No. 14-

IN THE

Supreme Court of the United States

WEST CHELSEA BUILDINGS LLC, 22-23 CORP., 26-10 CORP., TENTH AVENUE REALTY ASSOCIATES LP AND SOMATIC REALTY, LLC,

Petitioners,

v.

UNITED STATES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When the resolution of a novel or unsettled issue of New York law would allow the Federal Circuit to avoid deciding a difficult question of federal constitutional law, may the Federal Circuit summarily (and without explanation) decline to certify the issue to the New York Court of Appeals contrary to the principles of judicial federalism and constitutional avoidance underlying this Court's decisions in *Railroad Comm'n of Texas v. Pullman,* 312 U.S. 496 (1941), and *Arizonians for Official English v. Arizona*, 520 U.S. 43 (1997)?

2. When the United States takes an easement from New York landowners pursuant to the National Trails System Act Amendments of 1983, Pub. L. No. 98-11, 16 U.S.C. §§ 1241, et seq., and transfers it to New York City for a park, can the City require the landowners to forfeit their Fifth Amendment right to just compensation as a condition of the City granting owners development rights in their remaining land, or is this an unconstitutional exaction prohibited by this Court's decisions in *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987), *Dolan v. City of Tigard*, 512 U.S. 374 (1994), and *Koontz v. St. John's River Water Management District*, 133 S. Ct. 2586 (2013)?

CORPORATE DISCLOSURE STATEMENT (RULE 29.6)

There is no parent or publicly held company owning ten percent or more of the corporation's stock of any appellant in this case.

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OPINIONS BELOW

The Court of Federal Claims's (CFC's) opinion is at 109 Fed. Cl. 5 (2013) and reproduced in the appendix (Pet. App. 5a-59a). The Federal Circuit's summary affirmance is at 2014 WL 540421 (Feb. 12, 2014) and reproduced at Pet. App. 3a-4a.

JURISDICTION

The Federal Circuit rendered its panel decision February 12, 2014. Pet. App. 3a-4a. The landowners timely petitioned for panel rehearing and rehearing *en banc*; the court of appeals denied the petition on May 1, 2014. Pet. App. 1a-2a. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the United States Constitution provides "[n]o person shall * * * be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The National Trails System Act Amendments of 1983, Pub. L. No. 98-11, 16 U.S.C. §§1241, *et seq.*, provide the United States may establish public recreational trails across otherwise abandoned railroad rights-of-way. Relevant excerpts are at Pet. App. 60a.

The Tucker Act, 28 U.S.C. §1491, grants the CFC jurisdiction to, *inter alia*, award damages against the

United States for claims arising under the Constitution, including the Fifth Amendment Takings Clause. The statutory language is at Pet. App. 61a.

INTRODUCTION

Basic principles of federalism and constitutional avoidance direct federal courts confronting an unsettled question of state law and a federal constitutional issue to refer the unsettled issue of state law to the state's highest court for a definitive answer before proceeding to rule on the federal constitutional issue. Permitting state courts to decide unsettled questions of state law promotes federalism because "[f]ederal courts lack competence to rule definitely on the meaning of state legislation." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 48 (1997). And it promotes constitutional avoidance by preventing "premature adjudication of constitutional questions" when the state court's construction cabins the state law "within constitutional bounds." *Id.* at 78. When a federal court elects to decide "a novel state [law question] not yet reviewed by the State's highest court," it "risks friction-generating error." *Id.* at 78–79.

This case illustrates that risk. Petitioners sought Fifth Amendment compensation for property taken when the United States imposed easements on their land. These federally created easements granted New York City a right to now use the owners' land for a public park. The courts below denied the claims based on an agreement New York City required landowners to sign in exchange for granting the landowners development rights to their property. The United States was not party to this agreement but, nonetheless, claimed it escaped its

obligation to justly compensate the landowners because, the United States claimed, it was an intended third-party-beneficiary able to enforce the covenant-not-to-sue under New York law. No court has ever permitted a non-party to enforce such a covenant under New York law. Here, however, the CFC did precisely that, and, by ruling the United States could enforce a covenant-not-to-sue, decided an unsettled question of New York law in a manner no court has ever done.

Even worse, this error forced the CFC to confront a significant constitutional issue which, had the state law question been answered differently, could have been avoided. Specifically, the court proceeded to address whether the City's form agreement—which conditioned these landowners' development rights in their land upon waiving their Fifth Amendment rights—imposed an unconstitutional condition under this Court's holdings in *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). In holding that a "voluntary" waiver of rights can never be an unconstitutional exaction, the CFC committed additional error.

By summarily affirming the CFC without opinion, the Federal Circuit ignored two opportunities to remedy these errors. First, it rejected petitioners' request to certify the unsettled third-party-beneficiary question to the New York Court of Appeals, contrary to this Court's strong policy favoring certification in *Arizonans*. This ruling is emblematic of the Federal Circuit's confusion about when state law questions should be certified—a situation that requires clarification by this Court.

Second, the Federal Circuit ignored this Court's intervening decision *Koontz v. St. John's River Water Management District*, 133 S. Ct. 2586 (2013) which held the unconstitutional exaction doctrine extends to purportedly "voluntary" waivers of constitutional rights. While the CFC did not have the benefit of *Koontz*, which was decided after the CFC ruled, the Federal Circuit did. But rather than following *Koontz*, the Federal Circuit simply affirmed the lower court's ruling without opinion. It thus let stand an erroneous holding that could adversely affect future takings claims against the United States, which are the exclusive jurisdiction of the CFC and Federal Circuit.

The Federal Circuit could have, indeed should have, avoided all of these problems simply by certifying the unsettled question of New York law to the New York Court of Appeals. This Court can avoid them too, by granting *certiorari*, vacating the Federal Circuit's ruling, and remanding with instructions to certify the state law question to New York's highest court. In so doing, it would promote the values of federalism and constitutional avoidance, provide clarification to the Federal Circuit about when issues of state law should be certified and ensure this Court's holdings in *Nollan, Dolan* and *Koontz* are faithfully applied.

STATEMENT OF THE CASE

Petitioners own land traversed by an abandoned elevated railroad viaduct in Manhattan's West Chelsea neighborhood. The original easements granted the New York Central Railroad a limited right to use these owners' property for operation of a railroad. And when

railroad operations ended the easement terminated and the owners regained unencumbered possession of their land. See *Marvin M. Brandt Revocable Trust v. United States*, 134 S. Ct. 1257, 1265 (2014) ("The essential features of easements—including, most important here, what happens when they cease to be used—are well settled as a matter of property law. * * * [E]asements * * * may be unilaterally terminated by abandonment, leaving the servient owner with a possessory estate unencumbered by the servitude. * * * In other words, if the beneficiary of the easement abandons it, the easement disappears, and the landowner resumes his full and unencumbered interest in the land.") (citations omitted).

The last train ran in the 1980s and federal regulators ruled the railway abandoned. But, before the elevated viaduct was demolished, the United States issued an order under the federal Trails Act taking the owners' right to unencumbered possession of their land and imposing new easements allowing a public park to be built on the land. The federal government never compensated the owners for this taking.

After the federal government took an easement across these owners' land, New York City began rebuilding the abandoned railroad trestle as a public park. The City struck a deal with the landowners. The CFC found the "deal" provided the City would allow landowners development rights in exchange for the landowners releasing any claim against the City for, *inter alia*, a "condemnation award." To effect this release, the City drafted an agreement including a covenant-not-to-sue the "City or the United States of America." The United States was not a party to the agreement, did not participate in

negotiating the agreement and did not even know the agreement existed until years later.

The Court of Federal Claims dismissed petitioners' takings claim against the United States on the basis of this covenant-not-to-sue, holding the United States was—under New York law—an "intended third-party-beneficiary." This was the first time *any* court *ever* allowed a non-party to enforce a covenant-not-to-sue under New York law. The CFC went on to hold the agreement with the City—in which petitioners were required to forfeit their constitutional right to compensation they were due from the United States in exchange for the City granting development rights—was not an unconstitutional exaction. Despite petitioners' requests during argument and in their petition for rehearing, the Federal Circuit did not certify this admittedly novel application of New York third-party-beneficiary law to New York's Court of Appeals. Nor did the Federal Circuit review the federal constitutional ruling in light of this Court's intervening authority in *Koontz*. Rather, the Federal Circuit summarily affirmed and denied any rehearing.

The High Line and the Railway Easement. Until the 1930s, a street-level railway line plied Manhattan's West Side, connecting the meat-packers and warehouses of Tenth and Eleventh Avenues with the West Side Rail Yards. Kenneth T. Jackson, *From Rail to Ruin*, New York Times (Nov. 2, 2003), at 4.11. Accidents along the railway "killed and mutilated hundreds of people, and its path well earned the name Death Avenue." Christopher Grey, *When a Monster Plied the West Side*, N.Y. Times (Dec. 22, 2011), at RE7.

In 1934, an elevated viaduct, dubbed the High Line, replaced the street-level railroad. Jackson, *supra*, at 4.11. Unlike typical elevated railways running above existing streets, this trestle ran through the center of city blocks, passing over—and through—buildings. *Id.*

The owners of land under the High Line granted the railroad an easement to use their property "for the construction, equipment, maintenance, and operation of the railroad * * * upon a viaduct structure." See *Chelsea Property Owners*, 7 I.C.C.2d 991, 994-95 (S.T.B. 1991), *rev'd on other grounds*, 8 I.C.C.2d 773 (I.C.C. 1992) and Pet. App. 62a-63a. The easement did not extend to non-railway uses; would be extinguished upon the abandonment of railway use; and required the railroad to demolish the elevated structure when it was no longer being used for rail transport. *Id.*

The High Line's Abandonment. Beginning in the 1960s, trucks replaced trains, and traffic on the High Line fell substantially. 7 I.C.C.2d at 993. The last train, pulling three boxcars of frozen turkeys, ran in 1980. Meera Subramanian, *Blasts From the Past*, N.Y. Times (Feb 5, 2006), at 4. By 1982, "all stations and team tracks * * * by and over which traffic could move had been eliminated," and the viaduct quickly fell into disrepair. 7 I.C.C.2d at 993–994.

Owners of property along and under the decaying structure, supported by the City, initiated adverse abandonment proceedings to have the ICC order the High Line abandoned and allow the viaduct to be demolished. 8 I.C.C.2d at 774. The ICC granted the landowners' application, declaring the structure abandoned and

paving the way for its demolition. *Id.* at 783, *aff'd* 29 F.3d 706, 715 (D.C. Cir. 1994). Under the original right-of-way easements, the owners' land was now unencumbered and could be developed free of the elevated viaduct.

Creation of a Public Park on the Abandoned Right-of-Way. Before the High Line could be torn down, however, New York City government changed its mind and proposed developing the abandoned viaduct as a public park. The City asked the ICC's successor, the Surface Transportation Board (STB), to issue an order invoking §1247(d) of the Trails Act. The STB agreed and, in June 2005, invoked §1247(d). Pet. App. 5a-6a.

The Trails Act was adopted "to preserve shrinking rail trackage by converting unused rights-of-way to recreational trails." *Preseault v. I.C.C.*, 494 U.S. 1, 6 (1990). When invoked, §1247(d) destroys a landowner's state-law right to unencumbered title and exclusive possession of their land. By dint of §1247(d), the owner's land is now encumbered by easements for public recreation and "railbanking." See 494 U.S. at 8; *Presault v. United States*, 100 F.3d 1525, 1552 (Fed. Cir. 1996).[1]

In *Presault*, this Court held this "gives rise to a takings question" when "the easements provide that the property reverts to the abutting landowner upon abandonment of rail operations." 494 U.S. at 8. This is because, as Justice

1. *Citizens Against Rails-to-Trails v. Surface Transp. Bd.*, 267 F.3d 1144, 1150 (D.C. Cir. 2001). "By deeming interim trail use to be like discontinuance rather than abandonment, Congress prevented property interests from reverting [to the landowner] under state law." *Presault*, 494 U.S. at 8 (citation omitted); see also *Barclay v. United States*, 443 F.3d 1368, 1374 (Fed. Cir. 2006).

O'Connor explained in her concurrence, a government order that "delays property owners' enjoyment of their reversionary interests" operates to "burden[] and defeat[] the property interest" and thus implicates the Fifth Amendment. *Id.* at 22 (O'Connor, J., concurring joined by J. Scalia and J. Kennedy). This Court found the Trails Act constitutional but said this was so because a landowner could obtain the "just compensation" to which they are entitled by bringing an inverse condemnation action in the CFC.

The Landowners' Agreement with New York City. The STB's invocation of §1247(d) denied these owners unencumbered possession of their land. The new easements for public recreation and "railbanking" made it impossible to use and develop this land in the manner it could have been used and developed before the STB invoked §1247(d).

After the STB issued its order invoking §1247(d), New York City developed a rezoning scheme for the West Chelsea neighborhood. New York City would allow certain development rights under and around the High Line to be transferred to other nearby parcels. Pet. App. 19a-23a; see also Vicki Been & John Infranca, *Transferable Development Rights Programs: "Post-Zoning"?*, 78 Brook. L. Rev. 435, 450–452 (2013).

As part of the rezoning scheme, the City reached a "deal" in which owners would release claims they had against the City in exchange for the City allowing them development rights in their land. Pet. App. 11a-19a. The City drafted, and petitioners signed, a form agreement. Pet. App. 15a-19a and 62a-80a. The agreement primarily

addressed liability for environmental contamination and injuries related to the City's construction and operation of the park. As part of this "deal," the City required landowners to release any claim they had against the City for "any condemnation or similar award for public taking in connection with the Highline." Pet. App. 16a; see also Pet. App. 68a. To effectuate this release, the agreement contained a provision stating the landowners "agree[d] not to sue or join any action seeking compensation * * * from the City or The United States." *Id.*

That was the only mention of the United States in the entire agreement. The United States was not a party to the agreement, and as the CFC acknowledged, "no representative of the United States either participated in the negotiations that led to the creation of the trail or was part of the Covenant Not to Sue Agreements." Pet. App. 19a. Nor did the United States pay any consideration to petitioners (or anyone else) in connection with the agreement. Pet. App. 46a. It does not appear the United States even knew the agreement existed until years later. *Id.*

The agreement plainly states it was entered "for and on behalf of the City and [the landowners], respectively." Pet. App. 79a. The inclusion of the United States in the covenant-not-to-sue provision was apparently due to the City's (ultimately mistaken) concern that, if the landowners sued the United States for compensation, the United States may ask the City to indemnify the United States. The City's attorney testified, "[t]he City was aware of potential for litigation against the United States" and included the provision "to preclude any claim *against the City* by the property owners in connection with the

issuance of the CITU, and to generally settle all matters in connection with the CITU." Pet. App. 17a (emphasis added). (The "CITU" is the STB's order invoking § 1247(d).)

The High Line opened in 2009. Over the next five years, more than 2,500 new residential units, 1,000 hotel rooms, and 500,000 square feet of new office and art gallery space sprung up in the surrounding neighborhood. Kristina Shevory, *Cities See the Other Side of the Tracks*, N.Y. Times (Aug. 3, 2011), at B6. Between 2003 and 2011, property values near the High Line climbed by 103 percent. Moss, *supra*, at A25. Petitioners' properties, which remained encumbered by the Trails Act easements and by the physical presence of the viaduct, however, did not appreciate in value.

The Proceedings Below. It is an unconstitutional exaction for New York City to demand a landowner forfeit their Fifth Amendment right to compensation in exchange for the City approving development rights in the owner's property. Notwithstanding this, petitioners have honored their agreement with the City and have not sued the City for any condemnation award. But *the United States*' obligation to compensate these owners for property *the United States* took from them is another matter entirely.

In 2011, petitioners sought to vindicate their Fifth Amendment right to be justly compensated by the United States for that property the United States took. Although the United States was not party to the agreement between the City and landowners, it nevertheless sought to prevent the landowners from receiving compensation by invoking the covenant-not-to-sue and claiming the

United States was the intended third-party-beneficiary of the agreement.

In response, petitioners cited New York's longstanding policies disfavoring both covenants-not-to-sue and the enforcement of contracts by non-parties. They pointed out—and the United States did not dispute—that no case had *ever* construed New York law to allow a purported third-party-beneficiary to enforce a covenant-not-to-sue. Petitioners further argued that, even if the United States was an intended third-party-beneficiary, it was unconstitutional for the City to require landowners to forfeit their constitutional right to just compensation the United States owed them as a condition of the City granting development rights.

The CFC nonetheless granted summary judgment in favor of the United States holding it could enforce the covenant-not-to-sue as an intended third-party-beneficiary. Pet. App. 50a. The CFC concluded, notwithstanding the absence of any language designating the United States an intended third-party-beneficiary, "the surrounding circumstances indicate that all parties knew of the possibility of suits against the United States and that waivers of those suits would be part of the overarching agreement concerning the High Line." Pet. App. 49a. And it found "the City intended to give the United States the benefit of the promise not to sue." *Id.* Concluding "the United States was an intended beneficiary of [petitioners'] promise in the Covenants Not to Sue Agreements not to seek compensation from the United States in connection with the High Line CITU," the CFC held that the United States could "enforce the Agreements in this action as a third party beneficiary." Pet. App. 50a.

Because the CFC found the United States could enforce the covenant-not-to-sue under New York law, it was forced to address petitioners' constitutional argument that their waiver of Fifth Amendment rights was an unconstitutional exaction. As the CFC recognized, under *Nollan* and *Dolan*, "the government may not require a person to give up a constitutional right * * * in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no connection to the property." Pet. App. 55a (quoting *Dolan*, 512 U.S. at 385). Specifically, "a land use exaction is constitutional only if an 'essential nexus' exists between the condition imposed and a legitimate government purpose, and if there is a 'rough proportionality' between the required condition and the impact of the proposed development." Pet. App. 55a-56a (quoting *Nollan*, 483 U.S. at 837, and *Dolan*, 512 U.S. at 391). But the CFC did not apply the *Nollan/Dolan* test. Rather, it simply concluded that because petitioners had "voluntarily waived their constitutional rights as part of a voluntary agreement, the doctrine of unconstitutional conditions does not apply." Pet. App. 57a.

The landowners appealed to the Federal Circuit. Both at oral argument and in their petition for rehearing, petitioners asked the unsettled state-law question (whether the United States was an intended third-party-beneficiary able to enforce a covenant-not-to-sue) be certified to the New York Court of Appeals.[2] Petitioners also asked the Federal Circuit to consider this Court's intervening

2. Petitioners did not ask the CFC to certify the question because New York's Court of Appeals only accepts certification requests from this Court, the federal Courts of Appeals, or other states' highest courts. N.Y. Ct. R. 500.27.

opinion in *Koontz v. St. John's River Water Management District*, 133 S. Ct. 2586 (2013), which was issued while the appeal was being briefed. *Koontz* confirmed—contrary to the CFC's holding—the *Nollan/Dolan* test does indeed apply to situations where the government "pressure[s] an owner into *voluntarily* giving up property for which the Fifth Amendment would otherwise require just compensation." 133 S. Ct. at 2589–91 (emphasis added).

Rather than address either the certification issue or this Court's intervening decision in *Koontz*, the Federal Circuit elected to summarily affirm the CFC's judgment without opinion. Pet. App. 3a-4a. Petitioners sought rehearing and, again, asked the Federal Circuit to certify the state law question. The Federal Circuit again denied this request without opinion. Pet. App. 1a-2a.

The landowners seek an order granting *certiorari*, vacating the judgment below, and remanding to the Federal Circuit with instructions that it certify the question of state law to the New York Court of Appeals. In the alternative, petitioners request the Court vacate the judgment and remand the case for further consideration in light of *Koontz*.

WHY *CERTIORARI* SHOULD BE GRANTED

I. The Federal Circuit declined to certify an unsettled question of state law to the state's highest court in a case in which the resolution of that question would have allowed it to avoid unnecessarily deciding a significant constitutional question. Instead of honoring the principles of judicial federalism and constitutional avoidance enshrined in *Arizonans*, the Federal Circuit summarily affirmed the

CFC's decision interpreting New York law in a way that no New York court had ever done, and that was contrary to New York's foundational public policies. Had the Federal Circuit certified this question instead of affirming the CFC's "*Erie*-guess," it could have avoided reaching the federal constitutional issue altogether.

But there is more at stake here than simply correcting a federal court's mistaken interpretation of state law—albeit an interpretation that carries federal constitutional implications. The Federal Circuit's approach to certification is out of line with the approaches of the other courts of appeals. This case provides the opportunity for this Court to provide meaningful guidance as to the proper criteria for certifying a state law question. Such guidance would be particularly valuable given the Federal Circuit's exclusive jurisdiction over important questions involving federal takings and underlying questions of state property law.

II. The Federal Circuit affirmed the CFC's holding that New York City could condition its liability assumption on petitioners waiving their Fifth Amendment rights against the United States. This "deal"—which required petitioners to forfeit their federal constitutional rights in exchange for the City granting develop rights—was an unconstitutional exaction under this Court's decisions in *Nollan*, *Dolan,* and *Koontz*. In particular, the recent holding in *Koontz*—which was handed down while this case was pending before the Federal Circuit—invalidates the CFC's position that the unconstitutional exaction doctrine does not apply to "voluntary" agreements. Although petitioners called *Koontz* to the Federal Circuit's attention, the court never reconciled its summary affirmance with this Court's holding in *Koontz*. At a minimum, this Court

should vacate and remand to the Federal Circuit for further consideration in light of *Koontz*.

ARGUMENT

I. The Federal Circuit should have certified the unsettled question of New York state law before addressing the CFC's resolution of a significant constitutional issue.

1. The Federal Circuit's summary affirmance ignored this Court's cardinal rule that a federal court should not prematurely adjudicate a constitutional question that turns on an unsettled issue of state law when that question may be avoided by certifying the state law issue to the State's highest court. Under *Erie*, a federal court cannot presume to independently declare state law; it must defer to the interpretation of the highest state court. *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). Particularly when state law is unsettled, federalism concerns strongly favor certifying questions to a state's highest court instead of presuming to independently decide them. And when certification will avoid the need to reach a federal constitutional issue, the case for certification is even more compelling.

Long before certification became widely available, this Court held that principles of judicial federalism and constitutional avoidance sometimes require federal courts to abstain from deciding unsettled questions of state law when a definitive state court determination would allow the federal courts to avoid adjudicating a federal constitutional issue. See *Railroad Comm'n of Tex. v. Pullman,* 312 U.S. 496 (1941); *Clay v. Sun Ins. Office Ltd.*, 363 U.S. 207 (1960). With the development

of certification procedures, the "*Pullman* abstention doctrine" has become a "*Pullman* certification doctrine," because certification is substantially less time consuming and disruptive than traditional abstention. See *Arizonans.*

In this case, the Federal Circuit should have availed itself of New York's certification procedure—which has been invoked over 200 times by the Second Circuit—instead of hazarding an "*Erie*-guess" as to New York law and risking an unnecessary decision of a federal constitutional question.

2. By not doing so, the Federal Circuit violated important principles of federalism and constitutional avoidance. It affirmed an unprecedented holding that, under New York law, a non-party can enforce a covenant-not-to-sue—a result *no* New York court had *ever* reached. And it affirmed the CFC's (incorrect) holding on a constitutional takings issue that it never should have reached.

3. The Federal Circuit's approach to certification is in tension with the approach of other circuits. Although the tests employed by sister circuits vary, they each stand in stark contrast to the Federal Circuit's silence on the question. This case provides this Court with an opportunity to promote a more consistent approach among the circuits by providing meaningful guidance to the lower federal courts as to the proper criteria for employing *Pullman/Arizonans* certification.

4. This Court's guidance on when certification is appropriate is especially important because the Federal Circuit has exclusive jurisdiction over every appeal of an

inverse condemnation claim against the United States government. These cases often involve the intersection of unsettled questions of state property law and important federal constitutional issues—precisely the combination *Arizonans* held to be the prototypical case to be certified. Landowners vindicating their Fifth Amendment right to just compensation against the federal government do not have the option of litigating their claim before a state tribunal—making the input that state courts can provide through certification all the more valuable. And the concentration of takings cases in a single federal circuit makes this Court's active superintendence even more necessary.

A. Federal courts should ordinarily certify novel or unsettled questions of state law to the state's highest court when doing so avoids adjudicating a constitutional issue.

1. In *Pullman*, this Court required a federal court to abstain from deciding an issue of Texas law because the proper resolution of that issue would avoid "an unnecessary ruling of a federal court" on questions of federal constitutional law. 312 U.S. at 500. As the Court explained, "no matter how seasoned the judgment of the district court may be [on matters of state law], it cannot escape being a forecast rather than a determination." *Id.* at 499. Accordingly, the Court directed the district court to stay proceedings while the parties sought an authoritative determination of state law in state court. Such a procedure was lengthy and costly because the parties had to litigate the unsettled state law issue up through the state court system.

In the decades since *Pullman* was decided, virtually all states have adopted procedures that allow federal courts to certify unsettled questions of state law directly to the state's highest court for resolution. Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism after* Erie, 145 U. Pa. L. Rev. 1459, 1548 (1997). This Court was quick to encourage their use where the resolution of a state law issue might allow the federal courts to avoid deciding a federal constitutional question: "[W]e have frequently deemed it appropriate, where a federal constitutional question might be mooted thereby, to secure an authoritative state court's determination of an unresolved question of its local law." *Clay*, 363 U.S. at 212.

Whereas abstention typically took years (and involved adjudication in multiple state courts) certification typically takes only months (and involves only the state's highest court). Perhaps for this reason, this Court has urged federal courts to use certification to resolve unsettled questions of state law even when not necessary to avoid a federal constitutional question. See *Lehman Bros. v. Schein*, 416 U.S. 386, 390–91 (1974) (reversing a lower federal court's failure to certify an unsettled question of state law).

In addition to avoiding an erroneous resolution of an unsettled question of state law, the Federal Circuit had an additional, compelling reason for certification in this case: Proper resolution of the state law issue could have obviated the need to decide a federal constitutional question. If the Federal Circuit had certified the third-party-beneficiary issue to the New York Court of Appeals, then the federal court might have been able to avoid deciding whether the

zoning agreement exacted an unconstitutional condition under the Fifth Amendment. See section II, *infra*. Accordingly, the Federal Circuit should have certified the state law issue to the New York Court of Appeals.

2. This Court's unanimous opinion in *Arizonans* provides essential guidance on this issue. The Court admonished a lower federal court for deciding the constitutionality of a novel Arizona constitutional amendment (requiring that the state act only in English) without first certifying the question of the amendment's meaning to the Arizona Supreme Court: "Warnings against premature adjudication of constitutional questions bear heightened attention when a federal court is asked to invalidate a State's law, for the federal tribunal risks friction-generating error when it endeavors to construe a novel state Act not yet reviewed by the State's highest court." *Arizonans*, 520 U.S. at 78–79. And it stressed that the advantages of certification over abstention only strengthen the case for using certification to avoid a federal constitutional issue:

> *Pullman* abstention proved protracted and expensive in practice, for it entailed a full round of litigation in the state court system before any resumption of proceedings in federal court. * * * Certification procedure, in contrast, allows a federal court faced with a novel state-law question to put the question directly to the State's highest court, reducing the delay, cutting the cost, and increasing the assurance of gaining an authoritative response.

Id. at 76, 117 (citations omitted).

The *Arizonans* Court ultimately concluded lower federal courts should not have decided the constitutionality of the Arizona amendment because the case had become moot when the plaintiff left her employment with the state. *Id.* at 72. Nonetheless, the Court went out of its way to discuss certification and provide guidance for lower federal courts. Both the district court and the Ninth Circuit refused to certify the question of the amendment's meaning to the Arizona Supreme Court because they thought the meaning was "plain." *Id.* at 76. This Court stressed "[a] more cautious approach was in order." *Id.* at 77. "Given the novelty of the question and its potential importance to the conduct of Arizona's business, plus the views of the Attorney General and those of [the amendment's] sponsors, the certification requests merited more respectful consideration than they received in the proceedings below." *Id.* at 78.

Here, the Federal Circuit summarily rejected petitioners' requests for certification and affirmed the CFC's judgment without opinion or explanation. If the Federal Circuit had given certification "more respectful consideration," then it would have certified the unsettled question of state law—whether the United States is an intended third-party-beneficiary able to enforce a covenant-not-to-sue—before proceeding to reject the landowners' constitutional claims.

3. New York provides a ready mechanism for the Federal Circuit (or even this Court) to certify questions of New York law directly to its Court of Appeals. See N.Y. Const., art. 6 § 3(b)(9); N.Y. Ct. R. 500.27(a). And that court has emphasized that it welcomes the opportunity to answer questions of state law certified to it by the federal courts:

> We take this opportunity to underscore the great value in New York's certification procedure where Federal appellate courts * * * are faced with determinative questions of New York law on which this Court has not previously spoken. Indeed, the certification procedure can provide the requesting court with timely, authoritative answers to open questions of New York law, facilitating the orderly development and fair application of the law and preventing the need for speculation. As shown by actual experience, and by this Court's acceptance of all but a few of the questions that have been certified to us by the Circuit Court, inter-jurisdictional certification is an effective device that can benefit Federal and State courts as well as litigants.

Tunick v. Safir, 731 N.E.2d 597, 599 (N.Y. 2000) (citations omitted).

B. The Federal Circuit's refusal to certify the intended third-party-beneficiary question violates principles of federalism and constitutional avoidance.

This case dramatically illustrates the federalism and constitutional avoidance concerns expressed by the Court in *Pullman* and *Arizonans*. The lower federal courts' resolution of an unsettled issue of New York law resulted in "friction-generating error," *Arizonans*, 520 U.S. at 79, that is in tension with the policies and precedents of New York courts. That error is further compounded because, after failing to certify this issue of state law, the

federal courts proceeded to address a significant federal constitutional issue they otherwise could have avoided.

1. The decision below turned on whether a non-party to a contract can enforce a covenant-not-to-sue as an intended third-party-beneficiary. This is an unsettled question of New York law, which has not yet been addressed by the state's highest court. The CFC's resolution of this question is contrary to the policies and precedents of New York courts.

a. Until the CFC's decision below, *no* court applying New York law had *ever* allowed a non-party to enforce a covenant-not-to-sue. Indeed, only two years ago, the Federal Circuit itself rejected an attempt by a putative third-party-beneficiary to invoke such a covenant under New York law. *Active Video Networks, Inc. v. Verizon Comm., Inc.*, 694 F.3d 1312 (Fed. Cir. 2012).

As the CFC acknowledged, the only New York state court case in which a third-party attempted to enforce such a covenant rejected the attempt. Pet. App. 48a. In *Chavis v. Klock*, 846 N.Y.S.2d 490 (App. Div. 2007), a deliveryman signed an agreement with his employer that included a covenant-not-to-sue the employer's customers. He later sued a customer for injuries sustained during a delivery. The customer attempted to invoke the covenant as a third-party-beneficiary. The intermediate appellate court rejected this attempt, concluding that customers were "merely incidental beneficiaries of the employment agreement inasmuch as the agreement manifests [the employer's] intent to protect itself against possible third-party actions by alleged tortfeasors, not to confer a benefit upon such tortfeasors." *Id.* at 492.

As in *Chavis*, here the United States is merely the incidental beneficiary of the landowners' covenant-not-to-sue inserted by the City on the apparent (mistaken) belief that if the landowners recovered just compensation from the United States, the City might be required to indemnify the United States.[3]

b. *Chavis*'s result is unsurprising: Permitting a non-party to a contract to invoke a covenant-not-to-sue runs against two longstanding public policies advanced by New York courts.

Covenants-not-to-sue have long been disfavored under New York law; they are "not looked upon with favor by the courts, are strictly construed against the party relying on them, and clear and explicit language in the agreements is required in order to absolve the promisee from liability." *Kaufman v. Am. Youth Hostels, Inc.*, 177 N.Y.S.2d 587, 593 (App. Div. 1958); see also, *e.g.*, *Colton v. N.Y. Hosp.*, 414 N.Y.S.2d 866, 871–872 (Sup. Ct. 1979); *Sauer v. Xerox Corp.*, 95 F. Supp. 2d 125, 129 (W.D.N.Y. 2000); *Bridgeport Music, Inc. v. Universal Music Group, Inc.*, 440 F. Supp. 2d 342, 345 (S.D.N.Y. 2006).

New York also disfavors permitting outsiders to sue on a contract to which they are not a party. As the Second Circuit observed, "[i]t is ancient New York law that to succeed on a third-party beneficiary theory, a non-party must be the intended beneficiary of the contract, not an

3. "The taking that resulted from the establishment of the recreational trail is properly laid at the doorstep of the Federal Government." *Preseault v. United States*, 100 F.3d 1525, 1531 (Fed. Cir. 1996) (*en banc*).

incidental beneficiary to whom no duty is owed." *Madeira v. Affordable Housing Found.*, 469 F.3d 219, 251 (2d Cir. 2006); see also, *e.g.*, *Port Chester Elec. Const. Co. v. Atlas*, 357 N.E.2d 983, 985–986 (N.Y. 1976) (absent the parties' intent to benefit a third-party, "the third party is merely an incidental beneficiary with no right to enforce the particular contracts").

c. The CFC's interpretation of New York law not only runs counter to state precedent and policies, it also confuses the basic legal standards New York courts apply to third-party-beneficiary claims in general.

Under New York law, a stranger to an agreement (like the United States here) can only claim the benefit of that agreement if it can show the parties *intended* the agreement to operate for its *direct* benefit. New York courts "have demonstrated a reluctance to interpret circumstances to construe such an intent." *LaSalle Nat'l Bank v. Ernst & Young LLP*, 729 N.Y.S.2d 671, 676 (App. Div. 2001). They typically find such intent only: (1) where "no one other than the third party can recover if the promisor breaches the contract," or (2) where "the language of the contract otherwise clearly evidences an intent to permit enforcement by the third party." *Fourth Ocean Putnam Corp. v. Interstate Wrecking Co.*, 485 N.E.2d 208, 212 (N.Y. 1985). In particular, "it is not enough that it be intended by one of the parties to the contract and the third person that the latter should be a beneficiary. *Both parties* to the contract must so intend and must indicate that intention *in the contract*." *Stainless, Inc. v. Employers Fire Ins. Co.*, 418 N.Y.S.2d 76, 80 (App. Div. 1979) (quoting 18 Couch on Insurance 2d § 74:330 (1959)). Moreover, under New York law, "a party, claiming to be a

third-party-beneficiary, has the burden of demonstrating that he has an enforceable right." *Airco Alloys Div., Arco Inc. v. Niagara Mohawk Power Corp.*, 430 N.Y.S.2d 179, 186 (App. Div. 1980).

The CFC's ruling confused New York law in two respects. First, it shifted the burden of proof from the United States to petitioners. Second, it inquired only into New York City's intent rather than also examining the intent of the landowners. Applying these novel (and erroneous) principles, the CFC wrote, "plaintiffs have failed to provide any evidence to generate a factual dispute as to *the City's intent* in connection with the covenant-not-to-sue clause aside from bare assertions that the City intended to benefit itself. These assertions, however, are not enough to create a genuine dispute as to the intent of the parties to the Agreements." Pet. App. 50a (emphasis supplied).

Whether the New York Court of Appeals ultimately agrees or disagrees with the CFC's novel pronouncements, it is clear that the issue of New York law it addressed was—at best—unsettled. Yet, instead of certifying this question, the Federal Circuit summarily affirmed the CFC's opinion. In so doing, the Federal Circuit failed to take the simple step endorsed by *Pullman* and *Arizonans* to prevent erroneous resolution of unsettled issues of state law. As this Court stated in *Arizonans*, a federal circuit court's decision to proceed in this manner is "without warrant."

2. The CFC's resolution of the state-law question also required the courts below to resolve a significant federal constitutional question—a question they likely could have

avoided had they used certification. By concluding the United States was the intended third-party-beneficiary of the agreement between the owners and the City, the CFC had to decide if the City's requirement that the owners forfeit their constitutional right to just compensation in exchange for the right to develop their land—imposed an unconstitutional exaction in violation of *Nollan*, *Dolan*, and *Koontz*.[4]

As explained in Section II, the lower courts erred in their resolution of this constitutional question. But what is important from a constitutional avoidance perspective is not that the courts below got it wrong, but that they answered the question at all. To quote Justice Brandeis's classic formulation, a federal court should "not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of." *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring); see also *Pearson v. Callahan*, 555 U.S. 223, 821 (2009).

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4. Certification would have also allowed the Federal Circuit to avoid any possible due process issues relating to the validity of the petitioners' alleged "waiver" of their constitutional rights against the United States. This Court has suggested that all waivers of constitutional rights must be knowing, intentional, and voluntary. See *Fuentes v. Shevin*, 407 U.S. 67 (1972). In this case, petitioners did not intentionally and voluntarily waive their right to just compensation against *the United States*. The agreement between New York City and these landowners was an adhesion agreement the City drafted and demanded the owners sign as a condition to development rights in their land. And the reference to the United States was only six words in a more than 4,000-word document. Thus, as *Koontz* suggests, any "waiver" in favor of the United States was not truly voluntary.

This principle of constitutional avoidance is not merely prudential. Rather, "[l]ike the case and controversy limitation itself and the policy against entertaining political questions, it is one of the rules basic to the federal system and this Court's appropriate place within that structure." *Rescue Army v. Municipal Court*, 331 U.S. 549, 570 (1947). These vital separation of powers concerns strongly support certification here.

C. There is confusion among the Circuits regarding when to certify unsettled issues of state law in order to avoid federal constitutional questions.

1. The Federal Circuit rejected petitioners' request for certification without opinion or explanation. In two prior brief opinions, the Federal Circuit certified novel questions of state law to avoid federal constitutional issues, but never explained its standard for doing so. For example, in *Chevy Chase Land Co. v. United States*, 158 F.3d 574 (Fed. Cir. 1998), landowners sued the United States for taking a railroad right-of-way under the Trails Act. Rather than interpret Maryland property law, the Federal Circuit certified three questions to the Maryland Court of Appeals. In a brief *per curiam* opinion, the court simply stated that it was ordering certification because deciding whether the United States engaged in an uncompensated taking of property in violation of the Fifth Amendment "depends upon complicated issues of Maryland property law upon which this court discerns an absence of applicable and dispositive Maryland law." *Id.* at 575. See also *Klamath Irrigation District v. United States*, 532 F.3d 1376, 1377 (Fed. Cir. 2008) (certifying "complex issues of Oregon property law" to Oregon Supreme Court in order potentially to avoid deciding whether the United States had violated Fifth Amendment).

2. Contrary to the Federal Circuit's minimalist (and unexplained) approach, the Second Circuit has employed a more detailed analysis. In *Allstate Ins. Co. v. Serio*, 261 F.3d 143 (2d Cir. 2001), the Second Circuit considered a First Amendment challenge by insurers to a New York statute restricting commercial speech. Judge Calabresi, writing for the court, stressed the importance of avoiding unnecessary constitutional decisions. *Id.* at 149–50. He explained that *Pullman* abstention and *Arizonans* certification "can be used by federal courts to avoid (a) premature decisions on questions of federal constitutional law, and (b) erroneous rulings with respect to state law." *Id.* at 150. He also stressed several other factors that made certification particularly appropriate, including the views of the state attorney general, possible interference with "the basic sovereign functions of state government," and the fact that the unsettled questions of state law "are both important and recurring." *Id.* at 153–54.[5]

3. The Sixth Circuit has taken a more matter-of-fact approach. For example, in *American Booksellers Foundation for Free Expression v. Strickland*, 560 F. 3d 443 (6th Cir. 2009), booksellers challenged an Ohio statute limiting the distribution of materials harmful to juveniles. Citing this Court's prior certification decisions, the Sixth Circuit *sua sponte* decided to employ certification because of the "lack of an authoritative state court construction" of the challenged statute and because proper interpretation of the statute might allow the federal court to avoid an unnecessary constitutional decision. *Id.* at 447. See also *Planned Parenthood of Cincinnati Region v. Strickland*,

5. In a separate opinion, Judge Calabresi specified an even more elaborate six-factor test that he believed was the "composite lesson" of prior decisions in the area. See *Tunick v. Safir*, 209 F.3d 67, 81 (2nd Cir. 2000).

531 F.3d 406, 410–11 (6th Cir. 2008) ("Where statutory interpretation is at issue, the United States Supreme Court has instructed the federal courts to employ certification or abstention if the 'unconstrued state statute is susceptible of a construction by the state judiciary which might avoid in whole or in part the necessity for federal constitutional adjudication * * * *' ") (quoting *Bellotti v. Baird*, 428 U.S. 132, 146–47 (1976)).

4. Finally, the Ninth Circuit has strongly endorsed certifying unsettled questions of state law, even stating that certification is "compelled" when necessary to avoid a federal constitutional issue. In *Perry v. Schwarzenegger*, 628 F.3d 1191 (9th Cir. 2011), proponents of same-sex marriage challenged the constitutionality of Proposition 8, California's constitutional amendment banning same-sex marriage. Because state officials declined to defend Proposition 8, the Ninth Circuit had to decide whether the sponsors of the initiative had Article III standing to defend the law as intervenors. The Ninth Circuit thought that this question turned on whether the intervenors had a sufficient interest under state law to defend the amendment. Accordingly, the court found that the certified question was dispositive of its ability to hear the case under article III. *Id.* at 1195. Under these circumstances, the Ninth Circuit believed that it was "compelled to seek * * * an authoritative statement of California law" through certification. *Id.* at 1196.

The thoughtful, although varied, analyses of the various circuits on when *Pullman/Arizonans* certification is required contrast sharply with the Federal Circuit's silent refusal to certify the unsettled question of New York law present in this case. At a minimum, the Federal

Circuit should have explained why certification was not required.

This case presents this Court with an opportunity to provide guidance to the lower federal courts as to when they should employ *Pullman/Arizonans* certification and the proper criteria for making such determinations.

D. This Court's guidance is especially necessary given the Federal Circuit's exclusive jurisdiction over takings claims against the United States.

It is especially important for this Court to provide guidance to the Federal Circuit because Congress has granted the Federal Circuit exclusive nationwide jurisdiction of *every* appeal in which a landowner seeks to vindicate his or her Fifth Amendment right to be justly compensated for property taken by the federal government.

In cases brought within the diversity jurisdiction of the federal courts, the parties usually have a choice whether to litigate in state or federal court. Nonetheless, this Court has endorsed the use of certification by federal courts sitting in diversity to resolve unsettled questions of state law in order to ensure that federal courts do not usurp state authority by hazarding a guess about the meaning or direction of state law. See, *e.g.*, *Lehman Bros.*, 416 U.S. 386.

Federalism concerns are even more pressing where—as here—a litigant does not have the opportunity to seek relief in a state court in the first instance. Congress entrusted the Court of Federal Claims and

the Federal Circuit with exclusive jurisdiction over inverse condemnation actions by owners vindicating their constitutional right to just compensation under the Fifth Amendment where the claim exceeds $10,000. See 28 U.S.C. § 1491; *Resource Invs., Inc. v. United States*, 114 Fed. Cl. 639, 645 (2014). Because state law defines the nature and extent of property interests,[6] the Federal Circuit is frequently confronted with novel or unsettled issues of state law governing property ownership and associated rights.

Property owners who suffer a taking at the hands of the United States don't have the option of litigating their claims in state court or in the circuits familiar with the relevant state law. This makes the case for certification of unsettled questions of state law by the Federal Circuit even stronger than in other cases. And it increases the need for this Court's guidance as to when certification should be used.

II. In *Koontz*, this Court confirmed that a "deal" like the one upon which the courts below premised their decisions is unenforceable and unconstitutional.

The courts below claimed petitioners waived their Fifth Amendment claims against the United States when they signed the covenant-not-to-sue agreement with New York City. That agreement was drafted by the City and was presented to petitioners on essentially a take-

6. See, *e.g.*, *Preseault*, 494 U.S. at 20 (O'Connor, J., concurring) ("In determining whether a taking has occurred, we are mindful of the basic axiom that '[p]roperty interests * * * are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.' ")(citations omitted).

it-or-leave-it basis. In *Koontz v. St. John's River Water Management District*, 133 S. Ct. 2586 (2013)—decided while this case was pending before the Federal Circuit—this Court confirmed that this kind of "deal," in which owners are required to forfeit their constitutional right to property (or just compensation for their property) in exchange for the City granting development approval, is an unconstitutional exaction.

Koontz is the latest in a trilogy of cases dealing with unconstitutional conditions in the takings context. In *Nollan*, 483 U.S. at 827, "the California Coastal Commission * * * condition[ed] its grant of permission to rebuild [the property owners'] house on their transfer to the public of an easement across their beachfront property." And in *Dolan*, 512 U.S. at 377, the city "condition[ed] the approval of [Dolan's] building permit on the dedication of a portion of her property for flood control and traffic improvements" as a bicycle trail.

This Court invalidated both exactions, holding "[u]nder the well-settled doctrine of 'unconstitutional conditions,' the government may not require a person to give up a constitutional right—here the right to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property." *Dolan*, 512 U.S. at 385.

The CFC distinguished *Nollan* and *Dolan* on the ground that the "the doctrine of unconstitutional conditions does not apply" to a "voluntary agreement." Pet. App. 57a. But *Nollan* and *Dolan* do not support the CFC's attempt to cabin *Nollan* and *Dolan*. A waiver of

one's Fifth Amendment right to just compensation is never truly voluntary when exacted by the government as a condition of allowing the use of remaining property rights. This is especially true here where New York required landowners to forfeit their Fifth Amendment rights not only against New York but also against the United States. If there ever was any doubt on this point, the Court emphatically resolved it last Term in *Koontz*, where it recognized:

> land-use permit applicants are especially vulnerable to the type of coercion that the unconstitutional conditions doctrine prohibits. * * * By conditioning a building permit on the owner's deeding over a public right-of-way, for example, the government can pressure an owner into *voluntarily* giving up property for which the Fifth Amendment would otherwise require just compensation.

133 S. Ct. at 2594 (emphasis added). The Court continued:

> [W]e have recognized that regardless of whether the government ultimately succeeds in pressuring someone into forfeiting a constitutional right, the unconstitutional conditions doctrine forbids burdening the Constitution's enumerated rights. * * * As in other unconstitutional conditions cases in which someone refuses to cede a constitutional right in the face of coercive pressure, the impermissible denial of a governmental benefit is a constitutionally cognizable injury.

Id. at 2595–96.

The CFC did not have the benefit of *Koontz*, which was handed down the day after petitioners submitted their opening brief in the Federal Circuit. But the Federal Circuit did: Petitioners discussed *Koontz* at length in their reply brief, and again in their petition for rehearing. Although *Koontz* entirely undermined the CFC's "voluntariness" rationale, the Federal Circuit made no attempt to reconcile the CFC's decision with *Koontz* when it summarily affirmed without opinion. At a minimum, the Court should grant certiorari, vacate the Federal Circuit's ruling, and remand for further proceedings in light of *Koontz*.

CONCLUSION

The petitioners request that the Court grant *certiorari*, vacate the panel's summary affirmance, and remand the case with instructions to certify the unsettled issue of state law to the New York Court of Appeals or, in the alternative, for further proceedings in light of *Koontz*.

Respectfully submitted,

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APPENDIX

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, DATED MAY 1, 2014

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

2013-5066

WEST CHELSEA BUILDINGS LLC, 22-23 CORP., 26-10 CORP., TENTH AVENUE REALTY ASSOCIATES LP, SOMATIC REALTY, LLC,

Plaintiffs-Appellants,

v.

UNITED STATES,

Defendant-Appellee.

Appeal from the United States Court of Federal Claims in Nos. 11-CV-333, 11-CV-374 and 11-CV-0713, Judge Nancy B. Firestone.

ON PETITION FOR PANEL REHEARING AND REHEARING *EN BANC*

Before Rader, *Chief Judge*, Newman, Lourie, Dyk, Prost, Moore, O'Malley, Reyna, Wallach, Taranto, Chen, and Hughes, *Circuit Judges.*

Per Curiam.

Appendix A

ORDER

Appellants West Chelsea Buildings LLC, *et al.* filed a combined petition for panel rehearing and rehearing *en banc*. The petition was referred to the panel that heard the appeal, and thereafter the petition for rehearing *en banc* was referred to the circuit judges who are in regular active service.

Upon consideration thereof,

It Is Ordered That:

The petition for panel rehearing is denied.

The petition for rehearing *en banc* is denied.

The mandate of the court will issue on May 8, 2014.

For the Court

May 1, 2014 /s/
Date Daniel E. O'Toole
Clerk of Court

APPENDIX B — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, FILED FEBRUARY 12, 2014

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

2013-5066

WEST CHELSEA BUILDINGS LLC, 22-23 CORP., 26-10 CORP., TENTH AVENUE REALTY ASSOCIATES LP, AND SOMATIC REALTY, LLC,

Plaintiffs-Appellants,

v.

UNITED STATES,

Defendant-Appellee.

Appeal from the United States Court of Federal Claims in Nos. 11-CV-333, 11-CV-374 and 11-CV-0713, Judge Nancy B. Firestone.

JUDGMENT

Mark F. Hearne, II, Arent Fox, LLP, of Clayton, Missouri, argued for plaintiffs-appellants. With him on the brief were Meghan S. Largent and Lindsay S.C. Brinton, of Clayton, Missouri; and Debra J. Albin-Riley, of Los Angeles, California.

Vivian H.W. Wang, Attorney, Appellate Section, Environment and Natural Resources Division, United States Department of Justice, of Washington, DC, argued for defendant-appellee. With her on the brief was Robert G. Dreher, Acting Assistant Attorney General.

This Cause having been heard and considered, it is

Ordered and Adjudged:

Per Curiam (Dyk, Prost, and O'Malley, *Circuit Judges*).

AFFIRMED. *See* Fed. Cir. R. 36.

Entered by Order of the Court

February 12, 2014
Date

/s/
Daniel E. O'Toole
Clerk of Court

APPENDIX C — OPINION OF THE UNITED STATES COURT OF FEDERAL CLAIMS, FILED FEBRUARY 14, 2013

IN THE UNITED STATES COURT
OF FEDERAL CLAIMS

Nos. 11-333L, 11-374L, & 11-713L

WEST CHELSEA BUILDINGS, LLC, *et al*., and 437-51 WEST 13TH STREET LLC, *et al*., and TENTH AVENUE ASSOCIATES, LP, *et al*.,

Plaintiffs,

v.

THE UNITED STATES,

Defendant.

February 14, 2013, Filed

OPINION

Firestone, **JUDGE.**

Pending before the court is the government's motion for summary judgment seeking to dismiss some of plaintiffs' claims in these consolidated cases arising from the creation of the "High Line" recreational trail in New York City, New York ("City"). On June 13, 2005, the Surface Transportation Board ("STB") issued a Certificate of Interim Trail Use or Abandonment

("CITU") that applied to a 1.45-mile railroad corridor in the Borough of Manhattan known as the High Line. On November 4, 2005, the then-owner of the rail line, CSX Transportation, Inc. ("CSX"), and the City of New York entered into a Trail Use Agreement as authorized by the CITU. This Trail Use Agreement eventually led to the construction of the High Line elevated recreational trail pursuant to the "railbanking" provision of the National Trails System Act Amendments of 1983, 16 U.S.C. § 1247(d) (2006) ("Trails Act").

This lawsuit involves eight plaintiffs—West Chelsea Buildings, LLC; 22-23 Corp.; 26-10 Corp.; 437-51 West 13th Street LLC; Romanoff Equities, Inc.; Tenth Avenue Realty Associates, LP; Somatic Realty, LLC; and Semantic Realty, LLC— entities that are alleged owners of property adjacent to or underneath the High Line.[1] Plaintiffs ultimately seek just compensation for property rights that they alleged were "taken" by defendant the United States ("the government") when it issued the CITU authorizing use of the High Line as a recreational trail. Before reaching the merits of plaintiffs' case, however, the

1. Plaintiffs in *West Chelsea Buildings, LLC v. United States*, No. 11-333, are West Chelsea Buildings, LLC, 22-23 Corp., and 26-10 Corp. Plaintiffs in *West Chelsea* filed a motion for class certification, which this court denied. Plaintiffs in *437-51 West 13th Street LLC v. United States*, No. 11-374, are 437-51 West 13th Street LLC and Romanoff Equities, Inc. Plaintiffs in *Tenth Avenue Associates, LP v. United States*, No. 11-731, are Tenth Avenue Realty Associates, LP, Somatic Realty, LLC, and Semantic Realty, LLC. An additional party, Liron Realty, Inc., was voluntarily dismissed without prejudice on June 22, 2012. Order, ECF No. 55.

government argues that claims by six of the plaintiffs are jurisdictionally barred and must be dismissed.[2]

Specifically, the government argues that it is the third party beneficiary of certain agreements entered into in connection with the creation of the High Line. As part of its efforts to preserve the High Line for public use, the City and six plaintiffs—West Chelsea Buildings, LLC; 22-23 Corp.; 26-10 Corp.; 437-51 West 13th Street LLC; Tenth Avenue Associates, LP; and Somatic Realty, LLC (these six plaintiffs are collectively referred to for purposes of the pending motion as "plaintiffs")—entered into agreements with the City in which, the government argues, plaintiffs agreed not to sue the United States for any relief with respect to the High Line CITU, in exchange for certain benefits. The government contends, based on its alleged status as third party beneficiary, that these six plaintiffs must be dismissed. For one of the six plaintiffs, 437-51 West 13th Street LLC, the government also argues that that plaintiff did not own property under or adjacent to the High Line on the date of the alleged taking, and therefore lacks standing to bring its Fifth Amendment claim. For the reasons discussed below, the court **GRANTS** the government's motion for summary judgment.

I. BACKGROUND

The following background facts are undisputed unless otherwise noted. The High Line is a public park built

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2. Should these plaintiffs' claims be barred, only two plaintiffs would remain in these consolidated actions, Semantic Realty, LLC and Romanoff Equities, Inc.

on a former elevated rail corridor in the West Chelsea neighborhood of the Borough of Manhattan, New York City.[3] Since its development as a public park, the High Line has become a popular New York City destination. This case arises out of the efforts, over several years, to preserve the High Line for public use.

As part of these efforts, the City participated in STB proceedings initiated by the Chelsea Property Owners, a stakeholder group whose members owed property underlying the High Line, and who originally wanted the High Line torn down. Plaintiffs were members of the Chelsea Property Owners, provided financial support, or participated in meetings and conference calls held by the Chelsea Property Owners in regard to its plan for the High Line. Def.'s Mot., Ex. C, Deposition of Jeffrey Toback[4] ("Toback Dep.") 10-13; *Id.*, Ex. D, Deposition of Gary Spindler[5] ("Spindler Dep.") 23-26; *Id.*, Ex. F, Deposition of Michael Romanoff[6] ("Romanoff Dep.") 19-22.

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3. The former railway right-of-way at issue in this case is approximately 1.45 miles long and extends from 93 Gansevoort Street and runs northerly and westerly through 547-55 West 34th Street and the West 34th Street streetbed. Def.'s Mot., Ex. A, Declaration of Joseph T. Gunn ("Gunn Decl.") ¶ 4.

4. Jeffrey Toback has served as general counsel to plaintiff West Chelsea Buildings, LLC since 1994. Toback Dep. 9.

5. Gary Spindler signed the agreements at issue in this case for plaintiffs 22-23 Corp. and 26-10 Corp. as the President of those entities. Gunn Decl., Exs. C, D.

6. Michael Romanoff signed the agreements at issue in this case as Manager of plaintiff 437-51 West 13th Street LLC. Gunn Decl., Ex. F.

The High Line was not torn down; instead, after several years of negotiations, the City and the Chelsea Property Owners struck a deal to preserve the High Line as a public space. Plaintiffs, as part of that deal, signed the Release, Waiver, and Covenant Not to Sue Agreements ("Covenant Not to Sue Agreements" or "Agreements") at issue in this case. The court now discusses in detail the original plan to tear down the High Line, the negotiations and eventual agreements between the High Line stakeholders, the Covenant Not to Sue Agreements, and the special zoning district created as a result of the overarching agreement between plaintiffs, the City, and the railroad.

A. The original plan to tear down the High Line.

The Chelsea Property Owners began its efforts to tear down the High Line in the early 1990s, when it filed a third-party (or adverse)[7] application with the Interstate Commerce Commission ("ICC") (predecessor of the STB), requesting that the ICC authorize abandonment of the

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7. In typical abandonment cases before the ICC, a railroad requests the ICC to allow it to discontinue service of a particular line. In an adverse abandonment, the railroad wants to continue service and a third party seeks an issuance of an abandonment certificate. A third party generally seeks abandonment because it wants the rail line condemned, and an abandonment certificate can be used to establish that the line is not required for rail service and therefore is not exempt from local or state condemnation. *See Consol. Rail Corp. v. I.C.C.*, 29 F.3d 706, 708-09, 308 U.S. App. D.C. 60 (D.C. Cir. 1994) (an opinion arising out of the litigation surrounding the portion of the High Line at issue in this case).

High Line pursuant to 49 U.S.C. § 10903 (2006). The ICC granted the Chelsea Property Owners' application, but required as a condition of its approval that the Chelsea Property Owners post a bond or surety to ensure payment of any demolition expenses exceeding $7 million. The Chelsea Property Owners struggled to post the bond for several years, and in 1999 filed a motion asking the STB to issue a certificate of abandonment for the rail line. *See W. Chelsea Buildings, LLC v. United States*, No. 11-333, Compl., Ex. E (the STB decision on the Chelsea Property Owner's 1999 motion). The STB concluded that the Chelsea Property Owners' proposal did not meet the requirements of the 1992 decision and denied the motion. *Id.*

Three years later in August 2002, the Chelsea Property Owners filed another motion for a certificate of abandonment of the High Line with the STB. *See id.*, Ex. H. The City initially supported the efforts to tear down the High Line. *Id.* at 2. However, the City reconsidered that policy after Michael Bloomberg became Mayor in 2002. *See* Def.'s Mot., Ex. A, Declaration of Joseph T. Gunn[8] ("Gunn Decl.") ¶ 9. Around that time, the City was studying the potential rezoning of the West Chelsea neighborhood, which was then zoned for manufacturing and "largely characterized by underutilized properties such as parking lots, with increasing numbers of art

8. Joseph T. Gunn is Senior Counsel in the New York City Law Department. Gunn Decl. ¶ 1. He provides legal services to the City primarily on transactional and contract matters, and represented the City in its negotiations with the property owners who owned property encumbered by the High Line, including plaintiffs. *Id.* ¶¶ 3, 5.

galleries and museums in midblock locations." *Id.* City planners and administrative staff "concluded the public use of the High Line might well serve as a potential catalyst for neighborhood revitalization of West Chelsea" and began to consider whether the STB might issue a CITU under the Trails Act, which would allow the rail corridor to be used as a public recreational trail. *Id.*

In December 2002, the City decided to support the efforts of the Friends of the High Line, Inc. ("Friends of the High Line"), a community based non-profit group formed "to save the historic structure from demolition." Def.'s Mot., Ex. B, Declaration of Robert Hammond[9] ("Hammond Decl.") ¶ 7. Friends of the High Line participated in the STB proceedings concerning the High Line. *Id.* ¶ 9. When the Chelsea Property Owners filed its motion for a certificate of abandonment in 2002, Friends of the High Line opposed it and asked the STB to reconsider its 1992 decision granting an application for adverse abandonment of the High Line. *Id.* ¶ 10. Friends of the High Line spoke in favor of preserving the High Line for public use. *Id.* ¶ 12.

B. The negotiations and agreement between the property owners and the City to preserve the High Line for public use.

Following the City's support for preserving the High Line, the Chelsea Property Owners entered into

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9. Robert Hammond is the co-founder and Executive Director of Friends of the High Line, Inc. Hammond Decl. ¶ 1.

negotiations with CSX and the City in 2002 to discuss developing the High Line as a public space. Five of the six plaintiffs that eventually signed the Covenant Not to Sue Agreements were involved in these negotiations.[10] The Chelsea Property Owners were represented by counsel, and each of the five plaintiffs consulted with their own counsel as part of the negotiations with the City. *See* Toback Dep. 41 (West Chelsea Buildings, LLC); Def.'s Mot., Ex. E, Deposition of Barry Haskell[11] ("Haskell Dep.") 30 (Somatic Realty, LLC and Tenth Avenue Realty Associates, LP); Spindler Dep. 29, 31, 43 (22-23 Corp. and 26-10 Corp.).

The Chelsea Property Owners eventually struck a deal with the City and CSX, consisting of several elements. Gunn Decl. ¶¶ 10-11, 20. The City would approve a Special

10. The sixth plaintiff, 437-51 West 13th Street LLC, signed the Covenant Not to Sue Agreement four years after the other plaintiffs had delivered their Agreements. This plaintiff owned property that was south of the boundary of the special rezoning district that was eventually created as part of the deal between the City and the Chelsea Property Owners. Because the court dismisses this plaintiff on standing grounds, *see infra* Part II.A, the court will not discuss in detail the facts surrounding 437-51 West 13th Street LLC's signing of the Covenant Not to Sue Agreement.

11. Barry Haskell is the property manager for plaintiff Somatic Realty, LLC. Haskell Dep. 10. Mr. Mendy Taffel, a management member of plaintiffs Somatic Realty, LLC and Semantic Realty, LLC, was also a shareholder and officer of Tenth Avenue Realty Associates, LP, and signed the agreements at issue in this case on behalf of Somatic Realty, LLC and Tenth Avenue Realty Associates, LP. Gunn Decl., Exs. G, H; Haskell Dep. 31.

West Chelsea District ("Special District") rezoning, which, as described in more detail below, introduced a system that allows the transfer of development rights from underneath and adjacent to the High Line to other areas of the Special District. *Id.* ¶ 20. The City would also provide Internal Revenue Service forms to the Chelsea Property Owners' members to assist them in taking a charitable tax deduction for their donation of a public use easement to supplement the existing easement owned by CSX. *Id.* For their part, the Chelsea Property Owners' members, including plaintiffs, would withdraw their objections to the CITU and donate supplemental easements to the City. *Id.* Also as part of the deal, plaintiffs were to execute the Covenant Not to Sue Agreements.[12] *Id.* ¶ 21.

The overall timeline for the deal proceeded as follows. Sometime in 2004, a draft Term Sheet, outlining the above-described aspects of the deal between the High Line stakeholders, was circulated to the property owners

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12. As part of the deal, the five plaintiffs also signed covenant not to sue agreements with CSX, quitclaim, consent, and easement agreements with the City for the donation of supplemental easements, and authorizations which stated that the signatory had "taken all action required to authorize the execution and delivery" of all of these documents. *See* Toback Dep. 65, Ex. 8 (West Chelsea Buildings, LLC); Spindler Dep. 38-39, 79-80, Ex. 5 (22-23 Corp.), Ex. 14 (26-10 Corp.); Haskell Dep. 44-46, Ex. 7 (Somatic Realty, LLC), Ex. 8 (Tenth Avenue Realty Associates, LP).

At least two of the plaintiffs also signed release, waiver and covenant not to sue agreements with the Chelsea Property Owners. *See* Haskell Dep. 80-81, 84, Ex. 16 (Somatic Realty), Ex. 17 (Tenth Avenue Realty Associates).

represented by the Chelsea Property Owners. Def.'s Mot, Ex. G, Declaration of Emily M. Meeker ("Meeker Decl."), Ex. 1 (High Line Term Sheet); *see* also Toback Dep., Ex. 4 (a November 22, 2004 summary of the "major aspects of the proposed Special West Chelsea District rezoning and conversion of the Highline to public space"). The term sheet included a draft of the Covenant Not to Sue Agreements as well as several other agreements eventually made in connection with the deal between the High Line stakeholders. Gunn Decl. ¶¶ 13-15; *see* supra note 12. Several drafts were circulated between the City and Chelsea Property Owners before these agreements were finalized. Gunn Decl. ¶ 15.

The Chelsea Property Owners formally withdrew their opposition to the issuance of a CITU in December 2004. *Id.* ¶ 16. The STB granted the City's request for the issuance of a CITU on June 13, 2005. *Id.* ¶ 17. Ten days later, on June 23, 2005, the New York City Council approved the rezoning of the Special District. *Id.* ¶ 18.

After the issuance of the CITU, between June 14, 2005 and October 11, 2005, plaintiffs West Chelsea Buildings, LLC, 22-23 Corp., 26-10 Corp., Tenth Avenue Realty Associates, LP, and Somatic Realty, LLC signed the final versions of the Covenant Not to Sue Agreements at issue in this case. *Id.*, Exs. B, C, D, G, H. On November 4, 2005, the closing of the conveyance of the High Line from CSX to the City occurred and a Trail Use Agreement was signed between the City and CSX. *Id.* ¶ 19. At this closing, the Chelsea Property Owners delivered the Covenant Not to Sue Agreements signed by five of the plaintiffs that are the subject of the pending motions. *Id.* ¶ 23.

C. The Covenant Not to Sue Agreements.

As discussed briefly above, after the STB granted the City's request for the issuance of a CITU on June 13, 2005, five of the plaintiffs signed the Covenant Not to Sue Agreements with the City. Gunn Decl., Ex. B, Release, Waiver and Covenant Not to Sue Agreement (West Chelsea Buildings, LLC, dated June 14, 2005); Gunn Decl., Ex. C, Release, Waiver and Covenant Not to Sue Agreement (22-23 Corp., dated October 11, 2005); Gunn Decl., Ex. D, Release, Waiver and Covenant Not to Sue Agreement (26-10 Corp., dated October 11, 2005); Gunn Decl., Ex. G, Release, Waiver and Covenant Not to Sue Agreement (Tenth Avenue Realty Associates, LP, dated August 31, 2005); Gunn Decl., Ex. H, Release, Waiver and Covenant Not to Sue Agreement (Somatic Realty, LLC, dated August 31, 2005). All of the Agreements contained a prologue listing several purposes of the Agreements, including the following:

> WHEREAS, [plaintiff], desiring to encourage, induce and cooperate with said initiatives [conversion of the High Line to public space and the creation of the Special District], has agreed to grant certain releases, waivers and covenants to the City in furtherance thereof.

See, e.g., Gunn Decl., Ex. B at 2. The Agreements also state:

> This Agreement shall be binding upon and inure to the benefit of the City and [plaintiff], and

> their respective heirs, personal representatives, successors and assigns.

Id., Ex. B ¶ 12.

The parties' dispute centers the following provision of the Covenant Not to Sue Agreements:

> *1. Release and Waiver.* (A) Subject to the provisions of subparagraph (B) of this paragraph 1, Owner [plaintiffs], for itself and its successors, heirs, administrators and assigns as owner of the Servient Property, for good and valuable consideration, the receipt and adequacy whereof is hereby acknowledged, hereby:
>
> ...
>
> (b) *agrees not to sue or join any action seeking compensation from, and will not participate with and will withdraw from any class action seeking compensation from the City or The United States of America or any of its departments or agencies with respect to the Highline CITU . . .*

See, e.g., Toback Dep. 36-37, Ex. 5 ¶ 1(A)(b) (emphasis added) ("Covenant Not to Sue Agreement ¶ 1(A)(b)").

According to Joseph Gunn, Senior Counsel in the New York City Law Department involved in the High Line negotiations, it was the City's intent in the Covenant Not to Sue Agreements "to preclude any claim against the City by the property owners in connection with the issuance of the CITU, and to generally settle all matters in connection with the CITU." Gunn Decl. ¶ 21. Mr. Gunn states that at the time of negotiations, "[t]he City was aware of the potential for litigation against the United States" and "[i]n keeping with the City's desire to settle all matters related to the CITU, the owners of the properties north of 16th Street agreed not to sue the United States of America for compensation in connection with the CITU."[13] *Id.*

The Covenant Not to Sue Agreements included other releases between the City and plaintiffs, such as for claims against the City regarding contamination or the demolition of the High Line. *See, e.g.*, Gunn Decl., Ex. B ¶ 1(A)(a). The Agreements also outlined claims that plaintiffs and the City agreed were not waived, including claims arising after the City should, if ever, restore rail service on the High Line. *Id.* ¶ 1(B). Plaintiffs also agreed that if they themselves pursued reactivation of the rail line, they would reimburse the City for any improvements made on the High Line and pay the amounts of any condemnation awards necessary to maintain the use of public space of any parts of the High Line that were not restored for rail service. *Id.* ¶ 2(A). For its part, the City covenanted that, if rail service was ever reactivated, it would pay plaintiffs

13. Plaintiffs dispute that the City intended to benefit the United States in the Agreements, but provide no evidence that offers a different motive for including the covenant not to sue clause on the part of either party.

the diminution in value of their property as a result. *Id.* ¶ 2(B) ("The City hereby covenants that if the City . . . shall ever seek to obtain restoration of passenger or other rail service on or over the Highline . . ., the City shall pay Owner the amount by which the value of the Servient Property is diminished as a result thereof."). The City also indemnified plaintiffs in connection with the City's development and maintenance of the High Line. *Id.* ¶ 3.

Plaintiffs signed the Covenant Not to Sue Agreements with the City on the same date that they signed: (1) release, waiver and covenant not to sue agreements with CSX, and (2) quitclaim, consent and easements with the City.[14] Plaintiffs also signed authorizations, which stated that each signatory to the various agreements had "taken all action required to authorize the execution and delivery" of these documents.[15]

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14. *See* Toback Dep., Ex. 6 (West Chelsea Buildings, LLC Release to CSX), Ex. 7 (West Chelsea Buildings, LLC Quitclaim); Spindler Dep., Ex. 7 (22-23 Corp. Release to CSX), Ex. 8 (22-23 Corp. Quitclaim), Ex. 16 (26-10 Corp. Release to CSX), Ex. 17 (26-10 Corp. Quitclaim); Haskell Dep., Ex. 11 (Somatic, LLC Quitclaim), Ex. 13 (Tenth Avenue Realty Associates, LP Quitclaim), Ex. 14 (Somatic, LLC Release to CSX), Ex. 15 (Tenth Avenue Realty Associates, LP Release to CSX). In the quitclaim, consent and easement, plaintiffs supplemented the existing High Line rail corridor easement by conveying to the City "an exclusive, perpetual right-of-way, servitude and easement" for use of the High Line for public space. *See* Toback Dep., Ex. 7 at 2.

15. *See* Toback Dep., Ex. 8 (West Chelsea Buildings, LLC); Spindler Dep., Ex. 5 (22-23 Corp.), Ex. 14 (26-10 Corp.); Haskell Dep., Ex. 7 (Somatic Realty, LLC), Ex. 8 (Tenth Avenue Realty Associates, LP).

After plaintiffs signed all of these agreements, the City and CSX signed a Trail Use Agreement for the High Line on November 4, 2005, and the High Line was transferred from CSX to the City. *See W. Chelsea Buildings*, No. 11-333, Compl., Ex. I. The documents signed by plaintiffs, including the Covenant Not to Sue Agreements, were delivered to the City as part of the closing of the deal. Once all of the agreements were signed and the deal was closed, the High Line was officially established as a trail within the STB's Rails-to-Trails system. There is no dispute that no representative of the United States either participated in the negotiations that led to the creation of the trail or was a part of the Covenant Not to Sue Agreements, or any other agreements which were necessary to create the High Line recreational trail. However, it is also undisputed that the STB was aware of the negotiations between the High Line stakeholders through filings it received regarding the High Line CITU.

D. The Special West Chelsea District.

As part of the deal struck by the stakeholders, the Special West Chelsea District was approved by the New York City Council on June 23, 2005, three years after the parties began negotiations to preserve the High Line for public use. This rezoning affected an area on the west side of Manhattan that surrounds the High Line, approximately between West 16th Street on the south, West 30th Street on the north, Tenth Avenue on the east, and Eleventh Avenue on the west. *See* Meeker Decl., Ex. 2, West Chelsea Zoning Amendment App. A.; *see also* N.Y.C. Zoning Res. art. IX, ch. 8, App. B. The West Chelsea Zoning Amendment ("Zoning Amendment")

created a Special West Chelsea District and rezoned much of the land within this district from a manufacturing designation to a commercial designation, allowing residential development in addition to commercial and light industrial uses. *See* Gunn Decl. ¶ 20 (stating that the rezoning included "changes in permitted uses . . . from light manufacturing to commercial and residential").

The rezoning also introduced a system that allows for the transfer of development rights from underneath and adjacent to the High Line to other areas of the Special District. *See* Meeker Decl., Ex. 2, West Chelsea Zoning Amendment § 98-04. The transfer system allows property owners within an area called the High Line Transfer Corridor, such as plaintiffs, to sell their development rights to owners of land elsewhere in the Special District. *See id.* Owners in the High Line Transfer Corridor can sell unused development rights for use by other parcels within the Special District as long as those parcels can accommodate the additional development within the caps established by the City's Zoning Resolution.[16]

16. Apart from the West Chelsea Zoning Amendment, owners of land throughout the City may only transfer development rights to immediately adjacent parcels by agreement with the adjacent landowner. N.Y.C. Zoning Res. art. I, ch. 2, § 12-10 (defining "floor area ratio" and "zoning lot"). In areas of the City other than low-density commercial zones and low to medium-density residential zones, landowners may also transfer development rights from landmarked properties to properties across the street or on an opposite corner from the lot in question. *Id.* art. VII, ch. 4, § 74-79. Without the creation of the Special West Chelsea District, the transfer of development rights would be limited to these mechanisms.

To make the High Line transfer mechanism effective, the Zoning Amendment increased the development potential of many sites throughout the Special District by raising the floor area ratio,[17] thereby allowing these sites to accept development rights transferred from the High Line Transfer Corridor properties. *See* Meeker Decl., Ex. 2, West Chelsea Zoning Amendment § 98-22. The Zoning Amendment was "crafted so that there would be more capacity for incorporation of development rights into buildings within the West Chelsea Special District on 10th and 11th Avenues than could be met by the transfer of development rights from High Line properties, so as to ensure a robust market for transfer development rights deriving from the properties encumbered by the High Line." Gunn Decl. ¶ 20. The rezoning also allowed additional permissible uses, particularly residential uses, within the West Chelsea Special District. Together, the increase in floor area ratio for some sites and the increase in allowable uses created a market for transferring development rights from the High Line Transfer Corridor properties to other areas in the Special District.[18] *See*

17. A floor area ratio limits the development potential on any site by limiting the ratio of developable floor area to the size of the underlying parcel. *See* N.Y.C. Zoning Res., art. I, ch. 2, § 12-10 (defining "floor area ratio").

18. In addition to this general scheme, the Zoning Amendment created several other mechanisms to facilitate the transfer system. First, owners of certain property can obtain additional floor area ratio by funding improvements to the High Line through the High Line Improvement Bonus Program. *See* Meeker Decl., Ex. 2, West Chelsea Zoning Amendment § 98-25. Second, owners of vacant lots who sold all of their development potential for use on other parcels can purchase additional development rights up to an floor

Meeker Decl., Ex. 2, West Chelsea Zoning Amendment § 98-00.

Several of the plaintiffs have taken advantage of the development rights transfer system and have sold some of their development rights for millions of dollars. *See* Toback Dep. 82-84, Exs. 12, 14; Spindler Dep. 67, 69, 70, 109, Exs. 10-11, 20-21. The High Line Term Sheet developed during the negotiations between the City, CSX, and the Chelsea Property Owners required High Line property owners seeking to transfer development rights to certify that no condemnation award had been received in connection with the use of the High Line for public space. Meeker Decl., Ex. 1 at 18. The City also required property owners who transferred their development rights to agree not to sue the United States for a condemnation award in connection with the High Line. The plaintiffs who took advantage of the transfer development system made these declarations. *See* Toback Dep. 75, Ex. 10 ¶ 10, Restrictive Declaration: High Line Transfer of Development Rights by West Chelsea Buildings, LLC ("Declarant hereby forever and irrevocably releases and waives and covenants not to

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area ratio of 1.0 from the City of New York in order to develop commercial space (through the High Line Transfer Corridor Bonus program). *See id.* § 98-35. Finally, after development rights are transferred, owners of some parcels can garner additional floor area ratio by providing low- and moderate-income housing. *See id*. § 98-26. The rezoning also introduced design controls that guide growth in various areas of the Special District, including managing development adjacent to the High Line in order to maintain the quality of the public space on the High Line. *See id.* §§ 98-40 through 98-55.

seek any condemnation or similar award in connection with the use of the High Line for Public Space from . . . the United States of America."); Spindler Dep. 64, 67, 98-99, Ex. 9 ¶ 9, Restrictive Declaration: High Line Transfer of Development Rights by 22-23 Corp. (same); Ex. 19 ¶ 9, Restrictive Declaration: High Line Transfer of Development Rights by 26-10 Corp. (same).

E. Plaintiffs' suit before this court.

Nearly six years after the Special West Chelsea District was created and the High Line was established as a recreational trail, plaintiffs brought suit in this court, alleging that the STB's issuance of the High Line CITU in June 2005 had taken their property without compensation in violation of the Fifth Amendment, in three separate, and now consolidated, cases. *W. Chelsea Buildings*, No. 11-333 (Fed. Cl. filed May 24, 2011); *437-51 W. 13th Street LLC v. United States*, No. 11-374 (Fed. Cl. filed June 10, 2011); *Tenth Avenue Realty Assocs., LP v. United States*, No. 11-713 (Fed. Cl. filed Oct. 27, 2011). Plaintiffs seek an award of the full fair market value of the property allegedly taken by the United States, including any severance damages, as well as interest, and costs and attorneys' fees.

On October 11, 2011, the court denied the plaintiffs' request in *West Chelsea Buildings*, No. 11-333, to certify their suit as a class action. Order, Oct. 11, 2011, ECF No. 22. The parties agreed that the court should address the effect of the Covenant Not to Sue Agreements and any other jurisdictional issues before proceeding to the merits of plaintiffs' takings claims. The government

filed its motion for summary judgment as to the effect of the Covenant Not to Sue Agreements signed by six of the plaintiffs, as well as the standing of one of those six plaintiffs, on June 14, 2012. Oral argument on this motion was held on December 19, 2012. After oral argument and at the request of plaintiffs, the parties provided supplemental briefing, which was completed on January 18, 2013.

II. STANDARD OF REVIEW

When considering a summary judgment motion, the court's proper role is not to "weigh the evidence and determine the truth of the matter," but rather "to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact." United States Court of Federal Claims Rule 56(a); *see* also *Consolidation Coal Co. v. United States,* 615 F.3d 1378, 1380 (Fed. Cir. 2010). A material fact is one that "might affect the outcome of the suit," and a dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson,* 477 U.S. at 248. In reviewing the facts, "all justifiable inferences are to be drawn" in favor of the party opposing summary judgment. *Id.* at 255.

Once the movant has shown that no genuine issue of material fact exists, the party opposing summary judgment must demonstrate that such an issue does, in fact, exist. *Celotex Corp. v. Catrett,* 477 U.S. 317, 324,

106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). To establish a genuine issue of material fact, a party "must point to an evidentiary conflict created on the record; mere denials or conclusory statements are insufficient." *Radar Inds., Inc. v. Cleveland Die & Mfg. Co.,* 424 F. App'x 931, 936 (Fed. Cir. 2011) (quoting *SRI Int'l v. Matsushita Elec. Corp. of Am.,* 775 F.2d 1107, 1116 (Fed. Cir. 1985)) (internal quotation omitted). Where there is doubt as to the existence of a genuine issue of material fact, that doubt must be resolved in favor of the nonmovant. *Unigene Labs., Inc. v. Apotex, Inc.,* 655 F.3d 1352, 1360 (Fed. Cir. 2011) (citing *Ortho-McNeil Pharm., Inc. v. Mylan Labs., Inc.,* 520 F.3d 1358, 1360-61 (Fed. Cir. 2008)).

Summary judgment is also appropriate where the only issues to be decided are issues of law. *Huskey v. Trujillo,* 302 F.3d 1307, 1310 (Fed. Cir. 2002) (citing *Dana Corp. v. United States,* 174 F.3d 1344, 1347 (Fed. Cir. 1999)); 10A Charles Alan Wright *et al., Federal Practice & Procedure* § 2725 (3d ed. 2012) ("It necessarily follows from the standard set forth in the rule that when the only issues to be decided in the case are issues of law, summary judgment may be granted.").

III. DISCUSSION

The parties' dispute in this case centers on whether the United States is a third party beneficiary of the Covenant Not to Sue Agreements, and if so, if the provision waiving plaintiffs' claims against the United States waives all of those claims, or is otherwise enforceable. If the government can establish that it is a third party

beneficiary, and that the waiver found in the Covenant Not to Sue Agreements validly bars all claims against the government in connection with the establishment of the High Line recreational trail, then the Covenant Not to Sue Agreements bar the claims of six plaintiffs in this case, and their claims must be dismissed.

The government argues that, under New York law, the United States is a third party beneficiary to the Covenant Not to Sue Agreements, and that the plain language of the Agreements bars these plaintiffs from bringing suit against the United States in this case. The government asserts that it has established its third party beneficiary status under New York law because: (1) the Agreements are valid and binding in that there was offer, acceptance, and consideration for Agreements and the overall deal with the City; (2) the language of the Agreements explicitly reference the United States and the benefit bestowed on the United States, and this plain and unambiguous language shows an intent to provide a direct and immediate benefit to the United States; and (3) although it is unnecessary for the court to look beyond the plain language of the Agreements, the surrounding circumstances support that the parties intended to benefit the United States.

Plaintiffs argue in response that, read as a whole, the Agreements demonstrate that the United States was not a third party beneficiary, and that, even if it was, the Agreements did not bar all claims against the United States in connection with the CITU. Plaintiffs further argue that the covenant not to sue the United States found in the Agreements is unconstitutional.

The court now turns to the parties' arguments. For the reasons that follow, the court finds that the United States may assert its status a third party beneficiary to the Covenant Not to Sue Agreements in this case, that the waiver in those Agreements bars plaintiffs' claims, and that the waiver is not unconstitutional.

A. Plaintiff 437-51 West 13th Street LLC lacks standing to pursue its takings claim.

Before proceeding to the central dispute in this case—whether the Covenant Not to Sue Agreements bestow third party beneficiary status on the United States so as to bar plaintiffs' claims—the court first addresses plaintiff 437-51 West 13th Street LLC's standing in this case. The government argues that plaintiff 437-51 West 13th Street LLC lacks standing to pursue its takings claim because it did not own its property at the time of the alleged taking. Here, the alleged taking occurred when the June 13, 2005 CITU was issued. *Ladd v. United States,* 630 F.3d 1015, 1023 (Fed. Cir. 2010) (holding that the issuance of a NITU or CITU triggers a takings cause of action). However, 437-51 West 13th Street alleges that it acquired its property interest in the land at issue via an indenture on August 25, 2005. *437-51 W. 13th Street LLC*, No. 11-374, Am. Compl. ¶ 48.

Plaintiffs do not respond to this argument in their briefs. Only plaintiffs with "a valid property interest at the time of the taking are entitled to compensation." *CRV Enters., Inc. v. United States,* 626 F.3d 1241, 1249 (Fed. Cir. 2010) (citations omitted). Because it did not own the

property at issue at the time of the taking, 437-51 West 13th Street LLC's claim must be **DISMISSED** for lack of jurisdiction. In the discussion below, the court therefore addresses the claims of the five remaining plaintiffs in connection with the Covenant Not to Sue Agreements—West Chelsea Buildings, LLC; 22-23 Corp.; 26-10 Corp.; Tenth Avenue Realty Associates, LP; and Somatic Realty, LLC.

B. The United States may assert its status as a third party beneficiary to the Covenant Not to Sue Agreements.

1. Legal standards.

It is well-settled that the United States may be a third party beneficiary to an agreement between two other parties. *See, e.g., United States v. State Farm Mut. Auto. Ins. Co.,* 936 F.2d 206, 207 (5th Cir. 1991) (holding that the United States can be a third party beneficiary of an insurance policy). When the United States asserts its rights as a third party beneficiary to a private agreement, the United States has the burden of showing that it is entitled to those rights under the state law governing that agreement. *See id.* at 209; *Interspiro USA, Inc. v. Figgie Int'l Inc.,* 18 F.3d 927, 931 (Fed. Cir. 1994) (stating that in general, "[i]nterpretation of an agreement presents a question of law, governed by state contract law") (citations omitted). In this case, each Covenant Not to Sue Agreement had a provision stating that "[t]his Agreement shall be governed and construed in accordance with the internal laws of the State of New York," *see, e.g.,* Toback

Dep., Ex. 5 ¶ 8, and the parties do not dispute that the law of New York governs the Agreements. The court will therefore apply New York law in determining whether the government has met its burden of demonstrating third party beneficiary status.

Under New York law, a party seeking to enforce a contract as a third party beneficiary must establish (1) the existence of a valid and binding contract between other parties; (2) that the contract was intended for its benefit; and (3) that the benefit to it is sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate it if the benefit is lost. *Cal. Pub. Emps. Ret. Sys. v. Shearman & Sterling,* 95 N.Y.2d 427, 741 N.E.2d 101, 104, 718 N.Y.S.2d 256 (N.Y. 2000) (quotation omitted).

To establish the existence of a valid and binding contract, a party must show offer, acceptance, consideration, mutual assent, and intent to be bound. *See, e.g., Kowalchuk v. Stroup,* 61 A.D.3d 118, 873 N.Y.S.2d 43, 46 (N.Y. App. Div. 2009). This case involves a unique type of contract—a covenant not to sue agreement. A covenant not to sue applies to future as well as present claims and constitutes an agreement to exercise forbearance from asserting any claim which either exists or may accrue. *McMahan & Co. v. Bass,* 250 A.D.2d 460, 673 N.Y.S.2d 19, 21 (N.Y. App. Div. 1998). Covenant not to sue agreements are valid and enforceable contracts in New York.[19] *See, e.g., Hugar*

19. In addition, some New York courts have stated that covenant not to sue clauses should be construed narrowly against the party relying on them and require clear and explicit language

v. Damon & Morey LLP, 51 A.D.3d 1387, 856 N.Y.S.2d 434, 435 (N.Y. App. Div. 2008) (affirming dismissal of a claim because it was barred by a covenant not to sue). The parties do not dispute that the Covenant Not to Sue Agreements in this case are valid and binding contracts.

Rather, the parties dispute whether the United States is a third party beneficiary of the covenant not to sue clause at issue in the Agreements, and therefore whether the United States may use the covenant not to sue clause defensively to bar plaintiffs' claims. Under New York law, a party may assert third party beneficiary status if it is an "intended beneficiary" of the contract at issue. *Fourth Ocean Putman Corp. v. Interstate Wrecking Co.*, 66 N.Y.2d 38, 485 N.E.2d 208, 211-13, 495 N.Y.S.2d 1 (N.Y. 1985). To determine whether the parties to a contract intended to bestow an immediate benefit on the third party, and therefore whether the third party was an "intended beneficiary" of a subject contract, New York courts follow section 302 of the Restatement (Second) of Contracts. *Id.* at 212-13.[20] Under section 302, "a beneficiary of a promise

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indicating that the parties intended claims to be released. *Kaufman v. Am. Youth Hostels, Inc.*, 6 A.D.2d 223, 177 N.Y.S.2d 587, 593 (N.Y. App. Div. 1958) (holding that covenant not to sue clauses are "not looked upon with favor by the courts, are strictly construed against the party relying on them, and clear and explicit language in the agreements is required").

20. Contrary to plaintiffs' assertion, the courts of New York do not require that the language of a contract evidence an intent to permit enforcement by the third party, because the Restatement does not require such a showing. Plaintiffs quote *Fourth Ocean* for this proposition; however, that court was referring to prior

is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties" and either "the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary" or "the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance." Restatement (Second) Contracts § 302(1). The Restatement further states that "if the beneficiary would be reasonable in relying on the promise as manifesting an intention to confer a right on him, he is an intended beneficiary." *Id.* cmt. d. A beneficiary of a contract that is not an intended beneficiary is an "incidental beneficiary." *Id.* § 302(2).

The court must now determine whether the United States is an "intended beneficiary" or merely an "incidental beneficiary" of the Covenant Not to Sue Agreements. Because there is no promise to pay money to the United States in the Agreements at issue, the court must determine whether "recognition of a right to performance in the [United States] is appropriate to effectuate the intention of the parties" and whether "the circumstances indicate that [the City] intend[ed] to give the [United States] the benefit of the promised performance"— plaintiffs' promise

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decisions and factors that New York courts have looked to in determining whether a party is a third party beneficiary, not discussing the Restatement's test. Section 302 of the Restatement does not require evidence of enforcement rights. Instead, section 304 of the Restatement directs that when "[a] promise in a contract creates a duty in the promisor to any intended beneficiary to perform the promise, . . . the intended beneficiary may enforce the duty." Restatement (Second) of Contracts § 304.

not to sue the United States. In determining whether a third party is an intended beneficiary under New York law, the intent of the parties is "critical" and the "best evidence of the contracting parties' intent is the language of the agreement itself." *Edge Mgmt. Consulting, Inc. v. Blank,* 25 A.D.3d 364, 807 N.Y.S.2d 353, 358 (N.Y. App. Div. 2006). Courts applying New York law may also look to the surrounding circumstances in order to determine the intent of the parties. *Trans-Orient Marine Corp. v. Star Trading & Marine, Inc.,* 925 F.2d 566, 573 (2d Cir. 1991) ("In determining third party beneficiary status it is permissible for the court to look at the surrounding circumstances as well as the agreement." (citations omitted)); *Fourth Ocean,* 485 N.E.2d at 212.

2. The government's arguments.

Applying these standards, the government argues that it is clear on the face of the Covenant Not to Sue Agreements that the United States is a third party beneficiary in this case, and that there is no other reasonable interpretation of the Agreements. The government asserts that under New York law, an explicit reference in a contract to a benefit conveyed to a third party creates an intent to benefit that third party. *Edge Mgmt.,* 807 N.Y.S.2d at 358-59 (holding that the "explicit wording" of an indemnity provision in the agreement at issue created third party beneficiary status in a group of persons specifically named in the agreement).[21] In addition, the government asserts,

21. In *Edge Management*, a lessee sued its lessor after leaking water from the condominium above it—a result of renovations in that unit—led to mold growth. The lessor sought indemnification

when the language of a contract "admits of no other interpretation" than that the third party "is the direct and only beneficiary" of the promise to benefit that party, the party is a third party beneficiary under New York law. *Rekis v. Lake Minnewaska Mountain Houses, Inc.,* 170 A.D.2d 124, 573 N.Y.S.2d 331, 334 (N.Y. App. Div. 1991).[22] Here, the government argues, the benefit to the United States is explicitly referenced in the Agreements at issue, and clearly creates an unequivocal intent to benefit the United States. *See* Covenant Not to Sue Agreement ¶

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from the upstairs owner, arguing that it was a third party beneficiary of an alteration agreement between that owner and the condominium's board of managers, in which the upstairs owner indemnified other unit owners against any and all losses that resulted from the renovations. The court held that the lessor was an intended beneficiary because the "explicit wording of the agreement evidences an intent to indemnify other unit owners . . . against any and all loss that results from the renovations." 807 N.Y.S.2d at 358-59.

22. In *Rekis,* 573 N.Y.S.2d at 334, the plaintiff, a longtime employee of the defendant, claimed that he was the third party beneficiary of a contract in which the defendant sold a large tract of land to the Nature Conservancy. That contract explicitly required the defendant to convey a particular parcel to the plaintiff. *Id.* at 333 (The contract required that "At or before the Closing, [defendant] shall convey or cause to be conveyed to [plaintiff] . . . the parcel[ ] described in Exhibit C-1."). Applying the Restatement standard, the court found that the provision requiring the conveyance "admits of no other interpretation than that plaintiff's right to the conveyance provided for in the contract is appropriate to effectuate the intention of the parties and that the promisee (the Nature Conservancy) intended to give plaintiff the benefit of the conveyance." *Id.* at 334.

1(A)(b) ("[Plaintiff] agrees not to sue or join any action seeking compensation from, and will not participate with and will withdraw from any class action seeking compensation from . . . The United States of America or any of its departments or agencies with respect to the Highline CITU."). Moreover, the government contends, the provision in the Agreements here "admit[] of no other interpretation" than that the United States was the "direct and only" beneficiary of plaintiffs' clear promise not to sue the United States. As such, the government argues, the United States would be "reasonable in relying on the promise" made by plaintiffs not to sue the United States. Restatement (Second) Contracts § 302 cmt. d.

The government also relies on a case in the Eastern District of New York, which holds in similar factual circumstances that a release of claims can involve a third party beneficiary.[23] In *Noveck v. PV Holdings Corp.,* 742 F. Supp. 2d 284, 295-98 (E.D.N.Y. 2010), Mr. Noveck sued a car manufacturer and a rental car company after sustaining injuries in a car accident while driving a rental car. Mr. Noveck resolved his claims against the manufacturer in a settlement agreement, wherein Mr. Noveck agreed that any claims he brought against the rental car company would not be based on strict liability but would be based only on the rental car company's independent negligence (thereby eliminating the manufacturer's potential indemnification liability to the rental car company). *Id.*

23. Decisions of New York federal courts are not binding on this court, although they are persuasive authority because they interpret New York law. Both plaintiffs and the government rely on case law generated by the New York federal courts.

at 295. Despite this settlement agreement, Mr. Noveck sued the rental car company based on a theory of strict liability, and the rental car company, asserting third party beneficiary status, sought to enforce the release provision of the settlement agreement as to the strict liability claim. *Id*. The district court held that it was clear based on the language of the settlement agreement between the plaintiff and the car manufacturer that the rental car company was an intended third party beneficiary of the settlement agreement, and that the release provision in the settlement agreement "was plainly intended to eliminate [the manufacturer's] potential liability to [the rental car company] by preventing Plaintiff, in consideration of a large sum of money, from pursuing claims in strict liability against [the rental car company.]" *Id.* at 298.

Like the parties in *Noveck*, the government argues, the City in this case reached an agreement with plaintiffs that included a provision protecting the United States from suit. The government asserts that, like the *Noveck* court, this court should enforce the clear language in that provision. The government further argues that *Noveck* also clarifies that even where the promisee of an agreement (in *Noveck*, the manufacturer; here, the City) would benefit from a promise to a third party by avoiding indemnification liability, the third party may still be considered an "intended beneficiary." *See Noveck,* 742 F. Supp. at 298 (relying on the analysis in *Spanierman Gallery v. Merritt,* No. 00 Div. 5712, 2004 U.S. Dist. LEXIS 15609, 2004 WL 1781006, at *12 (S.D.N.Y. Aug. 10, 2004) ("That [the promisee] would also benefit from [a release of claims against a third party] does not militate

against the conclusion that [the promisor] undertook an obligation to the third party.”)).[24] This holding is supported by a New York law treatise on contracts, which states that an explicit reference to a benefit to a named third party in a contract usually means that party is a third party beneficiary of the contract, even if the contract also works to the advantage of one of the parties to that contract: “Where the terms of the contract necessarily require the promisor to confer a benefit upon a third person, then the contract contemplates a benefit to that third person, and this is ordinarily sufficient to justify third-party-beneficiary enforcement of the contract, even though the contract also works to the advantage of the immediate parties thereto.” 22 N.Y. Jur. 2d Contracts § 313 (2012).

The government finally argues that, apart from the plain language of the Agreements, the circumstances surrounding the agreements demonstrate that the City intended to prohibit suits for compensation against the United States related to the High Line CITU and that

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24. The government also cites other cases where the federal courts of New York have held that explicit references to third parties as beneficiaries confer third party beneficiary status. *See, e.g., Bekhor v. Bear, Stearns and Co., Inc.,* No. 96 Civ. 4156, 2004 U.S. Dist. LEXIS 21542, 2004 WL 2389751, at *4 (S.D.N.Y. Oct. 25, 2004) (unpublished) (holding that a third party could enforce a release provision found in a settlement agreement, explaining that because the third party “is expressly named in paragraph 8 [of the agreement], there is no question that the release applies to it”); *Levin v. Tiber Holding Corp.,* 277 F.3d 243, 249 (2d Cir. 2002) (upholding a district court decision finding a third party was an intended beneficiary, in part because the agreement at issue “specifically included [the third party] as a direct beneficiary”).

the parties intended to give the United States the benefit of plaintiffs' promise not to sue.

First, the government argues, a rezoning summary, dated November 22, 2004 and purporting to describe "the major aspects of the proposed Special West Chelsea District rezoning and conversion of the Highline to public space as set forth in the proposed Term Sheet between CPO [Chelsea Property Owners], the City, the State and the Railroads," shows that at least some of the plaintiffs understood that the deal required High Line property owners to release all claims against the United States. Toback Dep., Ex. 4 (the rezoning summary stating that the property owners "will be asked to (a) release all claims against CPO [Chelsea Property Owners], the City, the State, the Federal government and the Railroads, including condemnation claims"). The government argues that this summary shows that the parties intended to release the United States from condemnation claims in the final Covenant Not to Sue Agreements and as part of the overarching High Line negotiations.

Second, the government contends that, as Senior Counsel Gunn explains in his declaration, the City intended the United States to benefit from plaintiffs' promise not to sue it, because the City "was aware of the potential for litigation against the United States," and intended "to generally settle all matters related to the CITU." Gunn Decl. ¶ 21. "In keeping with the City's desire to settle all matters related to the CITU, the owners of the properties north of 16th Street agreed not to sue the United States of America for compensation in connection

with the CITU." *Id.* Because the City intended to settle all claims related to the High Line CITU, the government argues, it intended to benefit the United States.

3. Plaintiffs' response.

In response to the case law and undisputed evidence presented by the government, plaintiffs assert that the government misinterprets the Agreements at issue and misapplies the law of New York. Turning first to the language of the Covenant Not to Sue Agreements, plaintiffs argue that, when read as a whole, it is not possible to conclude that the City and property owners negotiated, designed, and drafted the Agreements for the purpose of conferring upon the United States the benefit of relieving it of its constitutional obligations under the Fifth Amendment. Rather, plaintiffs argue, the covenant not to sue clause was based on the desire of the City to protect only itself from possible liability.

Specifically, plaintiffs argue that the prologue to the Agreements indicates that the benefits of the Agreements were for the City only. *See, e.g.*, Gunn Decl., Ex. B ("WHEREAS, [plaintiff], desiring to encourage, induce and cooperate with said initiatives [conversion of the High Line to public space and the creation of the Special District], has agreed to grant certain releases, waivers and covenants to the City in furtherance thereof." (emphasis added)). *The City* could have included the United States in this prologue, plaintiffs argue, but did not. In addition, plaintiffs contend, the United States is mentioned only once in the Agreements. Moreover, the Agreements

contain no provision by which the federal government may enforce any provision of the Agreements, while containing detailed provisions specifying how and to whom any notice is to be made for a purported violation of the Agreements.

Plaintiffs also focus their argument on the term "beneficiary" or "benefit." The word "beneficiary" and the term "third party beneficiary" appear nowhere in the Agreements, demonstrating, plaintiffs assert, that the parties did not contemplate granting third party beneficiary status to the United States. Plaintiffs further argue that the only reference to "benefit" in the Agreements is in the following context, which does not include the United States: "This Agreement shall be binding upon and inure to the benefit of the City and [plaintiff], and their respective heirs, personal representatives, successors and assigns." *See, e.g.*, Gunn Decl., Ex. B ¶ 12. If the parties truly intended to benefit the federal government, plaintiffs contend, they would have expressly stated this fact. By way of contrast, plaintiffs point to a 2009 agreement between plaintiff 437-51 West 13th Street LLC and CSX where the City is expressly made a third party beneficiary. Pls.' Resp., Ex. F at 5 ("If Owner shall breach any of Owner's covenants not to sue CSXT and the city defends and/or indemnifies CSXT for such claim, then, in any such instance, the City shall be deemed to be a third party beneficiary of the releases, waivers and covenants made by Owner to CSXT . . . .").

Moreover, plaintiffs argue, the circumstances surrounding the Agreements demonstrate that the government was not an intended beneficiary of the

Agreements. First, plaintiffs assert, no agency of the federal government was involved in the negotiation or drafting of these Agreements. Furthermore, plaintiffs argue that the evidence shows that the City more generally came to the entire deal motivated by political interest or neighborhood development interest, not by a desire to benefit the United States. Gunn Decl. ¶¶ 8-9 (discussing the political shift and the idea to revitalize the neighborhood); Pls.' Resp., Ex. D., p. 437-51-US002742 (testimony of New York City Planning Commission Chairperson Amanda Burden stating, "We see this special district not only as providing an extraordinary public amenity but also as an enormous opportunity, an enormous economic development opportunity for the City of New York"). Plaintiffs also argue that Mr. Gunn's declaration does not explicitly state that the City intended to benefit the United States; rather, the declaration merely indicates that the City wanted to protect itself from liability, and generally settle all matters in connection with the CITU. Plaintiffs assert that the City inserted the language protecting the United States from suit in the Agreements to protect itself should the federal government seek indemnification from the City for any litigation resulting from the High Line.[25] Pls.' Resp. at 19.

Turning to New York case law, plaintiffs argue that the New York and federal cases relied on by the government are inapposite to the present situation. Plaintiffs argue that, unlike the third party beneficiary in *Rekis*, the

25. Plaintiffs do not provide any evidence in the form of an affidavit from a City official or otherwise to support this assertion by counsel.

United States is not the "direct and only beneficiary" of the promise not to sue the United States. Here, the City is also explicitly named in the covenant not to sue provision, which is therefore geared toward protecting the City, not the federal government. Plaintiffs further argue that *Edge* is distinguishable from this case, because one of parties to the agreement in *Edge* was an organization meant to "act[] on behalf" of the party that was found to be a third party beneficiary. *Edge Mgmt.,* 807 N.Y.S.2d at 359. Here, by contrast, New York City does not exist to represent or act on behalf of the United States. Finally, plaintiffs distinguish *Noveck*[26] by arguing that (1) there are no indemnification implications in this case, (2) that *Noveck* involved a release of specific claims, not a covenant not to sue, and (3) that *Noveck* is a statement of New York law by a federal trial court and as such is not precedential authority for this court.

Instead, plaintiffs argue, New York case law supports their position that the United States is not a third party beneficiary. Plaintiffs rely on *Chavis v. Klock,* 45 A.D.3d 1353, 846 N.Y.S.2d 490 (N.Y. App. Div. 2007), as the only New York case involving a situation where a purported third party beneficiary sought to enforce a covenant not

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26. As noted above, in *Noveck*, a rental car company was held to be a third party beneficiary of a promise between the plaintiff and a car manufacturer, made in a settlement agreement, where the plaintiff promised only to bring independent negligence claims, rather than strict liability claims, against the rental car company, so that the rental car company would not seek indemnification from the car manufacturer. 742 F. Supp. 2d 284, 290, 295-98 (E.D.N.Y. 2010).

to sue clause. In *Chavis*, a deliveryman signed a covenant not to sue customers or clients of his employer for injuries that were covered under workers' compensation statutes. *Id.* at 491. The express language of the covenant not to sue stated that the covenant was made "[i]n recognition of the fact that any work related injuries which might be sustained by [plaintiff] are covered by [such] statutes, and to avoid the circumvention of such state statutes which may result from suits against the customers or clients" of the employer. *Id.* (citation omitted). When the deliveryman later sued a customer and the customer sought to dismiss the case based on the above-cited language, the New York appellate court held that the customer was not a third party beneficiary of this contract, because the covenant manifested an intent, not to benefit the customer, but to protect the employer "against possible third-party actions by alleged tortfeasors." *Id.* at 491-92.

Like the customer in *Chavis*, plaintiffs argue, the United States should be considered only an incidental beneficiary. Moreover, plaintiffs point out, *Chavis* is the only New York case involving a third party beneficiary and covenant not to sue, and the court explicitly rejected third party beneficiary status. Based on this and other cited authorities, plaintiffs argue that the United States is clearly only an incidental, not intended, beneficiary of the Covenant Not to Sue Agreements under New York law.[27]

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27. Plaintiffs also rely on *Common Fund for Non-Profit Orgs. v. KPMG Peat Marwick, LLP,* 951 F. Supp. 498 (S.D.N.Y. 1997), where an investment broker claimed it was a third party beneficiary of a contract between an organization that it serviced and an accounting firm. In the contract, the accounting firm was

to perform auditing services relating to the broker's activities. Because the accounting firm was hired to audit the broker's activities, which would not necessarily benefit the broker, the court rejected the broker's claim. The court stated that the "allegations suggest that the agreement was for the primary benefit and protection of [the organization,] with at most a secondary intent . . . to benefit [the broker.]" *Id.* at 500. Plaintiffs further rely on *State of California Public Employees Retirement System v. Shearman & Sterling,* 95 N.Y.2d 427, 741 N.E.2d 101, 718 N.Y.S.2d 256 (N.Y. 2000), where New York's highest court rejected an argument by the California pension system that, as an assignee of a loan, it was a third party beneficiary of a law firm's contract with the assignor to provide legal services relating to that loan. The court found that the law firm was hired to assist the assignor, and that the California pension system and the assignor "did not share at all times the same interests." *Id.* at 105.

Here, plaintiffs argue that, like the broker in *Common Fund*, the City was the primary beneficiary of the Agreements, and the United States was merely an incidental beneficiary. Moreover, plaintiffs argue, as in *Shearman & Sterling*, the City and the United States did not share the same interests with respect to the City's interactions with the landowners. Plaintiffs assert that there is no evidence that the federal government had any interest in those dealings, because there is no evidence that the federal government participated in any of the negotiations at all. Pls.' Resp., Declaration of Mark F. (Thor) Hearne ¶¶ 5-7 (confirming no evidence of involvement of United States in negotiating the Agreements); *see also 243-249 Holding Co. v. Infante,* 4 A.D.3d 184, 771 N.Y.S.2d 651, 652 (N.Y. App. Div. 2004) (a brief opinion suggesting that in determining third party beneficiary status courts may consider whether the third party beneficiary took part in the negotiations between the other parties).

Plaintiffs also cite *2470 Cadillac Res., Inc. v. DHL Exp. (USA), Inc.,* 84 A.D.3d 697, 923 N.Y.S.2d 530, 531 (N.Y. App. Div. 2011),

4. Discussion

After consideration of the parties' arguments and the law of the State of New York regarding third party beneficiaries, the court agrees with the government that the plain language of and undisputed circumstances surrounding the Covenant Not to Sue Agreements indicate that the parties intended to directly benefit the United States under New York law, and that the United States is therefore a third party beneficiary to the Covenant Not to Sue Agreements. As discussed below, the express language of the Agreements demonstrates the parties' clear intent that plaintiffs would not sue the United States in connection with the High Line CITU. Under New York law, this clear language conveys third party beneficiary status on the United States unless a different intent can be gleaned from the language of the Agreements or the surrounding circumstances. The fact that the United States is not more specifically referenced as a third party beneficiary and participated in neither the drafting nor negotiations does not demonstrate a different intent that defeats third party beneficiary status under New York

where franchisees alleged third party beneficiary status as third party resellers under an agreement between the franchisor and an express courier service which authorized use of third party resellers. The court rejected the franchisees' argument because the authorization of the use of third party resellers was meant to only directly benefit the franchisor and the courier service by generating revenues for both, and any benefit flowing to the franchisees was an "incidental by-product." *Id.* Here, plaintiffs contend, any benefit to the United States from the Agreements would be an "incidental by-product" of the Agreements.

law. In addition, as demonstrated by *Noveck*, the fact that the City could also benefit from plaintiffs' promise not to sue the United States does not render the United States an "incidental beneficiary." While *Chavis* suggests that an alternate intent can limit contractual language that directly conveys a benefit on a third party in the form of a promise not to sue, plaintiffs have provided no showing of an alternate intent on the part of the parties here, either in the language of or the circumstances surrounding the Covenant Not to Sue Agreements. For all of these reasons, as discussed in more detail below, the court finds that the United States may enforce the Covenant Not to Sue Agreements as a third party beneficiary under New York law.

The main question before the court is whether the government has met its burden of showing that recognition of the United States as a third party beneficiary would be appropriate to effectuate the intention of the parties in these particular Agreements. *See* Restatement (Second) Contracts § 302. Under New York law, the terms of an agreement are the best evidence of the parties' intent, *Edge Mgmt.*, 807 N.Y.S.2d at 358, and the language of the Agreements here plainly and explicitly bestows a benefit—plaintiffs' promise not to sue—on the United States. In the Agreements, plaintiffs agreed "not to sue or join any action seeking compensation from, and will not participate with and will withdraw from any class action seeking compensation from the City or The United States of America or any of its departments or agencies with respect to the Highline CITU." *See* Covenant Not to Sue Agreement ¶ 1(A)(b). This express language demonstrates

that the parties intended to directly benefit the United States, and that the United States would "be reasonable in relying on [this] promise" not to sue. Restatement (Second) Contracts § 302 cmt. d.

That the United States is only mentioned once in the Agreements, or that the parties to the Agreements did not more explicitly state that the United States was a "third party beneficiary," does not change the clear intent of the parties expressed by this language. Under New York law, a third party need not even be explicitly identified in a contract to be a third party beneficiary, so long as the party can show the intent to benefit it. *Strauss v. Belle Realty Co.,* 98 A.D.2d 424, 469 N.Y.S.2d 948, 950 (N.Y. App. Div. 1983) ("[I]t is not necessary that a third-party beneficiary be identified or even identifiable at the time that the contract is made . . . ."). In addition, the fact that the United States did not participate in the negotiations or drafting of the Agreements does not render the United States an "incidental beneficiary" rather than a third party beneficiary. It is well-settled law that a third party beneficiary need not know of the agreement to be able to enforce the benefit. 22 N.Y. Jur. 2d Contracts § 311 ("New York follows the nearly universal rule that a third person may, in his or her own right and name, enforce a promise made for his or her benefit even though he or she is a stranger both to the contract and to the consideration."). Moreover, as the government points out, the STB was aware of the negotiations between the Chelsea Property Owners, the City, and CSX, and was provided a copy of the draft High Line Term Sheet during the proceedings before it. Def.'s Reply, Declaration of Alan Weinstein, Attorney Advisor with the STB, Ex. 11.

The court also disagrees with plaintiffs' argument that, because the City would also benefit from the Agreements, the United States was merely an "incidental beneficiary." The court agrees with the *Noveck* court, which held that a party to a contract and a third party beneficiary may both benefit from a promise not to sue, without rendering the third party an "incidental beneficiary." [28] Although plaintiffs argue that the City was attempting to protect itself from any indemnification liability by including the covenant not to sue clause in the Agreements, they provide no evidence of such an intent beyond this bare assertion. However, even if the City would also benefit from plaintiffs'

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28. While *Noveck* is only persuasive authority, its holding is supported by a New York law treatise, 22 N.Y. Jur. 2d Contracts § 313 ("Where the terms of the contract necessarily require the promisor to confer a benefit upon a third person, then the contract contemplates a benefit to that third person, and this is ordinarily sufficient to justify third-party-beneficiary enforcement of the contract, even though the contract also works to the advantage of the immediate parties thereto.").

In addition, although *Noveck* involves a settlement and release, not a covenant not to sue, the court finds that this difference does not affect the central holding of that case regarding third party beneficiary status. Similarly, the court rejects plaintiffs' argument that *Edge* is distinguishable because the promisee in *Edge* had a duty to act on behalf of the third party beneficiary in that case. The courts of New York no longer require a promisee to owe a duty to a third party for the third party to be an intended beneficiary. *McClare v. Mass. Bonding & Ins. Co.,* 266 N.Y. 371, 379, 195 N.E. 15 (1935) ("The requirement of some obligation or duty running from the promisee to the third party beneficiary has been progressively relaxed until a mere shadow of the relationship suffices, if indeed it has not reached the vanishing point.").

covenant not to sue the United States, under *Noveck*, that benefit would not erase the clear intent of the parties to bar any claims against the United States in connection with the High Line CITU. Aside from citing some evidence that the overall High Line deal was supported by the City for political or neighborhood revitalization reasons, plaintiffs have provided no evidence that the covenant not to sue clause itself was included in the Agreements for a purpose different from that expressed by the clear language of that provision.

Moreover, contrary to plaintiffs' contentions, the court finds that *Chavis*, the only case in New York state court expressly addressing a third party beneficiary and covenant not to sue, is distinguishable from the present case. In *Chavis*, the New York appellate court found that the particular language of the covenant not to sue at issue—under which a worker promised not to sue the customers of his employer "[i]n recognition of the fact that any work related injuries which might be sustained by [plaintiff] are covered by [workers' compensation] statutes, and to avoid the circumvention of such state statutes which may result from suits against the [employer's] customers or clients"—was intended to benefit the employer, not to bestow third party beneficiary status on a customer. 846 N.Y.S.2d at 491. Unlike the contract language in *Chavis*, the contract terms here evince clear intent to benefit the United States specifically, and contain no other language expressing a different intent. *See* Covenant Not to Sue Agreement ¶ 1(A)(b) ("[Plaintiff] agrees not to sue or join any action seeking compensation from, and will not participate with and will withdraw from any class action

seeking compensation from . . . The United States of America or any of its departments or agencies with respect to the Highline CITU."). The court therefore finds the situation in *Chavis* distinguishable from the present case.

Moreover, the surrounding circumstances indicate that all parties knew of the possibility of suits against the United States and that waivers of those suits would be part of the overarching agreement concerning the High Line. A summary describing "the major aspects of the proposed Special West Chelsea District rezoning and conversion of the Highline to public space" shows that at least some of the plaintiffs understood that the deal required property owners to release all claims against the United States. Toback Dep., Ex. 4. That summary sheet stated that the High Line property owners, including plaintiffs, would "be asked to (a) release all claims against . . . the Federal government . . . including condemnation claims." *Id.* The summary demonstrates that the High Line stakeholders, including plaintiffs, intended that the final Agreements would include a waiver of claims against the United States. *See* Restatement (Second) Contracts § 302(1) (the first part of the Restatement test used by New York courts, stating that "a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is *appropriate to effectuate the intention of the parties* . . ." (emphasis added)).

In addition, the government has shown that the City intended to give the United States the benefit of the promise not to sue the United States. *See id.* (the second part of the Restatement test, stating that "a beneficiary

of a promise is an intended beneficiary if . . . *the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance*" (emphasis added)). As Senior Counsel Gunn explains in his declaration, the City intended the United States to benefit from plaintiffs' promise not to sue it: "In keeping with the City's desire to settle all matters related to the CITU, the owners of the properties north of 16th Street agreed not to sue the United States of America for compensation in connection with the CITU." Gunn Decl. ¶ 21. As noted, plaintiffs have failed to provide any evidence to generate a factual dispute as to the City's intent in connection with the covenant not to sue clause, aside from bare assertions that the City intended to benefit itself. These assertions, however, are not enough to create a genuine dispute as to the intent of the parties to the Agreements. *See Pure Gold, Inc. v. Syntex (U.S.A.), Inc.,* 739 F.2d 624, 626-27 (Fed. Cir. 1984).

For all of these reasons, the court finds that the United States was an intended beneficiary of plaintiffs' promise in the Covenant Not to Sue Agreements not to seek compensation from the United States in connection with the High Line CITU. The United States may therefore enforce the Agreements in this action as a third party beneficiary.

C. The waiver in the Covenant Not to Sue Agreements applies to both the recreational trail and "railbanking" portion of the CITU, and the waiver term therefore entirely bars plaintiffs' takings claims.

The court next turns to whether the clause prohibiting suit against the United States in the Covenant Not to Sue Agreements bars plaintiffs' claims in this case. The covenant not to sue clause in the Agreements states that plaintiffs "agree[] not to sue or join any action seeking compensation from, and will not participate with and will withdraw from any class action seeking compensation from . . . The United States of America or any of its departments or agencies with respect to the Highline CITU." Covenant Not to Sue Agreement ¶ 1(A)(b). Plaintiffs do not dispute that, if enforceable and not otherwise limited, this language applies to their Fifth Amendment takings claims here. Rather, plaintiffs argue that, even if the United States is a third party beneficiary, the covenant not to sue clause impacts only the "recreational trail" component of the taking because the Agreements expressly exclude any release of the "railbanking" component of the taking—the component of the taking that involves the STB's right to reinstate rail service over the High Line in the future. Under the Trails Act, a railroad may relinquish responsibility for a rail line by transferring the corridor to an entity that will use it as a recreational trail. Although the corridor is not used as a railroad during this period of interim trail use, it remains intact for potential future use for rail service. The process by which a rail corridor is reserved for future rail service

is called "railbanking." *See Caldwell v. United States*, 391 F.3d 1226, 1228-29 (Fed. Cir. 2004). An easement under the Trails Act is therefore used as a recreational trail and also "railbanked" for future rail service.

Plaintiffs seek to draw a distinction between their covenant not to sue the United States for "railbanking" the High Line easement and their covenant not to sue the United States for creating the "recreational trail" portion of that easement. Specifically, plaintiffs argue that the Covenant Not to Sue Agreements expressly reserve to plaintiffs the right to be compensated should "future restoration of rail service" occur. Thus, plaintiffs argue, even if the covenant not to sue clause bars plaintiffs from bringing a takings claim for the creation of a recreational trail across their property, the portion of their Fifth Amendment takings claims involving the "railbanking" of an easement across their property (which contemplates potential reactivation of rail service) is not barred by the Agreements.

Plaintiffs rely on paragraph 1(B) of the Agreements, which lists exclusions to the covenant not to sue clause, to support their interpretation of the covenant. That provision states in pertinent part:

> Notwithstanding anything contained in this Agreement to the contrary, the City and [plaintiff] acknowledge and agree that (I) neither [plaintiff] nor its successor and assigns are releasing and/or discharging the City or its designee . . . from any claims or damages

> relating to or arising in any manner whatsoever out of . . . any claim for any matter described in Subparagraph (A) of this Section I to the extent that it arises from and after the date of restoration of rail service by the City or its designee on or over the Highline or any segment thereof . . . which . . . passes over all or any part of [plaintiff's property.]

Toback Dep., Ex. 5 ¶ 1(B). Plaintiffs argue that this reservation allows them to bring a takings claim today against the federal government for authorizing future reactivation of rail service through the "railbanking" of their property under the Trails Act.

The government contends that the plain language of the Agreements belies plaintiffs' argument. The government asserts that by its terms, paragraph 1(B) applies only to the City or its designee, and that reservation of the claim based on reactivation of rail service in the Agreements applies only "to the extent that it arises from and after the date of restoration of rail service by the City," not before rail service is restored. Therefore, the government argues, the reservation of claims in paragraph 1(B) does not impact plaintiffs' covenant not to sue the United States.

The court finds that plaintiffs' argument is not supported. First, the reservations relied on by plaintiffs are drafted to apply only to claims against the City or its designee. Moreover, the purpose of the reservation is to preserve claims that may arise after rail service is reactivated, not today. Regardless of whether plaintiffs

may have some right against the City or the United States in the future in connection with a possible decision to reactivate the rail line, plaintiffs cannot make that claim now. Any takings claims against the United States based on actual rail use in the future (as opposed to the imposition of "railbanking" now) are plainly not ripe. *See, e.g., Anaheim Gardens v. United States,* 444 F.3d 1309, 1315 (Fed. Cir. 2006) ("A claim for an uncompensated regulatory taking, however, must be ripe, meaning that it is the result of a 'final decision' by the allegedly offending agency."). The claim may be ripe only when a decision to reactivate rail service is made. Finally, this court has repeatedly held that the scope of the taking associated with the issuance of a CITU includes both trail use and "railbanking." *See, e.g., Jenkins v. United States,* 102 Fed. Cl. 598, 619 (2011); *Burgess v. United States,* No. 09-242L, 109 Fed. Cl. 223, 2013 U.S. Claims LEXIS 49, 2013 WL 474875 (Fed. Cl. Feb. 7, 2013) (also listing other cases in accord). Here, the Agreements' language barring plaintiffs' claims against the United States is expressly tied to the "CITU," and thus bars claims for both "railbanking" and trail use. Covenant Not to Sue Agreement ¶ 1(A)(b).

In sum, because the unambiguous language of the Covenant Not to Sue Agreements bars plaintiffs from seeking compensation from the United States "with respect to the High Line CITU," *id.*, the court finds that the Agreements operate to bar plaintiffs from bringing any Fifth Amendment takings claims in this case—claims related to trail use together with "railbanking."

D. The waiver does not constitute an "unconstitutional condition."

Plaintiffs in their final argument assert that even if the United States is an intended third party beneficiary of the Agreements, the covenant not to sue clause in the Agreements is unenforceable because it is unconstitutional. Plaintiffs argue that, by requiring plaintiffs to surrender their constitutional right to just compensation, the Agreements violate the "doctrine of unconstitutional conditions," as applied by the Supreme Court to government land use exactions in *Nollan v. Cal. Coastal Comm'n,* 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987), and *Dolan v. City of Tigard,* 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994). As such, plaintiffs contend, the waivers of their Fifth Amendment rights in the Agreements are unenforceable.

Under the doctrine of unconstitutional conditions, "the government may not require a person to give up a constitutional right . . . in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property." *Dolan,* 512 U.S. at 385. In *Nollan* and *Dolan*, the Supreme Court established a two-part test, based on the doctrine of unconstitutional conditions, to analyze the constitutionality of land use exactions[29] imposed by the

29. Land use exactions occur when a government requires that a property owner dedicate some of his or her property for public use before granting that property owner a permit to develop the land. *See Starr Int'l Co. v. United States,* 106 Fed. Cl. 50, 82 n.24 (2012) (citation omitted).

government as a condition on development. Under the *Nollan/Dolan* test, a land use exaction is constitutional only if an "essential nexus" exists between the condition imposed and a legitimate government purpose, and if there is a "rough proportionality" between the required condition and the impact of the proposed development. *Nollan,* 483 U.S. at 837; *Dolan,* 512 U.S. at 391.[30]

Here, plaintiffs argue, the City of New York has imposed a land use exaction on plaintiffs in exchange for the rezoning of the Special District—the requirement that they waive their Fifth Amendment claims against the United States. Plaintiffs contend that this land use exaction fails the *Nollan/Dolan* test of constitutionality, because plaintiffs' waiver of their claims against the United States has no relationship with the rezoning of West Chelsea or the preservation of the High Line. The government responds that the standards of *Nollan* and *Dolan* are not applicable in this case, and that, even if they are, they have been satisfied.

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30. In *Nollan*, the Court held that a city government could not condition a building permit on the granting of a public easement across a beachfront lot because there was no "essential nexus" between the legitimate state interest (defined by the city as maintaining the public's visual access to the ocean) and the condition imposed (requiring lateral public access across a private lot). 483 U.S. at 837. In *Dolan,* 512 U.S. at 391, the Court found that while an "essential nexus" existed between the legitimate state interest (flood and traffic control) and the condition imposed by the City of Tigard on a building permit (the dedication of property for flood control and a pedestrian/bicycle path), the exaction nevertheless failed to pass constitutional muster because there was no "rough proportionality" between the condition and the projected impact of the proposed development.

The court finds that plaintiffs' reliance on the *Nollan/Dolan* test is wholly misplaced. Where, as here, plaintiffs voluntarily waived their constitutional rights as part of a voluntary agreement, the doctrine of unconstitutional conditions does not apply. It is beyond dispute that persons can voluntarily waive their constitutional rights. For example, in *United States v. Mezzanatto,* 513 U.S. 196, 200-01, 115 S. Ct. 797, 130 L. Ed. 2d 697 (1995), the Supreme Court held, in the context of discussing the rights of a criminal defendant, that waiver of rights is available "in the context of a broad array of constitutional and statutory provisions." This includes the voluntary waiver of the right to sue for compensation under the Fifth Amendment. For example, in *The People of Bikini v. United States,* 554 F.3d 996, 1000 (Fed. Cir. 2009), the Federal Circuit held that it lacked jurisdiction over the plaintiffs' Fifth Amendment takings claims because they had waived their rights, in a settlement agreement with the United States, to sue over their claims in any United States court. Similarly, in *United States v. 119.67 Acres of Land,* 663 F.2d 1328, 1329 n.2, 1330 (5th Cir. 1981), the Fifth Circuit upheld a settlement agreement and resulting judgment where a party to that agreement waived any monetary just compensation claim in exchange for certain actions by the United States.

Here, because plaintiffs agreed not to sue the United States as part of an overall voluntary agreement concerning the creation of the High Line, the court concludes that plaintiffs' waiver of their Fifth Amendment takings claims against the United States with respect to the High Line CITU is not an unconstitutional condition

under the principles set forth in *Nollan* and *Dolan*. Unlike those land use exaction cases, the Covenant Not to Sue Agreements at issue here were negotiated over long periods of time between sophisticated business people represented by counsel in connection with a complex plan for development. The Agreements were voluntarily executed as part of an overall deal in which benefits were given in exchange for certain obligations by all parties. The Agreements at issue in this case do not involve land use conditions demanded by governments in exchange for permits, which are at the core of the *Nollan/Dolan* analysis. As the Ninth Circuit held in *Leroy Land Development v. Tahoe Regional Planning Agency*, 939 F.2d 696, 698 (9th Cir. 1991), the takings analysis under *Nollan* does not apply to agreements "entered into voluntarily, in good faith and [] supported by consideration." *Id.* (holding that *Nollan* did not apply retroactively to a settlement agreement between the plaintiff and a regional planning authority that gave the plaintiff the right to construct condominium units in exchange for performing certain mitigation measures). Similarly, in *McClung v. City of Sumner*, the Ninth Circuit held that where the plaintiffs voluntarily contracted with a city to install a 24-inch storm pipe in exchange for the waiver of certain permit fees, the *Nollan/Dolan* analysis did not apply. 548 F.3d 1219, 1230 (9th Cir. 2008). The *McClung* court found that because the plaintiffs "were not compelled to install a 24-inch pipe, but voluntarily contracted with the City to do so, there was simply no 'taking' by the City." *Id.* Here, too, plaintiffs entered into a voluntary agreement with the City supported by consideration. The court holds that, for the same reasons articulated in *McClung* and *Leroy*, the takings analysis articulated in *Nollan* and *Dolan* is

inapplicable in this case, and that the subject covenant not to sue clause in the Agreements is not unenforceable as an unconstitutional condition.

IV. CONCLUSION

For the foregoing reasons, the court **GRANTS** the government's motion for partial summary judgment as to the claims of (1) all of the plaintiffs in case number 11-333, West Chelsea Buildings, LLC, 22-23 Corp., 26-10 Corp.; and (2) two of the plaintiffs in case number 11-713, Tenth Avenue Realty Associates, LP, and Somatic Realty, LLC, because these five plaintiffs' claims are barred by the Covenant Not to Sue Agreements. The court also **GRANTS** the government's motion for partial summary judgment as to the claim of (3) one of the plaintiffs in case number 11-374, 437-51 West 13th Street LLC, based on a lack of standing.

The only remaining parties in these consolidated cases are Semantic Realty, LLC in case number 11-713 and Romanoff Equities, Inc. in case number 11-374. The parties shall file a joint status report by **February 28, 2013**, setting forth next steps for further proceedings in this matter. Because this opinion does not entirely close these consolidated cases, the parties shall continue to file all filings under the lead case, 11-333.

IT IS SO ORDERED.

/s/ Nancy B. Firestone
NANCY B. FIRESTONE
Judge

APPENDIX D — 16 U.S.C. SEC. 1247(D): INTERIM USE OF RAILROAD RIGHTS-OF-WAY

16 U.S.C. Sec. 1247(d):
Interim use of railroad rights-of-way

The Secretary of Transportation, the Chairman of the Surface Transportation Board, and the Secretary of the Interior, in administering the Railroad Revitalization and Regulatory Reform Act of 1976 [45 U.S.C. 801 *et seq.*], shall encourage State and local agencies and private interests to establish appropriate trails using the provisions of such programs. Consistent with the purposes of that Act, and in furtherance of the national policy to preserve established railroad rights-of-way for future reactivation of rail service, to protect rail transportation corridors, and to encourage energy efficient transportation use, in the case of interim use of any established railroad rights-of-way pursuant to donation, transfer, lease, sale, or otherwise in a manner consistent with this chapter, if such interim use is subject to restoration or reconstruction for railroad purposes, such interim use shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes. If a State, political subdivision, or qualified private organization is prepared to assume full responsibility for management of such rights-of-way and for any legal liability arising out of such transfer or use, and for the payment of any and all taxes that may be levied or assessed against such rights-of-way, then the Board shall impose such terms and conditions as a requirement of any transfer or conveyance for interim use in a manner consistent with this chapter, and shall not permit abandonment or discontinuance inconsistent or disruptive of such use.

APPENDIX E — 28 U.S.C. SEC. 1491(A)(1)

28 U.S.C. Sec. 1491(a)(1):

The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

APPENDIX F — RELEASE, WAIVER AND COVENANT NOT TO SUE AGREEMENT

RELEASE, WAIVER AND COVENANT NOT TO SUE AGREEMENT

[Owner to City]

This RELEASE, WAIVER AND COVENANT NOT TO SUE AGREEMENT ("Agreement"), made and entered into as of this 4th day of November, 2005 by and between West Chelsea Building, LLC, having an address at c/o Jeffrey Toback, 18 Franklin Avenue, Hewlett, NY 11557 ("Owner"), and THE CITY OF NEW YORK (the "City"), a municipal corporation formed pursuant to the laws of the State of New York, having its principal office atCity Hall, New York, NY 10007.

WITNESSETH:

A. WHEREAS, Owner is the owner of the parcel of real property more particularly described in Exhibit A attached hereto(the "Servient Property"); and

B. WHEREAS, CSX Transportation, Inc. ("CSXT") is the title-holder to an elevated railway viaduct with highway-railroad grade separation structures and street-level railway improvements known collectively as the "Highline" or the "West 30'h Street Secondary Track" in New York City, New York, extending from 75-95 Gansevoort Street and running northerly and westerly through 547-55 West 34th Street and the West 34th Street streetbed, identified as Line Code 4225 in the records of

the United States Railway Association (the "Highline"), including those certain easements, within which and upon which said viaduct is constructed, held by CSXT's predecessors-in-title (collectively, the "Easements", more specifically identified on Exhibit A-1 attached hereto), held in accordance with (i) agreements relating to the Easements (collectively, the "1929 Agreements", more specifically identified on Exhibit A-2 attached hereto) and (ii) those further easement agreements relating solely to individual properties encumbered by the Easements (the "Property-Specific Easements", more specifically identified on Exhibit A-3 attached hereto, said Highline having been conveyed to CSXT's immediate predecessor-in-interest New York Central Lines LLC ("NYCLLC") by quitclaim deed from Consolidated Rail Corporation ("Conrail") to NYCLLC dated as of June 1, 1999, and recorded in the Office of the City Register, New York County (the "Official Records") on March 27, 2000, in Reel3067, Page 1110, as corrected by corrective quitclaim deed from Conrail to NYCLLC dated as of August 24, 2004, and recorded (in the Official Records on January28, 2005 as Document ID 2004120200679001; and

C. WHEREAS, NYCLLC was merged with and into NYC Newco, Inc., under the name NYC Newco, Inc., and NYC Newco, Inc., was merged with and into CSXT, each merger effective August 27, 2004; and

D. WHEREAS, the City wishes to implement certain initiatives for the improvement and redevelopment of the area including and surrounding the Highline, including (i) a re-zoning of said area and (ii) the conversion of

the Highline to linear public space, public trail use or other public recreational purpose, as general municipal property, within the limits of the Easements, but not for any passenger or other rail service (collectively, "Public Space") pursuant to 49 C.F.R. Section 1152.29 and Section 8(d) of the National Trails System Act (also known as the "Rails-to-Trails Act"), 16 U.S.C. 1247(d) (collectively, the "Railbanking Legislation"), and pursuant to a Certificate of Interim Trail Use for the Highline (the "Highline CITU") issued by the federal Surface Transportation Board to the City and to the New York State Urban Development Corporation d/b/a Empire State Development Corporation ("ESDC") in accordance with the Railbanking Legistlation (such process, collectively, "railbanking"); and

E. WHEREAS, CSXT and its predecessors in interest have conducted no rail service over the Highline since 1982, and CSXT now desires to contribute the Highline and the Easements (the "Contribution"), south of West 301 h Street, to the City and, north of West 30" Street and west of II"' Avenue, to the ESDC, in furtherance of said initiatives in accordance with a Trail Use Agreement (the "TUA"); and

F. WHEREAS, Owner, desiring to encourage, induce and cooperate with said initiatives, has agreed to grant certain releases, waivers and covenants to the City in furtherance thereof;

NOW, THEREFORE, for and in consideration of the mutual agreements set forth herein, and other good

and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, and intending to be legally bound hereby, the City and Owner covenant and agree as follows:

1. Release and Waiver. (A) Subject to the provisions of subparagraph (B) of this paragraph 1, Owner, for itself and its successors, heirs, administrators and assigns as owner of the Servient Property, for good and valuable consideration, the receipt and adequacy whereof is hereby acknowledged, hereby:

> (a) agrees that it (x) will not, from the date hereof, file any action in any court of law against the City, or against its officers, directors, employees, agents, representatives and/or insurers, that arises out of or is in any way connected to any of the following (collectively, the "Released Claims"): (I) any act or omission with respect to the Highline prior to the date of the Contribution (a "Prior Claim"), including the railbanking, demolition of the High line or the presence, past or present Release (as hereinafter defined) or threatened Release of Contaminants (as hereinafter defined) on, at, to, from or under the Highline and/or the Servient Property and/or any real property to which any entity other than the City sent or sends any Contaminant or other material from the Servient Property or the Highline for treatment, storage, disposal, recycling or re-use, or any other aspect of the environmental

condition of the Highline and/or of the Servient Property, and any Damages arising under any Environmental Law (as hereinafter defined) respecting or affecting the Highline and/or the Servient Property; (II) the railbanking (or the conversion, maintenance and/or operation of the Highline for Public Space purposes through such mechanism upon which the City and CSXT or its successor in interest may agree), the failure to abandon or demolish all or any portion of the Highline (and incurrence of any past, present, or future costs, expenses or damages in connection therewith) and the demolition of all or any portion of the Highline running from 30th Street along the perimeter of and/or over the Hudson railyard (the "Hudson Yards Highline Segment"), including the relocation or reconstruction of, or alternate railway viaduct route for, or failure to relocate or reconstruct, all or any portion of the Hudson Yards Highline Segment, in each case under this clause (II) as long as the Highline is intended to be used or is being used for Public Space (and is not being used in a manner inconsistent with Public Space); (III) any condemnation or similar award for public taking in connection with the Highline as long as it is intended to be or is being used for Public Space(and is not being used **in** a manner inconsistent with Public Space); (IV) the issuance, existence and/or revocation or surrender of the Highline CITU, and/or support and/or cooperation by the City

with respect to any application for the issuance of an order of abandonment before the STB or its successor in function initiated by the City or its successor holder of the Easements for Public Space purposes, as long as the Highline is intended to be used or is being used for Public Space (and is not being used in a manner inconsistent with Public Space); and (V) the City's accepting the Contribution (and Owner hereby consents to the City's accepting the Contribution for Public Space with no intent to dedicate as parkland), or taking possession and control of the Highline, or expending or receiving any public or private funds in connection with the Highline, or any mapping of the Highline for Public Space, nor shall Owner make demand upon the City for the satisfaction of any liability, debt, damages, controversy, trespass, judgment, execution, demand or claim of any nature whatsoever, whether in law or in equity, whether known or unknown, that arises out of or is any way connected to any Released Claim, (y) releases and discharges the City from any claims, damages, or other liabilities relating to any Released Claim, and (z) waives any and all present or future claims against the City relating to any Released Claim, including all actions, causes of action, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments,

extents, executions, claims and demands whatsoever, in law, admiralty or equity, which against the City, Owner, Owner's heirs, executors, administrators, successors and assigns ever had from the beginning of the world to the date of this Agreement, now have or hereafter can, shall or may have for, upon, or by reason of any matter, cause or thing whatever relating to a Released Claim;

(b) agrees not to sue or join any action seeking compensation from, and will not participate with and will withdraw from any class action seeking compensation from the City or The United States of America or any of its departments or agencies with respect to the Highline CITU; and

(c) with respect to Released Claims, waives and renounces rights or claims, if any, against the City, its predecessors in title as titleholder to the Easements, and arising under the Easements, the Property-Specific Easements and/or the 1929 Agreements, to arbitrate disputes or otherwise make claims against the City, and/or its predecessors-in-title, for any alleged breach or nonperformance of obligations of the City under such agreements or any of them arising prior to the date the City receives the Contribution, including but not limited to any obligation to repair or restore the Servient Property and/or adjoining public streets and ways prior to that date.

(B) Notwithstanding anything contained in this Agreement to the contrary, the City and Owner acknowledge and agree that (I) neither Owner nor its successors and assigns are releasing and/or discharging the City or its designee {and shall not be deemed to have released or discharged the City or its designee) and {II) neither Owner nor its successors and assigns shall be required to indemnify any person, in either case, from any claims or damages relating to or arising in any manner whatsoever out of (i) any claim by Owner or any third party against Owner or its successors or assigns for personal injury, death or property damage during any period in which the City or its designee has had possession of the Highline (a "Possession Claim"), (ii) any breach by the City or its designee of any term, covenant, representation or warranty set forth in this Agreement, the TUA, the Highline CITU or any other agreement between Owner and the City (which may include other parties) relating to the Highline (an "Agreement Breach"), (iii) any claim for any matter described in Subparagraph (A) of this Section I to the extent that it arises from and after the date of restoration of rail service by the City or its designee on or over the Highline or any segment thereof (the "City Restored Segment") which City Restored Segment passes over all or any part of the Servient Property (a "City Restored Service Claim'), (iv) any matter described in subparagraph (A) of this Section 1 to the extent that any such matter is raised, asserted, alleged, or similarly Claimed or demanded with respect to real property other than the Servient Property, or any property to which any material or contaminant from the Servient Property or the Highline was sent for treatment, storage, disposal,

recycling or re-use, in either case, by any third party (i.e., a person which is not as at the date hereof, or at any time hereafter, either [x] a principal or affiliate of Owner or any such successor or assign, or [y] a licensee or ground or space lessee or other legal or illegal occupant of the Servient Property, or [z] in the chain offee title-holders to the Servient Property after the date hereof, any and all such described persons being deemed excluded from the definition of "third party" hereunder), including, without limitation, any governmental or quasi-governmental entity (including any environmental agency), against Owner or its successors or assigns to the extent arising by virtue of any act or omission of the City or its designee and/or its respective agents, employees, contractors or representatives occurring prior to the date ofthis Agreement (a "Third Party Claim"), (v) any claim asserted by any third party (as the term "third party" is used in this subparagraph (B) of this Section 1) against Owner or its successors or assigns for personal injury, death or property damage, (a "Tort Claim'), or (vi) any claim relating to the future demolition of the Highline (other than the Hudson Yards Highline Segment) or arising from a future obligation of the City that the City demolish the Highline (but nothing herein shall be construed to create such an obligation on the part of the City or imply that the City has such an obligation)(a "Demolition Claim') it being understood and agreed that Owner for itself and its successors and assigns as fee title holder of the Servient Property hereby reserves its rights, if any, with respect to (i) any Possession Claim, (ii) any Agreement Breach, (iii) any City Restored Service Claim, (iv) any Third Party Claim (including, without limitation, claim for contribution

with respect to a Third Party Claim), (v) any Tort Claim or (vi) any Demolition Claim, which Owner or its successors and assigns as fee title holders of the Servient Property may have against the City or its designee as a result of any matter described in this subparagraph (B).

2. Covenants. A. Owner, for itself and its successors, heirs, administrators and assigns as owner(s) of the Servient Property, for good and valuable consideration, the receipt and adequacy whereof is hereby acknowledged, hereby covenants that if Owner shall ever seek and obtain restoration of rail service on or over the Highline or any segment thereof (hereinafter, whatever the length or location, the "Restored Service Segment") or shall ever obtain regulatory clearances, permissions, or authorizations to do so, Owner shall reimburse the City for the unamortized costs of the permanent improvements made to the Highline, whether funded with City funds or otherwise, for the Restored Service Segment of the Highline in question which is to be restored to rail service, including without limitation from the southernmost point of such Restored Service Segment and all parts of the Highline north of such point (amortized on a straight line basis over the longest period of probable usefulness applicable to any such permanent improvements under New York State Local Finance Law), and shall pay the full and complete amounts of any awards for any condemnation or acquisition of property necessitated by or reasonably required as a result of such restoration of rail service in order to maintain the use as public space of those parts of the Highline other than the Restored Service Segment; and

B. The City hereby covenants that if the City or its designee shall ever seek and obtain restoration of passenger or other rail service on or over the Highline or any segment thereof, or shall ever obtain regulatory clearances, permissions or authorizations to do so, the City shall pay Owner the amount by which the value of the Servient Property is diminished as a result thereof.

3. The City Indemnity. The City agrees to defend, hold harmless and indemnify Owner from and against any claim for personal injury (including death} or damage to property, to the extent not caused by the negligence or willful act of Owner, on or after the date of the Contribution, arising from the acts or omissions of the City or its designee in connection with the development, improvement, operation, use, maintenance, repair and access to the Highline. The indemnification contained in this paragraph is subject to the following conditions: Owner shall (A} promptly notify the City of any claim; (B} consent to the reasonable settlement of any claim which is without Owner's cost, obligation or liability, and shall not otherwise materially and adversely affect Owner; (C) without incurring any liability or material out-of-pocket expenses, other than legal fees) reasonably cooperate with the City and its designee and their respective insurers in connection with any claim; and (D) provide access to the Highline across its Property for inspection, repair, maintenance and stabilization in accordance with the Access Easement dated the date hereof (provided the City otherwise has the right to such access under the Access Easement).

4. CITU or Trail Use Agreement Termination. Owner covenants and stipulates that the surrender or other termination of the CITU and the Trail Use Agreement between the City and CSXT and the issuance of an order of abandonment or other order to similar effect by the federal Surface Transportation Board or its successor-in-function shall not in any way impair, diminish, void, invalidate, extinguish, terminate or otherwise affect this Agreement and the covenants, consents, waivers and releases set forth herein for as long as (a) the Highline is being used or is intended to be used for Public Space in accordance with the terms of this Agreement and any other agreement between Owner and the City (which may include other parties) relating to the Highline (and is not being used in a manner inconsistent with Public Space), and (b) Grantee is not in default after notice and the expiration of any applicable cure periods under this Agreement or any other agreement between Owner and the City (which may include other parties) relating to the Highline.

5. West Side Rail Yard Use. Any requirement or condition herein or in the CITU or the Trail Use Agreement or other agreement between the City and Owner (which may include other parties) relating to the Highline that the Highline be used or be intended to be used for Public Space shall not be construed to require or create any condition that any portion of the Highline over or adjacent to the rail yards north of 30th Street be improved, developed, operated, used or maintained for Public Space purposes.

6. Covenant Runs with the Land. This Agreement is intended to be a covenant running with the land with respect to the Easements, the Property-Specific Easements and the Servient Property, and said covenant shall run with the land of the Servient Property unless and until such time as the Easements and Property-Specific Easements are terminated and the segment of the Highline traversing the Servient Property is demolished and entirely removed from the Servient Property and the statute of limitations has tolled with regard to the making of any claims by any natural person or entity against the City under or covered by this Agreement, the Easements, the Property-Specific Easements and/or the 1929 Agreements and/or any and all Environmental Laws.

7. Certain Definitions.

(a) As used herein, "Damages" shall mean any and all claims (including, but not limited to, claims for diminution in property value), actions, causes of action, demands, liabilities, damages (including, but not limited to, special, consequential, direct or indirect, or for personal injury, death or property damage), expenses (including but not limited to reasonable attorneys' and consultants' fees and expenses, court costs, administrative costs, and costs of appeal, and applicable incurred insurance deductibles or self-insured retention amounts in connection with a claim against the City under insurance policies), suits, liabilities, costs, losses, fines or penalties of whatsoever kind or

nature, arising out of any Prior Claim whether past, present or future, direct or indirect, known or unknown, absolute or contingent, and whether based in law, admiralty or equity, and whether based in contract, tort, strict liability, negligence, statute, rule, regulation, common law or otherwise.

(b) As used herein, “Release” means any release, spill, emission, leaking, pumping, injection, deposit, disposal, discharge, dispersal, leaching or migration.

(c) As used herein, “Contaminant” means any waste, pollutant, hazardous substance, hazardous material, hazardous waste, special waste, solid waste, petroleum or petroleum-derived substance or waste, asbestos, polychlorinated biphenyls (“PCBs”), or any constituent of any such substance or waste, which is defined in or regulated by any Environmental Law.

(d) As used herein, “Environmental Law” shall mean any of the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601 et seq., the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321 ~.the Energy Policy and Conservation Act, 42 U.S.C. §6362, the Coastal Zone Management Act of 1972, 16 U.S.C. §§1451 et seq., Executive Order 12898 (“Federal

> Actions to Address Environmental Justice in Minority Populations and Low-Income Populations", 59 FR 7629, February II, 1994), the Resource Conservation and Recovery Act, 42 U.S. C. §§6901 et seq., the Toxic Substances Control Act, 15 U.S.C. §§2601et seq. and the Federal Water Pollution Control Act, 42 U.S.C. §§1251 et seq. the Hazardous Materials Transportation Act, 42 U.S.C. §§5101 et seq., or the New York Environmental Conservation Law, §§1-0101 et seq. all of which as have been amended or may be amended in the future or under any other federal, state or local law, statute, rule, regulation or common law theory now or hereafter in effect, and designed to protect human health or the environment.

8. Governing Law. This Agreement shall be governed and construed in accordance with the internal laws of the State of New York.

9. Separability. If any term or provision of this Agreement or the application thereof to any person or circumstance shall to any extent be invalid and unenforceable, the remainder of this Agreement, or the application of such term or provisions to persons or circumstances to which it is valid or enforceable, shall not be affected thereby, and each term and provision of this Agreement shall be valid and enforced to the extent permitted by law.

10. Recording. This Agreement shall be recorded in the Office of the City Register, New York County, promptly following the execution and delivery hereof, by the City at the City's sole cost and expense (if any).

11. Captions; Plurals; Gender. Section headings, captions, titles and exhibit headings to this Agreement are for convenience and reference only, and are in no way to be construed as defining, limiting, or modifying the scope or intent of the various provisions of this Agreement. The plural shall be substituted for the singular, and the singular for the plural, where appropriate, and the words of any gender shall mean and include any other gender.

12. Successors and Assigns. This Agreement shall be binding upon and inure to the benefit of the City and Owner, and their respective heirs, personal representatives, successors and assigns.

13. Exhibits. All Exhibits attached hereto are incorporated by reference and hereby made a part hereof.

14. No Amendment. Neither this Agreement nor any provision hereof may be changed, modified, amended, supplemented, waived, discharged or terminated orally, but only by instrument in writing signed by the party against whom enforcement of the change, modification, amendment, supplement, waiver, discharge or termination is sought.

15. No Waivers. The failure of the City or Owner to seek redress for violations or to insist upon the strict

performance of any covenant, agreement, provision or condition of this Agreement shall not constitute a waiver thereof and the City or Owner, as the case may be, shall have all remedies provided herein and under applicable law with respect to any subsequent act which originally would have constituted a violation or default hereunder.

16. Survival. Subject to and except as limited by the other terms of this Agreement, the obligations, undertakings, duties, and covenants of each of the City and Owner shall survive the delivery and recording of this Agreement.

17. Notices. Any notice, request, consent or other communication under this Agreement ("Notice" or "notice") shall be in writing and sent by Registered or Certified Mail, return receipt requested, or by courier, express mail or overnight delivery with a receipt service. The date such notice shall be deemed to have been given shall be the date of receipt, the first calendar day after the date sent by courier, express or overnight ("next day delivery"), or the third calendar day after the postmark on the envelope if mailed, whichever occurs first. Notices to the City shall be sent to:

The City of New York
c/o New York City Economic
Development Corporation
110 William Street
New York, New York 10038
Attn: President

with a copy at the same time to:

The City of New York
Department of Parks and Recreation
The Arsenal
Central Park
New York, New York 10021

and to:

New York City Law Department
I 00 Church Street
New York, New York 10007
Attn: Chief, Economic Development Division

Notices to Owner shall be sent to the Owner's address set forth above.

Any party hereto may change its address or designate different or other persons or entities to receive copies by notifying the other party in the manner described in this Article of the Agreement. Any counsel designated above or any replacement counsel is hereby authorized to give notices hereunder on behalf of its client.

18. Due Authorization; Complete Agreement. The persons executing this Agreement on behalf of each of the City and Owner represent and warrant, each for himself or herself and the respective principal parties, that each has been duly authorized to execute this Agreement for and on behalf of the City and Owner, respectively. Ail understandings and agreements heretofore made between

the parties hereto relating to the particular subject matter hereof are merged in this Agreement, which alone fully and completely expresses the agreement between the City and Owner on such matters.