

**SURFACE TRANSPORTATION BOARD**

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**FINANCE DOCKET NO. 35950**

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**JAMES LaMAR DUGAN; DUGAN PROFESSIONAL BUILDING AND RENTAL, LLC;  
DOCTORS DUGAN AND DUGAN, LLC; AND JAMES L. DUGAN, II'S  
REPLY AND OPPOSITION TO THE PETITION OF NORFOLK SOUTHERN  
RAILWAY COMPANY FOR DECLARATORY ORDER**

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James L. Dugan II.*

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TO THE PETITION OF NORFOLK SOUTHERN RAILWAY COMPANY FOR  
DECLARATORY ORDER**

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**INTRODUCTION**

James LaMar Dugan; Dugan Professional Building and Rental, LLC; Doctors Dugan and Dugan, LLC; and James L. Dugan, II (the “**Dugans**”), operate a dental office in Athens, Tennessee. The dental office is located adjacent to, and downhill from, a mainline railroad track owned and operated by Norfolk Southern Railway Company (the “**Railroad**”). In December 2014, the Dugans filed a Complaint in the Circuit Court for McMinn County, Tennessee based on the Railroad’s failure to clear and clogging of a drainage culvert which connects to a pipe that runs under the Dugans’ office. The Dugans have also sued the City of Athens and the Athens Utility Board. The Dugans’ Complaint is limited to claims involving land use, police powers of the state, and damage to the Dugans’ property resulting from the Railroad’s negligent clogging of and failure to clear the drainage way. Neither the Dugans’ common law claims nor the relief sought by the Dugans would have the effect of managing or governing rail transportation.

The Railroad cavalierly filed this Petition for Declaratory Order (the “**Petition**”) in an attempt to prevent the Dugans from pursuing claims involving actions that do not relate to the operation of a railroad. The Railroad’s Petition mischaracterizes the Dugans’ allegations in an effort to bring the Dugans’ claims within the preemption afforded by the Interstate Commerce Commission Termination Act, 49 U.S. § 10101 *et seq.* (“**ICCTA**”). Although the ICCTA

provides the exclusive remedies with respect to regulation of rail transportation, it does not give the Railroad a license to negligently conduct non-railroad activities and disregard the rights of adjoining landowners.

### BACKGROUND

James LaMar Dugan has been practicing dentistry at an office located at 1132 W. Madison Avenue, Athens, Tennessee, 37303 (the “**Property**”) since 1978. (Complaint<sup>1</sup> at ¶ 13; Dugan Sr. Declaration at ¶ 4<sup>2</sup>). His son, James Dugan II, joined the practice in 2000. (Compl. at ¶ 13; Dugan II. Declaration<sup>3</sup> at ¶ 3). The Property is adjacent to, and downhill from, a mainline railroad track owned and operated by the Railroad. (Compl. at ¶ 8; Dugan II. Declaration at ¶ 4). The Railroad owns and maintains a storm water culvert that has an inlet on the opposite side of the rail line from the Property which travels under the rail line and connects to a drainage pipe that runs under the Dugans’ Property. (Compl. at ¶ 15; Dugan II. Declaration at ¶ 4). The ownership of the pipe that connects to the Railroad’s culvert is currently in dispute.

In 2012, the Railroad clear cut vegetation on the property located above and on the opposite side of the rail line from the Dugans’ Property. (Compl. at ¶ 14; Dugan II. Declaration at ¶ 5). The Railroad negligently discarded and failed to remove the clear cut debris, allowing large logs, tree limbs, and debris to enter and clog the drainage infrastructure that extends to and

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<sup>1</sup> The Dugans’ original Complaint was filed on December 29, 2014. The Dugans have moved to amend the Complaint after every significant flood event since December 29, 2014 in order to allege the dates and effects of each event. While the Dugans’ motions to amend have not yet been heard by the McMinn County, Tennessee Circuit Court, the Railroad cites to the Dugans’ fourth proposed Amended Complaint in its Petition. The Dugans have since moved to again amend the Complaint and filed a fifth proposed Amended Complaint, which is attached to this brief as **Exhibit 1**. The Dugans cite to the most recent (fifth) proposed Amended Complaint for the purposes of this opposition brief. The Dugans will use the form “Compl. at ¶ \_\_\_\_” when referring to the fifth proposed Amended Complaint.

<sup>2</sup> Please find the Declaration of Dr. LaMar Dugan, Sr. attached to this brief as **Exhibit 2**.

<sup>3</sup> Please find the Declaration of Dr. James L. Dugan, II. attached to this brief as **Exhibit 3**.

under the Dugans' Property. (Compl. at ¶ 14; Dugan II. Declaration at ¶ 5). The Railroad failed to clear the drainage ditch and culvert in order to prevent or remove the accumulation of the discarded debris. (Compl. at ¶ 53). A picture of the debris that the Railroad allowed to accumulate around its culvert is attached to Dr. James L. Dugan, II's Declaration as Exhibit A. (Dugan II. Declaration at Ex. A).

Prior to the Railroad's clear-cutting of its property, the Dugans never experienced flooding on their Property. (Compl. at ¶ 16; Dugan Sr. Declaration at ¶ 7; Dugan II. Declaration at ¶ 6). Following the Railroad's clear-cutting of its property and negligent disposal of the clear-cut debris, the Dugans experienced substantial flooding events on their property. (Compl. at ¶ 16; Dugan II. Declaration at ¶¶ 7, 10, 13). The Dugans' Property now floods after every heavy rainfall. (Compl. at ¶¶ 37-38). The flooding causes water to pour out from under the crawl space of the Dugans' office building and through the mortar of the exterior bricks. (Compl. at ¶ 16; Dugan II. Declaration at ¶ 7). Pictures of the water pouring from the exterior bricks during a flood event are attached to Dr. James L. Dugan, II's Declaration as Exhibit B. (Dugan II. Declaration at Ex. B).

In January 2013, the Dugans experienced a substantial flooding of their office building. (Compl. at ¶ 16). In April 2013, the Dugans discovered that a large body of water had formed on the opposite side of the rail line from the Dugans' property. (Compl. at ¶ 19; Dugan II. Declaration at ¶ 8). Despite the Dugans' repeated requests for the Railroad to alleviate the problem, the Railroad refused to take any action. (Compl. at ¶¶ 31, 36; Dugan II. Declaration at ¶ 8, 12). In September 2013, the local utilities board dug a hole and pulled large tree limbs, logs, and debris from the pipe that runs underneath the Dugans' Property. (Compl. at ¶ 34; Dugan II. Declaration at ¶ 11). The debris contained obvious evidence of clear-cut vegetation. (Dugan II.

Declaration at ¶ 11). Pictures of some of the debris pulled from the pipe are attached to Dr. James L. Dugan, II's Declaration as Exhibit C. (Dugan II. Declaration at Ex. C).

As a result of the Railroad's negligent disposal of the clear-cut vegetation, and failure to maintain its culvert, the Dugans' office building has incurred substantial damages including: damages to the heating and air conditioning units, interior cracks developing on the walls, damage to the building's foundation, and damage to the building's ductwork and other aspects of the building. (Compl. at ¶ 37; Dugan II. Declaration at ¶ 13). The Dugans have since been forced to vacate the premises, as the flooding continues to occur. (Dugan II. Declaration at ¶ 14).

### **PROCEDURAL HISTORY**

Based on the previously-described actions and omissions of the Railroad, the Dugans filed a Complaint in the Circuit Court for McMinn County, Tennessee alleging nuisance, negligence, trespass, and injunctive relief against the Railroad. *See generally* (Compl.). The Complaint names the local municipality and utilities board as defendants in addition to the Railroad. (Compl. at ¶¶ 6, 7).

The claims asserted in the Dugans' Complaint are common law claims arising from: the Railroad's common law duties to maintain its culvert and properly remove and dispose of the clear-cut vegetation; the nuisance created by the Railroad's unreasonable use of its land and its creating of a hazardous condition based on its failure to remove and dispose of the clear-cut debris or properly clear its culvert; and the trespass of water upon the Dugans' property. *See generally* (Compl.)<sup>4</sup>. The acts and omissions complained of in the Dugans' Complaint do not

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<sup>4</sup> In the latest proposed Amended Complaint, the Plaintiffs have also asserted a claim for inverse condemnation. The Dugans had testing conducted and discovered that the water accumulating in the crawl space of their building contains high levels of contaminants; thereby, requiring the Dugans to completely vacate the office. (Compl. at ¶¶85-92).

involve the regulation of the Railroad or its operations; instead, the Dugans seek to hold the Railroad to the same standard of care as any other landowner in the State of Tennessee. *Id.*

At the invitation of the Railroad's attorney, the Dugans' counsel engaged in confidential discussions with the Railroad to explore the possibility of modifications to the Railroad's culvert (e.g., the addition of a self-cleaning grate) which might help alleviate the consistent flooding problems on the Dugans' Property. The Railroad then attached one such confidential communication to its Petition and asserted that the Dugans' claims "are preempted by ICCTA because they would have the effect of managing and unreasonably burdening rail transportation." (Petition at p. 8, Ex. D).

## ARGUMENT

### **I. The Board Should Decline to Exercise Jurisdiction Over the Claims at Issue.**

Under 5 U.S.C. § 554(e) and 49 U.S.C. § 721, the Board may issue a declaratory order to terminate a controversy or remove uncertainty. However, the Board has exclusive jurisdiction only over:

(1) Transportation by rail carriers, and the remedies provided in [ 49 USC §§ 10101 *et seq.*] with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and (2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State.

49 U.S.C. § 10501(b). State courts retain jurisdiction over state and local regulation "where it does not interfere with interstate rail operations, and localities retain certain police powers to protect public health and safety . . ." *City of Lincoln v. Lincoln Lumber Co.*, 2006 U.S. Dist. LEXIS 34287, at \*22 (D. Neb. 2006). As discussed below, the Dugans' claims exclusively involve matters that do not interfere with or unreasonably burden rail operations.

“[Q]uestions of federal preemption under 49 U.S.C. § 10501(b) can be decided by the Board or the courts.” *CSX Transportation, Inc. – Petition for Declaratory Order*, 2015 STB LEXIS 260, at \*5-6 (Surface Transp. Bd. July 31, 2015). Because the determination of “whether a state regulation is preempted ‘requires a factual assessment of whether that action would have the effect of preventing or unreasonably interfering with railroad transportation,’” courts are particularly well suited to determine issues of preemption when an associated lawsuit is pending. *Emerson v. Kan. City S. Ry. Co.*, 503 F.3d 1126, 1133(10th Cir. 2007) (quoting *CSX Transp., Inc. – Petition for Declaratory Order*, 2005 STB LEXIS 675, at \*3 (Surface Transp. Bd. May 3, 2005)).

“Because there is abundant case law addressing preemption of state and local claims involving railroad design, construction, and maintenance,” the Board has recently declined to issue a declaratory order on such issues. *CSX Transportation, Inc. – Petition for Declaratory Order*, 2015 STB LEXIS 260, at \*6. The Board is also reluctant to issue declaratory orders where a preemption determination “will likely depend on how the facts and circumstances [are] determined in the state court action.” *Id.* at \*11. The associated state court action in this case involves issues of disputed fact, and because there is abundant case law addressing the preemption analysis for the claims involved in this case, the Board should decline to issue a declaratory order and should allow the preemption determination to be made by the Circuit Court for McMinn County, Tennessee.

**II. Alternatively, the Board Should Order that the Dugans’ Claims are Not Preempted by the ICCTA.**

If the Board chooses to issue a declaratory order, it should find that the Dugans’ claims are not preempted by 49 U.S.C. § 10501(b). The Dugans’ claims against the Railroad do not unreasonably burden interstate commerce or interfere with rail transportation; rather, the

Dugans' claims seek redress for tortious acts by a landowner who just happens to be a railroad company. The ICCTA states that “[e]xcept as otherwise provided in this part, the remedies provided under this part with respect to *regulation of rail transportation* are exclusive and preempt the remedies provided under Federal or State law.” 49 U.S.C. § 10501(b) (emphasis added). Under § 10501(b), “the preemptive force of the ICCTA extends only to the regulation of rail ‘transportation,’” which includes, “a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both . . .” *City of Lincoln v. Lincoln Lumber Co.*, 2006 U.S. Dist. LEXIS 34287 at \*22; 49 U.S.C. § 10102(9).

The Board has held that there are “two broad categories of state and local actions [that are] preempted regardless of the context or rationale for the action.” *CSX Transp., Inc. – Petition for Declaratory Order*, 2005 STB LEXIS 675 at \*5. The first category is “any form of state or local permitting or preclearance that, by its nature, could be used to deny a railroad the ability to conduct some part of its operations or to proceed with activities that the Board has authorized.” *Id.* The second category preempts any “state or local regulation of matters directly regulated by the Board – such as the construction, operation, and abandonment of rail lines . . .” *Id.* at \*\*5-6.

“State and local actions may also be preempted ‘as applied’ – that is, only if they would have the effect of unreasonably burdening or interfering with rail transportation.” *Buddy and Holley Hatcher – Petition for Declaratory Order*, 2012 STB LEXIS 355, at \*9 (Surface Transp. Bd. Sept. 19, 2012). “In addition, state and local action is preempted where . . . a state or local law ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’” *Id.* at \*\*9-10. “[W]hether a state regulation is preempted ‘requires a factual assessment of whether that action would have the effect of preventing or unreasonably

interfering with railroad transportation.” *Emerson v. Kan. City S. Ry. Co.*, 503 F.3d at 1133 (quoting *CSX Transp., Inc.* 2005 STB LEXIS 675 at \*3).

The Board itself recognizes the limits of ICCTA preemption, and has held, “Federal preemption does not completely remove any ability of state or local authorities to take action that affects railroad property. To the contrary, state and local regulation is permissible where it does not interfere with interstate rail operations, and localities retain certain police powers to protect public health and safety . . .” *City of Lincoln v. Lincoln Lumber Co.*, 2006 U.S. Dist. LEXIS 34287 at \*22.

In sum, the ICCTA only preempts state or local actions that “would have the effect of preventing or unreasonably interfering with railroad transportation.” *Emerson*, 503 F.3d at 1133. State and local governments retain police powers to protect public health and safety. Although the actions complained of in the Dugans’ Complaint may incidentally relate to railroad property, the Dugans’ claims would not interfere with or unreasonably burden railroad transportation; thus, the claims are not preempted.

**A. The ICCTA does not preempt state action relating to a railroad’s disposal of maintenance byproducts.**

The Dugans’ Complaint alleges that the Railroad negligently disposed of and failed to remove debris after it clear-cut vegetation on its property in 2012. (Compl. at ¶ 14). Prior to the 2012 clear-cutting, the Dugans never experienced flooding. (Dugan II. Declaration at ¶ 6; Dugan Sr. Declaration at ¶ 7). The Railroad’s negligent disposal and failure to clear and remove the byproducts of its vegetation-maintenance in 2012 resulted in large logs, tree limbs, and other debris entering and clogging the drainage infrastructure that extends to and under the Dugans’ Property. (Compl. at ¶ 14; Dugan II. Declaration at Ex. A, C). In its Petition, the Railroad attempts to recast the Dugans’ claims as an attempt to regulate the Railroad’s vegetation control.

(Petition at pp. 9-10). However, the Dugans' claims are not based on the fact that the Railroad clear-cut its property; instead, the Dugans' claims are based on the fact that the Railroad failed to remove and properly dispose of the clear-cut debris. (Compl. at 53).

As the Railroad has pointed out in its Petition, 49 C.F.R. § 213.37 provides that:

Vegetation on railroad property which is on or immediately adjacent to roadbed shall be controlled so that it does not -- (a) Become a fire hazard to track-carrying structures; (b) Obstruct visibility of railroad signs and signals:(1) Along the right-of-way, and (2) At highway-rail crossings; . . . (c) Interfere with railroad employees performing normal trackside duties; (d) Prevent proper functioning of signal and communication lines; or (e) Prevent railroad employees from visually inspecting moving equipment from their normal duty stations.

49 C.F.R. § 213.37. The Railroad asks the Board to broadly interpret this regulation to preempt claims for any railroad activities involving vegetation, including the removal and disposal of clear-cut byproducts. (Petition at pp. 9-11). However, courts and the Board have been unwilling to give § 213.37 such a broad reading.

In *Emerson*, the plaintiff landowners sued a railroad, alleging trespass, nuisance, negligence, and other state law claims after the railroad “improperly discarded railroad ties and *vegetation debris*” which resulted in “a gradual build-up of sediment in the drainage ditch and in the flooding of the Landowners’ property on a number of occasions.” 503 F.3d at 1128. The railroad argued that the plaintiffs’ state law claims were preempted by the ICCTA. *Id.* at 1128. The Tenth Circuit Court of Appeals disagreed. *Id.* at 1134.

First, the Tenth Circuit held that “the ICCTA does not expressly preempt the generally applicable state common law governing the Railroad’s disposal of waste and maintenance of the ditch.” *Id.* at 1130. The court further held, “[w]e do not think that a generally applicable state law regulating the disposal of detritus, or maintenance of vegetation, collides with the Federal scheme of economic regulation or deregulation.” *Id.* at 1131. Because “no ICCTA provision

gives the STB authority to dictate how the Railroad should dispose of detritus or maintain drainage ditch vegetation” and because state remedies would not “adversely affect the economic aspects of the Railroad’s operations subject to STB control,” the Tenth Circuit found that the plaintiffs’ state law claims were not categorically preempted or preempted “as applied.” *Id.*

The Tenth Circuit also refused to hold that the plaintiffs’ state law claims were preempted under a conflict-preemption analysis. Because the conflict preemption analysis “requires a factual assessment of whether the action would have the effect of preventing or unreasonably interfering with railroad transportation,” the Tenth Circuit found that “a factual assessment must be made as to whether requiring the Railroad to remedy the injury claimed by the Landowners would have the effect of preventing or unreasonably interfering with railroad transportation.” *Id.* at 1133.

The *Emerson* analysis applies to the Dugans’ claims. The Railroad’s Petition summarily dismisses the *Emerson* decision as “easily distinguishable.” (Petition at p. 10). The Railroad implies that *Emerson* involved only the discarding of old railroad ties; the Railroad blatantly ignores the allegations in the *Emerson* case regarding disposal of vegetation debris. *Id.* The Railroad’s petition never acknowledges that the *Emerson* complaint specifically requested that “dead trees, vegetation, and debris [be] removed from the drainage ditch on a regular basis.” 503 F.3d at 1134. The *Emerson* holding was not limited to the discarding of railroad ties; rather, the court explicitly held, “[w]e do not think that a generally applicable state law regulating the *disposal of detritus, or maintenance of vegetation*, collides with the Federal scheme of economic regulation or deregulation.” *Id.* at 1131. (emphasis added). Accordingly, the Railroad’s attempt to distinguish *Emerson* is misplaced.

The Board has cited the *Emerson* decision with approval, and takes a similar approach to the issues that *Emerson* involved. See *City of Milwaukie – Petition for Declaratory Order*, 2013 STB LEXIS 100 (Surface Transp. Bd. March 20, 2013). In *City of Milwaukie*, the petitioner City requested the Board to issue a declaratory order declaring that two municipal regulations were not preempted and, therefore, were enforceable against a railroad. *Id.* at \*2. The regulation most relevant to this case prohibited “scattering rubbish.” *Id.* In declining to declare that the regulation is preempted, the Board noted, that “[t]he fact that a railroad is performing rail transportation authorized by the Board is not a license for railroads to take, or neglect to take, whatever actions they may want to take in performing their operations.” *Id.* at \*8. Rather than issuing a declaratory order, the Board held, “it is appropriate for the state or municipal court applying state law to resolve the parties’ underlying property dispute.” *Id.* at \*12.

In *Cities of Auburn & Kent, WA – Petition for Declaratory Order – Burlington N. R.R. Co. – Stampede Pass Line*, 2 S.T.B. 330, (Surface Transp. Bd. July 1, 1997), the Board provided examples of permissible state regulation:

[T]here are areas with respect to railroad activity that are reasonably within the local authorities' jurisdiction under the Constitution. ***For example, even in cases where we approve a construction or abandonment project, a local law prohibiting the railroad from dumping excavated earth into local waterways would appear to be a reasonable exercise of local police power . . .*** The railroad also could be required to bear the cost of disposing of the waste from the construction in a way that did not harm the health or well being of the local community. We know of no court or agency ruling that such a requirement would constitute an unreasonable burden on, or interfere with, interstate commerce. Therefore, such requirements are not preempted.

*Id.* at \*19-20. Based on the Board’s holding that a local or state law prohibiting a railroad from dumping excavated earth into local water ways is not preempted, there is no reason that a railroad cannot be held accountable for dumping clear-cut vegetation into a drainage way.

As the foregoing authorities demonstrate, the Dugans' claims regarding the Railroad's disposal and failure to clear vegetation debris are not preempted by the ICCTA. The Railroad's self-serving affidavits do not invoke preemption. While the Railroad claims that it "conducted the related clearance of vegetation debris, in order to control vegetation that could impair rail operations, track safety, track integrity, and track visibility," (Petition at Exhibit C, p. 5), the Railroad does not assert that it conducted clearance of the vegetation debris on the portions of its property outside of the immediate area of the tracks. Indeed, the large amount of debris pulled from the pipe under the Dugans' property indicates that the Railroad failed to remove the clear-cut vegetation from the drainage way. (Dugan II. Declaration at ¶ 11, Ex. C). The Railroad has failed to explain how expecting it to prudently remove debris from its drainage way would unreasonably interfere with railroad transportation. Nor does the Railroad explain how a claim based on its negligence in failing to remove debris from the drainage way is preempted by the ICCTA. "The fact that a railroad is performing rail transportation authorized by the Board is not a license for railroads to take, or neglect to take, whatever actions they may want to take in performing their operations. *City of Milwaukie – Petition for Declaratory Order*, 2013 STB LEXIS 100 at \*8. Accordingly, the ICCTA does not preempt the Dugans' claims for damages resulting from the Railroad's failure to properly clear and dispose of the byproducts of its vegetation removal.

**B. The ICCTA does not preempt state action based on a Railroad's negligent maintenance of a drainage way.**

The Dugans' Complaint alleges that the Railroad's "efforts to clean and/or maintain the drainage infrastructure, drainage culverts, pipes and structures have been unreasonable, inadequate, insufficient, ineffective, negligent and/or grossly negligent." (Compl. at ¶ 58). To be clear, the Dugans' allegations regarding improper maintenance of the drainage culvert stem

from the Railroad's failure "to take action to alleviate impediments to drainage in the affected area," namely, the large amount of vegetation and debris the Railroad allowed to enter and clog the culvert. (Compl. at ¶ 60). The Railroad takes the position that it has *carte blanche* to maintain or not maintain the culvert without regard to the rights of its neighbors because the culvert is "necessary for NSR to maintain the Athens Track." (Petition at pp. 11-13). Neither the courts nor the Board have been willing to support such an expansive reading of the ICCTA.

*i. A request for injunctive relief does not require a finding of preemption.*

The Railroad's argument for preemption of the Dugans' negligent-maintenance-of-culvert claim can be summarized as follows: one sentence in the original complaint and one confidential settlement letter from the Dugans' counsel request the Railroad to make repairs of its culvert, therefore the Dugans are attempting to regulate railroad transportation. This argument is not supported by the facts of this case or existing precedent.

The Dugans' original Complaint requested both monetary damages and an injunction "requiring Defendants to repair, reconstruct, and redirect the drainage culvert." (Petition at Exhibit A, p. 15). The Dugans have since moved to amend the Complaint to, among other things, remove the request for injunctive relief and allege inverse condemnation. (Compl. at pp. 17-18). Although the Dugans now seek monetary damages from the Railroad and damages arising from inverse condemnation, the original request for injunctive relief, alone, does not warrant a finding of preemption.

In *Emerson*, the plaintiffs' complaint "asked for actual and punitive damages, **abatement and remediation**, and other relief." 503 F.3d at 1134 (emphasis added). The plaintiffs also stated in an interrogatory response that "additional culverts or a railroad bridge/trestle should be installed to allow the unimpeded flow of surface storm water . . ." *Id.* The district court found

that the requests for injunctive relief required a finding of preemption. *Id.* The Tenth Circuit reversed, holding that the request for injunctive relief “was nothing more than a wish for a remedy that [the plaintiffs’] would like to obtain.” *Id.*

Similarly, in this case the request for injunctive relief in the Dugans’ original complaint was “nothing more than a wish for a remedy . . .” *Id.* The Dugans have since moved to remove the request from their Complaint. (Compl. at pp. 17-18). Regarding the letter attached as Exhibit D to the Railroad’s Petition, the letter was merely one component of an ongoing discussion between the parties’ counsel regarding potential informal solutions to the issues on the Dugans’ property. This letter was never intended to attempt to instruct the Railroad on the steps that would need to be taken to prevent further flooding; instead, it was a good faith effort by the Dugans to amicably resolve their claims. It now appears that the Railroad may have had an ulterior motive in inviting the discussions. The letter attached hereto as **Exhibit 4** explains the context under which Exhibit D to the Petition was sent. Regardless, the now-removed request for injunctive relief does not require a finding of preemption. *See Emerson*, 503 F.3d at 1134. Additionally, the Dugans are now only seeking monetary damages.

*ii. The Dugan’s claims based on the Railroad’s failure to maintain its culvert are not preempted.*

In *Emerson*, the Tenth Circuit addressed whether the ICCTA preempts a claim for maintenance of a railroad’s drainage ditch. 503 F.3d at 1129-30. The court held, “[w]e do not think that the plain language of this statute can be read to include the conduct that the Landowners complain of here -- . . . failing to maintain that ditch.” *Id.* at 1130. The court further held that “no ICCTA provision gives the STB authority to dictate how the Railroad should . . . maintain drainage ditch vegetation.” *Id.* at \*1132. Failure to maintain and remove vegetation

from a drainage ditch is precisely the conduct that the Dugans are complaining about here. (Compl. at ¶ 53). Based on the *Emerson* analysis, there is no preemption of such claims.

In a recent decision, the Third Circuit addressed whether a plaintiff's common law claims for damages caused by inadequate construction and maintenance of railroad drainage were preempted by the Federal Railroad Safety Act ("FRSA"). *MD Mall Assocs., LLP v. CSX Transp., Inc.*, 715 F.3d 479 (3rd Cir. Apr. 30, 2013). The court's preemption analysis is instructive to the issues in this case. In *MD Mall*, the plaintiff alleged that inadequate construction and maintenance of a railroad's drainage ditch and an earthen berm allowed water runoff and debris from CSX's property to flow onto the plaintiff's property. *Id.* at 483-84. CSX argued that the claims were preempted by the FRSA. *Id.* at 485. The Third Circuit disagreed, holding that it could not read a regulation's silence "on a railroad's duties to its neighbors when addressing track drainage as an express abrogation of state storm water trespass law." *Id.* at 491. Instead, the Third Circuit held that courts "must take a sensible view of the FRSA's preemption provision, avoiding the carte lance ruling the railroad seeks. Longstanding state tort and property laws exist for a reason, and the FRSA's laudatory safety purpose should not be used as a cover to casually cast them aside." *Id.* at 493. Indeed, "if CSX is free to negligently discharge its storm water onto its neighbor's property, why should it not be allowed to do so intentionally? It might simplify CSX's duties . . . if it could simply install drainage pipes that empty directly onto adjoining properties." *Id.* at 494.

The Third Circuit's persuasive reasoning is applicable to this case. Courts and the Board must take a "sensible view" of the ICCTA's preemption provision. The Railroad argues that drainage control measures are necessary to protect track safety and, therefore, the Railroad is effectively shielded from any state law claims touching on the substance of drainage control,

regardless of whether the Railroad negligently maintains the drainage to the detriment of its neighbors. (Petition at pp. 11-13). As the Third Circuit pointed out, if such an argument is accepted, then the Railroad would be free to negligently, or even intentionally, disregard its duties to its neighbors when addressing track drainage. *MD Mall Assocs., LLP v. CSX Transp., Inc.*, 715 F.3d at 494. That simply cannot be the case. “The fact that a railroad is performing rail transportation authorized by the Board is not a license for railroads to take, or neglect to take, whatever actions they may want to take in performing their operations.” *City of Milwaukee – Petition for Declaratory Order*, 2013 STB LEXIS 100 at \*8.

Like the Third and Tenth Circuits, the Board has also been unwilling to find preemption of state law claims simply because the claims touch upon a railroad’s maintenance of its drainage infrastructures. In *CSX Transportation, Inc. – Petition for Declaratory Order*, 2015 STB LEXIS 260 (Surface Transp. Bd. July 31, 2015), the Board addressed a similar situation to the one at issue. In that decision, a mobile home park alleged that CSX failed to maintain a culvert which “resulted in the culvert filling up with sediment, rocks, and debris.” *Id.* at \*3. The park alleged that “as a result of CSXT’s failure to maintain the berm and culvert . . . [the park’s] infrastructure, water and sewer pipes, and concrete pad sites, as well as 67 mobile homes, were destroyed.” *Id.* at \*\*3-4. The park’s complaint sought an injunction, as well as damages for negligence, trespass, nuisance, and inverse condemnation. *Id.* at \*4. CSX sought a declaratory order from the Board that the park’s claims were preempted. *Id.* at \*\*4-5.

The Board declined to issue a declaratory order and noted that “§ 10501(b) preemption does not apply to state or local actions taken under their retained police powers, as long as they do not unreasonably interfere with railroad operations or the Board’s regulatory programs.” *Id.* at \*\*1, 9. If state law claims are preempted by the ICCTA simply because they involve a railroad’s

maintenance of its culvert, as the Railroad argues, the Board could have easily issued a declaration of preemption in the *CSX* case. Instead, the Board held that the preemption analysis “will likely depend on how the facts and circumstances as determined in the state court action fit within” existing precedent and declined to issue an order. *Id.* at \*11.

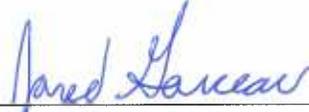
Here, the Railroad has ignored its responsibilities as a landowner by allowing its drainage culvert to become clogged with clear-cut vegetation and debris. (Dugan II. Declaration at Ex. A, C). The *Emerson* court made clear that the ICCTA does not categorically preempt claims involving a railroad’s maintenance of a drainage way, and that “no ICCTA provision gives the STB authority to dictate how the Railroad should . . . maintain drainage ditch vegetation.” 503 F.3d at 1132. Accordingly, the Railroad must show that a state claim allowing damages for the Railroad’s negligent maintenance of its drainage way would unreasonably interfere with rail transportation. The Railroad has failed to do so. “The fact that a railroad is performing rail transportation authorized by the Board is not a license for railroads to take, or neglect to take, whatever actions they may want to take in performing their operations.” *City of Milwaukie – Petition for Declaratory Order*, 2013 STB LEXIS 100 at \*8. Further, just because “maintenance is an integral part of running a railroad” does not mean that “*any* state or local regulation of such maintenance or disposal of maintenance byproducts is necessarily preempted.” *Emerson*, 503 F.3d at 1134. (emphasis in original). The Railroad cannot be permitted to hide behind the ICCTA’s preemption provision for the purpose of preventing the Dugans’ from recovering any damages for the Railroad’s negligent maintenance of its drainage way.

### CONCLUSION

For the reasons set forth herein, the Dugans request that the Board decline to issue a declaratory order and leave the determination to the Circuit Court for the McMinn County, TN.

In the alternative, the Dugans request that the Board issue a declaratory order finding that the Dugans' claims are not federally preempted and provide the Dugans with any other relief the Board deems appropriate.

Respectfully submitted this the 17<sup>th</sup> day of August, 2015.



\_\_\_\_\_  
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*Attorneys for the Dugans*

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was mailed, first class, postage prepaid to:

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James A. Hixon  
John M. Scheib  
Aarthy S. Thamodaran  
Norfolk Southern Railway Co.  
Three Commercial Place  
Norfolk, VA 23510  
(757) 629-2831

This the 17<sup>th</sup> day of August, 2015.



IN THE CIRCUIT COURT FOR MCMINN COUNTY, TENNESSEE

JAMES LaMAR DUGAN, individually )  
and on behalf of DUGAN )  
PROFESSIONAL BUILDING AND )  
RENTAL, LLC; DUGAN )  
PROFESSIONAL BUILDING )  
RENTAL, LLC, DOCTORS DUGAN )  
AND DUGAN, LLC; and JAMES L. )  
DUGAN, II )

No.: 2014-CV-258

Plaintiffs/Petitioners, )

v. )

CITY OF ATHENS, TENNESSEE, )  
ATHENS UTILITY BOARD, and )  
NORFOLK SOUTHERN RAILWAY )  
COMPANY f/k/a SOUTHERN )  
RAILWAY COMPANY, )

Defendants. )

**FILED**

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AUG 13 2015

RHONDA J. COOLEY  
CIRCUIT COURT CLERK  
BY g D.C.

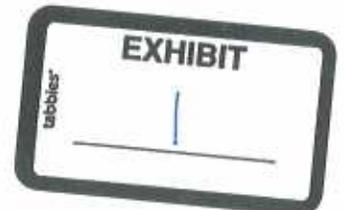
**PLAINTIFFS' FIFTH MOTION FOR LEAVE TO AMEND  
AND SUPPLEMENT COMPLAINT**

Pursuant to Rules 8.01 and 15.01 of the Tennessee Rules of Civil Procedure, Plaintiffs move this Honorable Court for leave to amend their Complaint. As grounds for this motion, Plaintiffs state the following:

1. Written discovery has just begun; no depositions have been taken; Defendants will not be prejudiced by this amendment as no trial is set. Attached hereto as Exhibit A is Plaintiffs' proposed Fifth Amended Complaint.

2. Plaintiffs seek to add Paragraph 38(d) to read as follows:

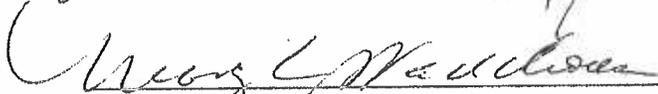
38 (d). On July 1, 2015, and continuing thereafter, Plaintiffs experienced significant and substantial flood events which caused additional damage.



3. Plaintiff further seek to add new Paragraphs 40 through 51, additional assertions in Paragraphs 39, 53, 54, 63 and to assert a claim for Inverse Condemnation found at Paragraphs 85 through 92, with additional relief sought in the Prayer for Relief.
4. In addition, Plaintiff seek to increase their ad damnum clause to Three Million Dollars (\$3,000,000.00) and remove their request for injunctive relief.
5. Plaintiffs adopt by reference their previously filed and pending Motions to Amend and Supplement the Complaint filed on December 29, 2014, January 13, 2015 and February 18, 2015, and April 22, 2015.

WHEREFORE, THE PREMISES CONSIDERED, Plaintiffs pray that this Honorable Court will grant Plaintiffs' motion for leave to amend their complaint and file the proposed Fifth Amended Complaint attached hereto as Exhibit A.

  
John J. Britton, BPR #009907 *in person*

  
Mary Ann Stackhouse, BPR #017210

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Attorneys for Plaintiffs

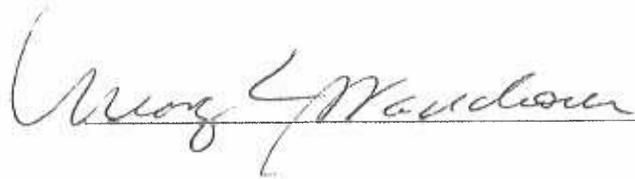
**CERTIFICATE OF SERVICE**

I hereby certify that on the 13<sup>th</sup> day of Aug, 2015, a copy of the foregoing has been delivered to all counsel for parties at interest in this cause by placing a copy of same in the United States mail, postage prepaid, in a properly addressed envelope, or by delivering same to each such attorney as follows:

Hand     John W. Baker, Jr., Esquire  
 Mail     Baker, O'Kane, Atkins &  
 Fax       Thompson, PLLP  
 Fed X     2607 Kingston Pike, Suite 200  
 EFS       P.O. Box 1708  
                 Knoxville, TN 37901-1708

Hand     John T. Batson, Jr., Esquire  
 Mail     Watson, Roach, Batson, Rowell  
 Fax       & Lauderback, P.L.C.  
 Fed X     900 S. Gay Street, Suite 1500  
 EFS       P. O. Box 131  
                 Knoxville, TN 37901-0131

Hand     Bridget J. Willhite, Esquire  
 Mail     Carter, Harrod & Willhite, PLLC  
 Fax       P. O. Box 885  
 Fed X     Athens, TN 37371-0885  
 EFS

  
\_\_\_\_\_



## FIFTH AMENDED AND SUPPLEMENTAL COMPLAINT

Plaintiffs/Petitioners (hereinafter “Plaintiffs”), bring this action pursuant to Tennessee common law, temporary nuisance, inverse condemnation, the Tennessee Governmental Tort Liability Act, Tenn. Code Ann. § 29-20-101, et seq., and the special duty exception to the public duty doctrine. For Plaintiffs’ causes of action against Defendants, Plaintiffs show to the Court as follows:

1. Plaintiff James LaMar Dugan, Sr., is a citizen and resident of McMinn County, Tennessee, and the sole member of Dugan Professional Building and Rental, LLC (hereinafter “Dugan LLC”). Plaintiff James LaMar Dugan, Sr., files this action on behalf of himself individually, as an owner of the Property (described below), as the sole member of Dugan LLC, and on behalf of Dugan LLC, whose current status is inactive-terminated as of April 21, 2014. As the sole member, Plaintiff James LaMar Dugan, Sr., has the right to assert the rights and claims of Dugan LLC. Tenn. Code Ann. § 48-249-614. Plaintiff Dugan Sr. has an interest in Doctors Dugan and Dugan, LLC.

2. Plaintiff Dugan Professional Building and Rental, LLC (hereinafter “Dugan LLC”) was a limited liability corporation organized under the laws of the State of Tennessee, whose principal place of business was located in Athens, McMinn County, Tennessee, who was in existence during certain material times referenced in this complaint. Plaintiff Dugan LLC is the owner of property and improvements, (hereinafter “the Property”) including, *inter alia*, a dental office, commonly known as 1132 W. Madison Avenue, Athens, Tennessee 37303, where Doctors Dugan and Dugan, LLC, practice dentistry. The Property is more particularly described in the deed book found at Book 19N, Page 195, in the office of the McMinn County Register of Deeds.

3. Plaintiff Doctors Dugan and Dugan, LLC, (hereinafter, "Doctors LLC"), practice dentistry in the office building on the Property, are tenants, and have a possessory interest, leasehold interest and business interest in the Property.

4. Plaintiff James L. Dugan, II is a citizen and resident of McMinn County, Tennessee, has an interest in said Property, an interest in the equipment of the dentistry practice, and an interest in Doctors Dugan and Dugan, LLC.

5. Plaintiffs bring this action on behalf of themselves, as property owners, as business owners, and as persons with interests in Dugan LLC and Doctors LLC.

6. The City of Athens (hereinafter "the City") is a municipality located in McMinn County, Tennessee and at all times material to this litigation was the owner of and in actual possession and/or in control of drainage structures and facilities and had access to easements used for drainage purposes. At all times herein material, the City controlled and had a duty to maintain various drainage structures and facilities, and was responsible for the original construction, modifications, and maintenance of drainage structures and facilities. Service of process is requested upon the City by service on Hal Buttram, the City Mayor, Mitchell B. Moore, the City Manager, each at the principal offices of the City as identified in the caption, and upon Chris Trew, the City Attorney, at his offices as identified in the caption.

7. The Athens Utility Board (hereinafter "AUB") is a utility board and district located in McMinn County, Tennessee, and at all times material to this litigation was the owner of and in actual possession and/or in control of drainage structures and facilities and had access to easements used for drainage purposes. At all times herein material, the Athens Utility Board controlled and had a duty to maintain various drainage structures and facilities, and was responsible for the original construction, modifications, and maintenance of drainage structures and facilities. Service of process is requested upon the Athens Utility Board by service on Eric

Newberry, the General Manager, at the principal offices of the Athens Utility Board as identified in the caption.

8. Norfolk Southern Railway Company, formerly known as Southern Railway Company, (hereinafter "the Railroad") is a for-profit foreign corporation and the owner of land *above* Plaintiffs' property, in McMinn County, Tennessee. Service of process is requested upon Norfolk Southern Railway Company through its registered agent as identified in the caption.

9. The purpose of the drainage structures and facilities owned and/or controlled and/or maintained by the City of Athens and the Athens Utility Board is to channel and direct water runoff and stormwater runoff in a manner that will not cause damage to the property of City residents and property owners and not cause personal injury to the residents.

10. Plaintiff James LaMar Dugan, Sr., acquired the Property in 1977, and built the improvement, the dental office, in 1978, where he has been practicing dentistry continuously since that time.

11. The City of Athens' engineers, planners and planning commission approved the location of the building and improvements on the Property.

12. The Plaintiff Dugan LLC, acquired the Property and improvements, including, *inter alia*, a dental office, located at 1132 W. Madison Avenue, Athens, Tennessee, 37303, on/about July 2, 2012, and has owned it continuously since that time.

13. James LaMar Dugan has been practicing dentistry on the Property since 1978. James Dugan II has been practicing dentistry on the Property since 2000. The Plaintiff Doctors LLC has been practicing dentistry on the Property since 2006.

14. In the 2012, the Railroad clear cut property located above and on the opposite side of the rail line from the Plaintiffs' Property, without regard to its foreseeable effect on Plaintiffs' Property and/or business; the Railroad negligently failed to remove the clear cut debris, allowing

the debris to clog the drainage infrastructure and/or stormwater culvert that extended to and under Plaintiffs' property.

15. On information and belief, it is alleged that the Railroad owns and operates a stormwater culvert that is intended to drain stormwater runoff. This stormwater culvert's inlet is on the opposite side of the rail line from the Property, and the stormwater culvert travels under the rail line, across the Property and joins a stormwater system drainage infrastructure in the right of way of State Highway 39/W. Madison Avenue.

16. In January 2013, Plaintiffs experienced a flooding event underneath the building on the Property such that water poured out from under the crawl space of the building and through the mortar. Prior to the Railroad's clear cutting on the opposite side of the rail line from the Property, the Property had experienced no flooding.

17. Plaintiffs inspected their building for water pipe leaks, and found none.

18. Flood events continued to occur.

19. In April, 2013, Plaintiffs discovered that when the Defendant Railroad had clear cut the property located above and on the opposite side of the rail line from the Plaintiffs' Property, a body of water had formed on the Railroad's property.

20. In April, 2013, Plaintiffs contacted the Defendant Railroad, but, received no immediate response.

21. On May 6, 2013, Plaintiffs contacted the City of Athens. City employee Harvel Henry came to the property.

22. The City indicated that the drainage infrastructure, which ran from the property where the Railroad had clear cut and under Plaintiff's Property, was clogged, but the City took no action, and has continued, to this day, to take no action, allowing the defective condition to exist and persist, allowing the flooding events to continue and cause damage to Plaintiffs.

23. The Athens Utility Board was contacted.
24. On information and belief, it is alleged that the drainage infrastructure is owned, operated and maintained by the City and/or AUB.
25. On or about May 6, 2013, the Athens Utility Board conducted some bush-hogging.
26. On May 7, 2013, the City, through City employee Shawn Lindsey, refused to respond further.
27. On May 8, 2013, contact was made with the Railroad.
28. On May 10, 2013, the Railroad conducted additional clearing and dug a trench in the middle of the swell on the property on the opposite side of the rail line from the Plaintiffs' Property.
29. Flood events on Plaintiffs' property continued to occur.
30. Plaintiffs continued to complain to Defendants.
31. On August 7 and 13, 2013, Defendants Railroad and AUB inspected but took no corrective action.
32. On August 19, 2013, AUB marked places in the parking lot but took no corrective action.
33. During the last week of August, 2013, a flood event occurred on Plaintiffs' property.
34. On September 11, 2013, AUB came to the Property, dug a hole and gave the appearance of cleaning out the drainage pipe.
35. On September 11, 2013, AUB performed this work negligently.
36. On October 24, 2013, the Railroad came out to the Property but took no corrective action to alleviate the flooding.

37. Since September 11, 2013, Plaintiffs have experienced flood events on or about the following dates: November 5, 2013; November 26, 2013; November 27, 2013; December 9, 2013; February 21, 2014; April 7, 2014; April 28, 2014; June 2 through 5, 2014; June 29, 2014; June 30, 2014; July 21, 2014. During these flood events, it is common for the water to pour out from the crawl space of the building and mortar; the hearing and air conditioning units were damaged, failed to work, and had to be repaired on multiple occasions; a horrible smell filled up the dental office; interior cracks developed on the walls; the foundation has been damaged; the duct work has been damaged.

38. On June 30, 2014, Plaintiff experienced a significant and substantial flood event where the water poured out of the crawl space, came out the mortar, and flooded the air conditioning units.

38 (a). On December 23/24, 2014, Plaintiffs experienced a significant and substantial flood event where the water poured out of the crawl space, came out the mortar, and flooded the air conditioning units, which caused additional damage.

38(b). On January 3 and 4, 2015, Plaintiffs experienced another significant and substantial flood event which caused additional damage.

38 (c). On March 10, 2015, Plaintiffs experienced a significant and substantial flood event where the water poured into the crawl space, which caused additional damage.

38 (d). On July 1, 2015, and continuing thereafter, Plaintiffs experienced significant and substantial flood events which caused additional damage.

39. This flooding has damaged the foundation of the building, the air conditioning units and the duct work in the crawl space under the building, and other aspects of the building.

40. Upon information and belief, as a result of the clog in the drainage pipe, there are now large amounts, and higher-than-normal, levels of groundwater moving through the Property's soil and flooding the Property.

41. On or about January 30, 2015, a sewer main owned, controlled, and maintained by AUB and the City, and located behind and above the Plaintiffs' building, experienced a "stop up" from which an overflow resulted.

42. The resulting overflow caused a foul odor to fill the air inside and outside of the Plaintiff's building.

43. The overflow necessitated an AUB crew to go to the source of the "stop up" to clear the clog.

44. AUB employees proceeded to spread lime on the ground near the 'main' to reduce the odor.

45. In early July 2015, stormwater rose above and covered said sewer main located behind and above the Plaintiffs' building; water poured out of the crawl space and mortar of Plaintiffs' building during this flood event; the Plaintiffs had tests performed on the water that poured out of the crawl space and mortar of their building during this flooding event. The tests have revealed that the water contains high levels of contaminants.

46. Upon information and belief, the source of the contaminated water in and under the Plaintiff's property is the overflow that resulted from the "stop up" of the City/AUB's sewage main.

47. Upon information and belief, since January 30, 2015, heavy rainfalls have caused the overflowed materials to slowly wash down towards the Railroad's storm water grate.

48. Upon information and belief, the substantial rainfalls during the month of July 2015 caused the overflowed materials to enter the Railroad's storm water grate and make their way into the pipe that runs underneath the Plaintiff's building.

49. Upon information and belief, the clog in the pipe that run's underneath the Plaintiff's property, which was caused by the negligent actions of the City, AUB, and/or the Railroad, has caused contaminated water to force its way up into the Plaintiff's building and onto the Plaintiff's property. Following receipt of the test results showing contamination in the water pouring out of the Plaintiff's building, the Plaintiffs closed their office on July 23, 2015 and began preparations for constructing a temporary office.

49. The closure of the Plaintiff's office has resulted in substantial losses to the Plaintiffs, including, but not limited to, lost profits, moving expenses, expenses incurred in setting up a temporary office, and equipment costs.

50. Defendants' acts constitute actual occupation of Plaintiffs' property.

#### **Nuisance, Negligence, and Trespass**

51. The allegations set forth above are incorporated by reference.

52. Plaintiffs allege that this repeated flooding is a repeated temporary nuisance.

53. On information and belief, Plaintiffs allege that the drainage pipe that runs under their property has either broken or is leaking at the seams or is no longer able to drain water correctly as a proximate result of debris washing into the pipe from the Railroad's clear cutting and failure to clean away the clear cutting and Defendants' failure to remedy this problem.

54. On information and belief, Plaintiffs allege that this drainage pipe has either broken or is leaking at the seams or is no longer able to drain water correctly due to debris washing into the pipe from the Railroad's clear cutting on property on the opposite side of the

rail line from the Plaintiffs' Property and allowing the debris to wash into the culvert and the drainage infrastructure and failing to clean away the clear cutting debris.

55. In spite of notice to the Defendants, the Defendants have not remedied this problem and have continued to allow this nuisance to exist and persist.

56. Plaintiffs aver that when the employees from the City, AUB and the Railroad came to their Property, the viewing of Plaintiffs' property by the Defendants' employees constituted actual notice to the City, AUB and the Railroad of the conditions affecting Plaintiffs' Property.

57. Plaintiffs aver that other than AUB negligently cleaning out the drainage pipe and the Railroad negligently digging an inadequate, insufficient and defective trench on the property on the other side of the rail line from Plaintiff's Property, Defendants have taken no reasonable, adequate, sufficient or effective action to alleviate or mitigate the flooding conditions and nuisance on Plaintiffs' Property.

58. Plaintiffs aver that Defendants' efforts to clean and/or maintain the drainage infrastructure, drainage culverts, pipes and structures have been unreasonable, inadequate, insufficient, ineffective, negligent and/or grossly negligent. Plaintiffs aver that the Defendants' unreasonable, inadequate, insufficient, ineffective, negligent and/or grossly negligent maintenance and/or repair activities and dangerous and/or defective drainage infrastructure construction have proximately caused and created a condition dangerous to their property.

59. Plaintiffs aver that Defendants have had actual notice of the flooding at Plaintiff's property and the conditions of the stormwater culvert and the drainage infrastructure owned, operated and/or maintained by the City and/or AUB and/or the Railroad. Alternatively, Plaintiffs aver that the Defendants have had constructive notice of the deficiencies, the effects and dangerous conditions of this drainage infrastructure as set forth in this Complaint. Plaintiffs aver

that the City, AUB and the Railroad have been guilty of negligence and/or gross negligence and breach of duty toward the Plaintiffs and their Property and have therefore materially caused the damages Plaintiffs have incurred.

60. Plaintiffs aver that the City and/or AUB and/or the Railroad have inadequately and negligently maintained the existing drainage culvert, structures and infrastructures, and have failed to take action to alleviate impediments to drainage in the affected area. Plaintiff avers that these conditions could be alleviated, but that the City and/or AUB and/or the Railroad have failed to take appropriate and necessary action to do so.

61. In the alternative, Plaintiffs aver that the City and/or AUB and/or the Railroad, have assumed the operation, maintenance, repair and cleaning out of the existing drainage culvert, structures and infrastructures, and have done so negligently and inadequately. Defendants have failed to take action to alleviate impediments to drainage in the affected area. Plaintiff avers that these conditions could be alleviated, but that the City and/or AUB and/or the Railroad have failed to take appropriate and necessary action to do so.

62. Plaintiffs aver that the Railroad clear cut the property located on the opposite side of the rail line from the Plaintiffs' Property, negligently failed to remove the debris and negligently clogged the drainage culvert and the drainage infrastructure. The Railroad could have alleviated these conditions, but the Railroad has failed to take appropriate and necessary action to do so.

63. Plaintiffs aver that the Railroad negligently disposed of waste and/or negligently failed to dispose of waste and negligently maintained the drainage ditch or culvert.

64. Plaintiffs aver that the Railroad's actions, inactions, commissions and/or omissions as described in this complaint were not related to transportation by rail carriers and

were not related to construction, acquisition, operation, abandonment or discontinuance of spur, industrial, team, switching or side tracks or facilities.

65. Plaintiffs aver that the actions and/or inactions of the Defendants have created a temporary nuisance condition on Plaintiffs' Property proximately causing them damage.

66. Plaintiffs aver that the City and/or AUB have created and maintained a wrongful condition of the drainage infrastructure over an unreasonable length of time, such that the unreasonable and/or unlawful condition of said infrastructure has proximately resulted in material and/or substantial annoyance, inconvenience, discomfort, harm and/or injury to Plaintiffs, to Plaintiffs' personal comfort and/or to the Plaintiffs' free use, possession or occupation of the Plaintiffs' own Property, and to Plaintiffs' business. The Plaintiffs aver that the affirmative acts, errors, and omissions of the City and/or AUB have created a defective and/or an inherently dangerous condition affecting the value of their Property and business, and damaging their Property and causing injury to Plaintiffs.

67. Plaintiffs aver that the Railroad has created and maintained a wrongful condition on the property located on the opposite side of the rail line from the Plaintiffs' Property over an unreasonable length of time, such that the unreasonable and/or unlawful condition has proximately resulted in material and/or substantial annoyance, inconvenience, discomfort, harm and/or injury to Plaintiffs, to Plaintiffs' personal comfort and/or to the Plaintiffs' free use, possession or occupation of the Plaintiffs' own Property, and to Plaintiffs' business. The Plaintiffs aver that the affirmative acts, errors, and omissions of the Railroad have created a defective and/or an inherently dangerous condition affecting the value of their Property and business, and damaging their Property and causing injury to Plaintiffs.

68. Plaintiffs aver that the affirmative acts, errors, and omissions of the City, AUB and/or the Railroad as set forth herein have disturbed the free use of Plaintiffs' Property and

business and caused Plaintiffs to incur damages related to the costs to alleviate flooding events and have diminished the value of Plaintiffs' property, and have diminished the use and enjoyment of Plaintiffs' property and have caused Plaintiffs' to suffer loss of business and income, and the loss of enjoyment of their property, business and dental practice.

69. Plaintiffs aver that the acts, errors, and omissions of the City and AUB have caused their damages as set forth herein that proximately result from the improper and negligent construction, operation and/or maintenance of public improvements owned and/or controlled by the City and AUB and have produced damages related to the diminished value of their Property and the use and enjoyment of their Property that are temporary in nature. Plaintiffs aver that they are entitled to successive recoveries until the nuisance created and caused by the City and AUB is abated.

70. Plaintiffs aver that the acts, errors, and omissions of the Railroad have caused their damages as set forth herein that proximately result from the improper and negligent clear cutting, digging and other actions upon the opposite side of the rail line from the Plaintiffs' Property, and Railroad's acts, errors and omissions have caused damages related to the diminished value of their Property and the use and enjoyment of their Property that are temporary in nature. Plaintiffs aver that they are entitled to successive recoveries until the nuisance created and caused by the Railroad is abated.

71. Plaintiffs aver that the Defendants have proximately caused their damages.

72. Plaintiffs aver that the actions, inactions and omissions of the City, AUB and the Railroad have proximately caused a direct and substantial interference with their beneficial use and enjoyment of their property and business; the interference has been repeated and not just occasional; the interference has peculiarly affected their property in a manner different than the

effect of the interference on the public at large; and the interference has resulted in a loss of market value, loss of value of land, loss of business and loss of business income and damages.

73. Alternatively, Plaintiff avers that the City, AUB and the Railroad have committed trespass on their property, having proximately caused entries upon their land and business without actual or implied permission, and thus, Plaintiffs bring their cause of action for trespass, and seek compensatory and punitive damages for same. Plaintiffs seek punitive damages for gross negligence.

74. In the alternative, the City, AUB and the Railroad have acted negligently and said negligence has proximately cause Plaintiffs' injuries and damages.

75. Plaintiffs also bring their causes of action pursuant to the Tennessee Governmental Tort Liability Act, Tenn. Code Ann. § 29-20-101, et seq, on account of the negligent actions and/or inactions and/or omissions of the City and AUB and/or on account of the dangerous and/or defective condition of the drainage infrastructure and facilities, owned and controlled by the City and AUB, which proximately caused Plaintiffs' injuries and damages, including property damage, loss of business and loss of business income.

76. Plaintiffs also bring their causes of action under the special duty exception to the public duty doctrine.

77. At all times material hereto, the employees and/or agents of the City, AUB and the Railroad have acted within the scope of their employment.

78. At all times material hereto, the actions and/or inaction and/or omissions of the City, AUB and the Railroad, by and through their employees and/or agents, are the proximate cause of Plaintiffs' injuries and damages.

79. In the alternative, the City, AUB and the Railroad, and their employees and/or agents have acted with gross negligence and said gross negligence has proximately caused Plaintiffs' injuries and damages.

80. Plaintiffs aver that the City and AUB have adopted an ordinance which includes an extensive Stormwater Management Policy ("Policy") for the purpose of protecting and maintaining the health and safety of the citizens of the City as well as property located within the City. Through the Policy, the City and AUB have assumed general regulation and control over the planning, location, construction, and operation and maintenance of all stormwater facilities located within the municipality, whether or not owned and operated by the City.

81. The Policy was implemented to prevent and address the exact problems that the Plaintiffs are experiencing. Via the Policy, the City and AUB owed, and continue to owe, the Plaintiffs the duty to alleviate impediments to drainage in the affected area. Plaintiffs aver that the Policy provides the City and AUB the authority and mandates the obligation to ensure proper drainage in the affected area, but that the City and/or AUB have failed to take appropriate and necessary action to do so, as required by the Policy.

82. The City and AUB's negligent failure to adhere to the standards established by the Policy proximately caused Plaintiffs' injuries and damages, including property damage, loss of business and loss of business income. The City and AUB's ignoring of the Policy adopted by the City amounts to an operational function for which the City and AUB are not immune.

83. Specifically, the City and AUB have negligently maintained the drainage ways leading into the drainage infrastructure located beneath the Plaintiffs' property. The City and AUB have further negligently failed to take appropriate action under the Policy to alleviate the drainage problem on the Plaintiff's property after receiving constructive and actual notice of the problem. Such failure has created a dangerous condition on the Plaintiffs' property and has

proximately caused Plaintiffs' injuries and damages, including property damage, loss of business and loss of business income.

84. The Policy requires all trash, junk, and rubbish to be cleared from all drainage ways and prohibits any discharge that is not composed entirely of stormwater into the municipal storm sewer system. The City and AUB failed to remove all trash, junk, and rubbish from the drainage ways leading to the drainage infrastructure and/or stormwater culvert that extended to and under Plaintiffs' property. The City and AUB further failed to ensure that nothing other than stormwater was entering into the sewer system through the inlet and/or stormwater culvert leading from the Railroad's property and extending underneath the Plaintiffs' property. Such negligent conduct by the City and AUB proximately caused Plaintiffs' injuries and damages, including property damage, loss of business and loss of business income.

#### **Inverse Condemnation**

85. In the alternative, the Plaintiffs adopt the allegations set forth above, incorporate the same by reference, and sue the Defendants in inverse condemnation and/or for damages in the ordinary way pursuant to Tenn. Code Ann. § 29-16-123 and §29-16-124, et seq.

86. The Plaintiffs assert that, in addition to the allegations of fact stated above as to the acts and omissions of the Railroad, the City and AUB, the overflow of AUB's sewage main and the resulting contamination of the water entering the Plaintiff's Property and building amounts to a taking of the Plaintiff's property which, due to the scope of the contamination and the nature of the Plaintiff's business, is permanent in nature and cannot be feasibly cured.

87. The contamination has also damaged the reputation of the Plaintiffs and the reputation of their facility as a safe and clean environment.

88. The Plaintiffs aver that their property has been taken without just compensation, in violation of Tennessee law and Article I, § 21 of the Constitution of the State of Tennessee.

89. The Plaintiffs aver that the actions, inactions and omissions of the City, AUB, and /or the Railroad and each entity's respective employees and/or agents have proximately caused a direct and substantial interference with the beneficial use and enjoyment of the Plaintiff's property; the interference has been repeated and not just occasional; the interference has peculiarly affected the Plaintiff's property in a manner different than the effect of the interference on the public at large; and the interference has resulted in a loss of market value and loss of value of land and damages.

90. The City, AUB, and the Railroad each possess the power of eminent domain under Tennessee law and, therefore, are subject to an inverse condemnation claim.

91. The Defendants' taking of the Plaintiffs' property, more particularly described in Exhibit A, entitles the Plaintiffs to full and just compensation for the entire value of their property including any improvements, fixtures, and appurtenances thereto.

92. The Defendants' taking of the Plaintiffs' property, more particularly described in Exhibit A, also entitles the Plaintiffs to full and just compensation for the loss of personal property, lost profits, and any additional incidental damages allowable under Tennessee law.

**Wherefore, the premises considered, Plaintiffs pray:**

1. That process issue against each Defendant and that each Defendant be served with a Summons/Notice and a copy of this Complaint, and that each Defendant be required to answer this Complaint within the time allowed by law;

2. That Plaintiffs have such damages as are allowed to them by law and equity in the amount of Three Million Dollars (\$3,000,000.00).

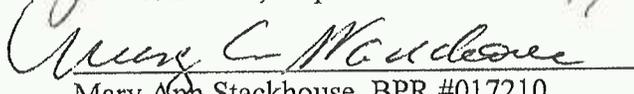
3. That Plaintiffs have such damages, costs and fees as are allowed to them by law, including loss of business and loss of business income.

4. That Plaintiffs have and recover punitive damages for trespass in such amount as the Court and Jury deem proper in the amount of Three Million Dollars (\$3,000,000.00).

5. That Plaintiffs have such damages, costs and fees as are allowed to them by the inverse condemnation statutes of the State of Tennessee, Tenn. Code Ann. § 29-16-123 and 124, et seq., including but not limited to the fair market value of Plaintiffs' property, more particularly described in Exhibit A, the value of the land and damages, and the Plaintiffs' attorney's fees, appraisal fees, and engineering fees, as provided by law.

6. That Plaintiffs have such further and general relief to which they are entitled under the facts of this cause; and

7. That a jury of twelve persons be empanelled to try all issues so triable by law.

  
John J. Britton, Esq. BPR #009907  
  
Mary Ann Stackhouse, BPR #017210

LEWIS, THOMASON, KING, KRIEG & WALDROP, P.C.  
One Centre Square, Fifth Floor  
620 Market Street  
Post Office Box 2425  
Knoxville, TN 37901  
(865) 546-4646  
*Attorneys for Plaintiffs*

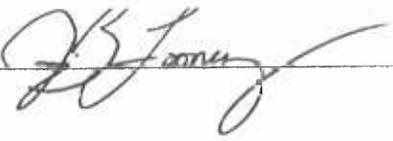
**COST BOND**

We acknowledge ourselves as surety for all costs, taxes, and damages in this case in accordance with Tenn. Code Ann. § 20-12-120.

LEWIS, THOMASON, KING, KRIEG &  
WALDROP, P.C.



By:



Monty Walton

**SURFACE TRANSPORTATION BOARD**

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**FINANCE DOCKET NO. 35950**

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**JAMES LaMAR DUGAN; DUGAN PROFESSIONAL BUILDING AND RENTAL, LLC;  
DOCTORS DUGAN AND DUGAN, LLC; AND JAMES L. DUGAN, II'S OPPOSITION  
TO THE PETITION OF NORFOLK SOUTHERN RAILWAY COMPANY FOR  
DECLARATORY ORDER**

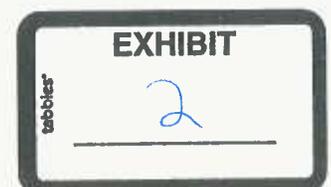
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**DECLARATION OF DR. JAMES LaMAR DUGAN, SR.**

---

I swear the following declaration is true subject to penalties of perjury in accordance with 18 U.S.C. 1621:

1. My name is Dr. James Lamar Dugan, Sr. I am a dentist licensed to practice dentistry in the State of Tennessee.
2. I am over the age of 18, have personal knowledge of the facts set forth in this Declaration, and am otherwise competent to testify.
3. I am the sole member of Dugan Professional Building and Rental, LLC, which owns real property located at 1132 W. Madison Avenue, Athens, Tennessee 37303 (the "**Property**").
4. I am also a member of Doctors Dugan and Dugan, LLC (the "**LLC**"). The LLC currently rents and occupies a dental office located on the Property and has done so since 2006. Prior to and after the formation of the LLC, I have been practicing dentistry in the office located on the Property continuously since 1978.



5. The parcel that shares the northern border of the Property is owned and maintained by Norfolk Southern Railway Company (the “**Railroad**”). There is a storm water culvert on the Railroad’s property that connects to a drainage pipe that runs underneath the dental office located on the Property.

6. In 2012, the Railroad clear cut property located above and on the opposite side of the rail line from the Property on which the dental office is located. The Railroad failed to carry away much of the debris and vegetation that resulted from the clear cutting. A picture of some of the debris that the Railroad allowed to accumulate around the drainage culvert is attached to the Declaration of Dr. James L. Dugan, II as **Exhibit A** and incorporated by reference into this Declaration.

7. Since I began practicing dentistry on the Property in 1978, there have never been any flooding issues on the Property until January 2013, after the Railroad clear-cut its property.

8. In January 2013, the Property was flooded, such that water poured out from under the crawl space of the dental office and through the mortar of the exterior bricks. My son and I inspected the building for water pipe leaks and found none.

9. In April 2013, I noticed that a body of water had formed on the Railroad’s property. During the same month, my son contacted the Railroad, but received no immediate response.

10. On May 8, 2013, my son contacted the Railroad. On May 10, 2013, the Railroad conducted additional clearing and dug a trench in the middle of the swell on the property on the opposite side of the rail line from the Property.

11. Flood events continued to occur on the Property. Pictures of the office building during a flood event are attached to the Declaration of Dr. James L. Dugan, II as collective **Exhibit B** and incorporated by reference to this Declaration.

12. On September 11, 2013, employees of the local utilities board came to the Property, dug a hole, and pulled debris from the drainage pipe that runs under the Property. The debris showed obvious signs of being clear-cut material. Pictures of some of the debris pulled from the pipe are attached to the Declaration of Dr. James L. Dugan, II as collective **Exhibit C** and incorporated by reference to this Declaration.

13. On October 24, 2014, the Railroad employees came to the Property but took no action to alleviate the flooding.

14. We experienced additional flood events on the Property on November 5, 2013; November 26, 2013; November 27, 2013; December 9, 2013; February 21, 2014; April 7, 2014; April 28, 2014; June 2 through June 5, 2014; June 29, 2014; June 30, 2014; July 21, 2014; December 23 and 24, 2014; January 3 and 4, 2015; March 10, 2015; and throughout the month of July 2015. During these flood events, it is common for the water to pour out from the crawl space of the building and mortar. During these flood events, the heating and air conditioning units were damaged, failed to work, and had to be repaired on multiple occasions; a horrible smell filled up the dental office; interior cracks developed on the walls; the foundation of the dental office was damaged, and the duct work was damaged, and other aspects of the building and dental practice were damaged.

15. As a result of the extensive damage to the Property, and contaminants in the water, we vacated the premises in July of 2015 and have since moved to a temporary office building.

I, James LaMar Dugan, Sr., declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Declaration.

Executed on 13 Aug 2015.

  
JAMES LaMAR DUGAN, SR.

SURFACE TRANSPORTATION BOARD

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FINANCE DOCKET NO. 35950

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**JAMES LaMAR DUGAN; DUGAN PROFESSIONAL BUILDING AND RENTAL, LLC;  
DOCTORS DUGAN AND DUGAN, LLC; AND JAMES L. DUGAN, II'S OPPOSITION  
TO THE PETITION OF NORFOLK SOUTHERN RAILWAY COMPANY FOR  
DECLARATORY ORDER**

---

**DECLARATION OF DR. JAMES L. DUGAN, II.**

---

I swear the following declaration is true subject to penalties of perjury in accordance with 18 U.S.C. 1621:

1. My name is Dr. James L. Dugan, II. I am a dentist licensed to practice dentistry in the State of Tennessee.
2. I am over the age of 18, have personal knowledge of the facts set forth in this Declaration, and am otherwise competent to testify.
3. I am a member of Doctors Dugan and Dugan, LLC (the "LLC"). The LLC currently rents and occupies a dental office located at 1132 W. Madison Avenue, Athens, Tennessee 37303 (the "Property"), and has done so since 2006. Prior to the formation of the LLC, I practiced dentistry in the office on the Property with my father, Dr. James LaMar Dugan, Sr., beginning in 2000.
4. The parcel that shares the northern border of the Property is owned and maintained by Norfolk Southern Railway Company (the "Railroad"). There is a storm water



culvert on the Railroad's property that connects to a drainage pipe that runs underneath the dental office located on the Property.

5. In 2012, the Railroad clear cut property located above and on the opposite side of the rail line from the Property on which the dental office is located. The Railroad failed to carry away much of the debris and vegetation that resulted from the clear cutting. A picture of some of the debris that the Railroad allowed to accumulate around the drainage culvert is attached to this Declaration as **Exhibit A**.

6. Since I began practicing dentistry on the Property in 2000, there have never been any flooding issues on the Property until January 2013, after the Railroad clear-cut its property.

7. In January 2013, the Property was flooded, such that water poured out from under the crawl space of the dental office and through the mortar of the exterior bricks. My father and I inspected the building for water pipe leaks and found none.

8. In April 2013, I noticed that a body of water had formed on the Railroad's property. During the same month, I contacted the Railroad, but received no immediate response.

9. On May 8, 2013, I contacted the Railroad. On May 10, 2013, the Railroad conducted additional clearing and dug a trench in the middle of the swell on the property on the opposite side of the rail line from the Property.

10. Flood events continued to occur on the Property. Pictures of the office building during a flood event are attached to this Declaration as collective **Exhibit B**.

11. On September 11, 2013, employees of the local utilities board came to the Property, dug a hole, and pulled debris from the drainage pipe that runs under the Property. The debris showed obvious signs of being clear-cut material. Pictures of some of the debris pulled from the pipe are attached to this Declaration as collective **Exhibit C**.

12. On October 24, 2014, the Railroad employees came to the Property but took no action to alleviate the flooding.

13. We experienced additional flood events on the Property on November 5, 2013; November 26, 2013; November 27, 2013; December 9, 2013; February 21, 2014; April 7, 2014; April 28, 2014; June 2 through June 5, 2014; June 29, 2014; June 30, 2014; July 21, 2014; December 23 and 24, 2014; January 3 and 4, 2015; March 10, 2015; and throughout the month of July 2015. During these flood events, it is common for the water to pour out from the crawl space of the building and mortar. During these flood events, the heating and air conditioning units were damaged, failed to work, and had to be repaired on multiple occasions; a horrible smell filled up the dental office; interior cracks developed on the walls; the foundation of the dental office was damaged, and the duct work was damaged, and other aspects of the building and dental practice were damaged.

14. As a result of the extensive damage to the Property, and contaminants in the water, we vacated the premises in July of 2015 and have since moved to a temporary office building.

I, James L. Dugan, II, declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Declaration.

Executed on 8/13/15.

  
JAMES L. DUGAN, II.



EXHIBIT

A.

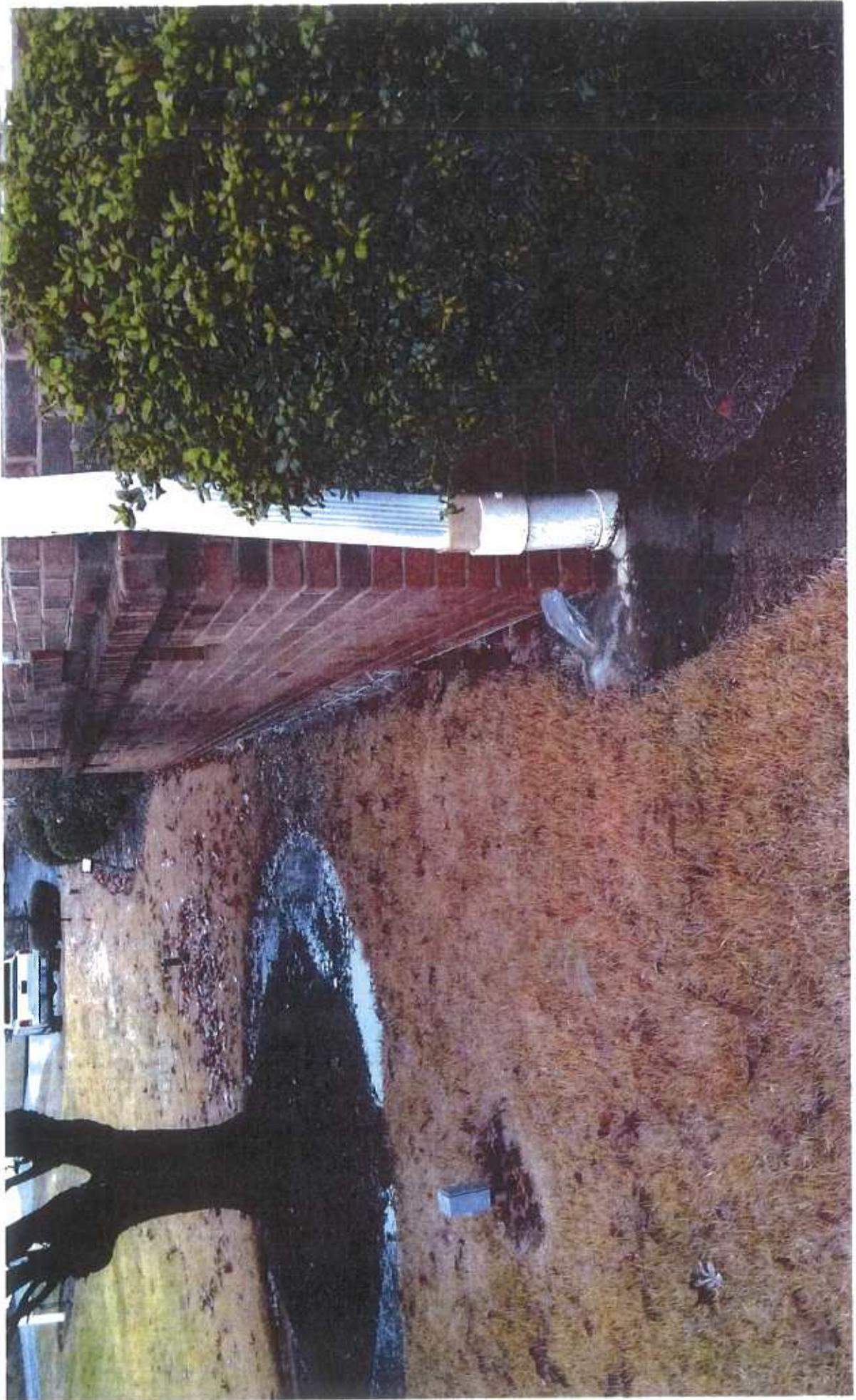
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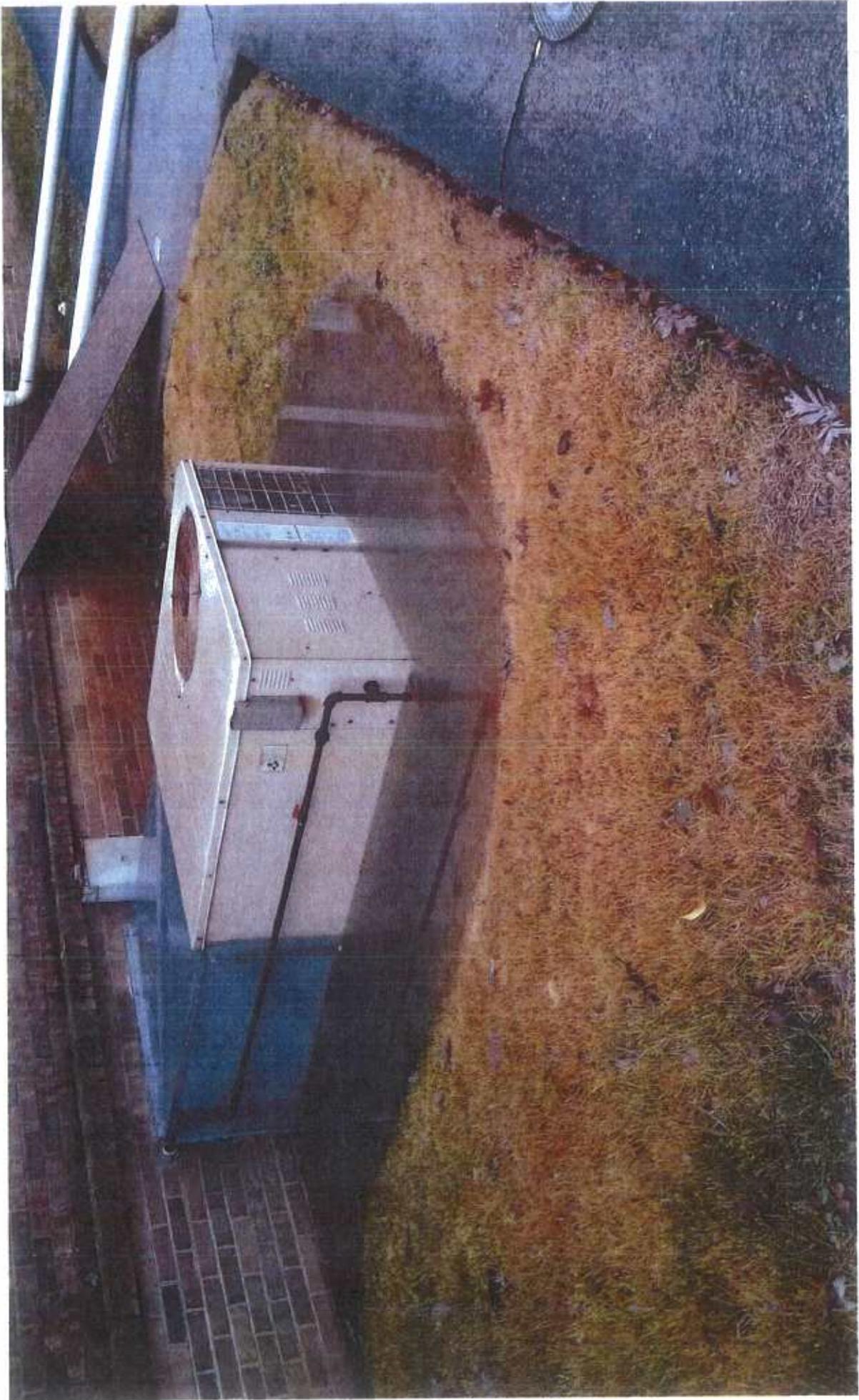


EXHIBIT

B

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09/11/2013

EXHIBIT

tabbles

C





09/11/2013



09/11/2013



LEWIS THOMASON

— 55<sup>TH</sup> ANNIVERSARY —

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JBritton@LewisThomason.com

August 14, 2015

John W. Baker, Jr., Esquire  
Baker, O'Kane, Atkins & Thompson, PLLP  
2607 Kingston Pike, Suite 200  
P.O. Box 1708  
Knoxville, TN 37901-1708

**RE: J. LaMar Dugan and James Dugan v. City of Athens and Southern Railway  
McMinn County Circuit Court, Docket No.: 2014-CV-258**

Dear Jay:

When I received your delayed courtesy copy of your Petition for Declaratory Order filed with the Surface Transportation Board, I was quite surprised to see your inclusion of my February 26, 2015 letter to you as an exhibit to your Petition.

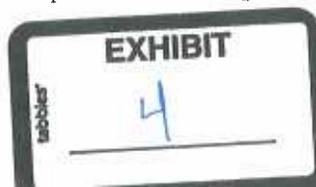
You know and I know that this letter, along with your letter to me of February 13, 2015, which you did not include, was part of an ongoing exchange of ideas between you and me regarding how we might solve the physical problems created by your client and others so that we could begin moving forward toward resolving this lawsuit. (I am attaching a copy of your February 13, 2015 letter as an exhibit to this letter for completeness.)

As such, these letters are confidential settlement negotiations which would not be admissible under Rule 408 of the Tennessee Rules of Evidence.

You and I also know that my February 26, 2015 letter to you was a follow up communication to you, after conversations invited by you, in the spirit of negotiation and in an effort to think about possible solutions to the repeated nuisance and trespass flooding and occupation of my clients' property.

It was in no way intended to be nor should it be construed to be an attempt by my clients or me to interfere with Railroad operations.

If you and your client persist in characterizing my suggestions made, at your request, for a possible physical solution to these repeated floodings and occupations as interference with

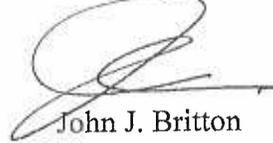


John W. Baker, Jr.  
August 14, 2015  
Page 2

Railroad operations, then all conversations and communications about such proposed solutions will cease, and we will pursue our remedies for monetary damages and inverse condemnation.

I regret that we have come to a point where we can no longer have informal oral and written communication about possible resolutions to this matter, but I feel that your actions have left me no other choice.

Very truly yours,



John J. Britton

JJB/tss  
6159924



John W. Baker, Jr.                      Emily H. Thompson  
James G. O'Kane\*                      Trevor L. Sharpe  
Debra A. Thompson                      Raymond G. Lewallen, Jr.  
  
OF COUNSEL  
Michael K. Atkins

\* Tennessee Supreme Court Rule 31 Listed General Civil Mediator

Direct E-Mail: [jbaker@boatlf.com](mailto:jbaker@boatlf.com)

February 13, 2015

John J. Britton, Esq.  
Mary Ann Stackhouse, Esq.  
LEWIS, THOMASON, KING, ET AL.  
One Centre Square, Fifth Floor  
620 Market Street  
P.O. Box 2425  
Knoxville, Tennessee 37901

RE: James LaMar Dugan, individually and on behalf of Dugan Professional Building and Rental, LLC; Dugan Professional Building and Rental, LLC; Doctors Dugan and Dugan, LLC; and James L. Dugan, II, vs. City of Athens, Tennessee, Athens Utility Board, and Norfolk Southern Railway Company, f/k/a Southern Railway Company  
In the Circuit Court for the Tenth Judicial District of Tennessee at McMinn County, Tennessee  
No.: 2014-CV-258

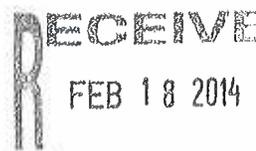
Dear John & Mary Ann:

This will memorialize your request made during our recent telephone conference that Norfolk Southern consider altering the position of its existing culvert to angle it to some extent to reduce the angle a proposed outlet extension would make and also for permission to install a new junction box at the outlet replacing the current configuration.

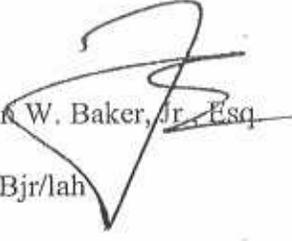
I have presented these proposals and should be back in touch with you shortly.

This will further confirm that I continue, on behalf of Norfolk Southern, to suggest to you and the Dugans, that the current outlet pipe extension configuration be changed and removed to prevent additional apparent water from reaching underneath the structure.

Again, I should have an answer for you shortly about your proposal.



Yours very truly,



John W. Baker, Jr., Esq.

JWBjr/lah