UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
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In re:

TRIGEANT HOLDINGS, LTD., *et al.*,[1]	Chapter 11 Case Case No. 14-29027-EPK
Debtors.	(Jointly Administered)
_____/	

DEBTORS' INITIAL PRE-CONFIRMATION BRIEF ON OWNERSHIP OF BAY/BERRY AGREEMENTS AND MATERIAL RAILROAD CONTRACTS[2]

(Hearing scheduled for March 30, 2015, at 9:30 a.m.)

Debtors-in-possession Trigeant Holdings, Ltd. ("**Holdings**"), Trigeant, LLC ("**LLC**"), and Trigeant, Ltd. ("**Trigeant**," and, together with Holdings and LLC, the "**Debtors**"), pursuant to this Court's *Agreed Master Scheduling Order for Plan Confirmation and Other Related Matters* [ECF No. 374] and the *Debtors' First Amended Plan of Reorganization* [ECF No. 107] (the "**Debtors' Plan**"), hereby file their Initial Pre-Confirmation Brief on Ownership of the Bay/Berry Agreements (as defined below) and Material RR Contracts (as defined below), and state:

Preliminary Statement

1. As a condition to closing the $100 million sale of the Debtors' assets to Gravity Midstream Corpus Christi, LLC ("**Gravity**"), under the terms of the Debtors' Plan, the Debtors are required to assign the Bay/Berry Agreements and Material RR Contracts to Gravity at

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are: Trigeant Holdings, Ltd., (5375); Trigeant, LLC (2035); and Trigeant Ltd. (2037). The Debtors' business address is 3020 North Military Trail, Suite 100, Boca Raton, Florida 33431.

[2] With the Court's indulgence, the Debtors' respectfully request relief from the Court's 20-page limit on summary judgment papers (as reflected in the Court's form adversary proceeding Pretrial Order). Given the complexities of the issues involved, and in light of the attempt by the Debtors' to address herein both the Bay/Berry Agreements and the Railroad Contracts, this brief exceeds that page limit notwithstanding the Debtors' best efforts to exercise brevity.

Closing.[3] BTB Refining, LLC ("**BTB**"), asserts an ownership interest in some or all of those agreements and contracts, and has stated its intention to object to their assignment to Gravity. As such, in connection with confirmation of the Debtors' Plan, the Debtors require a determination from this Court that the Bay/Berry Agreements and Material RR Contracts are the property of the Debtors and, accordingly, may be assigned by the Debtors to Gravity at Closing.

2. The principal agreement at issue is the Dock Use Agreement. Governed by Texas law, the Dock Use Agreement is an integrated, indivisible contract containing a series of separate but interdependent covenants. The primary covenants are the grant to Trigeant of exclusive use of the Dock (as defined below) for the purpose of shipping, loading and unloading crude-related products coming to and from the CPU Facility (as defined below), along with a right of first refusal to acquire additional land owned by Berry (as defined below). In exchange for these rights, Trigeant, as owner of the CPU Facility, agreed to make certain recurring payments to Bay (as defined below), a potential fixed payment to Bay and Berry, jointly, and granted Berry certain rights to perform and receive payment for work on real property owned by Trigeant.

3. The singular, overarching purpose of this inter-connected relationship between Trigeant and Bay/Berry is to provide all parties with greater access across the various adjacent parcels of real property, roadways, waterlines, pipelines, and the all-important Tule Lake Channel abutting the Dock. It is unmistakable from their terms and context that the Dock Use Agreement and the other agreements between Trigeant and Bay/Berry which are the subject of this Brief were real-property focused, and intended collectively to unify access across the various adjacent parcels owned either by Berry or Trigeant, so that any Trigeant-affiliated or successor

[3] Capitalized terms used but not defined herein shall have the meaning ascribed to them in the Debtors' Plan.

owner of the CPU Facility and the owner of the Dock would continue to enjoy that mutual, critical access.

4. The nature of the Dock Use Agreement and intent of the parties to treat it as an interest in real property is further made clear by its inclusion of various material terms and conditions that are common and integral to real estate leases. Those provisions include: (i) the grant of a landlord's lien in favor of Bay; (ii) a subordination and attornment provision; (iii) the grant of both a right of first refusal and an option in favor of Trigeant to purchase two separate parcels of real property; (iv) a fixed 20-year term; (v) payment of utilities and taxes by Trigeant; and (vi) recurring payments to Bay akin to monthly rent payments. Considering the underlying nature and purpose, and the unambiguous terms, of the Dock Use Agreement and the extensive history of the parties' relationship, including the entry into other related agreements that unquestionably run with the land, it becomes clear that the parties intended to create an interest in real property that would run with the land. This long-term relationship further developed through the Dock Use Agreement would continue to entrench and enhance – to the mutual benefit of both Trigeant and Bay/Berry and to their respective successors – the relationship between the CPU Facility and the Dock.

5. Trigeant's separate and complementary relationship with Union Pacific Railroad Co. ("**Union Pacific**") – through the Material RR Contracts – is no less critical to the successful operation of the CPU Facility, and also furthers Trigeant's relationship with Bay/Berry. The Material RR Contracts are patent interests in real property, the majority of which are grants of easements by Union Pacific in favor of the owner of the CPU Facility to maintain pipelines between the CPU Facility and the Dock that run through Union Pacific property. These

easements are vital to the operations of the CPU Facility – an essential function of which is to transfer petroleum products from one means of transportation to another – so that the owner of the CPU Facility and Bay/Berry can continue to operate using the pipelines contemplated under the Pipeline Easement Agreement and enabled by the Dock Use Agreement.

6. Moreover, because Trigeant currently owns the CPU Facility and the pipelines running between the CPU Facility and the Dock, it is impractical and serves no purpose to sever the rights to run the pipelines under the railroad tracks from the owner of the CPU Facility. Simply put, the Material RR Contracts – whether easements or licenses – have no value or purpose to a party that does not also have an ownership interest in the pipelines, CPU Facility and contracts attendant to the pipelines and CPU Facility. The Court should, therefore, determine that the Material RR Contracts are interests in real property owned by Trigeant, so that Trigeant may assign them to Gravity upon Closing in satisfaction of Trigeant's Closing obligation and in furtherance of confirmation of the Debtors' Plan.

7. The remaining Bay/Berry Agreements – consisting of easements, leases and a deed – are unquestionably interests in real property and should be conclusively determined as such, along with the Dock Use Agreement and Material RR Contracts, in any order confirming the Debtors' Plan.

General Factual Background

I. The CPU Facility

8. Trigeant owns a crude processing unit and storage facility located at 6600 Up River Road, Corpus Christi, Texas (the "**CPU Facility**"), which it acquired from Trifinery, a Texas joint venture ("**Trifinery**"), in 2001. The CPU Facility can generate revenue by, among

other things, processing different varieties of crude oil and operating as a terminal facility for crude-related products. A terminal facility allows third parties to store oil and oil-related products, combine them when necessary, and change the method of transporting the product. Those third parties pay the owner of the CPU Facility based on the amount of product that either flows through its pipes or the product that flows in and out of its tanks. There are four practical ways to move product in and out of the CPU Facility: (a) truck, (b) rail, (c) pipeline and (d) barge/ship. Each method of transportation is essential to the commercial viability of the CPU Facility, but none more so than by ship. Other than pipeline, which is limited to the movement of product from and to facilities that are immediately connected to the CPU Facility, transport by water is the most cost-effective way to move large quantities of product into and out of the CPU Facility. Access to the Dock and the waterway that it services is, therefore, critical to the commercial operation and financial viability of the CPU Facility.

II. The Bay/Berry–Trigeant Relationship, the Dock and the Dock Use Agreement

9. Access to and from the shipping corridor running through Corpus Christi is integral to the operation of the CPU Facility. The CPU Facility is not on the waterfront, but adjacent to a 6.85 acre parcel of real property and adjoining dock (the "**Dock**") owned by Berry GP, Inc. ("**Berry**"). The Dock can accommodate berthing, loading and unloading of commercial ships and barges and various other vessels. Berry leases the Dock to Berry Contracting, LP d/b/a Bay Ltd ("**Bay**").

10. As a material part of Trigeant's acquisition of the CPU Facility in 2001, it took assignment of or renegotiated a series of agreements with Bay and Berry. These agreements were, and continue to be, integral to the operation and maintenance of the CPU Facility.

11. The history is that effective as of November 1, 2001, Berry, Bay and Trigeant entered into a Dock Use, Construction, Maintenance & Option Agreement (the "**Dock Use Agreement**"),[4] a copy of which is attached hereto as **Exhibit A**. By its terms, the Dock Use Agreement memorializes a comprehensive understanding between and among Trigeant, Berry and Bay relating to the Dock, the CPU Facility and some adjacent real property. More specifically, the Dock Use Agreement provides the following material consideration running in favor of Trigeant: (a) the exclusive right to access and use the Dock to load, unload and ship crude, feedstock, petroleum and other crude-related products to and from the CPU Facility, (b) a right of first refusal to acquire the Dock and adjoining land, and (c) a right of first refusal to acquire a parcel adjacent to the CPU Facility referred to as the "Tule Lake Property." In exchange for these rights, Trigeant agrees in the Dock Use Agreement to: (x) pay Bay recurring dockage and wharfage charges and other amounts as set forth in the Dock Use Agreement, (y) grant Bay a landlord's lien and other customary landlord protections, and (z) grant Berry the exclusive right[5] to perform all major construction and maintenance on the CPU Facility and CPU Facility site.

12. The Dock Use Agreement further provides that Trigeant and any of its affiliates, successors and assigns remain "bound by this Agreement" so long as they remain an owner or lessee of the CPU Facility, and that any assignment of the Dock Use Agreement by Bay must

[4] The Dock Use Agreement replaced the original agreement for the use of the Dock dated January 12, 1989 by and between Bay, Berry and Trifinery (the "**Original Dock Use Agreement**"). As discussed below, the Original Dock Use Agreement – referenced in the First and Second Amendment to Easement Agreements – was executed along with the Pipeline Easement Agreement (as defined below) and the Waterline Easement Agreement (defined below).

[5] While labeled as an "exclusive right" it is more akin to a right of first refusal to serve as contractor and perform any necessary work or maintenance at the CPU Facility and on the CPU Facility site.

require "any subsequent owner or lessee of the Dock to agree in writing to be bound by the [the Dock Use Agreement]." *See* Dock Use Agreement, Recital C & § 4.02.

13. It is evident from the plain terms of the Dock Use Agreement that the long-standing business relationship between and among Bay, Berry and Trigeant arises as a direct consequence of the parties' respective real property interests in the CPU Facility, the Dock and surrounding parcels of land. The real-property focused relationship also extends beyond the Dock Use Agreement and includes, or in the past has included, without limitation, (i) a lease-back agreement dated October 19, 2001 between Trigeant and Berry, granting Berry a leasehold interest in a 23.39 acre tract of land adjacent to the CPU Facility and Dock owned by Trigeant and that was previously owned by Berry (the "**Lease Back Agreement**"),[6] which has since expired and is now embodied in the Lease Agreement dated March 24, 2006 (the "**23 Acre Lease Agreement**"); (ii) a lease agreement between Trigeant and Berry dated October 12, 2001, granting Trigeant a leasehold interest in a 0.437 acre tract of land adjacent to the CPU Facility and Dock to be coterminous with the Dock Use Agreement (the "**0.437 Acre Lease Agreement**")[7]; (iii) the Pipeline Use Agreement dated January 12, 1989 between Berry and Trifinery (the "**Pipeline Easement Agreement**"); (iv) the Waterline Use Agreement dated January 12, 1989 between Berry and Trifinery (the "**Waterline Easement Agreement**")[8]; (v) various other easements running through Trigeant's and Berry's real property relating to

[6] The Lease Back Agreement is expressly referenced in the Dock Use Agreement and the execution of an extension of the Dock Use Agreement by Trigeant through 2021 (i.e., for 20-years) is listed as a condition precedent to effectiveness in the Lease Back Agreement. *See* Dock Use Agreement, Recitals B and Lease Back Agreement, § 17.
[7] The execution of a 20-year extension of the Dock Use Agreement by Trigeant is listed as a condition precedent to effectiveness in the Lease Agreement. *See* 0.437 Acre Lease Agreement, § 28. A copy of the Lease Back Agreement is attached hereto as **Exhibit B.**
[8] Contemporaneously with entering into the Pipeline Easement Agreement and Waterline Easement Agreement, Bay, Berry and Trifinery entered into the Original Dock Use Agreement. This further evidences an intent on behalf of the parties to have the Pipeline Easement Agreement run in tandem with an agreement to use the Dock.

roadways, waterlines and pipelines; and (vi) a Special Warranty Deed with Vendor's Lien in favor of Trigeant that, collectively, encompass the larger business relationship between Trigeant, Bay and Berry (collectively, with the Dock Use Agreement, the "**Bay/Berry Agreements**").[9] All of the Bay/Berry Agreements ultimately relate to Trigeant's ownership and operation of the CPU Facility and its ability, as the CPU Facility operator, to use the Dock to transport petroleum, feedstock and other crude-related product to and from the Dock to the exclusion of others.

14. The direct linkage between the Dock, the CPU Facility, the CPU Facility site, and the critical rights granted under the Dock Use Agreement is accentuated by the Pipeline Easement Agreement. Under the terms of the Pipeline Easement Agreement, Berry granted Trigeant's predecessor, Trifinery, an easement to install an additional[10] pipeline running from the CPU Facility site to the Dock for the purposes of transporting feedstock from the Dock to the CPU Facility and refined products from the CPU Facility to the Dock. *See* Pipeline Easement Agreement, ¶ 3. The "appurtenant easements and rights" granted under the Pipeline Easement Agreement were "for the use and benefit of the [CPU Facility] site and all such successor owners of the [CPU Facility] site." *Id*. at ¶ 11. The parties agreed that these rights would "run with the land" and inure to the benefit of the current owner, and "all successive owners of the Pipeline Site and [CPU Facility] site." *Id*.

[9] A list of the Bay/Berry Agreements is attached hereto as **Schedule A** and a copy of each of the Bay/Berry Agreements (other than the Dock Use Agreement) is attached hereto as **Composite Exhibit C**. While additional agreements between Berry and/or Bay and Trigeant had been included as contracts to be assigned in the schedules to the original Trigeant/Gravity purchase agreement, Gravity has agreed to eliminate certain of those contracts from the assignment requirement. Accordingly, Schedule A lists only those agreements of which Gravity currently requires assignment as a condition to Closing.

[10] This pipeline was in addition to a vacuum gas oil pipeline and waste water pipeline that were already running between the Dock and CPU Facility.

15. The express terms of the Pipeline Easement Agreement provide for the CPU Facility and the Dock to be connected by pipeline, and the Dock Use Agreement expands upon that connection by facilitating the critical access necessary to utilize the very pipelines allowed for under the Pipeline Easement Agreement.

16. The interrelationship of these various Agreements is consistent with the commercial reality that the economic fortunes of the CPU Facility and the Dock, and their respective owners or operators, are inextricably linked and interdependent. On the one hand, the CPU Facility requires access to the Dock in order to operate at maximum efficiency and profitability. On the other hand, Bay's ability to generate meaningful income from the Dock relates directly to the movement of product across the Dock by the owner or operator of the CPU Facility. The ability to continue to move product through the Dock will no doubt be critical to the success of the future operations at the CPU Facility and to the generation of income for Bay. The interests of Berry are also interrelated, in that it derives revenue from the ability to perform maintenance and construction work for the owner of the CPU Facility, such that the loss of those rights would have financial consequences for Berry as well.

17. Finally, without the Dock Use Agreement and its various components, the viability of the 0.437 Acre Lease Agreement (and the 23 Acre Lease Agreement, as successor agreement to the Lease Back Agreement)[11] and the Pipeline Easement Agreement, would be threatened. There is an unmistakable intent and purpose for those leases and the Pipeline Easement Agreement to be coextensive with the Dock Use Agreement and the critical access to and use of the Dock provided thereunder. These critical agreements are interrelated and operate

[11] Expressly referenced in the Dock Use Agreement at Recital C.

in concert to provide each of the counter-parties with critical rights vis-à-vis the various strategic and important properties owned by the others.

III. The Material RR Contracts

18. The track and right of way of Union Pacific bisects the CPU Facility and the Dock. The relationship between Union Pacific and Trigeant is governed by a series of contracts executed by those parties and their respective predecessors over the years. It is a condition precedent to confirmation of the Debtors' Plan that the Court enter an order which includes a finding that Trigeant's bankruptcy estate owns all right, title and interest to 15 of these agreements (the "**Material RR Contracts**"), and that Trigeant may assign all such right, title and interest to Gravity.[12] The Debtors seek and request that finding in the confirmation order to be entered in respect of the Debtors' Plan.

19. Material RR Contract No. 1 is the grant of an easement by a predecessor of Trigeant to a predecessor of Union Pacific for "railroad purposes." Material RR Contract No. 2 concerns two private roadway crossings extending across the railroad track and right of way. These private roads and roadway crossings connect the CPU Facility to the Dock, can only be used by the owner or occupant of the CPU Facility and of the Dock, and are necessary to the gainful use, operation and enjoyment of the CPU Facility.

20. Material RR Contracts Nos. 3-12 and 14 (the "**Pipeline Crossing Agreements**") concern numerous pipelines that cross the railroad track and right of way to connect the CPU Facility to the Dock. Most of the pipelines cross the railroad track and right of way

[12] A list of the Material RR Contracts is attached hereto as **Schedule B** and a copy of each of the Material RR Contracts is attached hereto as **Composite Exhibit D**. To be clear, there may be additional agreements between Union Pacific, and its predecessor, and Trigeant, and its predecessor, that have expired or are otherwise no longer extant, that further relate to the CPU Facility. The Debtors, however, only list those agreements on Schedule B that Gravity is requiring assignment of as a condition to Closing.

underground, some above ground. The pipelines carry asphalt, oil, gas, water, and other items necessary to the operation of the CPU Facility between the CPU Facility and the Dock. Only the owner of the CPU Facility can use the pipelines, which range in size from 2 inches to 30 inches, are affixed to the CPU Facility, and as fixtures, are interests in real property of Trigeant.[13]

IV. The Foreclosures and Fraudulent Transfer Ruling

21. On March 4, 2008, BTB conducted a non-judicial foreclosure sale of the CPU Facility and other property purportedly under Texas law (the "**March Foreclosure**"), which foreclosure included real property and certain other property owned by Trigeant.

22. On September 8, 2008, BTB conducted a non-judicial foreclosure sale of personal property owned by Trigeant under Texas' version of Article 9 of the Uniform Commercial Code, other than the certain personal property that was the subject of the March Foreclosure (the "**September Foreclosure**").

23. Following the two foreclosures, BTB had exclusive control of the CPU Facility and all related personal property.

24. In 2009, PDVSA Petróleo, S.A ("**PDVSA**"), as a creditor of Trigeant, brought suit against BTB seeking, *inter alia*, to set aside the March Foreclosure sale as a fraudulent transfer under Texas law. On January 14, 2013, the United States District Court for the Southern District of Texas (the "**District Court**") in *PDVSA Petróleo, S.A. v. Trigeant, LTD et al.*, Case No. 09-cv-00038 (S.D. Tex. Jan. 14, 2013) entered final judgment in favor of PDVSA and

[13] Two of the Material RR Contracts—Material RR Contracts Nos. 13 and 15—were terminated by Union Pacific in 2010. Union Pacific entered into replacement contracts directly with BTB. The Debtors are evaluating their options with respect to these two contracts and do not seek any determination with respect to these two contracts at this time.

against BTB determining that the March Foreclosure effected by BTB constituted an actual and constructive fraudulent transfer (the "**Fraudulent Transfer Judgment**").[14]

25. The Fraudulent Transfer Judgment avoided the March Foreclosure, divested BTB of title to the CPU Facility, and returned title and ownership to Trigeant. BTB contends that the Fraudulent Transfer Judgment only re-vested in Trigeant title to the real property and other property foreclosed under the March Foreclosure, and that Trigeant's personal property foreclosed on through the September Foreclosure remains the property of BTB. Thus, for purposes of Trigeant's obligations to Gravity under the Plan, it is critical for the Court to determine as part of the confirmation order that the interests held by Trigeant under the Dock Use Agreement and Material RR Contracts are interests in real property, and not personal or intangible property.[15]

V. The Court's Guidance at the February 12, 2015 Hearing

26. At a hearing in these cases on February 12, 2015, the Court offered guidance on the issues to be addressed by the parties in their sequential pre-confirmation briefing of the so-called "Bay/Berry issues," specifically suggesting that briefing on the following issues would be particularly helpful to the resolution:

a. What law applies to the Dock Use Agreement?

b. Is the Dock Use Agreement one agreement or a series of agreements?

Perhaps through oversight, but for reasons that remain unclear to Trigeant, PDVSA never sought to challenge the Remaining Personal Property Foreclosure even though the facts which supported the Fraudulent Transfer Judgment were similarly applicable to the Personal Property Foreclosure and would have supported the District Court's avoidance of the Personal Property Foreclosure as an actual and constructive fraudulent transfer as well.

[15] While there is a possibility of substitute acceptable contracts being an alternative to satisfy the Closing conditions, there is no assurance that that alternative can be achieved.

c. Is the Dock Use Agreement an interest in real property belonging to Trigeant or is it personal property that was foreclosed upon by, and is now the property of, BTB?

27. Accordingly, the Debtors endeavor in this Initial Pre-Confirmation Brief to address the Court's concerns and other issues surrounding the Dock Use Agreement, the remaining Bay/Berry Agreements and the Material RR Contracts.[16]

Legal Argument

I. Choice of Law – What Law Applies to the Dock Use Agreement?

28. Based on principles governing the choice of law, Texas law governs the Dock Use Agreement and remaining Bay/Berry Agreements and Material RR Contracts.

29. The Bankruptcy Code is silent on the appropriate choice of law methodology for bankruptcy courts to employ when state law issues arise in federal bankruptcy proceedings. In *Klaxon Co. v. Stentor Electric Manufacturing Co.*, 313 U.S. 487 (1941), the Supreme Court extended the *Erie* doctrine to the conflict-of-laws rules of the forum state. The Eleventh Circuit has adopted the *Klaxon* holding in the bankruptcy context, pursuant to which federal bankruptcy courts must apply the choice-of-law rules of the forum state. *Mukamal v. Bakes*, 378 Fed. Appx. 890, 896 (11th Cir. 2010) (noting that federal courts have adopted the *Klaxon* principle "in cases arising under 28 U.S.C. § 1334, when the underlying rights and obligations of the parties are defined by state law" and applying Florida's choice of law rules where the action was filed in Florida). Accordingly, this Court must look to Florida choice of law rules to determine what state's law governs the Dock Use Agreement and remaining Bay/Berry Agreements.

[16] Of necessity, the Debtors further reserve the right to address in their Reply Brief due March 26, 2015 any additional issues that may be raised by BTB in its brief that is due on March 23, 2015.

30. The Supreme Court of Florida has given strong endorsement to choice-of-law clauses in commercial transactions. *See e.g., Burroughs Corp. v. Suntogs of Miami, Inc.*, 472 So. 2d 1166 (Fla. 1985); *Continental Mortgage Investors v. Sailboat Key, Inc.*, 395 So. 2d 507 (Fla. 1981). Provided that the law chosen by the parties does not offend "fundamental" public policy of the State of Florida, such clauses are typically enforced. *Farms, Inc. v. E.I. DuPont de Nemours & Co.*, 761 So. 2d. 306, 311 (Fla. 2000). The Dock Use Agreement includes a "Texas Law and Venue" provision, which provides that the agreement is to be governed by Texas law.

31. As for the Railroad Contracts and other Bay/Berry Agreements – which are unquestionably interests in real property – the law of the state where that property is situated governs. *See Walling v. Christian & Craft Grocery Co.*, 27 So. 46, 48 (Fla. 1899) ("[I]t is the universal rule that the laws of the state where [the property] is situated furnish the rules for its descent, alienation, and transfer, the construction and validity of conveyances thereof, and the capacity of the parties to such contracts and conveyances, as well as their rights under the same.").[17] In addition, the former Fifth Circuit has noted that the question of whether property is real or personal is determined by the law of the place where it is actually situated. *Commissioner of Internal Revenue v. Skaggs*, 122 F.2d 721 (5th Cir. 1941).[18] Because the agreements all relate to real property located in Texas, Texas law should apply to determinations under those agreements.[19]

[17] Many of the agreements also have an express Texas choice of law provision, further supporting the application of Texas law.

[18] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) the Eleventh Circuit adopted as binding precedent the decisions of the Fifth Circuit rendered prior to October 1, 1981.

[19] Even if the agreements themselves are not technically "situated in Texas," it is unquestionable that the Bay/Berry Agreements and Material RR Contracts directly relate to real property located in Texas, can only be performed in Texas, appear to have been executed in Texas and involve, in most instance, Texas entities. Accordingly, even applying some other choice of law test – *i.e.*, substantial relationship, performance of the contract, place of

32. Accordingly, Texas law applies to determine the nature of the property interest conveyed to Trigeant under the Dock Use Agreement and also to determine the relative rights under the other Bay/Berry Agreements and Railroad Contracts.

II. The Dock Use Agreement is an Integrated, Indivisible Contract Containing a Series of Separate but Interdependent Covenants

33. The Dock Use Agreement is an integrated, indivisible contract. Under Texas law, a contract is divisible, or severable, when one party's performance consists of more than one "distinct and separate item[ ] and the price paid by the other party is apportioned to each item." *In re Ferguson*, 183 B.R. 122, 124 (Bankr. N.D. Tex. 1995) (quoting *Johnson v. Walker*, 824 S.W.2d 184, 187 (Tex. App.—Fort Worth 1991, no writ)). No one test or rule of law can be used to ascertain whether a contract is divisible or indivisible. *Johnson*, 824 S.W.2d at 187. "Determination of the issue depends primarily on the intention of the parties, the subject matter of the agreement, and the conduct of the parties." *Id*. (citations omitted); *see also Nat'l Iranian Oil Co. v. Ashland Oil, Inc.*, 817 F.2d 326, 333 (5th Cir. 1987) ("whether [an agreement] is entire or severable turns on the parties' intent at the time the agreement was executed, as determined from the language of the contract and the surrounding circumstances"), *cert. denied*, 484 U.S. 943 (1987). In determining the intent of the parties, the court is to consider the entire writing and attempt to harmonize and give effect to all of the provisions of the contract by analyzing the provisions with reference to the whole agreement. *Hicks v. Castille*, 313 S.W.3d 874, 879-80 (Tex. App. 2010) (citing *Frost Nat'l Bank v. L & F Distribs., Ltd.*, 165 S.W.3d 310, 311–12 (Tex. 2005)). "The issue as to severability is whether or not the parties would have entered into

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execution – it is hard to conceive of any law other than Texas law applying to the interpretation of the Bay/Berry Agreements and Material RR Contracts.

the agreement absent the [severed] parts." *McFarland v. Haby*, 589 S.W.2d 521, 524 (Tex. Civ. App.—Austin 1979) (holding that contract could not be severed where party would not have signed contract absent illegal parts).

34. Analyzing the entirety of the Dock Use Agreement, it becomes clear that the parties intended for the agreement to be an integrated, indivisible contract. Each section of the Dock Use Agreement serves as a key component of the bargained-for consideration for the entire transaction. For example, Trigeant bargained for exclusive access to the Dock, as well as a right of first refusal to purchase the Dock and the "Tule Lake Property"; Bay bargained for the right to receive dockage and wharfage charges and the benefit of a buyout; and Berry bargained for the ability to perform all major construction and maintenance at the CPU Facility site and also to receive proceeds from a buyout. Stripping out any one component – whether the Dock Use, Construction, Maintenance, Option or Buyout provisions – would operate to deprive one of the parties to the Agreement of the valuable consideration flowing to it in exchange for the rights and interests granted to the others. Looking to the totality of the Dock Use Agreement and the interrelationship of its component parts, it is reasonable for the Court to conclude that absent each of the operative covenants the parties would not have entered into the Agreement; indeed, that conclusion is compelling.

35. Section 4.03 of the Dock Use Agreement also supports its construction as an integrated, non-severable contract. Section 4.03 provides that any lender of Trigeant that becomes an owner or lessee of the Refinery Site shall have the right to use and access the Dock in accordance with the terms and conditions of Part I of the Dock Use Agreement, so long as the lender agrees to "*perform the obligations otherwise imposed upon Trigeant*" under the Dock Use

Agreement. *Id*. at § 4.03 (emphasis added). Thus, the foreclosing lender's ability to use and access the Dock in accordance with Part I of the Dock Use Agreement, is dependent upon that lender's compliance with, and willingness to perform under, the remaining "Parts" of the Dock Use Agreement. Section 4.03, thus, further demonstrates that the various components within the Dock Use Agreement are inter-connected and were specifically intended not to be severed. In addition, Section 4.03 supports a finding that the Dock Use Agreement is an interest in real property because only a lender who has become an owner or lessee of the Refinery Site could perform its obligations under such section.

36. Furthermore, the "Miscellaneous" section – Part VI – applies with equal force to, and is intended to cover, all "Parts" of the Dock Use Agreement. The term "this Agreement" is also used throughout the Miscellaneous section to refer to the Dock Use Agreement in its entirety, not as an amalgamation of independent, divisible contracts. In addition, the Dock Use Agreement has only a single execution page.

37. More importantly, even if the Dock Use Agreement is deemed to consist of several instruments, those instruments still unquestionably comprise a single transaction that should be construed together. *Sunwest Operating Co. v. Classic Oil & Gas, Inc.*, 303 F. Supp. 2d 827, 831 (E.D. Tex. 2004) (as a general rule, several instruments comprising a single transaction are to be construed together) (citing *Jones v. Fuller*, 856 S.W.2d 597, 601 (Tex. App.-Waco 1993, writ denied) (citing *Terrell v. Graham*, 576 S.W.2d 610, 611 (Tex.1979) (acknowledging that two instruments that were both executed at the same time, between the same parties and related to the same tract of land should be considered together and construed as one transaction)). Instruments that are shown to be component parts of a single transaction are

read together. *Harris v. Rowe*, 593 S.W.2d 303, 306 (Tex. 1979) (separate instruments contemporaneously executed as a part of the same transaction and relating to the same subject matter may be construed together as a single instrument) (citing *Rudes v. Field*, 204 S.W.2d 5 (Tex. 1947)*; accord Jones v. Fuller*, 856 S.W.2d at 601; *In re Mirant Corp.*, 197 Fed. App'x 285 (5th Cir. 2006) (various documents executed as part of asset purchase agreement and attached as exhibits were not divisible).

38. The various "Parts" of the Dock Use Agreement, even if somehow determined to be multiple instruments, comprise a single transaction and are to be construed together. The Dock Use Agreement – inclusive of all of its "Parts" – was executed contemporaneously, in one single document and as one single transaction between and among the three parties to that Agreement. Accordingly, the only sensible construction is to construe the Dock Use Agreement as a single instrument.

III. The Dock Use Agreement is an Interest in Real Property Belonging to Trigeant

39. The Dock Use Agreement conveys an interest in real property, and in this sense most closely resembles a "lease" (or "sublease")[20] under Texas law. As such, the Dock Use Agreement was re-vested in Trigeant by the Fraudulent Transfer Judgment and is property of the Trigeant estate under section 541 of the Bankruptcy Code.

40. Under Texas law no particular words are necessary to create a landlord-tenant relationship, "but it should appear to have been the intention of one party to dispossess himself of the right to exclusive possession of the premises and of the other to possess that right." *Woodmark Austin Ltd. P'ship v. Coinamatic, Inc.*, 2007 WL 4339724, at *2 (Tex. App. Dec. 11,

[20] Because Bay is the lessee of the Dock, the "lease" of the Dock by Bay to Trigeant would be in the nature of a sublease.

2007) (citing *Brown v. Johnson*, 12 S.W.2d 543 (Tex. 1929)). Courts have noted that while no particular words are necessary to create a lease, the agreement must still contain: (1) the designation of the parties; (2) a description of the demised property; (3) a designation of the term; (4) a provision for possession by the lessee; (5) the amount of rent with the terms of payment. *Wilson v. Wagner*, 211 S.W.2d 241, 243-44 (Tex. Civ. App.--San Antonio 1948). While not in the *form* of a traditional lease agreement, the Dock Use Agreement contains the critical elements of a real property lease under Texas law, and in *substance* it creates an interest in real property most similar to a lease.

41. The Dock Use Agreement clearly identifies the parties thereto and describes the relevant real property, including the Dock site and adjacent parcels, by detailed metes and bounds legal descriptions, and a recorded rendering of the CPU Facility site, the Dock, and adjacent parcels prepared by an engineering firm. Legal descriptions are necessary under Texas law for documents that create an interest in real property, but not for those that create a license.

42. The Dock Use Agreement designates that it has a 20-year term, and the various dockage and wharfage charges that become due within a fixed number of days from invoice closely resemble monthly rent charges. Moreover, by virtue of a grant of "exclusive use" for the purpose of shipping, loading and unloading all crude oil and related products – the key commodity traversed over the Dock – Trigeant has what amounts to exclusive possession of the Dock.

43. More crucially, and looking at the Dock Use Agreement as a whole, it contains a series of material provisions and concepts that are customary in leases of real property, while

other key provisions create express interests in real property that simply cannot be interpreted as granting a license. These material provisions include, without limitation, the following:

- "Landlord's Lien" (§ 2.08) – Trigeant expressly granted Bay a "landlord's lien" on its equipment and pipes located on the Dock. A landlord's lien, by its very name, can *only* exist where a landlord-tenant relationship exists. *See* 15 Tex. Prac., Texas Foreclosure Law & Prac. § 14.01 (rev. 2014) ("A landlord's lien is a lien interest in the landlord's favor upon the tenant's property located on the leased premises."); *cf. Berkey & Gay Furniture Co. v. Sherman Hotel Co.*, 16 S.W. 807 (Tex. 1891) (in Texas, a consensual landlord's lien may be created and enforced between a lessor and lessee independently of the statutory landlord's lien). This reflection of a clear intent in the unambiguous terms of the Dock Use Agreement to create a species of landlord-tenant relationship does not exist in isolation, but is instead supported by other provisions appearing throughout the Agreement.

- "Subordination, Attachment and Non-Disturbance" (§ 11.0) – This provision is typically found in a lease, and requires that, upon the request of Trigeant, any secured creditor of Bay/Berry that is granted a lien on the Dock subordinate that lien to the Dock Use Agreement so that any secured creditor that exercises its rights against Bay/Berry following a default would be bound by the Dock Use Agreement and succeed to Bay/Berry's interests thereunder. The same section also provides that Trigeant will request of any secured creditor, to which it granted a lien against the CPU Facility, to "attorn to this Agreement." Attornment, of course, is a term used almost exclusively in the context of real property. *See* Black's Law Dictionary, at 130 (10th ed. 2014). (The word "attorn" is defined as "[t]o agree to be the tenant of a new landlord"). The inclusion of this provision, including requiring a lender to attorn, firmly reflects an intent under the Dock Use Agreement to convey an interest in real property.

- "Right of First Refusal to Purchase Dock" (§ 5.0) & "Option Agreement" (Part V)[21] – a right of first refusal is an interest in real property and is most commonly found in a

[21] While titled as an "Option Agreement," the "option" is actually a "right of first refusal" to purchase the "Tule Lake Property" and is, unquestionably, an interest in real property. *See* Dock Use Agreement, Part V. Even if this were a true "option," it would still be an interest in real property. *Old Tin Roof Steakhouse, LLC v. Haskett*, 2013 WL 1148921, at *7 (Tex. App. Mar. 20, 2013) (option to purchase contained in a real estate lease is a contract for the sale of real property that must comply with the statute of frauds) (citing *Matney v. Odom*, 147 Tex. 26, 210 S.W

real property lease agreement. *Williams v. State*, 406 S.W.3d 273, 281 n. 2 (Tex.App.-San Antonio 2013, pet. denied) (citing *Benefit Realty Corp. v. City of Carrollton*, 141 S.W.3d 346, 350–51 (Tex.App.-Dallas 2004, pet. denied)). As an interest in real property, a right of first refusal must satisfy the statute of frauds. *Jones v. Brown*, 2000 WL 1056028, at *1 (Tex. App. Aug. 2, 2000) (citing *Williams v. Ellison*, 493 S.W.2d 734, 736 (Tex.1973) (description of land in right of first refusal was so "vague, indefinite, uncertain and wanting as to be wholly insufficient" under the provisions of the statute of frauds)). The right of first refusal in the Dock Use Agreement references an exhibit which provides a legal description of the Dock and attendant real property and, therefore, satisfies the statute of frauds. As one court noted, a right of first refusal "requires the owner of the burdened real property interest to offer the interest first to the holder of the right on the same terms and conditions offered by a third-party prospective purchaser." *MPH Prod. Co. v. Smith*, 2012 WL 1813467, at *1 (Tex. App. May 18, 2012). Accordingly, the right of first refusal is, in effect, an offer to purchase real property and is unquestionably an interest in real property.

In addition, a right of first refusal has been recognized by the Texas state courts to be a covenant running with the land. *See e.g.*, *Stone v. Tigner*, 165 S.W.2d 124, 127 (Tex. Civ. App.-Galveston 1942) (holding that a right of first refusal to purchase real property is a covenant running with the land) *accord First Permian, L.L.C. v. Graham*, 212 S.W.3d 368, 372 (Tex. App. 2006) (citing *Sanchez v. Dickinson*, 551 S.W.2d 481, 485 (Tex. Civ. App.-San Antonio 1977, no writ)). As such, the right of first refusal is an interest in real property.

- "Effective Date" (§ 13.0) – The Effective Date provides for the Dock Use Agreement to have a 20-year term. Leases are required to include a designated term, while licenses are not so required and rarely include one of such a lengthy duration. For this reason as well, the Dock Use Agreement more resembles a lease than any other species of contract.

.2d 980, 982 (1948); *see also* Treas. Reg. § 1.897-1(d)(2)(ii)(B) ("an option, a contract or a right of first refusal to acquire any interest in real property (other than an interest solely as a creditor) is an interest in real property other than solely as a creditor.").

- "Other Charges" (§ 2.03) and "Taxes" (§ 3.03) – Much like a commercial landlord passing certain charges through to a tenant under a triple net lease, Bay is passing through utility charges and ad valorem taxes to Trigeant. Such provisions are typically associated with leases, not licenses.

- "Wharfage Charge" (§ 2.01), "Dockage Charge" (§2.02) and "Minimum Required Usage" (§ 2.06) – In accordance with these provisions, Trigeant is required to pay Bay a wharfage charge and a docking charge based on the number of barrels unloaded or loaded at the Dock. These provisions closely resemble percentage rent charges that one might more traditionally find in a lease than in a license agreement. Similarly, the minimum required usage clause resembles a minimum rent provision often included in lease agreements.

- "Non-Use Charge and Rail Charge" (§ 2.04) – By this provision, Trigeant is agreeing not to use any other dock in the Corpus Christi area, unless Trigeant pays Bay the charges for this Dock. This provision is the equivalent of a lease radius clause and is analogous to aggregating sales from a tenant's other store for purposes of computing percentage rent. This is simply not the type of provision commonly found in a license agreement.

- "Permits, Safety and Indemnification" (§ 3.01) and "Insurance" (§ 3.02) – Again, these provisions, which provide for Trigeant to indemnify Bay for conduct on the Dock and for Trigeant to purchase insurance in connection with its activity on the Dock, are standard provisions that one would find in a lease, but not necessarily in a license.

- "Lender's Right to Use the Dock" (§ 4.03) – Section 4.03 provides that any lender of Trigeant that becomes an owner or lessee of the Refinery Site shall have the right to use and access the Dock in accordance with the terms and conditions of Part I of the Dock Use Agreement so long as the lender agrees to perform the obligations otherwise imposed upon Trigeant under the Dock Use Agreement. This further underscores the indivisible relationship between the CPU Facility owner or lessee and the Dock Use Agreement and confirms that the Dock Use Agreement, tied to the CPU Facility owner or lessee, was intended to be an interest in real property.

44. Viewing the Dock Use Agreement as a whole, and taking into account the numerous real property interest and lease-oriented provisions contained therein, leads inescapably to the conclusion that the Dock Use Agreement most closely resembles a lease and must be construed as an interest in real property owned by Trigeant. As such, the Dock Use Agreement was foreclosed upon by BTB under the March Foreclosure and then returned to Trigeant by the Fraudulent Transfer Judgment.[22]

IV. The Dock Use Agreement is Not a License

45. The Dock Use Agreement cannot be construed as creating a license because it lacks many of the fundamental characteristics of a license.

46. A license in real property is a privilege or authority given to a person, or retained by a person, to do some act or acts on the land of another, but conveys no interest in or title to the property concerned. *Digby v. Hatley*, 574 S.W.2d 186, 190 (Tex. Civ. App. 1978). A license in real estate is generally revocable at will. *Drye v. Eagle Rock Ranch, Inc.*, 364 S.W.2d 196, 203 (Tex. 1963).

47. The Dock Use Agreement conveys far more to Trigeant than the mere right to take certain limited actions on the Dock. Rather, the Dock Use Agreement grants Trigeant the *exclusive* use of the Dock for the purpose of transporting certain crude oil, feedstock and related products across the Dock. Given that the primary purpose of the Dock is to facilitate the transfer of oil-based products, Trigeant (or the owner of the CPU Facility) in effect yields significant control of the Dock to the exclusion of others.

[22] Texas' version of the Uniform Commercial Code expressly excludes leases of real property, *see* Tex. Bus. & Com. Code Ann. § 9.109(d)(11), while the Deed of Trust under which the March Foreclosure was conducted expressly included all leases of real property relating to the real property foreclosed.

48. The Dock Use Agreement is also *not* revocable at will by Bay or Berry. As such, it lacks a key quality of a license and cannot be deemed one. The Dock Use Agreement also provides for a fixed 20-year term for the agreement, a provision typically not associated with licenses.

49. Moreover, as set forth above, the Dock Use Agreement has far too many material "lease-centric" and real property-related provisions to be a mere license. Those material terms include, without limitation, (i) the grant of landlord's lien in favor of Bay; (ii) two distinct rights of first refusal[23] to purchase two separate parcels of property; (iii) a fixed 20-year term; (iv) a subordination and attornment provision; (v) payment of utilities and taxes by Trigeant; and (vi) payment of various charges to Bay akin to monthly rent payments. These provisions, taken as a whole, reflect the intent of the parties to grant rights far greater and more complex than a mere license and to create a relationship intimately tied to the real property.

V. The Dock Use Agreement and the CPU Facility are Inextricably Linked

50. The Dock Use Agreement does not merely make mention of the CPU Facility; rather, it is inextricably linked to the CPU Facility for so long as Trigeant or any of its affiliates, successors and assigns own or lease the CPU Facility.

51. The interdependency between the Dock and the CPU Facility and site evident in the Dock Use Agreement is further consistent with the linkage between those parcels in the Pipeline Easement Agreement. Under the terms of the Pipeline Easement Agreement, Berry granted Trigeant a permanent appurtenant easement linking the Dock and the CPU Facility and site.

[23] One is labeled as an Option Agreement, see Dock Use Agreement § 5.0, but is more accurately a right of first refusal.

52. The Pipeline Easement Agreement cannot be considered in a vacuum and must be interpreted along with the Dock Use Agreement. Standing alone, the Pipeline Easement Agreement enables Trigeant to build and operate a pipeline running on to Berry's property – the Dock – for the purpose of transporting crude and other crude-based substances to and from the CPU Facility. The Pipeline Easement Agreement does not give Trigeant the right to access the Dock to take advantage of that pipeline; rather, that is where the Dock Use Agreement comes into play. Working in concert with the Pipeline Easement Agreement, the Dock Use Agreement adds an additional layer on top of the easement rights already granted to Trigeant, in the form of use and access to the Dock required in order to exploit the rights granted under the Pipeline Easement Agreement. Without the Dock Use Agreement, the rights granted under the Pipeline Easement Agreement would be hollow, and without the easements created by the Pipeline Easement Agreement the ability to transfer product from the Dock to the CPU Facility would be severely hampered. The Dock Use Agreement and the Pipeline Easement Agreement are inextricably intertwined and indelibly link together the Dock and the CPU Facility. Any attempt to break the two agreements apart such that a counter-party to one of the agreements would not have a possessory interest in either the CPU Facility or the Dock is simply unworkable and illogical.

53. In addition, the connection between these two agreements is further supported by the First and Second Amendments to Easement Agreement, both dated November 1, 1999, and recorded in the Official Records of Nueces County, Texas, under Document Nos. 1999049060 and 1999049061, respectively. These Amendments expressly reference both the Original Dock Use Agreement and the Pipeline Easement Agreement. Thus, it is clear from these recorded

instruments conveying interests in real property that both the Original Dock Use Agreement – and now the Dock Use Agreement as its successor agreement – and the Pipeline Easement Agreement were treated as inter-related interests in real property.

54. It has long been a generally accepted principle of contract interpretation under Texas law that if a contract is susceptible to two constructions, one of which would render it valid and the other invalid, the validating construction must prevail. *Harris v. Rowe*, 593 S.W.2d 303, 306 (Tex. 1979) (citing *Dahlberg v. Holden*, 238 S.W.2d 699 (Tex. 1951)). Moreover, courts are charged with construing contracts "from a utilitarian standpoint bearing in mind the particular business activity sought to be served" and "avoid[ing] [,] when possible and proper[,] a construction which is unreasonable, inequitable, and oppressive." *Frost Nat'l Bank*, 165 S.W.3d at 312 (quoting *Reilly v. Rangers Mgmt., Inc.*, 727 S.W.2d 527, 530 (Tex.1987)).

55. Ownership of the Dock Use Agreement without any ownership interest in the CPU Facility and Pipeline Easement Agreement would provide no more than an illusory right of use and access to the Dock, with no actual ability to use the pipelines connected to the Dock or otherwise exploit any of the rights under the Dock Use Agreement. Any construction of the Dock Use Agreement that treats it as personal property and severs it from the pipelines and the CPU Facility would produce an absurd result that strips key rights away from Trigeant, while conferring no cognizable benefit on its purported "owner" BTB.

56. Furthermore, performance under various provisions of the Dock Use Agreement – construction, maintenance, right of first refusal/option agreement, dock use (limited to product moving to and from CPU Facility) – is impossible if the counterparty does not have an ownership/leasehold interest in the CPU Facility. In other words, if BTB were determined to be

the owner of the Dock Use Agreement, performance under the Agreement would be rendered impossible for all parties to the contract because BTB has no ownership or leasehold interest in the CPU Facility.

57. More specifically, the Dock Use Agreement obligates the owner of the CPU Facility to hire Berry to perform all major maintenance of and any major construction on the CPU Facility. For these provisions of the Dock Use Agreement to have any practical meaning and inherent value, the owner or lessee of the CPU Facility must be a party to the contract. The same is true for the right to gain exclusive use and access to, and move product across, the Dock, and to move product through the pipelines under the easement created by the Pipeline Easement Agreement; these rights are only available to the owner of the CPU Facility.

58. Because the Dock Use Agreement has no real value and serves no practical purpose if severed from the CPU Facility and surrounding real property, the Court should construe the Dock Use Agreement from a practical standpoint as an interest in real property belonging to Trigeant. Only that proper and sensible construction will enable the parties to continue to perform under the Dock Use Agreement, while advancing the Debtors' confirmation objectives and the lucrative agreement with Gravity that they are trying to close for the benefit of all their creditors. Such a straightforward interpretation of the contract and contractual relationship would also circumvent "a construction [of the Dock Use Agreement] which is unreasonable, inequitable, and oppressive" to Trigeant (and Bay and Berry).[24] *See id.* This is particularly so where BTB has been found to have committed actual fraud in connection with the underlying foreclosures; this Court should not reach a result that rewards that fraud.

[24] The contrary interpretation would effectively render the Dock Use Agreement a nullity such that none of the parties thereto would be able to receive any of the benefits thereunder.

VI. The Dock Use Agreement Runs with the Land

59. The Dock Use Agreement, coupled with and taken into context in connection with the Pipeline Easement Agreement and other pipeline easements, was intended to run with the land.

60. The Dock Use Agreement expressly provides that Trigeant and any of its affiliates, successors and assigns remain "bound by this Agreement" so long as they remain an owner or lessee of the CPU Facility, and that any assignment of the Dock Use Agreement by Bay must require "any subsequent owner or lessee of the Dock to agree in writing to be bound by the Dock." *See* Dock Use Agreement, Recital C & § 4.02. Moreover, under the Pipeline Easement Agreement, Berry granted Trigeant permanent "appurtenant easements and rights" linking the Dock and the CPU Facility that "run with the land." *See* Pipeline Easement Agreement, at § 11. Read together – as they must be in order to give meaning to both agreements and to advance the intent at the time the Original Dock Use Agreement and Pipeline Easement Agreement were entered into – the relationship between the Dock and the CPU Facility was intended to be one of permanence, enhancing both properties.

61. Under Texas law, the creation of a covenant running with the land requires that:

a. privity of estate exist between the covenanting parties;
b. the covenant must relate to something *in esse* or assigns must be named if they are to be bound by the covenant;
c. the covenant must touch or concern the land; and
d. it must be the intention of the original covenanting parties that the restrictive covenant run with the land.

Selected Lands Corp. v. Speich, 702 S.W.2d 197, 199 (Tex. App.), supplemented, 709 S.W.2d 1 (Tex. App. 1985) (citation omitted); *see also Inwood North Homeowners' Ass'n v. Harris*, 736 S.W. 2d 632, 635 (Tex. 1987) ("Under Texas law a contract "runs with the land when it touches

and concerns the land; relates to a thing in existence or specifically binds the parties and their assigns; is intended by the original parties to run with the land; and when the successor to the burden has notice.").

62. The Dock Use Agreement, together with the Pipeline Easement Agreement, touches and concerns, and creates a covenant running with, the land. Construing the Dock Use Agreement as a lease of real property, *see* ¶ 40 *supra*, there was privity of estate between the covenanting parties – Berry/Bay and Trigeant. In addition Berry owns the Dock and at one time also was the owner of the CPU Facility site. Accordingly, there was also privity of estate at the time Berry entered into the Pipeline Easement Agreement and Original Dock Agreement with Trigeant's predecessor.

63. The Dock Use Agreement and Pipeline Easement Agreement both relate to the Dock and the pipelines running between the CPU Facility and the Dock and, thus, relate to something "in existence." The covenants set forth in the Dock Use Agreement and Pipeline Easement Agreement touch and concern the Dock, the CPU Facility and site, and the pipelines running between them. Finally, both agreements make express their intent to operate with the land. The Pipeline Easement Agreement expressly states that it "shall run with the land," while the Dock Use Agreement bound the parties and their affiliates, successors and assigns to the agreement reflect an intent to keep the agreement extant between the CPU Facility owner/lessee and the owner/lessee of the Dock.[25]

[25] It also bears mention that general counsel for Bay and Berry testified unequivocally at his deposition that, in his opinion, "you can't separate the Dock Use Agreement from the land." Deposition of Charles Vanaman, dated February 5, 2015 ("**Vanaman Depo**"), at p. 7, ll. 12-25, relevant portions of which are attached hereto as **Exhibit E**. Indeed, you cannot separate the Dock Use Agreement from the CPU Facility and site, and any suggestion otherwise by BTB would sacrifice common sense at the altar of its own self-interest in defeating confirmation of the Debtors' Plan. Mr. Vanaman's opinion should not be taken lightly, as he has been general counsel at Berry for 25 years and

64. Finally, Texas courts have long-recognized that a right of first refusal in real property is a covenant running with the land. *See e.g.*, *Tigner*, 165 S.W.2d at 127 (holding that a right of first refusal to purchase real property is a covenant running with the land); *accord First Permian, L.L.C.*, 212 S.W.3d at 372 (citation omitted). As such, the Dock Use Agreement, which contains as material terms rights of first refusal with respect to two separate parcels of real property, is an interest in real property belonging to Trigeant.

VII. Severing the Dock Use Agreement Would Not Change the Result

65. Even if the Court were inclined to sever the components of the Dock Use Agreement into a series of related, but non-integrated agreements – *i.e.*, severing the dock use component, Tule Lake Property right of first refusal/option, construction rights, maintenance rights, and buyout option – the dock use component of the Agreement would still remain an interest in real property.[26]

66. As discussed herein, the dock use portion of the Dock Use Agreement includes a right of first refusal to acquire the Dock and grants a landlord's lien in favor of Bay. *See Jones*, 2000 WL 1056028, at *1 (right of first refusal is an interest in real property that needs to satisfy the statute of frauds). These characteristics alone establish that the agreement must be construed as an interest in real property because they plainly are not personal property rights. Moreover, for the other reasons explored herein, the dock use component of the Dock Use Agreement is a critical component of the real property-focused business dealings between Trigeant and

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has extensive knowledge of the Dock, the CPU Facility site, their respective histories and the intent of the parties and their predecessors in creating this deep-rooted relationship surrounding the Dock and CPU Facility.

[26] Notably, the construction rights and maintenance rights are contractual provisions flowing for the benefit of Bay/Berry. If the Dock Use Agreement were severed and portions were held to be the personal property of BTB, Gravity has advised that it would agree to enter into substantially similar agreements with Bay and Berry to ensure that Bay/Berry's rights under the contract are not impaired and to ensure the continued viability of this critical business relationship between the CPU Facility and adjacent real property.

Bay/Berry. It, along with the Pipeline Easement Agreement, creates critical use rights and access to and from the CPU Facility and site and the Dock, which is necessary for the successful operation of the CPU Facility and critical to the economic viability of the Dock. For these reasons as well, even if severed, the dock use component of the Dock Use Agreement alone constitutes an interest in real property owned by Trigeant.

67. The same is true for the Tule Lake Property right of first refusal. As set forth above, a right of first refusal is an interest in real property and remains the property of Trigeant. *Id*. Thus, the only effect of splintering the Dock Use Agreement would be to strip Bay and Berry of their bargained-for consideration under the construction, maintenance and buyout option provisions of the contract, and to alter the comprehensive series of integrated rights and interests created and granted thereunder.[27]

VIII. The Other Bay/Berry Agreements

68. The uncertainty surrounding the ownership of the Dock Use Agreement is not applicable to the other Bay/Berry Agreements at issue.

69. Unlike the Dock Use Agreement, the other Bay/Berry Agreements unquestionably convey interests in real property and, as such, are owned by Trigeant. More specifically, those agreements include: (i) Pipeline Easement Agreement (granting easement and recorded), (ii) Waterline Use Agreement (granting easement and recorded), (iii) two Lease Agreements between Trigeant and Berry for the lease of real property adjacent to the CPU Facility,[28] (iv) Easement Agreement (and First and Second Amendments thereto – all recorded), and (v) Special

[27] Even if these provisions were separable the owner of the CPU Facility would still continue to enjoy access to the Dock and the attendant pipelines running between the two pieces of property.

[28] *See* Tex. Bus. & Com. Code Ann. § 9.109(d)(11) expressly excluding leases of real property from the scope of Texas' version of the Uniform Commercial Code.

Warranty Deed with Vendor's Lien. *See Eagle Rock Ranch*, 364 S.W.2d at 203 & n. 5 (Tex.1962) (easement is an interest in land, the creation and transfer of which is subject to the statute of frauds); *see also* Tex. Bus. & Com. Code Ann. § 26.01(b)(4), (5) (a lease of real estate for a term longer than one year, must comply with the Statue of Frauds). In fact, the Easements and Special Warranty Deed are not executory contracts or leases and are, thus, not even subject to assumption or rejection under section 365 of the Bankruptcy Code.[29]

IX. Railroad Contracts – The Material RR Contracts are Interests in Real Property Owned by Trigeant

70. Under Texas law, the Material RR Contracts are interests in real property of Trigeant as easements appurtenant to the CPU Facility site or are appurtenances to the CPU Facility or Trigeant's pipelines. As such, Trigeant owns all right, title and interest in the Material RR Contracts.

A. The Material RR Contracts are easements appurtenant to the CPU Facility.

71. An easement is a nonpossessory interest in land that authorizes its holder to use the property for only a particular purpose. *Marcus Cable Associates, L.P. v. Krohn*, 90 S.W.3d 697, 700 (Tex. 2002) (citing Restatement (Third) of Property (Servitudes) § 1.2 cmt. d.). An easement is appurtenant when there is a dominant estate that is benefited by the easement, a servient estate that is burdened by the easement, and the easement can be enjoyed by only the owner or occupier of the dominant estate. *Killam Ranch Properties, Ltd. v. Webb Cnty.*, 376 S.W.3d 146, 155 n.4 (Tex. App. 2012) ("'Appurtenant' means that the rights or obligations of a

[29] As noted, Gravity has agreed to eliminate a number of the Bay/Berry contracts that originally were required to be assigned, including several contracts that appeared to be personal property agreements; those contracts are accordingly not within the subject of the Debtors' determination request. Those contracts include, without limitation, an Asphalt Purchase and Sale Agreement, Mutual Agreement for Dock Projects, Master Service Agreement and an Equipment Rental Agreement.

servitude are tied to ownership or occupancy of a particular unit or parcel of land") (quoting Restatement (Third) of Property (Servitudes) § 1.5 (2000)); *see also Pokorny v. Yudin*, 188 S.W.2d 185, 193 (Tex. Civ. App. 1945) (an easement appurtenant requires a dominant and servient estate). An easement appurtenant is an interest in land and is automatically conveyed with the dominant estate. *Killam Ranch Properties*, 376 S.W.3d at 155 (an easement appurtenant "cannot be separated from the owner's rights in the land, and it passes with the property"); *see also Pokorny*, 188 S.W.2d at 193 (an easement appurtenant "is an interest in the land").

72. The elements for an express easement are the same legal requirements as for any real property conveyance. *Parsons v. Hunt*, 84 S.W. 644, 646 (Tex. 1905). There are five elements for an express easement: (1) a writing, (2) an intent to convey an easement, (3) an adequate property description of the servient estate, (4) execution of the writing by the grantor, and (5) delivery of the writing. *See* Tex. Prop. Code Ann. § 5.021 (West). The instrument creating the easement need not be recorded to be binding on a party's successors. *See* Tex. Prop. Code Ann. § 13.001(b) (West). No magic words are necessary to establish the intent to convey an easement. *See Mitchell v. Castellaw*, 151 Tex. 56, 63 (1952) ("neither words of inheritance nor other words of art are essential to the valid reservation of an appurtenant easement of even unlimited duration.") *Id.*

73. Courts in Texas and elsewhere have recognized that distinguishing intent to convey an easement from the intent to convey a license is "difficult." *Latimer v. Hess*, 183 S.W.2d 996, 997 (Tex. Civ. App. 1944); *see also Paul v. Blakely*, 243 Iowa 355, 358 (1952). As one Florida court noted, the "distinction between an easement and a license is often so metaphysical, subtle, and shadowy as to elude analysis. But there are certain fundamental

principles underlying most cases which enable courts to distinguish an easement from a license when construed in the light of the surrounding circumstances." *Dotson v. Wolfe*, 391 So. 2d 757, 758 (Fla. Dist. Ct. App. 1980).

74. The fundamental principles that enable a court to distinguish an easement from a license are as follows:

- ❖ Granting language, attestations of signatures, and recording all indicate an intent to create an easement;
- ❖ The creation of a right to be used in a particular portion of the servient estate indicates that an easement was intended;
- ❖ The right to improve or maintain affected portion of the servient estate indicates that an easement was intended;
- ❖ A perpetual right indicates an intent to create an easement. However, an easement may be subject to a condition subsequent by the owner of the servient estate;
- ❖ An express successors-and-assigns provision indicates an intent to create an easement; and
- ❖ An exchange of material consideration indicates an intent to create an easement.

See James W. Ely, Jr. and Jon W. Bruce, The Law of Easements & Licenses in Land § 1:5 (2015). Ultimately, it is the parties' intent, not labels, that is determinative. *Paul*, 243 Iowa at 358 ("the intent of the parties is to be taken as the real determining factor").

75. Applying all the foregoing legal standards, the Material RR Contracts are easements appurtenant to the CPU Facility site and, thus, interests in real property.

76. Material RR Contract No. 1 expressly grants "an easement for railroad purposes" to Union Pacific[30] over real property that is now owned by Trigeant. Material RR Contract No. 1 satisfies the requirements under Texas law to constitute an "Instrument of Conveyance" of real

[30] As successor to Missouri Pacific Railroad Company.

property and has all the essential qualities necessary to create an easement. *See* Tex. Prop. Code Ann. § 5.021 (West); *Parsons*, 84 S.W. 644 at 646. The contract is in writing, describes the servient estate, is executed by the grantor, expressly states that it is granting an easement over specifically described property, and has been delivered. Moreover, while labels used by the parties are not necessarily determinative, Material RR Contract No. 1 is in the form of a conveyance, is styled as an easement and contains a present grant of an interest in real property described as an "easement." It is also binding on successors and assigns. Finally, the face of the document shows the grantor's signature is attested and that the document was recorded in the Nueces County, Texas property records, further reflecting an intent to create an interest in real property. For these reasons, Material RR Contract No. 1 is unquestionably an interest in real property that creates an easement running through Trigeant's property, and any reversionary or other interest of Trigeant as the now-grantor of that easement continues to be owned by Trigeant.

77. Material RR Contract No. 2 is also an easement, in this instance granted by Union Pacific and running in favor of Trigeant. It is in writing, describes the servient estate, is executed by Union Pacific as grantor, and has been delivered to Trigeant's predecessor in interest as grantee. Although styled a "Commercial Road Crossing License," the terms of the agreement and the circumstances show the parties' intent to convey an easement appurtenant. The easement is perpetual, subject to defeasance only if the grantee shall remain in "actual default" after six months' notice. The face of the document shows that signatures of the grantor and the grantee are attested and that the document was recorded in the Nueces county property records. Moreover, the easement benefits only the owner or occupant of the CPU Facility. It provides for two private road crossings, for private roads that are part of the CPU Facility site.

78. The Pipeline Crossing Agreements also are easements. They are in writing, describe the servient estates, are executed by the grantor, and have been delivered. Although the Pipeline Crossing Agreements contain "license" labels, the substance of the Pipeline Crossing Agreements and the surrounding circumstances show the parties intended to convey an easement.

- Each Pipeline Crossing Agreement conveys a right to use only a particular portion of Union Pacific's track and right of way, defined by specific Mile Posts. For example, Material RR Contract No. 12 provides for use of the easement at only Mile Post 143.30.

- Each Pipeline Crossing Agreement confers the right to improve and maintain only the affected portion of the servient estate. For example, Material RR Contract No. 12 provides for the installation and maintenance of only a 2 inch condensate, a 2 inch steam and 12 inch asphalt pipeline.

- Later Pipeline Crossing Agreements further limit the right to improve and maintain the easement by expressly restricting the pipelines to petroleum-related uses and prohibit other uses, such as the installation of fiber optic cables.

- The Pipeline Crossing Agreements are perpetual, generally subject only to three conditions subsequent: (i) failure to use the easement by not installing or using the pipelines for a period of time between six months and one year, (ii) failure to cure an actual default after notice, and (iii) thirty days' notice by either party that the Pipeline Crossing Agreement will be terminated.

- The Pipeline Crossing Agreement is binding on successors and assigns.

- The Pipeline Crossing Agreements require payment of material consideration for the easement, ranging in amount from $750 to $2000.

79. Moreover, it is important to the analysis that the rights conferred under the Pipeline Crossing Agreements can be enjoyed by only the owner or occupant of the CPU Facility. The physical pipelines which connect the CPU Facility to the Dock are unquestionably interests in real property owned by Trigeant. The intangible rights conferred by the Pipeline

Crossing Agreements can be enjoyed only by the owner of the pipeline, and are necessary to the operation of the CPU Facility.

B. In the alternative, Material RR Contract No. 2 and the Pipeline Crossing Agreements are appurtenances to the CPU Facility or Trigeant's pipelines.

80. Even if Material RR Contract No. 2 and the Pipeline Crossing Agreements are deemed to constitute licenses rather than easements, they grant and create interests in real property as appurtenances to the CPU Facility or Trigeant's pipelines.

81. Trigeant's interests in real property include the CPU Facility, the private roads upon Trigeant's land, and the pipelines connected to the CPU Facility. Trigeant's interests in real property also include all appurtenances to this real property. Intangible personal property can be an appurtenance to land. *See Yellowstone Valley Co. v. Associated Mortgage Investors*, 290 Pac. 255, 258 (Mont. 1930) (shares of stock in company controlling water rights to irrigated land are appurtenances to the land). Such appurtenances to the land pass with the conveyance of the land. *See id.* at 259 (if an owner "conveys the land without reservation, he also conveys the appurtenance and whatever is incidental to the land").

82. An appurtenance to property is "everything essential to the beneficial use and enjoyment of the property conveyed." *Yellowstone Valley Co.*, 290 Pac. at 258. Specifically in the context of secured real property transactions, a "mortgage of land with the appurtenances covers both the incorporeal hereditaments annexed to the realty, and also such physical property, or rights to or in connection with it, as are used with and for the benefit of the land and are reasonably necessary for its proper enjoyment." *Id.*

83. Here, there can be little question that Material RR Contract No. 2 and the Pipeline Crossing Agreements are reasonably necessary for Trigeant's use and enjoyment of the CPU

Facility. Without pipeline access to the Dock, Trigeant's throughput of petroleum products is substantially diminished. By way of example, Trigeant can move 80,000 barrels per day of asphalt through its pipelines to a ship whereas it can move only 13,000 barrels per day by railcar (the next best method of petroleum product transport from the CPU Facility).[31] The economies of scale of transpiration over water are such that the Dock, and Trigeant's connections to the Dock via its pipelines and roadway crossing, are essential to the operation of the CPU Facility.

Conclusion

84. As the Court has made clear in its series of prior rulings in Trigeant's first bankruptcy case, *In re Trigeant, Ltd.*, Case No. 13-38580-EPK (Bankr. S.D. Fla.), and comments on the Bay/Berry Agreements – and particularly the Dock Use Agreement – in these pending Chapter 11 cases as well, the question of whether Trigeant owns and has the ability to assign the various Agreements to Gravity in connection with the Debtors' Plan is multi-dimensional. The outcome cannot be determined solely by reference to the language, labels or terms of any single Agreement, but only in the context of the interrelated series of Agreements that collectively grant and allocate the various rights and interests between and among Bay, Berry, and the owner of the CPU Facility. Now that Trigeant has conclusively been determined to own that Facility as a result of the Fraudulent Transfer Judgment in Texas and prepares to resume business operations at the CPU Facility, the only way to give effect to the intent of the parties is to construe the series of Agreements as granting and effectuating an integrated or interrelated package of real property rights and interests that Trigeant can assign and transfer to Gravity upon confirmation of the Debtors' Plan. As set forth in greater detail above, such a construction is consistent with the

[31] It worthy of note that the railcars have rarely been used for this purpose because of the overwhelming economies of scale in using the Dock and the pipelines.

language and terms of the Dock Use Agreement, the Material RR Contracts and the other related and complementary Agreements. Any other construction would dismember the collective series of rights and benefits allocated to Bay, Berry and the owner of the CPU Facility, and do violence not only to the Debtors' Plan, but also to the intent of the parties as best expressed through the Agreements and, indeed, to the commercial viability of the CPU Facility itself.

WHEREFORE, the Debtors' respectfully request that the Court determine in the Order Confirming the Debtors' Plan of Reorganization that the Bay/Berry Agreements and the Material RR Contracts are the property of Trigeant and may be assigned to Gravity at Closing of the acquisition of the Debtors' assets, and awarding such other and further relief as may be appropriate in the circumstances.

Dated March 17, 2015.

Respectfully submitted,

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Schedule A

"BAY/BERRY AGREEMENTS"
1. Waterline Use Agreement dated Jan. 12, 1989
2. Pipeline Use Agreement dated Jan. 12, 1989
3. Easement Agreement dated Dec. 8, 1989, effective June 11, 1989
4. First Amendment to Easement Agreement dated Nov. 1, 1999
5. Second Amendment to Easement Agreement (Additional Lines) dated Nov. 1, 1999
6. Lease Agreement dated Oct. 18, 2001
7. Special Warranty Deed with Vendor's Lien dated Oct. 18, 2001
8. Lease Agreement dated March 24, 2006
9. Dock Use, Construction, Maintenance and Option Agreement dated Nov. 1, 2001

Schedule B

"Material RR Contracts"

Exhibit "D"	Folder No.	Audit No.	Date	Description
1.			06-May-58	Easement for railroad purposes from Alice Dunn to Missouri Pacific Railroad Co., dated May 6, 1958, recorded in Volume 813, Page 513
2.		CA73999	23-Oct-75	Commercial Road Crossing License Eng. Chain 312 + 18 – 116 feet West of P.S. Track No. 50-104 Contract with non-debtor Berry Contracting, Inc.
3.	969-51	CA -87008	11-Mar-85	Agreement covering underground 12" asphalt and 2" and 3" steam pipelines at MP 143.26.
4.	1193-29	CA -87007	11-Mar-85	Agreement covering underground 14" oil and gas pipelines at MP 143.89 (by Licensee's survey MP 143.51), at Eng. Chain St. 311+ 93.6.
5.	1332-23	148090	18-May-89	Agreement covering 12" asphalt and two 2" steam pipeline crossing at MP 143.65.
6.	1332-24	148097	18-May-89	Agreement covering 12" asphalt and two 2" steam pipeline crossings at MP 143.51.
7.	1581-43	201422	01-Sep-97	Agreement covering underground 30" Underground crude oil pipeline at MP 143.25.
8.	1581-45	201417	01-Sep-97	8" underground asphalt pipeline at MP 143.63.
9.	1581-46	201420	01-Sep-97	Agreement covering an underground 4X 4 underground electrical conduit & instrumentation pipeline at MP 143.45 conveying instrumentation.
10.	1581-47	201423	01-Sep-97	Agreement covering underground 3", 4", 6" & 4" underground pipelines for conveying rain H20 return, oily H20, rain steam and condensate H20 return, oily H20, steam and condensate at MP 143.45.
11.	1584-56	201428	01-Sep-97	Agreement covering underground 16' Underground firewater pipeline at MP 143.26. Ag.
12.	2024-75	223704	18-Dec-01	Agreement covering 2" condensate, 2" stream, and 12" asphalt pipeline crossing
13.	2049-46		10-Dec-01	Track Lease Agreement covering 4,592 feet of ICC Track No. 50-104 (Circ7: CC150, Yard 13, Track 120) and 1,244 feet of ICC Track No. 50-107 (Circ7:

Exhibit "D"	Folder No.	Audit No.	Date	Description
				CC150, Yard 13, Track 791), as amended pursuant to that certain Joint Use Agreement and Supplement thereto, with Citgo.
14.	2062-74	224810	8-Mar-02	Pipeline Crossing Agreement covering overhead pipe bridge pipeline crossing carrying one 2" and one 12" pipeline
15.	2437-57		2-April-07	Industry Track Contract covering 1,272 feet of ICC Track No. 794 (Circ7: CC150, Yard 13, Track 794).