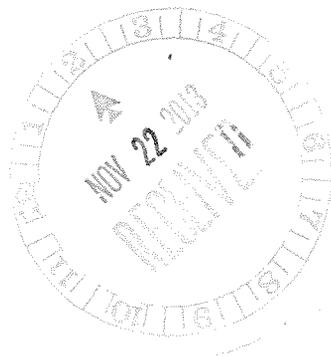


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CHARLES H. MONTANGE
ATTORNEY AT LAW
426 NW 162ND STREET
SEATTLE, WASHINGTON 98177
(206) 546-1936
FAX: (206) 546-3739



21 November 2013

By Express Delivery

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

ENTERED
Office of Proceedings
NOV 22 2013
Part of
Public Record

Re: Consolidated Rail Corp. – Abandonment Exemption – in Hudson County, NJ, AB 167 (Sub-no. 1189X)
Notice of Decision and Request for Lifting of Stay of Proceedings

Dear Ms. Brown:

Enclosed please find the original and eleven copies of formal notification (and a copy) of the order and opinion of the USDC for DC in City of Jersey City, et al v. Conrail, USDC for DC 09-1900, granting summary judgment that the Harsimus Branch is a line of railroad subject to STB’s abandonment jurisdiction. Other documents filed in the USDC for DC that are germane to further proceedings in AB 167 (Sub-no. 1189X) are also supplied. City et al requests that the stay in AB 167 (Sub-no. 1189X) be lifted for appropriate proceedings. We request that you forward the additional copy to STB’s Office of General Counsel. If you have any questions, please telephone me.

Very truly,

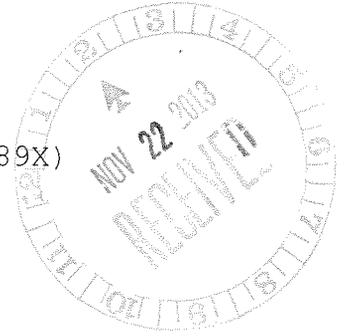
Charles H. Montange
Counsel for City of Jersey City,
Rails to Trails Conservancy, and
Pennsylvania Railroad Harsimus Stem Embankment
Preservation Coalition

Encls.

cc. Andrea Ferster, G.C. of RTC
parties or reps of parties per service list on pleading
(all w/encl.)

BEFORE THE SURFACE TRANSPORTATION BOARD

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



Notice of Decision by
United States District
Court of the District of
Columbia, Sitting as
Special Court
And
Request for Lifting of Stay
of Proceeding

In a decision served April 20, 2010 in this proceeding, this Board held in abeyance further proceedings in this case (which informally had been held in abeyance for almost a year by that point already) pending an outcome in litigation before the United States District Court for the District of Columbia, acting as the Special Court under the Regional Rail Reorganization ("3-R") Act, concerning whether a line of railroad known as the Harsimus Branch had been conveyed to Conrail as a "line" subject this agency's abandonment jurisdiction as provided under the 3-R Act and other statutes.

I. Notice of Decision

In an order and memorandum opinion issued September 30, 2013 in City of Jersey City, et al, v. Conrail, USDC for DC No. 09-1900, the United States District Court issued a memorandum opinion and order granting summary judgment to Plaintiffs (petitioners above) Jersey City ("City"), Rails to Trails

Conservancy ("RTC"), and the Pennsylvania Harsimus Stem Embankment Preservation Coalition ("Coalition"). The Order and Memorandum Opinion are attached as Exhibit A. The Court ruled that the Harsimus Branch at issue in this proceeding was conveyed to Defendant Consolidated Rail Corporation ("Conrail") as a line of railroad subject to STB abandonment jurisdiction. Mem. Op. at 9. The Court denied the intervener LLCs' (i.e., 212 Marin Boulevard, LLC, et al's) motion for leave to file an amended answer asserting cross claims against Conrail and counterclaims against City, et al. Mem. Op. at 8.

The Order notes that this is a final appealable order. "212 Marin Boulevard, LLC, et als" filed a notice of appeal of the decision of the United States District Court in the U.S. Court of Appeals for the D.C. Circuit on 29 October 2013. That appeal has been docketed as No.13-7175. There is no automatic stay of the 30 September 2013 decision by reason of an appeal. No stay has been sought from any court much less granted.

II. Further Notices

The Memorandum Opinion makes reference to a joint stipulation, which was filed by the parties on July 10, 2012. In that stipulation, 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. Conrail stipulated that it would raise no fact or argument to

the contrary. The stipulation is a reversal of the position previously taken by the LLCs and Conrail before this Board and in subsequent judicial proceedings. Because the stipulation is germane to further proceedings before this agency, City et al. file it at this time. A copy of the stipulation is attached as Exhibit B.

The Memorandum Opinion makes reference to a crossclaim that the LLCs sought to file against Conrail. That proposed crossclaim alleges, among other things, that Conrail fraudulently or negligently represented to the LLCs, the City, the Surface Transportation Board ("STB"), and the courts that the Harsimus Branch was not a line of railroad subject to STB abandonment jurisdiction. A copy of excerpts from the LLCs' proposed Amended Answer setting out the crossclaim is attached as Exhibit C. Because the allegations in the LLCs' proposed crossclaim that Conrail made fraudulent or negligent misrepresentations to various parties and tribunals that the Harsimus Branch was not a line subject to STB jurisdiction have a bearing on the relief that this agency should now provide in this proceeding pursuant, among other things, to provisions of Section 110(k) of the National Historic Preservation Act, 16 U.S.C. § 470h-2(k), we now file these excerpts. Also relevant are allegations in the LLCs' proposed crossclaim that Conrail abetted the alleged fraud by entering into an agreement with the LLCs pledging to "take all necessary steps to protect their

interests in their titles to the properties," despite the fraudulent misrepresentations to STB, the City, and the courts. The LLCs further allege that Conrail's purpose was to preserve economic gains resulting from the asserted fraud and to cover up alleged additional illegal abandonments. Ex. C, p. 52, para 136 & p. 53, para 140. The allegations of the proposed crossclaim are also relevant to the LLCs' motives or objectives. The LLCs state that they seek to obtain all the profits for which they aspired had the property not been subject to public interest regulation, and despite their entry into an agreement with Conrail which they elsewhere indicate was to preserve economic gain to Conrail arising from fraud as well as to cover up additional illegal abandonments by Conrail. Ex. C, p. 53, para 141 and demand for damages, including punitive damages and attorney fees.

III. Request for Lifting of Stay

In light of the final order of September 30, 2013, the portion of the Harsimus Branch at issue in this proceeding is a line of railroad within this agency's abandonment jurisdiction. This Board's order issued April 20, 2010 holding this proceeding in abeyance should be dissolved or otherwise terminated.

Respectfully submitted,



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Exhibit A: order and decision

Exhibit B: joint stipulation

Exhibit C: excerpts from LLCs' proposed Amended Answer

Certificate of Service

The undersigned certifies service of the foregoing by U.S. Mail, postage prepaid, first class, this 21st day of November, 2013, upon the following:

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Robert Jenkins III, Esq.
Mayer Brown LLP
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Daniel D. Saunders
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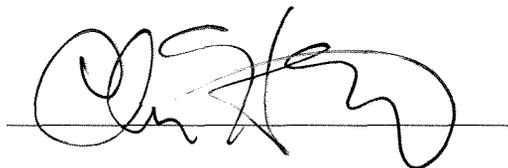
A handwritten signature in black ink, appearing to read "Eric S. Strohmeyer", is written over a horizontal line. The signature is stylized and cursive.

Exhibit A

September 30 USDC for DC Opinion and Order

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

_____)	
CITY OF JERSEY CITY, <i>et al.</i> ,)	
)	
Plaintiffs,)	
)	
v.)	Civil Action No. 09-1900 (ABJ)
)	
CONSOLIDATED RAIL)	
CORPORATION,)	
)	
Defendant,)	
)	
and)	
)	
212 MARIN BOULEVARD, LLC, <i>et al.</i> ,)	
)	
Intervenor-Defendants.)	
)	
and)	
)	
PAULA T. DOW,)	
<i>Acting Attorney General of the</i>)	
<i>State of New Jersey,</i>)	
)	
Intervenor.)	
)	
_____)	

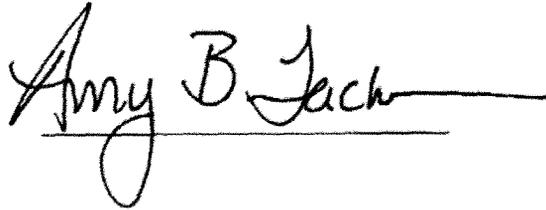
ORDER

Pursuant to Federal Rule of Civil Procedure 58 and for the reasons set forth in the accompanying Memorandum Opinion, it is

ORDERED that plaintiffs' renewed motion for summary judgment [Dkt. # 79] is **GRANTED**; and it is further

ORDERED that intervenor-defendants' motion for leave to file an amended answer [Dkt. # 86] is **DENIED**.

This is a final appealable order.

A handwritten signature in cursive script that reads "Amy B. Jackson". The signature is written in black ink and is positioned above a horizontal line.

AMY BERMAN JACKSON
United States District Judge

DATE: September 30, 2013

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

_____)	
CITY OF JERSEY CITY, <i>et al.</i> ,)	
)	
Plaintiffs,)	
)	
v.)	Civil Action No. 09-1900 (ABJ)
)	
CONSOLIDATED RAIL)	
CORPORATION,)	
)	
Defendant,)	
)	
and)	
)	
212 MARIN BOULEVARD, LLC, <i>et al.</i> ,)	
)	
Intervenor-Defendants.)	
)	
and)	
)	
PAULA T. DOW,)	
<i>Acting Attorney General of the</i>)	
<i>State of New Jersey,</i>)	
)	
Intervenor.)	
)	
_____)	

MEMORANDUM OPINION

Pending before the Court are two motions: a motion for leave to file an amended answer by intervenor-defendants 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,¹ [Dkt. # 86], and a renewed motion for summary judgment by plaintiffs City of Jersey City, Rails to Trails Conservancy, and Pennsylvania Railroad Harsimus Stem Embankment Preservation Coalition, [Dkt. # 79]. The

¹ Intervenor-Defendants will be referred to collectively as “the LLCs.”

Court will deny the motion to amend because the LLCs' amended answer would alter the nature and scope of the litigation and would prejudice the other parties by unnecessarily delaying resolution of this action. It will grant the renewed motion for summary judgment because the parties have stipulated to the sole factual issue in this case, no genuine issues of material fact remain, and plaintiffs are entitled to judgment as a matter of law.

BACKGROUND

This lawsuit concerns a portion of rail property known as the Harsimus Branch, between CP Waldo and Luis Munoz Marin Boulevard in Jersey City, New Jersey ("Harsimus Branch"). Compl. [Dkt. # 1] ¶ 1. The Harsimus Branch was conveyed to defendant Consolidated Rail Corporation ("Conrail") in 1976 pursuant to the Regional Railroad Reorganization Act of 1973, 45 U.S.C. § 741; 45 U.S.C. § 1301. *Id.* ¶ 12. The specific question before the Court in this case is whether the Harsimus Branch conveyed at that time was a railroad "line" or a "spur." *Id.* ¶ 6. This distinction matters because before a railroad can abandon or discontinue operations on a rail line, it must obtain authorization from the Surface Transportation Board ("STB"), formerly the Interstate Commerce Commission. *See* 49 U.S.C. § 10903 (2006). This requirement does not apply to spurs. *Id.* § 10906. In 2005, defendant Conrail purported to sell the Harsimus Branch to intervenor-defendants, but it did not have abandonment authorization from the STB at that time. Compl. ¶ 19. Since then, the Harsimus Branch has been the subject of protracted litigation.

In January 2006, plaintiffs, along with a New Jersey state assemblyman, petitioned the STB for an order declaring that Conrail was required to obtain authorization from the STB to abandon the Harsimus Branch. *Consolidated Rail Corp. v. Surface Transp. Bd.*, 571 F.3d 13, 17 (D.C. Cir. 2009), citing *City of Jersey City – Petition for Declaratory Order*, STB Fin. Docket No. 34818, 2007 WL 2270850 at *1 (Aug. 9, 2007) ("STB Order"), *recons. denied*, Docket No.

34818, 2007 WL 4429517 (Dec. 19, 2007) (“STB Recons. Order”). In August 2007, the STB determined that the Harsimus Branch is “subject to the [STB’s] exclusive jurisdiction until appropriate abandonment authority is obtained.” *See id.*, citing STB Order, 2007 WL 2270850 at *7. The STB subsequently denied a petition for reconsideration of that order. *Consolidated Rail Corp.*, 571 F.3d at 17, citing STB Recons. Order, 2007 WL 4429517 at *6.

The STB Order was appealed to the United States Court of Appeals for the District of Columbia Circuit, which ruled only on the procedural ground that the STB did not have authority to determine whether a railroad track is a line or a spur for purposes of abandonment authorization. *See Consolidated Rail Corp.*, 571 F.3d at 20. The Court of Appeals ruled that this court has exclusive jurisdiction to determine that issue, while the STB has exclusive jurisdiction to determine whether to authorize abandonment of a line. *Id.*

After the Court of Appeals issued that decision, the parties filed this lawsuit on October 7, 2009, seeking a ruling on whether the Harsimus Branch was conveyed as a line subject to STB jurisdiction. Compl. ¶ 49. The specific question before the Court is whether the Harsimus Branch was conveyed to Conrail as a line or a spur. *Id.* ¶ 6. On September 28, 2010, the court ruled, without reaching the merits, that plaintiffs lacked standing. *City of Jersey City v. Consolidated Rail Corp.*, 741 F. Supp. 2d 131, 149 (D.D.C. 2010), *rev’d*, 668 F.3d 741 (D.C. Cir. 2012). Plaintiffs appealed and the Court of Appeals reversed, *City of Jersey City v. Consolidated Rail Corp.*, 668 F.3d 741 (D.C. Cir. 2012), remanding the case back to the court on March 23, 2012, for further proceedings, [Dkt. # 61].² The parties filed status reports with the

² On May 3, 2012, the case was reassigned to Judge Kollar-Kotelly. *See* Reassignment of Civil Case [Dkt. # 62]. It was transferred to this Court on September 20, 2013. *See* Reassignment of Civil Case [Dkt. # 96].

court, and on June 25, 2012, the court issued an order to govern proceedings. Sched. and Procs. Order [Dkt. # 77].

On July 10, 2012, the parties filed a joint stipulation in which plaintiffs and intervenor-defendants stipulated that the Harsimus Branch was conveyed to Conrail as a line subject to the STB's abandonment jurisdiction. Joint Stipulation [Dkt. # 78] at 1. They further stipulated that defendant Conrail and intervenor Attorney General of New Jersey would not raise any facts or arguments in opposition to that stipulation. *Id.* In light of this, on August 15, 2012, plaintiffs filed a renewed motion for summary judgment. Renewed Mot. for Summ. J. [Dkt. # 79]. The LLCs oppose the renewed motion, Mem. of Law on Behalf of the LLCs in Opp. to Pls.' Mot. for Summ. J. [Dkt. # 81], and filed a motion seeking leave to file an amended answer to add counterclaims and cross-claims, Mot. for Leave to File an Am. Answer [Dkt. # 86].

STANDARD OF REVIEW

I. Motion to Amend

According to Federal Rule of Civil Procedure 15(a)(2), the Court should “freely give leave [to amend] when justice so requires.” The decision to grant leave to file an amended pleading is at the discretion of the Court. *Firestone v. Firestone*, 76 F.3d 1205, 1208 (D.C. Cir. 1996). Such leave is appropriate “in the absence of undue delay, bad faith, undue prejudice to the opposing party, repeated failure to cure deficiencies, or futility.” *Richardson v. United States*, 193 F.3d 545, 548–49 (D.C. Cir. 1999), citing *Foman v. Davis*, 371 U.S. 178, 182 (1962).

II. Summary Judgment

Summary judgment is appropriate “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). The party seeking summary judgment bears the “initial responsibility of informing the

district court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (internal quotation marks omitted). To defeat summary judgment, the non-moving party must “designate specific facts showing that there is a genuine issue for trial.” *Id.* at 324 (internal quotation marks omitted). The existence of a factual dispute is insufficient to preclude summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986). A dispute is “genuine” only if a reasonable fact-finder could find for the non-moving party; a fact is only “material” if it is capable of affecting the outcome of the litigation. *Id.* at 248; *Laningham v. U.S. Navy*, 813 F.2d 1236, 1241 (D.C. Cir. 1987). In assessing a party’s motion, the court must “view the facts and draw reasonable inferences ‘in the light most favorable to the party opposing the summary judgment motion.’” *Scott v. Harris*, 550 U.S. 372, 378 (2007) (alterations omitted), quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962) (per curiam).

ANALYSIS

I. The LLCs’ Motion for Leave to File an Amended Answer

The court granted the LLCs’ motion to intervene as defendants in this action on May 10, 2010. Minute Order (May 10, 2010). Federal Rule of Civil Procedure 13 does not distinguish between intervenors and other parties with respect to their ability to assert counterclaims or cross-claims. *See, e.g.*, Fed. R. Civ. P. 13(g) (“A pleading may state as a crossclaim any claim by one party against a coparty”); *see also Consolo v. Fed. Mar. Comm’n*, 383 U.S. 607, 617 n.14 (1966) (“[A]n intervenor of right may assert a cross-claim without independent jurisdictional grounds[.]”). But it is also well-established that “one of the most usual procedural

rules is that an intervenor is admitted to the proceeding as it stands, and in respect of the pending issues, but is not permitted to enlarge those issues or compel an alteration of the nature of the proceeding.” *Vinson v. Wash. Gas Light Co.*, 321 U.S. 489, 498 (1944); *see also EEOC v. Woodmen of the World Life Ins. Soc’y*, 330 F. Supp. 2d 1049, 1055 (D. Neb. 2004) (holding that an intervenor could not assert a cross-claim that would “improperly expand the scope of the proceedings before this court”); *Seminole Nation v. Norton*, 206 F.R.D. 1, 7 (D.D.C. 2001) (denying a potential intervenor’s request to intervene and present claims that fell outside of the scope of the litigation); *Marvel Entm’t Grp., Inc. v. Hawaiian Triathlon Corp.*, 132 F.R.D. 143, 146 (S.D.N.Y. 1990) (stating that an intervenor may not assert additional claims that “needlessly expand the scope and costs of th[e] litigation and . . . thus prejudice the rights of” the other parties to expeditiously resolve the action).³ But even if one reads Federal Rule of Civil Procedure 24 broadly to accord an intervenor the full rights of any participant in a lawsuit, a motion to amend any party’s pleading to add new claims is committed to the Court’s discretion and governed by the factors that would ordinarily pertain under Federal Rule of Civil Procedure 15. Here, the LLCs move – after entry of a joint stipulation that resolves the single issue raised in this case – to expand the issues in the case and alter the nature of this proceeding.

This action sought a declaratory judgment on the narrow question of how the Harsimus Branch was conveyed to Conrail. The LLCs assert that there is a broader dispute concerning property beyond the portion of rail track addressed in the complaint, and they want to amend

³ In a case involving a direct petition from agency action under 28 U.S.C. § 2344, the D.C. Circuit stated, “Intervenors may only argue issues that have been raised by the principal parties; they simply lack standing to expand the scope of the case to matters not addressed by the petitioners in their request for review.” *Nat’l Ass’n of Regulatory Util. Comm’rs v. Interstate Commerce Comm’n*, 41 F.3d 721, 729 (D.C. Cir. 1994). Although not directly applicable to this situation, that statement tends to support the proposition that an intervenor cannot expand the scope of the action.

their answer to add counterclaims and cross-claims “for a full and fair consideration of the issues in this case.” Mem. of Law in Supp. of Defs.-Intervenors LLCs’ Mot. for Leave to File an Am. Answer (“LLCs’ Mem.”) [Dkt. # 86-1] at 1. Their new claims include, among others, a claim for declaratory judgment about the broader disputed property, including another rail line, the Hudson Street Industrial Track. *Id.* at 3; Am. Answer [Dkt. # 87] ¶ 96. They also seek to add state law claims against Conrail for fraud and negligent misrepresentation related to Conrail’s conveyance of the Harsimus Branch to the LLCs. Am. Answer ¶¶ 115–48.

The LLCs argue that no discovery has taken place in this case and contend their motion is timely given the procedural history of this case. But the case they cite for their argument that their motion is timely is distinguishable from this case. In *Harrison v. Rubin*, 174 F.3d 249 (D.C. Cir. 1999), the Court of Appeals ruled that there is no undue delay “[w]here an amendment would do no more than clarify legal theories or make technical corrections.” *Id.* at 253. But here the LLCs do not seek to simply change a statutory citation to clarify legal theories or make technical corrections, as in *Harrison*. They seek to expand the scope of the case beyond the track at issue and to add state law claims that require the Court to delve into their commercial negotiations with Conrail. This would introduce entirely new legal and substantial factual issues to the case. See *Williamsburg Wax Museum, Inc. v. Historic Figures, Inc.*, 810 F.2d 243, 247 (D.C. Cir. 1987) (holding that the district court properly denied motion to amend complaint where amendment would have introduced an entirely new issue into the case). The LLCs acknowledge as much. LLCs’ Mem. at 20 (“The counterclaim, likewise, primarily deals with new legal theories. The counterclaims raise many new facts”); *id.* at 21 (acknowledging that “the fraud count introduces new factual issues”).

And the argument that no discovery has taken place does not aid the LLCs' position. No discovery is needed to resolve the issue before the Court, but the LLCs' proposed amendment would require extensive discovery, particularly as to the fraud and negligence claims – which the Court notes do not even involve all the parties in this case.

The LLCs' new claims go significantly beyond the narrow legal question involved in this litigation, as they address property beyond the Harsimus Branch and numerous factual issues and state law claims arising out of their commercial dispute with Conrail.⁴ Allowing this amendment would prejudice the other parties by expanding this litigation far beyond the original question presented and causing substantial delay in the resolution of this case. By contrast, a denial of the motion to amend does not prejudice the LLCs because they are free to raise their claims in separate litigation. Accordingly, the Court will deny the LLCs' motion for leave to file an amended answer.

II. Renewed Motion for Summary Judgment

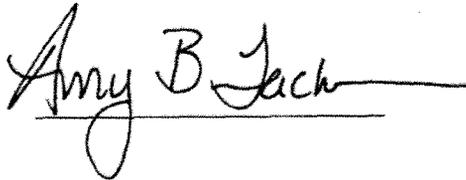
In light of the Court's decision to deny the LLCs' motion to amend and the parties' stipulation of July 10, 2012, this case presents no genuine issues of material fact and so may be properly decided on summary judgment as a matter of law. *See* Fed. R. Civ. P. 56(a); *Celotex Corp.*, 477 U.S. at 323. Again, the complaint presents one question: whether the Harsimus Branch was conveyed to Conrail in 1976 as a line subject to the STB abandonment jurisdiction.

⁴ In its opposition to the LLCs' motion for leave to amend, Conrail raises significant questions about whether this Court, sitting as the Special Court under the Regional Railroad Reorganization Act of 1973, has the power to exercise supplemental jurisdiction over the new state law claims. Conrail's Opp. to Def.-Intervenors' Mot. for Leave to File an Amended Answer [Dkt. # 89], at 19–22, citing *Consolidated Rail Corp.*, 571 F.3d at 18 n.11. But even if it does, the Court would still have to determine that the issues derived from a “common nucleus of operative fact,” *see United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966), and even then, the exercise of jurisdiction would be discretionary. *See id.* at 726; 28 U.S.C. § 1367.

As the D.C. Circuit held in *Consolidated Rail Corp.*, the district court has “exclusive jurisdiction to decide the antecedent question if it arises” of whether a track at issue “was conveyed . . . as ‘part of [the rail carrier’s] railroad lines’” subject to the STB’s abandonment jurisdiction. 571 F.3d at 20 (alteration in original), citing 49 U.S.C. § 10903(a)(1)(A). If so, then the STB “retains its authority under sections 10903 and 10906 to approve or deny an abandonment application.” *Id.* Given that the parties have now stipulated that the Harsimus Branch was conveyed to Conrail as a line and not a spur, the Court rules that the Harsimus Branch “was conveyed . . . as ‘part of [the rail carrier’s] railroad lines’” subject to the STB’s abandonment jurisdiction.

CONCLUSION

For the reasons stated above, the Court will deny the LLCs’ motion for leave to file an amended answer and will grant plaintiffs’ renewed motion for summary judgment. A separate order will issue.

A handwritten signature in cursive script that reads "Amy B. Jackson". The signature is written in black ink and is positioned above a horizontal line.

AMY BERMAN JACKSON
United States District Judge

DATE: September 30, 2013

Exhibit B
Joint Stipulation

**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.*,)
)
Defendant-Intervenors.)
_____)

C.A. No. 09-01900-CKK

JOINT STIPULATION

Pursuant to this Court’s Scheduling and Procedures Order filed June 25, 2012, ECF #77, the parties in this case make the following stipulations:

- Plaintiffs and Intervenor-Defendants LLCs stipulate that the Harsimus Branch from CP Waldo to Henderson Street (now Marin Boulevard) in Jersey City was conveyed to Defendant Consolidated Rail Corporation (“Conrail”) in 1976 as part of a line of railroad subject to the jurisdiction (including the abandonment jurisdiction) of the Interstate Commerce Commission, now the Surface Transportation Board.
- Conrail and Intervenor Attorney General of New Jersey stipulate that in connection with Plaintiffs’ renewed motion for summary judgment, Conrail and the Attorney General will not raise any facts or arguments in opposition to the foregoing stipulation of Plaintiffs and Intervenor-Defendants LLCs.

The parties have not reached settlement of the claims and disputes among them and make no further stipulations, at this time.

Respectfully submitted,

/s/ Robert M. Jenkins III

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Defendant Consolidated Rail Corporation*

Jeffrey S. Chiesa
Attorney General of New Jersey

By: /s/ Kenneth M. Worton
Deputy Attorney General
Kenneth Michael Worton
N.J. DEPARTMENT OF LAW & PUBLIC
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LLC and 446 Newark Avenue, LLC*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10nd day of July, 2012, I caused a true and correct copy of the foregoing 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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Exhibit C

LLCs' Allegations of Fraud by Conrail

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

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