 Q But at the time you were involved in formulating this 11 track plan, did you know what sole source aquifers were? 12 A As of today, yes. 13 Q No. 14 When you were designing the track plan, 15 Exhibit 4, between October 2013 and the time it was dated, 16 January 2014, did you know what sole source aquifers were? 17 A It is in part of what my consideration was. 18 Do I know what sole source aquifers are? I'm an 19 engineer, yes, I do. My responsibility was to take the 20 objectives of the operation and achieve a concept plan 21 that met those objectives. 22 Q Did you know what a hydrological zone three was? 23 A No, I did not. 24 Q Did you know a location of the Upper Glacial aquifer 25 beneath this site between October 2013 and January 2014? <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>	Humbert-Direct/Calica 205 1 completely away from the Long Island Rail Road and not 2 disrupting their operation. 3 The track has two other tracks in that same 4 slope area coming down the grade. One is a departing 5 track, the other is a runner track. That runner track is 6 kept free so power can move between one track and another 7 independently. 8 The departure track is one where the cars that 9 are ready for outbound moves to the Long Island Rail Road 10 can be built up such that power released from the inbound 11 can use the runner track and hook on to the head end of 12 the cars sitting on the departure track for an outbound 13 movement. That is objective number one. 14 Objective number two is to create a condition 15 that allows the plant to digest the cars that have been 16 just received. 17 So there are a number of support staging tracks 18 that allow the 35 cars to be broken out into digestible 19 blocks for delivery to a number of different locations 20 from the C line. 21 The third element is the industry tracks 22 themselves within C line -- C lot are identified, 23 depending what the actual site development is or what the 24 customer is, to identify those as industry tracks where 25 those blocks would be delivered to that industry and <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>

Humbert-Direct/Calica 206 1 material would be off-loaded from that. 2 The next objective is to allow for C to collect 3 blocks and bring those blocks over to lot A for delivery 4 to lot A. That way, again, we have a situation where none 5 of the tracks are – for the Long Island Rail Road are 6 disturbed because we already had the full 35 cars. 7 The final element is how to get those lots in 8 lot C in that staging lot to lot D, which would 9 necessitate going underneath the Long Island Rail Road. 10 That is the track objectives. There are also 11 some roadway objectives. 12 Q Let me ask you this: At the time you formulated the 13 plan, did BRT own parcel D? 14 A You know, I don't know the answer to that – to make 15 sure lot D was taken into consideration. 16 Q Do they own or control lot D today? 17 A I don't know. I don't think they do. 18 Q So what you are saying is that one of your 19 engineering considerations was to design parcels B and C 20 so that you could extend track onto parcel B that is not 21 owned by BRT when you designed the track and isn't even 22 owned by BRT while you are testifying here today; is that 23 correct? 24 A It is my understanding that parcel B and C were under 25 their control. Parcel D was out there as potential HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER	Humbert-Direct/Calica 208 1 A It could have been east or west side. Those were the 2 two longest sections. 3 Q Has anybody identified any proposed occupants, 4 purchasers or tenants on buildings lot B or C? 5 A Not within my purview. 6 Q Anybody identified any potential customers for the 7 track and building on the tracks of B and C who would like 8 to have material delivered to the site or shipped out of 9 the site? 10 A Again, not within my purview once again. 11 Q Is it a correct summary, sir, that you designed a 12 track plan starting in October 2013, completing in January 13 of 2014, without the assistance of any New York State 14 licensed engineer, without any geologist, without any 15 consideration of the aquifer or ground water 16 considerations of – to accommodate buildings that aren't 17 designed for users that insofar as you know do not exist 18 as of the present time; is that correct, sir? 19 A I don't believe you mentioned completed the design? 20 Is that what you said. 21 Q Completed the track design you said. 22 A No, sir. 23 Q Well, you completed – what is this, a concept? 24 A A design concept, yes, sir. 25 Q I see. HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER
Humbert-Direct/Calica 207 1 business. And as such we want to make sure that what you 2 are designing initially ultimately can accommodate a 3 future expansion of a business, which is a good business 4 decision. 5 Q And what about parcel E or parcel F? 6 THE COURT: Counsel, move ahead. 7 Q Let me ask you this, sir. 8 Was your track designed to accommodate -- design 9 designed to accommodate any buildings or structures? 10 A I believe we identified three large boxes as our 11 goal. Primarily it was a generic plan to address whatever 12 it might be. We had the ability to identify or tweak the 13 alignment to match that. 14 Q Do you know if there are any building places or three 15 or four or even one building on parcel B or C formulated 16 by Brookhaven? 17 A We did meet with one particular developer that was 18 looking at a refrigerated warehouse and he gave us 19 dimensions for us to use as a template. And we used that 20 as a template. 21 Q And where on the site would this refrigerated 22 warehouse be? 23 A It hadn't been actually identified. It was either on 24 the east or west side of the lot. 25 Q It could have been on the east side? HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER	Humbert-Direct/Calica 209 1 So for this design concept, your client is now 2 removing, according to one of the documents in evidence, 3 two and a half million cubic yards of sand material, 4 excavating for proposed tracks in areas 100 feet, 90 feet, 5 80 feet, 70 feet, the majority of the site, excavating it 6 down to 50 feet for a track that you are telling me, sir, 7 is a concept? 8 A Every design goes through phases. It begins with a 9 desk top and then proceeds through a concept. That 10 concept is used as a basis for design. It goes through 11 preliminary and final design. It is a part of a design 12 process, by no means complete. Consideration for other 13 elements come in as we progress through understanding what 14 we want to do. 15 Q Isn't it a fact, sir, that your client is excavating, 16 removing material, grading now for a track designed by 17 your company, AECOM, that you just told his Honor is a 18 concept? 19 A It is a concept design used as a basis for design. 20 Whether there was sand there or whether there 21 was no sand there, we would still be presented the same 22 option. 23 Q Do you think it is fair for an engineering practice 24 to alter the entirety of the site, to remove the native 25 soils, to change the grades by 50 feet along the entire HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER

1 west side for a concept track plan for undesigned
2 buildings, for unidentified users? Is that consistent
3 with your idea of good railroad engineering practice?

4 **A I think it is prudent engineering to understand
5 exactly what you want the picture in the puzzle box to
6 look like and then to set steps towards achieving that.**

7 **So this identifies what it is that we need, and
8 then we have to go through the necessary processes in
9 order to figure out what else needs to be done and
10 accommodate it.**

11 **Q** One of the processes is removing native sand and
12 selling them; is that right?

13 **A I don't know what that means.**

14 **Q** Well, do you know where the sand that is being
15 excavated on the site is being stored on-site -- being
16 stored on-site or removed and sold to purchasers off-site?

17 **MR. ARONOFF:** This is not an appropriate witness
18 to do this with.

19 **THE COURT:** If he knows.

20 Do you know?

21 **THE WITNESS:** No.

22 **Q** Do you know whether it is being screened on site?

23 **A Obviously I have been out to the site so I have seen
24 the screening going on, yes, so I know that.**

25 **Q** Does the screen contribute in any way either towards
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1 the design or the eventual construction of the track along
2 the lines shown on Exhibit 4?

3 **A Again, counsel, it is not within my purview.**

4 **Q** What is within your purview, sir?

5 **THE COURT:** Objection sustained.

6 Don't answer the question.

7 Anything else, counsel?

8 **Q** Would you look at Exhibit 1 in the binder in front of
9 you.

10 Three pages, the second is from Systra
11 Engineering, the last page is an area that other witnesses
12 have said shows a J track layout.

13 Do you see that, sir?

14 **A I do.**

15 **Q** Are you familiar with Systra Engineering?

16 **A I'm aware of them, yes.**

17 **Q** What are they?

18 **A An engineering firm.**

19 **Q** Did -- do they concentrate, if you know, or
20 specialize in track design?

21 **A I believe they are involved in track design, yes.**

22 **Q** Is it a material part of their business?

23 **A I do not know.**

24 **Q** Have you ever dealt with them?

25 **A Yes.**

HARRY RAPAPORT, CERTIFIED REALTIME REPORTER
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1 **Q** And do you consider them to be competent
2 professionals in the railroad engineering field?

3 **A I would assume so. But I have not dealt with them
4 enough to make my own judgment on that.**

5 **Q** Have you seen Exhibit 1 before today, the cover
6 letter and the attached J track option?

7 **A I have seen the J track option. But I have not seen
8 this particular exhibit.**

9 **Q** Have you seen the attachment of the J track option,
10 the last page of Exhibit 2?

11 **A That is what I'm referring to, I have not seen this
12 exhibit before.**

13 **Q** Not before today?

14 **A No, sir.**

15 **I have seen the J track option, but it is not
16 with the aerial in the background.**

17 **Q** In any event, did the J track options that you saw
18 follow the contour shown on Exhibit 1, that is, the track
19 proceeding along the southerly boundary, entering on the
20 west side of parcel B, continuing to the easterly side
21 sloping down, following the natural elevation and then
22 continuing north and ending south of the Long Island
23 Expressway in the northeast corner of the parcel?

24 **A It does appear to follow the contours.**

25 **Q** Would such a design, if competently prepared by
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1 Systra, a -- have enabled BRT to put surface buildings and
2 structures, such as a refrigerated warehouse as you
3 described it, along the easterly border of the property?

4 **A This plan does not meet the objectives of the
5 operation.**

6 **Q** That was not my question, sir.

7 My question is: Would it be possible if you
8 built a J track plan designed -- as designed by Systra
9 that you could put a refrigerated warehouse along the
10 track along the easterly boundary of the property?

11 **A I would suspect it is possible to build a warehouse,
12 period.**

13 **Q** Okay.

14 If you constructed a track in a J configuration,
15 would you agree that there would be a lesser need to
16 excavate and alter the grades of the property in the
17 manner that is now shown in Exhibits 16 and 21?

18 **THE WITNESS:** Your Honor, it is difficult for me
19 to answer because I don't agree with the premise that this
20 track plan meets any objectives.

21 **THE COURT:** That is your answer, sir.

22 **Q** Did your company prepare any revisions of Exhibit 4?

23 **A I believe there has been some various tweaks as we
24 looked at additional variations and modifications. But
25 the basic premise stays the same.**

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Humbert-Direct/Calica 214 1 Q So would it be correct that any of the current tweaks 2 would basically show the track in the same O track 3 configuration that is shown on Exhibit 4? 4 A Absolutely. 5 Q Now, what relationship, if any, does AECOM have to 6 Sidney Bowne, B-O-W-N-E, the engineers that prepared the 7 grading plan for BRT? 8 A To my knowledge, none. 9 Q So you didn't consult with them and they didn't 10 consult with you; is that correct? 11 A The extent of my relationship with Bowne was to get 12 information from them insofar as grade and elevations are 13 concerned. 14 Q Let me ask you this, sir: Do you know whether the 15 Bowne firm is doing any work on track design? 16 A Only from a standpoint that I have seen exhibits that 17 have Bowne's name on it with some tracks shown. 18 Q Do you know from your own professional track 19 engineering activities on behalf of BRT whether it is 20 AECOM or Bowne who is preparing the track design, 21 conceptual or proposed, for parcels B and C? 22 A It is my understanding it is AECOM who is doing the 23 track design. 24 Q And your company was hired in October 2013; is that 25 correct? HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER	Humbert-Direct/Calica 216 1 have been referring to, loop, as well as the J loop, as 2 well as double track. So there has been a number of 3 different alignment configurations that have been going on 4 prior to AECOM being involved. 5 Q Let me try to simplify. 6 AECOM is the only engineering firm designing 7 conceptual proposed track by BRP; is that correct? 8 A Certainly my hope. 9 Q You came on board October of 2013? 10 A Yes, I did. 11 Q And there was no formulations of any track design by 12 AECOM, or any of its staff, or any of your associates, 13 prior to October 2013; is that correct? 14 A That's correct. 15 Q Would you agree, sir, that the Town could not have 16 learned of any track designs originated with AECOM at any 17 time prior to October -- 18 THE COURT: I will take that as background. 19 MR. CALICA: I have nothing further. 20 THE COURT: We will take a brief break while we 21 charge the batteries here. 22 (Whereupon, a recess was taken.) 23 24 25 HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER
Humbert-Direct/Calica 215 1 A Yes, that's correct. 2 Q And so it is correct then that the Town could not 3 have been apprised of any track design for an O track that 4 had any track engineering design at any time prior to 5 October 2013 when AECOM came on board; is that correct, 6 sir? 7 MR. ARONOFF: Objection. 8 THE COURT: How is he supposed to know? 9 Q Sir, have you seen any Bowne engineering work 10 identifying track design on parcel B and C? 11 A I have seen exhibits with it shown in there. That is 12 the extent of my relationship with Bowne. 13 Q But you have considered those exhibits you have seen 14 a design or engineering of tracks? 15 A They certainly show the general principles of track 16 design being followed, yes, sir. 17 Q Insofar as AECOM is concerned, did you acknowledge -- 18 do you acknowledge, sir, that the Town would not have 19 learned anything of the track design plans of BRT that 20 involve any design by AECOM at any time prior to October 21 2013? 22 A It is my opinion that based on the research that we 23 did when we were looking on doing -- putting the 24 conceptual plans together in the design mode that we were 25 looking at previous drawings that showed this O that we HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER	Humbert-Direct/Calica 217 1 THE COURT: Counsel, before you begin your 2 hybrid cross and direct examination, I have a few 3 questions. 4 Remember you are still under oath. 5 Based on the plan that you prepared, calling it 6 a plan loosely -- is that what you would call it, a plan? 7 THE WITNESS: Yes. 8 THE COURT: Based on a plan of that level, and 9 you have been describing how it was preliminary and so 10 forth, would you expect a reasonable client to begin 11 construction based on that plan? 12 THE WITNESS: Your Honor, we had the experience 13 where we develop a plan of that sort that is actually used 14 to go to construction. 15 Again, it depends on the client, but we had 16 clients that have gone forward with construction and 17 getting bids with plans of that sort. 18 THE COURT: Do you think it is a good idea? 19 THE WITNESS: It depends on the circumstances 20 surrounding it, there are times I believe it is a good 21 plan. But it is economically a good idea from a 22 standpoint of not having a protracted construction. You 23 can shorten the timeframe associated with that, and as 24 long as we have the proper supervision, it can be 25 accomplished in a proper and sufficient manner. HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER

Humbert-Direct/Calica 218 1 THE COURT: You have been here all day with us? 2 THE WITNESS: Yes. 3 THE COURT: You have seen Exhibit B and B-1 and 4 the big pictures; is that right? 5 THE WITNESS: Yes. 6 THE COURT: And does the construction of your 7 plan require clearing, grading and grubbing, I believe the 8 other word was used, to this magnitude? Or could it have 9 been done different? 10 THE WITNESS: It probably could have been done 11 more surgically associated with following the plan to the 12 letter of the law. 13 THE COURT: For example, you could clear 150 or 14 75 foot swath in the direction of the O; is that fair? 15 THE WITNESS: Yes. 16 THE COURT: And the last question, since you are 17 the railroad engineer and you should know, the whole 18 notion of grading the track downward 1.25 percent slope, 19 is that an ideal design for a railroad? Is it better from 20 a railroad engineer perspective to have a level track, 21 with respect to the safety issues and things like that? 22 THE WITNESS: In an ideal world everything is 23 better if level. In this case the criteria we were using 24 was actually a 1.5 maximum grade, which makes for an 25 efficient operation. <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>	Humbert-Direct/Calica 220 1 into the support facility, from the support facility I may 2 take it to the runner track which is open to take it over 3 to lot A. 4 So those considerations are more important, 5 quite frankly, as long as we are able to establish those 6 tangent sections and keep the loop at no greater than 7 somewhere — I think our desire was — desired curvature 8 was 11 degree 30 minutes and the maximum curvature was 12 9 degree 30 minutes, which is within the principles of 10 railroad engineering. 11 Then we are in good shape. But to do that, 12 though, there was another element that came into play in 13 that we needed a roadway access as well. 14 We spoke to the track objectives, but there is 15 also roadway objectives. One was the access onto the 16 service road, and you mentioned it earlier, there was the 17 recharge basin. We needed enough room between the tracks 18 and the recharge basin to afford us an access road between 19 the two. 20 The objective here again is not to have a 21 conflict between the track operation and the roadway 22 operation. 23 So the part of the O that is exposed is where 24 the roadway comes in. 25 THE COURT: When did you first learn that <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>
Humbert-Direct/Calica 219 1 Quite frankly, we develop things in processes. 2 We develop the operating plan, regardless of what the 3 vertical looks like first initially. And then we overlay 4 that vertical on what the constraints of the property are. 5 As long as the constraints, like degree of 6 curve, grades, as long as you can achieve that plan within 7 those design criteria, then you have a successful project. 8 THE COURT: Would it have been from an 9 engineering perspective feasible to increase the grade in 10 the lower area of the property to create a lower track? 11 THE WITNESS: Not to achieve the objectives. 12 THE COURT: The objective in parcel B? 13 THE WITNESS: One objective. 14 The other is that at the north end we were going 15 to tie in to the Long Island Expressway service road. 16 That is about 53 to 52, that elevation. 17 There is also the track going around the loop. 18 There are dimensions that are very important. The only 19 two tangent sections in that loop that you can effectively 20 change the section — direction of the train in various 21 tracks, in doing so we have to maintain the tangents to 22 get cross-overs and turn-outs so I can take a train from 23 the inside loop to the outside loop. 24 Specifically if I was taking a train I just 25 received, taking it apart, cutting cars or a block of cars <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>	Humbert-Direct/Calica 221 1 construction in the sense of clearing, grading and 2 grubbing had begun in connection with your plan? 3 THE WITNESS: I have seen area photographs, so I 4 knew from the aerial photographs when something was 5 underway. 6 THE COURT: When did you see that? 7 THE WITNESS: It was probably in early November. 8 We started in October. But I probably didn't see anything 9 until then. 10 THE COURT: Is it fair to say that that 11 construction had begun before you designed your plan? 12 THE WITNESS: There was work going on at the 13 site before I started my plan. 14 THE COURT: Counsel. 15 MR. ARONOFF: The first thing I wanted to do is 16 to have Mr. Humbert qualified as a railway engineering 17 expert. 18 THE COURT: I think we are good. 19 MR. ARONOFF: Do you want me to mark the CV so 20 it is part of the record? 21 THE COURT: It is entirely up to you. 22 23 24 25 <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>

Humbert-Cross/Aronoff 222 1 CROSS-EXAMINATION 2 BY MR. ARONOFF: 3 Q Now that you have been admitted as a railway 4 engineering expert, I want your conclusion on the record 5 as well. 6 Is it your expert conclusion that the conceptual 7 track design put in for the BRT expansion was designed 8 based upon sound engineering concepts and principles? 9 A Yes, it was. 10 Q Now, you talked a lot on the record about the 11 operational objectives communicated to you by the client 12 when you started working in October of 2013? 13 A Yes. 14 Q I want to show you a document that memorializes that 15 so we have it as part of the record as well. 16 MR. CALICA: Can I have Exhibit CCCC. 17 THE COURT: I will need that one as well. 18 (Handed to the Court.) 19 THE COURT: You may proceed. 20 Q Do you have it in front of you, sir? 21 A Yes, I do. 22 Q Would you tell the Judge what it is. 23 A After we have been retained by BRT to begin looking 24 into the operation as was currently appeared to be 25 designed on the previous drawings, we put forth a work in HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER	Humbert-Cross/Aronoff 224 1 A That is also correct. 2 Q Does it memorialize the criteria that you just 3 described? 4 A Yes, it does. 5 MR. ARONOFF: I would move to admit it in 6 evidence. 7 MR. CALICA: Your Honor, I believe it is 8 hearsay. It is self-serving. 9 THE COURT: I will allow it. 10 (Whereupon, Defendant's Exhibit CCCC was 11 received in evidence.) 12 Q Now, I wanted to turn your attention to the fourth 13 page in. The pages are not numbered, the page that reads, 14 Brookhaven Rail Terminal Site Operating Parameters. 15 Do you see that? 16 A Yes, I do. 17 Q And are those the operational objectives you 18 described earlier? 19 A The parameters, not necessarily the objectives. 20 Q Okay. 21 With respect to the operational objectives, 22 Mr. Humbert, did you design your conceptual track design 23 plan in accordance with the operational objectives that 24 were communicated to you by the client that you testified 25 about earlier? HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER
Humbert-Cross/Aronoff 223 1 session that established some of the elements that we felt 2 were important with respect to going forward. Operating 3 parameters were one. You can see a series of issues that 4 we understood to be true as part of the operating 5 parameters. 6 The design criteria we developed to achieve the 7 necessary proper design regardless of what the actual 8 situation presented itself with. 9 We also took into consideration some of the 10 general warehouse layouts. It was a generic drawing but 11 it had some elements we needed to follow with respect to 12 the location and sizing of the warehouse. 13 You can also see the general warehouse facility 14 layout that was presented by a potential client, a 15 customer of BRT's that we utilized to help size our 16 facility. 17 As you can see, the typical cross-section in 18 lot B, frankly it could have been in lot C as well, the 19 general relationship between the top of rail and the 20 roadway systems. 21 Q To be clear, this is a document that was prepared by 22 AECOM? 23 A That's correct. 24 Q And it was prepared shortly after you were retained 25 by BRT? HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER	Humbert-Cross/Aronoff 225 1 A Yes, I did. 2 Q I don't want to go over ground we covered already -- 3 MR. ARONOFF: I think it would be helpful to 4 explain the operational objectives quickly again, by 5 pointing to the exhibit so you can see exactly what he is 6 talking about. 7 THE COURT: Okay. 8 MR. ARONOFF: I will borrow my friend's 9 demonstrative if it is okay by having the witness explain 10 by pointing to the exhibit himself -- 11 THE COURT: Okay with me. 12 MR. CALICA: The only problem is he testified it 13 is Bowne's grading plan and not this company's track plan. 14 MR. ARONOFF: I only want him to show where on 15 the property it is happening. 16 THE COURT: If it is helpful to explain your 17 testimony, you can. 18 MR. ARONOFF: May I use the pointer? 19 THE COURT: Sure. 20 A In connection to the Long Island Rail Road which is 21 here, the tracks come off the Long Island Rail Road. 22 There is a single track that is shown here. We have three 23 tracks in the ultimate build-out. 24 Once you reach this location here, the tangent 25 that I mentioned earlier, is where your cross-overs occur HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER

Humbert-Cross/Aronoff 226 1 and where the lead getting down to D occurs. 2 By the time you reach this elevation, it would 3 be elevation 50 or thereabouts. You would continue around 4 with additional trackage that helped you store or stage 5 cars to the correct area. Again, it is in the portion 6 here where you have tangent of about five to six hundred 7 feet. You have cross-overs and turn-outs allowing you to 8 get into some of the industry tracks, as well as to run 9 around cars that are staged within the configuration 10 itself. 11 This is the area we would need to make sure that 12 we have sufficient room to get between the track 13 configuration and the recharge basin. 14 Coming around here, we have the support 15 facilities with a track that extends beyond the rest of 16 the track so that the power that brings in anything can be 17 released and it should have what you call a pull move by 18 the locomotive as opposed to a push move by the 19 locomotive. 20 THE COURT: Do you still have CCCC in front of 21 you? 22 THE WITNESS: I do. 23 THE COURT: Look at page 2 by way of example. 24 It is a drawing of the O shaped track. Do you 25 see that? <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>	Humbert-Cross/Aronoff 228 1 clearance. 2 As I mentioned before, a grade of 1.5 percent, 3 allows you 15 feet in a thousand. 4 So taking that into consideration gives you a 5 kind of understanding of how much distance is needed to 6 achieve a grade separation of whatever is necessary. 7 So if you wanted 30 feet, you would have to go 8 2,000 feet in order to achieve that 30 feet, and so on. 9 Q And just to amplify that point, would you show the 10 Court where parcel B is located? 11 A Down there (indicating). 12 Q Where is the Long Island Rail Road running? 13 A Here (indicating). 14 Q Where is the track going to ultimately be connected 15 to parcel B? 16 A Here (indicating). 17 Q Do you know, sir, the approximate level of elevation 18 of the Long Island Rail Road, top of the rail for the 19 connection -- where the connection occurs to parcel B? 20 A Yes, I do. 21 Q And what is that? 22 A Elevation 69 and change. 23 Q And in order to make that connection you would have 24 to do what, sir? 25 A In order to accommodate a rail movement under the <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>
Humbert-Cross/Aronoff 227 1 THE WITNESS: Yes. 2 THE COURT: Did you draw this or were you 3 presented with this? 4 THE WITNESS: We drew this. We prepared this 5 document. 6 THE COURT: I wasn't sure. It has BRT on it. 7 THE WITNESS: This was the PowerPoint 8 presentation we prepared to present in a work session. 9 Q Please continue explaining the operational 10 objectives, please. 11 A As you see there is a gap in the location here where 12 the track ends. This track is on a grade coming on down. 13 This allows for an unimpeded operation for truck traffic 14 to get into the inside of the oval where presumably there 15 would be rail service facilities located so there would 16 not be any conflict. 17 This location from here to here are acceptable 18 from what I understand for access by trucks into this 19 site. 20 As I mentioned to you before, it was an 21 elevation before. 22 The reason elevation 50 becomes more important 23 other than the two points I presented here plus the tie 24 ins to the Long Island Rail Road is also the need to get 25 underneath the Long Island Rail Road with the appropriate <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>	Humbert-Cross/Aronoff 229 1 Long Island Rail Road, we would need to take into 2 consideration the roadbed of the Long Island Rail Road, 3 the support members or structural members associated with 4 holding up the Long Island Rail Road, and the clearance 5 level that is used in -- throughout North America at this 6 point in time, which is 21 foot, that allows for double 7 stack containers. And that equivalent is about 28 feet 8 from top of rail to top of rail, which would necessitate 9 that we bow in the 40, 41 foot top of rail elevation 10 within the Long Island Rail Road. 11 In order to do that, let's go back to the 12 thousand feet, gaining 15 feet and a thousand, we were at 13 50, and another ten feet, so it means I need 700 or 650 14 feet in order to achieve that. 15 The further I move that back, the more difficult 16 it becomes to make that connection. 17 Q And would you tell the Court anything about the 18 natural topography of this particular site that may have 19 impacted the conceptual design plan. 20 A One of the benefits of the site is some 40, almost 45 21 percent of the site is in that 55, 50 to 55 foot range. 22 And it is important by virtue of the fact that these were 23 tie-in points for the roadway access as well as it allows 24 us to make the move underneath the Long Island Rail Road. 25 Q Are you familiar with an acronym AREMA, A-R-E-M-A? <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>

Humbert-Cross/Aronoff 230 1 A Yes. 2 Q What is it? 3 A American Railway Engineering and Maintenance of Way 4 Association. 5 Q What is AREMA? 6 A It is a national organization – actually 7 international organization at this point, that brings 8 together the railroads or short lines and class ones into 9 one body and is – it generated every year a list of 10 standards that is fairly comprehensive, and it is used 11 by -- there is a standard reference used by railroad 12 engineering. 13 Q Is that something you kept up with over the years? 14 A Yes, we have. 15 Q And did you design the conceptual track in accordance 16 with AREMA guidelines? 17 A Yes, we did. 18 Q I would like to show you what is marked as 19 Exhibit TT. 20 (Handed to the witness.) 21 Q Explain this document. 22 A It represents in the pink shaded area an elevation 23 that is 55 or less as shown in pink in the areas of the B 24 lot and the C lot. In combination, if you were to add the 25 two and divide by the total B and C lot it would come to <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>	Humbert-Cross/Aronoff 232 1 It is extremely important that there is no grade 2 on those tracks, as those cars have to roll, so those 3 tracks are designed to be flat. 4 Q What would be happening operationally to tighten the 5 curve, if you were to bring the western boundary of the 6 spur track towards the east so as not to disturb as much 7 of the natural topography? 8 A Again, going back to the design criteria. If these 9 curves we are already maxing out on those curves, so it 10 would be very imprudent to increase those curves beyond 11 what we increased them to right now. 12 THE COURT: I'm sorry, meaning what? The cars 13 will fall off the tracks? 14 THE WITNESS: They would derail. 15 Q Mr. Humbert, were you ever asked by the client to 16 design a conceptual -- to create a conceptual track design 17 plan that maximized the amount of sand that can be removed 18 from the property? 19 A Absolutely not. 20 Q And with the amount of sand that can be removed from 21 the property, in all considerations to you in coming up 22 with your conceptual design plan? 23 A Absolutely not. 24 MR. ARONOFF: The last thing I wanted to do, 25 Judge, is put his report in evidence, the declaration he <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>
Humbert-Cross/Aronoff 231 1 44, a little less than 45 percent. 2 Q Did you create this document? 3 A Yes, I did. 4 MR. ARONOFF: Move to admit it in evidence. 5 MR. CALICA: No objection. 6 THE COURT: Admitted. 7 (Whereupon, Defendant's Exhibit TT was received 8 in evidence.) 9 Q We talked about how the natural topography in much of 10 the site is in a 50 to 55 feet above sea level range? 11 A Yes. 12 Q And the western boundary of the loop is a higher 13 elevation, isn't it? 14 A Yes. 15 Q Are there any engineering reasons why you deemed it 16 important to have that area of the spur track at a 50 foot 17 elevation and not higher? 18 A Yes. 19 I think we talked mainly about the entrance and 20 gaining access to that 50 foot elevation, and having that 21 50 foot elevation provide us the access to the D lot. 22 As we go around in that 50 foot elevation, we 23 are now beginning to utilize this area here to store 24 blocks of cars for remarshaling and redistribution either 25 to the D lot or to the C lot. <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>	Humbert-Redirect/Calica 233 1 submitted. We have it as Exhibit O. 2 MR. CALICA: I think he should testify to it, 3 your Honor. But if you are convenient having it -- 4 THE COURT: I will admit it over objection. 5 MR. ARONOFF: No further questions. 6 THE COURT: Counsel, any brief, brief follow-up? 7 MR. CALICA: Yes. 8 9 REDIRECT EXAMINATION 10 BY MR. CALICA: 11 Q Mr. Humbert, even the conceptual O track design that 12 your company formulated for conceptual purposes is a dead 13 end; is that correct? 14 A They call it a stub end. It doesn't allow for 15 progressive moves. Is that your point? 16 Q Yes. 17 A It doesn't allow for progressive moves. 18 Q So flow around the O design and reconnecting it at 19 the south end is not one of the goals of this conceptual 20 track design; is that correct? 21 A Absolutely not. 22 Q All right. 23 If I can direct your attention again to the 24 Systra Engineering, Exhibit 1 in the binder in front of 25 you, isn't it a fact, sir, that the Systra J track design <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>

Humbert-Redirect/Calica 234 1 does contemplate or make provision for a potential future 2 connection of the track to the track on parcel B? 3 A In my opinion it does not do -- it does not provide 4 for a proper design. 5 Q It does attempt to do so; is that correct? 6 A It attempts to, but if you look at the configuration 7 that you see here, the maximum that they can switch into a 8 D lot at any one time, the maximum they could switch into 9 D lot, and it would be a push move where the engine would 10 be behind all of the cars, would be somewhere in the order 11 of eleven or twelve cars at any one time. 12 Q So your design has better future access to parcel B 13 that your client doesn't own and has no contract to 14 acquire? 15 A My concept design basis provides for a much more 16 efficient operation than one that would be -- that would 17 be well to follow, yes. 18 Q You testified that no representative of BRT ever 19 asked your company to design the track plan so as to 20 maximize the amount of fill; is that correct? 21 A That is correct. 22 Q Would you look at Exhibit 20 in the binder in front 23 of you, and if it is not in evidence I will offer it at 24 this time. 25 MR. CALICA: Those are the documents that were <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>	Humbert-Redirect/Calica 236 1 amount, the net amount of fill that will be removed from 2 parcel B and from parcel C? 3 A Yes, I see the schedule. 4 Q Okay. 5 And how much net is proposed to be removed from 6 parcel C under that calculation in cubic yards? 7 A I'm not sure I understand your question, sir. 8 Q Does that calculation show the amount of material 9 that is going to be removed from parcel C? 10 MR. ARONOFF: Judge, I object. Mr. Miller will 11 take the stand tomorrow, and he is the one responsible for 12 this document. 13 THE COURT: If you can answer. 14 THE WITNESS: It shows there is a net of a 15 million so cubic yards. 16 Q A million, so you mean 1,346,074; is that correct? 17 A Yes, under parcel C. 18 Q So the "so" is more than -- 19 THE COURT: Objection sustained. 20 Q And then on parcel B, isn't there an additional 21 removal of 1,159,759 cubic yards? 22 THE WITNESS: Your Honor, I'm being asked to 23 speak to something that I have no knowledge of, nor was I 24 involved in the development. 25 THE COURT: Are you familiar with this type of <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>
Humbert-Redirect/Calica 235 1 the subject of our discovery conference and ruling last 2 Friday, your Honor. Those are the emails exchanged 3 between an engineer, Lawrence Kuo, K-U-O, of Bowne, and 4 Dan Miller, a chief financial officer of the affiliate of 5 BRT. 6 THE COURT: Any objection to it coming in 7 evidence? 8 MR. ARONOFF: No objection. 9 (Whereupon, Plaintiff's Exhibit 20 was received 10 in evidence.) 11 Q Have you ever seen those emails before? 12 A I don't believe I have seen this email. 13 Q Let me direct your attention to Mr. Miller's 14 July 12th, 2010 email to Bowne. 15 A Is that included in this? 16 Q Yes, the bottom of the first page of Exhibit 20. 17 A Yes. 18 Q Late in the day, and I may be reading incorrectly. 19 Larry, pursuant to our closing documents, I will 20 actually need you to provide a calculation of estimated 21 volume on parcel C and, all caps, parcel B, rather than 22 parcel C as I originally request. 23 Do you see that email? 24 A Yes, I do. 25 Q And do you see the third page is a schedule of the <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>	Humbert-Redirect/Calica 237 1 calculation being done on this type of project? 2 THE WITNESS: Yes. 3 THE COURT: And what the purpose of the 4 calculation? 5 THE WITNESS: You approach projects from a 6 number of different vantage points; some you look to 7 balance cuts and fills, and you do that from an economic 8 standpoint. 9 I suspect where counsel is going is to show that 10 there is a significant amount of excavation here. 11 THE COURT: Don't worry where he is going. Just 12 answer my question, which you did. 13 It is a net suggestion that that is what we are 14 getting rid of? 15 THE WITNESS: That is what would be considered 16 surplus material. 17 THE COURT: Which can be sold? 18 THE WITNESS: It certainly can be sold. 19 I will tell you regardless of whether this was 20 mud or whether it was sand, there would be no difference 21 in the presentation of my operational design. 22 Q Just to wrap this up, Mr. Humbert, you said that the 23 client didn't ask you to factor into your design the 24 amount of material to be removed from the site which you 25 said could be sold. <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>

238 1 Would you agree looking at Exhibit 20 that what 2 Mr. Miller did is he asked Bowne initially to say how much 3 can we remove from parcel C, and he came back and said, 4 you know something, give me a calculation estimated on 5 parcel C and parcel B rather than parcel C only? 6 THE COURT: Objection sustained. 7 You can argue to me later. 8 MR. CALICA: All right. 9 I have no further questions of the witness, 10 thank you. 11 THE COURT: Very good. 12 You may step down. 13 (Whereupon, the witness leaves the witness 14 stand.) 15 THE COURT: We will stop here for today. 16 Now, I want to talk more about scheduling. And 17 there is something I neglected to think about on Friday. 18 You can come in tomorrow, and I can only give 19 you the morning. We will start at 9:30 and I can only 20 give you to lunch time. 21 MR. ARONOFF: We are both unavailable on 22 Wednesday. 23 THE COURT: Okay. 24 Tomorrow, can you be done in the morning? 25 (Counsel confer.) HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER	240 <u>I-N-D-E-X</u> <u>W-I-T-N-E-S-S-E-S</u> <table> <tr> <td>STEPHANIE DAVIS</td><td style="text-align: right;">8</td></tr> <tr> <td>DIRECT EXAMINATION</td><td style="text-align: right;">8</td></tr> <tr> <td>BY MR. CALICA</td><td></td></tr> <tr> <td>CROSS-EXAMINATION</td><td style="text-align: right;">71</td></tr> <tr> <td>BY MS. MILLER</td><td></td></tr> <tr> <td>MATTHEW MINER</td><td style="text-align: right;">109</td></tr> <tr> <td>DIRECT EXAMINATION</td><td style="text-align: right;">109</td></tr> <tr> <td>BY MR. CALICA</td><td></td></tr> <tr> <td>CROSS-EXAMINATION</td><td style="text-align: right;">140</td></tr> <tr> <td>BY MR. ARONOFF</td><td></td></tr> <tr> <td>REDIRECT EXAMINATION</td><td style="text-align: right;">191</td></tr> <tr> <td>BY MR. CALICA</td><td></td></tr> <tr> <td>ROBERT HUMBERT</td><td style="text-align: right;">196</td></tr> <tr> <td>DIRECT EXAMINATION</td><td style="text-align: right;">196</td></tr> <tr> <td>BY MR. CALICA</td><td></td></tr> <tr> <td>CROSS-EXAMINATION</td><td style="text-align: right;">221</td></tr> <tr> <td>BY MR. ARONOFF</td><td></td></tr> <tr> <td>REDIRECT EXAMINATION</td><td style="text-align: right;">233</td></tr> <tr> <td>BY MR. CALICA</td><td></td></tr> </table> HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER	STEPHANIE DAVIS	8	DIRECT EXAMINATION	8	BY MR. CALICA		CROSS-EXAMINATION	71	BY MS. MILLER		MATTHEW MINER	109	DIRECT EXAMINATION	109	BY MR. CALICA		CROSS-EXAMINATION	140	BY MR. ARONOFF		REDIRECT EXAMINATION	191	BY MR. CALICA		ROBERT HUMBERT	196	DIRECT EXAMINATION	196	BY MR. CALICA		CROSS-EXAMINATION	221	BY MR. ARONOFF		REDIRECT EXAMINATION	233	BY MR. CALICA	
STEPHANIE DAVIS	8																																						
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REDIRECT EXAMINATION	191																																						
BY MR. CALICA																																							
ROBERT HUMBERT	196																																						
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CROSS-EXAMINATION	221																																						
BY MR. ARONOFF																																							
REDIRECT EXAMINATION	233																																						
BY MR. CALICA																																							
239 1 MR. CALICA: Judge, I just got the photographs 2 that were taken because they were not in a copy-able form. 3 THE COURT: That is three minutes, we are 4 talking about time right now. 5 MR. CALICA: I have basically one more witness. 6 MR. ARONOFF: Who? 7 MR. CALICA: Mr. Kelsey. 8 THE COURT: Who else do you have? 9 MR. ARONOFF: Mr. Newel and Mr. Miller, and that 10 is it. 11 So it is possible. 12 THE COURT: We will do the best we can. 13 I have a court obligation, which will most 14 likely put me in Brooklyn all day on Thursday. That is 15 the problem. 16 MR. ARONOFF: Is Friday available to you? 17 THE COURT: I can be here Friday morning. 18 It is up to you to work it out. Let's be on 19 time tomorrow. 20 Everyone have a good night. 21 (Case on hearing adjourned until 9:30 o'clock 22 a.m., Tuesday, May 20, 2014.) 23 24 25 HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER	241 <u>E-X-H-I-B-I-T-S</u> <table> <tr> <td>Plaintiff's Exhibit 8-B was received in evidence</td><td style="text-align: right;">32</td></tr> <tr> <td>Plaintiff's Exhibit 1 was received in evidence</td><td style="text-align: right;">35</td></tr> <tr> <td>Plaintiff's Exhibits 4 and 5 were received in evidence</td><td style="text-align: right;">43</td></tr> <tr> <td>Plaintiff's Exhibit 18 was received in evidence</td><td style="text-align: right;">46</td></tr> <tr> <td>Plaintiff's Exhibits B and 16 were received in evidence</td><td style="text-align: right;">58</td></tr> <tr> <td>Plaintiff's Exhibit 2 was received in evidence</td><td style="text-align: right;">118</td></tr> <tr> <td>Plaintiff's Exhibit 28 was received in evidence</td><td style="text-align: right;">126</td></tr> <tr> <td>Plaintiff's Exhibit 24 was received in evidence</td><td style="text-align: right;">128</td></tr> <tr> <td>Plaintiff's Exhibit 8-A was received in evidence</td><td style="text-align: right;">135</td></tr> <tr> <td>Plaintiff's Exhibit 9 was received in evidence</td><td style="text-align: right;">140</td></tr> <tr> <td>Plaintiff's Exhibit 4 was received in evidence</td><td style="text-align: right;">199</td></tr> <tr> <td>Plaintiff's Exhibit 20 was received in evidence</td><td style="text-align: right;">235</td></tr> <tr> <td>Plaintiff's Exhibit 26 was received in evidence</td><td style="text-align: right;">67</td></tr> </table> HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER	Plaintiff's Exhibit 8-B was received in evidence	32	Plaintiff's Exhibit 1 was received in evidence	35	Plaintiff's Exhibits 4 and 5 were received in evidence	43	Plaintiff's Exhibit 18 was received in evidence	46	Plaintiff's Exhibits B and 16 were received in evidence	58	Plaintiff's Exhibit 2 was received in evidence	118	Plaintiff's Exhibit 28 was received in evidence	126	Plaintiff's Exhibit 24 was received in evidence	128	Plaintiff's Exhibit 8-A was received in evidence	135	Plaintiff's Exhibit 9 was received in evidence	140	Plaintiff's Exhibit 4 was received in evidence	199	Plaintiff's Exhibit 20 was received in evidence	235	Plaintiff's Exhibit 26 was received in evidence	67												
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Plaintiff's Exhibit 4 was received in evidence	199																																						
Plaintiff's Exhibit 20 was received in evidence	235																																						
Plaintiff's Exhibit 26 was received in evidence	67																																						

Defendant's Exhibit IIII was received in evidence	84
Defendant's Exhibit K was received in evidence	144
Defendant's Exhibit U was received in evidence	147
Defendant's Exhibit V was received in evidence	148
Defendant's Exhibit W was received in evidence	150
Defendant's Exhibit CC was received in evidence	155
Defendant's Exhibit BB was received in evidence	160
Defendant's Exhibit XX was received in evidence	172
Defendant's Exhibit EE was received in evidence	173
Defendant's Exhibit GG was received in evidence	174
Defendant's Exhibit FF was received in evidence	177
Defendant's Exhibit II was received in evidence	178
Defendant's Exhibits DDDD and EEEE were received in evidence	183
Defendant's Exhibit AAA was received in evidence	188
Defendant's Exhibit CCCC was received in evidence	224
Defendant's Exhibit TT was received in evidence	231

HARRY RAPAPORT, CERTIFIED REALTIME REPORTER
OFFICIAL COURT REPORTER

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - X

TOWN OF BROOKHAVEN, :
Plaintiff, : 14 CV 02286

-against- : U.S. Courthouse
Central Islip, N.Y.

SILLS ROAD REALTY LLC :
BROOKHAVEN RAIL LLC f/k/a :
U S RAIL NEW YOUR LLC, :
BROOKHAVEN TERMINAL OPERATIONS, :
OAKLAND TRANSPORTATION HOLDINGS: :
LLC, SILLS EXPRESSWAY :
ASSOCIATES, WATRAL BROTHERS, :
INC., and PRATT BROTHERS, INC., :
Defendant. : TRANSCRIPT OF HEARING
: May 20, 2014
- - - - - X 9:00 a.m.

BEFORE:

HONORABLE GARY R. BROWN, U.S.M.J.

Court Reporter: HARRY RAPAPORT, CSR
United States District Court
100 Federal Plaza
Central Islip, New York 11722
(631) 712-6105

Proceedings recorded by mechanical stenography.
Transcript produced by computer-assisted transcription.

HARRY RAPAPORT, CERTIFIED REALTIME REPORTER
OFFICIAL COURT REPORTER

APPEARANCES: For the Plaintiff: ROSENBERG CALICA & BIRNEY 100 Garden City Plaza, Suite 408 Garden City, New York 11530 BY: ROBERT M CALICA, ESQ. GEORGE B. KORDAS, ESQ. ANNETTE EADERESTO, ESQ. Brookhaven Town Attorney 1 Independence Hill Farmingville, New York 11763 For the Defendants: FARRELL FRITZ For Sills Expressway 1320 RXR Plaza Uniondale, New York 11556 BY: KEVIN P. MULRY, ESQ. For remaining Defendants: FOLEY & LARDNER, ESQ. 90 Park Avenue New York, New York 10016 By: YONATON ARONOFF, ESQ. VANESSA L. MILLER, ESQ. MORNING SESSION 19 THE COURT: Good morning. 20 Call your first witness. 21 MR. CALICA: The Town calls Kevin Loyst, 22 L-O-Y-S-T. 23 THE COURT: Please step up to the witness stand 24 HARRY RAPAPORT, CERTIFIED REALTIME REPORTER 25 OFFICIAL COURT REPORTER	Loyst-Direct/Calica 246 1 first. 2 A I have a bachelor of science in civil environmental 3 engineering from Clarkson University; a bachelor of 4 science in engineering management, and a master's in 5 science in environmental engineering. 6 Q From what university and what year? 7 A Polytechnic University, the City of New York, 1997. 8 Q By whom are you currently employed? 9 A FPM Group. 10 Q In what position, sir? 11 A Department manager of environmental engineering, and 12 I am currently a vice president. 13 Q There have been documents filed on behalf of FPM by 14 both Stephanie Davis, a geologist, and Ritu Mody, a 15 professional engineer. 16 Would you please explain to the Court what your 17 professional relationship is with both those individuals 18 within the FPM organization. 19 A Stephanie Davis runs the hydrogeology department, and 20 I run the environmental engineering department. Ritu Mody 21 works directly for me. 22 Q Did you participate in her preparation of the reports 23 that she signed and were filed with declarations in this 24 matter? 25 A Yes. HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER
Loyst-Direct/Calica 245 1 to be sworn in. 2 THE CLERK: Please raise your right hand. 3 4 KEVIN LOYST, 5 called as a witness, having been first 6 duly sworn, was examined and testified 7 as follows: 8 THE CLERK: State and spell your name for the 9 record. 10 THE WITNESS: Kevin Loyst, L-O-Y-S-T. 11 THE COURT: Any time you are ready. 12 MR. CALICA: Yes. 13 Thank you, Judge. 14 15 DIRECT EXAMINATION 16 BY MR. CALICA: 17 Q Good morning, Mr. Loyst. 18 What is your business or profession? 19 A I am an environmental engineer. 20 Q Licensed as a professional engineer by the State of 21 New York? 22 A Yes. 23 Q Since when? 24 A Since 1999. 25 Q Could you tell the Court your educational background HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER	Loyst-Direct/Calica 247 1 Q Were they reviewed by you? 2 A Yes. 3 Q Would you tell the Court what your -- what type of 4 professional practice you engaged in, in your role as the 5 head of the environmental engineering Department of FPM 6 Group? 7 A I get involved in numerous projects involving site 8 development, remediation design, environmental compliance, 9 permitting, those sorts of projects. 10 Q Have you worked as a consultant for municipalities? 11 A Yes. 12 Q And governments? 13 A Yes. 14 Q Which? 15 A Town of Riverhead, Town of Smithtown, Town of 16 Southold, Town of Greenberg, the Village of Lake Success, 17 the Town of North Hempstead, the City of Rye, and others. 18 THE COURT: Is part of this a proffer for 19 purposes of expert testimony? 20 MR. CALICA: Twofold, your Honor. 21 First I would like to qualify him as an expert. 22 Secondly, I'm trying to adduce evidence of his design 23 experience. 24 THE COURT: He is qualified as an expert. 25 MR. CALICA: Okay. HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER

Loyst-Direct/Calica 248 1 Q Have you been involved in landfill design? 2 A Yes. 3 Q Does that entail consideration of grading slopes, 4 excavation consideration? 5 A Yes. 6 Q And have you been involved in supervising remediation 7 of landfill for municipalities? 8 A Yes. 9 Q Was this likewise involved in the same type of 10 professional activities? 11 A Yes. 12 Q Do you deal with issues of stability in landfill 13 design? 14 A Yes. 15 Q You deal with issues of erosion? 16 A Yes. 17 Q And grading? 18 A Yes. 19 Q Do you deal with issues of grading and maintaining 20 grades? 21 A Yes. 22 Q Have you been involved in any transportation 23 projects? 24 A Yes. 25 Q Would you tell his Honor what some of them are and <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>	Loyst-Direct/Calica 250 1 parcel? Do you have such an opinion? 2 A Yes. 3 Q Would you tell his Honor, please, what it is? 4 A It seems odd that basically he testified that at the 5 engineer stage, conceptional engineering stage at this 6 point, early on in the process, and the site had been also 7 major league constructed. 8 Normally, you know, you go through phases of 9 preliminary design. It is final design, and it goes out 10 for bidding and then construction but not typically at the 11 conceptional stage already constructing on the site. 12 MR. ARONOFF: I do object to that. 13 I mean, he is not an expert in construction 14 stages. He is testifying as an environmental engineer. 15 And I don't even understand his testimony about 16 Mr. Humbert's opinion, because he mischaracterized it. 17 THE COURT: I will overrule the objection, but 18 counsel, it is not by much. 19 The plan was withdrawn, so I'm not even sure 20 that any of that matters. 21 Q In approaching a -- have you approached a large scale 22 project that involved excavation grading, whether landfill 23 design, bus terminal or other projects? 24 A Yes. 25 Q And what type of professional engineering practice <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>
Loyst-Direct/Calica 249 1 what your role was. 2 A One of our clients is the New York City Transit. So 3 we have been involved in assisting them with their design 4 of sites, as far as grading, storm water management, 5 erosion control, anything along that nature. 6 Q Have you been involved in the design of any bus 7 terminals? 8 A Yes. 9 Q Where? 10 THE COURT: Counsel, get to the substance. 11 Q Just where were the bus terminals? 12 A New York City, Staten Island. 13 THE COURT: I don't care about that. Get to the 14 point. 15 MR. CALICA: Yes. 16 Q Mr. Loyst, were you present during the testimony 17 yesterday of both Stephanie Davis when she reviewed and 18 observed the site conditions, and the testimony of the 19 AECOM engineer, Robert Humbert? 20 A Yes. 21 Q And do you have an opinion, sir, concerning the 22 professional engineering practice -- from a professional 23 engineering practice standpoint, concerning the manner in 24 which Mr. Humbert testified that he and his firm AECOM 25 approached the designing of the grades on the 93 acre <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>	Loyst-Direct/Calica 251 1 have you considered proper to consider in terms of design 2 of grading and excavation? 3 A Well, typically you try to optimize or balance a cut 4 and fill, you know, as much as possible. 5 Q What does that mean? 6 A It means if you are cutting in one area of the site, 7 you would try to use that and try to fill another site, so 8 you are not exporting to another site and not having to 9 import a lot of material. 10 Q Why is that so? 11 A Well, cost, number one. You know, just preserving, 12 you know, the resources that you have. It makes for a 13 better general project. 14 Q I see. 15 What about ground water considerations? Is that 16 something that as an engineering practice would be 17 considered in developing a site of this size for a use 18 such as contemplated here? 19 A Yes. 20 Coming in you would be working with a team of 21 professionals. 22 I work with Stephanie a lot on different sites. 23 You have engineers, you have planners, you have 24 geologists, environmental scientists, etcetera. 25 Q And why do you consider ground water impact in <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>

Loyst-Direct/Calica 252 1 approaching a design of a project of this type from a 2 standpoint of sound engineering practice? 3 A As Stephanie elaborated on, the more filtering 4 capacity you have on the site with the ground water, it 5 just makes common sense, the more material the better 6 filtering to prevent any kind of contaminants that might 7 be introduced. 8 Q If you were approaching the design of a 93 acre site 9 for industrial use, would you consider it professionally 10 appropriate as an engineer to consult with or at least 11 have as part of your team a geologist to consider ground 12 water considerations? 13 A Yes. 14 Q Now, you indicated when you design projects you try 15 to minimize cut and fill. 16 Do you have an opinion concerning whether or not 17 from a standpoint of good engineering practice and design 18 the methodology as testified by Mr. Humbert of leveling 19 the site to a uniform grade of 50 feet is or is not 20 consistent with sound engineering principles and 21 practices? 22 MR. ARONOFF: I object, Judge. Mr. Humbert did 23 not testify about that. Mr. Humbert designed conceptual 24 design track plan. He did not testify about the 25 methodology questioned about. <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>	Loyst-Cross/Aronoff 254 1 creation of slopes? 2 A Yes. 3 Q All right. 4 In looking at the manner in which the excavation 5 has occurred both in the southwest corner where there is 6 what looks like a pit area, and the cliff, do you as an 7 engineer observe any indication that there has been any 8 engineering design of the slopes? 9 A No. I mean, they look steeper than, you know -- 10 steeper than you normally want to have. 11 Q In your opinion, sir, is that reflective of any type 12 of engineering design or planning whatsoever? 13 A No. 14 MR. CALICA: I have no further questions of the 15 witness. 16 THE COURT: Cross-examination. 17 MR. ARONOFF: Yes. 18 19 CROSS-EXAMINATION 20 BY MR. ARONOFF: 21 Q Mr. Loyst, let me start with the picture Mr. Calica 22 referred to. 23 THE COURT: So we are clear, is that Exhibit B? 24 MR. ARONOFF: I believe it is, yes, your Honor. 25 MR. CALICA: There is also -- they are also in <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>
Loyst-Direct/Calica 253 1 THE COURT: Would you rephrase the question, 2 please. 3 Q You were present during Mr. Humbert's testimony; is 4 that correct? 5 A Yes. 6 Q And you have an opinion concerning whether or not his 7 testimony that the site was being graded to a uniform 8 level at the lowest elevation of 50 feet is or is not 9 consistent with sound, good, accepted engineering 10 practice. 11 MR. ARONOFF: Objection. 12 THE COURT: Objection sustained. 13 Q Did you have a chance to see the photographs 14 indicating some of the areas of elevation on the site? 15 A Yes. They are aeriels. 16 Q Are you able to observe what the angles of the slopes 17 are in the areas shown on Exhibit 16 and 21, and in 18 particular the southwest corner of the parcel and the 19 westerly side where there is what appears to be a cliff of 20 some type of an area that has been excavated? 21 A They appear to be steep. 22 Q Are you familiar with slope design? 23 A Yes. 24 Q And are there engineering practices that are 25 generally -- engineering considerations involved in the <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>	Loyst-Cross/Aronoff 255 1 evidence here as 16 and 21. 2 Q Which one are you referring to when you were 3 referring to the slope being steep? 4 A Either one, either 16 or 21. 5 MR. ARONOFF: One question, your Honor? 6 THE COURT: Sure. 7 Q You understand that BRT's expansion construction has 8 been halted? 9 A Yes. 10 Q And this is a construction project stopped midway 11 because of a TRO? 12 A Yes. 13 Q You mentioned you are an environmental engineer? 14 A Yes, civil environmental engineer. 15 Q And Ms. Mody is the same? 16 A Yes. 17 Q Neither of you are railway engineers? 18 A No. 19 Q You have adopted Ms. Mody's report in this case; is 20 that correct? 21 A Yes. 22 Q Let's take a look at that. It is Exhibit I. 23 (Handed to the witness.) 24 Q You have it in front of you? 25 A Yes. <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>

Loyst-Cross/Aronoff 256 1 MR. ARONOFF: Judge, you have it available, 2 Exhibit I? 3 THE COURT: I am with you. Go ahead. 4 Q This is the report that Ms. Mody submitted in 5 connection with the preliminary non-injunction motion? 6 A Yes. 7 Q This is what you adopted? 8 A Yes. 9 Q Look at the second page, and she excerpts portions of 10 her report, which is also annexed in full as an exhibit, 11 right? 12 A Yes. 13 Q Do you see those excerpts in the middle of the page? 14 A Yes, the quotes? 15 Q Yes. 16 Let me just read the first line? 17 It is our understanding that much of parcel C, 18 parenthesis, approximately 93 acres, end paren, of the BRT 19 site is presently being cleared of forest and excavated to 20 an elevation of 50 feet above mean sea level. 21 Do you see that? 22 A Yes. 23 Q Now, is that accurate, sir? 24 A It appears to be, yes, especially looking at the 25 photos. <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>	Loyst-Cross/Aronoff 258 1 A Where is that now? 2 Q I just completed the first sentence. 3 THE COURT: The indented section of paragraph 4 five. 5 A I don't see that. 6 Q You see paragraph five? 7 A Yes, page 2? 8 Q Yes. 9 You see an indented quoted excerpt from a 10 report. You see that? 11 A Yes, in the middle of the page. 12 Q I read earlier the first half of the first sentence, 13 which ends at -- I stopped reading at 50 feet above mean 14 sea level. 15 A Yes, I see it. 16 Q Now I read the rest of it. 17 A Yes. 18 Q As part of BRT's track extension project, so as to 19 align the new tracks for a railroad spur on parcel C with 20 existing tracks. 21 You see that? 22 A Yes. 23 Q That is your understanding of BRT's project, is it 24 not? 25 A Yes. <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>
Loyst-Cross/Aronoff 257 1 Q You are basing that on the photos that you are 2 looking at in court today? 3 A As far as clearing and excavation, yes. 4 Q Were you looking at those photos with Ms. Mody when 5 you prepared this report with her? You didn't see those 6 photos before today, have you? 7 A No. I have seen them in the last several days. 8 Q The last several days, but not before you submitted 9 this report? 10 A I saw some grading plans. 11 Q Some grading plans? 12 A Yes. 13 Q Okay. 14 But you didn't see any evidence of actual 15 grading activity until you came to court? 16 A No. I have not been to the site. 17 Q It is not accurate that parcel C is 93 acres, is it? 18 A Well, putting C and B together it is 93 acres. 19 Q So it should read parcel B and C? 20 A Yes. 21 Q Let's continue with the rest of that sentence. 22 It reads, as part of BRT's track extension 23 project, so as to align the new tracks for a railroad spur 24 on parcel C with existing tracks. 25 Do you see that? <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>	Loyst-Cross/Aronoff 259 1 Q Later on in that same paragraph, do you see where it 2 starts, we understand that? 3 I will read it, in the middle of the paragraph. 4 We understand that the existing Long Island Rail 5 Road track near the southern of parcel C is at 6 approximately 100 foot elevation. You see that? 7 A Yes. 8 Q What is the elevation of the Long Island Rail Road at 9 the southeast corner, do you know that? 10 A Southeast corner? 11 Q Yes. 12 A Approximately that elevation. 13 Q You believe it is approximately 100 feet at the 14 southeast corner, sir? 15 A Well, the southeast corner, going to parcel B you 16 mean, in that area? 17 Q What is the elevation? 18 A I believe that is roughly about the 60 feet -- in the 19 60 range. 20 Q So you understand that the Long Island Rail Road 21 slopes down for 100 feet in the 60 foot range? 22 A Yes. 23 Q Do you know if the Long Island Rail Road was required 24 to perform any grading or excavation in order to lay the 25 track at that elevation? <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>

Loyst-Cross/Aronoff 260 1 A Yes. 2 Q So they might have? 3 A They might have. 4 Q The next paragraph, page 2, in the quoted excerpt 5 still, and it starts with, good engineering practice. 6 Do you see that? 7 A Yes. 8 Q Good engineering practice dictates using the excess 9 fill located elsewhere on the site to level the site and 10 thereby reduce the need for excavation and removal of 11 clean virgin material. 12 Do you see that? 13 A Yes. 14 Q Did I read that right? 15 A Where -- in the second paragraph now? 16 Q Yes, sir. 17 A I guess I don't see exactly where you are reading. 18 MR. ARONOFF: May I approach, your Honor? 19 THE COURT: Sure. 20 (Counsel approaches the witness stand.) 21 Q You have it? 22 A Yes. 23 Q What is the engineering practice being referred 24 there? 25 A Balancing, cut and fill. <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>	Loyst-Cross/Aronoff 262 1 A We are looking at site development type design, 2 whether it is a railway or building or anything else. 3 Q Let's talk about proper fill for a second -- cut and 4 fill. 5 You mentioned on direct cut and fill is mostly 6 about cost, cost number one? 7 MR. CALICA: Objection. 8 THE COURT: You may answer the question. 9 A I said cost was one of the factors. 10 Q The reason it is a factor is typically it costs 11 less -- there is a cost savings associated with not having 12 to remove the fill off-site and paying for storage 13 someplace and being able to use it elsewhere on the 14 property; is that right? 15 A Yes. 16 Q Here you understand much of the excavated material 17 has value? 18 A Yes. 19 Q It has value that can be realized by selling it? 20 A Yes. 21 Q Have you calculated what percentage of the excavated 22 material from the BRT site is actually reusable? 23 A I haven't done calculations, but it would be most if 24 not all of the material would be reusable. I am assuming 25 it is clear, but it seems like a pretty pristine site. <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>
Loyst-Cross/Aronoff 261 1 Q What specific engineering standards or guidelines are 2 you referring to? 3 A Just normal practice. 4 Q Just normal practice? 5 A Good engineering practice that we learn in school and 6 through experience. 7 Q You can't name a specific guideline or principle 8 beyond that? 9 A Not that I -- I don't think there is a, you know, 10 a -- an agency or something. It is just what we do. 11 Q Okay. 12 Are you familiar with AREMA, the acronym 13 A-R-E-M-A? 14 A No. 15 Q You never heard of it? 16 A Yesterday. 17 Q For the first time? 18 A Yes. 19 Q It is the American Engineering -- American Railway 20 Engineering and Maintenance of Way Association. 21 It is something you have not heard of since 22 yesterday? 23 A No. 24 Q It is fair to say you didn't consult the AREMA 25 guidelines in reaching these conclusions? <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>	Loyst-Cross/Aronoff 263 1 Q Have you calculated the cut and fill method to be 2 used as opposed to selling the material that can be sold? 3 THE COURT: I'm not sure I understand the 4 question. 5 Can you rephrase it? 6 MR. ARONOFF: Yes, I can. 7 Q You mentioned there was a value to be realized from 8 selling some of the excavated material, and you understand 9 that to be the case, right? 10 A I would think it is clean sand. 11 Q BRT can sell it and offset some of its construction 12 costs? 13 A Yes. 14 Q And have you calculated -- and you advocated for BRT 15 to use a cut and fill method, which means instead of 16 selling that sand they would put it elsewhere on the site, 17 spread it out to raise the level of the topography, right? 18 A Raise the level and even it out in certain areas, 19 yes. 20 Q And if they did that, they wouldn't be able to sell 21 the sand, they would be using it on the property? 22 A Yes. 23 Q And my question is: Have you attempted to calculate 24 what financial impact it would have on BRT if they use 25 that method as opposed to the method of selling the sand? <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>

Loyst-Cross/Aronoff 264 1 A No, I have not done the cost calculations. 2 THE COURT: I have a question. 3 There was in evidence yesterday, and I will not 4 remember the fancy word, but essentially debris type 5 material, construction debris brought in and potentially 6 used as fill. 7 THE WITNESS: Right. 8 THE COURT: Is there a cost to bring that 9 material in, or does one get a benefit because it is 10 something that someone else needs to get rid of? 11 THE WITNESS: Normally there is a cost to dump 12 material. 13 THE COURT: So what I'm saying, the person who 14 owns the land would be getting a fee or paying for having 15 that material delivered? 16 THE WITNESS: Would be getting a fee. Would be 17 taking in money. 18 THE COURT: All right. 19 Q You heard Mr. Humbert's testimony yesterday where he 20 set forth the operational objectives communicated to him 21 in connection with his conceptual track design? 22 A Yes. 23 Q You have not presented an alternative design plan to 24 meet those conceptual objectives, have you? 25 A No. <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>	Loyst-Redirect/Calica 266 1 REDIRECT EXAMINATION 2 BY MR. CALICA: 3 Q Mr. Loyst, how many projects have you designed or 4 worked on that involved construction of a site that is 5 previously undeveloped? 6 A From this size, more than 20. 7 Q And how about if we dropped that from ninety-three 8 acres to five acres, ten acres, twenty acres, how many? 9 A A hundred. 10 Q And some of them involve industrial development? 11 A Yes. 12 Q Some involve landfill design? 13 A Yes. 14 Q Okay. 15 In any of those projects, from a design or 16 engineering perspective, did you employ the practice of 17 balancing cut and fill? 18 A Yes. 19 Q In every one of them? 20 A You always try to maintain a balance. 21 Q Have you tried to -- have you had to have compliance 22 with zoning issues in municipal government? 23 A Yes. 24 Q In your experience is there an effort to be made 25 required to remove fill material and balance -- <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>
Loyst-Cross/Aronoff 265 1 Q Are you familiar with the acronym SWPP? 2 A Yes. 3 Q What is the purpose of the SWPP? 4 A A plan, documented, and is for the site to minimize 5 erosion and manage storm water on-site. 6 Q You are familiar with the SWPP plan submitted by BRT 7 for the Town? 8 A No. 9 Q You are not? 10 A No. 11 Q You have not seen it? 12 A No. 13 Q And that was not something you asked your client for? 14 A I have seen the SWPP, no. 15 MR. ARONOFF: No further questions. 16 THE COURT: All right. 17 Redirect? 18 MR. CALICA: Yes. 19 THE COURT: Brief. 20 MR. CALICA: Yes. 21 THE COURT: Brief being the operative word, 22 counsel. 23 MR. CALICA: Yes. 24 25 <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>	Loyst-Redirect/Calica 267 1 MR. ARONOFF: Objection. 2 THE COURT: I will allow it. 3 A Yes. 4 Q In all cases? 5 A Yes. 6 Q Does doing so, minimizing cut and fill, minimize 7 ground water contamination? 8 A Yes. 9 Q Minimize erosion? 10 A Yes. 11 Q And minimize storm water runoff? 12 A Yes. 13 Q I will show you a document which is marked by 14 defendants as HH. They have identified it as their SWPP 15 plan. 16 MR. CALICA: May I hand it up? 17 THE COURT: Yes, please. 18 (Handed to the witness.) 19 Q Incidentally, are you familiar with the Bowne 20 Engineering firm? 21 A Yes. 22 Q Are they a reputable and well-regarded engineering 23 firm on Long Island? 24 A Yes. 25 Q And do you know whether or not they perform any <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>

268 1 railway engineering? 2 A I don't know. 3 Q The question is this, sir: That is the SWPP plan 4 prepared by Bowne, and the defendants identified it as 5 their effort to deal with storm water pollution 6 protection, as you described it. 7 Anything in that SWPP plan that shows elevations 8 on the 93 acre parcel? 9 A I can hardly read it. 10 Q Do your best. 11 Anything on it to show elevations on the 93 acre 12 parcel? 13 A No. 14 Q Is there anything that shows grading, or plans for 15 grading, on the 93 acre parcel? 16 A Not that I can see. 17 Q Is there anything showing the location or plan 18 location of the railway -- 19 A No. 20 MR. CALICA: I have no further questions. 21 THE COURT: You can step down, sir. 22 (Whereupon, the witness leaves the witness 23 stand.) 24 THE COURT: Call your next witness, please. 25 MR. CALICA: Your Honor, I indicated to <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>	Miller-Direct/Calica 270 1 THE COURT: Pull the microphone nice and close 2 for you. 3 Oakland Transportation Holdings? 4 THE WITNESS: Yes. 5 THE COURT: What is that? 6 THE WITNESS: It is the holding company that 7 owns Brookhaven Rail, and we also own the majority of 8 Brookhaven Rail Terminal. 9 THE COURT: Excellent. 10 Q Is your background in accounting, business, or what, 11 sir? 12 A I have a background in both industrial operations, 13 engineering and finance. 14 Q Okay. 15 And how long have you been involved with or 16 associated with the Brookhaven Rail Terminal operations in 17 Yaphank? 18 A Since 2011. 19 Q So you had no role involving the prior litigation 20 brought by BRT against the Town and the settlement in 21 2010; correct? 22 A I joined Oakland Transportation Holdings in 2011, so, 23 no. 24 Q Now, when you came on board, was Sidney B. Bowne 25 Engineering already employed by BRT? <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>
Miller-Direct/Calica 269 1 Mr. Aronoff I will be calling his client Daniel Miller, 2 and he is going to want to on cross -- 3 THE COURT: Mr. Miller is who? 4 MR. ARONOFF: The CFO for BRT. 5 THE COURT: Is that your next witness? 6 MR. CALICA: Yes. 7 THE COURT: Come on up, sir. 8 MR. ARONOFF: Again, Judge, if we can go beyond 9 the scope to save time? 10 THE COURT: Absolutely. 11 12 DANIEL MILLER, 13 called as a witness, having been first 14 duly sworn, was examined and testified 15 as follows: 16 THE CLERK: Please state and spell your name for 17 the record. 18 THE WITNESS: Daniel Miller, M-I-L-L-E-R. 19 20 DIRECT EXAMINATION 21 BY MR. CALICA: 22 Q Good morning, Mr. Miller. 23 What is your business or profession, sir? 24 A I'm the managing director for Oakland Transportation 25 Holdings. <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>	Miller-Direct/Calica 271 1 A Yes. 2 Q And what was Bowne's role? 3 A Bowne Group is an engineering firm that we have been 4 engaged with for a number of years. And at the time that 5 I joined Oakland Transportation Holdings, Bowne Group was 6 an active part of our engineering and design. 7 THE COURT: What year did you say you came on? 8 THE WITNESS: 2011. 9 THE COURT: Thank you. 10 Q Was Bowne involved in doing the railway engineering 11 or design? 12 A Yes, some of the railway engineering, yes. 13 Q Did you have or did Oakland or BRT have a company 14 Systra, S-Y-S-T-R-A, Engineering, on board? 15 A Yes. 16 Q And who had hired them? 17 A They were on board before I joined, so I don't know 18 exactly who started that engagement, but they were engaged 19 with BRT at the time I started with Oakland. 20 Q Do you know anything about the background of Systra? 21 A I understand they have a more specific knowledge than 22 Bowne in railway engineering. 23 Q Do you know whether or not they are considered an 24 internationally recognized railway design and engineering 25 firm? <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>

Miller-Direct/Calica 272 1 A My understanding is we engaged them because we felt 2 they were a reputable and competent firm. 3 Q Do you know that they had designed what we call the J 4 track plan, which is in evidence as Exhibit 1? 5 A Yes. I believe they are a part of that. 6 Q Okay. 7 If Systra was doing the railway design, what was 8 Bowne doing? 9 A Bowne and Systra worked together on a number of 10 aspects. Bowne is a civil engineering firm we used for 11 more of the civil work associated with the site. We use 12 and rely on Systra for our railway system engineering. 13 THE COURT: I'm sorry, I'm confused. 14 If you have Systra designing the railroad, what 15 is Bowne doing? 16 THE WITNESS: Well, Systra was more specifically 17 aligned with the track design and the specific railway 18 issues. They have a more in-depth experience in that 19 area. 20 THE COURT: Right. 21 THE WITNESS: However, we have to coordinate 22 closely with Bowne, who are familiar with the site from 23 the beginning, involving civil engineering and grading and 24 things like that. 25 So we used two firms with slightly different HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER	Miller-Direct/Calica 274 1 THE COURT: Do you have it? 2 THE WITNESS: Yes. 3 Q Do you have the email in front of you? 4 A Yes. 5 Q Did you receive it? 6 A Yes. 7 Q All right. 8 Do you recall, sir, that your engineer at Bowne, 9 Mr. Kuo, responded to you and Mr. Solomon as follows: 10 Quote, I was not involved in the decision making -- 11 THE COURT: You have to read nice and slow for 12 the record. 13 MR. CALICA: I was not involved in the decision 14 making for the single versus double. You have to talk to 15 Andy. 16 I can only provide you with site related 17 engineering perspective. Systra is the rail engineer. 18 Do you recall having received that information? 19 A Yes. 20 Q Does that correctly report what the allocation and 21 responsibility was -- 22 THE COURT: Counsel, where is that on this 23 document? 24 MR. CALICA: It is in the middle of the page, 25 your Honor, it is the May 13th, 2013 email from Lawrence HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER
Miller-Direct/Calica 273 1 specific skillsets. 2 Q Who did you deal with at Bowne? 3 A Most of my dealings were with Larry Kuo, K-U-O. 4 Q Were you assisted by an individual named Tom Solomon? 5 A Yes. 6 Q Who is Tom Solomon? 7 A The controller of BRT. 8 Q In the ranking of your organization, who holds a 9 higher role? 10 A Tom Solomon reports to me. 11 Q Did he work under your direction as it related to the 12 financial aspects of the BRT development on the 93 acre 13 parcel? 14 A Yes, he did. 15 Q Okay. 16 MR. CALICA: I would like to offer in evidence a 17 document produced at BRT, which is an email from Lawrence 18 Kuo to Tom Solomon and to Dan Miller dated May 13th, 2013. 19 THE COURT: Do I have a copy of that somewhere? 20 (Handed to the Court.) 21 MR. CALICA: These are the documents received in 22 the early morning hours on Monday. 23 THE COURT: Fine. Give me an exhibit number, 24 please. 25 MR. CALICA: 21. HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER	Miller-Direct/Calica 275 1 Kuo of Bowne to Solomon and -- 2 THE COURT: I have it. 3 Q Does that statement correctly report the allocation 4 of engineering responsibility between Systra Engineering 5 as the rail engineer and Bowne? 6 A I'm not sure what question you are asking. 7 Q My question is: I asked you whether Bowne was 8 involved in track design. And you said Systra was the 9 designer. And I think you testified that Bowne was also 10 working with them in the rail aspect of the development. 11 Now I'm asking you if you stand by that 12 statement when you look at the email which was just 13 offered in evidence. 14 A I will explain to you that both Systra and Bowne 15 worked closely together on a number of engineering aspects 16 on the site. It is difficult to compartmentalize a 17 complex project like this. Systra focused on rail because 18 that is where their depth of expertise involved. Bowne 19 was focused on other aspects, but there was careful 20 coordination between the two obviously as we planned the 21 site. 22 Q You recall, sir, that Systra designed a J track 23 design or option for the site, correct? 24 A Yes, I do. 25 Q And that was some 5,600 feet of track that ran along HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER

Miller-Direct/Calica 276 1 the southern boundary, along the southern boundary 2 entering on the westerly side, going to the east, and 3 going north up to the Long Island Expressway and ending 4 there; is that correct? 5 A Yes, I do. 6 Q Is Systra still working for Brookhaven Rail Terminal? 7 A A limited basis. 8 Q Have they been replaced by AECOM? 9 A Pretty much. 10 Q When did that replacement occur? 11 A In early 2013 as we began contemplating a wide 12 variety of issues related to site development, we felt the 13 engineering skillsets we had on board between Bowne and 14 Systra were appropriate but narrow. 15 We reached out for a national firm with a wider 16 breadth of knowledge to incorporate both rail design, 17 civil engineering, and a wide variety of other 18 construction issues we felt we would face. 19 Q You felt that Systra, an international railway 20 engineering firm with offices in New York and Paris and 21 elsewhere, was not suitable to develop a 93 acre site in 22 Yaphank, the Town of Brookhaven? 23 THE COURT: Objection sustained. 24 Q What engineering firm developed the O track design? 25 A Every engineering firm that we dealt with has HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER	Miller-Direct/Calica 278 1 configuration. And that has been consistent in all of our 2 engineering conversations. 3 Q Did Systra design an O track? 4 A Systra was involved in a wide variety of engineering 5 up to that point. 6 Q Did Systra design an O track, sir? 7 A I would have to go back and review the plan documents 8 from the earlier years to know which firms produced which 9 documents. 10 Q I will tell you, sir, that your counsel produced 11 2,000 pages of documents, I have not seen an O track 12 bearing the name of Systra Engineering. 13 Are you aware of any such documents, sir? 14 A No, not at this time. 15 Q Would you agree that Systra designed a J track and 16 somebody else other than Systra designed and contemplated 17 an O track? 18 A I would not agree with that, because in 2012 we 19 already contemplated an O track. 20 Q Who is "we"? 21 A The Brookhaven Rail Terminal. 22 Q Are you a railway track designer? 23 A No, I'm not. 24 Q Is Tom Solomon a railway track designer? 25 A More of -- both of us are more finance. HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER
Miller-Direct/Calica 277 1 contemplated the exact type of layout on parcels B and C 2 based on the constraints and operating requirements that 3 we faced. 4 Q Didn't Systra design a J track configuration ending 5 at the northeast corner and stopping south of the Long 6 Island Expressway? 7 A That was a phase of construction. Absolutely. 8 THE COURT: You say a phase? 9 THE WITNESS: Yes, and one of the designs 10 presented here. 11 Q And how would that phase continue? 12 A Well, if you look at the site plan in front of us 13 here, that addresses some of the engineering concerns and 14 development concerns that we have for the full utilization 15 of the site, such as contemplating access to parcel D to 16 the south. But it does not provide for the track space to 17 handle the operational requirements that we reviewed 18 yesterday. 19 Q So you decided that the J track option designed by 20 Systra and presented to the Town was not suitable, and you 21 wanted an O track; is that correct? 22 A I don't think that's correct. 23 Q Well, tell me how I'm wrong. 24 A Well, in 2012 we had discussed on a number of 25 occasions what we were referring to as an O track HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER	Miller-Direct/Calica 279 1 Q All right. 2 The question is: Who designed an O track in 3 2012? 4 A Well -- 5 Q And you said Systra didn't do that. 6 A If you would like to review the plans contemplated 7 and provided over time, you can do so. 8 I'm well aware of the O track plans we did in 9 footnote 12. I don't recall who did them. 10 Q Do you believe Bowne did some? 11 A I'm sure Bowne was involved. 12 Q Even though Mr. Kuo, the engineer at Bowne, said he 13 couldn't provide information from a railway engineering 14 perspective, and that was not what his company does? 15 A Yes, that's correct. They were involved in the 16 project. 17 Q Despite what Mr. Kuo said in his email to you and 18 your subordinate controller, Mr. Solomon? 19 THE COURT: Objection sustained. 20 Q Moving on. 21 When you came on board as the chief financial 22 officer, were you considering from an economic standpoint 23 the amount of sand that could be excavated, removed from 24 the site and sold? 25 A We considered a wide range of economics associated HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER

Miller-Direct/Calica 280 1 with a project of this size, which includes the potential 2 sale of materials developed in construction. 3 Q Does that mean the answer is yes? 4 A Yes. 5 Q And how did you rank the consideration of excavating, 6 removing and selling sand among those goals you just 7 testified to, Mr. Miller? 8 A As a very small portion of an overall developing 9 plan. 10 Q Are you acquainted with the ground lease between BRT 11 and Sills Expressway under which you ground leased 12 parcel B, 20 acres on the westerly side of the site? 13 A Yes, I am. 14 Q And that very ground lease provides that BRT receive 15 no less than 60,000 cubic yards of sand to be excavated 16 and removed from the site? 17 A Yes. 18 Q And were you involved in the business terms of that 19 lease? 20 A Yes. 21 Q And would you consider the fact that the document 22 which conveyed control of parcel B to your company 23 specifies 600,000 cubic feet -- yards, rather, to be 24 excavated and removed, and the very first document, as you 25 said, a minor consideration? <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>	Miller-Direct/Calica 282 1 A Yes. 2 Q You see it has the cc to you from Lawrence Kuo -- I 3 mean from Tom Solomon, the controller, who reports to you? 4 THE COURT: Do you recognize these documents? 5 THE WITNESS: Yes. 6 THE COURT: Is it an accurate production of the 7 group's emails involved in your business? 8 THE WITNESS: To my knowledge, yes. 9 THE COURT: Would you like to offer it? 10 MR. CALICA: Yes, sir. 11 THE COURT: Any objection? 12 MR. ARONOFF: No. 13 THE COURT: Now it is admitted. Now you can 14 talk about it. 15 (Whereupon, Plaintiff's Exhibit 30 was received 16 in evidence.) 17 Q Hi, Larry, for accounting purposes, I'm trying to 18 record an estimate of sand in tons on our balance sheet. 19 Dan provided me with this analysis from you. The sand is 20 being measured in cubic yards. 21 Then it goes on to discuss converting cubic 22 yards to tons. 23 Isn't it a fact, sir, the sand planned to be 24 excavated and removed from the site was being shown on 25 BRT's balance sheet? <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>
Miller-Direct/Calica 281 1 A Yes, I would. 2 MR. CALICA: Your Honor, I would like to offer 3 the ground lease into evidence. 4 THE COURT: We can get that. Keep going until 5 you finish. 6 MR. CALICA: Okay. 7 Q How many times, sir, did you communicate with Bowne 8 asking for computations of the amount of sand that can be 9 excavated and removed from the site if a uniform grade of 10 50 feet was intended? 11 A How many times? 12 Q Yes. 13 A We did communicate about that topic. But as to how 14 many times we did, I wouldn't know. 15 Q But it was a minor consideration, correct? 16 A What was minor consideration? 17 Q The amount of sand you would remove and sell. 18 A Relative to the entire project, yes, it was. 19 MR. CALICA: I would like to offer an email 20 from -- 21 THE COURT: Mark it as Exhibit 30 and give it to 22 the witness. 23 MR. CALICA: Okay. 24 (Handed to the witness.) 25 Q You have the document in front of you? <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>	Miller-Direct/Calica 283 1 A Yes, it was. 2 Q But the amount you would get for removing sand and 3 fill was in your words a minor consideration; is that 4 correct? 5 A That's correct. 6 Q All right. 7 MR. CALICA: I would like to show the witness a 8 document BRT Bates stamp 928 and offer it as the next 9 exhibit for identification. 10 THE COURT: It is 31. 11 (Handed to the witness.) 12 Q Do you recognize that email, sir? 13 A Yes, I do. 14 Q Is it a correct copy insofar as you know? 15 A It would appear to be. 16 MR. CALICA: I offer it in evidence, your Honor. 17 MR. ARONOFF: No objection. 18 THE COURT: All right, I allow it, go ahead. 19 (Whereupon, Plaintiff's Exhibit 31 was received 20 in evidence.) 21 Q This email from you -- to you, directly to Larry Kuo 22 at Bowne and copied to you, to Solomon, is called Phase 2, 23 rough grading plan. Phase 2, estimated cut and fill 24 analysis. 25 MR. ARONOFF: Objection, not what it is called. <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>

Miller-Direct/Calica 284 1 MR. CALICA: Attachments, sorry, I misread that. 2 It is called sand estimates. I was reading the wrong 3 line. It is dated November 12th, 2012, and it reads as 4 follows: 5 Are you able to put your sand survey in a more 6 formalized report? We want to have a formalized estimate 7 on file as backup for our tax estimates regarding 8 depletion. 9 Do you recall receiving that information? 10 A Yes, I do. 11 Q So was your company seeking a formalized calculation 12 in the amount of fill that would be removed and sold from 13 the site? 14 A We were trying to make our absolute best estimate of 15 what we thought at the time what we felt was going to be 16 removed from the site. 17 Q And it was going to be a tax consideration for the 18 tax benefit of BRT; is that correct? 19 A Actually, if you want to get into the accounting 20 behind it, we have to show it as an asset on our balance 21 sheet, and then depletion of the asset factors into the 22 tax calculations, which is right. 23 THE COURT: Is that with your accounting 24 background? 25 THE WITNESS: I'm not a CPA. I have a finance <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>	Miller-Direct/Calica 286 1 recommended by all of our engineering staff. 2 So as we prepared our year end books for 3 accounting, our auditors required us to make estimates of 4 the eventual amount of sand that would be removed from the 5 site and the financial implications of that. 6 THE COURT: And this was drawn by Bowne; is that 7 correct? 8 THE WITNESS: That's correct. 9 THE COURT: And they have track drawings on here 10 of some sort, yes? 11 THE WITNESS: Correct. 12 THE COURT: Would that have been their tracks? 13 Or would they have gotten that information from Systra and 14 transferred it, if you know? 15 THE WITNESS: There was a lot of communication 16 between Bowne and Systra, passing overlays back and forth, 17 etcetera. 18 THE COURT: I would like to get a better copy of 19 Phase 2. There has to be a bigger board. 20 MR. CALICA: We will provide it to you, your 21 Honor. 22 THE COURT: All right. 23 Q Mr. Miller, directing your attention to the 24 attachment to Exhibit 31, prepared by Bowne, as the Court 25 pointed out, and as I'm directing to you, it shows what <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>
Miller-Direct/Calica 285 1 background with a variety of staff in accounting working 2 for me. 3 THE COURT: You are familiar with the concept of 4 depletion? 5 THE WITNESS: Yes. 6 THE COURT: When it comes to something like sand 7 depletion, that is generally associated with mining 8 accounting? 9 THE WITNESS: I don't know that specifically. 10 THE COURT: And the plan attached to the email, 11 was it part of it originally? 12 THE WITNESS: You know, I don't know. It would 13 be tough for me to -- to be honest, I'm not certain. 14 THE COURT: Are you familiar with the Phase 2 15 plan attached here? 16 THE WITNESS: I'm familiar with this plan here, 17 yes. 18 THE COURT: In the middle, and to the right of 19 center, there is a sort of odd three-legged, almost a 20 peace sign, elevation 50, and it is very small and hard to 21 see. 22 Was it the suggestion there that the entire 23 center of the property would be graded down to 50? 24 THE WITNESS: Yes, the expectation as we 25 developed the site is that elevation 50 was the elevation <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>	Miller-Direct/Calica 287 1 appears to be a proposed elevation of 50 feet across the 2 entire site from the westerly side to the easterly side, 3 including up to the north; is that correct? 4 A That's correct. 5 Q Now, have you seen the SWPP plan that your counsel 6 offered into evidence, and which was provided to the Town? 7 A Yes, I have. 8 Q All right. 9 There is an extra copy as Exhibit 19 in our 10 binder. I think it is Defendant's Exhibit G? 11 MR. ARONOFF: HH. 12 MR. CALICA: HH. 13 (Handed to the witness.) 14 Q Do you see the SWPP plan? 15 A Yes, I do. 16 Q And were you aware that that document was provided by 17 BRT to the Town of Brookhaven? 18 A Yes, I was. 19 Q And does the SWPP plan show the 50 foot elevation 20 that is on the attachment to Exhibit 31? 21 A It doesn't. The intent of the SWPP plan is to show 22 how we are going to manage the excavation during the 23 construction phase. So there is a different intent in 24 terms of what we are communicating here. 25 Q Wouldn't lowering the grade of the property from 100 <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>

Miller-Direct/Calica 288 1 to 50 or 80 to 50 feet, or 70 to 50, be involved with the 2 management of erosion and other factors in developing the 3 site? 4 A Would you repeat the question. 5 Q More directly, sir, why is it that your company gave 6 the Town a SWPP plan that did not show a 50 foot 7 elevation, and at the very same time your company was 8 exchanging with your engineers a sand removal application 9 showing the whole plan going down to 50 feet, top to 10 bottom? 11 A The SWPP plan, the intent of that plan to my 12 understanding is to manage the debris – the management of 13 soil excavation and ground water as we construct the site. 14 So there is no elevation as far as I can tell in 15 this plan, except for the track location, which looks like 16 it has stations. 17 The other plan is intended for us to estimate 18 the excavation that we intended to embark on. 19 Q But that was still in your words minor consideration 20 in terms of site development and planning; is that 21 correct? 22 A What was a minor consideration? 23 Q The amount of material you can excavate and remove. 24 A That's correct. 25 MR. CALICA: I would like to show the witness <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>	Miller-Direct/Calica 290 1 Is that your response? 2 A Essentially Jake Watral's response. 3 Q And who is Jake Watral? 4 A Jake manages some of the excavation work on the site. 5 Q In 2012 was he a partner in BRT? 6 A Yes, he was. 7 Q Is he still? 8 A Yes, he is. 9 Q He is more than an excavator, he is your partner? 10 A He is also a partner, yes. 11 Q And it is correct that your engineer said, well, I 12 guess you want us to assume a flat surface of about 56 13 feet, and your partner said, no, make that 50. 14 MR. ARONOFF: Objection. 15 THE COURT: If he can answer it. 16 A What are you asking? 17 Q Is it correct that your engineering inquired, should 18 I assume a flat surface of 56 feet? 19 And your partner, Mr. Watral, said, no. Make it 20 50? 21 A No. It is actually not what he said in this email. 22 Q What did he say? 23 A Larry, we used elevation 50 plus minus, which is 24 approximately county farm elevation. 25 Q Is it correct in response to Bowne's question, should <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>
Miller-Direct/Calica 289 1 next what is BRT document 935, and that would be 2 Exhibit 32 for ID. 3 (Handed to the witness.) 4 Q Can you identify that exchange of emails that 5 occurred in July 2012 between Larry Kuo of Bowne 6 Engineering and you on behalf of BRT? 7 A Yes, I can. 8 Q Are they accurate copies insofar as you know? 9 A Insofar as I can remember, yes. 10 MR. CALICA: I move them into evidence, your 11 Honor. 12 THE COURT: Any objection? 13 MR. ARONOFF: No. 14 THE COURT: So admitted. 15 (Whereupon, Plaintiff's Exhibit 32 was received 16 in evidence.) 17 Q Is it correct on July 20, 2012 Larry Kuo wrote to BRT 18 and said, quote, you wish for us to assume a flat surface 19 across the majority of the property to match lowest track 20 elevation at 56.12; is that correct? 21 A That is what he said here, yes. 22 Q And you responded, Larry, we have used elevation 50 23 plus, which is the approximate county farm elevation at 24 Route 495 service road elevation. Also that grade will 25 carry into parcel B with no sloping between. <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>	Miller-Direct/Calica 291 1 we assume a flat surface across the majority of 56, the 2 response was that it should be designed at 50 plus minus? 3 THE COURT: Objection sustained. 4 Q Isn't that the elevation shown in the attachment to 5 Exhibit 31, 50 feet across the entire parcel? 6 A Are you referring to this exhibit? 7 Q If that is the Bowne attachment to the email, yes. 8 If it is the SWPP, there are no elevations. 9 A If this is the drawing I referred to earlier, yes, it 10 is also elevation 50. 11 Q Isn't it a fact you respond to Bowne, Larry, please 12 use these elevations for your cut line to calculate sand 13 volume? 14 A Yes, I did. 15 Q Were you asking your engineer to say, how much sand 16 are we going to be able to excavate, remove and sell from 17 the site at a 50 foot elevation across the entire site? 18 A Yes. 19 Q But it was still a minor consideration? 20 A That's correct. 21 (Whereupon, at this time there was a pause in 22 the proceedings.) 23 MR. CALICA: Just give me a second, I know we 24 marked this yesterday. 25 Q Would you look at Exhibit 20 in the binder of <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>

Miller-Direct/Calica 292 1 plaintiff's exhibits. 2 A Yes. 3 Q In that email exchange did Mr. Kuo, your engineer at 4 Bowne, give you a calculation of the amount of fill 5 material that would be excavated, sold and removed from 6 the site based upon a uniform elevation of 50 feet? 7 A Yes. That is my understanding. 8 Q And what is the net total on parcel C and on parcel B 9 combined? 10 A The net total with the loam or without the loam. 11 Q That is one foot of topsoil. 12 A We used an estimate of one foot cover because that is 13 our experience on the site. 14 Q You can't sell the one foot? 15 A No. 16 The topsoil is stockpiled and used for later 17 when we do our final elevation. 18 Q What is your calculation of material of the type that 19 you understand can be excavated and sold to remove from 20 the site? 21 A We have approximately at this estimate 1.1 million 22 cubic yards for parcel B, and 1.3 million cubic yards for 23 parcel C. 24 THE COURT: At that point in time had you sold 25 off any sand, or was this the beginning of that operation, <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>	Miller-Direct/Calica 294 1 We spent approximately 40 million dollars 2 developing parcel A, and it is not completed yet. 3 THE COURT: All right. 4 THE WITNESS: Our expectation is when the site 5 is fully developed, it should range anywhere from 15 to 20 6 million dollars a year in net income. 7 THE COURT: What does parcel A produce in 8 income? 9 THE WITNESS: I would have to refresh my memory 10 because there is a lot of figures associated. 11 THE COURT: Give me a ballpark. What would you 12 use as your sort of metric? 13 THE WITNESS: Approximately between eight and 14 ten million dollars. For total income on the site I would 15 have to look at the breakdown. 16 THE COURT: Eight or ten million dollars a year 17 or per its life? 18 THE WITNESS: Per year. 19 THE COURT: All right. 20 Q Is it correct you calculate, after you discounted for 21 the one you called loam, that there would be some 2.5 22 million cubic yards in the aggregate of material that 23 could be mined, excavated and sold; is that correct? 24 A Correct. 25 Q And what are you selling the material for today per <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>
Miller-Direct/Calica 293 1 if you know? 2 THE WITNESS: I believe it was around that time 3 that the excavation work began on parcel B and C, but I 4 would have to refresh my memory for the specific day. 5 THE COURT: What would the projected revenue be 6 for selling that quantity of sand? 7 THE WITNESS: When you develop a site there is 8 revenue expenses, and because obviously -- when we remove 9 sand for sale from the site, there is both revenue and 10 expenses because it cost me money to excavate and handle 11 the site as we are removing sand and unloading the trucks. 12 My expectation is if we look at these estimates 13 based on average marketing conditions we experienced over 14 the past couple of years, I would expect that we would 15 have a margin of somewhere between 9 and 10 million 16 dollars related to the sand. 17 THE COURT: What is the projected revenue 18 from -- from developing the railway on parcel B and C? 19 THE WITNESS: Looking for expected revenue or 20 expected investment? 21 THE COURT: You say the sand is a minor issue. 22 THE WITNESS: Sure. 23 We looked as parcel B and C that we would 24 require somewhere between 100 and 125 million dollars to 25 fully construct the site. <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>	Miller-Direct/Calica 295 1 cubic yard? 2 A We sell it per ton. Per ton sand material ranges 3 anywhere from seven to ten dollars per ton, dollars. 4 Q Do you recall having seen in the emails that we 5 marked a conversion that cubic yards could be about 1.1 to 6 1.2 tons? 7 A Yes, I believe because earlier, yes, and -- 8 Q So you did the math and you figured how much did you 9 say, seven to nine? 10 A I believe I said between eight and ten million 11 dollars is the margin we expect for the sand. 12 Q What is the per ton cost that which you are selling, 13 the price at which you are selling sand? 14 A Between seven and ten dollars. 15 Q So an average of eight and a half? 16 A Yes. 17 Q And if we converted cubic yards at 1.1 or 1.2 -- 18 THE COURT: It is a negligible difference, I got 19 it. 20 Q How is it if you had two and a half million cubic 21 yards, which would be maybe 2.3 million tons -- 22 THE COURT: It is the other way around, I think. 23 MR. CALICA: Okay. 24 Q So 2.3 million tons at seven to ten, why are you 25 saying nine to ten million dollars, isn't it 20 million <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>

Miller-Direct/Calica 296 1 dollars plus? 2 A I believe I explained earlier there is no revenue 3 expenses associated with sand. If you look at the revenue 4 and don't include any expenses, then there would be a 5 larger number involved. But my projection from revenue, 6 and my projection from -- for margin associated with the 7 sand are two different amounts. 8 THE COURT: You are projecting a 50 percent 9 margin roughly? 10 THE WITNESS: Typically, yes. That is what we 11 have seen up to this point in time. 12 THE COURT: That is a pretty ROI, as they say in 13 the finance world; is that correct? 14 THE WITNESS: Sure. 15 Q Isn't it better ROI if you acknowledge that your 16 company is not incurring any expenses for digging, loading 17 and weighing material on parcel B, which is almost half 18 the amount in issue according to this exhibit? 19 MR. ARONOFF: Objection. 20 THE COURT: I will let you answer the question, 21 if you can. 22 A I'm not sure of the question. 23 Q Are you acquainted with the ground lease between 24 Sills Expressway Associates and your company? 25 A Yes, I am. <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>	Miller-Direct/Calica 298 1 in evidence.) 2 THE COURT: What were you referring to when you 3 said Sills would pay the cost? 4 MR. CALICA: Page 2, subdivision one, beginning 5 six lines up from the bottom of page 2, at Bates number 6 17. 7 THE COURT: It appears that that reference to 8 Sills with respect to cost relates to specific material 9 supplied. Is that correct? 10 MR. CALICA: Yes, 600,000 tons of material 11 removed from parcel B. 12 THE COURT: 600,000 tons of gravel, right? 13 MR. CALICA: Gravel free of -- 14 THE COURT: I'm not sure that is on all fours 15 here. 16 Q What is bank run gravel, free of overburden? 17 A Bank run is typically the sand that is removed from 18 the site that is not screened. 19 THE COURT: Is Sills paying the expenses of 20 removing the first 600,000 tons that you are selling? 21 THE WITNESS: No. 22 The way this works is a complex relationship 23 involving both the lease payments contemplated and the 24 sand. 25 So there is a commitment that Sills has the <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>
Miller-Direct/Calica 297 1 Q All right. 2 And under that ground lease isn't it a fact that 3 Sills is required to pay all costs associated to, quote, 4 dig, load and weigh the minerals at its sole cost and 5 expense? 6 A Sorry. What was the question? 7 Q Are you aware that that is what the ground lease 8 between BRT and Sills Expressway provides for? 9 A If you are reading it, yes. 10 THE COURT: Let's mark the ground lease and put 11 it in. 12 You are not paying any of those expenses, sir? 13 THE WITNESS: It is more complicated than that. 14 There is associated sand that we estimated, or 15 as we entered this transaction on this ground lease, 16 certain owners of parcel B had requested that part of 17 their consideration be to have the ability to use that 18 sand for their other businesses. So there is a variety of 19 transactions associated with his. 20 However, that being said, it does cost us on 21 average five dollars a ton for every ton of sand -- sand 22 removed. 23 THE COURT: The ground lease is admitted as 24 Exhibit 33 without objection, I assume. 25 (Whereupon, Plaintiff's Exhibit 33 was received <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>	Miller-Direct/Calica 299 1 right to get some of this sand, and the cost of the 2 excavation of that sand is calculated in terms of the 3 overall relationship. 4 So the sand customers are ones with a unique 5 relationship because they have ownership of some of the 6 property that we are working on. 7 THE COURT: Okay. 8 You may continue. 9 Q Sir, what is your understanding of the meaning of 10 these words: Lessor at Sills Expressway shall be 11 obligated at all costs to dig, load and weigh the 12 minerals, at the sole cost and expense, and lessor shall 13 provide at its sole cost and expense all trucking 14 necessary for removing the minerals from the property. 15 A What was your question? 16 Q What does that mean to you in the English language, 17 sir? 18 A I think it means pretty clearly what it says here. 19 Q Which means that BRT isn't incurring the cost of 20 digging, loading, weighing and trucking, but Sills 21 Expressway, the ground lessor, is paying those expenses; 22 is that correct? 23 A We are matching revenue expenses. Because we are not 24 projecting revenue for that 600,000 tons, there are also 25 not expenses associated with that 600,000 tons. <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>

Miller-Direct/Calica 300 1 Q Are you saying it is factored in as part of the rent 2 that you pay? 3 A All those numbers are looked at as part of the entire 4 lease. 5 Q When you do the value calculations based on 6 approximately 2.5 million cubic yards of net filling 7 material, would you agree if you factor in the obligation 8 of Sills that they bear these expenses, the amount is 9 greater than the nine to ten million dollars you testified 10 to, to his Honor? 11 A I would really have to look at that calculation in 12 detail to know exactly what you are asking. 13 Q All right. We will move on. 14 Who selected AECOM? 15 A We did. 16 Q Who is "we"? Were you involved in the planning 17 process? 18 A The board of directors of BRT. 19 Q How did you find AECOM? 20 A AECOM had prior relationships with some of our 21 minority partners, and we felt they were a firm that could 22 be qualified. 23 As we looked for a variety of different firms 24 that we felt would meet our needs, we selected AECOM. 25 Q And according to Mr. Humbert, that happened in <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>	Miller-Direct/Calica 302 1 THE COURT: Let's wrap it up. 2 A Would you restate that question one more time, 3 please. 4 Q Were you dissatisfied with Systra? 5 A We weren't from a track engineering perspective. Our 6 concern laid more with the holistic site development. We 7 felt Systra's skillset was narrower from what we were 8 looking for for developing the site. 9 Q Did Systra perform any calculation or recommendation 10 to you to bring the elevation of the entire site down to 11 50 feet level from its maximum elevation of 100 down to 12 the westerly side to where it is about 50? 13 A We discussed a number of different plans. I would 14 have to review specific communication with both Systra and 15 Bowne to recall who did what and when. 16 Q Do you recall Systra ever making a recommendation 17 that you grade and level the entire site after Systra 18 designed the J track where the track runs only across the 19 southerly and easterly area of the parcel? 20 A Rephrase that one more time. 21 Q Do you recall Systra ever recommending that you 22 excavate and grade the entire parcel to a uniform level of 23 50 feet after it had designed a J track which had the 24 track only along the southern and easterly perimeter of 25 the 93 acre site? <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>
Miller-Direct/Calica 301 1 October or November of 2013; is that correct? 2 A That's correct. 3 Q Pretty late in the game? 4 A Late in the game? 5 Q Considering you coming on board in 2011, and the 6 documents we have seen concerning the plan development of 7 parcels B and C. 8 A I'm not sure I understand the question. Can you 9 rephrase that? 10 Q When did the development plans for B and C begin? 11 A We have been developing plans for B and C since 2011, 12 2012. 13 Q Late in the game. 14 But would you agree that it was relatively 15 recently, October, November 2013, that AECOM was brought 16 on board? 17 A AECOM was engaged in the fall of 20013; that's 18 correct, yes. 19 Q And were you dissatisfied with Systra Engineering? 20 MR. ARONOFF: Objection. 21 I don't understand why we are planning hours of 22 testimony on their choice of the engineering firm. 23 MR. CALICA: Offer of proof, they hired an 24 engineer that designed the O track and bring the whole 25 grade down to 50 feet. <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>	Miller-Direct/Calica 303 1 A Again, I would have to review prior communication 2 with all the engineering firms to remember exactly which 3 firm recommended which things. 4 Q As you sit here under oath today, sir, do you recall 5 Systra having made any such recommendation? 6 A No. I can't focus on a specific recommendation. 7 Q I represent to you, sir, in the 2,000 pages of 8 documents produced by your counsel, there is no such 9 document. Are you aware of any other? 10 THE COURT: Strike all the portion of the 11 question other than are you aware of any other. 12 Answer that. 13 THE WITNESS: No, I'm not. 14 THE COURT: All right. 15 Q Now, when AECOM came on board, they were more 16 flexible in terms of designing the site with a uniform 17 track level of 50 feet and excavating everything to 50 18 feet; is that correct, sir? 19 THE COURT: I will sustain the objection. 20 MR. CALICA: No further questions. 21 THE COURT: Good. 22 It is cross, slash, direct. 23 MR. ARONOFF: I will be very brief, your Honor. 24 THE COURT: Please. 25 MR. ARONOFF: Most of this was covered in <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>

Miller-Cross/Aronoff 304 1 direct. I want to just summarize it. 2 THE COURT: Please. 3 4 CROSS-EXAMINATION 5 BY MR. ARONOFF: 6 Q His Honor asked the question, I think, about what the 7 scope of the sand revenue would be compared to the overall 8 investment in the project. 9 If you were to put a rough percentage on the 10 amount of offset you get from selling the sand compared to 11 your overall investment, what would that be? 12 A Our expectation was to build up parcel – our 13 expectation is that the full build-out of parcel B and C 14 will cost somewhere between 100 and 125 million dollars in 15 capital. Our expectation is that a margin associated with 16 certain material sales including sand would be somewhere 17 in the vicinity of ten million dollars when the site is 18 completed. 19 So a portion of the expected construction cost 20 are offset by sand revenue. 21 THE COURT: And are there non-private investment 22 sources, like government grants, to build the railway? 23 THE WITNESS: Yes. 24 The New York State Department of Transportation 25 granted us a two and a half million dollar grant this past HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER	Miller-Cross/Aronoff 306 1 Q In order to secure that grant, did you have to 2 explain to the Department of Transportation what your 3 expansion plans were? 4 A We had a long and drawn out conversation both before 5 the application process and as we worked toward the post 6 award of the grant to talk about all the grants and the 7 potential plans and what we planned to do. 8 Q The grant was awarded? 9 A Yes. 10 Q Do you think they would have awarded a 2.5 million 11 dollar grant to the sand mine? 12 A I have a hard time to feel why the New York State 13 Department of Transportation feels that is important. 14 Q And you have a finance background you said? 15 A Yes. 16 Q Does it make financial sense, you think, to spend 125 17 million dollar investment to get ten million dollars in 18 sand? 19 A I would have a hard time selling that to my 20 investment committee. 21 Q Can you briefly, without going too much over old 22 ground, please explain briefly to the Judge what needs to 23 happen on parcel A and why you need to expand? 24 A Parcel A is a land railway facility. We have seen 25 actual work in the last two years we have been operating. HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER
Miller-Cross/Aronoff 305 1 year, which is for an offset of a portion of the rail 2 construction in the next phase. 3 Q And we will talk about that grant for a second. It 4 is actually something I wanted to ask you about. 5 How did you secure that grant? 6 A We applied for the grant because we felt that our 7 site as an alternative to trucking freight onto Long 8 Island provided something that was of significant interest 9 to the New York State Department of Transportation, and as 10 I mentioned in the very beginning of this, there is a 11 tremendous amount of congestion on the Long Island 12 Expressway. And for a truck to haul freight from 13 elsewhere in the country to Long Island, they have to 14 cross two bridges and pay tariffs and tolls. 15 The New York State Department of Transportation 16 whom we met with on a number of occasions continues to 17 have concerns about the long-term bridge infrastructure, 18 and for us to allow a portion of the freight on Long 19 Island to bypass the truck bridges and utilize the rail 20 network is in both of our best interests. 21 And I believe that has been the majority of the 22 reason why the New York State Department of Transportation 23 granted us those funds, because they see this as an 24 important alternative for freight transportation on Long 25 Island. HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER	Miller-Cross/Aronoff 307 1 The most recent work we closed, we transloaded 172 rail 2 cars of product. Transloading that volume of rail cars on 3 such a constrained space has obvious operational 4 considerations. Parcel A is at and on certain occasions 5 above reasonable capacity. All those customers continue 6 to grow volume. 7 As an example, we transloaded in less than two 8 years over 100 million pounds of flour for bakeries on 9 Long Island. 10 That type of growth in a short time span 11 requires us to further expand the site to service both the 12 existing customers and potential customers that we are 13 engaged in negotiations with about using similar 14 facilities on parcels B and C to transload products 15 brought in via rail, to be transloaded to trucks and 16 distributed locally to Long Island. 17 Q And you were present for Mr. Humbert's testimony 18 yesterday? 19 A Yes, I was. 20 Q And you recall his testimony about the operational 21 objectives is communicated to AECOM? 22 A Yes, I do. 23 Q And is that consistent with your understanding of 24 what those objectives are? 25 A Absolutely, and I was part of that as well. HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER

Miller-Cross/Aronoff 308 1 Q Tell us what you directed AECOM to do. 2 A We intend to own this investment for the long term. 3 It is not a project remodeling we intend to invest and 4 capitalize to try to sell it five or ten years from now. 5 So the absolute primary objective was a long-term 6 efficient rail operation. The railroad has a number of 7 constraints and we want to make sure that we dealt with 8 all those as well as the site constraints as we developed 9 the property. 10 Q One of those operational objectives had to do with 11 parcel B. You recall that? 12 A Yes. 13 Q Please tell the Judge what the status of that 14 parcel B? 15 A Oakland Transportation Holdings, the owner of 16 Brookhaven Rail, acquired parcel B in 2013. We began 17 negotiations on parcel B well in advance of that. And our 18 expectation based on our analysis suggests that Long 19 Island typically has approximately one percent of the 20 freight delivered via rail. 21 Elsewhere in the northeast percentages are 22 around 19 percent. 23 So we see a big gap in the amount of rail served 24 freight on Long Island versus truck. 25 We believe by developing this type of HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER	Miller-Cross/Aronoff 310 1 A Because of the grade change that is required for our 2 railroad track construction, that is a multiyear process, 3 and as an investment firm and with the growth we were 4 seeing we simply have to start working as fast as possible 5 to generate additional rail space to handle our customer 6 load. 7 THE COURT: Who made the decision to clear, grub 8 and grade the entire property as compared to grading a 9 more surgical path? 10 THE WITNESS: Well, when we first started that 11 grading, our focus was to deal with it in a most cost 12 efficient way as possible. Because sand is a relatively 13 cheap commodity on a per ton basis. And handling sand 14 twice becomes very expensive. Every time you handle tough 15 sand, it becomes very expensive very quickly. 16 Our initial plan was to develop the site in the 17 most cost efficient way, to minimize the double handling. 18 Now, after we came into these discussions, we 19 modified our excavation plan to use a less efficient plan 20 but a more specific to the initial track work area. 21 So on the big picture basis, it is less 22 efficient for us to do it in this fashion. But we are 23 trying to be -- to work with -- 24 THE COURT: I'm confused. What fashion are you 25 doing it in now that is less efficient? HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER
Miller-Cross/Aronoff 309 1 infrastructure facility, we can capture a small portion of 2 that freight. 3 Parcel B is designed for future expansion based 4 on our expectation and future growth that we would 5 continue to need more area to do the same type of 6 business. 7 Q Let's talk briefly about grading. There has been a 8 lot of testimony today and yesterday about why it is that 9 the grading started before AECOM got involved in October 10 of 2013 and started a large area. 11 Why don't you explain to the Court why it is 12 that the grading was staged the way it was. 13 A Every single engineering firm we talked to, and this 14 has been consistent throughout my enrollment in the 15 project, looks to parcel B and C as the site developed and 16 most efficiently developed, a site most efficiently 17 developed with a base elevation of approximately 50. And 18 that is 50 feet above sea level, where approximately 50 19 percent, if I remember the percentage correctly, already 20 is. 21 We look at primarily railroad operations and 22 then we look at constraints, and look to develop the site 23 in the most efficient fashion. 24 Q And why is it that you started the grading when you 25 did back in 2012? HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER	Miller-Cross/Aronoff 311 1 THE WITNESS: Well, if you look at the concept 2 of just excavating a narrow path around the track 3 construction, that is much more difficult from an ingress 4 and egress perspective. It is also less efficient because 5 as you are grading different areas, you don't have easy 6 access in and out of the site. There is more movement 7 that is required. 8 So all that additional movement adds up to 9 additional cost, versus focusing the excavation in a more 10 focused area. 11 Q I think what the Judge was asking is: Have you 12 changed your staging of the construction -- when you 13 said -- 14 THE COURT: Honestly, that is the first I heard 15 of that. 16 MR. ARONOFF: I want to bring that out a bit. 17 Q At some point after this dispute arose, you reordered 18 the order of construction; is that correct? 19 A That's correct. 20 Because we have a New York State DOT grant for 21 track construction. That is what is going in first. So 22 in an effort to keep things moving, we specifically said, 23 okay, let's reorient and focus specifically on the next 24 section of track that needs to be laid since we are having 25 complications with the preceding or the prior plan for HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER

Miller-Cross/Aronoff 312 1 excavation. 2 Q And when did that reordering occur, the 3 reorientation? 4 A This year when the litigation began. 5 Q You have been grading the site for two years? 6 A That's correct. 7 Q And you kept the Town informed of the grading? 8 A My understanding, yes. 9 Q And have you provided reports to the Town on a 10 periodic basis about the grading that was occurring? 11 A Yes, we have. 12 MR. ARONOFF: I need to find an exhibit to put 13 it in. 14 Q I will show you what is marked as GGGG. 15 (Handed to the witness.) 16 MR. ARONOFF: I will try to introduce it as a 17 group exhibit after he identifies it. 18 Q Do you recognize the reports included in this 19 exhibit? 20 A Yes. 21 Q Would you tell the Court what they are. 22 A These are the reports that Sidney Bowne prepares on a 23 two times per month basis and provides to the Town based 24 on the ongoing basis. 25 Q The first one based on BRT 00801 is dated HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER	Miller-Cross/Aronoff 314 1 Q Would you look at the very first report under work in 2 progress, general description, the November 2010 report 3 that says excavation and mining operation ongoing. Do you 4 see that? 5 A Yes. 6 Q And that probably relates to parcel A? 7 A That's correct. 8 Q Take a look at BRT 00831. 9 A Yes. 10 Q And what is the date of that report? 11 A August 25th, 2012. 12 Q And do you see under work in progress, it says 13 excavation operation ongoing on parcel B? 14 A That's correct. 15 Q Take a look at BRT 00834. 16 A Okay. 17 Q Do you see under work in progress it says excavation 18 ongoing at area B and C? 19 A That's correct. 20 Q And take a look at BRT 00 -- also, sorry, under 21 remarks on that same BRT 00834, what does Bowne remark? 22 A The site is well maintained. 23 Q Take a look at BRT 00861. 24 A Yes. 25 Q Again, it says under work in progress, excavation in HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER
Miller-Cross/Aronoff 313 1 November 17th, 2010? 2 A That's correct. 3 Q And who is Tom Miller? 4 A Tom Miller is one of our superintendents on the site. 5 Q And if you look at the last page, BRT 00868, dated 6 December 21, 2013. 7 A Yes. 8 Q Are these the reports that were prepared and 9 submitted to the Town by Bowne on a periodic basis from 10 2010 to 2013? 11 A Yes. And I think they also continue to this day. 12 MR. ARONOFF: I will move to have it admitted as 13 a group exhibit. 14 MR. CALICA: No objection. 15 Q Mr. Miller, do you know who at the Town would have 16 been receiving reports? 17 A My understanding they are communicated via email from 18 Larry Kuo at Bowne to Greg Kelsey at the Town. 19 Q The Town engineer sitting here today? 20 A Yes. 21 THE COURT: Any objection? 22 MR. CALICA: No, your Honor. 23 THE COURT: GGGG is admitted. 24 (Whereupon, Defendant's Exhibit GGGG was 25 received in evidence.) HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER	Miller-Cross/Aronoff 315 1 areas B and C, you see that? 2 A Yes. 3 Q And it says site is well maintained? 4 A Yes. 5 Q And it also mentions asphalt? 6 A Yes. 7 That was at the time we were installing asphalt 8 near the Home Depot loading facility. 9 THE COURT: What is RCA? 10 THE WITNESS: Recycled concrete and aggregates 11 used as a base material on parcel A. In this particular 12 instance it related to the construction of the Home Depot 13 transloading facility. 14 THE COURT: Is RCA another word for what is 15 being called homogenic, I think? 16 THE WITNESS: I don't think they are exactly the 17 same thing in terms of what they were trying to insert 18 elsewhere on the property. 19 Q The homogenic, human debris we heard testimony about 20 yesterday, can you tell the Court what it is and why it 21 appears on B and C? 22 A Sure. 23 As we develop a site, and unfortunately as we 24 develop a site, there were areas that had previous 25 material accumulated, basically a variety of things. In HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER

Miller-Cross/Aronoff 316 1 addition to that, there was certain construction 2 demolition on a limited basis that occurred on parcel A 3 involving prior foundations and some brick and things like 4 that. 5 When that type of material was found, it has 6 been stockpiled. Right now it is stockpiled as we have 7 seen. It is the top elevation on parcel B. And then as 8 that material gets to a certain point, then we make 9 arrangements to truck it off and dispose of the property. 10 Q So your ultimate plan is to dispose of that material? 11 A Yes. 12 Q And why haven't you done that yet? 13 A Well, again, just for efficiency standpoint, there is 14 not that much there at this point in time. So for us to 15 dispose of it, we typically -- 16 THE COURT: Wait a moment. Is that someone who 17 has a cell phone on, or near the microphone? 18 All right, that solved the problem. 19 Do all of these reports marked as GGGG relate to 20 parcel B and C? 21 THE WITNESS: They relate to parcels A, B and C. 22 THE COURT: When did you start work on B and C? 23 THE WITNESS: I believe that was the August 25th 24 report, I think was the first time -- 25 Q August 25th of when? <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>	Miller-Cross/Aronoff 318 1 THE WITNESS: Similar. 2 Q What did you build on parcel A? 3 A We built two transloading facilities. We installed a 4 flour transload area. We put in what we refer to as the 5 super stacker, which is a facility that allows us to 6 aggregate cars and dump the material from the bottom or 7 bottom dumping into a hopper, and that excavator -- that 8 machine allows that to be captured at the rate of 800 tons 9 an hour and distributed to piles, which is probably 10 visible on some of the area photographs. It is a fairly 11 large operation. 12 Q And the purpose of the excavation done on parcel A 13 was to build what you just described? 14 A That's correct. 15 Q And similarly the purpose of the excavation on 16 parcel B and C is to build the spur track you spoke about 17 here for two days? 18 A Related to this structure. 19 Q And the Town received these reports dating back to 20 November of 2010? 21 A That is my understanding. 22 Q I want to talk briefly about environmental litigation 23 procedures which were taken. 24 We saw the SWPP plan in earlier testimony. But 25 we can look at it again. It is Exhibit HH. <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>
Miller-Cross/Aronoff 317 1 A 2012. 2 Q Do you remember what BRT 00831, do you have that? 3 THE COURT: That is the first one relating to 4 parcel B? 5 THE WITNESS: Yes. 6 THE COURT: Where is it, going back to the old 7 one, where was it that your company was conducting an 8 excavation and mining operation, excavation and mining 9 operation? 10 THE WITNESS: At that point parcel A was still 11 excavating to bring down the final grade, so parcel B 12 wasn't done yet. 13 THE COURT: So it is fair to say you conducted a 14 mining operation on parcel A? 15 THE WITNESS: I would call that grading and 16 excavation. 17 THE COURT: It says that there. It is a mining 18 operation; is that right? Was there a mining operation on 19 parcel B? 20 THE WITNESS: We refer to it as excavation and 21 construction. And the material that is removed from the 22 site was certainly screened and -- 23 THE COURT: Was there anything different about 24 the activity occurring on parcel A than B, or was it 25 similar? <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>	Miller-Cross/Aronoff 319 1 MR. ARONOFF: Judge, a blown up copy of this. 2 THE COURT: All right. 3 (Handed to the witness.) 4 Q Do you recognize Exhibit HH? 5 A Yes. 6 Q What is it? 7 A The SWPP plan as referred to before. 8 Q What is the purpose of the plan? 9 A We commissioned the SWPP plan to make sure we were 10 managing ground water erosion and erosion considerations 11 during construction of parcels B and C. 12 Q And it may help to look at the full size one, perhaps 13 you can see it on HH. 14 Do you see where it says erosion control 15 measures? 16 A Yes. 17 Q And would you explain generally what that consists 18 of? 19 A That consists of the erosion control recommendations 20 that are part of this SWPP plan. 21 Q And there is also a construction schedule listed 22 under that? 23 A Yes. 24 Q And what steps have you taken -- by the way, this was 25 provided to the Town as we saw earlier? <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>

Miller-Cross/Aronoff 320 1 A Yes. 2 Q What steps have you taken to comply with the SWPP 3 plan? 4 A Both Tom Miller, mentioned earlier, and Chris Flynn, 5 F-L-Y-N-N, who are both superintendents on the site who 6 are certified with SWPPs. And so on a weekly basis Tom 7 Miller walks the site to make sure we are in compliance 8 with the recommendations of this plan. 9 In addition, Bowne during their two times per 10 month visits also as an outside party certifies the SWPP 11 plan weekly walk-throughs that are done by our on-site 12 personnel. 13 Those reports that Bowne does on a two-times per 14 month basis are provided then to the Town along with the 15 reports we mentioned earlier, which are the site overview 16 reports. 17 Q We saw testimony yesterday about the environmental 18 overview. Do you recall that? 19 A Yes. 20 Q And Fleming was hired by BRT? 21 A Yes. 22 Q And did the environmental overview that Gannette 23 Fleming provided to you indicate any concerns resulting in 24 grading and excavation work? 25 A I am not aware. <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>	Miller-Cross/Aronoff 322 1 MR. CALICA: I need a moment to look at it, your 2 Honor. 3 I understand it is parcel A and not for 4 parcel B. 5 THE COURT: Is that right? It is for parcel A 6 or B? 7 THE WITNESS: Right now this is specifically for 8 parcel A because it is a post construction phase document. 9 THE COURT: Do you still want to offer it? 10 Q Is this the plan you intend to implement in parcel B 11 and C when you finish your development? 12 A Absolutely. 13 THE COURT: Any objection to the admission? 14 MR. CALICA: Yes. 15 THE COURT: For those limited purposes? 16 MR. CALICA: Objection, relevance. It is not 17 indicated it is being implicated for parcel B and C. 18 THE COURT: I will allow it. You will 19 forcefully object later and explain why it is irrelevant. 20 MR. CALICA: Specifically because there is a 21 filed stipulation in this action that precisely governs 22 the development of parcel A. 23 THE COURT: I understand that even in my sleep. 24 MR. CALICA: All right. 25 (Whereupon, Defendant's Exhibit CCC was received <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>
Miller-Cross/Aronoff 321 1 Q What is spill prevention control and countermeasure? 2 A Once the site, to be more specific here, once parcel 3 A was under construction and in operation of transloading 4 material, we commissioned an outside firm with a special 5 expertise to help us prepare a scope prevention control 6 and countermeasure plan. 7 The purpose of the plan is once you move from a 8 construction facility to a transloading facility, as an 9 efficient and safe operation you need to know what you are 10 transloading, what types of spills can occur, containment 11 measures that are designed and expected at the site, and 12 also what happens if the spill should occur and all sorts 13 of appropriate response parameters. 14 THE COURT: Is this a good time to take a break? 15 MR. ARONOFF: I'm almost done. 16 THE COURT: All right, finish up first. 17 Q Can you please identify what I have shown you as CCC. 18 (Handed to the witness.) 19 A The plan we discussed. 20 MR. ARONOFF: Move it in evidence. 21 THE COURT: Any objection? 22 It is the SWPP plan? 23 THE WITNESS: No, the spill prevention control 24 and countermeasure plan. 25 THE COURT: Any objection to this? <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>	Miller-Cross/Aronoff 323 1 in evidence.) 2 Q Let me wrap it up and talk briefly about the impact 3 of the work stoppage on your business. And start with the 4 TRO. 5 You are subject to a TRO now? 6 A Yes. 7 Q How has it impacted your business? 8 A It completely halted all construction operations. It 9 has affected the construction plans for our next phase of 10 track. It has also complicated if not significantly 11 damaged our relationships with current and potential 12 customers who are seeking to utilize the expansion room 13 for their needs. 14 THE COURT: We will take our break at this 15 point. 16 (Whereupon, a recess was taken.) 17 18 19 20 21 22 23 24 25 <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>

Miller-Cross/Aronoff 324 1 THE COURT: Please continue with the hybrid 2 cross/direct. 3 Q You were explaining the impact that the TRO has had. 4 And my question is: How has it impacted your immediate 5 revenue? 6 A Well, due to the stoppage of construction, the 7 immediate revenue goes down. 8 Q And why is that? 9 A A portion of our revenue is made up of sale of 10 material at the site. 11 THE COURT: Is that the sand; is that correct? 12 THE WITNESS: Correct. 13 Q And what happens when you are not able to service the 14 customers that have been coming to you for sand? 15 A When you are not able to provide a consistent supply 16 for a season, there is a lot of customers that won't use 17 your facility for that year. There is also a mixed design 18 involved at the beginning of the year for customers who do 19 bids for road work and things, and they have to specify 20 the mix design for specific sand sites, and they don't 21 feel you have a consistent supply that may affect the 22 ability to use you. 23 Q And what about a longer term injunction, how would it 24 impact your business? 25 A It is very difficult for me to quantify the HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER	Miller-Redirect/Calica 326 1 as possible. When our construction is halted and our 2 progress stops, it is a significant potential that those 3 customers will seek out an alternate solution for their 4 transportation and supply needs. 5 Q And just to conclude, Mr. Miller, have you taken 6 steps to hide your activities from the Town? 7 A Never. 8 Q Has the Town, prior to this dispute, did the Town 9 ever come to you and say we want to take a look at the 10 site? 11 A Not that I'm aware. 12 Q Had they done that, would you have allowed that? 13 A Yes. 14 MR. ARONOFF: No further questions. 15 THE COURT: Anything further, counsel? 16 MR. CALICA: Yes, your Honor. 17 18 REDIRECT EXAMINATION 19 BY MR. CALICA: 20 Q Mr. Miller, it is important for your company to get 21 the operations in parcel B up and running, correct? 22 A Parcel B and C, yes. 23 Q And you told the Town in July of 2013 that you were 24 going to start working on the Systra designed J track. Is 25 that correct? HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER
Miller-Cross/Aronoff 325 1 significant disruption in construction which would affect 2 all future revenue streams as well as the track 3 construction. It is a complicated project and it would be 4 very expensive if we don't adhere to our construction 5 pattern. 6 Q The DOT grant, would it be substantially impacted by 7 a longer term injunction? 8 A Yes, I believe it could. 9 Q And you have no customers signed up for B and C yet; 10 is that right? 11 A No. 12 Q And have you had customers approach you about B and 13 C? 14 A Many. 15 Q And you are talking about freight customers in 16 trucking? 17 A Yes. 18 We had a large number of customers approach us 19 about potentially utilizing space on B and C for 20 transloading activities similar to what occurs in 21 parcel A. 22 Q And how long a work stoppage of a longer term, how 23 would it impact your relationship with those customers? 24 A It is difficult because in general all those 25 customers are looking for us to be up and running as soon HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER	Miller-Redirect/Calica 327 1 A I think it was 2012. 2 Q 2012? 3 A Yes. 4 Q How much track has your company installed in the 5 nearly two years since you advised the Town that you were 6 going to go forward and construct J track? 7 A On parcels B and C? 8 Q Yes. 9 A No track at this point. 10 Q Okay. 11 If it is so important to build this railroad, 12 why hadn't you built the railroad? 13 MR. ARONOFF: Objection. 14 THE COURT: I will allow it. 15 A Why haven't we built a railroad? Could you be more 16 specific? 17 Q Why haven't you laid any track? 18 A Well, we were not able to lay track until all the 19 area is at grade. In addition, we had to secure two 20 easements from LIPA, across LIPA's property. 21 Q Is it true, sir, that you can't begin constructing 22 along the southerly line of the property going from a 100 23 foot elevation to a 60 foot elevation, as your own 24 engineer testified you are doing, until you excavate the 25 whole site down to 50 feet? HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER

1 **A Could you rephrase that question?**

2 **Q** Doesn't the J track enter the southwest corner of the
3 parcel at the existing Long Island track elevation of 100
4 feet, follow along the southern boundary line, more or
5 less following the natural topography down to 60 feet in
6 the southeast corner?

7 **A Yes, it does.**

8 **Q** Why, if your railway engineer, Systra, designed that
9 track to go along the southern boundary, have you not
10 constructed or installed any track in two years?

11 **A I think in order to answer that question -- I already**
12 **answered that question when I explained we are not in a**
13 **position at this time to construct that track until final**
14 **rough grade is reached.**

15 **Q** Why?

16 **A I can't put track on the property until it is at the**
17 **proper elevation.**

18 **Q** Why can't you excavate the southern boundary to the
19 eastern boundary as Systra designed it?

20 **A Systra didn't design an excavation plan for us.**

21 **I guess I don't understand the question.**

22 **Q** What is impeding Brookhaven Rail Terminal from
23 constructing rail, excavating to rail along the southern
24 boundary of the property from where the Long Island Rail
25 Road track ends on the west to the southeast portion of

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1 the property?

2 **A Rail construction of this size is generally a bid**
3 **project. So at this point in time you can look at the**
4 **site and realize we are not in a position to go bid the**
5 **work. The railroad construction firms that we would hire**
6 **don't generally like to come out to the site and construct**
7 **100 or 200 or 500 feet of rail at a time. They provide**
8 **much more attractive pricing when you can provide a large**
9 **surface and a large area so they can send their crews**
10 **there for months on end.**

11 **Q** Isn't it a fact, sir, that you haven't even begun to
12 remove the vegetation in the southeast corner of the
13 parcel where the Systra plan shows the track was supposed
14 to go?

15 **A That is the area photograph, yes.**

16 **Q** That is from Google Earth as of September 2003.

17 **Is that approximately the same area that has**
18 **been -- in which vegetation has been removed?**

19 **THE COURT:** You mean 2013.

20 **MR. CALICA:** 2013.

21 **A On this area photograph?**

22 **Q** Yes.

23 **A** Yes.

24 **Q** And so you are excavating on the less than the size
25 of the property, but you haven't done any vegetation

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1 removal and almost no excavation along the southern
2 boundary of the property where the Systra J track
3 indicated the track was going to be placed; is that
4 correct?

5 **A I wouldn't agree with that, no.**

6 **Q** Where along the southern boundary have you excavated
7 for track purposes?

8 **A Along the southern boundary of parcels B and C we**
9 **have done excavation work for track purposes.**

10 **Q** When?

11 **A** 2012.

12 **Q** Not a lot of it, have you, sir?

13 **A Could you be more specific, please?**

14 **Q** If you look at the southern border, isn't it correct
15 that you have not even removed the vegetation to half the
16 southern boundary where the proposed track was to be
17 installed?

18 **A If you look at the area where the vegetation remains.**
19 **There is significant less elevation change for that point**
20 **in time. Therefore, removing vegetation is a relatively**
21 **fast process. We are more concerned with managing the**
22 **grade first. Clearing trees doesn't take as much time.**

23 **Q** You testified, with respect to GGGG, that the Town
24 was advised what was going on in parcels B and C; is that
25 correct?

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1 **A** Yes.

2 **Q** Would you agree that the last written notification of
3 precise work that was beginning on parcels B and C was
4 your notice to the Town that in July of 2012 that you were
5 beginning excavation, limited excavation, associated with
6 the construction of the J track?

7 **A Would you repeat that question one more time for me,**
8 **please.**

9 **Q** I will direct your attention to Exhibit 2 in the
10 plaintiffs exhibits in front of you.

11 **Is James Pratt one of your partners?**

12 **A** Yes.

13 **Q** Are you aware he wrote to Mr. Miner on June 29th,
14 2012, stating, quote, construction in this phase will
15 begin with clearing and grading of the track right-of-way
16 and installation of track in accordance with the proposed
17 J track layout?

18 **THE COURT:** What exhibit are you reading from?

19 **MR. CALICA:** Exhibit 2, your Honor.

20 **A Yes, I am aware he wrote the letter.**

21 **Q** Is that what BRT did?

22 **A What are you asking, sir?**

23 **Q** Did you begin clearing and grading the track
24 right-of-way and installation in accordance with the J
25 track plan, or did you level the whole westerly side of

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Miller-Redirect/Calica 332 1 the site and excavate over a million cubic yards of sand 2 to date? 3 A I don't believe I have excavated over a million cubic 4 yards to date. But we did excavation on the southwest 5 portion of the property. 6 Q Did your construction, as your partner's letter 7 states, begin with the installation of track? 8 A Construction does not begin with the installations of 9 track. 10 Q The letter says to Mr. Miner in June of 2012, 11 construction in this phase will begin with the clearing 12 and grading of the track right-of-way and installation of 13 track in accordance with the proposed, quote, J track, 14 close quote, layout. 15 Is it correct, sir, as your partner advised the 16 Town in June 2012, that BRT began with the installation of 17 track? 18 A No, we did not begin new track installation. 19 Q Almost two years later there is not a foot of track; 20 is that correct? 21 A On parcels B and C? 22 Q Yes. 23 A No. 24 Q And is it accurate or inaccurate that the grading is 25 occurring, quote, in accordance with the proposed, quote, <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>	Miller-Redirect/Calica 334 1 accordance with the proposed J track layout? 2 A The J track layout and the grading here is for 3 operational plans, the construction plans. And that site 4 grading was to support the installation of track on 5 parcels B and C in accordance with our plans, the 6 operation plans. 7 Q You don't plan to answer the question, do you? 8 A I'm not sure of the question you are asking. 9 THE COURT: Are you still building the J track? 10 THE WITNESS: Working on the O track. 11 THE COURT: So you are not building the J track? 12 THE WITNESS: Right. 13 THE COURT: So what you told the Town, that you 14 were excavating and building the J track, it is no longer 15 your plan; is that it? 16 THE WITNESS: Yes. 17 THE COURT: Counsel, is that it? 18 MR. CALICA: I apologize, I was looking at an 19 exhibit. 20 THE COURT: You should pay attention. 21 I asked the witness if he is building the J 22 track and he said, no, the O track. 23 MR. CALICA: I apologize, your Honor. 24 THE COURT: All right. 25 Q Looking to the bimonthly report prepared by Bowne and <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>
Miller-Redirect/Calica 333 1 J track, close quote, layout? 2 A It is consistent with our construction and operation 3 guidelines. 4 Q The question is: Was it in accordance with the 5 proposed J track layout? 6 A Could you repeat the question one more time for me, 7 please? 8 Q Is the work you did – you can see it on Exhibit 16 9 and 21 – quote, in accordance with the proposed J track 10 layout? 11 A We have cleared a portion of the site which you see, 12 which is partially in support of the J track layout. 13 Q Of the total you see in Exhibit 21, how much is along 14 the southerly border along the J track and how much is an 15 area not shown on the Systra J track option? 16 A I'm not sure what you want me to answer. 17 Q I would like you to look at the photograph. 18 You disagree, sir, that you excavated what looks 19 to be 90 percent of the area, having nothing whatsoever to 20 do with the proposed J track layout? 21 A I don't know percentages. We excavated the area that 22 you can see on the aerial photograph. 23 Q Sir, would you acknowledge that the vast majority, 24 what you see in Exhibit 21 in evidence, and in front of 25 you, and it is also Exhibit B, is not at all grading in <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>	Miller-Redirect/Calica 335 1 given to your superintendent Miller and passed on to the 2 Town, would you agree when you were doing work on 3 parcel A, the reference, looking at 801, for example, said 4 excavation and mining operation ongoing? 5 A Yes, that is what it says. 6 Q And when you get to parcel B and C, for example, I 7 direct your attention to Bates number 00844, which is 8 December 2012, now all it says is excavation ongoing at 9 areas B and C; is that correct? 10 A Yes. 11 Q Does it say where on parcels B and C this is going 12 on? 13 A No. It says excavation ongoing in areas B and C. 14 Q Would it be consistent with your partner Jim Pratt's 15 written notice to the Town, Exhibit 2, that construction 16 in this phase will begin with clearing and grading of the 17 track right-of-way and installation of track in accordance 18 with the proposed J track layout to tell the Town that 19 excavation was ongoing at areas B and C? 20 THE COURT: I don't come close to understanding 21 that question, so the answer to it really doesn't matter. 22 So don't answer it. 23 Ask something else. 24 MR. CALICA: All right. 25 Q Sir, is there anything in the bound bimonthly reports <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>

Miller-Redirect/Calica 336 1 where it says mining going on in areas B and C, or mostly 2 saying excavation ongoing in B and C, that tells the Town 3 in any way that what BRT is actually doing, at least since 4 the latter part of 2013, is removing sand and lowering the 5 grade of the middle of the site and not along the boundary 6 shown on the proposed J track installation? 7 A The reports state that excavation is ongoing in B and 8 C. And I believe that terminology is used relatively 9 consistently. 10 Q But it doesn't say where on B and C? 11 A It doesn't specify where on B and C. 12 Q If you received a report like that, would that tell 13 you — 14 MR. ARONOFF: Objection. 15 THE COURT: Objection sustained. 16 Q Is it true for the first customer of the then planned 17 20 acre parcel was to bring in crushed aggregate from 18 upstate New York, approximately 500,000 tons a year? 19 MR. ARONOFF: I object. 20 This is related to parcel A. I don't understand 21 what it has to do with this proceeding. 22 MR. CALICA: The witness testified that they 23 can't use up — they are overburdened on parcel A. 24 MR. ARONOFF: Is that a disputed thing? It is 25 not a disputed item. <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>	Miller-Redirect/Calica 338 1 your existing parcel A customers? 2 A For example, Home Depot's volume has grown to the 3 point that they engaged to us for a long-term five year 4 contract. And that five year contract will commence in 5 September. The initial contract was only for one year. 6 So in conjunction with that contract, they 7 specifically requested additional space both for storage 8 and track space related to their increase in volume. 9 Q And when Gannette Fleming, the environmental overview 10 of February 2014 shows some 1.2 million square feet of 11 proposed new buildings in parcels B and C, how much of 12 that is proposed to be used by Home Depot? 13 A I couldn't give you a specific number at this time. 14 Q One entire building? 15 A I really can't give you a specific number at this 16 time, because I don't know. 17 Q Isn't it true that currently they operate a 60,000 18 foot transload building that serves other customers? 19 A That's correct. 20 Q So Home Depot is not going to use 1.2 million feet, 21 or even a 400,000 foot building as shown on the Gannette 22 Fleming overview; is that correct? 23 THE COURT: You can answer that question if you 24 can. 25 A It is very difficult for me to ascertain how much <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>
Miller-Redirect/Calica 337 1 THE COURT: Are you trying to prove that that is 2 not the case? 3 MR. CALICA: It is not the case that they need 4 93 acres or they need parcel D, your Honor. 5 MR. ARONOFF: Come on. 6 THE COURT: Counsel, I believe one thing we have 7 done here is gone a little astray. I don't think the 8 question before this Court is has BRT adopted the best 9 plan imaginable. It is a business plan. You can't come 10 in and say it is a bad business plan. 11 The question goes to other things here. 12 MR. CALICA: I will be very brief on this. 13 Q You testified you had a bakery customer that does, I 14 think you said 100 million pounds? 15 MR. ARONOFF: Objection. 16 THE COURT: Sustained. 17 Move on. 18 Q Do you have any customers for parcels B and C? 19 A I think we already answered that question. 20 THE COURT: It is, but answer it again. 21 A No, we don't have signed customers for B and C. 22 Q So if you have customers at some time, they would be 23 new customers; is that correct? 24 A Not necessarily correct. 25 Q Do you know whether they will be new customers or <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>	Miller-Redirect/Calica 339 1 Home Depot is going to need. Right now we are only 2 handling approximately 80 of the SKUs or products in the 3 Home Depot store. 4 If you look at the average Home Depot store, it 5 is my understanding they have tens of thousands of SKUs 6 for individual products. 7 I suspect if we begin to service Home Depot as 8 we have to this point, we would be able to expand the 9 products we are able to bring in by rail. And we believe 10 there is a tremendous potential for expanse by Home Depot. 11 Q Do you know any rail facility that serves Home Depot 12 or a customer like this that has a facility of 1,200,000 13 square feet of space? 14 A I'm not sure what other facilities Home Depot uses, 15 rail or otherwise. 16 Q And have you any design plans for any of the 17 buildings shown on the Gannette overview? 18 A Design plans? 19 Q Have you designed any buildings? 20 A Could you be more specific? 21 Q Have you hired an engineer to draw preliminary plans? 22 A The engineers and group or groups working with us is 23 the Tippman Group. They are specialists in temperature 24 control storage. We engaged them last year to begin a 25 market study and analysis of the need and demand for <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>

Miller-Redirect/Calica 340 1 additional temperature control storage on Long Island. 2 Q Sir, I didn't ask you if you did a market survey. I 3 asked you -- 4 THE COURT: No comment on the question. Just 5 ask questions. 6 Q Did you hire anybody to prepare a preliminary plan of 7 any of the buildings shown on the Gannette Fleming 8 overview? 9 A I requested of the Tippman Group concept plans they 10 provided, which to us are plans for a temperature control 11 storage facility. 12 Q Does it include any building details? 13 A It includes the approximate square footage of the 14 building. We know the Tippman Group typically has an 15 initial footprint or an initial building out of -- 100,000 16 square feet. And we contemplated as many as six 17 additional zones or additional expansion areas. Part of 18 the market study involves us determining how large that 19 facility should be constructed initially and how it should 20 be appropriately phased as demand increases. 21 Q Did you say they are studying a 2100,000 square foot 22 building? 23 A No. If you look at the concept plans, they 24 contemplate a 600,000 square foot building. 25 Q The environmental overview says 400,000. <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>	Miller-Redirect/Calica 342 1 indicate any areas of environmental concern; is that 2 correct? 3 A No. 4 Q Did you read it? 5 A Yes. 6 Q And it is in evidence as Exhibit 8-B. Would you open 7 up to page 4 of that document, please. 8 Do you see the top paragraph on the page? 9 A Yes. I do. 10 Q Do you see where your environmental consultant 11 advised the site is within the Nassau Suffolk sole source 12 aquifer, i.e. the Upper Glacial aquifer? 13 A Yes, I do. 14 Q And do you see it expressed that the sole source 15 aquifer is a sole or principal drinking water source whose 16 contamination would pose a hazard to public health? 17 A Yes. 18 Q And it says this designation protects an area's 19 ground water resource by requiring the EPA's proposed use 20 of the project within the designated area to receive 21 federal finance assistance. The EPA review is designed to 22 assure that potential projects do not endanger the ground 23 water source. 24 Has there been any EPA review? 25 A On which one are you referring to? <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>
Miller-Redirect/Calica 341 1 A Which environmental overview? 2 Q Exhibit 8-B, the Gannette environmental overview. 3 A Do you have a page number you are looking at? 4 Q Exhibit 8-B. 5 There is also a blowup there. 6 MR. CALICA: Bring it closer to the witness. 7 Q Which is it, 100,000 or 600,000? 8 A The original concept -- before we engaged a 9 professional specific firm that has specific knowledge of 10 temperature control storage, and the layout and 11 engineering associated, we estimated the building could be 12 as much as 400,000 square feet, as we entered into 13 specific discussion with a contractor that designs and 14 builds these facilities and designed a footnote print of 15 potentially up to 600,000 square feet. 16 Q And what you have so far is the footprint? 17 A I have a footprint and concept sketches and the flow 18 of the facility from rail to truck. 19 Q Does it have any interior features? 20 MR. ARONOFF: Judge, we will stipulate that 21 there are no building plans that have been finalized. 22 THE COURT: Excellent. 23 Move ahead. 24 Q You testified that according to your understanding 25 the Gannette Fleming environmental overview did not <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>	Miller-Redirect/Calica 343 1 Q Has there been any review by the US Environmental 2 Protection Agency of your proposed development plan such 3 as there are for the 93 acre parcel? 4 A No. 5 Q What, if anything, have you or your environmental 6 consultants done to create a design to insure that 7 potential projects do not endanger the ground water 8 source? 9 A Well, as I believe I discussed earlier, we have 10 engaged an environmental firm to look at the track 11 construction and the environmental implications of that 12 track construction. 13 Then we also completed the SWPP plan we referred 14 to which manages the ground water during the construction 15 phase. 16 My expectation that as a responsible corporate 17 citizen we will continue to look at environmental 18 considerations as we go along on the site. 19 Q Have you hired a geologist? 20 A Could you be more specific? 21 Q Did you hear the testimony of your railway engineer, 22 Mr. Humbert, yesterday, that when he and AECOM designed 23 the grading plans of the proposed stack of the 50 foot 24 level, they did not consult with a geologist and did not 25 consider for purposes of grading design ground water <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>

344 1 consideration? 2 MR. ARONOFF: Objection. 3 THE COURT: Sustained. 4 A quick question. 5 THE WITNESS: Yes. 6 THE COURT: In connection with the paragraph 7 just read to you, is the project -- the rail project -- 8 that is potentially slated receiving any federal 9 financing? 10 THE WITNESS: Not federal, no. 11 MR. CALICA: No further questions. 12 THE COURT: No follow-up, I assume? 13 MR. ARONOFF: No follow-up. 14 THE COURT: You may step down. 15 (Whereupon, the witness leaves the witness 16 stand.) 17 MR. CALICA: I would like to amend the offer. 18 Yesterday we provided counsel with photographs as we 19 received them, which were forwarded from a cell camera. 20 And we are substituting ten photographs taken at the site 21 as part of Exhibit 29 showing what Ms. Davis identified as 22 the piles of introduced material. 23 THE COURT: So it is nine plus one new one? 24 MR. CALICA: Ten new ones. 25 THE COURT: You had nine yesterday? HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER	346 1 was received in evidence.) 2 MR. ARONOFF: I would like to note for the 3 record that JJJJ -- 4 THE COURT: Can I have a copy? 5 MR. ARONOFF: Yes. I will bring it to you now. 6 Do you want it hole punched, Judge? I have a 7 hole puncher here. 8 (Handed to the Court.) 9 MR. ARONOFF: I want to note for the record that 10 this is a March 19th, 2012 email from Mr. Kelsey to 11 Mr. Miner. And the sentence I wanted to highlight for the 12 Court is: For future plans asked that they send them to 13 us via email so we can view them in color and print them 14 to our color printer. 15 THE COURT: Okay. 16 Any further witnesses? 17 MS. MILLER: Mr. Newel. 18 THE COURT: What is he going to testify to? 19 MS. MILLER: Mr. Newel is president of 20 Brookhaven Rail. He will be testifying to the current 21 operation in parcel A, and the operational design behind 22 parcels B and C. 23 THE COURT: Step up to the witness stand, 24 please. 25 HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER
345 1 MR. CALICA: Yes. 2 THE COURT: Ten different photos? 3 MR. CALICA: Ten additional. 4 MR. ARONOFF: As long as we have the stipulation 5 that the photos were taken on Saturday, fine. 6 THE COURT: All right. 7 Can I have the ten? 8 MR. CALICA: Yes. 9 THE COURT: So the Town rests? 10 MR. CALICA: Yes. 11 THE COURT: Very good. 12 MR. ARONOFF: Just briefly, your Honor. 13 There are two exhibits I wanted to offer in 14 evidence that were produced to us by the Town yesterday 15 morning. I marked them as JJJJ and KKKK. They are emails 16 involving Mr. Kelsey. I prefer not to call him to 17 authenticate the documents. If there is no objection, we 18 will put them in. 19 THE COURT: Is there objection to quadruple J 20 and quadruple K? 21 MR. CALICA: Just give me a moment with it, your 22 Honor. 23 No objection, your Honor. 24 THE COURT: They are admitted. 25 (Whereupon, Defendant's Exhibits JJJJ and were HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER	Newell-Direct/Miller 347 1 JIM NEWELL, 2 called as a witness, having been first 3 duly sworn, was examined and testified 4 as follows: 5 THE CLERK: Please be seated. 6 State and spell your name for the record. 7 THE WITNESS: My name is Jim Newell, 8 N-E-W-E-L-L. 9 THE COURT: Counsel, proceed. And keep it 10 brief. 11 MS. MILLER: Yes, your Honor. 12 13 DIRECT EXAMINATION 14 BY MS. MILLER: 15 Q Mr. Newell, in addition to being president of 16 Brookhaven Rail, you are also the chief operating officer 17 of Oakland Transportation Holdings; is that correct? 18 A Yes. 19 Q And you currently reside in Ponce Vedra Beach, 20 Florida? 21 A Correct. 22 Q But in your role as president of Brookhaven Rail, you 23 spend a significant amount of time at the terminal? 24 A Yes, I do. 25 Q Approximately how many days a month are you at the HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER

Newell-Direct/Miller 348 1 terminal? 2 A Roughly 15 days a month. 3 Q And Brookhaven Rail is a class three railroad; is 4 that correct? 5 A Yes. 6 Q What does it mean to be a class three railroad? 7 A There is an operating member of less than 20 million 8 dollars, and every short line falls in that category. 9 THE COURT: Is that gross or net revenue? 10 THE WITNESS: Net revenue. 11 MR. ARONOFF: Not adjusted for inflation. 12 THE COURT: So the gross revenue of the railroad 13 in total falls under 20. 14 THE WITNESS: Yes, and any movement of class two 15 and class one. 16 Q Brookhaven Rail gets revenue from the terminal 17 operation; is that correct? 18 A Yes, it does. 19 Q Please tell us, sir, your educational background, 20 briefly. 21 A I have a bachelor in business from Tampa College, and 22 a master's degree in business from Jacksonville University 23 in 1997. 24 Q You have been working in the rail industry as of this 25 September for approximately 49 years; is that right? HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER	Newell-Direct/Miller 350 1 A May 31, 2011. 2 Q And when did you become the president of Brookhaven 3 Rail? 4 A In October of 2013. 5 Q What are your current responsibilities as president 6 of Brookhaven Rail? 7 A Well, Brookhaven Rail being smaller than we are right 8 now, and I spent approximately my time in development of 9 business, I have P & L responsibility for the railroad. 10 We have a railroad approved and – approval, and I do all 11 the contractual work relative to our agreements with the 12 New York and Atlantic, and to set up the operation 13 agreements. 14 Q Your salary is currently paid by Brookhaven Rail; is 15 that correct? 16 A Yes. 17 Q And talking about the terminal itself, can you please 18 turn to Exhibit EEE in volume 2, the black binder. 19 Do you recognize the photograph? 20 A Yes. 21 MS. MILLER: We move the admission of EEE. 22 THE COURT: Is this — 23 A This is the middle of the yard going from the north 24 toward the south. 25 MR. CALICA: No objection. HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER
Newell-Direct/Miller 349 1 A That is correct. 2 Q Please describe the highlights of your career in the 3 rail industry. 4 A I spent the first eight years in my career as a 5 trainman, conductor, qualified as an engineer and yard 6 master. I took the promotion into what we refer to as the 7 low level management in 1972. And I spent the 8 preponderance of that time working various different road 9 jobs, and worked my way through the ranks and up into 10 mid-level management. I was train master, assistant 11 terminal train master, division manager, general manager 12 working operations, since 2004. 13 Q Have you been involved in rail construction projects? 14 A Yes, many. 15 Q And have you been involved in rail expansion 16 projects? 17 A Yes, I have. 18 Q What is a rail expansion? 19 A It is two or three different rail expansions. You 20 can expand the rail siding, and you can expand a rail 21 terminal, or you can expand it by continuing an auxiliary 22 track in a spur location and develop an additional set of 23 transload or transload operations. 24 Q What year did you join Oakland Transportation 25 Holdings? HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER	Newell-Direct/Miller 351 1 THE COURT: Admitted. 2 (Whereupon, Defendant's Exhibit EEE was received 3 in evidence.) 4 Q Does this photo accurately depict some of the 5 current — 6 THE COURT: You don't need to do that. 7 Q Please describe the current rail operation on 8 parcel A. 9 A Do you see that? 10 THE COURT: I can't. 11 A We are part of the interchange location here with the 12 New York Atlantic who operates the franchise on the Long 13 Island Rail Road line. 14 We have three tracks that are used for arrival 15 tracks. Two of which are – two of which, track one and 16 two, which are number one being the furthest outside track 17 to the east. And under track one and track two would be 18 the unloading pit in this area that provides for the 19 unloading of the aggregate material. 20 This is track three, which is the other long 21 track used as in running track. It is set up so that the 22 New York and Atlantic can come in and bring their cars and 23 head straight in and bring 35 cars and take those cars 24 into a track. And they detach the locomotive power. They 25 come back to the loading track, and the other track we HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER

Newell-Direct/Miller 352 1 have there is outbound cars to come back with them. They 2 come back for the other cars and put their locomotive back 3 on the train. And then they perform -- they provide their 4 initial terminal break desk, which is a federal 5 requirement, and then get ready for the trip back to 6 Queens. 7 THE COURT: How many feet of track do you 8 operate on that terminal? 9 THE WITNESS: If you look at the clearest point 10 to the clearest point of the track, you are looking at 11 2,200 feet roughly in a track of -- just for rule of 12 thumb, you can use 50 feet for a rail car. 13 THE COURT: Okay. 14 So you ran about 2,200 feet? 15 THE WITNESS: Per track. 16 THE COURT: Is it fair, the plan you have seen, 17 and I will call it the O track plan, and you have been 18 here and you know what I'm referring to? 19 THE WITNESS: Absolutely. 20 THE COURT: Is about 6,600 feet? 21 THE WITNESS: No. No track plan has way more 22 footage. 6,600 feet is so far what you guys are referring 23 to as the J track. 24 THE COURT: So it is fair to say that this 25 expansion will be a multiple of the amount of track you <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>	Newell-Direct/Miller 354 1 about Brookhaven Rail's current abilities. 2 You are not currently able to provide freight 3 rail service on Long Island outside of the terminal 4 boundaries; is that correct? 5 A No, we cannot. 6 Q And that is because New York Atlantic holds the 7 exclusive franchise to provide freight rail service over 8 Long Island Rail Road lines? 9 A That's correct. 10 Q Is there any other rail facility on eastern Long 11 Island that can handle freight capacity at Brookhaven 12 Rail? 13 A There is not. 14 Q With respect to the New York and Atlantic, can you 15 please explain how transportation payments are received by 16 Brookhaven Rail from shippers shipping product to the 17 Brookhaven Rail Terminal? 18 A Brookhaven Rail does not participate in any of the 19 interline settlement agreements. Brookhaven Rail operates 20 under a tariff arrangement with the New York and Atlantic. 21 And when we get a car in that is destined to our location. 22 But we simply make a list of cars that are received and we 23 bill the New York and Atlantic on a per car basis for our 24 revenue. We do not go through the normal railway 25 clearinghouse for interline settlements. <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>
Newell-Direct/Miller 353 1 are running now? 2 THE WITNESS: Absolutely it will be. 3 It is not really a multiple of the availability 4 of space as much as it gives us the ability to have a 5 marshaling yard operation that will be needed to supply 6 the customers on C and B. 7 THE COURT: It would be bigger? 8 THE WITNESS: Absolutely bigger. 9 THE COURT: All right. 10 Q Have you completed walking through the number of 11 tracks? 12 THE COURT: I think I have seen enough on that. 13 Q You are saying you are operating at capacity on 14 parcel A. 15 Have Brookhaven Rail Terminal's existing rail 16 customers approached you about handling additional 17 shipments? 18 A Yes. 19 Q And have potential new customers approached you about 20 additional shipments? 21 A Yes. 22 That is, in my day, I spend most of my time 23 talking to potential customers and the relevance of coming 24 over to parcels B and C. 25 Q And I just want to quickly walk through a question <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>	Newell-Direct/Miller 355 1 Q Neither Brookhaven Rail nor the Rail Terminal owns or 2 controls any of the shippers; is that correct? 3 A That is correct. 4 Q And that has never been part of your business plan? 5 A No. And never will. 6 Q Not for parcels B and C? 7 A No. 8 Q Does Brookhaven Rail have contracts with any of the 9 customers for parcel A? 10 A Yes, we do. 11 Q Which ones? 12 A Home Depot and a customer called REG. 13 Q What is REG? 14 A Renewable Energy Group. 15 Q And what about purchase orders, does Brookhaven Rail 16 issue purchase orders to contractors? 17 A Yes. 18 Q And do you know whose rates and operating conditions 19 are referenced in those purchase orders? 20 A Referenced in Brookhaven's tariff 9200. 21 Q And Brookhaven Rail is responsible for marketing 22 Brookhaven Rail services; is that correct? 23 A Yes. 24 Q And Brookhaven Rail operates the car, undertaking 25 switching, off-loading and loading and moves cars under <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>

Newell-Direct/Miller 356 1 their contracts? 2 A Yes. 3 Q And Brookhaven Rail is also responsible for the goods 4 until the trucks take them away from the terminal; is that 5 correct? 6 A Yes. 7 Q Is there insurance policies for the rail terminal's 8 operations? 9 A Yes, we have insurance. 10 Q Who holds the insurance policy? 11 A Brookhaven Rail. 12 Q Are any of these operational responsibilities 13 expected to change when the expansion takes place of B and 14 C? 15 A I said, no. We just want to get some additional 16 personnel in to help the development. 17 Q With respect to the additional track plan for parcels 18 B and C, is Brookhaven Rail going to construct and 19 maintain that track? 20 A Yes. 21 Q Is that correct? 22 A Yes. 23 MS. MILLER: For the record, previously the 24 witness was pointing to a blown up image of DDD in the 25 binder, and I move for its admission. <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>	Newell-Direct/Miller 358 1 But that is not what I'm referring to. Systra hasn't done 2 another section of drawings that outline the O track that 3 was part of the earlier testimony. 4 Q I would like to direct your attention to Exhibit WW. 5 Please explain to the Court from an operational 6 perspective -- first please explain where the track in 7 parcel A is as opposed to B. 8 THE COURT: What is WW? 9 MS. MILLER: It is already admitted. WW is the 10 image of -- 11 THE COURT: I have it, all right. 12 A The entrance to track B and C is here. And the track 13 would go to 1.25 degrees here and curves around and makes 14 basically an O design. 15 There are three tracks you enter into, which is 16 basically the concept we have with the New York and 17 Atlantic to operate on that part of the track. And it 18 gives BRT, Brookhaven Rail, the opportunity to get onto 19 those cars and take them around to the tracks that are on 20 this end, which are the marshaling yard tracks, to be able 21 to switch cars that go to the appropriate customers, and 22 also to put the outbound train together to come back to 23 the track to New York and Atlantic to be able to pick up 24 and depart with. 25 Q And you know the TRO was entered by Judge Wexler in <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>
Newell-Direct/Miller 357 1 THE COURT: Any objection to that? 2 MR. CALICA: I need to be oriented first. 3 (Counsel confer.) 4 MR. CALICA: No objection. 5 THE COURT: Admitted. 6 (Whereupon, Defendant's Exhibit DDD was received 7 in evidence.) 8 Q Let's turn to parcels B and C. 9 You have been involved in the design of the 10 track on parcels B and C from an operational standpoint; 11 is that correct? 12 A Yes. 13 Q And we talked this morning about the 2012 track 14 design. Did you hear that testimony? 15 A I did. 16 Q Did you receive an O track design from Systra? 17 A I have seen it, yes. 18 Q Please explain. 19 A The O track design was in early 2012. And it was a 20 design that is a continuation of the J track. And it just 21 simply loops around and provides the capability for 22 marshaling the cars that would be arriving on track B 23 and C. 24 THE COURT: Is that the casino drawing? 25 THE WITNESS: That drawing has a piece of it. <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>	Newell-Cross/Calica 359 1 this case, since then -- before then what construction 2 activities were taking place on B and C? 3 A We were bringing the site down to grade to put in the 4 track construction. 5 Q Prior to the Town's motion for preliminary 6 injunction, did anyone from the Town approach you about 7 the contamination of the aquifer? 8 A No. 9 MS. MILLER: That's all. 10 THE COURT: Any cross-examination? 11 MR. CALICA: Yes. 12 CROSS-EXAMINATION 13 BY MR. CALICA: 14 Q Did I hear you correctly testify, Mr. Newell, that 15 you say you saw a Systra track plan that was in an O 16 design? 17 A Correct. 18 Q Where is it? 19 A I don't have it. I was just asked if I saw it. 20 Q Where did you see it? 21 A At BRT terminal. 22 Q Are you able to produce one for the Court? 23 THE COURT: Would you be able to find one if you 24 had to, sir? 25 THE WITNESS: I mean, I don't know if I can put <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>

360 1 my hands on it right at this moment. But I can probably 2 at some point. 3 MR. CALICA: Your Honor, I would respectfully 4 request the records be kept open and he provide it through 5 counsel and I reserve the right to examine him. 6 THE COURT: Counsel. 7 MS. MILLER: We agree, your Honor. 8 We believe we produced an image of it in the 9 photograph that was sent over. 10 MR. ARONOFF: We had iPhone photos at their 11 request a couple of days ago. And there were full sized 12 plans. We believe it was one of the iPhone photos we sent 13 to them. We can go back to verify it. If it wasn't, we 14 will be happy to produce it. 15 THE COURT: Okay. 16 MR. CALICA: Subject to that, I have no 17 additional questions of the witness. 18 I would like to just qualify my resting to offer 19 certain of the documents. 20 THE COURT: You can step down. Thank you. 21 THE WITNESS: Thank you. 22 (Whereupon, the witness leaves the witness stand.) 23 MR. CALICA: I hope your Honor is flexible in 24 that regard. 25 THE COURT: Are you referring to documents HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER	362 1 from somewhere else. It doesn't mean that the defendants 2 introduced it as part of the construction project. It 3 could have been on the property. 4 MR. CALICA: The testimony of Ms. Davis was 5 quite clear that this is undisturbed virgin stack 6 underneath historic vegetative area 15 feet deep -- 7 THE COURT: I heard the testimony and you are 8 making assumptions from it. I will not do the testing 9 piece right now because it may be largely irrelevant for 10 purposes of this hearing, so I will not talk about doing 11 scientific testing right now. 12 Have both sides rested? 13 MR. CALICA: Yes. 14 MR. ARONOFF: Yes. 15 THE COURT: No more witnesses? 16 MR. ARONOFF: No. 17 THE COURT: All right. 18 Now the question becomes what happens next? 19 For those purposes I will share some thoughts 20 with the parties. 21 I will suggest at the end of this that with 22 certain assumptions in mind, that both parties should have 23 the opportunity to file a brief, a letter brief if you 24 want or a more formal brief if you wish, as to what would 25 happen with certain facts. And the parties may try to HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER
361 1 already submitted in support of TRO preliminary 2 injunction? 3 MR. CALICA: Yes. 4 THE COURT: I will consider them anyway, 5 counsel. I have seen all of them. I will not obliterate 6 them from my mind. You can cite to them if you wish. 7 MR. CALICA: All right. And I see from the 8 nodding I'm getting approval, I believe. 9 THE COURT: Counsel, if you wish to cite them in 10 resolving this, I have seen them and I will consider them. 11 MR. CALICA: The final request, your Honor, two 12 things. One, we would request that BRT not remove the 13 material shown in Exhibit 26, and we have made a request 14 for permission to inspect them. 15 I will do that, because we would like an 16 opportunity to go on the site. 17 THE COURT: We had one witness that testified 18 that they found material through dumping of I don't know 19 how many years ago. In light of that, why do we need to 20 test that? 21 MR. CALICA: There is no scientific testimony 22 that it is dumping from years ago at this site. It was 23 introduced to this site, your Honor. 24 THE COURT: There was a Metro card in it. I get 25 that. I used to be a prosecutor. And it may have come HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER	363 1 dissuade me from the facts, we can discuss it now or you 2 can brief it. 3 Let us assume for purposes of our discussion 4 today only that it would be reasonable to conclude from 5 the evidence presented that as to the sand mining -- I'm 6 using that term deliberately -- being conducted, or that 7 was being conducted by the defendant on parcel B and C, 8 that that sand mining, the excavation, the purification 9 and sale, has little or no connection to the construction 10 of a rail spur, assuming this is a rail spur. 11 By the way, that may be another question. 12 And it appears from the evidence that that sand 13 mining was done without licensure, largely without notice 14 to the Town. And my question is: What happens then? 15 The Town has certain authority to monitor 16 activities on the property consistent with its police 17 powers -- my general understanding of the law. 18 More specifically, when it comes to a sand mine, 19 the information presented to me here -- and I assume it to 20 be true for these purposes -- is that the state DEC is in 21 charge or has authority to license, regulate, inspect and 22 so forth. And apparently that wasn't done. 23 Of course, the DEC is not a party here. We can 24 change that, I guess. 25 But my question is: Assuming that was the HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER

364 1 logical conclusion that one could draw from the evidence 2 presented, where does that stand vis-a-vis your claims and 3 defenses? 4 MR. CALICA: Your Honor, legally, and we will 5 brief it, I was advised when I spoke to the DEC counsel 6 that Long Island has a unique law, applicable only on Long 7 Island, that where localities exercise control of the sand 8 mining, then the DEC is precluded from licensing. And I 9 can get access to this -- 10 THE COURT: Wait a minute. I don't understand. 11 If the DEC is precluded from issuing licenses? 12 MR. CALICA: They have the power to license. 13 When they get an application for license, they 14 write to the locality only if it is in Nassau and Suffolk, 15 under the statutory scheme in New York. 16 If the locality says that they license in the 17 area, you know, that it is not an allowable use or -- 18 THE COURT: Are you suggesting -- sorry to 19 interrupt you -- but that the DEC's power has been 20 delegated to the Town? 21 MR. CALICA: Yes, under the statutory scheme 22 which I only recently learned of. 23 THE COURT: What do you say about that? 24 MR. ARONOFF: I can't speak to that specific 25 issue. I don't know if it is delegated or not. HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER	366 1 argument, but there is more sadly. 2 The CFO testified that the company is possibly 3 making close to 10 million dollars, close to the annual 4 revenue, in sand mining. It is a critical part of the 5 business plan, not incident. 6 And there was also testimony, and there are 7 other documents that established that the clearing and 8 sale of the material began well before the track was 9 designed. 10 This O plan we are looking at was drafted in 11 November of 2013, I want to say, and the clearing, 12 grubbing, scrubbing and sale of the material began well 13 before that. 14 And fascinatingly the exhibit put in as GGGG 15 includes a series of reports by BRT which described the 16 activities of parcel A as, quote, unquote, a mining 17 operation. 18 And Mr. Miller testified that the activities 19 there were identical to parcel B and C. 20 So by its own admission the company described 21 mining activity. 22 Again, feel free to try to dissuade me from any 23 of this. But when I get all this together, of course, the 24 hydrogeologist testified she observed sand sifting 25 equipment to purify the sand being sold. HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER
365 1 I do want to take the opportunity, and we will 2 do it in our brief, to try to dissuade you from the 3 assumption that the excavation has little or no connection 4 to track construction, sir. I have a hard time given the 5 testimony -- 6 THE COURT: Be careful. I didn't say excavation 7 had nothing to do with track construction. 8 The sale, and the mining -- the mining and sale 9 of sand on the property -- and let me give you a few 10 highlights, if I may. 11 My recollection of engineer Humbert's testimony 12 which he stated in response to my question that the 13 clearing and excavating could have been done in a more 14 surgical method to accommodate his track design. Which 15 says to me the entire mining of the center of the property 16 as such had to do with selling sand and not with the 17 design of track. 18 MR. ARONOFF: It is to put buildings eventually 19 on the site in support of the track activities that 20 Mr. Newell testified would be, and we always contemplated, 21 and the Town cited to emails in 2012 with buildings, 22 Mr. Miner testified that he understood the buildings had 23 to be on level grounds. 24 THE COURT: If that was the only piece of 25 evidence to be cited, I would be impressed with your HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER	367 1 Again, little or no connection to the 2 construction of the railway. 3 And also that it is part of the company's 4 business model to potentially help offset the construction 5 doesn't strike me as an integral part. Meaning if there 6 was an oil deposit under the sand, you try to drill for 7 sand and say it is part of the business plan because the 8 oil will pay for all the train cars and track, but it 9 would not be integral to the rail operation. 10 Phase two, Exhibit 31, showed the reduction of 11 the grade across the entire area of 50 feet, which only 12 relates from what I heard to the sale of sand. 13 If one looks to the email exchanges, 14 Plaintiff's Exhibit 20 to 29 and 31, makes it very clear 15 in the nature of those communications that the mining 16 extraction and sale of sand was a separate subsidiary 17 business that happens to be run by a rail operator. 18 Lastly and not least, Exhibit 33 also makes it 19 clear that the mining was a critical economic 20 consideration in connection with its project. 21 And in terms of the notice to the Town, I do 22 think we have a problem in connection with Exhibit 2 23 saying it was to be a J track. Clearly this excavation 24 has nothing to do with a J track. It has to do with 25 something entirely different. HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER

1 So to the extent that the Town could have some
2 notice here from some of the documents, I do think that
3 overall it was not clear as to exactly what was going on
4 at the time.

5 So in light of those facts, I think it is pretty
6 clear that the mining operation was a separate subsidiary
7 operation that happens to be conducted by the same company
8 constructing.

9 Also, I will note that the president's
10 testimony, which was very helpful, mentions that it was a
11 class three railroad operation, which means it has gross
12 revenues of 120 million dollars. And if that is the case,
13 clearly ten million dollars of sand is less than a minor
14 consideration as characterized earlier.

15 MR. ARONOFF: I don't want to argue with you
16 today. But I do want the opportunity to brief this issue.

17 THE COURT: Great.

18 MR. ARONOFF: I think, Judge, under the case
19 law, the way the railroad uses to finance its construction
20 operation, how it arranges that financing and stages its
21 construction falls within the deference given to railroad
22 by the ICCTA. It is in the case law. We will explore
23 that in our brief.

24 THE COURT: If there are cases, as I suggested
25 in my hypothetical, oil wells used to fund it and it is

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1 covered by exclusive jurisdiction, I would love to see
2 such cases. It is interesting.

3 MR. ARONOFF: I don't know about oil wells,
4 Judge.

5 THE COURT: But the question is, does the --
6 assuming it is a spur. And there is an entire issue there
7 because what is being constructed is at least twice as big
8 as currently exists.

9 MR. ARONOFF: Not relevant to the analysis, your
10 Honor.

11 THE COURT: In Judge Boyle's decision on this
12 matter --

13 MR. ARONOFF: Just to be clear, the issue in
14 that instance was that the builder, the railroad, had
15 existing operations in Ohio. And the argument made there
16 is we are supporting our existing operations in Ohio,
17 which is ancillary to those. And Judge Boyle said, no.
18 Your operations in Ohio is not ancillary to something that
19 is many states away, a thousand miles away.

20 Here we had existing operations on parcel A.
21 Yes, what is being build on B and C is larger. But there
22 is no dispute that what is being built is to support and
23 expand the existing operations in parcel A. So it is very
24 different from the earlier litigation. And it does fall
25 squarely within a square.

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1 THE COURT: I don't want anyone to think that
2 the rest of the evidence was lost on me. I decided to
3 focus on this issue because I think it is a potentially
4 dispositive issue.

5 I understand the nature of the projects here
6 being run by the rail operations, and they are very
7 important projects. I think economically there is a
8 significant interest. But I recognize the potential
9 environmental interest that the Town presented, and it is
10 very serious. Everybody has a serious matter here, I hear
11 it all and I appreciate the presentation.

12 But it strikes me that the sand operation, when
13 looked at in isolation, is simply a separate matter.

14 If that is the case, I'm not quite sure what we
15 do next.

16 MR. ARONOFF: If we were mining sand on a
17 different parcel that we weren't constructing a rail on
18 top of it, I'd understand the argument better.

19 THE COURT: In fairness, they were mining the
20 sand before you had the plan for the track.

21 MR. ARONOFF: We had concept plans going back to
22 early 2012 that came into evidence. We still only have a
23 concept plan. The final design plan for the site is not
24 established. But all the concept plans that all the
25 engineers presented required operational use both inside

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1 and within the track area.

2 THE COURT: I don't think that the current
3 grading, the evidence is pretty clear, has any necessary
4 relation to any of those plans, and that is the problem.

5 But I'm happy to get briefs from both sides.

6 When would you like to file them?

7 Mr. Mulry, I haven't given you an opportunity at
8 all?

9 MR. MULRY: Sills Expressway and Associates is
10 the owner of parcel B. There has been very little
11 evidence to anything Sills Expressway Associates was done.

12 While we agree with the BRT defendants with
13 respect to the law that has been presented on this motion,
14 I have nothing to add at this time.

15 THE COURT: Excellent.

16 MR. CALICA: How about next Thursday?

17 THE COURT: Fine with me.

18 MR. ARONOFF: Fine.

19 THE COURT: Bear in mind that the TRO stays in
20 place pending the resolution of this.

21 I will look forward to getting your briefs next
22 Thursday.

23 Anything further today?

24 MR. CALICA: Nothing further, your Honor.

25 MR. ARONOFF: Judge, I want to revisit the bond

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1 issue if the TRO is going to stay in place.

2 It is mandated by the Federal Rules. They have
3 not put in any evidence as to why it is not attainable.

4 We heard testimony from Mr. Miller about the
5 impact this is having on him.

6 THE COURT: I will say on the impact, other than
7 the delay of construction, which is obviously a real issue
8 but I believe for these purposes is not a significant
9 consideration, the main impact is not being able to sell
10 sand.

11 MR. ARONOFF: But the delay is significant. It
12 has a real impact, and it directly implicates these
13 issues. Every day they have them, they don't have boots
14 on the ground doing work, it delays the ultimate launch
15 date and it turns away customers interested in entering
16 into a relationship.

17 THE COURT: Include it as part of your brief.

18 MR. ARONOFF: All right.

19 MR. CALICA: Thank you for your time and
20 attention, your Honor.

21 THE COURT: It has been a pleasure.

22 Everyone have a good week.

23 MR. ARONOFF: Thank you.

24 MR. CALICA: Thank you.

25 (End of proceedings.)

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E-X-H-I-B-I-T-S

Plaintiff's Exhibit 30 was received in 282
evidence

Plaintiff's Exhibit 31 was received in 283
evidence

Plaintiff's Exhibit 32 was received in 289
evidence

Plaintiff's Exhibit 33 was received in 297
evidence

Defendant's Exhibit GGGG was received in 313
evidence

Defendant's Exhibit CCC was received in 322
evidence

Defendant's Exhibits JJJJ and were was 345
received in evidence

Defendant's Exhibit EEE was received in 351
evidence

Defendant's Exhibit DDD was received in 357
evidence

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I-N-D-E-X

W-I-T-N-E-S-S-E-S

KEVIN LOYST 245

DIRECT EXAMINATION 245

BY MR. CALICA

CROSS-EXAMINATION 254

BY MR. ARONOFF

REDIRECT EXAMINATION 266

BY MR. CALICA

DANIEL MILLER 269

DIRECT EXAMINATION 269

BY MR. CALICA

CROSS-EXAMINATION 304

BY MR. ARONOFF

REDIRECT EXAMINATION 326

BY MR. CALICA

JIM NEWELL 347

DIRECT EXAMINATION 347

BY MS. MILLER

CROSS-EXAMINATION 359

BY MR. CALICA

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EXHIBIT B

Subject: FW: Update on request for Topo information on Parcel C
Attachments: Phase 2 Rough Grading Plan.pdf; Phase 2 Estimated Cut & Fill Analysis.pdf

From: Lawrence Kuo
Sent: Tuesday, July 17, 2012 10:20 AM
To: Dan Miller; 'Jake Watral' (jake@watral.com)
Cc: William Clifford; Ted Mills; Andy Kaufman (akaufman@brookhavenrailterminal.com); Paul Stevens (pstevens@bownegroup.com); Richard Geiger (rgeiger@bownegroup.com)
Subject: RE: Update on request for Topo information on Parcel C

Attach estimated cut and fill analysis for your use.

Thank you,
Larry Kuo, P.E.

Bowne AE&T Group
235 East Jericho Turnpike
Mineola, NY 11501
Tel. 516-746-2350 ext. 1418
Fax 516-747-1396
E-mail: LKuo@BowneGroup.com
www.bownegroup.com

From: Dan Miller [<mailto:DMiller@ETCCAPITAL.COM>]
Sent: Thursday, July 12, 2012 3:06 PM
To: Lawrence Kuo
Cc: William Clifford; Ted Mills; Andy Kaufman (akaufman@brookhavenrailterminal.com)
Subject: Update on request for Topo information on Parcel C

Larry,

Pursuant to our closing documents I will actually need you to provide a calculation for estimated volume on Parcel C AND Parcel B, rather than parcel C only as I originally requested.

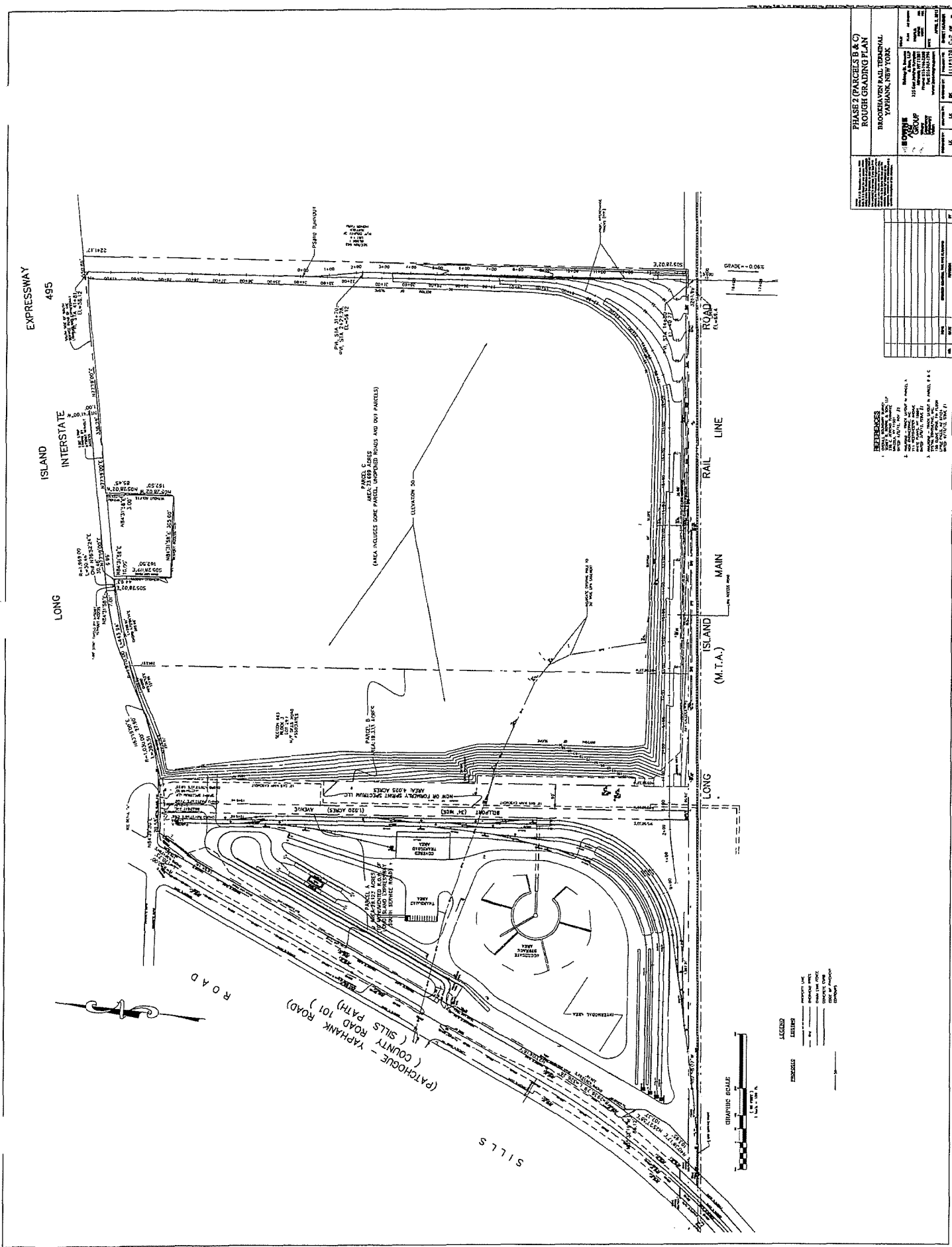
Please let me know if you have any questions, otherwise I hope to hear from you sometime next week with calculations.

Best Regards,

Dan

Daniel K. Miller
Chief Financial Officer
ETC Capital
38955 Hills Tech Drive
Farmington Hills, MI 48331

dmiller@etccapital.com



(Existing Surface

Parcel B

Cut = 1,159,761 cu.yds Fill = 2 cu.yds
Net = 1,159,759 cu.yds CUT

Parcel C

Cut = 1,394,936 cu.yds Fill = 48,862 cu.yds
Net = 1,346,074 cu.yds CUT

Existing Surface Minus 1 Foot

Parcel B

Cut = 1,128,842 cu.yds Fill = 219 cu.yds
Net = 1,128,622 cu.yds CUT

Parcel C Existing Minus 1 Foot

Cut = 1,309,027 cu.yds Fill = 77,610 cu.yds
Net = 1,231,417 cu.yds CUT

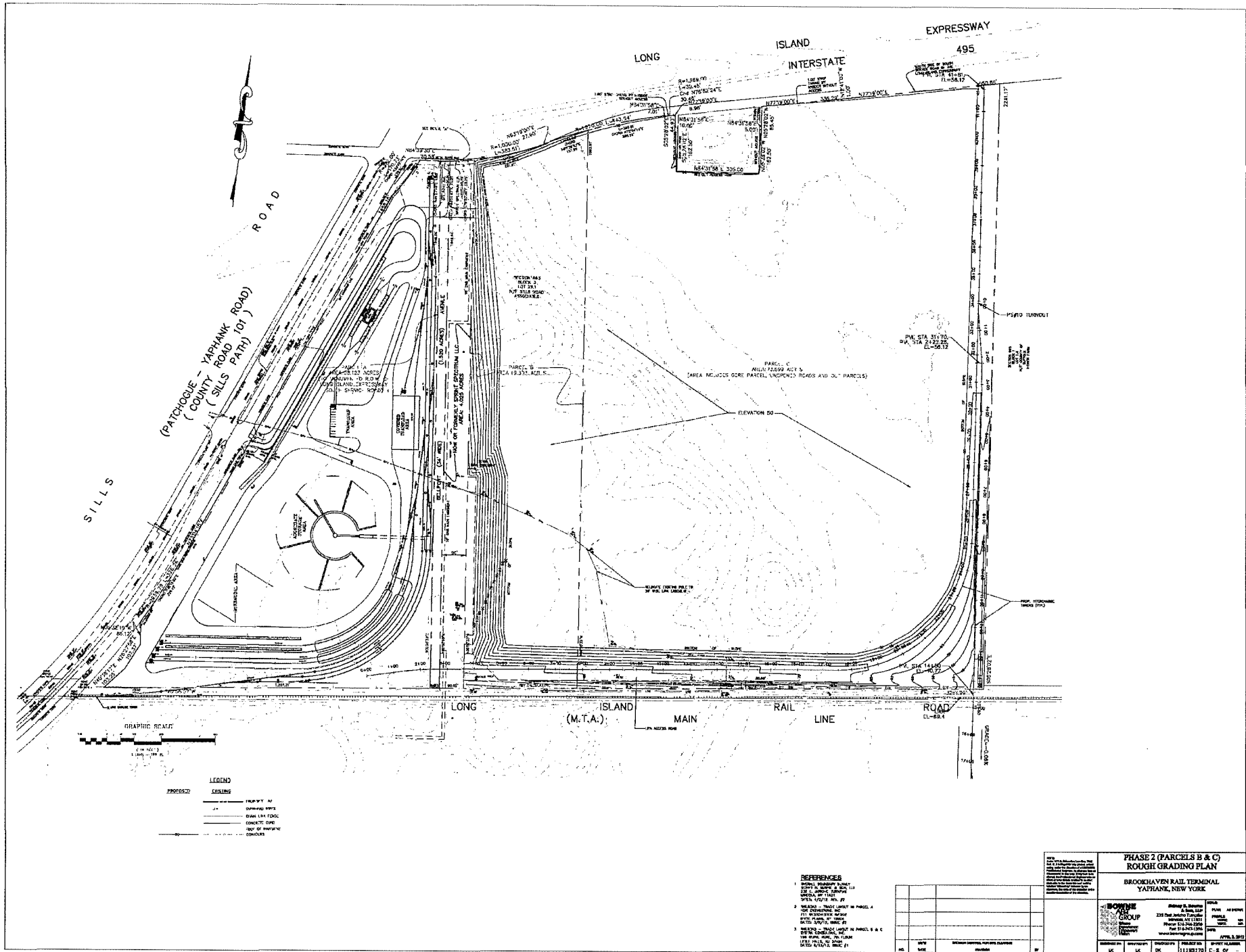
From: Tom Solomon [TSolomon@etccapital.com]
Sent: 11/12/2012 11:03:56 AM
To: lkuo@bownegroup.com
CC: Dan Miller [DMiller@ETCCAPITAL.COM]; Andy Kaufman [akaufman@brookhavenrail.com]
Subject: Sand Estimates
Attachments: Phase 2 Rough Grading Plan.pdf.pdf; Phase 2 Estimated Cut & Fill Analysis.pdf.pdf

Hi Larry-

Are you able to put your sand survey in a more formalized report? We want to have a formalized estimate on file as backup for our tax estimates regarding depletion.

Let me know if you have any questions or want to talk further on this,
Thanks

Tom Solomon, CPA | Accounting Manager
Brookhaven Terminal
205 Sills Road
Yaphank, NY 11980
P: 631.205.5755
F: 248.871.4081



Existing Surface

Parcel B

Cut = 1,159,761 cu.yds Fill = 2 cu.yds
Net = 1,159,759 cu.yds CUT

Parcel C

Cut = 1,394,936 cu.yds Fill = 48,862 cu.yds
Net = 1,346,074 cu.yds CUT

Existing Surface Minus 1 Foot

Parcel B

Cut = 1,128,842 cu.yds Fill = 219 cu.yds
Net = 1,128,622 cu.yds CUT

Parcel C Existing Minus 1 Foot

Cut = 1,309,027 cu.yds Fill = 77,610 cu.yds
Net = 1,231,417 cu.yds CUT

From: DMiller@ETCCAPITAL.COM [DMiller@ETCCAPITAL.COM]
Sent: 7/5/2012 9:44:48 AM
To: Jake Watral [jake@watral.com]
CC: Lawrence Kuo [lkuo@bownegroup.com]; Ted Mills [Ted@ETCCAPITAL.COM]; Karim Beydoun [kbeydoun@ETCCAPITAL.COM]; Tom Solomon [TSolomon@etccapital.com]; Andy Kaufman (akaufman@brookhavenrailterminal.com) [akaufman@brookhavenrailterminal.com]; Paul Stevens [pstevens@bownegroup.com]; Richard Geiger [rgeiger@bownegroup.com]; Jim Pratt [jpratt@prattbrothers.com]
Subject: Re: 3 requests

Larry,

Please use these elevations for your cut line to calculate sand volume.

Thanks

Dan

Daniel K. Miller
dmiller@etccapital.com

On Jul 3, 2012, at 7:19 PM, "Jake Watral" <jake@watral.com> wrote:

Larry we have used elevation 50+ _ which is approx county farm elevation and Rt 495 service rd elevation Also that grade will carry into parcel B with no slopping between

Sent from my iPad

On Jul 3, 2012, at 3:14 PM, Lawrence Kuo <lkuo@bownegroup.com> wrote:

Attach pdf's for request #1 & 2.

As discussed, we need to build existing and proposed surfaces for Parcel C and will bill Brookhaven Eastern Holdings job # 11183170 for this work. You wish for us to assume a flat surface across the majority of the property to match lowest track elevation at 56.12.

Thank you,

Larry Kuo

From: Dan Miller [mailto:DMiller@ETCCAPITAL.COM]
Sent: Tuesday, July 03, 2012 10:25 AM

To: Lawrence Kuo

Cc: Ted Mills; Karim Beydoun; Tom Solomon; Andy Kaufman (akaufman@brookhavenrailterminal.com); jake@watral.com

Subject: 3 requests

Larry,

3 quick things for you – if you are able to send this information over sometime soon that would be great.

1. Updated copy of parcel D layout for new potential tenant in PDF format.
2. Updated parcel A-D layout, including revised D layout from #1 in PDF format
3. Topo plan from Parcel C, including calculation of sand volume on parcel C based on 1' unusable material over entire parcel and site grades as specified in most current track design. Please include your calculation and a PDF with topo lines.

Thank you for your continued assistance.

Best Regards,

Dan

Daniel K. Miller

Chief Financial Officer

ETC Capital

38955 Hills Tech Drive

Farmington Hills, MI 48331

EXHIBIT C

GROUND LEASE

This lease (the "Lease") is entered into as of June 1, 2012 between **SILLS EXPRESSWAY ASSOCIATES, LLC**, a New York limited liability company, with offices at 608 Union Avenue, Holtsville, New York 11742 and 157 Albany Avenue, Freeport, New York 11520 ("Lessor"), and **SILLS ROAD REALTY, LLC**, a New York limited liability company with offices at 56 Comsewogue Road, East Setauket, New York 11733 (the "Lessee"), on the terms and conditions set forth below.

WHEREAS, Lessor now owns an approximately 20 acre parcel of undeveloped land in Yaphank, New York, on the south service road of the Long Island Expressway and designated on the Tax Map of the County of Suffolk, State of New York as District 02.00, Section 663.00, Lot 03.00 and Block 029.00 (together with all easements and other rights appurtenant thereto, the "**Property**"), as more particularly described on Exhibit "A" annexed hereto;

WHEREAS, Lessor previously entered into an Option Agreement, dated October 26, 2010, with Sills Road Realty, LLC (the "Option Agreement") pursuant to the terms of which Sills Road Realty was granted an exclusive option through October 31, 2012 to lease the Property;

WHEREAS, the terms of this Lease supersedes, replaces, and otherwise terminates the Option Agreement; and

WHEREAS, Lessee desires to lease the Property in connection with its operation of a transmodal rail facility on the parcel contiguous to the eastern and western boundaries of the property (the "Rail Facility") and to otherwise use the Property for lawful uses.

NOW THEREFORE, it is mutually covenanted and agreed as follows:

1. **Property.** Lessor leases to Lessee and Lessee leases from Lessor, the Property.
2. **Term.** This Lease shall be for an initial term of twenty five (25) years commencing on the date hereof (the "Effective Date"). The term of this Lease will extend automatically for successive five year terms unless and until such time as Lessee provides Lessor written notice that it does not intend to renew the Lease following expiration of the then-current term. Such notice must be given at least 180 days prior to the renewal date of any term.
3. **Rent.**
 - a. **Base Rent:** Beginning on the first day of the fourth (4th) year following the Effective Date, Lessee shall pay rent of \$396,740.75 per year, payable in equal monthly installments of \$33,061.73, for use of the Property ("Basic Rent"). Rental payments shall be made in advance on the first day of each month during the term of the Lease and any extended term.
 - i. The Basic Rent shall increase at the end of the eighth (8th) year and annually thereafter, including during any renewal term, by the percentage of increase in the

Consumer Price Index ("CPI") during the preceding year. To determine the CPI increase, there shall first be determined the CPI for the month of May preceding the commencement of the next lease year (the "Base Index"); there shall next be determined the CPI for the month of May in the ensuing lease year preceding the Basic Rent increase ("Comparative Index"). The parties shall then compute the following:

Comparative Index ÷ Base Index x prior year's Basic Rent = the new Basic Rent based upon CPI

By way of example, if the CPI as of May, 2019 is 205.600 and the CPI as of April 2020 is 234.384, then in calculating the Basic Rent increase to be effective on the first day of the ninth lease year, the Base Index is 205.600 and the Comparative Index is 234.384. The Comparative Index is divided by the Base Index, multiplied by \$396,740.75 equals \$452,284.46. The Base Rent for the eighth lease year shall be \$452,284.46.

For purposes of this Lease, the CPI shall mean the United States Department of Labor Consumer Price Index all items for all Urban Households for the Northeast Region, 1982-84=100, as adjusted in the event the United States Department of Labor shall establish a new base.

In the event that during the term of this Lease the United States Department of Labor shall no longer issue the CPI, then the parties shall agree upon an alternate index to be used in place and stead thereof, and the manner in which said index shall be utilized. If the parties cannot agree on such an alternate index or manner of utilizing same, the issue shall be submitted to arbitration .

ii. Notwithstanding anything to the contrary set forth above, on the date which is ninety (90) days prior to the thirty-fifth (35th) anniversary, Lessee will provide Lessor with a written appraisal of the property. The annual rent thereafter will be the higher of the then current rent in effect or the appraised value times .07. Each renewal shall be on the same terms and conditions as contained in this Lease except that the rent will increase as set forth in subparagraph (i) above.

b. Additional Consideration:

i. As additional consideration for Lessor entering into this Lease, Lessee, at its sole option, shall be obligated to (a) provide Lessor with up to Six Hundred Thousand (600,000) tons of bankrun gravel free of overburden (the "Minerals") commencing upon the commencement of excavation on the Property, or, at Lessee's sole option, (b) pay to Lessor the sum of \$5 per ton for Minerals not furnished. If Lessee elects to provide Lessor with the Minerals, Lessee may provide same from either the Property or from contiguous properties on which it has excavation rights. Lessor shall be obligated for all costs to dig, load and weigh the Minerals, at its sole cost and expense, and Lessor shall provide, at its sole cost and expense, all trucking necessary to remove the Minerals from the Property. Clearing, stripping and loading shall be undertaken in accordance with the provisions of a separate agreement with Watral Brothers Incorporated. Lessor shall not be entitled to more than fifteen thousand (15,000) tons of Minerals per month and no more than one hundred fifty thousand (150,000) tons per year.

ii. If, for any reason beyond Lessee's control (i.e., due to moratorium or some other governmental or quasi-governmental stop-work order or the like), Lessee cannot perform its obligations under this Paragraph 3b to provide the Minerals to Lessor, then Lessee's obligations to perform hereunder shall be suspended for the period that Lessee is unable to perform. If the period of suspension exceeds six (6) months, Lessee shall elect to either (a) terminate this Lease or (b) make the payments set forth in subsection b.i.(b) above.

4. **Use.** The Property may be used for rail terminal operations and all rail-related facilities and for any other legal purpose, including but not limited to the right to grade and remove material at the Property in accordance with approved engineered development plans and to construct buildings thereon. No uses shall be permitted which will violate any law, municipal ordinance, or regulation. If the Property is overdug, the Property will be brought to the correct grade using engineered fill.

5. **Easements.** In conjunction with this Lease:

(a) Lessor hereby grants Lessee and Brookhaven Terminal Operations, LLC ("BTO") a perpetual easement as described in **Exhibit B** (the "Easement"). Additionally, Lessor shall grant to Long Island Power Authority ("LIPA") such easements as LIPA shall request in the area running along the westerly boundary of the Property and thence easterly in the area to the south of the Easement area (the "LIPA Easements"). Lessor shall approve any other utility easements necessary for Lessee's development of the Property, which consent shall not be unreasonably withheld, delayed or conditioned. The provisions of this paragraph shall survive the termination of this Lease, including but not limited to an Event of Default by Lessor; and

(b) Lessee hereby grants Lessor a non-exclusive, perpetual and assignable easement and right of way in the form set forth and described in **Exhibit C** (the "Springing Easement"), which easement shall be recorded contemporaneously with the recording the Easement, and which become effective upon the expiration or sooner termination of this Lease pursuant to its terms.

6. **Mineral Rights.** Lessee may excavate all materials of whatever kind from Parcel B. Any and all materials excavated by Lessee and proceeds from the same shall remain the sole and exclusive property of Lessee.

7. **Lessor Representations.** As of the date of this Agreement and of the Effective Date, Lessor makes the following representations and warranties to Lessee:

(a) This Agreement constitutes a legal, valid and binding obligation of Lessor, enforceable against Lessor in accordance with its terms, subject to general equitable principles except as the enforceability thereof may be limited by public policy or applicable bankruptcy, insolvency, reorganization, moratorium or other similar laws of general application relating to creditors' rights.

(b) There are no pending or threatened condemnation or eminent domain proceedings involving the Property and Lessor has received no notices in connection therewith.

(c) There are no unpaid special or other assessments for public improvements or otherwise affecting the Property.

(d) There are no liens for taxes (other than for current real and personal property taxes not yet due and payable) on the Property.

(e) The Property is, and at all times has been, in compliance with applicable laws, regulations, ordinances, permits, and approvals.

(f) As of the Effective Date, Lessor has no knowledge of default under any contracts, agreements, or any other obligations related to the ownership or operation of the Property.

(g) Lessor warrants that no lien, exception to title, or encumbrance affects the Property other than those of record at the Effective Date of this Lease. If a holder of a mortgage from Lessee affecting the Property requests Lessor to enter into a reasonable subordination, non-disturbance agreement, Lessor shall do so provided that the holder agrees, in the event of foreclosure or sale under the mortgage, to recognize all of Lessor's rights under this Lease, and to perform all of Lessee's obligations under the Lease.

(h) Lessor has no knowledge of the existence of, any pending or threatened investigation, claim, suit or proceeding regarding any environmental liability in connection with the Property and has no knowledge of any basis for an environmental liability.

(i) Lessor has no knowledge of any litigation, proceeding, or claim against Lessor or the Property which will affect the obligations of Lessor hereunder or the Property.

(j) Lessor has no knowledge that the Property is now or has ever been used for the purpose of disposal of, refining, generating, manufacturing, producing, storing, handling, treating, transferring, releasing, processing or transporting any hazardous material, or that there are or ever have been underground storage tanks located on, at, or under the Property.

8. **Covenant of Quiet Enjoyment.** So long as the Lessee is not in default under this Lease, Lessee shall be entitled to quiet possession of the Property during the term of this Lease.

9. **Government Permits and Construction of Improvements by Lessee.** Lessee's obligations under this Lease are contingent upon the Lessee obtaining all necessary governmental permits and approvals for its proposed use of the Property for rail terminal operations and all warehouse, distribution, manufacturing and other rail-related facilities, including but not limited to the right to grade and remove material at the Property in accordance with approved development plans and to construct buildings thereon. If any necessary permits or approvals cannot be obtained after diligent and complete application therefor, Lessee may elect to terminate this Lease without any further liability to either party.

10. **Taxes.** During the term of this Lease, the Lessee shall pay all real estate taxes and special assessments levied against the Property, including installment payments for special

assessments extending beyond the term of this Lease prior to the last day to pay same without penalty. Lessee may contest the amount or validity of any taxes or special assessments by appropriate proceedings at Lessee's expense and any refunds shall belong solely to Lessee.

11. **Casualty Insurance.** During the term of this Lease and to the extent that there are any buildings constructed on the Property, Lessee shall procure fire and extended coverage insurance insuring the Property, including all leasehold improvements, for their full replacement value. The insurance policy shall show Lessor, any mortgagee of Lessor (of which Lessee has been give the name and address) or the Lessee, with respect to the Property, and the Lessee as named insureds. The insurance policy shall carry an endorsement requiring that Lessor shall be given 10 days written notice prior to any change in or any cancellation of the policy. Certificates of all insurance policies shall be delivered to Lessor. Lessor and the Lessee and all parties claiming under them mutually waive any right of recovery against each other for any loss occurring to the Property or as a result of activities conducted on the Property, which is covered by insurance, regardless of the cause of the damage or loss. Each insurance policy covering the Property shall contain an endorsement recognizing this mutual release by Lessor and the Lessee and waiving all rights of subrogation by their respective insurers.

12. **Liability Insurance.** Throughout the term of this Lease, the Lessee shall hold harmless and indemnify Lessor against any injury or damage to third parties arising as a result of any act or neglect of the Lessee, its agents, employees, successors and/or assigns, in or about the Property. Lessee shall, at the Lessee's cost, procure a liability insurance policy covering the Property and the Lessee's contractual indemnity obligations hereunder, with an insurance company licensed to do business in the State of New York, in amounts which are recommended in writing by a qualified and experienced insurance agent in the area as optimum coverage for the uses made of the Property, but which in no event are less than \$10,000,000 in primary coverage. The insurance policy or policies shall show Lessor and any mortgagee of the Lessor of which the name and address has been given to Lessee, and the Lessee as additional insureds. The insurance policy shall carry an endorsement requiring that Lessor shall be given 10 days written notice prior to any change in or any cancellation of the policy. Certificates of all insurance policies shall be delivered to Lessor. Lessor and the Lessee and all parties claiming under them mutually waive any right of recovery against each other for any loss occurring to the Property or as a result of activities conducted on the Property, which is covered by insurance, regardless of the cause of the damage or loss. Each insurance policy covering the Property shall contain an endorsement recognizing this mutual release by Lessor and the Lessee and waiving all rights of subrogation by their respective insurers. Each policy carried by a sublessee of the Lessee shall also show Lessor and any mortgagee of the Lessor of which the name and address has been given to Lessee, and the Lessee as additional insureds.

13. **Utilities.** Lessee shall contract directly with the utility providers and pay when due all bills for water, gas, electricity, and other utilities and services for the Property during the term of this Lease directly to the utility company.

14. **Leasehold Improvements.**

(a) Unless Lessor reasonably disapproves, Lessee shall have the right to place permanent structures on the Property for any lawful purpose related to the development and

operation of the Property. At the expiration of the Lease, unless otherwise mutually agreed, title to all such structures and leasehold improvements on the Property (other than those in the Easement areas) shall vest in Lessor. Lessor hereby acknowledges and agrees that it has and shall have no rights to any structures and/or improvements made in the Easement Area, and that Lessee shall have the right to make improvements in the Easement Area without Lessor's consent. In the event that the members of Lessor deadlock on the issue of whether to disapprove a permanent structure requested by Lessee, the members shall bring the matter to mediation in accordance with the Construction Industry Mediation Rules of the American Arbitration Association then in effect. Any request for mediation shall be filed in writing with the other party and with the American Arbitration Association.

(b) Lessor shall cooperate with Lessee in the development of the Property and shall execute any applications required in connection therewith and attend any public hearing if requested by Lessee. Lessor and Lessee shall meet upon reasonable request and at reasonable times at the Property to determine compliance with maintaining appropriate grade pursuant to the site plan to be developed by Lessee.

15. **Maintenance by Lessee.** Lessee shall, at its expense, keep the Property and any buildings or improvements on the Property in good condition and repair, reasonable wear and tear excepted. Lessee agrees to operate and keep the Property in a clean condition, in compliance with applicable laws and ordinances.

16. **Damage to Improvements.** In the event of damage to the improvements caused by fire or other casualty, Lessee shall promptly rebuild the Property to substantially the condition it was in prior to the casualty in accordance with the plans and specifications to be prepared by Lessee. The insurance proceeds carried by Lessee to cover casualty damage to the Property shall be available for the reconstruction.

17. **Condemnation.** If the whole or any part of the Property (a) in excess of two (2) acres or (b) which would render the Property unoperable for rail terminal operations and all rail-related facilities or any other legal purpose for which it was being used at the time of a taking shall be taken by any public authority under the power of eminent domain, the Lessee shall have the right up to the date of the taking to elect to terminate the Lease by giving notice of the termination to Lessor. If notice has not been received by Lessor as of the date of the taking, then the Lease shall be deemed to continue with regard to the portion of the Property not taken by eminent domain. If the Lessee does elect to terminate the Lease, then the Lessee's obligation to pay rent shall end as of the date of the taking and any amount of rent paid in excess of the amount due shall be returned to the Lessee. In the event that the Lessee does not elect to terminate the Lease, then the Lease shall continue in effect on the terms as stated in this document with the exception that the rent shall be reduced in proportion to the nature, value and extent which the part of the Property taken by eminent domain bears to the entire Property. To the extent of any renovation required to the Property to restore it to use after the taking, the Lessee shall be responsible for undertaking and completing that renovation and paying the cost of the renovation. Each party shall seek its own award for damages for the taking, and Lessor shall specifically receive all awards for the taking of the Property. Lessor shall pay over to Lessee that portion of any compensation or award received as consideration for any impacts to improvements that have been made.

18. **Signs.** Lessee may erect, maintain, and remove signs, appropriate to its business operations, in or about the Property as the Lessee may deem necessary or desirable. The signs shall be in compliance with all governmental regulations.

19. **Default.**

(a) Event of Default by Lessee. An Event of Default by Lessee shall occur if there has been: 1) a failure by Lessee to pay, when due, any rent to be paid to Lessor, or to make payment when due of any taxes, assessments, or charges required by the terms of this Lease; 2) a failure by Lessee to obtain any policy of insurance or to pay any insurance premiums required by the terms of this Lease to be paid by Lessee; or 3) a failure by Lessee to comply with any other obligations or provisions of this Lease. Following an Event of Default, Lessor may send to Lessee notice of the Event of Default. The notice shall give Lessee 30 days to cure the default. If the Event of Default is not cured during the notice period, then upon the expiration of that notice period of 30 days a Default shall exist, the Lease shall be deemed terminated, and Lessor may dispossess Lessee by any action or proceeding at law.

(b) Event of Default by Lessor. An Event of Default by Lessor shall occur if: 1) any warranty, representation, or statement made by Lessor in or associated with this agreement was false in any material respect when it was made or furnished; 2) Lessor dissolves, becomes insolvent, or makes an assignment for the benefit of creditors, or a voluntary or involuntary bankruptcy is begun by or against a party; 3) Lessor commits a default or event of default under any mortgage financing; or 4) Lessor fails to comply with any other obligations or provisions of this Lease. Following an Event of Default, Lessee may send to Lessor notice of the Event of Default. The notice shall give Lessor 30 days to cure the default. If the Event of Default is not cured during the notice period, then upon the expiration of that notice period of 30 days a Default shall exist.

20. **Remedies.**

(a) Lessor's remedies. If an Event of Default by Lessee as defined above occurs, Lessee shall deliver vacant possession of the Property to Lessor and remove all personal property therefrom, and shall pay all of Lessor's fees, costs and expenses of any action or proceeding to remove Lessee from the Property, including, but not limited to, reasonable legal fees and expenses, and if any due from Lessee is not paid within thirty (30) days of the date when due, the unpaid sum shall bear interest at the rate of eighteen percent (18%) per annum from the date when due until the date when paid.

(b) Lessee's remedies. If an Event of Default by Lessor as defined above occurs, Lessee shall, at its election, upon or concurrent with the giving of notice to Lessor, have the right to:

(i) terminate this Lease with no further obligation. If Lessee terminates this Lease, Lessee shall be entitled to recover from Lessor all damages incurred by Lessee on account of Lessor's default;

(ii) cure the default at Lessor's cost, at any time after Lessor commits a default. If Lessee at any time, by reason of Lessor's default, pays any sum or does any act that requires the payment of any sum, the sum paid by Lessee shall be due immediately from Lessor to Lessee at the time the sum is paid, and if paid at a later date shall bear interest at the rate of eighteen percent (18%) per annum from the date the sum is paid by Lessee until Lessee is reimbursed by Lessor. If Lessor fails to reimburse Lessee as required by this subparagraph, Lessee shall have the right to withhold from future rent due the sum Lessee has paid until Lessee is reimbursed in full for the sum and interest on it.

(iii) perform Lessor's obligations and make payments on behalf of Lessor:

a. In addition to any other right to remedy of Lessee hereinbefore provided, if Lessor shall fail to perform or observe any covenant or condition contained in this lease, Lessee may, after ten (10) days' written notice to Lessor, perform the same for the account of Lessor.

b. If Lessor shall fail to pay within ten (10) days after due, any installment of principal or interest on any mortgage paramount to this lease, or shall fail to promptly remove any other lien or charge which could jeopardize Lessee's right to possession of the Property as hereby granted, Lessee may make such payment or effect such removal, unless Lessor shall notify Lessee of any valid claim or setoff within the same ten (10) days. Any such payment or removal shall entitle Lessee to be subrogated to the lien or charge of the item so paid in addition to the rights given Lessee under this paragraph.

21. Mortgage, Leaschold Mortgage and Industrial Development Agency Transaction. Lessor shall have the right to encumber by mortgage all of Lessor's interest in the Property together with its interests in this Lease and all improvements and fixtures placed on the Property by and owned by Lessor. The maximum amount of Lessor's mortgage financing shall be seventy five (75%) percent of the then-appraised value of the Property but in no event greater than seventy five (75%) percent of the option price set forth in paragraph 29 hereof for as long as the option is in effect. In connection with any such mortgage financing, Lessor shall obtain a subordination non-disturbance and attornment agreement from the mortgagee in the mortgagee's usual form agreeing not to disturb Lessee interest in the Lease in the event of a foreclosure of the mortgage. Lessee shall have the right to encumber by mortgage all of Lessee's interest under this Lease including, without limiting the generality of the foregoing, its right to use the Property together with its interests in all improvements and fixtures placed on the Property. Each party hereto agrees to execute any amendments to this Lease reasonably required by any prospective institutional mortgagee, for so long as they do not materially alter the financial and other material provisions of this Lease. Lessee shall further have the right to enter into an installment sale or lease-leaseback transaction with the Town of Brookhaven Industrial Development Agency. Lessor agrees to reasonably cooperate with Lessee to effect such a transaction.

22. Notices to Mortgagee. If, at any time after the signing and recording of any mortgage encumbering Lessee's interest under this Lease, the mortgagee shall notify Lessor in writing that the mortgage has been given and signed by Lessee, and shall at the same time

furnish Lessor with the address to which it desires copies of notice to be mailed, Lessor agrees that it will mail to that party at the address given, duplicate copies of any suits filed by Lessor against Lessee and duplicate copies of any notices which Lessor may give or serve upon Lessee under this Lease.

23. **Mortgagee's Rights.** To the extent that Lessee may grant the right to any mortgagee, the mortgagee may, at its option, at any time before this Lease shall terminate, pay any amount or do any act or thing required of Lessee by the terms of this Lease; and all payments so made and all acts so done by the mortgagee shall be as effective to prevent a forfeiture of the rights of Lessee under this Lease as if the act or thing were performed by Lessee instead of the mortgagee.

24. **Assignment and Subletting.**

(a) Other than as it relates to the Lease Call Option, dated June 1, 2012, between Lessee and Brookhaven Terminal Operations LLC ("BTO") and as otherwise set forth herein, Lessee shall have the right to assign or transfer any or all of its rights under this Lease with Lessor's consent, not to be unreasonably withheld, delayed or conditioned. Lessee shall also have the right to sublet all or any part of the Property. No such assignment or sublease shall relieve Lessee of its obligations hereunder. Lessee shall cause to be executed by its assignee or sublessee an agreement in such form as Lessor shall prescribe or approve, to perform faithfully and to assume and be bound by all of the terms, covenants, conditions, provisions and agreements of this Lease. Lessee shall also deliver an executed copy of each sublease or assignment and assumption not less than five (5) business days prior to the commencement of occupancy set forth in such assignment or sublease. No such assignment or sublease shall be binding on Lessor until Lessor has received such copies as required herein.

(b) Notwithstanding the foregoing, in the event that Lessee shall transfer its interest in the real property described in Exhibit "D" and assign its interest in this Lease to BTO and shall thereafter withdraw as a member of BTO, then, upon the date of such withdrawal, Lessee shall be released from its obligations under this Lease.

25. **Notices.** All notices and other communications under this Lease shall be in writing and be sent by reputable overnight courier (provided a receipt is obtained), to the respective party at the address indicated above or at such other address as either party shall designate in writing. A change in address may be effected by notice given in accordance with this Section 25, sent by either party to the other. Unless Lessor gives notice to the contrary, all payments to Lessor under the terms of this Lease shall be made to Lessor at the address for Lessor first set forth above. Attorneys may give notices on behalf of their respective clients. Notices shall be deemed given upon actual receipt, refusal or return of the notice as undeliverable.

26. **Modifications.** No modification, alteration, or amendment to this Lease shall be binding unless in writing and signed by both parties to the Lease.

27. **Whole Agreement.** This Agreement constitutes the entire agreement between the parties and shall be deemed to supersede and cancel any other agreement between the parties

relating to the transaction contemplated in this Agreement. None of the prior and contemporaneous negotiations, preliminary drafts, or prior versions of the agreement leading up to its signing and not set forth in this Agreement shall be used by any of the parties to construe or affect the validity of this Agreement. Each party acknowledges that no representations, inducement or condition not set forth in this Agreement has been made or relied upon by either party.

28. **Governing Law.** This Agreement shall be governed by and interpreted in accordance with the laws of the State of New York. In the event any provision of this Agreement is in conflict with any statute or rule of any law in the State of New York or is otherwise unenforceable for any reason whatsoever, then that provision shall be deemed severable from or enforceable to the maximum extent permitted by law, as the case may be, and that provision shall not invalidate any other provision of this Agreement. Venue for any action brought under this Agreement shall lie in Suffolk County, New York.

29. **Option to Purchase.** For the three years following the effective date, Lessee shall have the exclusive right, upon ninety (90) days prior written notice to Lessor, to purchase the Property from Lessor (the "Option"). The Option must be exercised within the first three (3) years following the Effective Date. If Lessee exercises the Option, the purchase price shall be \$10,000,000.00, less (i) the value of the Minerals previously provided to Lessor which is agreed to be \$8 per ton and (ii) any cash payments made in lieu of providing Minerals.

Closing of title shall take place at the office of Lessor's attorney, on the date specified in Lessee's notice, which date shall not be more than ninety (90) days from the date of such notice. At the Closing, Lessor shall deliver to Lessee a Bargain and Sale Deed with Covenants against Grantor's Acts conveying to Lessee fee title to the Property in the condition of such title as of the date hereof, and subject to the easements provided for herein.

30. **Right of First Refusal.** If at any time after the expiration of the exclusive Option provided for in Section 29 above, Lessor desires to sell or otherwise transfer the Property to a third party and Lessor shall obtain a bona fide written offer for the purchase of the Property, setting for the all of the material terms and conditions of such proposed offer (the "Offer"), then Lessor shall immediately send such Offer to Lessee. Lessee shall have sixty (60) days from the date of its receipt of Lessor's notice of the Offer to elect to purchase the Property on the same terms and conditions as those set forth in the Offer and Lessee shall provide written notice to Lessor during such sixty (60) day period as to whether or not it will purchase the Property on the same terms and conditions as those set forth in the Offer. If Lessee exercises its rights contained in this Section 30, the closing shall take place at the office of Lessee's attorney within ninety (90) days from the date of Lessee's notice to Lessor of its exercise of its rights under this Section 30. In the event Lessee does not elect to purchase the Property as hereinabove provided, Lessor shall be free to sell the Property to the proposed third party purchaser making the Offer on the same terms and conditions as those set forth in the Offer. In the event that the Lessee does not elect to exercise its rights under this Section 30, and the sale to the third party provided for in the Offer does not occur in accordance with the provisions of the Offer, the Lessor may not sell or otherwise transfer the Property, or attempt to sell or otherwise transfer the Property, without complying with the terms and conditions of this Section 30 in each and every instance.

31. **Memorandum of Lease.** The parties agree to execute, and Lessee shall record, a Memorandum of Lease identifying the existence of this Lease and other materials provisions hereof.

IN WITNESS WHEREOF, this Lease has been duly executed by the parties hereto as of the date and year first above written.

"LESSOR"

Sills Expressway Associates, LLC

By: James J. Pracht

Name: James J. Pracht

Its: Manager

"LESSEE"

SILLS ROAD REALTY, LLC

By: Andrew Kaufman

Name: Andrew Kaufman

Its: President

EXHIBIT A
LEGAL DESCRIPTION

EXHIBIT B
EASEMENT

EXHIBIT C
SPRINGING EASEMENT