

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB DOCKET NO. AB 167 (SUB-NO. 1189X)

**CONSOLIDATED RAIL CORPORATION
—ABANDONMENT EXEMPTION—
IN HUDSON COUNTY, NJ**

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**RESPONSE OF CONSOLIDATED RAIL CORPORATION
TO CITY PARTIES' NOTICE OF DECISION AND
REQUEST FOR LIFTING OF STAY OF PROCEEDING**

Consolidated Rail Corporation (“Conrail”) hereby responds to the “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,” filed by City of Jersey City, Rails to Trails Conservancy, and Pennsylvania Railroad Harsimus Stem Embankment Preservation Coalition (hereinafter “City Parties”) on November 22, 2013.

First, Conrail opposes the lifting of the stay in this proceeding. The City Parties are correct that in *City of Jersey, et al. v. Consolidated Rail Corporation, et al.*, Civil Action No. 09-1900 (ABJ), the United States District Court for the District of Columbia, sitting as the Special Court under the Regional Rail Reorganization Act of 1973, granted a motion for summary judgment filed by the City Parties, which were the plaintiffs in that action. However, the LLCs, which were intervenors in that action,¹ have filed an appeal to the United States Court of Appeals

¹ The LLCs, which also appeared in prior STB proceedings, are 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.

for the District of Columbia Circuit challenging the district court's decision and expressly calling into question in their Statement of Issues, filed November 29, 2013, whether the STB should be allowed to consider Conrail's abandonment application pending the LLCs' appeal. *City of Jersey City, et al. v. Consolidated Rail Corp., et al.*, Case No. 13-7175 (filed October 29, 2013). In addition to the uncertainty created by the LLCs' appeal, there have been numerous developments regarding the properties at issue since the STB proceedings were held in abeyance in 2010, and Conrail does not believe it is appropriate to proceed with its application until more clarity is reached regarding the parties' plans and positions.

Second, Conrail vigorously objects to the City Parties' suggestion that fraud allegations the LLCs attempted to make against Conrail, which the district court refused to entertain, have any merit or are relevant in any respect to this proceeding. As the City Parties well know, Conrail presented compelling arguments to the court that those allegations were not only procedurally improper but also substantively baseless. The LLCs asserted that the facts upon which their fraud claims were allegedly based were only discovered through "independent research" conducted between October 2010 and March 2012, while the court case was on appeal to the D.C. Circuit.² In opposing the LLCs' motion for leave to amend its Answer to include those allegations, Conrail demonstrated that in prior proceedings before the Board—specifically, in STB Finance Docket No. 34818, *City of Jersey City, Et Al.—Petition for Declaratory Order—* those allegedly newly discovered facts were discussed at length, including by the Board itself in

² See Memorandum of Law in Support of Defendants-Intervenors LLCs' Motion for Leave to File an Amended Answer (Including Addition of Counterclaims and Cross-Claims) Pursuant to F.R. Civ. P. 15(a)(2), at 17 (submitted in Special Court proceedings as Document 86-1 (Oct. 4, 2012); see also *id.* at 9-10 (discussing the alleged new investigation conducted by the LLCs).

its decisions served August 8 and December 19, 2007, and by the LLCs and their witnesses.³ For the convenience of the Board and to assure a fair and complete record, we are attaching Conrail's memorandum in opposition to the LLCs' motion to the district court to amend their answer to include the fraud claims.⁴

In sum, the LLCs' abortive fraud allegations against Conrail are irrelevant in this proceeding, and the City Parties' inclusion in their Notice of references to the LLCs' unproven and baseless allegations should be disregarded by the Board.

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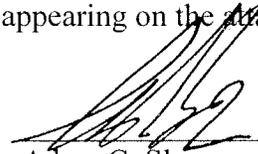
December 11, 2013

³ Much of the information developed in the STB proceedings resulted from the independent research and investigations performed by the LLCs' own counsel, Fritz Kahn. As Conrail pointed out to the court, the LLCs' court papers ignored the fact that Mr. Kahn had performed extensive research concerning the issues in dispute before the STB and the court. The LLCs also ignored (and in many instances rejected) the results of Mr. Kahn's inquiries and the information provided by the LLCs' own witnesses in the STB proceedings.

⁴ We are not including the lengthy exhibits filed by Conrail in support of its memorandum in the court case. As will be apparent from the declaration that was appended to Conrail's memorandum and that we are including here, many of the exhibits were, in fact, submissions to the STB or decisions in STB Finance Docket No. 34818. All of the exhibits that were included with Conrail's court memorandum are available through the court's electronic (ECF) docket.

CERTIFICATE OF SERVICE

I hereby certify service that on December 11, 2013, I caused a copy of the foregoing to be served by U.S. Mail, postage prepaid, first class, on those appearing on the attached Service List.



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**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

**CONSOLIDATED RAIL CORPORATION’S OPPOSITION TO
DEFENDANT-INTERVENORS’ MOTION FOR LEAVE TO
FILE AN AMENDED ANSWER**

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Dated: October 22, 2012

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Consolidated Rail Corporation (“Conrail”) hereby files this memorandum in opposition to the motion of 212 Marin Boulevard, LLC and the other LLC defendant-intervenors (collectively, the “LLCs”) to amend their Answer to add crossclaims against Conrail for fraud and negligent misrepresentation.

INTRODUCTION

For over six years the LLCs vigorously argued before the Surface Transportation Board (“STB”), the United States Court of Appeals for the District of Columbia Circuit, and this Court that the property at issue in this case (“Embankment”) was *not* part of a line of railroad (“Harsimus Branch”) subject to the abandonment authority of the STB. The LLCs were independently represented by expert regulatory and trial counsel, they conducted their own investigations and discovery, they filed their own arguments and evidence, and they collaborated with Conrail on joint filings. Now, when this case is on the cusp of being dismissed, they seek leave to amend their Answer to charge Conrail with fraud and negligent misrepresentation for taking the *same* position the LLCs consistently took in multiple proceedings.

As a threshold matter, this Court does not have jurisdiction over the proposed crossclaims. On this ground alone, the LLCs’ proposed amendments must be rejected. In any event, the LLCs’ extraordinary effort to reverse course at this late date could be rejected under any one of the several established legal criteria for denying a motion to amend. *See Am. Soc’y for the Prevention of Cruelty to Animals v. Ringling Bros. & Barnum & Bailey Circus*, 244 F.R.D. 49, 50-51 (D.D.C. 2007) (“*ASPCA*”). Here, virtually *all* of the criteria apply.

It is difficult to conceive of a more striking example of “undue delay, bad faith or dilatory motive.” *Id.* at 50 (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962)). The LLCs waited over six years to spring their new claims; they effectively indict themselves for having

misled the STB and the courts; and they do so when the Court is about to dispose of the only issue that the parties have agreed is properly before the Court.

Moreover, allowing the crossclaims would patently result in “undue prejudice to the opposing party.” *Id.* (quoting *Foman*, 371 U.S. at 182). It would radically alter the theory on which this case has proceeded and greatly increase Conrail’s burden and expense of defending itself.

Finally, “futility of amendment” (*id.*) also dooms the LLCs’ motion. In the first place, as noted above, this Court, sitting as the Special Court, has no jurisdiction to entertain an ancillary state-law claim. *See, e.g., Conrail v. Penn Cent. Corp.*, 533 F. Supp. 1351, 1354 (Sp.Ct.R.R.R.A. 1982). Second, even if this Court did have jurisdiction, the proffered crossclaims are barred by the applicable six-year New Jersey statute of limitations (N.J. Stat. Ann. §2A:14-1), and they do not “relate back” to the date when the LLCs filed their Answer. *See, e.g., In re Sharps Run Assocs., L.P. v. C.G. Realty Capital Ventures-I, L.P.*, 157 B.R. 766, 781 (D.N.J. 1993).

In sum, allowing the LLCs to amend their Answer to make the duplicitous claims they have conjured up at the eleventh hour would be highly inequitable, prejudicial, and futile. Their motion should be rejected.

BACKGROUND AND STATEMENT OF FACTS

Based on the orders entered by this Court since the case was remanded from the D.C. Circuit, it is clear that this Court is quite familiar with the factual background and legal issues in the case.¹ Accordingly, we will restrict our recounting of the background and facts to the matters that are directly germane to the LLCs’ motion.

¹ Much of the factual background is summarized in the decisions of the D.C. Circuit—*Conrail v. STB*, 571 F.3d 13 (D.C. Cir. 2009), and *City of Jersey City v. Conrail*, 668 F.3d 741 (D.C. Cir.

This case is before this Court under the jurisdiction of the Regional Rail Reorganization Act of 1973, Pub. L. No. 93-236, 87 Stat. 985 (1974) (“3R Act”). The D.C. Circuit determined that “*qua* the Special Court,” this Court has sole and exclusive jurisdiction over this matter pursuant to Section 209(e)(2) of the 3R Act (45 U.S.C. 719(e)(2)). *Conrail*, 571 F.3d at 19.

Despite this matter’s protracted procedural history, the issue presented to this Court in the Plaintiffs’ October 2009 Complaint is relatively straightforward. As the LLCs themselves stated in their Statement of Points and Authorities in Support of Motion for Leave to Intervene, “[t]he issue before the Court is whether the [property at issue] is a ‘line of railroad’ and subject to federal railroad laws regarding ‘abandonment.’” ECF No. 17-1, at 2. The case had been litigated with that understanding since the Complaint was filed.

That all changed in June of this year, when the LLCs suddenly announced their intent to expand the scope of the litigation by advancing new estoppel counterclaims against Plaintiffs, and state-law fraud and misrepresentation crossclaims against Conrail. The LLCs propose to expand the scope of the litigation to cover not only the Embankment but also the regulatory status of other former rail properties in the Jersey City area. To justify this eleventh-hour attempt to massively expand the scope of the proceedings, the LLCs have claimed that, while the case was pending before the D.C. Circuit on appeal from Judge Urbina’s September 2010 summary judgment decision, the LLCs had their first opportunity to engage in an investigation “[t]o arrive at an informed litigation position.” Mem. of Law in Supp. of Defendant-Intervenors LLCs’ Mot. for Leave to File an Amended Answer, ECF No. 86-1 (“Mem.”) at 10.

2012)—and the unreported decisions of the STB—STB Fin. Docket No. 34818, *City of Jersey City, et al.—Petition for Declaratory Order* (served Aug. 9, 2007 and Dec. 17, 2007). For the Court’s convenience, the STB’s decisions are attached as Exs. A and B. Exhibit letters refer to the exhibits to the declaration of Adam C. Sloane, attached hereto.

That they now contend that they had not previously engaged in such an investigation is reason enough to summarily deny the LLCs' motion. But apart from that problem, the story they tell about their role in the many proceedings since 2006 concerning the Embankment is utterly fictional, and is belied by their own representations to the courts and to the STB.

In the story they tell, the LLCs barely appear at all in the lengthy proceedings at the STB, the D.C. Circuit, this Court, and the D.C. Circuit again. When they are present, the LLCs portray themselves as mere spectators—seeing little, understanding less, and responsible for nothing. In this narrative, they did not have notice of anything that might have put them on inquiry about possible claims against Conrail until the case was before the D.C. Circuit as a result of a standing argument that, according to the tale, is a primary source of the delay in their seeking to amend their Answer. This tale is pure fantasy.

The LLCs have never been passive participants in the disputes about the status of the property, and the recent independent inquiries they trumpet were far from the first such inquiries in which they engaged. In the STB proceedings in 2006-2007, in the D.C. Circuit challenge to the STB's decisions, in the proceedings in this Court before Judge Urbina, and in the proceedings in the D.C. Circuit challenging Judge Urbina's summary judgment decision, the LLCs were represented by Fritz R. Kahn. Mr. Kahn is a former General Counsel of the Interstate Commerce Commission ("ICC") and an experienced and well known railroad regulatory attorney.² From the outset of the STB proceedings, the LLCs revealed both that they already

² After the case was referred to this Court *qua* Special Court, Mr. Kahn was assisted before this Court by Herbert J. Stern and Stephen M. Plotnick of the New Jersey law firm Stern & Kilcullen, LLC. On remand to this Court from the second appeal, Messrs. Kahn, Stern, and Plotnick withdrew, and the LLCs now are represented by attorneys from the law firm Waters, McPherson, McNeill, P.C. of Secaucus, New Jersey. As we detail below, while represented by Mr. Kahn the LLCs mounted their initial thorough investigation of matters relating to the property and obtained notice of every issue that they now say they have only recently discovered.

were quite familiar with the outlines of the history of the property, and that they intended to perform “searching inquiries” concerning the historical uses of the line. *See* Pet. for Extension of Time of 212 Marin Blvd., et al., Ex. C, at 3.

They were well positioned to do so. The LLCs not only were represented by Mr. Kahn, but they also obtained the services of an impressive array of former railroad and United States Railway Association (“USRA”) personnel to research the Embankment and offer testimony in the form of Verified Statements. One such witness was John D. Heffner, himself a long-time practicing transportation attorney, a former staff attorney at the ICC, and a former member of the Office of General Counsel for USRA. *See* Verified Statement (“V.S.”) of John D. Heffner, Ex. D, at 1. Mr. Heffner accompanied Mr. Kahn to the National Archives at College Park, MD, to review maps used by USRA in connection with the Final System Plan (“FSP”). *See id.* at 2-3.³

The LLCs also presented Verified Statements by James W. McClellan, who was USRA’s Vice President in charge of the Office of Strategic Planning (see Ex. E, at 2); Richard B. Hasselman, formerly a Vice President at Penn Central and a Senior Vice President at Conrail; William F. Wulforth, former special duty Assistant Trainmaster on the Harsimus Branch, who also referred to operations on the Hudson Street Industrial Track (“Hudson Street IT”) in describing service to Colgate (Ex. F, at 2); and Victor Hand, a former USRA official who also at one time was a brakeman on the New Jersey Division of the Penn Central (Ex. G, at 1-5). Together with this detailed testimony, the LLCs in early 2006 presented extensive documentary evidence, participated in written discovery and document production, and made their own independent legal arguments to the STB. *See* LLCs’ Reply Statement, Ex. H.

³ Thus, the research at the Archives described by the LLCs on page 10 of their Memorandum was not the first such research undertaken on their behalf.

The LLCs continued to take an independent path after the STB issued its August 2007 decision about the regulatory status of the Embankment. They filed their own petition for reconsideration of the STB's decision, their own petitions for review to the D.C. Circuit, and their own brief in the D.C. Circuit. Further, when Plaintiffs brought their claims in this Court, the LLCs intervened and filed their own Reply Memorandum in Response to Opposition to Cross-Motion for Summary Judgment, ECF No. 55, in which they principally argued that the Plaintiffs did not have standing and that a New Jersey statute relating to the Plaintiffs' standing was unconstitutional.

The LLCs themselves stated in seeking to intervene in this case that “[t]he LLCs have been constant participants in all aspects of the controversy that is the subject matter of these proceedings—because it is their title to and rights in the Embankment that are on the line.” Statement of Points of Law and Auth. in Supp. of Mot. For Leave to Intervene, ECF No. 17-1, at 6. *See also* LLCs' Reply in Further Supp. of Their Mot. for Leave to Intervene and in Opp'n to Pls.' Mot. for Permission to Submit a Sur-Reply, ECF No. 28, at 2 (“The LLCs have been constant participants in all aspects of the exact controversy that is the subject matter of these proceedings. . . .”); LLCs' Supplemental Reply Mem. in Further Supp. of Their Mot. for Leave to Intervene, ECF No. 34, at 4-5 (“The LLCs have been litigating with the Plaintiffs for nearly five years before the STB, the Court [of] Appeals for the District of Columbia Circuit, in the New Jersey state and federal courts, and now this Court . . .”).

In short, contrary to their current assertion that in the STB proceeding they took the same line as Conrail “based upon what [the LLCs] knew in reliance upon Conrail[’s] representation as to railroad law” (Mem. 4), the record shows that the LLCs took an active, aggressive, and independent part in investigating the pertinent facts and formulating the legal theories in support

of the positions that they have recently abandoned. Further, as we demonstrate below, *every* allegedly newly discovered fact that they now construe as support for their claims against Conrail was fully available to them in the STB proceedings, more than six years before they surfaced their proposed amendments in June of this year.

ARGUMENT

“The grant or denial of leave to amend is committed to the discretion of the district court. It is an abuse of discretion, however, to deny leave to amend without sufficient reason, ‘such as undue delay, bad faith or dilatory motive on the part of the movant, . . . undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.’” *ASPCA*, 244 F.R.D. at 50-51 (quoting *Foman*, 371 U.S. at 182; citation omitted). Here, virtually every factor set forth in *ASPCA* compels denial of the LLCs’ motion.

Indeed, the very cases cited by the LLCs in support of their amendments compel denial of their motion. *See* Mot. 16-17. The LLCs seek to do far more than “clarify legal theories or make technical amendments” to their Answer. *Harrison v. Rubin*, 174 F.3d 249, 253 (D.C. Cir. 1999). Rather, their amendments would inject entirely new issues into the case and would be highly prejudicial. Thus, under the cases the LLCs themselves cite, the motion should be denied.⁴

I. THE PROPOSED AMENDMENTS REFLECT UNDUE AND INEXCUSABLE DELAY, BAD FAITH, AND DILATORY MOTIVE

The basic premise of the LLCs’ attempt to justify their dilatory amendments is false. They even go so far as to blame Conrail for their own failure to bring their claims sooner, suggesting that Conrail’s standing arguments unnecessarily delayed the case (*see* Mem. 7, 22),

⁴ We do not understand the LLCs to be arguing that “mandatory joinder” principles concerning counterclaims (Mem. 14) support their motion to add the *crossclaims*, because, as the LLCs seem to recognize, crossclaims are not mandatory. *See, e.g., Hall v. General Motors Corp.*, 647 F.2d 175, 184 (D.C. Cir. 1980).

while ignoring the fact that *they* also argued the Plaintiffs did not have standing. See LLCs' Answer, ECF No. 28-1, ¶¶ 5-7, 22, 24 & Affirmative Defense ¶ 2; Response to Opposition to Cross-Motion for Summary Judgment, ECF No. 55. These misrepresentations are inexcusable and reflect the LLCs' undue delay, bad faith, and dilatory motive.

As discussed above, contrary to the picture the LLCs try to paint, they have been actively involved in the disputes relating to the Embankment since no later than early 2006. In fact, they trumpeted their involvement in moving to intervene in this very case. *See supra* at 6.

But there is more. The LLCs have summarized the facts that they allegedly recently discovered and which, they say, form the basis for their fraud and negligent misrepresentation claims. Their "new" discoveries include the supposed revelations that Conrail never sought leave to abandon the Harsimus Branch; that Jersey City ("City") urged Conrail to halt service to clear the way for waterfront development; that Conrail removed rail improvements along the property and eastward without obtaining STB approval; that Conrail allegedly internally reclassified the branch as a spur; that Conrail represented to the LLCs that there were no regulatory issues with respect to the property; and that Conrail advised the City that the Harsimus Branch had been lawfully abandoned without the need for ICC approval. Mem. 10-11, 17-18. They also make much of their "discovery" of a connection between the trackage formerly on the Embankment or in the Harsimus Cove Yard and the Hudson Street IT. *Id.* at 3, 12, 15, 18. And they contend that they have just discovered that Conrail's arguments about the mileposts listed in the FSP were incorrect and in fact that the property at issue was actually part of the "line" designated as the Harsimus Branch in Line Code 1420 of the FSP. *Id.* at 10, 17. The LLCs knew or were on notice to make inquiries about each of these "facts" since no later than early 2006—more than three years before they intervened here, five years before the appeal of

Judge Urbina's decision, and more than six years before the LLCs noticed their intent to amend their Answer.

Before turning to the evidence of what the LLCs knew (and when they knew it), some broader points bear emphasis. **First**, the LLCs argue that Conrail's "duplicity has now been confirmed" by Conrail's agreement, pursuant to the Joint Stipulation, not to raise facts or arguments in response to the stipulation between Plaintiffs and the LLCs that the Embankment was conveyed as a line of railroad. *Id.* at 18. Contrary to the LLCs' allegation, Conrail's change of *litigating* position does not reflect any change in Conrail's *views* about the regulatory status of the Embankment. Conrail continues to believe, as it consistently has maintained, that the Embankment was not conveyed as a line of railroad. As Conrail has made clear repeatedly, Conrail simply has determined not to *contest* the regulatory status of the property any further.

Second, contrary to the LLCs' assertion (*id.* at 13), the fraud claims do not arise from the same transactions that are already in issue. The transaction at issue in the case is the conveyance of the Embankment to Conrail in 1976 pursuant to the FSP. The transaction at issue in the fraud claims is the sale of the property to the LLCs nearly thirty years later.

Third, we are not sure which "facts" the LLCs contend we have "acknowledged . . . are correct" (*id.* at 20), but if the LLCs are referring to the facts they presented in response to Plaintiffs' renewed summary judgment motion, Conrail has made it very clear that it does not concede the truth of those alleged facts. As Conrail stated in the Second Joint Status Report, those facts are not material to the issues raised by the Plaintiffs' pending summary judgment motion, and Conrail did not wish to burden the Court with a response to non-material facts relating to a motion that Conrail did not make. *See* ECF No. 83, at 1 n.1.

Fourth, throughout the 2006 STB evidentiary proceedings, the regulatory status of the Embankment was sharply in issue. The City and other petitioners before the STB offered evidence and legal argument that the property was designated as a line of railroad and so used by Conrail. The City also argued that Conrail never obtained authorization to abandon the Embankment and that USRA did not change the Embankment's regulatory status. The LLCs' position, however, was that the Embankment consisted of spur, switching, yard, or other excepted track that was merely appurtenant to the main line of railroad designated in Line Code 1420, and that USRA had not conveyed the Embankment as part of a line of railroad. *See, e.g.*, LLCs' Reply Statement, Ex. H, at 2-8; *see also* STB August 2007 Decision, Ex. A, at 7-8. The arguments that the LLCs heard and disputed clearly put them on notice of their present claims regarding the regulatory status of the line. That they are now claiming that they were only just put on inquiry into the facts that they think give rise to fraud allegations simply does not square with the whole tenor of the 2006 proceedings.

Fifth, that the LLCs now have new counsel who claim to have discovered things that the LLCs had notice of while represented by Mr. Kahn does not excuse, much less justify, their attempt to change course so late in this litigation. *Cf. e.g., Veal v. Geraci*, 23 F.3d 722, 725 (2d Cir. 1994) (for purposes of the statute of limitations, the client has notice of facts that his attorney knows or should know); *Link v. Wabash R.R. Co.*, 370 U.S. 626, 634 (1962) (client is chargeable with notice of all facts of which lawyer has notice).

Turning to the specific issues that the LLCs now claim to have just discovered, we show that not one of them was unheralded in the 2006 proceedings.

A. The LLCs Knew in 2006 That Conrail Halted Service Without Filing for Abandonment Authority

That Conrail did not seek leave from the STB to abandon the Harsimus Branch was no secret. Conrail admitted it; the LLCs themselves referred to it in a January 23, 2006 petition for extension of time in the STB proceedings, Ex. C, at 1-2; and the STB assumed it in its August 2007 Decision, Ex. A at 1. The LLCs also admitted in their original Answer here that “Conrail did not seek or obtain authorization for abandonment from the [STB] prior to” selling the property to the LLCs. ECF No. 28-1, ¶ 19. Thus, their characterization of this as a recent discovery is belied by the very Answer they now seek to amend. It beggars credulity that the LLCs can cite this “discovery” now as a basis for their proposed amendments.

B. The LLCs Knew in 2006 That the City Urged Conrail to Halt Service to Clear the Way for Waterfront Development

That the City urged Conrail to halt service to clear the way for waterfront development and that Conrail sold other parcels also was revealed, indeed emphasized—*by Conrail*—in early 2006 in the STB proceedings. *See* Conrail’s Reply to Pet. for Declaratory Order of Jersey City, et al. (filed Feb. 1, 2006), Ex. I, at 3 (“On the contrary, Jersey City and the Jersey City Redevelopment Agency strongly encouraged Conrail to make the ‘Harsimus Branch’ property, particularly along the waterfront, available for development, and Conrail began to sell off various parcels to the Redevelopment Agency and to private developers. Over time, almost 90% of the acreage was sold off in a half dozen different transactions. The majority of the ‘Harsimus Branch’ property is now covered by commercial and residential developments.”). Of course, the LLCs did not need Conrail to tell them about these facts in 2006: the LLCs’ own February 1, 2006 Reply to the City’s Petition for a Declaratory Order (Ex. J), recited much the same story. *See id.* at 7. The STB likewise recited it in its August 2007 Decision. Ex. A at 5.

C. The LLCs Knew in 2006 That Conrail Removed Rail Improvements on the Embankment and Eastward Without STB Approval

That Conrail removed rail improvements on the Embankment and eastward without STB approval also was known to the LLCs in early 2006. The LLCs themselves adverted to this fact in their STB filings. Thus, in their Reply to the City's Petition for a Declaratory Order, the LLCs noted "Conrail removed the tracks and ties and, at the urging of the City of Jersey City, it removed the bridges which crossed the intersecting streets—Grove Street, Erie Street, Jersey Avenue, Coles Street and Monmouth Street. All this was done by Conrail without securing the advance abandonment authorization from the ICC or this Board. Moreover, all this was done by Conrail with the knowledge and acquiescence of the City of Jersey City." LLCs' Reply, Ex. J, at 7; *see also* Ex. H at 4, 23-24; Conrail's Reply, Ex. I, at 3 (referring to "removal of the tracks and bridges" and stating that Conrail removed "all of the railroad infrastructure on the remaining property at Jersey City's request"). The STB's August 2007 Decision also noted this fact. Ex. A at 2, 5. Thus, this supposedly new discovery is a discovery of nothing new. It was known by the LLCs in 2006. It cannot support a motion to amend in 2012.

D. The LLCs Knew in 2006 About Conrail's Supposed Internal "Reclassification" and Representations to the City and LLCs Concerning the Regulatory Status of the Harsimus Branch

In early 2006, the LLCs also knew about the alleged "reclassification" by Conrail of the Embankment as a spur. They also knew about Conrail's expression to the LLCs of its belief that there were no regulatory issues with respect to the property, and that Conrail advised the City that the Harsimus Branch had been lawfully abandoned without the need for ICC approval (as well as that the City alleged that Conrail had made a conflicting statement to the City). In fact, the allegation about Conrail's alleged internal reclassification of the property was front and center in the STB proceedings. In its Petition for a Declaratory Order in January 2006, the City

alleged that “in April 1994, Conrail arbitrarily internally reclassified the Harsimus line as ‘spur’ or ‘industrial’ and subsequently took the position that it could sell it to developers without prior ICC (now STB) approval, notwithstanding the claim to the City as late as 2004 that indicated Conrail recognized continued STB jurisdiction.” Ex. K, at 16. *See also id.* at 23 (“Unilateral reclassification of a line is not a permissible means to avoid federal abandonment jurisdiction”); Ex. L.⁵

In fact, a 1994 list identifying the property as “spur track” was disclosed by Conrail in discovery in the STB proceedings, discussed by Jersey City in its March 9, 2006 Opening Statement, Ex. M, at 4, and included as the very first two pages of Appendix I to Jersey City’s Opening Statement.⁶ Jersey City also called Conrail’s alleged representations to the LLCs into question in its March 9, 2006 Opening Statement, in which it referred to an email and a letter from Conrail outside attorney Fiorilla to LLC attorney Alampi. Ex. M at 3. Clearly, Jersey City’s argument in its Opening Statement should have put the LLCs on inquiry about these issues. But in the STB proceeding, the LLCs firmly and repeatedly argued that Conrail’s position was the correct one.

⁵ Exhibit L, an exhibit to the City’s Petition for a Declaratory Order, is a letter, dated June 17, 2005, from one of Conrail’s outside lawyers, John Fiorilla, to one of the City’s lawyers, John J. Curley. It states that the property at issue in this case “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.” This letter has been in the public record, then, since January 2006. The LLCs cannot argue now that they have just become aware of it or of its potential significance.

⁶ Appendix I is included in Exhibit M. Conrail also included the document as Exhibit FF to its April 24, 2006 Reply Statement. Conrail continues to take the position that the list does not reflect an internal *reclassification* but rather the conclusions of an analysis of the regulatory status of various Conrail properties.

E. The LLCs Knew in 2006 About Service to the Hudson Street IT

The LLCs' references to revelations about connections between the Harsimus Branch or Harsimus Cove Yard and the Hudson Street IT also are unavailing. The precise significance of these revelations is difficult to tease out from the LLCs' motion and proposed amended pleading. At bottom though, the record of the 2006 STB proceeding establishes that whatever significance service to Hudson Street via the Harsimus Branch or Harsimus Cove Yard may have for the LLCs *now*, the LLCs would have to be charged with knowledge about such service in *2006*, and, at a minimum, were on notice to make inquiries about it no later than early 2006. For instance, in its Opening Statement filed in the STB proceedings in early March, 2006, the City noted:

Conrail by 1985 was referring to the portion of the Harsimus Branch involved in this proceeding as part of the 'Passaic and Harsimus Branch and Hudson Street Track.' This nomenclature appears to encompass everything on the old Harsimus Branch down to the Cove and then south along the waterfront to the former location of the Colgate Palmolive plant on Hudson Street. According to a Conrail document dated January 17, 1985, during the twelve month period ending 9/84, there were seven customers on the Branch, with 3,204 carloadings per year.

Ex. M, at 5. In Appendix I to the City's Opening Statement are several documents produced by Conrail in discovery in the STB proceeding that discuss rail traffic Conrail moved over the Harsimus Branch to and from the Hudson Street IT. *See* Ex. M.⁷

⁷ The third page of that appendix contains a document that prominently discusses the Hudson Street IT, referring to the "Passaic & Harsimus Branch/Hudson St. Industrial" as a "line" that "generated 637 carloads in 1986." The next page of the appendix is titled "Conrail Line Screening Summaries," and "Passaic & Harsimus/Hudson St." is the first entry on that page. That entry provides 1983-1986 data on the number of cars, the number of customers, the revenues, and other information about the use of the trackage. There follows a document (with the header "Exhibit 1") that has a centered title "Hudson Street Track," and lists the customers on the trackage and the carloads and revenues for them for the period ending September 1984. Next, the appendix includes a Conrail memorandum whose subject is "Passaic & Harsimus Branch/Hudson Street Track, Jersey City, NJ." That document also provides an analysis of the customers, carloads, and revenues relating to the trackage. *See* Ex. M.

The LLCs did not just have *notice* about the service via the Hudson Street IT. They discussed it in their own papers. *See* Reply Statement, Ex. H, at 22-23. In fact, LLC witness William F. Wulforth related that when he was special duty Assistant Trainmaster working on the Harsimus Branch, for the Pennsylvania Railroad, they “handle two or three carloads of inbound traffic, five nights a week, for Colgate, but that was a difficult operation, as the train had to wend its way through the streets of Jersey City to reach Colgate’s plant” *Wulforth V.S.*, Ex. F, at 2. As the documents referred to in the previous paragraph show, Colgate was the primary customer on the Hudson Street IT.⁸

Finally, any argument that the LLCs were not aware until recently that the Hudson Street IT had been assigned its own Line Code number and was separately conveyed to Conrail cannot stand even the slightest scrutiny. The reference to the Hudson Street IT and its line code (Line Code 1440) occurs on the *same page* of the FSP (page 272) as does the reference to the Harsimus Branch. That page has been introduced into proceedings relating to the property many times, including in Appendix VIII to the City’s March 9, 2006 Opening Statement. *See* Ex. M. It also was specifically cited by the STB in its August 2007 decision. Ex. A, at 3.

⁸ The service to Hudson Street via the property was also noted in the STB’s August 2007 decision. *See* Ex. A, at 4, 8-9 (referring to the trackage as having been used for shippers located on Hudson Street), 10 (trackage used to “move substantial amounts of traffic to serve shippers located on Hudson Street”); *see also* STB December 2007 Decision, Ex. B, at 3 (noting volume of cars for shippers on Hudson Street). The prominence of the issues relating to the Hudson Street IT in the STB proceedings also torpedoes the LLCs’ argument that they were somehow misled or put off inquiry by Conrail’s inclusion of the Hudson Street IT in a 2008 abandonment notice followed by Conrail’s subsequent withdrawal of the Hudson Street track from that notice. In light of what they knew about the allegations concerning the implications of service to the Hudson Street IT in 2006, it is utterly mysterious how Conrail’s subsequent filing in the STB could have put them off the trail.

F. The LLCs Knew in 2006 About the Milepost Controversies

As for the LLCs' alleged discoveries about alleged misstatements by Conrail concerning the relationship between the Embankment and the Harsimus Branch designated in the FSP as Line Code 1420 and the correct location of the mileposts referred to in the FSP, these issues were sharply contested in the STB 2006 proceedings. Essentially, the position that the LLCs are now taking appears to be the very position that the City took—and the LLCs disputed based on their own independent research—in the 2006 STB proceedings. *See, e.g.*, LLCs' Reply (Feb. 1, 2006), Ex. J, at 2-3, 6-7; Jersey City, et al., Opening Statement, Ex. M, at 1, 16-21, 25; LLCs' Reply Statement, Ex. H, at 1, 13-14 (disputing that Line Code 1420 designated the property at issue in this case to be an active line of railroad and noting that Jersey City's argument "completely ignores the milepost designations of the 6th Street Embankment as set forth" in the FSP); *see also id.* at 14-18 (further discussing location of the property and milepost issues); Heffner V.S., Ex. D, at 3-4 (discussing mileposts as shown on maps reviewed by Heffner and Kahn at the National Archives); LLCs' Reply (May 26, 2006), Ex. N, at 2 (discussing mileposts in connection with City's motion to admit track charts). The LLCs relied on their milepost analyses to claim, like Conrail, that the Harsimus Branch was ancillary track to the Main Line of the Pennsylvania Railroad, and the LLCs specifically petitioned the STB for reconsideration of its contrary decision. August 29, 2007 LLCs' Pet. for Reconsideration, Ex. O, at 3-5.⁹

Given how vigorously the parties disputed the location of the mileposts and the relationship between the property and the FSP's designation of Line Code 1420, as well as the amount of independent research performed by the LLCs' lawyers and experts in the 2006 STB

⁹ The LLCs continued to make the same milepost/property identification argument in their appeal to the D.C. Circuit. *See* Br. of Pet'rs 212 Marin Blvd., LLC et al., Ex. P, at 5-6 (submitted Feb. 3, 2009 in Case Nos. 07-1401, 07-1529, 08-1019, and 08-1052).

proceedings, it is clear that, at a minimum, the LLCs were on notice in early 2006 of the basis for the allegations that they now assert against Conrail. Their claim to have just discovered facts causing them to change their position defies belief.

* * *

In short, the record clearly establishes that in early 2006 the LLCs knew or were on notice about every matter that they claim just to have discovered. Their proposed amendments reek of undue delay, bad faith, and dilatory motive.

II. THE PROPOSED AMENDMENTS ARE HIGHLY PREJUDICIAL

Prejudice to the party opposing the proposed amendment is a critical factor for the Court to consider in deciding whether to grant leave to amend. *ASPCA*, 244 F.R.D. at 50-51. “The Court may deem prejudicial an amendment that substantially changes the theory on which the case has been proceeding and is proposed late enough so that the opponent would be required to engage in significant new preparation. The Court may also deny leave to amend where the non-moving party would be put to the additional expense and burden of a more lengthy and complicated trial or where the issues raised by the amendment are remote to the issues in the case.” *Id.* at 51 (internal quotation marks and citation omitted).

The LLCs’ proposed fraud crossclaims would be highly prejudicial to Conrail. Until now, this case has been about the terms of the FSP and the conveyance documents executed pursuant to the FSP—focusing on whether the Embankment was conveyed to Conrail as a line of railroad. Conrail (and Plaintiffs) have briefed those issues on summary judgment and developed and memorialized evidence relating to those matters.

The LLCs’ proposed state-law fraud claims, however, would radically alter the theory on which the case has proceeded and greatly increase Conrail’s burden and expense in defending itself. Under New Jersey law, the elements of common law fraud are “(1) a material

misrepresentation of a presently existing or past fact; (2) knowledge or belief by the defendant of its falsity; (3) an intention that the other person rely on it; (4) reasonable reliance thereon by the other person; and (5) resulting damages.” *Suarez v. E. Int’l Coll.*, 50 A.3d 75, 85 (N.J. Super. Ct. App. Div. 2012) (internal quotation marks omitted). Negligent misrepresentation requires proof of “[a]n incorrect statement, negligently made and justifiably relied on, [and] may be the basis for recovery of damages for economic loss . . . sustained as a consequence of that reliance.” *Moskow v. K. Hovnanian at Jackson, LLC*, 2012 WL 3140241, at *10 (N.J. Super. Ct. App. Div. Aug. 3, 2012) (unpublished) (alterations in original; internal quotation marks omitted).

The injection of these new claims into the case would require inquiry into Conrail’s knowledge, intent, and belief as long ago as eighteen years, when its law department issued the list of spur track properties trumpeted by the LLCs, and no more recently than 2005 and 2006, when the property was sold to the LLCs and Conrail made the representations now alleged by the LLCs to have been fraudulent or negligent. Conrail also would have to inquire into the LLCs’ state of mind upon hearing those representations, since reliance and the reasonableness of reliance are elements of the fraud claims. These matters are far outside the scope of the current case, would greatly complicate the issues with which Conrail has to deal, and would result in far more burdensome and expensive pre-trial and trial proceedings.

The prejudice to Conrail of allowing these claims is exacerbated by the fact that the LLCs have waited so long to bring them. If the LLCs had brought these claims promptly, witness recollections would be fresh and relevant evidence could have been preserved and memorialized.

Thus, the prejudice to Conrail resulting from the LLCs’ proposed addition of its fraud claims is palpable and pronounced. The LLCs should not be permitted to amend their Answer to assert their proposed crossclaims.

III. THE PROPOSED AMENDMENTS ARE FUTILE

Proposed amendments are deemed futile when they would “not survive a motion to dismiss.” *Hettinga v. United States*, 677 F.3d 471, 480 (D.C. Cir. 2012) (per curiam).

A. This Court Does Not Have Jurisdiction Over the Crossclaims

The LLCs’ proposed amendments would be futile because the state-law claims are not within this Court’s jurisdiction. The Special Court has exclusive jurisdiction where resolution of a dispute involves the Court’s “central functions.” *See Conrail*, 571 F.3d at 18 n.11 (discussing cases). Those “central functions” include enforcing or declaring rights under the 3R Act and interpreting the FSP, the Special Court’s conveyance orders, and conveyance documents to give effect to the USRA’s intentions. *See id.* at 18-19 & n.11. The Special Court has been assiduous about confining its jurisdiction to matters implicating those “central functions.”¹⁰

The Special Court has repeatedly addressed only issues implicating the meaning and effect of the 3R Act, the FSP, the Court’s conveyance orders, and conveyance documents required to be executed under the FSP to give it effect. When a dispute involves not only such matters, but others as well, the Court has not hesitated to address the former and send the litigants off to other courts to address the latter. *See Conrail v. Ray*, 632 F.3d 1279, 1283 (D.C. Cir. 2011) (affirming Special Court decision that Rail Act did not preclude a successor liability claim against Conrail and noting that the claim could now proceed in state court); *Conrail v.*

¹⁰ The LLCs baldly assert that this court has jurisdiction under 45 U.S.C. § 719(e)(2). Mem. 15. The LLCs do not cite any Special Court cases in support of their assertion. In their proposed Answer, they do cite a Special Court case for the proposition that this Court has “all of the powers of a federal District Court, including full equity powers to grant relief as appropriate.” ECF No. 87, at 15 ¶ 2. But the Court’s powers do not determine the scope of its jurisdiction. *See Sioux Honey Ass’n v. Hartford Fire Ins. Co.*, 672 F.3d 1041, 1052 (Fed. Cir.) (“‘[P]ower’ and ‘jurisdiction’ are separate and distinct concepts. . . . ‘Subject matter jurisdiction’ refers to the class of cases that the court is authorized to hear. ‘Power’ refers to the court’s ability, when it has subject matter jurisdiction, to grant equitable and legal relief to a party.”), *cert. denied*, 2012 WL 1598667 (U.S. Oct. 1, 2012). Here, the issue is this Court’s jurisdiction, not its powers.

Penn. Dep't of Gen. Servs., C.A. No. 97-RR-01, slip op. at 7 (D.D.C. Mar. 24, 1997) (attached as Ex. Q) (deciding successor liability because that issue required interpretation of Special Court's conveyance order but stating that the "independent negligence" claim against Conrail, which arose out of "Conrail's post-conveyance ownership of the railroad rights of way and easements . . . is within the jurisdiction of the [Dauphin County] court of common pleas"); *Conrail v. United States*, 883 F. Supp. 1565, 1571-74 (Sp.Ct.R.R.A. 1995) (discussing Special Court's limited jurisdiction and holding that Special Court did not have jurisdiction to resolve a dispute over three private agreements because the agreements were not "tied directly" to the Rail Act and implicated issues of Pennsylvania contract law); *Minsi Rail Corp. v. United States*, 638 F. Supp. 1346 (Sp.Ct.R.R.A. 1986) (declining to consider breach of contract claim brought by Conrail); *Penn Cent.*, 533 F. Supp. at 1354 (concluding that Court had jurisdiction to review a conveyance document but noting that "if Conrail entered into an agreement for purchase of properties independent of the agreement for conveyance directed in our order, disputes involving that agreement would not be within section [719(e)(2)]" although the Special Court would have jurisdiction over the question whether the property was "outside the FSP"); *id.* at 1355 ("But that the entire action is not within our jurisdiction need not prevent us from granting a stay of proceedings on one issue in that action").

We have not found any case in which the Special Court has adjudicated state tort law claims or exercised supplemental or ancillary jurisdiction over such claims. *See Stratford Land & Improvement Co. v. Blanchette*, 448 F. Supp. 279, 286-87 (Sp.Ct.R.R.R.A. 1978) (declining to exercise ancillary jurisdiction and noting substantial questions over whether it could do so).¹¹

¹¹ Thus, the LLCs' invocation of 28 U.S.C. § 1367(a) (Mem. 13) is unavailing. Even if this Court, sitting as the Special Court, could exercise supplemental jurisdiction under Section 1367(a), it would be inappropriate to do so with regard to the LLCs' crossclaims. Those claims

The abolition of the Special Court and transfer of its jurisdiction to this Court under the Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, 110 Stat. 3847, did not expand the jurisdiction of this Court sitting “*qua* the Special Court” (*Conrail*, 571 F.3d at 20). Nothing in the Federal Courts Improvement Act reflects any Congressional intent to expand the jurisdiction of the Court under Section 719(e). To the contrary, the legislative history evinces an intent that this Court follow the Special Court’s precedents: “Further, the precedential value of the Special Court will be retained, and the jurisprudence of the Special Court will be adopted by the District Court for the District of Columbia for the purpose of deciding these cases.”

S. Report No. 104-366, at 42 (1996).

Thus, this Court should deny the LLCs’ motion to amend the Answer to add state fraud claims against Conrail on the basis of futility—because such claims are beyond this Court’s jurisdiction. By resolving the issue that *is* properly before the Court—whether the Embankment is a line of railroad subject to STB abandonment jurisdiction—this Court will address the one issue within its jurisdiction that is implicated by the LLCs’ fraud claims. Then the LLCs can take that decision back to New Jersey to see if their fraud claims can be brought there. That approach is consistent with the approach this Court has consistently taken to claims that

are not “so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.” 28 U.S.C. § 1367(a). To the contrary, the claims raised in the Complaint concerning the 1976 conveyance of the Embankment to Conrail (which comprised the sole issues before the Court up until now) and the LLCs’ fraud crossclaims relating to the sale of the Embankment almost thirty years later do not “derive from a common nucleus of operative fact” and hence do not form a single Article III case or controversy. *Chicago v. Int’l College of Surgeons*, 522 U.S. 156, 164-65 (1997) (internal quotation marks omitted), *quoted in Lindsay v. GEICO*, 448 F.3d 416, 424 (D.C. Cir. 2006). Rather, the facts necessary to prove the claims under the Federal law at issue here are almost entirely different from the facts implicated by the crossclaims. *See Lindsay*, 448 F.3d at 424 (citing Third and First Circuit holdings).

implicate both matters within the “central functions” of the Special Court and matters outside the Court’s limited jurisdiction.¹²

B. The Crossclaims Are Barred By the Statute of Limitations and Do Not Relate Back

The New Jersey statute of limitations for the proposed claims against Conrail is six years. N.J. Stat. Ann. §2A:14-1. As demonstrated in Section I, above, the LLCs knew or were put on inquiry about every material fact relevant to their fraud claims in the 2006 STB evidentiary proceedings to which they refer in their proposed Amended Answer. *See Simpson v. Widger*, 709 A.2d 1366, 1373 (N.J. Super. App. Div. 1998) (period runs from time plaintiff should have discovered the fraudulent scheme). Because the evidence and arguments giving them notice of the facts and contentions upon which they seek to predicate their crossclaims were aired in the STB proceedings to which they refer in their amended Answer more than six years before they raised the possibility of amending their Answer in June 2012, their fraud and negligent misrepresentation claims are barred by the New Jersey statute of limitations.¹³

¹² Any claim by the LLCs that they cannot go to New Jersey state court for an adjudication of their fraud claims because those claims are barred by the statute of limitations would *support* the conclusion that the proposed amendments are in bad faith. Having sat on their new-found claims for over six years, the LLCs should not be permitted to game the system by bringing their claims here.

¹³ As noted above (at 19), a claim is deemed futile when it would not survive a motion to dismiss. Many of the STB documents discussed in Section I, *supra*, were not specifically referenced in or attached to the Complaint or the LLCs’ Answer—although the STB proceedings themselves were discussed in the Complaint, the LLCs’ Answer, and the LLCs’ intervention papers. Nevertheless, the documents may be considered in conjunction with our statute of limitations futility argument, because matters of which the district court can take judicial notice may be considered on a motion to dismiss without converting the motion into a motion for summary judgment. 5C Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure*, § 1366, at 184-85 (3d ed. 2004); *Mack v. S. Bay Beer Distribs.*, 798 F.2d 1279, 1282 (9th Cir. 1986), *cited with approval in Marshall Cnty. Health Care Auth. v. Shalala*, 988 F.2d 1221, 1226 n.6 (D.C. Cir. 1993); *Hinton v. Corrections Corp. of Am.*, 624 F. Supp. 2d 45, 47 (D.D.C. 2009). Administrative materials like those referred to in Section I, *supra*, are subject to judicial notice. *See, e.g., Mack*, 798 F.2d at 1282; *Town of Norwood v. New England Power Co.*, 202 F.3d 408,

The LLCs may argue that their fraud and negligent misrepresentation claims relate back to their original pleading. Such an argument would be unavailing.

When a proposed amendment does not seek to add a new party, Federal Rules of Civil Procedure 15(c)(1)(A) and 15(c)(1)(B) govern whether the amendment may relate back to a prior pleading. Rule 15(c)(1)(A) provides for relation back when the state law supplying the applicable statute of limitations allows relation back, and Rule 15(c)(1)(B) provides for relation back when “the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out . . . in the original pleading.”

Crossclaims may relate back under New Jersey law only if they are defensive in nature—that is, are in the nature of claims for set-off, recoupment, indemnity, or contribution, rather than independent, affirmative claims. *See In re Sharps Run Assocs.*, 157 B.R. at 781 (affirmative claims do not relate back); *Biddle v. Biddle*, 395 A.2d 218, 222 (N.J. Super. Ct. Law Div. 1978) (no basis for permitting a crossclaim that is affirmative and states a new cause of action that is barred by the statute of limitations). Because the LLCs face no potential monetary liability in this case that they are seeking to reduce through claims in the nature of claims for contribution or set off, their proposed crossclaims are affirmative, not defensive. Accordingly, the LLCs’ claims would not be eligible for relation back under New Jersey law.

For similar reasons, the relation back doctrine under Federal law would not save LLCs’ claims either. The federal cases also recognize the distinction between affirmative and defensive crossclaims, and do not allow affirmative crossclaims to relate back. *See Kansa Reinsurance Co. v. Cong. Mortg. Corp.*, 20 F.3d 1362, 1368 (5th Cir. 1994); *EverHome Mortg. Co. v. Charter*

412 n.1 (1st Cir. 2000); *DuBois v. Macy’s Retail Holdings, Inc.*, 2012 WL 4060739, at *9 n.15 (E.D.N.Y. Aug. 17, 2012); *Mancuso v. Dunbar*, 2010 WL 466004, at *4 n.3 (D. Conn. Feb. 5, 2010). Thus, we request that the Court take judicial notice of the documents referred to in Section I, *supra*, in considering the statute of limitations futility argument.

Oak Fire Ins. Co., 2012 WL 868961, at *9 (E.D.N.Y. Mar. 14, 2012) (discussing distinction between affirmative and defensive claims and comprehensively reviewing federal cases); *Appelbaum v. Cere Land Co.*, 546 F. Supp. 17, 20 (D. Minn. 1981) (characterizing as “federal common law” the doctrine that “[d]efensive claims generally relate back, while affirmative claims must satisfy the applicable statute of limitations”), *aff’d*, 687 F.2d 261 (8th Cir. 1982). Here, as noted above, the LLCs’ crossclaims are affirmative. No party in this case has sought to recover money damages from the LLCs, and, therefore, the LLCs do not seek to bring the crossclaims to reduce potential damages for which they may be liable. *Cf. EverHome Mortg. Co.*, 2012 WL 868961, at *10.

The LLCs’ new fraud claims also do not relate back because they do not arise “out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading.” Fed. R. Civ. P. 15(c)(1)(B). As the D.C. Circuit has explained, this limitation renders relation back improper “when the amended claim ‘asserts a new ground for relief supported by facts that differ in both time and type from those the original pleading set forth.’” *Jones v. Bernanke*, 557 F.3d 670, 674 (D.C. Cir. 2009) (quoting *Mayle v. Felix*, 545 U.S. 644, 650 (2005)). The court also noted “that an amendment that attempts to introduce a new legal theory based on facts different from those underlying the timely claims does not relate back. Indeed, even an amendment that shares some elements and some facts in common with the original claim does not relate back if its effect is to fault [the defendants] for conduct different from that identified in the original complaint.” *Id.* (internal quotation marks and citation omitted; alteration in original).

The LLCs’ proposed fraud claims against Conrail arise from the sale of the Embankment to the LLCs, whereas the Complaint and original LLCs’ Answer relate to the conveyance of the

property to Conrail almost thirty years before Conrail sold the property to the LLCs. In addition, the Complaint and original LLCs' Answer do not raise questions about Conrail's state of mind or the LLCs' knowledge and reliance. Thus, the proposed crossclaims raise a request for relief relating to different facts and conduct than were put in issue by the Complaint and original LLCs' Answer. Accordingly, the claims do not relate back under Rule 15(c)(1)(B).

CONCLUSION

For the foregoing reasons, the LLCs' motion to amend should be denied.

Respectfully Submitted,

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Dated: October 22, 2012

CERTIFICATION OF SERVICE

I HEREBY CERTIFY that on this 22nd day of October 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 matter.

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