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BEFORE THE  
SURFACE TRANSPORTATION BOARD

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FINANCE DOCKET NO. 35819

BROOKHAVEN RAIL TERMINAL AND BROOKHAVEN RAIL, LLC –  
PETITION FOR DECLARATORY ORDER

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**PETITIONERS' OPPOSITION TO TOWN OF BROOKHAVEN'S  
SUPPLEMENTATION OF EMERGENCY APPLICATION TO UPDATE THE RECORD**

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*Counsel for Brookhaven Rail Terminal and  
Brookhaven Rail, LLC*

Dated: July 14, 2014

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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**PETITIONERS' OPPOSITION TO TOWN OF BROOKHAVEN'S  
SUPPLEMENTATION OF EMERGENCY APPLICATION TO UPDATE THE RECORD**

The Town of Brookhaven (“Town”), by a filing dated June 24, 2014 entitled an “Opposition To Brookhaven Rail Terminal’s Application To Close The Record And In Support Of The Town’s Application To Update The Record” (Document No. 236220) (“June 24 filing”), seeks to keep open the record in this matter, and supplement the record with materials from (a) a proceeding in the U.S. District Court for the Eastern District of New York, June 24 filing, Appendix A, and (b) various materials from the Long Island Power Authority (“LIPA”) and the Long Island Rail Road (“LIRR”), *id.*, Appendices B-D. The Town’s June 24 filing also provides extensive comments on same, *id.* at 2-11, and asks the Board to invite further comments from LIPA and LIRR as well, *id.* at 11-12.

Petitioners Brookhaven Rail Terminal and Brookhaven Rail, LLC (collectively, “Petitioners”) oppose and ask the Surface Transportation Board (“Board”) to deny the relief sought in the Town’s June 24 filing. As discussed below, the Town’s June 24 filing adds nothing of substance to the Town’s prior, also unpersuasive opposition to closing the record (Document Nos. 236176 and 236178, filed June 12, 2014), and the materials the Town now seeks to add do not bear on the spur and federal preemption issues presented by Petitioners’ Petition For Declaratory Order (Document No. 235971)(“Petition”). Accordingly, the record

need not be kept open and these documents need not – and should not – be permitted to supplement the record. Finally, the issues upon which the Town would invite LIPA and LIRR to comment are also irrelevant to the spur and federal preemption issues presented by the Petition, and in the case of LIRR, are already moot. Accordingly, there is no need to solicit comments from those parties.

#### **A. Procedural And Factual Background**

1. Petitioners filed their Petition with the Board on April 28, 2014, seeking a declaratory order by the Board that (a) railroad track to be constructed on Parcels B and C, as shown on Petition Exhibits 1 and 2, will constitute a spur, (b) as a spur track, construction and operation of that track is exempt from the Board’s licensing and economic regulation, and (c) federal preemption applies to construction and operation of that track so as to preclude most state and local regulation thereof. Petition at 1. The Petition concerned exclusively the track area as shown on Petition Exhibits 1 and 2, Petition 1, 15-38, and did not seek a declaratory order as to the other, non-track areas of Parcels B and C; indeed, Petitioners expressly stated that the Petition concerned only the track area, as the use and status of the non-track areas on Parcels B and C “remained to be determined.” Petition at 30, n. 32. The Town filed a reply on May 19, 2014. No other party filed a reply or opposed the Petition, including LIRR, which was served with the Petition. Petition at 42.

2. Because neither LIRR nor any other railroad (nor for that matter, any other railroad-related entity) filed a reply or otherwise opposed the Petition, on June 9, 2014, Petitioners moved the Board to close the record and issue a decision (“Motion To Close Record”). In response to the Motion To Close Record, the Town filed an “emergency application” on June 12, 2014 to keep the instant matter open and to “reopen” FD 35141.

(Document No. 236176.) On June 20, 2014, Petitioners filed a timely reply to the Town's "emergency application." (Document No. 236207.)

3. On June 23, 2014, the U.S. District Court for the Eastern District of New York ("Court") entered a preliminary injunction barring Petitioners and others from taking "further actions and activities to mine, excavate, sell, grade and/or remove native sand, minerals and vegetation from parcels B and C," June 24 filing, Appendix A ("Order"). A portion of the Court's Order concerned a May 7, 2014 sworn declaration submitted by an officer of Brookhaven Rail Terminal, Daniel Miller ("Miller Declaration"). The Court misconstrued a statement in the Miller Declaration, located in paragraph nine (9), concerning grading and sand removal on Parcels B and C. The Court misread the paragraph 9 statement to mean that grading and sand removal on Parcels B and C had at all times been limited to the track area on Parcels B and C, which the Court determined was "flatly untrue" and a "misrepresentation" to the Court. Order at 9, 10.

4. The Court's reading of the Miller Declaration was incorrect, and on June 24, 2014, at approximately 4 p.m., counsel for Petitioners filed a letter with the Court explaining that the referenced Miller Declaration paragraph 9 statement was not inaccurate and was not a misrepresentation; it referred *only* to the limited construction work that was occurring as of the date of the Declaration, was not intended to describe the work that had been done over the previous two years. Exhibit 1 hereto.

5. Also, on June 24, 2014, the Town served Petitioners with the Town's June 24 filing at the Board. The Town's June 24 filing did not reference the Petitioners counsel's letter filed with the Court contesting the Court's conclusion as to Miller Declaration paragraph 9.

6. In response to Petitioners counsel's letter, the Court held a telephonic hearing on June 25, 2014, and was persuaded by Petitioners to issue a corrective Minute Order following the hearing:

Minute Order for proceedings held before Magistrate Judge Gary R. Brown: Telephone Status Conference held on 6/25/2014. Counsel has suggested to the Court that the statements made in the Declaration of Mr. Miller cited on page 10 of the Court's preliminary injunction was an incomplete statement of the facts, rather than an intentional misrepresentation. *Upon review, and with the consent of the parties, it is hereby noted that that may well have been the case.* Even assuming, however, that any misimpression on this particular point arose from an oversight, this point is ultimately immaterial to the Court's determinations therein.

Exhibit 2 (emphasis added).

7. As noted in the Minute Order, the Town consented to the Court's issuance of the corrective Minute Order. Nevertheless, the Town has not filed papers with the Board correcting its June 24 filing to reflect the Court's Minute Order of June 25.

## **B. Discussion**

1. **To the extent the Town's June 24 filing purports to respond to Petitioners' June 9 Motion To Close Record, the Town's filing should be ignored:** First, the Town's June 24 filing constitutes a *second* response to the Motion To Close Record, as the Town already responded on June 12 through the "emergency application" to keep the record open, Document No. 236176. The Board's rules do not permit two responses without leave of the Board, which the Town has not sought from the Board, much less obtained. Second, the Town's June 24 filing does not address the substantive issues raised in the Motion To Close Record.<sup>1</sup>

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<sup>1</sup> To the extent the Town's June 24 filing seeks to supplement the Town's "emergency application," it constitutes a reply to Petitioners' June 20 reply, and filing a reply to a reply is

2. **Were the Board to consider the Town's June 24 filing, it should be deemed a concession that the Town has no substantive basis to contest closing the record:**

a. The main purpose for the Town's June 24 filing is to provide an ostensible excuse to put before the Board the Court's June 23, 2014 decision entering the preliminary injunction, *id.* at Appendix A, and the various LIPA and LIRR materials, Appendices B-D, along with the Town's commentary thereon, June 24 filing, at 2-12. Indeed, besides asking the Board to accept the proffered documents, the only other relief the Town's June 24 filing seeks is to have further information requested from LIPA and LIRR. *Id.* at 12.<sup>2</sup>

b. While the Town's filing may proffer additional documents, the Town's June 24 filing does *not* address the substantive issues set forth in either the Motion To Close Record or Petitioners' June 20 reply to the Town's emergency application, nor demonstrate how the additional documents bear on the spur and federal preemption issues. Accordingly, if the Town's June 24 filing is to be considered at all, it should be treated as a judicial admission that the Town has no substantive response to either of Petitioners' filings, and therefore the Town concedes that, on the merits, Petitioners' Motion To Close Record should be granted and the Town's emergency application should be denied.

3. **The Town's "fraud" on the Board contention, besides being logically and legally flawed, was meritless from the outset, as the Town has acknowledged, but the Town has failed to correct the record before the Board:** The Town commences its

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also contrary to the Board's rules, absent leave, which again, has been neither sought nor granted.

<sup>2</sup> LIRR was served with the Petition, and did *not* file a reply or otherwise oppose the Petition, and that fact was the very basis for the Motion To Close Record, another point left altogether unaddressed by the Town in its several filings.

discursive on its proffered documents with an allegation that Petitioners, merely by seeking to close the record (on the ground that no railroad or railroad-affiliated entity replied, a fact *not* contested by the Town), has perpetrated a fraud on the Board. June 24 filing at 2. The Town's June 24 filing does not explain how Petitioners, by asking to close the record, would supposedly commit a fraud on the Board, *see id.*; rather, the Town merely uses the Motion To Close Record as a device to imply the Court's comments as to paragraph 9 of the Miller Declaration somehow indicates a "fraud" as to the Board. June 24 filing at 2 (citing only the Court's Order at 9-10). The allegation not only fails on numerous grounds, but also reflects poorly on the Town:

a. The Town has been aware since receiving the Miller Declaration shortly after May 7, 2014 that the proper context of the statement in paragraph 9 of the Miller Declaration concerning grading and sand removal from Parcels B and C concerned only the period *after* the lawsuit was filed. Indeed, the Town obviously knew well *before* May 7 that grading and sand removal had occurred on areas of Parcels B and C *beyond* the track area before the lawsuit was filed, as the Town made exactly that claim throughout the papers in its lawsuit and had discussed that point with the parties to the lawsuit during the discussions to tailor the "stop work order" to non-track areas. Petition 12-14. Thus, the Town has known all along that the Miller Declaration paragraph 9 statement, which the Town trumpets here to be "materially false," June 24 filing at 2, was *not* inaccurate when considered in its proper context. Moreover, the Town also knew that the Court had misinterpreted the Miller Declaration statement, as the Town acknowledged that point just two days later, on June 25, 2014, when it indicated its consent to the Court's conclusion that the Miller statement was an "incomplete statement of the facts, rather than an intentional misrepresentation." Exhibit 2. Despite this, the Town

nonetheless advanced a claim to the Board that the statement was “materially false,” June 24 filing at 2, and has yet to correct that misstatement.

b. Indeed, the Town may have known that Petitioners had made that very point in their letter to the Court, Exhibit 1, even before the Town submitted its June 24 filing to the Board. If the case, then when the Town submitted its June 24 filing with the Board, the Town was aware (or should have been aware) that the Petitioners had already taken steps to clarify the Court’s misreading of the Miller Declaration, yet, apparently in its haste to get the Court’s Order before the Board the day after it was entered, the Town still advanced its “materially false” claim in its Board filing.

c. With the Court’s Minute Order (which the Town consented to), the entire predicate of the Town’s “materially false” fraud claim has evaporated. Remarkably, while the Town has unmistakably known this since at least the date of the Court’s telephonic hearing and Minute Order of June 25 (the very next day after its Board filing), the Town has yet to file a correction with the Board in the ensuing three weeks.

d. Moreover, from a substantive standpoint, the Town’s allegation of fraud on the Board was logically and legally flawed from the outset, as grading and sand removal from areas of Parcels B and C *outside* the track area, which were the areas on Parcels B and C discussed in paragraph 9 of the Miller Declaration that the Court initially thought inaccurate, Order 9-10, were *never* covered by the instant Petition. *Supra* at 2. The Petition was explicit that it concerned *only* the track area on Parcels B and C, *id.*, and Petitioners have not and do not seek a declaration from the Board as to other areas on Parcels B and C. Thus, the alleged untrue statement in the Miller Declaration – which was, in fact, accurate – did not even concern a matter

before the Board, demonstrating the Town's fraud allegation here was nothing more than a brazen attempt to create a *faux* issue when there was none.

4. **The Town makes a similar makeweight allegation of fraud as to the LIPA and LIRR matters:** The Town's parallel fraud allegations concerning the LIPA and LIRR matters, June 24 filing at 3-4, are also logically and legally flawed, as the LIRR and LIPA matters asserted by the Town have no factual or legal bearing on the Board's regulatory determination of whether Petitioners' track on Parcels B and C is a spur or a line of railroad, or the extent of federal preemption. Confirming that very point, Petitioners addressed the LIPA and LIRR matters in their filing of June 20, 2014 (Document No. 236207), and the Town's June 24 filing does not even respond to Petitioners' June 20 filing, much less establish that a link exists between the LIPA and LIRR matters and the regulatory issues before the Board. Furthermore, as of the date of this filing, Petitioners and LIRR have reached agreement on the encroachment dispute, so there is nothing further to represent to the Board on that issue.

5. **The Town's June 24 filing does not present evidence relevant to the regulatory issues raised by the Petition, and should be denied in all respects:** To the extent the Town's June 24 filing purports to go to the merits of the Petition, it raises three points: import of the Court's Order, June 24 filing at 4-8, the LIPA and LIRR matters, *id.* at 8-10, 11-12, and whether railroad activity is now being conducted on Parcels B and C, *id.* at 10-11. None of those bear on the merits of the Petition:

a. **The Court's Order:**

i. The Court's Order addresses the nature of and the basis for the grading and sand removal activities on Parcels B and C, and enjoins further such activities until trial on the merits. As noted previously, the Court's decision as to those activities does not bear,

factually or legally, on the determination of the legal status of the track to be constructed on Parcels B and C as a spur track versus a line of railroad. The Court itself recognized as much, as it declined to address the spur track issue, as that issue was not sufficiently factually mature to be joined at the Court. Order 16-17.

ii. While the Court's Order does address federal preemption, the Court found that track construction on Parcels B and C was too remote at this point to warrant invoking federal preemption, Order 15-16, leaving the "serious questions" on federal preemption for trial on the merits. *Id.* at 17. Thus, as with the spur versus line of railroad issue, the Court's Order does not bear upon the Board's determination of federal preemption as presented by the Petition. The Petition seeks a determination on that issue *only* as to the track area delineated on Petition Exhibits 1 and 2, *supra* at 2, and it is well-established that construction of a railroad track (whether a spur or line of railroad) is covered by federal preemption. Petition at 31-39. The Board, therefore, should proceed to decision on the federal preemption issue; indeed, a Board decision on federal preemption will advance resolution of the issue by the Court, which will benefit from the Board's expertise and analysis on federal railroad regulatory matters.

**b. LIPA and LIRR matters:**

i. Both matters are irrelevant to both the spur and federal preemption issues, as discussed above and in Petitioners' June 20 filing.<sup>3</sup> Additionally, the LIRR matter is moot, as Petitioners and LIRR have reached agreement to resolve the matter.

ii. The Town's underlying mistaken assumption on the LIPA and LIRR matters is the belief that track installation issues must be resolved *before* the Board can

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<sup>3</sup> As noted above, Petitioners have reached agreement with the LIRR as to the encroachment issues, and remaining LIPA issues will be resolved prior to installation of track.

decide the spur issue and federal preemption issues, which is simply wrong. The Board possesses ample authority to issue a declaratory order on those issues *in advance of track construction*. *New York City Economic Development Corp.–Petition for Declaratory Order*, STB Finance Docket No. 34429, slip op. at 5, 9 (STB served July 15, 2004)(Board authority to terminate controversy/remove uncertainty under 5 U.S.C. § 554(e) and 49 U.S.C. § 721 permits Board issuance of declaratory order regarding spur status and federal preemption as to NYCEDC’s *proposed* plan for track construction project described in NYCEDC's petition); *DesertXpress Enterprises, LLC–Petition for Declaratory Order*, STB Finance Docket No. 34914, slip op. at 1-4 (STB served June 27, 2007)(Board has broad discretion under 5 U.S.C. § 554(e) and 49 U.S.C. § 721 to issue declaratory order to terminate a controversy or remove uncertainty whether *proposed* construction of interstate high speed passenger rail system is subject to state and local environmental review and other permitting requirement); *Swanson Rail Transfer, LP–Petition for Declaratory Order–Swanson Rail Yard Terminal*, STB Finance Docket No. 35424, slip op. at 2-4 (STB served June 14, 2011) (declaratory order issued that *proposed* track was a spur, relying on plans to construct terminal within existing rail yard and intended use).

**c. The status of current railroad construction on Parcels B and C:**

Similar to the LIRA and LIRR matters, the current status of track construction on Parcels B and C is irrelevant to both the spur and federal preemption issues that are the subject of the Petition, as the Board may – and should – issue a decision on both issues in advance of track construction. *Id.* Should the Board determine the track is not a spur, but rather a line of railroad, track construction will not proceed absent appropriate Board approval. Per the Court’s Order, grading for all purposes, including track construction is enjoined pending trial on the merits.

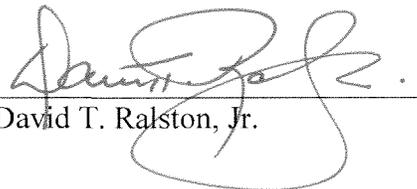
Consequently, assuming a reasonably prompt Board decision on the Petition, absent relief from the Court, there will likely be no track construction until after the Board has entered a decision.

**C. Conclusion**

Wherefore, Petitioners request the Board close the record, and deny the Town's requests to admit the additional documents proffered in the Town's June 24 filing and to obtain evidence from LIPA and LIRR. Furthermore, Petitioners request the Board enter a decision on the Petition as soon as feasible so that the parties and the Court will have the benefit of the Board's decision.

Respectfully submitted,

***Brookhaven Rail Terminal and Brookhaven Rail, LLC***

By:   
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***Counsel for Brookhaven Rail Terminal and Brookhaven Rail, LLC***

Dated: July 14, 2014

**CERTIFICATE OF SERVICE**

I hereby certify that on July 14, 2014, I caused to be served Brookhaven Rail Terminal's and Brookhaven Rail's Motion to Close the Record and Enter a Decision, by first-class mail, postage prepaid, upon the following Parties of Record in this proceeding:

TO: Judah Serfaty, Esq.  
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Albany, NY 12233-4757  
Attn: Tara Seoane

Field Office Supervisor U.S. Fish and Wildlife Service  
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Brookhaven, NY 11719  
Attn: David A. Stilwell

MTA Long Island Rail Road  
Jamaica Station  
Jamaica, NY 11435-4380  
Attn: Helena E. Williams

New York & Atlantic Railway  
68-01 Otto Road  
Glendale, NY 11385  
Attn: Paul Victor

A handwritten signature in black ink, appearing to read "David T. Ralston, Jr.", written over a horizontal line.

David T. Ralston, Jr.  
*Counsel for Brookhaven Rail Terminal  
and Brookhaven Rail, LLC*

## **EXHIBIT 1**



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CLIENT/MATTER NUMBER  
105011-0105

June 24, 2014

VIA ECF

Hon. Gary R. Brown, U.S. Magistrate Judge  
United States District Court – EDNY  
100 Federal Plaza  
Central Islip, NY 11722

Re: Town of Brookhaven v. Sills Road Realty LLC et al.,  
Case No.: 2:14-cv-02286

Dear Judge Brown:

We represent the BRT Defendants (all of the defendants except for Sills Expressway Associates) in the above-referenced matter (collectively, “BRT”). We have reviewed the Court’s June 23, 2014 Order (the “Order”). While we obviously are disappointed with the Court’s conclusions, BRT of course intends to comply with the issued injunction subject to any appeal rights it may pursue. There is one matter, however, about which we would like to be heard immediately: on pp. 8-10 of the Order, the Court describes what it regards as a “misrepresentation to this Court” by BRT CFO Dan Miller. There was no such misrepresentation, as explained below.

What the Court perceives as a “misrepresentation” appears to stem from a misreading of the Declaration submitted by Mr. Miller. As the Order points out on page 8, Mr. Miller stated in his sworn Declaration that “the *only* construction activity presently occurring and planned for the foreseeable future is grading the shaded track loop area depicted in Exhibit O...” Miller 5/7/14 Decl., ¶ 9. That statement initially appeared in the April 30, 2014 Declaration submitted in opposition to the Town’s TRO application (DE 19, ¶ 6), in order to respond to the Town’s claim of imminent harm, and to allow BRT to proceed with limited construction during the Court’s consideration of the Town’s emergency application. To be clear, Mr. Miller was referring in that statement to BRT’s discussions with the Town *after* the lawsuit was filed, in which BRT offered and agreed to re-orient its construction plans to attempt to address the Town’s concerns and hopefully resolve the dispute.<sup>1</sup> The statement – which was accurate – was *not* intended to characterize the

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<sup>1</sup> Counsel for BRT explained this re-staging to the Court on several occasions, including during the telephonic conference before Judge Bianco (5-1-14 Tr. 8:2-9:9) and the initial hearing before Judge Wexler (5-14-14 Tr. 17:17-18:12). This reorientation also was discussed at the evidentiary hearing, although not in detail, as is noted at p. 4 of the Order.

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FOLEY & LARDNER LLP

Hon. Gary R. Brown,  
U.S. Magistrate Judge  
June 24, 2014  
Page 2

excavation work that had been done prior to the filing of the lawsuit, which BRT concedes extended well beyond the shaded track area. While we regret that this nuance was not explored (by either side) during testimony, it is imperative that the Court understand that BRT has not intended to mislead the Court, and we respectfully would request the opportunity to be heard on this limited issue so that the record may be corrected. We do not necessarily believe that this sole issue, standing alone, warrants a formal motion for reconsideration, but if the Court deems otherwise we are willing and ready to make a formal filing.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Yonaton Aronoff".

Yonaton Aronoff

cc: (via ECF): Robert M. Calica, Esq.  
Kevin Mulry, Esq.

**EXHIBIT 2**

**Ralston Jr., David T.**

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**From:** Aronoff, Yonaton  
**Sent:** Wednesday, June 25, 2014 2:08 PM  
**To:** Miller, Vanessa L.; Ralston Jr., David T.  
**Subject:** FW: Activity in Case 2:14-cv-02286-GRB Town of Brookhaven v. Sills Road Realty LLC et al Status Conference

Yonaton Aronoff  
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**From:** [ecf\\_bounces@nyed.uscourts.gov](mailto:ecf_bounces@nyed.uscourts.gov) [mailto:[ecf\\_bounces@nyed.uscourts.gov](mailto:ecf_bounces@nyed.uscourts.gov)]

**Sent:** Wednesday, June 25, 2014 2:07 PM

**To:** [nobody@nyed.uscourts.gov](mailto:nobody@nyed.uscourts.gov)

**Subject:** Activity in Case 2:14-cv-02286-GRB Town of Brookhaven v. Sills Road Realty LLC et al Status Conference

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U.S. District Court

Eastern District of New York

**Notice of Electronic Filing**

The following transaction was entered on 6/25/2014 at 2:06 PM EDT and filed on 6/25/2014

**Case Name:** Town of Brookhaven v. Sills Road Realty LLC et al

**Case Number:** [2:14-cv-02286-GRB](#)

**Filer:**

**Document Number:** [65](#)

**Docket Text:**

**Minute Order for proceedings held before Magistrate Judge Gary R. Brown: Telephone Status Conference held on 6/25/2014. Counsel has suggested to the Court that the statements made in the Declaration of Mr. Miller cited on page 10 of the Court's preliminary injunction was an incomplete statement of the facts, rather than an intentional misrepresentation. Upon review,**

and with the consent of the parties, it is hereby noted that that may well have been the case. Even assuming, however, that any misimpression on this particular point arose from an oversight, this point is ultimately immaterial to the Court's determinations therein. (Posillico, Lauren)

**2:14-cv-02286-GRB Notice has been electronically mailed to:**

Kevin Patrick Mulry [kmulry@farrellfritz.com](mailto:kmulry@farrellfritz.com), [courtnotifications@farrellfritz.com](mailto:courtnotifications@farrellfritz.com)

Robert M. Calica [rcalica@rcblaw.com](mailto:rcalica@rcblaw.com)

Judah Serfaty [jserfaty@rcblaw.com](mailto:jserfaty@rcblaw.com)

Yonaton Aronoff [yaronoff@foley.com](mailto:yaronoff@foley.com), [amccarthy@foley.com](mailto:amccarthy@foley.com)

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**Document description:**Main Document

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[STAMP NYEDStamp\_ID=875559751 [Date=6/25/2014] [FileNumber=8862919-0]  
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