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WRITTEN DECISION - NOT FOR PUBLICATION

ENTERED 11-10-10
FILED
NOV 10 2010
CLERK U.S. BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY 19 DEPUTY

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA

In re)
SOUTH BAY EXPRESSWAY, L.P.)
Debtor.)
_____)
OTAY RIVER CONSTRUCTORS,)
Plaintiff,)
v.)
SOUTH BAY EXPRESSWAY, L.P.,)
et al.,)
Defendants.)
_____)
AND RELATED ADVERSARY)
PROCEEDINGS)

Chapter 11
Case No. 10-04516-A11
(Jointly Administered with
Case No. 10-04518)
*Adversary Cases Consolidated for
Discovery and Trial*
Lead Case Adv. No. 10-90172-LA
(Consolidated with
Adv. No. 10-90180 and
Adv. No. 10-90214)

FINDINGS OF FACT AND
CONCLUSIONS OF LAW
RE: ESTOPPEL AND WAIVER

[AMENDED]

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INTRODUCTION

In response to the pre-trial motions of the consortium of Senior Lenders and their Collateral Agent, Wells Fargo Bank (collectively “WFB”) and South Bay Expressway, L.P. (“SBX”) to try their estoppel and waiver affirmative defenses first in order, the Court granted the motion over the objection of Otay River Constructors (“ORC”). The motion argued, and the Court agreed, that trying these affirmative defenses first might obviate the need to hear voluminous evidence to determine the scope of the Toll Road “work of improvement,” and the extent of pre-contract work, if any, by ORC and others on the Toll Road “work of improvement,” commencing prior to May 22, 2003.

On October 25, 26, and 27, 2010, the Court took testimony and considered documentary evidence on the issues of waiver and estoppel. In an oral ruling on the record on October 27, 2010, the Court held that ORC was equitably estopped to assert that construction on the Toll Road “work of improvement” had commenced prior to the Financial Closing of the transaction on May 22, 2003. These Supplemental Findings of Fact and Conclusions of Law are filed at the request of the parties and to further supplement the Court’s comments on the record.

In arriving at its ruling, the Court considered the Statement of Undisputed Facts contained in the Amended Pre-Trial Order (ECF No. 168) and numerous documents which were admitted into evidence, including the following:

a. The Consent and Agreement between ORC, SBX and WFB
[Ex. 245];

b. The Amended and Restated Toll Road Design Build Contract
 (“Toll Road DBC”) [Ex. 276];

1 c. Progress Reports submitted by ORC [Ex. 325, 339, 358 and 389];

2 d. Pay Applications submitted by ORC [Ex., 322, 332, 366, 399 and
3 401]; and

4 e. Appendix 10(c) to the Toll Road DBC [Ex. 276, at 276-429].

5
6 Additionally, the Court considered the testimony of the witnesses at trial,
7 including D. Richard Linford (“Mr. Linford”), Patrick Flaherty (“Mr. Flaherty”)
8 and Richard Fierce (“Mr. Fierce”).

9
10 **FINDINGS OF FACT**

11 1. SBX developed and operates a four-lane toll road in Southern
12 California commonly referred to as the SR 125 Toll Road or the South Bay
13 Expressway (“Toll Road”). SBX’s rights arise from a Toll Road Development
14 Franchise Agreement (“DFA”) and Toll Road Lease Agreement between SBX and
15 Caltrans.

16 2. SBX, as the developer under the DFA, hired ORC as its general
17 contractor to design and construct the Toll Road segment of State Route 125 (the
18 “Toll Road project”). The Toll Road project was privately funded from financing
19 obtained from WFB. By separate contract, SBX also hired ORC to be the general
20 contractor for the two additional segments of State Route 125 known as the gap
21 and the connector which connect to the Toll Road to State Route 54 (the “G/C
22 DBC” and “G/C project”). The G/C project was publicly funded, and the public’s
23 use of these segments is toll-free.¹

24
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26
27 ¹ ORC contends the Toll Road project and the G/C project comprise a single “work of
28 improvement” within the meaning of California Civil Code § 3106, but the Court did not reach this
issue.

1 **A. ORC's Representations and Warranties that it Had No Claim and No**
2 **Lien as of the May 22, 2003**

3 3. On May 22, 2003, ORC, along with WFB and SBX, participated in a
4 Financial Closing to execute and exchange the various transactional documents.
5 ORC's representatives at this Financial Closing were Mr. Linford, Mr. Flaherty
6 and Mr. Fierce.

7 4. At this Financial Closing, WFB and SBX executed the various
8 financing documents, including a construction deed of trust granting a first priority
9 lien to WFB on virtually all of SBX's assets in exchange for the construction
10 financing ("2003 CTD"). As well, ORC and SBX executed the Toll Road DBC
11 pursuant to which ORC would serve as general contractor for the Toll Road
12 project. Additionally, ORC through its representatives Mr. Flaherty and
13 Mr. Linford executed a "Consent and Agreement" in favor of WFB for the Toll
14 Road DBC. [Ex. 245].² Paragraph 3(f) of the Consent and Agreement states as
15 follows:

16 The Obligor [ORC] has *no present claim against the*
17 *Assignor [SBX] or lien upon the Project* arising out of
18 the Obligor's performance of *any* work or service under
19 the Assigned Agreements [the Toll Road DBC, the G/C
20 DBC, and the Coordination Agreement].³

21 [Ex. 245, at 245-0004 (emphasis added)]

22 5. As more fully set forth below, the evidence supports a finding that at
23 the time of the Financial Closing, ORC understood that execution of the Consent
24 and Agreement was material to SBX and WFB. ORC understood that WFB

25 ² ORC executed another identical "Consent and Agreement" in favor of WFB for the
26 separate G/C DBC. [Ex. 244] However, references to the Consent and Agreement in this decision
27 are to the Toll Road document only, not the G/C document.

28 ³ As part of the collateral granted to WFB, SBX assigned all of its rights under the Assigned
Agreements. In the Consent and Agreement, ORC expressly acknowledged and consented to WFB's
security interest in the Assigned Agreements.

1 required a first priority trust deed as a condition to its agreement to finance
2 construction of the Toll Road project. ORC also understood that WFB intended to
3 rely upon the representations and warranties made in the Consent and Agreement,
4 including ORC's representation and warranty that it had no "present claim" or
5 "lien" to assure WFB would have a first priority lien. Finally, ORC also
6 understood that without the construction financing, there would be no Toll Road
7 construction.

8 6. The evidence is that ORC could not start construction of the Toll
9 Road project before it received a Notice to Proceed from SBX. Pursuant to
10 Paragraph 8.1.1 of the Toll Road DBC, this Notice to Proceed would be issued on
11 the Effective Date of the Toll Road DBC. Article 2 of the Toll Road DBC set
12 forth the conditions precedent to the Effective Date, which could not have
13 occurred prior to execution of the Toll Road DBC on May 22, 2003. [Ex. 276,
14 at 276-0021; 276-0036]

15
16 7. Upon receipt of the Notice to Proceed, ORC could commence certain
17 Phase 1 Work. [*Id.* at 276-0055] Pursuant to Paragraph 8.1.2, Phase 1 Work
18 involved pre-construction design and engineering work.

19 8. Pursuant to Paragraph 8.2.1 of the Toll Road DBC, ORC could
20 commence Phase 2 Work (the actual construction work) at any time after the
21 issuance of the Notice to Proceed, ***subject to Paragraph . 8.2.2*** which provides:

22
23 Unless Contractor [ORC] has received the prior written
24 approval of Developer [SBX], ***in no case shall***
25 ***Contractor commence any portion of the construction***
26 ***work*** at the Site⁴ prior to the occurrence of the following
27 events:

28

⁴ The Toll Road DBC defines "Site" to mean: (i) those areas designated in the Scope of Work [Appendix A1] for the performance of the Work; and (ii) the property on or about which ORC is required to perform any of the Temporary Work or the Permanent Work. [*Id.* at 276-0031]

1 (a) Developer and Caltrans **shall have**
2 **approved the Baseline Schedule** and
3 Contractor's Quality Assurance and Control
4 Plans;

5 [*Id.* at 276-0056 (emphasis added)]

6 9. The evidence supports a finding that as of May 22, 2003, SBX had
7 not provided ORC with prior written consent, or a formal Notice to Proceed; nor
8 had the Baseline Schedule been approved.

9 10. The evidence is that ORC represented that construction work had not
10 begun in its Payment Applications and Progress Reports presented to SBX during
11 the period immediately after the Financial Closing. Specifically:

12 **■ Toll Road Payment Application No. 1**

13 Payment Application No. 1 for the period of May 22, 2003 through May 30,
14 2003 contains an Invoice Certificate, with the notarized signature of Jan Bohn,
15 project director, stating in relevant part:

16 In order to induce [SBX] ... to make payment as
17 requested by this Invoice, the undersigned Contractor
18 hereby certifies, represents and warrants to [SBX] as
19 follows:

20 * * * *

21 2. The Work described in Attachment A and the
22 other exhibits attached hereto has been fully performed
23 ... and the information contained in such exhibits is true,
24 complete, and correct in all material respects.

25 [Ex. 322, at 322-0005] Attachment A to Exhibit 322 shows *no* Phase 2 work was
26 performed during this pay application period. [*Id.* at 322-0004]

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■ **Toll Road Progress Report No. 1**

Progress Report No. 1 for the period of May 22, 2003 through May 30, 2003 states on the Executive Summary that ORC would submit the Baseline Schedule for the Toll Road construction on June 11, 2003. [Ex. 325, at 325-0004]

■ **Toll Road Payment Application No. 2**

Payment Application No. 2 for the period of May 31, 2003 through June 30, 2003 indicates in Attachment A that *no* construction work had been performed during that period. [Ex. 332, at 332-0003]

■ **Toll Road Progress Report No. 2**

Progress Report No. 2 for the period of May 31, 2003 through June 30, 2003 in the Executive Summary states that the Baseline Schedule for construction had been submitted on June 11, 2003. No approval of the Baseline Schedule was reported. [Ex. 339, at 339-0004]

■ **Toll Road Payment Application No. 3**

Payment Application No. 3 for the period of July 1, 2003 through July 30, 2003 contains another Invoice Certificate with the notarized signature of Jan Bohn, project director, reciting the same relevant language set forth above. [Ex. 366, at 366-0007] As well, Attachment A to this pay application shows that *no* construction work had been performed. [*Id.* at 366-0003]

■ **Toll Road Progress Report No. 3**

Progress Report No. 3 for the period of July 1, 2003 through July 30, 2003 in the Executive Summary states that the Baseline Schedule for construction had been approved on July 18, 2003. [Ex. 358, p. 358-0004].

1 **▪ Toll Road Payment Application No. 4**

2 Payment Application No. 4 for the period of July 31, 2003 through August
3 31, 2003 contains the same Invoice Certification by Jan Bohn as recited above
4 [Ex. 399, at 399-0035], and Attachment A for the first time reflects an allocation
5 of cost to the Phase 2 (construction work) element of the contract. [*Id.* at
6 399-0004]

7
8 **▪ Toll Road Progress Report No. 4**

9 Progress Report No. 4 for the period of July 31, 2003 through August 30,
10 2003 states in the Executive Summary under the item “Specific Construction
11 Issues”: “There are no issues because construction has just barely begun.”
12 [Ex. 389, at 389-0005]

13
14 **B. ORC’s Agreement to Use a Compliant Lien Release Form**

15 11. In Paragraph 19.3.3.(ii) of the Toll Road DBC, ORC agreed it would
16 submit lien release forms in connection with its monthly payment invoices
17 substantially in the form attached as Appendix 10(c) to the Toll Road DBC.
18 [Ex. 276, at 276-0113, 276-0429] It is uncontroverted the lien release form
19 attached as Appendix 10(c) is substantially similar to the form prescribed in
20 California Civil Code § 3262, and use of the Appendix 10(c) form would have
21 been effective to release all liens covered by the monthly invoices, if paid.

22 12. On June 19, 2003, ORC submitted a lien release form attached to
23 Payment Application No. 1. The lien release attached to Payment Application
24 No. 1 requested payment in the sum of \$2,137,500. [Ex. 322, at 322-0006] The
25 uncontroverted evidence is that SBX paid that amount.

26
27 13. On June 30, 2003, ORC submitted a lien release form attached to
28 Payment Application No. 2. The lien release covered the period from May 31,

1 2003 through June 30, 2003. The lien release requested payment in the sum of
2 \$2,137,500. [Ex. 332, at 332-0004] The uncontroverted evidence is that SBX
3 paid that amount.

4 14. On August 1, 2003, ORC submitted a lien release form attached to
5 Payment Application No. 3. The lien release covered the period from July 1, 2003
6 through July 30, 2003. The lien release requested payment in the amount of
7 \$2,137,500. [Ex. 366, at 366-0005] The uncontroverted evidence is that SBX
8 paid that amount.

9
10 15. It is uncontroverted that each of the above lien release forms are not
11 substantially in the form attached as Appendix 10(c); nor are they substantially in
12 conformance with the form prescribed by California Civil Code § 3262. Each of
13 the above lien release forms were on ORC's letterhead. Jan Bohn, ORC's project
14 director, who signed and submitted the Payment Applications with the lien release
15 forms, testified he had no knowledge who prepared the lien release forms or why
16 they were changed from the form ORC agreed to use in the Toll Road DBC
17 [Ex. 276]. However, he did not contend that someone had sneaked into ORC's
18 offices and prepared non-compliant lien release forms on ORC's letterhead. The
19 highly probable inference is that they were prepared by ORC. Importantly, the
20 lien release forms submitted with ORC's Payment Applications, contained no
21 clear and conspicuous language alerting recipient that the form was altered and
22 may no longer substantially comply with the agreed upon form or Civil Code
23 § 3262.

24 16. All Findings of Fact that are Conclusions of Law shall be deemed to
25 be Conclusions of Law.

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CONCLUSIONS OF LAW

17. SBX and WFB argue that ORC should be estopped from asserting priority of its lien dating before May 22, 2003. Calif. Evid. Code § 623; *Ware Supply Co. v. Sacramento Sav. & Loan Assn.*, 246 Cal. App. 2d 398, 406-09 (1966) (holding that a subcontractor was estopped from asserting a mechanic's lien when it executed contracts intending to induce reliance by the lender). After consideration of all the evidence, the Court concludes that equitable estoppel should be applied to bar ORC from introducing any evidence that construction began before May 22, 2003, and from asserting priority of its lien before that date.

18. The doctrine of equitable estoppel arises from the declarations or conduct of the party estopped from asserting a position. There must be a false representation or concealment of a material fact concerning the matter for which estoppel is claimed, and the party to whom the representation was made or from whom the facts were concealed must be ignorant – actually and permissibly – of the truth. The doctrine of equitable estoppel is founded on justice and good conscience, and is based on the theory that the party to be estopped has, by his own statements or conduct, misled another to his prejudice. *Ware Supply Co.*, 246 Cal. App. 2d at 407; *see also* 1 B. Russell, *Bankruptcy Evid. Manuel*, § 5.1, 555-56 (2010-2011 ed.).

19. To establish equitable estoppel in California, a party must prove four elements: (1) the party to be estopped must be apprised of the true facts; (2) the party to be estopped must intend that its conduct be acted upon, or must so act that the party asserting estoppel has a right to believe it was so intended; (3) the party asserting estoppel must be ignorant of the true state of facts; and (4) the party asserting estoppel must rely on the conduct to its detriment and injury. *Ware Supply Co.*, 246 Cal. App. 2d at 407.

1 20. The burden of proof is on the party asserting estoppel. It must be
2 met by clear and convincing evidence. *In re Marriage of Brinkman*, 111 Cal.
3 App. 4th 1281, 1289 (2003). This standard of proof requires a higher degree of
4 proof than the usual preponderance of evidence standard. It requires a finding of
5 “high probability” that the fact is true – *i.e.*, evidence so clear as to leave no
6 substantial doubt. *Lillian F. v. Sup. Ct. (Kretz)*, 160 Cal. App. 3d 314, 320 (1984).

7 21. California Evidence Code § 623 provides that whenever a party has,
8 by its own statement or conduct, intentionally and deliberately led another to
9 believe a particular thing is true and to act upon such belief, he is not, in any
10 litigation arising out of such statement or conduct, permitted to contradict it.
11 California Evidence Code § 620 states that Evidence Code § 623 is a conclusive
12 presumption.

13
14 22. The Court concludes there is clear and convincing evidence that the
15 elements for equitable estoppel are met. First, ORC was the party most
16 knowledgeable as to the state of its work, if any, on the Toll Road project. ORC
17 affirmatively represented and warranted that it had no present claim or lien upon
18 the Toll Road project arising from any of its work or services under any of its
19 agreements with SBX. [Ex. 245]

20 23. Additionally, there is clear and convincing evidence that ORC
21 intended for WFB and SBX to believe it had no present claim or lien. ORC knew
22 that SBX needed the Consent and Agreement, including the representations and
23 warranties made in Paragraph 3(f), in order for WFB to agree to provide the
24 construction financing for the Toll Road project. Clear and convincing evidence
25 establishes that ORC understood that if there was no loan, there would be no Toll
26 Road project, and there would be no Toll Road DBC.

1 A. Mr Flaherty, who represented ORC at the Financial Closing,
2 testified as follows:

3 **Q:** Did ORC intend for SBX to rely on the
4 representations and warranties in [paragraph] 3f
5 [of Ex. 245]?

6 **A:** Yes because SBX told us that they needed that
7 representation to secure their financing.

8 **Q:** And specifically did ORC intend for SBX to rely on
9 the very last sentence of paragraph 3f?

10 **A:** Yes.

.....

11 **Q:** You also knew, didn't you, sir, that the lenders
12 wanted these representations to be assured that any
13 potential claims had been disclosed and resolved prior to
14 the financial close, didn't you?

15 **A:** Yes, that's correct.

16 **Q:** And you knew in fact that they wanted a clean slate;
17 isn't that right, sir?

18 **A:** Yes.

[Trial Tr. vol. 2, 222:17-23; 223:3-10, October 26, 2010]

19 B. Mr. Fierce, legal counsel present at the Financial Closing who
20 represented the interests of Mr. Flaherty/ORC, testified as follows:

21 **Q:** When you say they're "entitled to rely on,"
22 what do you mean by that?

23 **A.** ...The other side is entitled to read it and rely on
24 it, and that reliance would be deemed, you know,
25 justifiable.

[Trial Tr., vol. 2, 307:25-308:5]

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1 Further, he stated:

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Q: If we could look at paragraph 3(f) [of Ex. 245]
...You also understand that this is within the
representations and warranties provision of this
contract?

5

A: Correct.

6

Q: And these are representations and warranties made by ORC;
correct?

7

A: Correct.

8

9

Q: And the parties to whom these representations and
warranties were made could justifiably rely on ORC's word;
right?

10

A: Correct.

11

Q: Were these representations and warranties true on May 22,
2003?

12

A: Yes.

13

Q: They're still true today?

14

A: Yes.

15

Q: So as far as you could tell on May 22, 2003, ORC had no
present claim against SBX?

16

A: That's correct.

17

Q: And on May 2, 2003, ORC had no lien against the toll road?

18

A: Correct.

19

20

[*Id.* at 315:7-316:5]

21

This evidence leaves no substantial doubt that ORC intended WFB and SBX to
22 rely on their representations. The testimony of Mr. Flaherty and Mr. Fierce not
23 only confirms ORC intended to induce reliance, but also confirms a belief that
24 such reliance was justifiable.

25

26

24. Clear and convincing evidence also establishes that WFB and SBX
27 were ignorant of the facts that ORC now seeks to introduce into evidence. There
28 is no evidence that either was aware that ORC, or persons hired by ORC, may

1 have been already working on the Toll Road project. ORC was the general
2 contractor for the Toll Road project, and it possessed the superior knowledge of
3 status of construction on the Toll Road project. If ORC, or someone hired by
4 ORC, had commenced any work or services under the Toll Road DBC prior to
5 May 23, 2003, or any of the other Assigned Agreements, ORC should have
6 disclosed these facts at the Financial Closing so that WFB and SBX would know
7 the “slate” was *not* clean.

8
9 25. Despite Mr. Fierce’s testimony in Paragraph 23 above, ORC contends
10 that WFB and SBX could not justifiably rely upon ORC’s representations and
11 warranties in the Consent and Agreement. They contend that WFB and SBX
12 should have physically inspected the site to confirm that ORC’s representations
13 and warranties were, in fact, correct. Under the circumstances, this argument is
14 silly. Although no one from WFB or SBX walked the undeveloped Toll Road
15 route before of the Financial Closing, a physical inspection would not have been
16 convenient or helpful. The evidence shows the Toll Road project extended some
17 14 miles in length through undeveloped scrub land. The evidence also shows that
18 the Toll Road project had somewhat uncertain boundaries, and there were adjacent
19 construction projects underway by other landowners. Logically, the Financial
20 Closing was orchestrated to avoid the need for WFB or SBX to walk the entire
21 site, guessing whether any materials or construction work in the vicinity might, or
22 might not, be part of the Toll Road project. The Court is not aware of any legal
23 authorities, nor has ORC cited to any authorities requiring a construction lender to
24 determine for itself that no construction has commenced instead of relying on the
25 written word of the estopped party who possessed superior knowledge of the facts.

26 26. Clear and convincing evidence also supports that WFB and SBX
27 would be seriously injured if ORC is not estopped from asserting priority of its
28 lien dating before May 22, 2003. ORC is asserting a lien for unpaid construction

1 work of approximately \$145 million. From the evidence derived from SBX's
2 schedules, it appears there is insufficient value in SBX's rights under the
3 Franchise Agreement and its accompanying Toll Road Lease to fully secure its
4 obligations to WFB.⁵

5 27. ORC claims there can be no waiver or estoppel of a mechanic's lien
6 except by execution of a waiver and release form substantially in the form set forth
7 in Civil Code § 3262, and the Consent and Agreement clearly does not comply
8 with this statute. ORC's argument is nonsensical. It is clear, from a cursory
9 review of the statutorily-compliant lien release forms, that these forms deal with
10 waiver and release of liens in connection with progress payments made during a
11 construction contract, or a final payment upon performance of the contract. They
12 do not address this situation where ORC – the general contractor – at the outset of
13 the Toll Road DBC, represented and warranted that it had no present claim or lien
14 for any work or services arising out of any of its agreements with SBX knowing
15 this agreement would be relied upon by SBX and WFB to their financial
16 detriment. There is ample authority in California applying the doctrine of
17 equitable estoppel to bar mechanic's liens to prevent fundamental unfairness
18 where (as here) the factual elements were met. *See Ware Supply Co.*, 246 Cal.
19 App. 2d at 406-08.; *A.A. Baxter Corp. v. Home Owners & Lenders*, 7 Cal. App. 3d
20 725, 733-35 (1970); *R. D. Reeder Lathing Co. v. Allen*, 66 Cal. 2d 373, 377-78
21 (1967)(recognizing that estoppel to assert mechanic's lien rights may be inferred
22 from the circumstances and conduct of the parties). ORC has not cited any legal
23 authorities to support its argument that these cases are superceded by Civil Code
24 § 3262.

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27 ⁵ These obligations include \$140,000,000 owed to the United States Department of
28 Transportation. [Adv. Proc. 10-90180-LA, ECF No. 59]

1 28. Further, ORC contends that the word “lien” in the Consent and
2 Agreement meant a “recorded lien” and did not mean an off-record or inchoate
3 lien. The argument ignores the definition of lien in California Civil Procedure
4 Code § 1180 which provides:

5 DEFINITION OF LIEN. A lien is a charge imposed
6 upon specific property, by which it is made security for
7 the performance of an act.

8 More importantly, ORC’s argument ignores realities of this case. WFB and SBX
9 could have obtained “recorded lien” information from the public records, and did
10 not need a representation from ORC to assure themselves there were no “recorded
11 liens.” However, the public records would not have revealed off-record liens
12 such as a mechanic’s lien which could not have been recorded by law, and which
13 might later ripen into a recorded lien with priority relating prior to May 22, 2003.
14 The obvious concern was with this off-record, or inchoate, lien claim – not
15 recorded liens. Since ORC was the only contractor yet hired – to both design and
16 build the Toll Road project – ORC’s representation that it had no “present claim”
17 or “lien” must be construed in this context to mean that it had no off-record or
18 inchoate lien on the project.

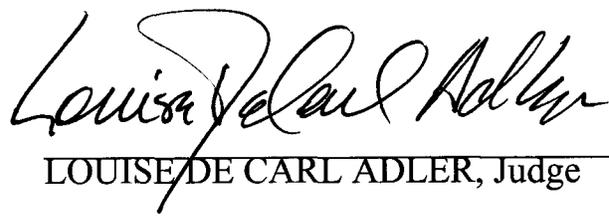
19 29. The Court also concludes that clear and convincing evidence estops
20 ORC from asserting that its lien release forms are void. It is uncontroverted that
21 ORC’s lien releases do not substantially conform with the statutorily-prescribed
22 lien release forms in Civil Code § 3262. [Ex. 322, 332, 366, 399 and 401]
23 However, it is also uncontroverted that ORC agreed it would submit lien release
24 forms substantially in the form attached as Appendix 10(c) to the Toll Road DBC.
25 [Ex. 276, at 276-0113, 276-0429] Instead, ORC submitted lien release forms with
26 minor language changes which ORC now contends rendered the lien releases void.
27 ORC obviously intended for SBX and WFB to rely upon these altered lien
28

1 releases, and it knew that SBX and ORC would indeed rely upon them to their
2 detriment (if void). It is fundamentally unfair for ORC to alter the agreed upon
3 statutorily-compliant form to a void form without alerting SBX or WFB, and then
4 to contend that these altered releases are void.

5 30. All Conclusions of Law that are Findings of Fact shall be deemed to
6 be Findings of Fact. A separate judgment will be entered on these Findings of
7 Fact and Conclusions of Law.

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Dated: 10 Nov 10



LOUISE DE CARL ADLER, Judge