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December 11, 2013
235167

Submitted by E-Filing

Cynthia Brown, Chief
Section of Administration
Surface Transportation Board
Office of Proceedings
395 E Street, SW
Washington, D.C. 20423

ENTERED
Office of Proceedings
December 11, 2013
Part of
Public Record

RE: CONSOLIDATED RAIL CORP. – Abandonment Exemption –
In Hudson County, NJ; Docket AB 167 (Sub-No. 1189X)
Motion for Intervention, Notice, and Opposition to Request to
Lift Stay of Proceedings.

Dear Ms. Brown,

We are E-Filing this letter with a Motion seeking intervention, a Notice, and our Opposition to Lifting Stay in the above captioned matter, together with related exhibits. We represent 212 Marin Boulevard, LLC. and seven other named limited liability companies which hold fee title to the lands underlying some of the lines of rail which Conrail seeks to abandon, and seek the Board's permission to intervene for the reasons expressed in the papers.

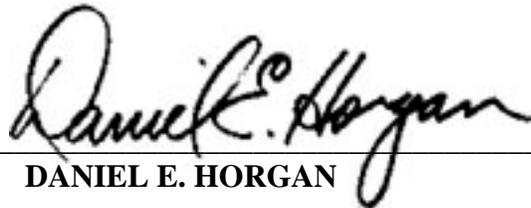
In accordance with the Board's regulations, we are filing our papers electronically in lieu of a paper filing. All parties on the service list included in the filed papers are being served with papers copies of these documents by first class mail on this date. As noted in a footnote in the papers, we have also sent an electronic copy of one exhibit by overnight delivery to your attention. While this exhibit has been electronically filed in the U.S. District Court, and is provided as part of our present E-Filing, we thought it would be best to provide a separate DVD for the convenience of the Board and its staff.

In light of the fact that Mr. Montange has requested that you forward a paper copy of his motion to which we are now responding to the STB's Office of General Counsel, we likewise request that you advise the same parties in the general counsel's office of our opposition and motion to intervene. Thank you for your attention to this matter.

Very truly yours,

WATERS, McPHERSON, McNEILL, P.C.

BY: _____


DANIEL E. HORGAN

BEFORE THE SURFACE TRANSPORTATION BOARD

CONSOLIDATED RAIL CORPORATION]
- ABANDONMENT EXEMPTION –] **AB 167 (Sub-no, 1189X)**
IN HUDSON COUNTY, NJ]

Petition to Intervene
- And –
Notice Concerning U.S. District Court Decision
and Appeal to U.S. Circuit Court of Appeals
- And –
Opposition to Lifting Stay
Of Proceedings

On November 21, 2013, the City of Jersey City (hereafter, “Jersey City”), the Pennsylvania Railroad Harsimus Branch Embankment Preservation Coalition (hereafter “Coalition”), and Rails to Trails Conservancy (hereafter “RTC”) petitioned through their attorneys for a lifting of the Stay of Proceedings in this matter. The stay was issued by Board Order on April 20, 2010. The request to lift the stay was served upon the undersigned attorney for eight limited liability companies:

- 212 Marin Boulevard, LLC.
- 247 Manila Avenue, LLC.
- 280 Erie Street, LLC.
- 317 Jersey Avenue, LLC.
- 354 Cole Street, LLC.
- 389 Monmouth Street, LLC.
- 415 Brunswick Street, LLC.
- 446 Newark Avenue, LLC.

These eight New Jersey limited liability companies each hold fee title to one of eight separate parcels of real estate that have been the impetus for these and prior Board proceedings,

proceedings in the U.S. Courts for the District of Columbia, numerous New Jersey state court proceedings, and continued disputes concerning the underlying ownership and use of the real property that was formerly owned by the petitioner Consolidated Rail Corporation (“Conrail”), and upon which was located a portion of the Harsimus Branch of the Pennsylvania Railroad (also identified as Conrail Line Code 1420). These eight corporate entities are collectively referred to herein as the “Owner LLCs” or “LLCs.”

I. PETITION TO INTERVENE

In requesting intervention and other relief in this matter, the Owner LLCs respectively show as follows:

1. The LLCs have been parties in a prior proceeding before the Board which involved the same or similar issues, the same properties, and the same essential parties, including Conrail, Jersey City, Coalition and RTC. City of Jersey City et al. for Declaratory Order, STB Docket No. F.D. 34818.

2. The LLCs have also been parties to every related proceeding in the United States District Court for the District of Columbia (“D.C. District Court”), and the United States Court of Appeals for the District of Columbia Circuit (“D.C. Circuit Court”). See, Consolidated Rail Corp. v. Surface Transp. Bd., 571 F.3d 13 (D.C. Cir. 2009); City of Jersey City v. Conrail, 741 F. Supp.2d 131 (D.D.C. 2010); and City of Jersey City v. Conrail, 681 F.3d 741 (D.C. Cir. 2012).

3. Recognizing the LLCs’ interest in this matter, counsel for Jersey City, et al. served a copy of the present Notice of Decision, etc., upon the undersigned attorney for the LLCs, listing him immediately after the Petitioner, Conrail, on the service list. See: Notice of Decision, etc., page 5.

4. The LLCs are presently Appellants before the D.C. Circuit Court, appealing the

September 30, 2013 Order and Memorandum Decision of the D.C. District Court which, inter alia, was the subject of the November 21, 2013 filing by Jersey City, et al. See: LLCs' Notice of Appeal, and Docketing Statement, attached as **Exhibit A**.

5. The LLCs have both property and procedural interests in the present proceedings arising from 2005 deeds from Conrail conveying properties underlying the former Harsimus Branch and from their continued involvement in litigation and proceedings involving these properties from 2005 to the present. They also have a very specific interest in the Board's proceedings involving their properties by virtue of the relief sought in the pending appeal before the D.C. Circuit Court.

6. The present Board proceedings were initiated in 2010 by Conrail, but have remained dormant while litigation was pending in the D.C. District Court, which decision is now on appeal. That unresolved litigation still proceeds and holds the potential for yet another change of course in these proceedings. The Board had previously ordered further proceedings be stayed pending the outcome and resolution of the federal court litigation. That final outcome has not yet been reached and, as indicated further below in this submission and request by the LLCs, the proceedings may be further delayed due to pending litigation. During such delays, granting intervention to the Owner LLCs will not cause any additional delay in the proceedings before the Board.

7. The Owner LLCs seek a complete abandonment of rail service and federal railroad jurisdiction over their properties through a procedurally proper abandonment ruling in the event that judicial relief is not granted in the continuing federal litigation. Abandonment is the same relief requested by Conrail as petitioner. Jersey City, Coalition, and RTC seek additional relief, the full extent of which is not yet manifest, but seems to include the *de facto*

abandonment of other portions of the Harsimus Branch and another line of rail in Jersey City, which was not made a part of Conrail's present abandonment petition. Absent certain relief from the D.C. Circuit Court and/or the D.C. District Court on a remand, it is likely that the LLCs will oppose this *de facto* abandonment. See, *Atchison, Topeka and Santa Fe Railway Company – Abandonment Exemption – In Lyon County, KS*. ICC, June 11, 1991, Docket No. AB-52 (Sub-No. 71X); 1991 WL 120344 (I.C.C.). The LLCs are in disagreement with Conrail's petition to the degree that its abandonment petition is not in accord with the locations of lines of rail as deeded to it by the Trustee's deed as approved by Order of the Special Court. It has been established in these proceedings that only the D.C. District Court, acting as statutory successor to the Special Court created by Congress to oversee the railroad reorganization in the 1970's, has jurisdiction to determine the status and location of Conrail lines. See, *Consolidated Rail Corp. v. Surface Transp. Bd.*, 571 F.3d 13 (D.C. Cir. 2009). The LLCs maintain that if it is necessary to identify and abandon former lines of rail to relieve them of federal regulatory obligations, then Conrail's petition should do that so that the proceedings are proper. Conversely, if other portions of lines of rail are to be abandoned *de facto*, and the particular circumstances of this case admit a unique exception for *de facto* abandonment, then the former lines of rail on the Owner LLCs' properties were abandoned *de facto* by the STB in 2002. See, *Conrail Abandonment of the Weehawken Branch—in Hudson County, NJ*, 2001 W.L. 244841 (March 12, 2001); *RLTD Railway v. STB*, 166 F3d 808, 812 (6th Cir., 1999), and the related Board decision in AB 457 (Sub-No. 1X), 1997 WL 671920 (S.T.B.). *Jost v. STB*, 194 F3d 79, 87 (D.C. Cir. 1999) citing *RLTD*, *supra*. See also: LLCs' D.C. Circuit Court Statement Of Issues To Be Raised on Appeal, annexed hereto as **Exhibit B**.

8. The Owner LLCs seek the complete abandonment of railroad regulatory

jurisdiction over their properties so that they may enjoy the free use and enjoyment of their fee interest in those properties. The LLCs' participation as Intervenors is necessary to protect that interest.

II. NOTICE CONCERNING U.S. DISTRICT COURT DECISION AND APPEAL TO D.C. CIRCUIT COURT

9. The November 21, 2013 submission by Jersey City et al. contains a section entitled "II. Further Notices," which the LLCs believe to be inaccurate and potentially misleading to the Board. A clearer understanding of the proceedings before U.S. District Court and the D.C. Circuit Court is therefore necessary.

10. By order, issued on June 25, 2012, the District Court required the parties to reach a stipulation on any matters not in dispute. That order produced only one factual stipulation by the LLCs. The stipulation was attached by Jersey City as Exhibit B to its November 21, 2013 submission. Arguing that the stipulation is germane to further proceedings before this agency, Jersey City subtly misrepresents its import by characterizing it in this fashion: "...the LLCs stipulated that the Harsimus branch *at issue in this proceeding* was conveyed to Conrail as a 'line of railroad' *and that it was* subject to STB jurisdiction." [emphasis added]. See, Notice of Decision, etc., page 2.

11. The first misrepresentation contained in Jersey City's quotation in paragraph 10, above, is that the LLCs agreed that the lines of rail then in issue in the D.C. District Court are coextensive with their eight parcels plus additional property to the west still owned by Conrail. They are not. At issue in the D.C. District Court was the continuation of the Harsimus Branch from a location known as CP Waldo to the ultimate end points, portions of which both Jersey City and Conrail now seek to abandon *de facto*. Additionally, none of the parties in the D.C.

District Court could agree on the location of the continuations of the Harsimus Branch and an additional line of rail known as the Hudson Street Industrial Track (Line Code 1440), which was connected to the Harsimus Branch, and for that reason there was no stipulation as to this fact in the D.C. District Court

12. However, this dispute on the nature and locations of lines of rail is found in the LLCs' opposition to the motion of Jersey City et al., which led to summary judgment and is now the subject of appeal. It is not a fair representation of the LLCs' position in this proceeding that they agree with Conrail's location of the Harsimus Branch, its end point on the Jersey City waterfront, its location as shown in Conrail's petition, or Jersey City's attempt to work a *de facto* abandonment of other properties which are identically situated to the LLCs properties, while at the same time subjecting the LLCs' properties to extensive regulatory procedures.

13. The dispute concerning the location of the Harsimus Branch and the Hudson Street Industrial Track has direct bearing on the issues raised in this petition. Conrail's petition asserts that the Harsimus Branch begins at a point called CP Waldo, and continues east toward a location near the Hudson River, identified as mile post 1.36. The LLCs dispute that is the location of the Harsimus Branch, and affirmatively contend that Conrail has not included the correct location of the Harsimus Branch between Marin Boulevard and the Hudson River, and has, in fact, overlapped the Harsimus Branch with a section of the Hudson Street Industrial Track while omitting to include the portion of the Hudson Street Industrial Track which is being proposed for abandonment. The D.C. District Court denied the LLCs' motion to amend their answer to seek a declaratory ruling on the location of the Harsimus Branch or the Hudson Street Industrial Track. Thus, the D.C. District Court only located a portion of the Harsimus Branch as described by Conrail's petition before this Board. Only the D.C. District Court can determine

the location of Conrail's line, and the LLCs have appealed the D.C. District Court's refusal to fix the location of the Harsimus Branch or the Hudson Street Industrial Track. The LLCs submit this Board cannot determine whether to grant abandonment of the segment of the Harsimus Branch identified by the D.C. District Court, or any or all of the Hudson Street Industrial Track, without knowing the balance of the lines' locations.

14. A second, subtle misrepresentation is found in the insertion of the conjunctive phrase "and that it was" subject to STB jurisdiction. We refer to the Board to the actual language of the stipulation in the first bullet point of page 1 of Exhibit B attached to Jersey City's submission. That language makes it clear that the LLCs were focused upon the status of the property in 1976, with the remainder of the proceedings excluded from any stipulation. This exclusion was intentional, known to all parties, and clearly left the **present** status of the property open, including whether **all** or **any** of the former lines of rail should **today** be subject to federal regulatory jurisdiction. By virtue of the pending appeal, these issues are still subject to adjudication in the federal courts and it would be premature to consider the matter closed and speak of it, as Jersey City does, in the past tense.

15. The November 21, 2013 filing by Jersey City, et al. at pages 3 - 4 also omits the first 114 paragraphs of the pleading with critical exhibits, and in particular the factual basis for the claims against Jersey City. This appears to have been done to permit the implication to be made that the LLCs somehow were involved in, or knowledgeable of, Conrail's fraud and misrepresentation. The fact of the matter is that they were not. They were Conrail's victims, just as they have been the victims of the inequitable and improper conduct of Jersey City which is complained of in the omitted paragraphs. To properly complete the record in this matter we are

attaching the relevant portions of omitted pleadings, paragraphs 23 through end, as **Exhibit C**.¹

16. The LLCs' proposed counterclaims alleged Jersey City et al. had engaged in inequitable conduct (outlined therein) that should estopp them from seeking to invoke certain remedies, including certain relief Jersey City et al. intends to raise here. Jersey City et al.'s invoking the LLCs' proposed claims against Conrail indicates the relevance of all unresolved LLC issues in the D.C. District Court, and further supports continuing the stay until the issue of Jersey City et al.'s right to seek relief before this Board is resolved by the D.C. Circuit Court in the pending appeal. Important, unresolved issues also include the City's participation with Conrail in dismantling and sale of the Harsimus Branch and, together with New Jersey Transit, disposing of the Hudson Industrial Track, which now forms part of N.J. Transit's light rail system. The Board had previously sought to address Conrail's and N.J. Transit's pattern of violations, in which the City has now also joined, by requiring Conrail to disclose all property sales made without prior Board approval. See: Consolidated Rail Corporation's Sales and Discontinuances, STB Docket EP-695 (May 13, 2010); 2010 WL 1957871 (S.T.B.). The Owner LLCs have been victimized by both Conrail and the City by the same kind of conduct so strongly criticized by the Board in 2010. Addressing that conduct requires the LLCs' participation in the

¹ Of particular relevance to these proceedings and the position of the LLCs is an exhibit and certification filed in the D.C. District Court by the LLCs to which none of the other parties responded. They certainly did not stipulate to it. That Exhibit is ECF Document #88, an exhibit in the LLCs' objection to the City's motion for summary judgment, and also as an exhibit to the LLCs' own motion for summary judgment. It is a Declaration by David B. Dixon with an attached layered PDF document showing the actual locations of lines of rail, and the differing positions of the parties as to which location was actually which line. Conrail was unwilling to address the location dispute in the court ordered Stipulation of the Parties and Jersey City took the position that it was not relevant (*de facto* abandonment?). We are concurrently providing the Board and Staff by overnight delivery with a DVD with the layered PDF exhibit. Upon request, we will also provide copies to anyone on the service list. The Exhibit can be readily accessed through PACER as ECF Document #88 in the D.C. District Court case, Docket CV-09-1900. A copy of the Dixon Declaration and its Exhibit C is attached hereto as **Exhibit E**.

proceedings as an indispensable party.²

17. The LLCs have raised the issues of *de facto* abandonment on their issues for appeal. See, Docketing Statement, **Exhibit A**. Those disputes should be resolved before this Board embarks upon further proceedings in this matter.

18. That the allegations in the LLCs' claims against Conrail are relevant to these proceedings is argued in the November 21, 2013 submission by Jersey City, et al. at page 3. From the discussion in the paragraph beginning on that page and carrying on to the next, it appears that Jersey City, et al. intend to argue before the Board on the identical issues that the LLCs maintain should have been resolved by the D.C. District Court. Because this failure to resolve those issues is now before the D.C. Circuit Court, and because this matter has been before the D.C. Circuit Court twice before, the Board should not permit Jersey City, et al. the opportunity to burden everyone with duplicative litigation.

**III. THE PRESENT STAY OF PROCEEDINGS SHOULD CONTINUE
AND SHOULD NOT BE LIFTED.**

19. The November 21, 2013 submission of Jersey City, et al. concludes with a two

² Despite the Board's 2010 Order, Conrail did not report any of the sales of either the Harsimus Branch or the Hudson Industrial Track as having been made without Board approval since 1996 when it formally responded on September 27, 2010. Conrail issued its deeds to the Owner LLCs in July, 2005 and the Board declared that part of the Harsimus Branch to be a line of rail (absent the legal jurisdiction to do so) in 2007. This strongly suggests that the Board believed the Harsimus Branch to be a line after 2007. While perhaps narrowly correct, Conrail's 2010 report to the Board appears, at best, to be inaccurate and less than fully forthcoming; and it is certainly not accurate when considered in light of all relevant facts as they are known today. An accurate report to the Board would have identified the transactions with the Owner LLCs in 2005. A complete report may have also mentioned the discontinuances of service and sales occurring before 1996, unless they are to be considered *de facto* abandonments, exempt from all regulation. This is exactly the scope of inquiry sought by the Owner LLCs in the D.C. District Court, and now before the D.C. Circuit Court which both the City and Conrail so vigorously opposed. See: Decision Terminating Proceedings in EP-695 (January 28, 2011); 2011 WL 290502 (S.T.B.).

sentence argument under the heading at “Point III. Request For Lifting Of Stay.” (Page 4). In essence, it says that all issues have been resolved and the Board should proceed. This, of course, ignores all of the issues pending in the federal courts and all of the issues acknowledge to be in the case by Jersey City and its litigation allies. The request is inconsistent with the submission, and inconsistent with the status of the matter. It is nothing less than an improper effort to involve the Board in matters now pending before the D.C. Circuit Court. It is also an improper attempt to burden all parties to this matter, Conrail included, with additional litigation and the prospect of yet an additional federal appeal arising from the unresolved issues of *de facto* abandonment and the location of lines of rail as conveyed to Conrail under Order of the Special Railroad Court in 1976.

20. As but one illustration of Jersey City’s bad faith in this matter with respect to proceedings before the Board, it has represented to the courts in the State of New Jersey that the Board has inherent authority to decide matters of New Jersey property law and to summarily declare as void Conrail’s 2005 deeds to the LLC Owners. To the contrary, the US Supreme Court has decided that matters of property law are the exclusive province of the states. See, Presault v. Interstate Commerce Commission, 494 U.S. 1 (1990). A certified transcript of this misrepresentation, made to the Superior Court, Hudson County, Chancery Division in open court on October 25, 2013 is attached at **Exhibit D**.

In respect of the foregoing, the LLC Owners respectfully ask that the Board grant their request for intervention in this matter so that they may protect their substantive and procedural interests in their properties. They further respectfully request the Board give careful consideration to the status of the matter now before the D.C. Circuit Court and continue the stay

of proceedings previously directed by the Board.

Respectfully Submitted:

S/ Daniel E. Horgan

S/ Eric D. McCullough

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dehorgan@lawwmm.com
edm@lawwmm.com
Attorneys for LLC Owners

LIST OF EXHIBITS

- A. LLCs' Notice of Appeal, and Docketing Statement
- B. LLCs' D.C. Circuit Court, Statement of Issues To Be Raised
On Appeal
- C. LLCs' Proposed Counterclaims, and Cross-Claims, excerpted
- D. Transcript of Proceedings, dated October 25, 2013, City of Jersey City v. 212
Marin Boulevard, LLC, Superior Court of New Jersey, Chancery Division,
Hudson County, docket number HUD-C-12-13, excerpted
- E. Declaration of David B. Dixon, PLS with Exhibit C

CERTIFICATE OF SERVICE

I, Daniel E. Horgan, an attorney-at-law of New Jersey, New York, and the District of Columbia, hereby certify that on December 11, 2013, I caused service of this filing with the Surface Transportation Board to be made upon the Board by Electronic Filing and that all parties on the following service list were served by First Class Mail in accordance with the provisions of 49 C.F.R. §1104.12.

DATED: December 11, 2013

S/ Daniel E. Horgan

Daniel E. Horgan

SERVICE LIST

Counsel for Jersey City, Coalition, RTC:

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426 NW 162nd Street
Seattle, WA 98177

Counsel for Rails to Trails Conservancy (RTC)

Andrea Ferster, Esq.
General Counsel
2121 Ward Court NW, 5th floor
Washington, D.C. 20037

Counsel for Conrail:

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Mayer Brown LLP
1999 K Street, NW
Washington, D.C. 20006-1101

Former Counsel for LLCs

Fritz Kahn, Esq.
1920 N Street, NW
8th Floor
Washington, D.C. 20036-1601

And the following self-represented individuals or entities:

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Daniel D. Saunders
State Historic Preservation Office
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Trenton, NJ 08625-0404

Stephen D. Marks, Director
Hudson County Planning Division
Justice Brennan Court House
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Jersey City, NJ 07306

Ron Emrich
Executive Director
Preservation New Jersey
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Trenton, NJ 08608

Michael D. Selender
Vice President
Jersey City Landmarks Conservancy
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Eric Fleming
President
Harsimus Cove Association
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Jersey City, NJ 07302

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Valerio Luccio
Civic JC
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Jersey City, NJ 07303-0248

Eric S. Strohmeyer
Vice President, COO
CNJ Rail Corporation
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Watchung, NJ 07069

Exhibit

“A”

Consolidated Rail Corp.

Abandonment Exemption

In Hudson County, NJ;

Docket AB 167 (Sub-No. 1189X)

**Motion for Intervention, Notice, and
Opposition to Request to Lift Stay of
Proceedings**

**UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA**

333 Constitution Avenue, NW
Washington, DC 20001-2866
Phone: 202-216-7000 | Facsimile: 202-219-8530

Plaintiff: City of Jersey City, et als,

vs.

Civil Action No. 09-1900 (ABJ)

Defendant: Consolidated Rail Corp. et als.

CIVIL NOTICE OF APPEAL

Notice is hereby given this 28 day of October 2013, that

the eight Intervenor-Defendants, 212 Marin Boulevard, LLC, et.als

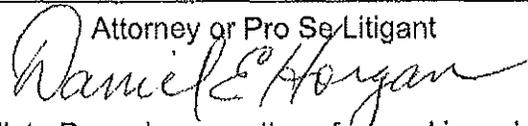
hereby appeals to the United States Court of Appeals for the District of Columbia Circuit from the
judgement of this court entered on the 30 day of September, 2013, in

favor of Plaintiff, City of Jersey City, et als

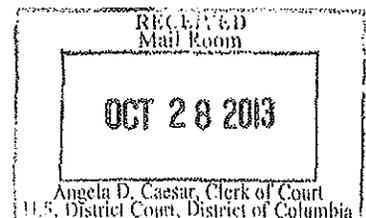
against said eight Intervenor-Defendants 212 Marin Boulevard, LLC, et als

Daniel E. Horgan, Esq. (239772)

Attorney or Pro Se Litigant



(Pursuant to Rule 4(a) of the Federal Rules of Appellate Procedure a notice of appeal in a civil action must be filed within 30 days after the date of entry of judgment or 60 days if the United States or officer or agency is a party)



UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

333 Constitution Avenue, NW
Washington, DC 20001-2866
Phone: 202-216-7000 | Facsimile: 202-219-8530

CIVIL DOCKETING STATEMENT

All Cases Other than Administrative Agency Cases (To be completed by appellant)

- 1. CASE NO. 13-7175
2. DATE DOCKETED: 10-30-2013
3. CASE NAME (lead parties only) City of Jersey City v. Consolidated Rail Corporation
4. TYPE OF CASE: [X] District Ct - [] US Civil [] Private Civil [] Criminal [] Bankruptcy
5. IS THIS CASE REQUIRED BY STATUTE TO BE EXPEDITED? [] Yes [X] No
6. CASE INFORMATION:
a. District Court Docket No. Bankruptcy Court Docket No. Tax Court Docket No.
b. Review is sought of: [X] Final Order [] Interlocutory Order appealable as of right [] Interlocutory Order certified for appeal
c. Name of judge who entered order being appealed: Judge Amy Berman Jackson Magistrate Judge
d. Date of order(s) appealed (use date docketed): 09-30-2013 e. Date notice of appeal filed: 10-29-2013
f. Has any other notice of appeal been filed in this case? [] Yes [X] No
g. Are any motions currently pending in trial court? [] Yes [X] No
h. Has a transcript of proceedings been ordered pursuant to FRAP 10(b)? [] Yes [X] No
i. Has this case been before the Court under another appeal number? [X] Yes Appeal # 10-7135 [] No
j. Are any cases involving the same underlying order or, to counsel's knowledge, involving substantially the same issue, currently pending before the District Court, this Court, another Circuit Court, or the Supreme Court? [] Yes [X] No
k. Does this case turn on validity or correct interpretation or application of a statute? [] Yes [X] No
7. Have the parties attempted to resolve issues in this case through arbitration, mediation, or another alternative for dispute resolution? [] Yes [] No

Signature /s/ Daniel E. Horgan Date 11-29-2013
Name of Party 212 Marin Boulevard, LLC et al.
Name of Counsel for Appellant/Petitioner Daniel E. Horgan
Address Waters, McPherson, McNeill, P.C., 300 Lighting Way, P.O. Box 1560, Secaucus, NJ 07096
Phone (201) 330-7453 Fax (201) 863-2866

ATTACH A CERTIFICATE OF SERVICE

Note: If counsel for any other party believes that the information submitted is inaccurate or incomplete, counsel may so advise the Clerk within 7 calendar days by letter, with copies to all other parties, specifically referring to the challenged statement. Attach a certificate of service to this form.

Exhibit

“B”

Consolidated Rail Corp.

Abandonment Exemption

In Hudson County, NJ;

Docket AB 167 (Sub-No. 1189X)

**Motion for Intervention, Notice, and
Opposition to Request to Lift Stay of
Proceedings**

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

CITY OF JERSEY CITY, et al.)	
)	
Appellees)	
)	
v.)	
)	
CONSOLIDATED RAIL CORPORATION and,)	Case No. 13-7175
PAULA T. DOW, ATTORNEY GENERAL,)	
STATE OF NEW JERSEY,)	
)	
Appellees)	
)	
and)	
)	
212 MARIN BOULEVARD, LLC, et al.,)	
)	
Appellants.)	
)	

APPELLANTS’ STATEMENT OF ISSUES TO BE RAISED

Appellants 212 Marin Boulevard, LLC, 247 Manila Avenue, LLC, 280 Erie Street, LLC, 317 Jersey Avenue, LLC, 354 Cole Street, LLC, 389 Monmouth Street, LLC, 415 Brunswick Street, LLC, and 446 Newark Avenue, LLC (“Appellants”) intend to raise the following issues:

1. The District Court should have allowed the Appellants’ amended their pleading to adjudicate these issues raised in the proposed amended answer,

counterclaims, and cross-claims, which issues the parties were unable to stipulate at the outset of the proceedings¹:

a. The location of other lines of rail identified by Appellants that are similar to the adjudicated portion of Conrail's former Harsimus Branch by virtue of being identical in all respects for federal regulatory purposes to the area now adjudicated to be federally regulated.

b. Do the facts that all of these former Conrail properties, most of which have been long ago transferred to third parties and intensely developed, require that any of these properties, including Appellants' properties similarly situated, remain subject to the federal regulatory jurisdiction of the Surface Transportation Board ("STB")?

c. Has there been a de facto abandonment of all of these properties by virtue of STB approval in 2002 of an abandonment of a portion of a Conrail line of rail known as the River Line, which served as the only connection between Conrail's railroad and the properties now at issue, including Appellants' properties?

d. If de facto abandonments are not permitted as a matter of law, then is it proper for the City of Jersey City, et al., to create such a de facto

¹ See District Court order to stipulate and stipulation, ECF ##

abandonment for the properties which will be abandoned de facto if the STB authorizes abandonment of Appellants' properties (Issue 1(a), above)?

2. The decision of the District Court will not allow the STB to act upon a petition for abandonment by Conrail of properties that includes Appellants' properties but that also includes additional properties of Conrail, not previously abandoned and identified in NO. 1(a), above. This will reprise the proceedings first ruled upon by the D.C. Circuit Court of Appeals in Consolidated Rail Corp. v. Surface Transp. Bd., 571 F.3d 13 (D.C. Cir. 2009).

3. Should this Court Order the STB not to proceed with the foregoing pending petition for abandonment by Conrail until this Court decides the present appeal in light of the fact that the City of Jersey City, et al., have asked the STB to lift an order staying further proceedings and proceed without further delay?

4. Is Appellants' claim of fraud and negligent misrepresentation against Conrail so integral to the facts and issues which should be considered by the District Court that the District Court should have allowed the inclusion of those claims?

Respectfully submitted,

/s/ Daniel E. Horgan

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Dated: November 29, 2013

778805.1

CERTIFICATION OF SERVICE

I HEREBY CERTIFY that on this 27th day of November, 2013, I caused a true and correct copy of the Appellants' Statement of Issues to be Raised to be filed with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to the following counsel who have registered for receipt of documents filed in this manner:

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Dated: November 27, 2013

778805.1

Exhibit

“C”

Consolidated Rail Corp.

Abandonment Exemption

In Hudson County, NJ;

Docket AB 167 (Sub-No. 1189X)

Motion for Intervention, Notice, and
Opposition to Request to Lift Stay of
Proceedings

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITY OF JERSEY CITY,)
RAILS TO TRAILS CONSERVANCY, and)
PENNSYLVANIA RAILROAD HARSIMUS STEM)
EMBANKMENT PRESERVATION COALITION,)
))
Plaintiffs,)
))
v.)
))
CONSOLIDATED RAIL CORPORATION,)
))
Defendant,)
))
and)
))
212 MARIN BOULEVARD, LLC;)
247 MANILA AVENUE, LLC;)
280 ERIE STREET, LLC;)
317 JERSEY AVENUE, LLC;)
354 COLES STREET, LLC;)
389 MONMOUTH STREET, LLC;)
415 BRUNSWICK STREET, LLC; and)
446 NEWARK AVENUE, LLC,)
))
PAULA T. DOW, ATTORNEY GENERAL, STATE)
OF NEW JERSEY)
))
Intervenor-Defendants.)
_____)

Civil Action No.
09-cv-1900 (CKK)

AMENDED ANSWER, AFFIRMATIVE DEFENSES, COUNTERCLAIMS, CROSS-CLAIMS, AND JURY DEMAND

212 Marin Boulevard, LLC; 247 Manila Avenue, LLC; 280 Erie Street, LLC; 317 Jersey Avenue, LLC; 354 Coles Street, LLC; 389 Monmouth Street, LLC; 415 Brunswick Street, LLC; and 446 Newark Avenue, LLC (collectively, the “LLCs”), by and through their undersigned counsel, hereby make this Amended Answer to the Complaint for Declaratory and Injunctive Relief (the “Complaint”) of Plaintiffs City of Jersey City (the “City”), Rails to Trails

Pages 2 through 19 omitted

reference to the Penn Central Line Code, a branch name, and the linear distances. (See, Exhibit 1). The Special Court approved the FSP on April 1, 1976.

22. By deed dated March 31, 1976 and recorded on October 12, 1978, the Trustee of the UNJRCC property, Fairfax Leary, conveyed title to assets to Conrail (the “Leary Deed”). The Leary Deed provided additional descriptions of each line being transferred to Conrail. (Exhibit 2: March 31, 1976 Deed from Fairfax Leary, Trustee, to Consolidated Rail Corporation).

B. Identification of Lines of Rail Transferred to Conrail

Harsimus Branch

23. Plaintiffs have commenced this action seeking determination of whether a segment of the Harsimus Branch (described below) was transferred to Conrail as a line, thereby subjecting that segment, but only that segment, to the jurisdiction of the Surface Transportation Board (“STB”), including the abandonment jurisdiction. The segment identified by Plaintiffs includes the area between Marin Boulevard (formally Henderson Street) and a former Control Point located in a railroad cut at Waldo Avenue (“CP Waldo”). That segment is within Jersey City, New Jersey, and includes the eight properties owned by the LLCs and other property still in Conrail ownership. Plaintiffs have described the segment as being between Mile Post 1.3, which they locate at Marin Boulevard and Mile Post 2.54 which they locate at CP Waldo.

24. The area targeted by Plaintiffs’ Complaint includes a structure known as the Harsimus Stem (or Sixth Street) Embankment (the “Embankment”). The Embankment consists of six earth-filled sandstone walls ranging in height from twenty to thirty-five feet. Each of the six separate blocks of property comprising the Embankment is 400 feet long by one hundred feet wide. The Embankment runs in an east–west direction parallel to the south side of Sixth Street in

Jersey City. The total length of the Embankment is approximately one-half mile. Six of the LLCs each own one of the six segments of the Embankment, having purchased the properties from Conrail on July 12, 2005. Plaintiffs have brought this action in an attempt to subject only the Embankment, the properties of the other two LLCs, and certain property of Conrail to STB abandonment proceedings for the purpose of seeking certain federal and state remedies the Plaintiffs argue they are entitled to pursue in STB abandonment proceedings. (Exhibit 3: Deeds (eight total) from Consolidated Rail Corporation, to LLCs, dated July 12, 2005). Plaintiffs have not included in their Complaint other portions of Conrail's Harsimus Branch (described below) to the East of Marin Boulevard (or Mile Post 1.3) which Conrail previously owned and conveyed to other parties for exclusively non-railroad use prior to 2005.

25. The entire Harsimus Branch is identified in the FSP as Line Code 1420. Line Code 1420 began in Jersey City at Mile Post 1.00, and ended in Harrison, New Jersey (west of Jersey City) at Mile Post 7.0. (See, Exhibits 1 and 2).

26. The Leary Deed (UNJRCC Trustee) to Conrail provided the following description of Line Code 1420:

Situated in the County of Hudson, State of New Jersey, and being The United New Jersey Railroad and Canal Company's line of railroad known as the Penn Central Harsimus Branch and being all the real property in the County lying in, under, above, along, contiguous to, adjacent to or connecting to such line.

Such line originates in the County at Harsimus Cove, passes through Journal Square, and terminates in the County near the junction with the Penn Central New York-Philadelphia Main Line, west of the New Jersey Turnpike Overhead Bridge.

The line of railroad described herein is identified as Line Code 1420 in the records of the United States Railway Association.

[See, Exhibit 2.]

27. Based upon review of Pennsylvania Railroad track charts, the Pennsylvania Railroad placed Mile Post 0.00 in Manhattan on the eastern side of the Hudson River opposite Jersey City. Beginning on the Hudson River waterfront in New York City, Mile Post 1.00 would correspond to the Jersey City waterfront. Therefore, the Harsimus Branch began at or near water's edge along the Hudson River shoreline. This location is commonly known as Harsimus Cove. (Exhibit 4: Pennsylvania Railroad Track Charts).

28. The Pennsylvania Railroad operated a freight facility called the Harsimus Cove Yard in Jersey City. The Harsimus Branch was the main freight line servicing the Harsimus Cove Yard.

29. Historic photographs and maps (including documents previously submitted to this Court by Plaintiffs) show that the Pennsylvania Railroad's tracks at the Hudson River (Mile Post 1.00) and running west in a straight line to Marin Boulevard and the Embankment. The historic photographs show a series of catenaries along the undisputed course of the Harsimus Branch (i.e., atop the Embankment and also along the remaining distance to the river). (Exhibit 5: Pictures of P.R.R. Harsimus looking west to receiving yard - main stem (embankment) from the book *Jersey City's Hudson River Waterfront, Book One: The Pennsylvania Railroad 1941-1964* by Charles Caldes, Journal Square Publishing 2009). The system of catenaries for electric locomotives on the Harsimus Branch continues east from the Embankment past Marin Boulevard to the Hudson River further indicating that the Harsimus Branch began at Mile post 1.00 located at the Hudson River waterfront and continued along the Sixth Street Embankment. This was the location of line code 1420 as it existed to the East of CP Waldo.

30. The Harsimus Branch was at-grade from the waterfront until it reached Marin Boulevard. At that point, it crossed over a steel bridge structure that took the tracks above-grade. On the opposite side of Marin Boulevard is the first block of the Embankment.

31. As previously described, the Embankment consists of six earth-filled sandstone structures, each one 400 feet long by one hundred feet wide. . The Embankment then carried the Harsimus Branch above-grade and crossing on bridges over the following five streets, heading east to west: Manila Avenue (formally Grove Street), Erie Street, Jersey Avenue, Coles Street, and Monmouth Street. While in service it had up to seven tracks on the top, and included the system of catenaries that continued to the Hudson River waterfront.

32. Beginning at the western end of the Embankment blocks at Brunswick Street, the Harsimus Branch continued west across trestles supported by concrete columns, all but one of which columns still exist. The two other LLCs each own one of the two parcels on which some of these columns are still located, but the trestle structures are long since gone, and Conrail still owns the balance. Along this route, the Harsimus Branch passed under the elevated portion of the New Jersey Turnpike as it approaches the Holland Tunnel to New York City (portion designated as Interstate 78).

33. A short distance after passing under the New Jersey Turnpike (Interstate 78), the Harsimus Branch returned to grade as a result of the rising elevation caused by a geological feature in Jersey City called Bergen Hill. At about the point the Harsimus Branch returned to grade on Bergen Hill, it converged at a switch with another line of rail known as the River Line. The River Line was a line of rail also transferred to Conrail in 1976.

34. Continuing west for a distance of approximately 750 feet (0.13 mile) from the River Line switch, the Harsimus Branch passed CP Waldo in a cut dug through the Bergen Hill.

The Harsimus Branch continued west past CP Waldo, through Journal Square (in Jersey City), and ended at Mile Post 7.00 in Harrison, New Jersey. At this point it converged with another Pennsylvania Railroad track called the Passaic Line. (Exhibit 6: Declaration of David B. Dixon of September 6, 2012, with attachments).

35. The properties east of Marin Boulevard that were conveyed to Conrail in 1976 as the Harsimus Branch were sold by Conrail for non-railroad uses and now contain residential, commercial and office development. Conrail no longer holds any property rights or easements to conduct rail freight operations on any of those properties that once were a part of the Harsimus Branch east of Marin Boulevard. Conrail did not obtain authorization from the STB to discontinue or abandon service, or to dismantle the railroad improvements or sell off these properties.

Hudson Street Industrial Track

36. The second line of rail relevant to issues raised in this matter is the Hudson Street Industrial Track. In the FSP, the Hudson Street Industrial Track is identified as Line Code 1440. Line Code 1440 was located entirely within Jersey City and was 1.30 miles long.

37. The 1976 Leary Deed provided the following description of the Hudson Street Industrial Track:

Situate in the County of Hudson, State of New Jersey and being the United New Jersey Railroad and Canal Company's line of railroad known as The Penn Central Hudson Street Branch and being all the real property in the County lying in, under, above, along, contiguous to, adjacent to or connecting to such line.

Such line originates in the County near Montgomery and Hudson Streets in Jersey City, connecting to another line of railroad known as the Harsimus Cove Yard, passes through Hudson Street, Essex Street, and Warren Street and terminates in the County 1 1/2 blocks west of the intersection of Warren and Essex Streets.

The line of railroad described herein is identified as Line Code 1440 in the records of the United States Railway Association.

38. The purpose of the Hudson Street Industrial Track was to provide freight service to industrial customers in downtown Jersey City along the Hudson River waterfront. The most prominent (and profitable) customer was the Colgate-Palmolive ("Colgate") factory.

39. From review of historical maps, records, and photographs, it can be determined Line Code 1440 began near the intersection of Warren Street and Essex Street in Jersey City, and headed east in the middle of Essex Street. At Hudson Street, Line Code 1440 turned north and traveled through the bed of Hudson Street. At a street called Christopher Columbus Drive (once known as Railroad Avenue), the Hudson Street Industrial Track turned north-west for a short distance, turned northerly, and resumed a northerly heading following the current location of Greene Street. Line Code 1440 passed through the Harsimus Cove Yard and terminated at Mile Post 1.30, where it connected with the Harsimus Branch at Marin Boulevard (i.e., the eastern-most block of the Embankment).

40. At the time Conrail took title to the assets provided in the FSP in 1976, the only means of accessing the Hudson Street Industrial Track was across the Harsimus Branch Embankment. Previously, alternate access had been abandoned and demolished in the 1960s before Conrail was formed. Thus, Line Code 1420 and Line Code 1440 formed an integrated system of tracks providing for freight customer service in the Harsimus Cove Yard and the industrial area at and around the Colgate soap factory.

41. The Hudson Street Industrial Track is easily identified where it passed across public streets. Once it entered the Harsimus Cove Yard, the line track can also be identified by review of aerial photographs, as well as the following documents: (a) a 1985 riparian survey,

which shows a segment of the Hudson Street Industrial Track, (b) a 1988 subdivision map, which memorialized an agreement between Conrail, the City's redevelopment agency, and private developers, and (c) the 1990 City tax map, which shows an area of tax exempt Class I railroad property extending as an arch south-east from Marin Boulevard. The City's 1995 tax map does not show that tax exempt property, indicating Conrail disposed of that property by that date. (See, Exhibit 6; Exhibit 7: 1985 survey entitled "Map of the Property of Waterfront Associates" showing, in part riparian boundaries; Exhibit 8: 1988 Major Subdivision/Boundary survey by Lange & Surveying and Mapping).

C. Plaintiffs' Erroneous Description of the Harsimus Branch Requiring Resolution by this Court

42. In papers filed in this pending action, Plaintiffs have admitted that another track, corresponding with the description of the Hudson Street Industrial Track, connected with the Harsimus Branch at the easternmost segment of the Embankment at Marin Boulevard. They also have alleged that the Harsimus Branch to the west of this point of connection constituted a line of rail because Conrail analyses conducted in and around 1983 purported to show substantial freight traffic accessed waterfront customers in Jersey City over the Embankment. The track in question was the Hudson Street Industrial Track. Plaintiffs have further admitted in papers filed in this action they seek a determination of only a "part" of the Harsimus Branch, and acknowledge the segment described in the Plaintiffs' complaint does not encompass the totality of the Harsimus Branch nor do they even mention the Hudson Street Industrial Track.

43. Plaintiffs have provided not only an incomplete but an inaccurate description of the Harsimus Branch and the segment they are singularly focused on (i.e., the Embankment). Plaintiffs claim the segment begins at Marin Boulevard at Mile Post 1.30 and ends at Mile Post 2.54 at CP Waldo. An examination of the track chart relied upon by Plaintiffs indicates that the

document in fact relates to the Pennsylvania Railroad's main passenger line that once ran along Christopher Columbus Drive (then known as Railroad Avenue). Thus, Mile Post 2.54 at CP Waldo was a distance along the passenger main line, and not the Harsimus Branch. Furthermore, Mile Post 1.30 would not correspond to the distance between the Hudson River waterfront (Mile Post 1.00) and Marin Boulevard, which is approximately one-half mile from the waterfront. However, Plaintiffs' designation of Marin Boulevard as Mile Post 1.30 would correspond to the Hudson Street Industrial Track's mile marker at the same location. As a consequence of Plaintiffs' confusion and mis-designation of the Harsimus Branch, the distance it alleges to exist between Marin Boulevard (Mile Post 1.3) and CP Waldo (Mile Post 2.54) is materially in error because the distance between the Mile Posts cited (1.3 and 2.54) would indicate a difference between the two Mile Posts, and hence a distance of 1.24 miles, when in fact the total distance between Marin Boulevard and CP Waldo is 0.88 miles. By using Mile post designations for other lines, Plaintiffs have failed to identify correctly the length of the segment of the Harsimus Branch which they would have the Court address,

44. Plaintiffs also fail to address the location of the Harsimus Branch east of Marin Boulevard. The line begins at Harsimus Cove at the Hudson River at Mile Post 1.0 and runs west to Marin Boulevard for approximately 0.55 miles, and then from Marin Boulevard to CP Waldo for a distance of another 0.88 miles, for a combined distance of both segments of the Harsimus Branch of approximately 1.43 miles. Both segments were conveyed to Conrail as part of line code 1420 as lines of rail. All properties to the east, and the Embankment to the west of Marin Boulevard were sold by Conrail to third parties for non-railroad use without any formal abandonment authority. Plaintiffs claim that such sales of regulated lines without formal abandonment authority are illegal as a violation of federal railroad law, making such property

subject to the federal remedies they seek to impose of the properties of the LLCs. The only distinctions between the two segments of the Harsimus Branch, east and west of Marin Boulevard, is that Plaintiffs refuse to identify the segment to the east of Marin Boulevard in any way, claiming that it is not relevant to these proceedings; and, would subject that eastern segment which is the obvious tail end of the Harsimus Branch to a de facto abandonment when severed from the rest of the Harsimus Branch, while claiming such de facto abandonment by severance to be illegal. Such piecemeal designation of only portions of lines of rail to be abandoned in STB proceedings would be arbitrary and discriminatory, and would not provide sufficient basis or determination for subjecting any of the segments of the Harsimus Branch to federal railroad regulation.

D Conrail's Erroneous Description of the Harsimus Branch and Hudson Street Industrial Track, Requiring Resolution by this Court

45. In an abandonment proceeding before the STB that has been held in abeyance pending outcome of this matter, Conrail has provided a description of the Harsimus Branch that is at odds with the FSP and with Plaintiffs' description of the Harsimus Branch.. Specifically, Conrail has described the entire Harsimus Branch (and not merely a segment of it) as beginning at CP Waldo (Mile Post 0.00) and heading east across the Embankment to Marin Boulevard (Mile Post 0.88), and then, rather than continuing due east to its end point at the Hudson River, the Harsimus Branch allegedly turns south-east through the area that was once the Harsimus Cove Yard. According to Conrail, the Harsimus Branch now ends in the Harsimus Cove Yard at Mile Post 1.36. This description differs from that of Plaintiffs not only as to the purported location of the line segment of the Harsimus Branch to the east of Marin Boulevard, but also in the location of its terminus. The 1976 Leary Deed has the Harsimus Branch starting at the Hudson River, which is also the location shown on track charts for Line Code 1420 as Mile Post

1.00. Conrail's description, which it and Plaintiffs rely upon for future STB abandonment proceedings, is in conflict with the FSP and Conrail's own property records for Line Code 1420.

46. Conrail has also admitted through its STB filing that the original Harsimus Branch continued to the south for another 0.12 miles to Mile Post 1.48, but that Conrail had sold that property constituting the final 500+ feet. That sale also occurred without first obtaining STB abandonment authorization. Both Conrail and Plaintiffs simply ignore this portion of line for STB regulatory purposes. (Exhibit 9: Conrail's Notices of Exemption Docket No. AB 167 Sub No. 1189X dated January 6, 2009).

47. In a pre-abandonment petition filing with the STB which was made in anticipation of Conrail's presently pending STB abandonment proceeding for what it describes as the Harsimus Branch, which proceeding Plaintiffs urge should proceed without interference from the Special Court, Conrail described the Hudson Street Industrial Track as beginning near the intersections of Warren and Essex Streets, and continuing generally northward along the path of Line Code 1440 described above, but ending at Mile Post 0.72. (Exhibit 10: Conrail's Notice of intent to file for an Exemption for Abandonment and Discontinuance of Service STB Docket No. AB 167 Sub No. 1189X dated March 6, 2008).

48. Conrail's description of the Harsimus Branch as being 1.36 miles long and the Hudson Street Industrial Track as being 0.72 miles long creates a gap between the two lines—as described by Conrail to the STB and visible in Conrail's maps accompanying its STB petition.

49. That gap would be filled with the 0.12-mile long stretch Conrail admits it sold without STB authorization. That gap also corresponds with the section of track shown on the a 1985 riparian survey and a 1988 subdivision map. (See, Exhibits 7 and 8).

50. Various railroad properties that once comprised portions of the Hudson Street Industrial Track have now all been sold by Conrail and they are now improved with privately sponsored development, including residential, commercial, and office high-rises under the authority of redevelopment plans adopted by the Jersey City Redevelopment Agency (“JCRA”). In addition, the segment of the Hudson Street Industrial Track that was identified in the 1988 subdivision survey is now the location of Greene Street—a public arterial street in the City serving the downtown area. The balance of the Hudson Street Industrial Track on Hudson Street and Essex Street is used as NJ Transit’s Hudson-Bergen Light Rail line.

51. The exhibit accompanying this Amended Answer, Counter-Claims, and Cross-Claims accurately illustrates the precise locations of the Harsimus Branch and the Hudson Street Industrial Track. (See, Exhibit 6).

E. City and Conrail Discontinue Rail Service in Downtown Area

52. During the mid-1980s, the need for freight service in the downtown area of Jersey City was diminishing. The City was interested in developing its waterfront for high-end residential, retail, and office uses, and displacing the increasingly obsolete and unproductive railroad uses in the process. On December 18, 1984, the then Mayor of Jersey City, Gerald McCann, wrote to the chairman of Conrail to address the City’s waterfront development plans and Conrail’s position as a major property owner in the area. On behalf of the City, Mayor McCann told Conrail that the need for freight rail service in Jersey City had declined. The Mayor reminded Conrail that it had already sold “surplus” property for the City’s development projects, although that property and its classification were not identified. (Exhibit 11: Correspondence from Jersey City Mayor McCann to Conrail dated December 18, 1984).

53. The Mayor identified the Embankment and an additional, connecting track as property that was acting as an impediment to development. Mayor McCann specifically referenced the Embankment as serving the tracks on Hudson Street. Tracks south-east of the Embankment “cut a diagonal line through a forty acre waterfront development site.” The Mayor continued:

The line then runs at street grade bisecting two major office projects to the south: the Harborside Financial Center, a two million square foot rehab project where the Bankers Trust Company is already leasing almost one-half million square feet of office space, and a seventeen story, 325,000 square foot office building under construction by an affiliate of the Evergreen Shipping Lines.

The line continues along Hudson Street at grade, crossing both Christopher Columbus Drive and Montgomery Street, which will serve as main arteries to the imminent commercial developments at Exchange Place.

Because of the dramatically changing land uses in the area, I believe you will agree that the time of the freight line service on this line has passed. I suggest we meet in the near future to discuss the discontinuance of this impediment and to select an alternate means of serving your remaining customers.

[See, Exhibit 11.]

54. The line described by Mayor McCann’s letter corresponds to the known location of the Hudson Street Industrial Track running from Mile Post 1.30 at Marin Boulevard, through the Harsimus Cove Yard, along what is now Greene Street, past Exchange Place and down Hudson Street to the area of the Colgate factory.

55. During the 1980s, when Mayor McCann wrote his letter, Conrail’s need for service in downtown Jersey City was in fact diminishing. By 1985, Conrail was serving only seven industrial customers, including Colgate. Colgate advised Conrail of its intention to close its Jersey City plant by 1988. Conrail also expected to lose two more customers due to

development projects sponsored by the City. Conrail considered connecting the Hudson Street Industrial Track to the nationwide rail system at another location, but the expected termination of need for service led Conrail to conclude that alternate access was unnecessary. (Exhibit 12: Conrail Memorandum regarding the Hudson Street Track, dated January 28, 1985).

56. In 1988, Conrail entered into a subdivision agreement with private developers and the JCRA, an independent agency of the City, to settle lot boundaries. The 1988 agreement was evidenced by a survey that was signed by all interested parties, including Conrail. Conrail expressly kept possession of a narrow corridor that coincided with the location of the Hudson Street Industrial Track, which tracks are shown on the survey. (See, Exhibit 8).

57. The lot created by the subdivision survey to accommodate the Hudson Street Industrial Track coincides with the location of the missing segment of the track system shown on Conrail's STB abandonment petition. The lot shown on the survey would therefore coincide with the 0.12 missing miles of track, which Conrail admits it sold without STB abandonment authority.

58. Following discontinuation of active freight service across the Embankment and the Hudson Street Industrial Track in 1988, Conrail continued to use the Embankment for turn-around purposes while it constructed a facility called Marion Junction in Jersey City, which would make turning trains on the Embankment unnecessary. Once Marion Junction became operational Conrail did not need the Embankment.

59. On April 13, 1994, Marion Junction became operational. During that summer, without having further need for the Embankment, Conrail caused all remaining rails and ties along the Embankment to be removed—at the City's urging. Conrail also made a commitment to the City to remove the connecting bridges that spanned Brunswick Street, Monmouth Street,

Coles Street, Jersey Avenue, Erie Street, and Manila Avenue during winter 1994. Conrail also agreed to remove the the trestles that connected the Embankment from Brunswick Street to CP Waldo.

60. On April 5, 1995, the City's Director of Engineering wrote to Conrail's chief engineer to complain Conrail had not removed the cross-bridges that connected the segments of the Embankment and those bridges were posing a public safety hazard. The City engineer noted that the City had removed the bridge over Marin Boulevard, which carried the tracks from the Embankment to grade. The City's Director of Engineering further inquired when Conrail intended to remove the Embankment itself, and if Conrail had long-term plans for the right-of-way. The Director of Engineering described the Embankment (the "elevated viaduct") as an "eyesore which divides the downtown section of Jersey City." (Exhibit 13: Correspondence from Jersey City Municipal Engineer to Conrail, dated April 5, 1995).

61. In April 1997, the Mayor of Jersey City, then Bret Schundler, wrote to Conrail to express the City's interest in acquiring the Embankment as part of its redevelopment efforts. (Exhibit 14: Correspondence from Jersey City Mayor Schundler to Conrail, dated April 21, 1997).

62. Conrail had a meeting with the JCRA to discuss the Embankment. In a letter dated October 29, 1997, JCRA's Executive Director advised Conrail that JCRA intended to hire licensed professionals to examine environmental issues relating to the Embankment with a goal of the JCRA purchasing the property for redevelopment. No mention was made of federal regulatory obligations or STB jurisdiction. (Exhibit 15: Correspondence from the Jersey City Redevelopment Agency Executive Director to Conrail dated October 29, 1997).

63. In 1999, long after the last vestiges of railroad use had been eliminated except the stone Embankment, local residents opposed to the development of the property organized the Pennsylvania Railroad Harsimus Stem Embankment Preservation Coalition (the "Coalition") (a Plaintiff in this matter) and lobbied for placement of the Embankment on the State of New Jersey's Register of Historic Places. Conrail and the City opposed those efforts because the City's ability to develop the site would be hampered by State historic designation regulations. Conrail's and the City's objections were unsuccessful, and the Embankment was named as a State Historic Place. (Exhibit 16: correspondence from Conrail to New Jersey DEP Historic Preservation Office, dated June 4, 1999; Exhibit 17: Correspondence from Jersey City Mayor Schundler to the New Jersey DEP Historic Preservation Office dated July 7, 1999).

64. Negotiations between Conrail and the JCRA for the sale of the Embankment ceased in 1999. Conrail and the City have claimed the imposition of historic designation regulations made the Embankment no longer a target for JCRA acquisition.

65. In 2003, at the urging of the Coalition, the City passed an ordinance declaring the Embankment a municipal historic landmark, subjecting the Embankment to the jurisdiction of the Jersey City Historic Preservation Commission; notwithstanding the City's contrary position the Embankment should not be placed on the State Registry of Historic Places in 1999. (Exhibit 18: Jersey City Ordinance No. 03-010).

66. By approximately 1994 Conrail had discontinued all rail service and removed tracks, bridges, and trestles from all of the properties later purchased by LLCs with the knowledge of and encouragement by the City. The City directly participated in the demolition of rail infrastructure at Marin Boulevard. Approximately eleven years later in 2005, after offering the properties to the City and being repeatedly refused, Conrail sold the properties to the LLCs,

subject to the City's historic regulation, but without any notice to the LLCs that Conrail had never sought abandonment authorization for those properties or any other portions of its lines of rail on the Harsimus Branch.

67. Plaintiffs filed a petition with the STB in January 2006 for a determination that the Harsimus Branch between Marin Boulevard and CP Waldo was transferred as a line. In that petition, as here, Plaintiffs did not seek adverse abandonment relief which would have entitled the City to condemn the property or otherwise acquire it for public use (Plaintiffs' stated goal), and Plaintiffs also avoided any discussion of the Harsimus Branch east of Marin Boulevard or the Hudson Street Industrial Track, which would have been necessary to proceed through an abandonment proceeding.

68. On August 8, 2007, the STB determined the Harsimus Branch, as defined by Plaintiffs, was a line. (Exhibit 19: Surface Transportation Board Decision of August 8, 2007, in the matter docketed as Finance Docket No. 34818). The STB denied the LLCs' request for reconsideration on December 19, 2007. However, that decision was reversed by the United States Court of Appeals for the District of Columbia Circuit on June 26, 2009 on the ground that the resolution of Plaintiffs' petition required interpretation of the FSP, and only this Court, as statutory successor to the Special Court, could make that ruling. Plaintiffs thereafter initiated this action.

69. While the appeal of the STB decision was pending, on March 12, 2008 Conrail filed a notice of intent to initiate an abandonment proceeding for what it wrongly claimed was the 1.36-mile long Harsimus Branch and the 0.72-mile long Hudson Street Industrial Track. Plaintiffs objected to inclusion of the Hudson Street Industrial Track in a petition for abandonment because that would create confusion, but never took issue with Conrail's

description of either the segment of the Harsimus Branch to the east of Marin Boulevard or the implicit de facto abandonment of the Hudson Street Industrial Track. (See, Exhibit 10).

70. A State Assemblyman, L. Harvey Smith (who represented the state district where the Embankment is located), commented on Conrail's notice of intent to STB on April 18, 2008. Assemblyman Smith had been a member and president of the Jersey City Council and had served as interim mayor of Jersey City from March to November 2004. He was also once a member of the JCRA. Assemblyman Smith was well aware of the history of the Embankment and Jersey City waterfront development. Smith objected to consideration of the Harsimus Branch and the Hudson Street Industrial Track in the same application as being "confusing." Assemblyman Smith was also the prime sponsor of a 2009 amendment to N.J.Stat. 48:12-125.1 through which the City now seeks to void Conrail's sale to the LLCs, but only that sale and not other prior sales. (Exhibit 20: Correspondence of Assemblyman L. Harvey Smith to STB dated April 16, 2008).

71. After objections to any abandonment of the Hudson Street Industrial Track, on January 6, 2009, Conrail filed a notice of exemption for the Harsimus Branch only, in which it requested the STB determine the segment of the Harsimus Branch east of CP Waldo was no longer subject to the STB's jurisdiction. (See, Exhibit 9). Plaintiffs objected to that procedure, and continued to avoid any discussion of the true extent of Line Code 1420 and Line Code 1440.

72. After the D.C. Circuit Court reversed the STB's decision that the Harsimus Branch was a line, Plaintiffs initiated this matter on October 7, 2009. Conrail's STB application was stayed pending outcome of this matter.

F. Conrail Fraudulently Misrepresents the Legal Status of the Embankment Properties

73. In 1993 and at about the time when all railroad facilities on the Embankment were being removed as requested by the City, Conrail reclassified Line Code 1420 as being a 1.36

mile long spur beginning at CP Waldo (and presumably heading east), and the Hudson Street Industrial Track as being a 0.72 mile long spur. That reclassification is contained in a memorandum prepared by Conrail's Law Department. Its purpose was to attempt the removal of these rail assets from federal regulatory jurisdiction. The reclassification was inconsistent with the FSP, the order of the Special Court adopting the FSP, and the Leary Deed transferring the assets to Conrail.

74. Conrail did not obtain STB authorization to reclassify those tracks from lines to spurs. Spurs, unlike lines, are not regulated by the STB for abandonment purposes, and service may be discontinued and the property sold without seeking STB abandonment authorization.

75. In 2005, leading to the LLCs' purchase of the Embankment, Conrail's agents affirmatively misrepresented to the LLCs that the Embankment was a spur track and not subject to the STB's abandonment jurisdiction—citing its own internal reclassification memorandum. (Exhibit 21: Correspondence from John Fiorella, Esq., to Carmine Alampi, counsel for the LLCs from July and October 2005).

76. Conrail did not seek STB authorization to discontinue freight service or abandon Line Codes 1420 (including removal of railroad improvements) until 2009, and then only in response to an STB decision that the Harsimus Branch between Marin Boulevard and CP Waldo was a line of rail. (That decision, as noted above, was subsequently reversed on appeal, and Conrail's abandonment petition has been stayed pending outcome of this matter.)

77. Conrail has demonstrated a pattern of claiming the Embankment was a spur track, including: (a) in its representations to the City and the LLCs between 2003 and 2005, (b) in opposing the City's 2006 petition with the STB, and (c) in its motion for summary judgment filed with this Court in prior court proceedings. Before the STB and later this Court, Conrail

argued that the Harsimus Branch was a spur of the old Pennsylvania Railroad Main Line, which once followed current Christopher Columbus Drive (then appropriately named Railroad Avenue). The Main Line was used primarily for passenger service to Exchange Place in Jersey City. Despite Conrail's repeated representations that this line was what it received as Line Code 1420, the Pennsylvania Railroad discontinued service in the early 1960's (with approval from the STB's predecessor agency, the Interstate Commerce Commission), and demolished the elevated steel trestles that carried this line above Railroad Avenue in 1964. (Exhibit 22: Photograph of Railroad Avenue Main Line, source, Kenneth French, Railroads of Hoboken and Jersey City (2002)). The passenger Main Line did not exist when Conrail received the Harsimus Branch in 1976, and it was not mentioned in the conveyances to Conrail in the FSP or the Leary Deed.

78. Conrail followed the Plaintiffs' request to drop the Hudson Street Industrial Track from its current STB abandonment proceedings. After reviewing the Plaintiffs' position, Conrail explained: "On further reflection, Conrail agrees [with the City] that there is no need for it to seek authority to abandon the Hudson Street I.T. in this proceeding or any proceeding. Conrail considered the Hudson Street I.T. a spur line and no one, including the City, has ever contended otherwise." (Exhibit 23: Comments of Consolidated Rail Corporation on Issues Raised by Pre-Filing Correspondence of January 6, 2009 in the matter STB No. 167 Sub No. 1189X).

COUNTERCLAIMS AGAINST
THE CITY, RTC, THE COALITION, AND CONRAIL
COUNT I
DECLARATORY JUDGMENT

79. The LLCs repeat the allegations contained in Paragraphs 1 through 78 as if set forth at length herein.

80. This Court has original and exclusive jurisdiction to determine whether assets transferred to Conrail in 1976 under the FSP, approved by this Court's predecessor (the Special Court) are lines of rail, subject to the abandonment jurisdiction of the STB. See, 45 U.S.C.A. 719(b)(1) and (e)(2); Consolidated Rail Corp. v. Surface Transp. Bd., 571 F.3d 13 (D.C. Cir. 2009).

81. This Court has original and exclusive jurisdiction to enter orders "enjoining, restraining, conditioning, or limiting any conveyance, transfer, or use of any asset or right which is subject to such an order or which is at issue in such a proceeding, or which involves the enforcement of any liens or encumbrances upon such assets or rights." This Court may further enter orders "which interpret, alter, amend, modify, or implement orders entered by the special court," which scope would include the order approving the FSP. This Court's orders "shall be final and shall not be restrained or enjoined by any court." See, 45 U.S.C.A. § 719(e)(2).

82. This Court possessed all the powers of a district court and a reorganization court. The Special Court specifically found that it possesses broad equitable powers. See, 45 U.S.C.A. § 719(b) (1); Penn Central Corp. v. Chicago Union Station Co., 830 F. Supp. 1509, 1520 (Sp. Ct. R.R.R.A. 1993).

83. The federal government's authority over railroads and lines of rail is based on the interstate commerce clause of the United States Constitution. See, 49 U.S.C.A. § 10101 et seq.

84. In recognition of the limitations of that authority, Congress has authorized the exemption of the STB's regulatory oversight to lines of rail that have been out of service for more than two years, provided federal jurisdiction is not necessary to carry out the transportation

policies of the federal government, and the scope of the subject activity is limited or the exercise of jurisdiction is not necessary to protect shippers from abuse. See, 49 U.S.C.A. § 10502(a); 49 C.F.R. § 1152.50 (STB regulations on filing notice of exemption); and Illinois Commerce Com. v. Interstate Commerce Com., 848 F.2d 1246 (D.C. Cir. 1988).

85. An STB abandonment proceeding will require the STB to consider the present and future rail needs that may be impacted by the abandonment of a line, including the needs (or lack of need) of other portions of that line to be abandoned or cut off from any future rail service, as well as any other public purpose to which the subject property should be subject. See, 49 U.S.C.A. § 10905; 10906(d); 49 C.F.R. § 1152.1(a) (STB regulations concerning abandonment).

86. The LLCs have correctly identified the location of the Harsimus Branch between the Hudson River and CP Waldo, and the entire length of the Hudson Street Industrial Track.

87. Plaintiffs' description of the Harsimus Branch is incomplete, inaccurate, and will not permit the STB, in an abandonment proceeding, to make the requisite findings concerning present and future needs unless the full extent of Line Code 1420 and the connecting Line Code 1440 are resolved by this Court.

88. Moreover, the Harsimus Branch east of CP Waldo and the Hudson Street Industrial Track have been out of service since at least 1994, and all tracks and other improvements (with the exception of the stone Embankment walls) have been removed by Conrail and the City. There are (and for many years have been) no active rail customers in this area.

89. The transformed character of downtown Jersey City obviates any need for a return of freight service either now or in the future. (Exhibit 24: Declaration of Dean Marchetto dated September 4, 2012).

90. The jurisdiction of the STB over Line Code 1420 east of CP Waldo and over Line Code 1440 is not necessary to carry out the transportation policies of the United States, as defined by Congress and there are no elements of interstate commerce here to be regulated through the 3R Act or other railroad regulatory statutes.

91. The removal of federal jurisdiction over Line Code 1420 east of CP Waldo and over Line Code 1440 is a transaction of limited scope.

92. Federal jurisdiction over Line Code 1420 east of CP Waldo and over Line Code 1440 is not necessary to protect shippers from abusive practices.

93. The sole reason for the exercise of abandonment jurisdiction at this time is for the Plaintiffs to seek the abandonment for the purpose of invoking certain remedies available in an abandonment proceeding only with respect to the Embankment which are applicable before a railroad transfers its fee interest in regulated railroad property , including (a) an offer of financial assistance to the railroad carrier in order to avoid abandonment, (b) a requirement that abandoned lines be made available for sale for public purposes, (c) the imposition of historical or environmental conditions on the line to be abandoned, or (d) rail banking under which a party may request that in lieu of abandonment, the line be "rail banked," which would preclude abandonment and leave the line available for future reactivation, and let the line be used for trail purposes until reactivation occurs. Plaintiffs also believe they may invoke a right of first refusal under New Jersey law to compel a sale of the Embankment to the City on terms identical to the LLCs' purchase terms *ex-post-facto*. N.J. Stat. 48:12-125.1. However, Plaintiffs have not brought nor identified any judicial proceeding through which they would be able to void the LLCs' title to the properties and retroactively apply state law provisions. The only

constitutionally permissible means to acquire the LLCs' properties at this time is through the payment of just compensation for a public purpose. U.S. Const., Amendment V.

94. Plaintiffs, by and through the City, may seek the same relief through the powers available to the City—a municipal corporation of the State of New Jersey. The City has already imposed historical use restrictions on the Embankment, and it may condemn the Embankment for public purposes.

95. The dispute concerning the location of the Harsimus Branch for purposes of seeking future abandonment relief is presented now in Conrail's abandonment petition, and therefore the issue for this Court to resolve is ripe for determination.

96. This Court may enter an order removing the federal jurisdiction over the Embankment and the Harsimus Branch east of CP Waldo and the Hudson Street Industrial Track, which residual jurisdiction Plaintiffs have argued is a cloud on the title of the Embankment, and consequently all other similarly situated properties.

WHEREFORE, the LLCs demand judgment as follows:

A. Declaratory judgment of this Court setting out the true and correct location of Line Code 1420 from CP Waldo due east to its termination point at the Hudson River waterfront;

B. Declaratory judgment of this Court setting out the true and correct location of Line Code 1440;

C. Declaratory judgment by this Court, acting as the successor to the Special Court with powers to interpret, alter, amend, modify, or implement its prior orders, that there is no longer any basis for federal regulatory jurisdiction over the Harsimus Branch east of CP Waldo and over the Hudson Street Industrial Track;

D. Declaratory judgment altering, amending, or modifying the April 1, 1976 order of this Court adopting the FSP to remove the Harsimus Branch east of CP Waldo and over the Hudson Street Industrial Track from the FSP, thereby removing all federal railroad regulatory jurisdiction over the identified area; and

E. Such other relief the Court deems equitable and just.

COUNT II

EQUITABLE ESTOPPEL

97. The LLCs repeat the allegations contained in Paragraphs 1 through 96 as if set forth at length herein.

98. The City was aware that both the Harsimus Branch (Line Code 1420) and the Hudson Street Industrial Track (Line Code 1440) were lines of rail in 1984, as evidenced by the Mayor's letter to Conrail and before as the City taxed the various railroad properties in the area.

99. The City urged Conrail to sell properties that both the City and Conrail knew were lines of rail in order to encourage development of the downtown waterfront area.

100. Without STB authorization, and at the City's request and for the City's benefit, Conrail sold, conveyed, or discontinued rail service on the entirety of Line Code 1440, and Line Code 1420 east of Marin Boulevard.

101. In the 1990's, the City and Conrail demolished cross-bridges and removed rails and ties along the Embankment, thereby effectively ending rail service in downtown Jersey City.

102. The City further urged Conrail to demolish the Embankment itself.

103. After determining it wanted to acquire the Embankment, but learning Conrail had entered into a contract with the LLCs, the City, joined by RTC and the Coalition, embarked on

litigation to establish the Embankment is a line of rail, while mischaracterizing the full extent of Line Code 1420 for the sole purpose of imposing federal regulatory jurisdiction only on the LLCs, while not seeking such impositions on other affected property owners, and while failing or refusing to proceed with condemnation of the LLCs' properties as the only proper and constitutionally permissible course .

104. The City, RTC, and the Coalition have not raised the issue of the balance of Line Code 1420 east of Marin Boulevard in order to avoid exposing for judicial and administrative scrutiny the City's wrongful conduct of encouraging and benefitting from Conrail's selling and otherwise conveying federally regulated lines without obtaining STB approval and in order to avoid the regulatory burdens under federal law that they seek here to impose only upon the LLCs. There remains no basis for such regulation today as to any property owner of former Conrail property classified as Line Code 1420. The imposition of such burdens as is sought by the City, RTC, and the Coalition constitutes denial of constitutionally protected property rights, due process and the equal protection of the law.

105. The City, RTC, and the Coalition have also urged that the STB ignore Line Code 1440, despite the City's urging here that the Embankment must be subject to federal regulatory authority.

106. The City, RTC, and the Coalition have jointly pursued a strategy of imposing federal regulatory burdens on the LLCs, but not other similarly situated property owners (i.e., owners of property once covered by tracks constituting Line Codes 1420 and 1440) in order to take advantage of certain remedies only available in STB abandonment proceedings, including (a) an offer of financial assistance, (b) a requirement that abandoned lines be made available for sale for public purposes, (c) the imposition of historical or environmental conditions on the line

to be abandoned, (d) rail banking, and (e) alleged right of first refusal under New Jersey law. Despite the quest for remedies against the interests of the LLCs, in 2012 the City has amended its redevelopment plans for the Marin Embankment block to permit 400 high rise dwelling units and a 200 unit hotel, provided that the City first obtains the full benefits of a proposed settlement agreement which was publicly approved by the Jersey City City Council.

107. There is at present no basis to subject the Embankment to federal regulatory authority of the STB because rail service has long since left the downtown Jersey City area, and there are no customers for freight service in this area (now dominated by residential and office high-rises). Conrail has no present or future plans of resuming freight service in the downtown Jersey City area.

108. There is no basis in law or equity to impose federal regulatory authority on the LLCs, without also imposing those obligations on owners of other properties that were sold by Conrail—at the City’s encouragement and support—and which were part of Line Code 1420 and Line Code 1440.

109. Due to the City’s inequitable, wrongful conduct, the City is estopped from subjecting one consortium of affiliated property owners (the LLCs) to federal regulatory jurisdiction while not seeking similar relief against all owners similarly situated with the LLCs.

110. RTC and the Coalition, who are dependent on the City’s standing to continue as parties to this suit, are similarly estopped from independently seeking relief against the LLCs. RTC and the Coalition have asserted in this proceeding and in other matters that they have a common interest with the City with respect to the Embankment. RTC and the Coalition are not entitled to equitable relief greater than what the City is entitled to receive. RTC and the Coalition, in addition to being subject to the scope of relief the City may be entitled to, have also

affirmatively participated in presenting a false history of the Embankment, Line Code 1420, and Line Code 1440 to the STB and to the Courts, and have actively participated in concealing the City's involvement with Conrail in illegally conveying federally encumbered properties without obtaining STB abandonment authorization.

111. In the event the issue of abandonment is brought before the STB or any other judicial or administrative forum, Plaintiffs should be equitably estopped based on their past and continuing conduct from invoking statutory remedies to the disadvantage of the LLCs.

WHEREFORE, the LLCs seek a judgment as follows:

A. Declaring that the Embankment is no longer subject to federal regulatory jurisdiction;

B. Declaring the City, RTC, and the Coalition are each separately barred and estopped from seeking a judgment finding the Embankment is a line of rail;

C. Declaring the City, RTC, and the Coalition are barred and estopped from invoking remedies, including but not limited to (a) offers of financial assistance, (b) public purpose requirements (c) historical or environmental conditions, (d) rail banking, or (e) seeking right of first refusal under New Jersey law;

D. Damages caused by the City, RTC, and the Coalition's wrongful conduct in subjecting the LLCs, and no other property owner, from expensive litigation;

E. Attorneys' fees and cost of suit; and

F. Such other relief as the Court considers equitable and just.

COUNT III

PREEMPTION

112. The LLCs repeat the allegations contained in Paragraphs 1 through 111 as if set forth at length herein.

113. The Plaintiffs have alleged they are entitled to invoke the remedies available under N.J. Stat. 48:12-125.1, which provides that a railroad must first offer former regulated railroad assets for sale to New Jersey state governmental bodies, including the State, its agencies, counties, and municipalities, such as the City.

114. N.J. Stat. 48:12-125.1 violates the exclusive jurisdiction of the STB to set conditions on abandonment and post-abandonment conditions, and is preempted by federal law and this Court's original and exclusive jurisdiction to interpret, alter, amend, or modify the FSP.

WHEREFORE, the LLCs demand judgment as follows:

- A. Declaratory judgment of this Court that N.J. Stat. 48:12-125.1 is preempted by federal law; and
- B. Such other relief as the Court deems equitable and just.

CROSS-CLAIMS AGAINST CONRAIL

COUNT IV

FRAUD

115. The LLCs repeat the allegations contained in Paragraphs 1 through 114 as if set forth at length herein.

116. Conrail was created by Congress pursuant to the 3-R Act in 1973 to take ownership of railroad assets of eight bankrupt railroad companies and to operate rail service along those assets.

117. The USRA was created to determine which assets of the bankrupt railroads should be transferred to Conrail. In 1975, USRA released the FSP, which identified which assets should be transferred to Conrail. The FSP listed lines of rail that were to be transferred to Conrail which lines of rail included additional properties ancillary to those lines, such as spurs, yards, and side tracks, but not specifically identified.

118. The Special Court approved the FSP on April 1, 1976, and the trustee in the bankruptcy matter transferred the assets to Conrail by deeds.

119. Among the many assets transferred to Conrail were two lines that were identified as Line Code 1420 (Harsimus Branch) and Line Code 1440 (Hudson Street Branch). Both Line Code 1420 and Line Code 1440 were transferred as lines of rail, subject to STB (then, the ICC) jurisdiction.

120. Conrail operated these lines of rail for many years subsequent to 1976 until its remaining customers left and the nature of the area changed such that rail freight service was no longer required, feasible or foreseeable.

121. Conrail is required to operate consistent with federal law, including STB regulations.

122. In the 1980's and 1990's, Conrail, in cooperation with the City's redevelopment plans, sold portions of Line Code 1420 east of Marin Boulevard, and either sold, or relinquished to the City and NJ Transit for use of light rail, the entire 1.3 mile length of Line Code 1440.

123. Conrail did not seek STB abandonment authority prior to selling or abandoning those assets.

124. Conrail also ended rail service in downtown Jersey City, in part due to requests from the City, and demolished cross-bridges connecting the segments of the Embankment and tore up tracks and ties. Conrail allowed the City to demolish the bridge connecting the Embankment at Marin Boulevard. Conrail did not seek or obtain STB abandonment authority before ending rail service and removing the railroad improvements.

125. After the installation of the Marion Junction in 1994, Conrail did not use the Harsimus Branch for any purpose. Upon information and belief, Conrail did not (and could not due to the absence of tracks, bridges, trestles, and signals) operate trains along the Harsimus Branch or the old Pennsylvania Railroad main line east of Marion Junction after 1994 (the old Pennsylvania Railroad main line having been demolished and removed from Railroad Avenue in approximately 1964).

126. In 2003, when Conrail entered into a contract of sale with the LLCs, there were no properties still owned by Conrail east of the Embankment in downtown Jersey City that had formed part of Line Codes 1420 and 1440.

127. Conrail internally reclassified the Harsimus Branch as a spur in 1994 without approval by the STB.

128. Conrail, with fraudulent intent and at numerous times, misrepresented to the LLCs that the Embankment was a spur or other, non-regulated railroad improvement, which could be freely conveyed by Conrail without first obtaining abandonment authority from the STB. It also made similar representations to the City to further its sale of properties to the LLCs without the necessity of seeking STB abandonment authority.

129. Conrail made those misrepresentations, through its attorneys, and otherwise with the intent that the LLCs would rely on those statements. The LLCs did rely upon those statements to their detriment, incurring enormous costs, delays and loss of opportunities, as well as being subjected to the wrongful actions of the Plaintiffs.

130. Conrail was aware at the time it sold the Embankment to the LLCs that it had not sought abandonment authority for the Harsimus Branch and that if the Embankment was in fact a line, it would have placed the LLCs into ownership of a line of rail, thereby subjecting their properties to the regulatory jurisdiction of the STB.

131. Conrail knew the Embankment was in fact a segment of Line Code 1420. Conrail fraudulently misrepresented the status of the Embankment to the LLCs to induce them to purchase the Embankment. The LLCs did in fact rely upon the statements and actions of Conrail.

132. Conrail purported to transfer all its "right, title, and interest" in the Embankment lots to the LLCs in July 2005. Conrail could not convey its interest as a common carrier to the LLCs, but no notice of that was given to the LLCs as Conrail did not reserve any residual rights by way of easement to resume rail operations along the Embankment.

133. With an intent to defraud the LLCs in the sale of the properties, but while avoiding the City and Coalition's objections that its properties were still federally regulated, Conrail represented to the City that the properties had been legally abandoned. Among other fraudulent and misleading statements made at the behest of Conrail, one of its attorneys responded to specific City and Coalition inquiries that: "You should be aware that the Jersey City Embankment, which is a portion of the Conrail Harsimus Branch was abandoned in April 1994 without application to the Interstate Commerce Commission pursuant to federal law which does not require formal ICC now Surface Transportation Board approval." Upon information

and belief, this statement, among others, led the City into a course of litigation on the line of rail issue and challenging the LLCs title and ownership interests. By so doing, a regulatory cloud has been placed on the LLCs' title and has forced them to suffer damages, including, but not limited to the cost of litigating these matters and lost business opportunities.

134. The LLCs reasonably relied on statements by Conrail, believing that Conrail was correctly describing the status of the Embankment. They were not aware of the true nature and history of Conrail's actions with respect to its former properties, and during the preceding twenty-nine years, to the LLCs' knowledge and belief, no property owner in the waterfront area of Jersey City had ever been subjected to any sort of claim arising from Conrail's lack of regulatory compliance. The LLCs also received title insurance binders, and title insurance policies at closing that gave no indication of Conrail's lack of regulatory compliance. Information concerning the status of the Embankment and Conrail's regulatory compliance is to a large degree contained within Conrail's own files, or maintained by the National Archives, and not readily ascertainable to the LLCs prior to the closing.

135. After the purchase, Conrail continued to tell the LLCs, as well as the STB and this Court, the Harsimus Branch was a spur, not that it had been legally abandoned in 1994 without formal ICC action.

136. The LLCs learned the Harsimus Branch was in fact a line years after the sale, and only after reviewing Conrail's filings with the STB and this Court, and in preparation for the potential remand of the case from the Circuit Court of Appeals which did, in fact, reverse the prior dismissal of Plaintiffs' case for lack of standing. Prior to that time, Conrail had further induced the LLCs into a false sense of comfort in its false and misleading statements by an agreement executed between the LLCs and Conrail in which Conrail promised the LLCs that it

would take all necessary steps to protect their interests in their titles to the properties. The LLCs reasonably relied upon Conrail's positions taken before the STB, this court, and in its written and verbal promises of solidarity with the LLCs.

137. In addition to fraudulently misrepresenting the actual status of the Embankment to induce the LLCs to purchase the Embankment, Conrail acted in order to avoid scrutiny of its own illegal, de facto abandonments of lines of rail in Jersey City east of Marin Boulevard, and the de facto abandonment of rail service across the Embankment, accomplished through demolition of the cross-bridges and removal of track.

138. Conrail first misrepresented to the STB, and later to this Court, the Embankment is a spur or side track or yard track of the Harsimus Cove Yard, which was transferred to Conrail as ancillary track, and that the Embankment was not Line Code 1420 when in fact it was Conrail that decided on its own that the Harsimus Branch was a spur in the 1990's, and not USRA in the 1970's. Conrail has identified the Pennsylvania Railroad main line from CP Waldo to Exchange Place along Railroad Avenue as Line Code 1420, notwithstanding the fact that in 1961 passenger service along Railroad Avenue was abandoned, and in 1964 the above-grade, elevated steel trestles were removed from Railroad Avenue. Conrail has thus argued Line Code 1420, as described in the 1976 FSP, was an abandoned former line, despite the fact that it was never conveyed to Conrail and had all the tracks removed twelve years before the formation of Conrail.

139. Conrail has also avoided discussion of Line Code 1440 to avoid disclosure and scrutiny of Conrail's complete de facto abandonment of that line without STB authorization. After initially intending to include Line Code 1440 in the STB abandonment petition, Conrail's actual application, filed in January 2009, does not include Line Code 1440.

140. Conrail has misrepresented the Embankment's actual status to the LLCs, the STB, and this Court for its own pecuniary gain and to avoid examination of its own wrongful conduct beginning in the 1980's. When the City objected in 2008 to the inclusion of the Hudson Street Industrial Track in the proposed Conrail STB filing by an letter from Assemblyman Smith, but later relied upon the traffic from that line which connected to the Harsimus Branch at Marin Boulevard at Mile Post 1.30 to support its initial summary judgment motion before the court in the present matter, neither Conrail nor the City brought the inconvenient fact of the unabandoned Hudson Street Industrial Track to the attention of the court or the LLCs. The City remained silent so that its own complicity in Conrail's history of past regulatory violations (lack of abandonment applications) would not come to the attention of the court or the LLCs.

141. Conrail fraudulently misrepresented its status, resulting in damages to the LLCs, including, but not limited to, cost of acquiring the Embankment, loss of value of the Embankment if it is federally regulated and subjected to restrictions of other federal remedies such as Plaintiffs now seek, loss of opportunity to develop the Embankment, and costs associated with litigating the status of the Embankment before the STB, the Circuit Court, and this Court, including attorneys' fees.

WHEREFORE, the LLCs demand judgment against Conrail as follows:

- A. Damages for the fraudulent misrepresentation of the status of the Embankment, including actual damages, and punitive damages;
- B. Attorneys' fees and cost of suit; and
- C. Such other relief as the Court considers equitable and just.

COUNT V

NEGIGENT MISREPRESENTATION

142. The LLCs repeat the allegations contained in Paragraphs 1 through 141 as if set forth at length herein.

143. In its negotiations with the LLCs, Conrail failed to perform customary diligence necessary and expected of a regulated railroad to assess the true and correct status of assets the railroad intends to sell to third parties. It also failed to properly inform and/or supervise its agents and attorneys with respect to communications with the LLCs and with the City and others in respect to the true status of the properties sold to the LLCs.

144. Conrail negligently maintained its internal records so as to allow the Embankment lots to be reclassified as spur tracks, when in fact the Embankment was part of a line subject to STB abandonment jurisdiction.

145. Conrail negligently failed to pursue STB abandonment prior to selling the Embankment to the LLCs.

146. A reasonable business enterprise, engaged in the business of railroad ownership and operation should have been aware that the Embankment would be considered subject to federal regulations and STB abandonment authority.

147. As a result of Conrail's negligence, the LLCs have received title to property with a cloud on title arising from the regulatory scheme.

148. The LLCs have suffered damages, including lost opportunities and costs of defending title, as a result of Conrail's negligence.

WHEREFORE, the LLCs demand judgment as follows:

- A. Damages for the negligent misrepresentation of the status of the Embankment;
- B. Attorneys' fees and cost of suit; and

C. Such other relief as the Court considers equitable and just.

DEMAND FOR JURY TRIAL

The LLCs hereby demand a jury trial on all issues so triable

Dated: October 4, 2012

Respectfully submitted,

/s/ Daniel E. Horgan

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Monmouth Street, LLC, 415 Brunswick Street, LLC

and 446 Newark Avenue, LLC

LIST OF EXHIBITS

Exhibit 1: July 26, 1975 United States Railway Association Final System Plan (excerpted)

Exhibit 2: March 31, 1976 Deed from Fairfax Leary, Trustee, to Consolidated Rail Corporation

Exhibit 3: Deeds (eight total) from Consolidated Rail Corporation, to LLCs, dated July 12, 2005

Exhibit 4: Pennsylvania Railroad Track Charts

Exhibit 5: Pictures of P.R.R. Harsimus looking west to receiving yard - main stem (embankment) from the book Jersey City's Hudson River Waterfront, Book One: The Pennsylvania Railroad 1941-1964 by Charles Caldes, Journal Square Publishing 2009

Exhibit 6: Declaration of David B. Dixon of September 6, 2012, with attachments

Exhibit 7: 1985 survey entitled "Map of the Property of Waterfront Associates" showing, in part riparian boundaries

Exhibit 8: 1988 Major Subdivision/Boundary survey by Lange & Surveying and Mapping

Exhibit 9: Conrail's Notices of Exemption Docket No. AB 167 Sub No. 1189X dated January 6, 2009

Exhibit 10: Conrail's Notice of intent to file for an Exemption for Abandonment and Discontinuance of Service STB Docket No. AB 167 Sub No. 1189X dated March 6, 2008

Exhibit 11: Correspondence from Jersey City Mayor McCann to Conrail dated December 18, 1984

Exhibit 12: Conrail Memorandum regarding the Hudson Street Track, dated January 28, 1985

Exhibit 13: Correspondence from Jersey City Municipal Engineer to Conrail, dated April 5, 1995

Exhibit 14: Correspondence from Jersey City Mayor Schundler to Conrail, dated April 21, 1997

Exhibit 15: Correspondence from the Jersey City Redevelopment Agency Executive Director to Conrail dated October 29, 1997

Exhibit 16: correspondence from Conrail to New Jersey DEP Historic Preservation Office, dated June 4, 199

Exhibit 17: Correspondence from Jersey City Mayor Schundler to the New Jersey DEP Historic Preservation Office dated July 7, 1999

Exhibit 18: Jersey City Ordinance No. 03-010

Exhibit 19: Surface Transportation Board Decision of August 8, 2007, in the matter docketed as Finance Docket No. 34818

Exhibit 20: Correspondence of Assemblyman L. Harvey Smith to STB dated April 16, 2008

Exhibit 21: Correspondence from John Fiorella, Esq., to Carmine Alampi, counsel for the LLCs from July and October 2005

Exhibit 22: Photograph of Railroad Avenue Main Line, source, Kenneth French, Railroads of Hoboken and Jersey City (2002)

Exhibit 23: Comments of Consolidated Rail Corporation on Issues Raised by Pre-Filing Correspondence of January 6, 2009 in the matter STB No. 167 Sub No. 1189X

Exhibit 24: Declaration of Dean Marchetto dated September 4, 2012

700898.13

Exhibit

“D”

Consolidated Rail Corp.

Abandonment Exemption

In Hudson County, NJ;

Docket AB 167 (Sub-No. 1189X)

Motion for Intervention, Notice, and
Opposition to Request to Lift Stay of
Proceedings

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION - HUDSON COUNTY
DOCKET NO.: HUD-C-12-13

CITY OF JERSEY CITY, :
 :
 Plaintiff : TRANSCRIPT
 : of
 v. : MOTION
 :
 212 MARIN BOULEVARD, LLC, et al, :
 :
 Defendants. :

PLACE: Hudson County Courthouse
583 Newark Avenue
Jersey City, NJ 07306
DATE: October 25, 2013

BEFORE:

THE HONORABLE HECTOR R. VELAZQUEZ, P.J. Ch.,

TRANSCRIPT ORDERED BY:

Bernadette K. McPherson, Esq.
(Waters, McPherson, McNeill, PC)

APPEARANCES:

JOHN J. CURLEY, ESQ.
COUNSEL FOR THE CITY OF JERSEY CITY

DANIEL H. HORGAN, ESQ.
ERIC D. McCULLOUGH, ESQ.
(WATERS, McPHERSON, McNEILL, PC)
Attorneys for Defendant

CareyAnn Rose, RPR, RMR, CCR
OFFICIAL COURT REPORTER
HUDSON COUNTY COURTHOUSE
583 NEWARK AVENUE
JERSEY CITY, NEW JERSEY 07306

1 THE COURT: All right. Are we ready?

2 City of Jersey City versus 212 Marin

3 Boulevard, LLC, et al, Docket HUD C-12-13.

4 Your appearance, please.

5 MR. CURLEY: Good morning, your Honor, John

6 J. Curley, C-U-R-L-E-Y for the plaintiff, City of

7 Jersey City.

8 MR. HORGAN: Daniel H. Horgan, H-O-R-G-A-N,

9 Waters, McPherson, McNeill for the defendants.

10 MR. McCULLOUGH: Good morning, your Honor.

11 Eric D. McCullough, M-c-C-U-L-L-O-U-G-H, also of

12 Waters, McPherson, McNeill for 212 Marin Boulevard, et

13 al.

14 THE COURT: All right. I have before me a

15 motion for summary judgment filed by the named

16 defendant LLCs.

17 These defendants are seeking to dismiss the

18 complaint filed by the City of Jersey City.

19 I also have as a cross-motion, the

20 plaintiff's motion for summary judgment. The City is

21 seeking to declare the subject tax sale certificate

22 invalid.

23 The City is also in this motion seeking as

24 an alternative remedy, a stay pending a final

25 determination of the matters now pending, I guess,

Pages 3 through 32 omitted

1 able to consider some kind of an agreement to repay
2 those taxes in the event the Federal system STB Board,
3 whatever, decides that you don't have good title.

4 MR. McCULLOUGH: Briefly, I know we are
5 almost over, but the --

6 THE COURT: The question is would you be
7 willing to accept that stipulation.

8 MR. McCULLOUGH: I would have to speak to my
9 client.

10 SPEAKER: No.

11 MR. McCULLOUGH: He is saying no.

12 THE COURT: All right.

13 MR. McCULLOUGH: The STB, your Honor, does
14 not void the titles. They have never been asked to
15 void these titles, and in fact the in the City's
16 original petition in 2006 they attached our eight
17 deeds.

18 STB allowed us to appear as interveners.
19 The STB said it is a line of rail. The STB never
20 told Conrail get the title back -- and incidentally,
21 we are not a common carrier, we don't have any
22 obligations to the STB.

23 If there is a problem here, the STB issues a
24 fine against Conrail. They don't void the titles.

25 The Supreme Court of the United States says

1 that titles are a State law issue. And I would just
2 add the caveat which is briefly on the statute --

3 THE COURT: Well, that just means they file
4 an action in State Court, right?

5 MR. McCULLOUGH: And they have done that.
6 But they said here, it is a way of getting a stay that
7 something will happen at the STB that could result in
8 us losing our titles which would moot their need to
9 proceed under the statute.

10 There is nothing --

11 THE COURT: I don't know.

12 Do you agree with that statement that the
13 STB does not declare --

14 MR. CURLEY: No, your Honor, and in our
15 brief we cited Columbia County Port Authority versus
16 Burlington Township. That is a case in which titles
17 and agreements were voided by the STB.

18 There is also a Sixth Circuit case involving
19 the same controversy. It is routinely done and we
20 have communicated with counsel that we intend to seek
21 the voiding of the title at the STB once those
22 proceedings which were -- would have been on the way
23 by now, I believe, except for the Federal government
24 shutdown --

25 THE COURT: So you are going to make a

1 direct request for that relief from them?

2 MR. CURLEY: We certainly intend to.

3 MR. McCULLOUGH: They have never done that
4 yet, Judge.

5 THE COURT: Then you can move before the STB
6 to, I guess, to dismiss those claims.

7 MR. McCULLOUGH: And we would. But it is --
8 to sit here today and listen to them say that after
9 they have been petitioning the STB for years, that
10 they never asked the STB, they never asked the
11 District Court to void their title. They brought this
12 claim in the Law Division.

13 They never once to this day pled anywhere
14 that the titles were void except in the Law Division.

15 THE COURT: Now who's got the Law Division
16 case?

17 MR. McCULLOUGH: Judge Bariso has it, your
18 Honor.

19 THE COURT: All right. Anything else?

20 MR. McCULLOUGH: No.

21 THE COURT: Sir, I can't allow you to speak.
22 You have very competent lawyers, believe me. They
23 keep me working.

24 All right, folks. I will have a decision
25 within a couple days.

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MR. CURLEY: Thank you, your Honor.

MR. HORGAN: Thank you, your Honor.

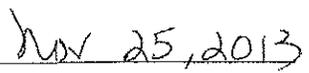
THE COURT: You are welcome.

(Whereupon, the matter is concluded.)

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C E R T I F I C A T I O N

I, CAREYANN ROSE, License Number 30XI00192900,
an official Court Reporter in and for the State of
New Jersey, do hereby certify the foregoing to be
prepared in full compliance with the current
transcript format for Judicial Proceedings and is a
true and accurate non-compressed transcript to the
best of my knowledge and ability.

Official Court Reporter Date

Hudson County Courthouse

Exhibit

“E”

Consolidated Rail Corp.

Abandonment Exemption

In Hudson County, NJ;

Docket AB 167 (Sub-No. 1189X)

Motion for Intervention, Notice, and
Opposition to Request to Lift Stay of
Proceedings

0
Exhibit 11

In support of Intervenor-Defendants' opposition to Plaintiffs' Motion for Summary Judgment

Nature of Exhibit: Declaration of David B. Dixon, PLS

In the matter:

City of Jersey City et al. v. Consolidated Rail Corporation, et al.
C.A. No. 09-1900 (CKK)

Daniel E. Horgan, Esq.
Bar No. 239772
Waters, McPherson, McNeill, P.C.
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(201) 863-4400

Counsel for Intervenor-Defendants - 212
Marin Boulevard, LLC; 247 Manila Avenue,
LLC; 280 Erie Street, LLC; 317 Jersey
Avenue, LLC; 354 Coles Street, LLC; 389
Monmouth Street, LLC; 415 Brunswick
Street, LLC; and 446 Newark Avenue, LLC

Dated: September 6, 2012

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

CITY OF JERSEY CITY, *et al.*)
)
 Plaintiffs)
)
 v.)
)
 CONSOLIDATED RAIL CORPORATION,)
)
 Defendant, and)
)
 212 MARIN BOULEVARD, LLC, *et al.*,)
)
 Defendants-Intervenors.)
)

C.A. No. 09-01900-CKK

DECLARATION OF DAVID B. DIXON

1. I have been a Licensed Surveyor and Professional Planner, licensed by the State of New Jersey since 1981. I am currently employed by Omland Engineering Associates, Inc., located at 54 Horse Hill Road, Cedar Knolls, New Jersey 07927, as Director of Surveying. I have personal knowledge of the facts stated herein and the Attachments to this Declaration.

2. I have been retained by the Defendants-Intervenors 212 Marin Boulevard, LLC; 247 Manila Avenue, LLC; 280 Erie Street, LLC; 317 Jersey Avenue, LLC; 354 Coles Street, LLC; 389 Monmouth Street, LLC; 415 Brunswick Street, LLC; and 446 Newark Avenue, LLC (the "LLCs") to perform an analysis and prepare graphic presentations of the location of former railroad lines and other features located in the downtown Jersey City, New Jersey area. These rail lines extended over several miles of track within what is now a densely populated and developed area and, as a consequence, large scale drawings which show the full scope of a line from beginning to end and are inadequate for some purposes as they would not adequately

present certain detailed information useful to a full understanding of certain facts in particular areas. Nor do large scale drawings serve well to show the differences in circumstance between 1976 when Conrail took title to those lands and the present conditions under which Conrail has sold off its holdings.

Methods Used

3. In order to establish a context for the location of rail lines I have relied upon three large scale aerial photos.

a. Aerial photography from Robinson Aerial Surveys of May 10, 1976, authenticated by a separate Exhibit of Robinson. This is a black and white photo taken shortly after Conrail acquired its properties. The lack of color contrast limits the ability to identify some detail, but it does show rail lines and facilities closest to Conrail's acquisition date. I refer to this as 1976 Robinson.

b. Aerial photography from Keystone Aerial Surveys of April 8, 1979, three years after Conrail's acquisition date. This photo is referred to as Keystone 1979 and provides higher contrast as it is in full color. I have compared the fixed physical features in both the 1976 and 1979 photos and they match in so far as the relevant railroad facility features are concerned. The later photo has a greater number of rail cars and it is easier to identify details in this photo than it is in the 1976 Robinson black and white photo. For that reason, in most cases I have relied upon this photo as my context photo for the location of historical features. This photo has been separately authenticated by Keystone.

c. Aerial photography from the State of New Jersey's Office of Information Technology network, specifically 5000' x 5000' "tiles" which are all or parts of tiles K6D15,

K6D14, K6D9, K6D10 and K6D13. These photographic sources are official documents of the State of New Jersey and are accepted as authentic and reliable for the purposes to which I have put them. This photo is identified as 2007 NJ OIT.

5. These three photos provide the base context for four Attachments to this Declaration, as follows:

Attachment A	Historic Conditions 1976 – 1979
Attachment B	Location of Rail Lines from CP Waldo 1976 – 1979.
Attachment C	Contested Rail Locations – 2007 / Present
Attachment D	River Line and Harsimus Branch at CP Waldo – 1979

6. In preparing these Attachments, the various sources of information were assembled into a series of Geographic Information System (“GIS”) document layers for each of the above four categories which enabled each source of geographic data to be located on the base photograph and examined to determine whether the various sources of information were consistent with what appeared in the photographs when viewed at the same scale. GIS technology enables the comparison of multiple layers of information in this fashion, and the comparison of those layers with each other separate from the base photograph. This ensures a greater degree of accuracy and the presentation of multiple sources of geographic information in a way that can be readily understood, and that quickly shows whether the information presented is consistent, and allowing conclusions to be drawn with greater confidence from that information. It also allows for measurements of specific distances to be taken and for points of reference to be utilized effectively.

7. In examining these Attachments, any layer of the Attachment can be examined at any scale by “zooming” in or out to increase or decrease the scale of the view, whether it is a

photo or information in any other layer, such as a survey. Also at any scale, multiple layers can be examined either in isolation or overlaid upon each other. The only case in which one layer obscures another is in the case of photos where the most recent photo is always on top covering any prior year photo. Any layer can be viewed or removed by using the check box which appears in the "Layers" panel of Adobe Acrobat on the left side of the screen when it is opened.

Sources of Information

8. The aerial photographs described above which were carefully examined to identify key features such as the Sixth Street Embankment and the location of features such as Waldo Avenue where CP Waldo is located, and the point on Marin Boulevard (formerly Henderson Street) where rail lines formerly intersected. The pictures represent the areas in question where Conrail rail lines were formerly located, and they depict those areas over a span of 31 years from 1976 to 2007. I have also examined accurate versions of Jersey City tax maps which were placed into the GIS versions of the Attachments. These allow for a quick reference between different photos for the identification of points and locations on each photo, such as streets, lot locations, and illustrating changes in property ownership patterns over time. I also received from counsel the following materials, among others, which were incorporated into my GIS analysis:

- a. Harsimus Branch conveyance maps from milepost 1.0 at the West shore of the Hudson River to a point in Harrison at milepost 7.0.
- b. Deeds to Conrail from Fairfax Leary, Trustee and descriptions in the US Railway Association Final System Plan for the Harsimus Branch (Line Code 1420), and the Hudson Street Industrial Track (Line Code 1440).

c. Maps filed by Conrail with the Surface Transportation Board (“STB”) concerning the location and potential abandonment of Line Code 1440, and the abandonment of a portion of Line Code 1420 running east from CP Waldo.

d. Hirth Weidener Associates survey dated May 7, 1985 showing railroad tracks across properties lying just to the North of Columbus Drive in the vicinity of the present Greene Street. This survey covers a gap between Conrail’s locations for Line Codes 1420 and 1440 which it does not connect in its STB filings.

e. Major Subdivision Map prepared by Lange Surveying and Planning dated May 1, 1988 and signed by Plaintiff Jersey City’s redevelopment agency, a number of private developers and Conrail. This survey confirms the location of the tracks depicted in the 1985 survey, which is also consistent with aerial photography in 1976 and 1979. It also shows a corridor owned by Conrail in which one track is located which is the only track connecting the area and tracks where Line Code 1440 begins with other Conrail property to the North where Conrail’s version of Line Code 1420 ends. These routings are confirmed by 1990 versions of the Jersey City tax maps which show Class I and Class 2 railroad properties along this routing.

f. I reviewed with counsel the positions of Conrail and of the City as to where and to what extent each of them identified locations for Lines 1420 and 1440.

g. I was also advised of the abandonment by the STB in 2001 of the River Line to CP Waldo and have located the routing of that line from various reliable sources as it ran close along the base of the Hudson River Palisades in Weehawken, Hoboken and Jersey City.

Analyses

9. From the foregoing I was tasked with analyzing all available information for purposes of accurately locating the current positions of the parties with respect to the locations of

certain rail lines over time, and accurately presenting that information in graphic form for the Special Court.

Harsimus Branch – Line 1420

10. As I understand the location of the Harsimus Branch there is no dispute that it ran from CP Waldo Easterly to and over the blocks of the Sixth Street Embankment to Henderson Street (now Marin Boulevard). The City takes no position as to where it may have run to the East of Henderson Street, except that it ran somewhere to receive and deliver freight. The City has also indicated, as I understand their position from counsel that Line 1440 connected with Line 1420 in the vicinity of the Embankment at Henderson Street, but that point of intersection is not the point described as the Easterly end point of Line 1420 in the deed and Final System Plan at milepost 1.0 at the Hudson River. From the City's position I cannot determine where Line 1420 ran to the East of Henderson Street and therefore have not been able to present any such information.

11. The position of Conrail is different. Conrail in its STB filing has indicated that the portion of the Harsimus Branch it wishes to abandon runs from milepost 0.0 at CP Waldo to a point 1.36 miles to the East. This point is illustrated as being in the vicinity of First Street to the East of Washington Boulevard, near the Northern end of Greene Street. The distance from CP Waldo, running along the Embankment, certainly puts the end point of Line 1420 somewhere to the East of Henderson Street, but for reasons discussed below I believe that this routing of track as presented by Conrail is part of Line 1440, not Line 1420. Also, it does not end at milepost 1.0 at the river as described in the deed which is an obvious inconsistency.

12. My analysis of the location of Line 1420 to the East of Henderson Street (now Marin Boulevard) as presented by the LLCs relies upon the track maps used in the conveyance to

Conrail and the distance of 6 miles from the end point in Harrison to the Hudson River. (Milepost 7.0 back to milepost 1.0). I did not rely upon the Plaintiffs' argument that CP Waldo is located at milepost 2.54 on the Harsimus track maps because I believe that to be in error. That milepost number would be correct if the distance were measured along the long abandoned Pennsylvania main line that ran from milepost 1.0 at Exchange Place. Pennsylvania Railroad mileposts seem to have begun at milepost 0.0 at the New York side of the river at a time when car floats were in operation and rail cars crossed the river to New York by that means. In any event, the Plaintiff's number cannot be verified by other means so I did not rely upon it.

13. However, an examination of the 1979 Robinson aerial photo clearly shows a continuation of the line that ran along the North side of the Sixth Street Embankment, which everyone agrees is Line 1420, almost directly Eastward along what is now an Easterly extension of Sixth Street into the Newport Development and out to the river on a long, solid-fill pier. That line, even though it has its own side tracks to the North side, runs to the North of what appears to have been a rail yard. The 1979 photograph also shows active use of the tracks east of Marin Boulevard. Many box cars, including twenty-eight connected cars, are visible on the peninsula. At the end, there appears to be an intermodal warehouse, where freight was transferred onto trucks. Further, close examination of the photo (magnified in the GIS assemblage) also shows overhead catenaries providing electric power along the length of the Embankment and along this line to its end at the river. While the catenaries also extend a limited distance South toward the Harsimus yard tracks, neither the yard tracks nor the through track around that yard and which Conrail sees as part of the other line, Line 1420 but which I believe is Line 1440 have catenaries. It is more likely that the track with the direct line to the river and with the same power source for electric locomotives from the Embankment to the River would be the same line of rail, Line

1420. The other line of rail, Line 1440, extending to the South is not electrified and the City maintains that it joins Line 1420 at or near the Embankment at Henderson Street (now Marin Boulevard).

14. This conclusion as to Line 1420 extending to the river as indicated in the deed is buttressed by the lack of viable alternatives visible in the 1976-1979 aerial photos, and assuming that the U.S. Railway Association's Final System Plan identified actual lines of rail in existence at the time. An examination of the only other through track (not a track entering the maze of tracks into what remained of the previous rail yards), illustrates that only other track through the Harsimus Yard was Line 1440, and not a continuation of Line 1420.

Hudson Street Industrial Track – Line 1440

15. The starting point for Line 1440 is not identified by the City, but it is clearly identified in both the Final System Plan and by Conrail. That point is at the vicinity of Warren and Essex Streets. From there it proceeds East, then North toward the former Railroad Avenue, now Christopher Columbus Drive. Conrail has it stopping there, but that was not the case. The survey and subdivision map (signed by Conrail for its property) both show that the rail continued to the North. Conrail shows this area of its subdivided ownership as a gap between what it claims was the Southern end of Line 1420 and the Northern terminus of Line 1440.

16. The principal reason why Conrail's gap is merely an omission of a portion of Line 1440 is that the Final System Plan described the line as being 1.30 miles long and the deed to Conrail had it terminating in the Harsimus Yard. Neither of those would be possible if it stopped roughly a half mile short of its 1.30 mile described length in the vicinity of Exchange Place. I have Line 1440 through the Harsimus Cove Yard based upon the following: (a) a detailed riparian map prepared by Hirth Weidener Associates, professional surveyors and planners, dated

May 7, 1985 clearly shows railroad tracks beginning at Hudson Street to the south and heading due north to First Street. The 1979 Keystone aerial photograph also shows tracks in the same area, which tracks were the only means of connecting the tracks on Hudson Street to the Harsimus Cove yard; (b) There is a major subdivision map prepared by Lange Surveying and Planning, dated May 1, 1988. This subdivision map was signed by private developers, the Jersey City Redevelopment Agency, and Conrail. The 1988 survey confirms the location of the tracks shown in the 1985 survey; (c) The official tax map of the City of Jersey City shows a section of tax exempt Class I railroad property beginning at Marin Boulevard and heading south-east through the location of the Harsimus Cove Yard, and ending at approximately the northernmost section of track shown in the 1985 survey. The 1979 aerial shows tracks in this corridor. These features are shown as individual layers on Attachment C.

Conclusions

17. From these analyses I have concluded what appear to be the locations for both Line 1420 East of Marin Boulevard / Henderson Street, and for Line 1440 running to the South of the former Harsimus Yards. Those are illustrated in **Attachment C**. The City has taken no specific position on these issues to my knowledge and I disagree with the positions of Conrail for the reasons stated. The positions of the Plaintiffs, Conrail and the LLCs are dramatically different in some areas as they pertain to properties lying to the East and South of the intersection of Henderson Street (Marin Boulevard) and Sixth Street. The different routings of the parties affect a number of different parties, although it is also obvious that some properties such as the building directly to the East of the Embankment was built over the site of either Line 1420 and 1440. Tax maps reflecting property transfers and ownership over the years indicate that there are multiple property owners for these former properties no matter which line is determined

to be the correct one. A review of the locations of the lines as layered over the various aerial photos shows the now complete abandonment of the area by the railroads and the presence in those former railroad areas with substantial commercial and residential development locations and projects.

18. My conclusions are further supported by the GIS analysis which was prepared at Omland Engineering under my direction and supervision. That analysis graphically illustrates in detail each of the foregoing facts and conclusions.

River Line at CP Waldo

19. I have prepared Attachment D at the request of counsel to illustrate in greater detail (smaller scale) the intersection of two rail lines at a point which I have determined to be approximately 750 feet along the arc of the rail as it existed in both 1976 and 1979 to the East of CP Waldo to a point where it split into the River Line and the line running to the Sixth Street Embankment. The 1976 and 1979 photos show only one track leading east from CP Waldo to this point. I have located the track in this Attachment D associated with the River Line from a review of areas to the North and the former rights of way over which the River Line ran from Weehawken and Hoboken to the North to confirm that that track has been properly identified as the River Line track. A description of the River Line is provided in an STB abandonment decision captioned In re Conrail Abandonment of the River Line—in Hudson County, NJ, which is a companion petition with In re Conrail Abandonment of the Weehawken Branch—in Hudson County, NJ, STB Docket Number AB-167 (Sub-No. 1067N) (decided March 12, 2001). The River Line began at CP Waldo and headed east then north. Based on the description of the River Line, the Harsimus Branch and the River Line occupied the same tracks for a distance of 750 feet between CP Waldo and the point where the lines diverged.

20. I am aware of the provisions of Title 28 of the United States Code, Section 1746,
and I declare under penalty of perjury that the foregoing is true and correct.

Executed on: September 6, 2012

S/David B. Dixon

David B. Dixon, PLS

Exhibit 11

Attachment C (thereto)

In support of Intervenor-Defendants' opposition to Plaintiffs' Motion for Summary Judgment

Nature of Exhibit: Contested Rail Locations – 2007 / Present

In the matter:

City of Jersey City et al. v. Consolidated Rail Corporation, et al.
C.A. No. 09-1900 (CKK)

Daniel E. Horgan, Esq.
Bar No. 239772
Waters, McPherson, McNeill, P.C.
300 Lighting Way
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Secaucus, NJ 07096
(201) 863-4400

Counsel for Intervenor-Defendants - 212
Marin Boulevard, LLC; 247 Manila Avenue,
LLC; 280 Erie Street, LLC; 317 Jersey
Avenue, LLC; 354 Coles Street, LLC; 389
Monmouth Street, LLC; 415 Brunswick
Street, LLC; and 446 Newark Avenue, LLC

Dated: September 6, 2012

NOTE: TO VIEW EXHIBIT –

>go to next page

>select layers icon on left if not visible

**>use checkboxes in layers panel to view individual
or multiple layers of exhibit**



- LEGEND**
- 1440 LINE PER LLCs
 - 1440 LINE PER CONRAIL
 - 1420 LINE PER LLCs
 - 1420 LINE PER CONRAIL
 - 1420 LINE PER CITY



EXHIBITS FOR
HYMAN PROPERTY
Attachment C
 Contested Rail Locations - 2007 / Present
 JERSEY CITY, HUDSON COUNTY, NEW JERSEY

OMLAND
 ENGINEERING ASSOCIATES, INC.

STANLEY L. OMLAND, N.J. Professional Engineer, Lic. 240603098600
 DAVID B. DIXON, N.J. Professional Land Surveyor, Lic. 245507282600

54 Horseshill Road
 Cedar Knolls, New Jersey 07927
 Phone: 973-399-9455
 Fax: 973-399-9455
 E-mail: omland@omland.com
 NJ Certificate: 240603098600
 Lic. 245507282600

DATE: 9/12
 PROJ.: 100805
 SCALE: 1" = 250'

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OF