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BEFORE THE  
SURFACE TRANSPORTATION BOARD

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FINANCE DOCKET NO 35036  
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SUFFOLK & SOUTHERN RAIL ROAD LLC  
-- LEASE AND OPERATION EXEMPTION --  
SILLS ROAD REALTY, LLC

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REPLY TO PETITION FOR CLARIFICATION  
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**ENTERED**  
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May 30, 2008



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Set forth below is the reply of the Town of Brookhaven (“Brookhaven”) to the Petition for Clarification of Decision of October 12, 2007 filed by U S Rail Corporation (“U S Rail” or “Petitioner”) Petitioner’s pleading is yet another attempt to evade regulation of its construction/mining activities at the Sills Road site by any governmental authority, be it Federal, State or local. Brookhaven contends that the Surface Transportation board (the “Board”) should not condone or foster U S Rail’s activities, but instead should condemn those activities<sup>1</sup> U S Rail’s arguments do not address the current situation of an entity without construction authority from the Board seeking to commence the construction of a rail line, but instead rely on precedent involving the construction of a rail line by an entity that has received advance Board authorization to commence construction, or is a railroad with local operations

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<sup>1</sup> Brookhaven also believes that the Board should consider imposing the penalties of 49 U S C § 11901(c) on U S Rail, Sills, Suffolk and their respective officers

Petitioner's request for clarification would require the Board to illogically leap to the determination of whether so-called "preconstruction activities," which Brookhaven views as "construction activities," should be permitted in advance of a threshold determination of whether to authorize regulated rail construction, or to determine whether the rail construction that is being proposed comes within the scope of the federal preemption. Because Petitioner has yet to seek authority on these threshold issues, the Board cannot grant the Petition for Clarification. In short, Petitioner has put the cart well before the horse.

### **PROCEDURAL BACKGROUND**

On May 18, 2007, non-carrier Suffolk & Southern Rail Road LLC ("Suffolk") filed a verified notice of exemption under 49 C.F.R. § 1150.31 to lease from non-carrier Sills Road Realty ("Sills") approximately 11,000 feet of track that Suffolk claimed was currently being constructed in Yaphank, NY. At the same time, Suffolk requested authority to operate over the track. In its notice, Suffolk had included a verified statement that "for-hire service was intended for the trackage underlying Suffolk's notice of exemption, in which case Board authorization of the construction of the trackage, and an environmental review until the National Environmental Policy Act, would be required." See Suffolk & Southern Rail Road LLC -- Lease And Operation Exemption --Sills Road Realty, LLC, Finance Docket No. 35036 (served October 12, 2007)(hereinafter the "October 12th Decision"). See also Verified Statement of Robert F. Quinlan in Support of Town of Brookhaven's Reply to Petition for Stay (filed Nov. 5, 2007)("Quinlan Statement"), annexed hereto at Exhibit A, at 2. Upon review, the Board found Suffolk's notice of exemption to be incomplete and directed Suffolk to file certain supplemental information describing the construction of the trackage. See Suffolk & Southern Rail Road LLC -- Lease And Operation Exemption -- Sills Road Realty, LLC, Finance Docket No. 35036

(served June 1, 2007)(hereinafter the “June 1st Decision”), Quinlan Statement at 2-3. The Board made no decision regarding the exemption

On June 15, 2007, Suffolk sought to withdraw its notice of exemption without providing the additional information ordered by the Board Quinlan Statement at 3

On July 12, 2007, Attorney John Heffner faxed a letter to then-Town of Brookhaven Attorney Robert F Quinlan stating that he represented U S Rail, an Ohio based company and common carrier short line railroad operating pursuant to authority granted by the Board His letter stated that as a common carrier railroad, U S Rail’s construction of the rail facility is governed by federal law and subject to the exclusive jurisdiction of the Board Quinlan Statement at 3 The letter further indicated that U S Rail had leased real property and intended to construct and operate an “exempt spur” within the meaning of 49 U S C §10906

In August 2007, the Board again directed Suffolk to file the information required by the June 1st Decision, a substantive reason for its attempted withdrawal and a detailed explanation of “whether it or Sills anticipated that for-hire service would have been provided over the trackage that was to be constructed ” See Suffolk & Southern Rail Road LLC -- Lease And Operation Exemption -- Sills Road Realty, LLC, Finance Docket No 35036 (served August 13, 2007)(herein after the “August 13th Decision”), Quinlan Statement at 4-5 The Board’s decision explained that if for-hire service was intended for the trackage being constructed by Sills then the “construction that has either already occurred or will occur in the future is construction of a line of railroad subject to the Board’s jurisdiction, and the Board authorization for the construction is required under 49 U S C § 10901 ” Further, the Board made it absolutely clear that “The proposed construction of a line of railroad also requires that the Board conduct

an environmental review under the National Environmental Policy Act See 49 C F R § 1105 6(a)(b)(1) ” August 13th Decision at 2, Quinlan Statement at 5

Given the record before the Board, it was justifiably suspicious of the situation and warned

The Board increasingly has grown concerned that persons using the notice of exemption procedures to obtain authority for the lease or other acquisition and operation of a railroad line may not be making a thorough review of their circumstances prior to filing a verified statement that a proposal should be exempted from environmental and historic reporting because the thresholds at 49 CFR § 1105 7(e)(4) or (5) will not be met See 49 CFR § 1105 6(b)(4), (c)(2)(i) Suffolk filed such a statement, but failed to provide any explanation in its notice of exemption as to why the anticipated movements of intermodal containers and up to 500,000 tons of construction aggregates would not meet or exceed the Board’s 3 train per day threshold for environmental documentation under 49 CFR § 1105 7(e)(5)(ii)(A) Nor did Suffolk explain why the anticipated increase in truck traffic would not meet or exceed the Board’s thresholds under 49 CFR § 1105 7(c)(5)(ii)(C)

August 13th Decision at 2

Suffolk filed an evasive response on August 23, 2007 and stated, *inter alia*, that “Sills never undertook any construction of rail facilities at the Sills Road location at issue here ” Response to Information Requested by the Surface Transportation Board at 3-4 On this basis, in a decision served September 25, 2007, the Board allowed Suffolk to withdraw its notice of exemption and noted that it would “view with disfavor any future request for authority to commence rail operations over trackage at this location unless the construction of that trackage has first been authorized by the Board ” See Suffolk & Southern Rail Road LLC -- Lease And Operation Exemption -- Sills Road Realty, LLC, Finance Docket No 35036 (served September 25, 2007)(hereinafter the “September 25th Decision”) However, U S Rail now admits that

construction was occurring on the property as early as August 2007 Verified Statement of Gerald T Drum in Support of Petition for Clarification (“Drum Statement”) ¶ 8

In October 2007, evidence of the on-going construction came to the Board’s attention Based on this evidence that “rail construction may be occurring or contemplated on this property” – including a newspaper account indicating that Sills, Suffolk and/or others had cleared 18 acres of land and excavated mountains of sand (estimated at approximately 30,000 cubic yards of sand with a value of between \$330,000 and \$750,000) at the Property<sup>2</sup> – the Board, *sua sponte*, issued an order to cease and desist and joined Petitioner U S Rail as a party to this action Specifically, the Board held

*because no party has sought authority from the Board to construct any rail facilities at this site, this proceeding will be reopened on the agency’s own motion and U S Rail will be made a party to this proceeding If U S Rail, Suffolk, Sills, or any other related entity is undertaking construction of any rail facilities in Yaphank, Brookhaven, or anywhere in that vicinity, it is directed to immediately cease that activity and to either obtain Board authorization pursuant to 49 U.S.C. § 10901(a) or a Board decision . . . finding that such activity does not require Board approval.*

Suffolk & Southern Rail Road LLC -- Lease And Operation Exemption -- Sills Road Realty, LLC, Finance Docket No 35036 (served October 12, 2007)(hereinafter the “October 12th Decision”)

The Board’s decision was crystal clear, it prohibits any rail construction By the time of the October 12th Decision, however, eighteen acres of land had already been clear-cut and hundreds of thousands of cubic yards of materials had been mined without any environmental study as to its impacts – as required by both the National Environmental Protection Act (“NEPA”) and the New York State Environmental Quality Review Act (“SEQRA”) – or whether

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<sup>2</sup> See Smith, Jennifer, *Work Started for Yaphank rail site without approvals*, NEWSDAY (October 1, 2007), annexed hereto at Exhibit B

measures could have been taken in mitigation Quinlan Statement at 9-10 Additionally, such clearing was done in violation of Town Codes relating to clearing, site plan review, construction activities and sand mining Id.

Still, U S Rail's Petition for Clarification seeks to negate the effect of the Board's October 12th Decision and to continue construction activities. Though captioned as a different pleading, the Petition for Clarification is merely the latest in a series of many similarly-intentioned pleadings aimed at beginning construction free from any regulation and outside the bounds of the established regulatory framework by a non-railroad

Petitioner first sought to continue construction by way of a petition for a stay dated October 18, 2007 It claimed that the trackage it sought to build was disconnected and therefore an exempt "spur" pursuant to 49 U S C. § 10906. The motion for stay was denied on November 16, 2007. In denying the stay, the Board noted that Petitioner did not have a reasonable likelihood of success on the merits of its argument that the trackage was an ancillary "spur" because "the track cannot reasonably be viewed as used for a purpose ancillary to the operations that will be located hundreds of miles from U S. Rail's existing operations in Ohio " Suffolk & Southern Rail Road LLC -- Lease And Operation Exemption -- Sills Road Realty, LLC, Finance Docket No. 35036 (served Nov. 16, 2007) at 4

Next, on October 26, 2007, Petitioner filed a petition for administrative reconsideration of the cease and desist order The Board denied the petition for reconsideration on December 20, 2007, holding that U.S Rail had not alleged changed circumstances or submitted any new evidence that would warrant reconsideration Suffolk & Southern Rail Road LLC -- Lease And Operation Exemption -- Sills Road Realty, LLC, Finance Docket No 35036 (served Dec 20,

2007) at 4 Again the Board noted that there was “no evidence in the record” that the proposed trackage would be classified as an ancillary spur

While its petitions for stay and reconsideration were still pending before the Board, Petitioner also appealed the cease and desist order and sought a stay from the U S Court of Appeals for the Second Circuit, which denied the stay on November 13, 2007 and thereafter dismissed the appeal

Finally, U S Rail filed an action in the U.S District Court for the Eastern District of New York seeking to preliminarily enjoin Brookhaven from taking any action to prosecute appearance tickets it issued to Petitioner on October 4, 2007 or from issuing further tickets Petitioner also sought to enjoin Brookhaven from “taking any other action to interfere with or obstruct Petitioner’s construction and operation of” the alleged rail terminal Order to Show Cause at 2 A hearing on the preliminary injunction was held on December 5-6, 2007, and, to date, no decision has issued

Not content with two petitions before the Board and two separate attempts at judicial review by federal courts, through its Petition for Clarification U S Rail now comes to the Board for yet another bite at the apple Incredibly, Petitioner again asks the Board “whether it can begin certain activities with those Activities pre-empted from state and local permitting, zoning and environmental regulations ” Petition at 1

Although it is still the case that “no party has sought authority from the Board to construct any rail facilities at this site,” (October 12th Decision at 2), Petitioner seeks permission to ignore the Board’s prior mandate, side-step all state and local regulation, and begin activities without *any* oversight or authority from *any* governing agency The Petition for Clarification must be denied unless and until U S Rail obtains “authorization pursuant to 49 U S C §

10901(a) or a Board decision finding that such activity does not require board approval ”  
October 12th Decision at 2

After the hearing on the preliminary injunction, on March 26, 2007, Petitioner applied to the Section of Environmental Analysis (“SEA”) for a waiver of the six-month’s pre-filing notice required by the Board’s environmental regulations at 49 C F R § 1105 10(a)(1). See generally March 26, 2007 Letter to the SEA appended hereto at Exhibit C In a letter dated April 29, 2008, U S Rail claimed that the SEA had reached a “consensus” that the project would require an Environmental Assessment (“EA”) rather than an Environmental Impact Statement (“EIS”) In fact, this statement by U S. Rail was so inaccurate that the Chief of the SEA, Victoria Rutson, deemed it necessary to respond by letter correcting the record on May 1, 2008 (“May 1 Letter”) See generally May 1, 2008 Letter from Victoria Rutson to John Heffner, annexed hereto at Exhibit D Forced to own up to its misrepresentation, U S Rail corrected itself by letter dated May 13, 2008. This distorted account of statements made at a meeting with the SEA is just the latest in a string of misrepresentations by U S Rail before the Board

In support of its request for the waiver of the environmental notice period, U S Rail also claims that “within the next several weeks U S. Rail plans to petition the Board for an individual exemption under 49 U S C § 10502 from the requirements of 49 U S.C § 10901 to permit it to construct and operate a new rail-served facility in the Town of Brookhaven ” March 26, 2008 Letter (Exhibit C) at 1 The inaccuracy of U S Rail’s prior statements strongly suggests that this statement should be closely scrutinized Indeed, because of the controversy created by U S Rail’s continuing attempts to evade the Board’s construction jurisdiction, Brookhaven contends that the Board should require U S. Rail to file an application in order to fully describe its proposal instead of the less rigorous petition for exemption

In fact, U S Rail has not even petitioned the Board for an exemption, instead, Petitioner filed the instant Petition for Clarification on May 2, 2007. Notwithstanding the Board's prior decisions described above, the Petition seeks "clarification" of the cease and desist order and permission to proceed with seven enumerated construction activities

### ARGUMENT

Not only is the Petition for Clarification a thinly veiled attempt to continue construction activities without regulation, it is simply premature. No application has been filed seeking a grant of authority to construct a line of railroad under 49 U.S.C. § 10901(a). As the Board has already held, the proposed line of railroad is not an "exempt spur," where U.S. Rail's existing track is located hundreds of miles away in Ohio. Moreover, as set forth in detail below, there is evidence of U.S. Rail's involvement in a lucrative sand-mining operation at the property, which raises a significant question as to whether U.S. Rail and its affiliates even intend to build a line of railroad *at all*.

**A. No petition or application has been filed seeking a grant of authority to construct a line of railroad under 49 U.S.C. § 10901(a).**

Petitioner misrepresents its dealings with the Board to date. Despite assurances and indications to the contrary, no petition or application has been filed for authority to construct a line of railroad. Still, the Petition repeatedly asserts "U.S. Rail has initiated the process of seeking Board authority to construct and operate the BRT"<sup>3</sup>. To the contrary, under the statute, a

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<sup>3</sup> Petition for Clarification at 5. Petitioner also states that it "desires to undertake the Activities described while the Board is processing its request for authority." *Id.* Moreover, it repeatedly makes the request to commence activities "during the time that its construction proposal is undergoing Board and SEA analysis and review" (Petition at 9) and "during the pendency of its petition for exemption for construction." Petition at 11. U.S. Rail even goes so far as to presumptively state, "Once the Board grants its request for authority, the services for which US Rail seeks the construction and operation exemption preempt any otherwise applicable state and local laws." Petition at 12-13 (citing New England Transrail LLC d/b/a Wilmington & Woburn Terminal Railway – Construction, Acquisition and Operation Exemption – in Wilmington and Woburn, MA, Finance Docket No. 34797 (served July 10, 2007)). Finally, U.S. Rail misleadingly asserts that "the fact that the Board has yet to decide U.S. Rail's petition for exemption should not prevent the Board from ruling [in its favor]." Petition at 15. This attempt to try to

proceeding to grant authority begins when an application is *filed* 49 U S C § 10901(b). In the midst of the hyperbole, Petitioner does concede that no application or petition has yet been filed See, e.g., Petition for Clarification at 5 (“will file a separate Petition for Exemption”)(“files this petition in advance of submitting the aforementioned Petition for Exemption”)

In fact, *nothing* has changed since the Board found in October 2007 that no party had sought authority from the Board to construct any rail facilities at this site October 12th Decision at 2 As such, the threshold question regarding jurisdiction has not been answered The jurisdictional question is paramount since if the Board has jurisdiction over Petitioner’s activities, its jurisdiction is exclusive and preempts the application of many state and local laws and regulations 49 U S C § 10501(b), see also New England Transrail LLC d/b/a Wilmington & Woburn Terminal Railway – Construction, Acquisition and Operation Exemption – in Wilmington and Woburn, MA, Finance Docket No 34797 (served July 10, 2007)(“New England Transrail”)(“Section 10501(b) also expressly provides that ‘the remedies provided under [49 U S C §§ 10101-11908] are exclusive and preempt the remedies provided under Federal or state law ’ The purpose of the Federal Preemption is to prevent a patchwork of local and state regulation from unreasonably interfering with interstate commerce ”)

In support of its premature request, however, Petitioner cites to the Board’s decision in DesertXpress Enterprises, LLC – Petition for Declaratory Order, Finance Docket No 34914 (served June 27, 2007)(“DesertXpress”) Petitioner’s reliance on DesertXpress is misplaced Although in that case, like this one, DesertXpress had petitioned the Board prior to obtaining authority to construct a rail facility, the similarities begin and end there

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mischaracterize the so-called undecided “petition for exemption” completely misconstrues the reality that, to date, no petition has been filed .

First and foremost, in DesertXpress, the rail carrier was not asking the Board for “clarification” of a previous order *or* for permission to begin any “construction” activity. Rather, DesertXpress asked the Board “to issue a declaratory order finding that its proposed construction of an interstate high speed passenger rail system is not subject to state and local [regulations] because of the Federal preemption in 49 U.S.C. § 10501(b)” DesertXpress at 1. The relief sought was both procedurally and substantively different than the result U.S. Rail seeks by its petition for clarification.

Second, there was no question that the activity proposed by DesertXpress was “rail transportation” warranting federal preemption. The Board noted

DesertXpress’ petition for declaratory order concerns its proposed project to construct an approximately **200-mile interstate high speed passenger rail system** between Victorville, CA and Las Vegas, NV . . . that would involve the construction of significant lengths of new track and ancillary facilities, including two passenger stations and a 50-acre train maintenance and storage facility and operations center. DesertXpress states that the proposed route is planned alongside or within the median of Interstate 15 and would provide an alternative to automobile travel on that highway. Petitioner anticipates that the project would utilize European high-speed trains that would operate at speeds up to 125 miles per hour and would travel between the two termini in under 105 minutes.

DesertXpress at 1-2 (emphasis added). To the contrary, the Board has already noted its skepticism regarding whether U.S. Rail’s proposed trackage would be an exempt “spur” and there remain significant factual issues with respect to whether U.S. Rail is constructing a rail facility at all. See infra sections D and E at pages 18-22.

Finally, unlike U.S. Rail, at the time of its Petition, DesertXpress had already met with the SEA and had begun the preparation of an Environmental Impact Statement (“EIS”) under NEPA. State and local authorities and concerned citizens were being encouraged to participate

in the EIS process, a fact to which the Board specifically pointed in its decision. Moreover, it was not just the rail carrier that was seeking clarification in DesertXpress, but also a number of state and local officials who were looking for answers. Noting the particularities of the situation before it, the Board clearly stated, “our findings here are relevant only to the specific project DesertXpress is proposing and the individual facts and circumstances at issue here.”

DesertXpress at 3. In that particular case, the Board was able to certify that its decision would not significantly affect either the “quality of the human environment or the conservation of energy resources.” Id. at 4.

U.S. Rail, on the other hand, has not begun any environmental review. To the contrary, all that U.S. Rail has done to date is to request a *waiver* of the six-month notice requirements under the Board’s environmental regulations, arguing disingenuously that the 6-month notice is not required because the proposed construction would have such minimal impact on the environment that it would not require an environmental impact statement.

U.S. Rail’s argument flies in the face of the facts. This is not the first time that it has requested permission for so-called “pre-construction activities.” Such permission was requested (and denied) by way of a motion for a stay and for preliminary injunction to the United States Court of Appeals for the Second Circuit. In opposing that application, Brookhaven submitted an affidavit from its Director of the Division of Environmental Protection, Mr. John Turner. See Declaration of John L. Turner in Opposition to Petitioners’ Motion for a Preliminary Injunction, annexed hereto as Exhibit E. Mr. Turner pointed out that if he were called upon to review the project pursuant to the SEQRA (the state counterpart to NEPA), U.S. Rail would undoubtedly be required to prepare an

environmental impact statement because, among other things, the property is in a deep flow recharge zone and is ecologically part of the Long Island Pine Barrens and therefore development of the property may cause significant hydrological and ecological impacts Turner Affidavit ¶¶ 4-5 Thus, despite the representations that Petitioner has made to the SEA, the project has and is going to involve significant environmental impacts

In addition, the Regional Director of the New York State Department of Environmental Conservation recently summarized the significant environmental impacts when he stated, “The most serious concern is that a development project that calls for the clearing of a 28-acre site and the mining of hundreds of thousands of yards of cubic materials could move forward without any environmental review” Sec supra, Smith, note 2

Similarly, in New England Transrail, the Board clearly stated that it would grant an exemption for a requested activity “only if it is satisfied that it has sufficient information about the transportation and potential environmental aspects of the proposal to be confident that it has no cause for regulatory concern” New England Transrail, LLC, Finance Docket No 34797 at 11 Where, as here, there has been no environmental analysis to date, the Board by its own standard cannot approve any requested activities on the property Id (finding that the Board could not authorize New England Transrail’s proposal before conducting the environmental review required by NEPA)

As the Board stated in its decision on U S Rail’s Petition to Stay

If the proposed activities at issue here are found to require prior approval from the Board under 49 U S C § 10901, environmental review under NEPA would be conducted as part of that process During the NEPA process there would be ample opportunity for all interested parties, affected communities, and members of the general public to participate and to comment on all aspects of the environmental analysis Moreover, the Board could impose specific mitigation

conditions, should it decide to authorize this proposal, to mitigate potential environmental impacts resulting from the transaction

November 16th Decision at 7

By skipping the first step – “determination of prior approval” – U S Rail is basically asking the Board to sanction construction without any environmental accountability. The process was purposely designed to prevent such a result See Stewart Park and Reserve Coalition, Inc v Slater, 352 F 3d 545, 557 (2d Cir 2003)(finding that NEPA requires an agency to “withhold its decision to proceed with an action until it has taken a hard look at the environmental consequences”), Pogliani et al v U S Army Corps of Engineers, 306 F 3d 1235, 1237 (2d Cir 2002)(holding that NEPA was enacted “to ensure federal agencies examine and disclose the potential environmental impacts of projects before allowing them to proceed”), see also 40 C F R § 1500.1 (“The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions to protect, restore and enhance the environment.”)

U S Rail is seeking to engage in actual construction activities. This is clearly within the Board’s construction jurisdiction. “[T]he bringing of a condemnation proceeding constitutes ‘construction.’” Nicholson v Missouri Pacific Railroad Company, 366 I.C.C. 69, 72 (1982). The Interstate Commerce Commission (the “ICC”), the Board’s predecessor, considered condemnation to be construction. Condemnation is usually the first step in the construction of a railroad line. After property is condemned, activities on the property commence, similar to those claimed to be “preconstruction” activities by U S Rail, grading, installation of utilities, security equipment, lighting, fencing, and temporary structures. Petition at 5. Since the ICC took jurisdiction over a construction project at the condemnation stage, it defies logic for U S Rail to

argue that actual construction activities do not require Board approval and can be authorized by the Board prior to a full review of the proposal and a full environmental analysis

In short, U S Rail's petition is the most recent in a string of attempts to begin actual construction without Board authority contrary to prescribed law and procedure Brookhaven urges the Board to follow the ICC precedent and reject U S Rail's misleading and illogical argument

**B. Petitioner has made no attempt to engage state and local authorities, but rather has maintained from the beginning that the facility is not subject to state or local regulation of any kind.**

Contrary to U S Rail's assertion that it has engaged state and local authorities through a series of meetings, Petitioner has in fact totally ignored any input from state and local authorities to date By all accounts, U S Rail's "meetings" with state and local authorities, were not participatory meetings, but rather pronouncements by U.S Rail to local officials that it was proposing rail construction that was exempt from state or local regulation These pronouncements did not invite comment or collaboration A careful read of the "meeting chronology" reveals the true course of events a clever but transparent "bait and switch "

All of the meetings prior to July 2007 listed in the "Meeting Chronology" at Exhibit A to the Petition for Clarification took place when it was the stated intention of the owners of the site to operate at the site pursuant to a Notice of Exemption under 49 U S C § 10901 and 49 C F R § 1150 31 and based on a lease between Suffolk and Southern Rail Road LLC and Sills Road Realty LLC, U S Rail was not a party to any of the meetings

The first interaction between Petitioner U S Rail and Brookhaven was on July 12, 2007, just a few weeks before U S Rail commenced its unauthorized construction activities Petitioner claims that on that date "John Heffner, Esq. on behalf of U S Rail Corporation submits notice of

US Rail's intent to commence construction to the Town Attorney, Town of Brookhaven, New York " Exhibit A to Petition for Clarification First, the "notice of intent to commence construction" was by no means an introduction to a cooperative relationship Indeed, the letter merely stated that U S Rail had leased the Property and intended to construct and operate an "exempt spur" within the meaning of 49 U S C. §10906 See July 12, 2007 Letter from John D Heffner to Robert F Quinlan, annexed hereto at Exhibit F. Secondly, not only was U S Rail announcing its plans to operate without state or local approval, the self-designation of its project as an "exempt spur" signaled its intention to operate outside the bounds of federal authority as well By way of context, this letter was sent just a few weeks after Suffolk attempted to withdraw its notice of exemption and the Board directed it to provide more information See June 1st and August 13th decisions

To add insult to injury, U S Rail began clearing the Property just a few weeks later This was the start of the unauthorized construction process Indeed, by its own account U S Rail proceeded unsupervised with its initial plans and caused "potentially unsafe" conditions on the property Drum Statement ¶ 9 These conditions were caused by the actions taken by Petitioner beginning in August 2007, at which time it had no authority whatsoever to proceed As a matter of fact, it was not even a party to the proceedings at this juncture

Still, U S Rail now argues that the Board must grant it the authority to perform certain "limited" preconstruction activities because it would be otherwise prejudiced As stated above, the activities Petitioner seeks to begin are actually construction activities under ICC precedent Further, as explained below, Petitioner will not suffer any harm if it is not permitted to commence construction

As evidence of the alleged “harm” it would suffer, U S Rail cites to the fact that it has already ordered 2 locomotives and that it has various “contractual commitments” that it must fulfill Exhibit B to Petition for Clarification (Hall Affidavit) ¶¶ 23-24 This argument is a non-sequitor First, Petitioner has raised all of these arguments in its application for preliminary injunction, which remains pending before the U.S District Court for the Eastern District of New York The Board has clearly spoken on this issue and it should not be persuaded to re-visit these arguments because they have been cleverly captioned as a different motion Second, any assets U S Rail has purchased or commitments it has made to third parties are due solely to its own actions and not at the behest of any Board decision or directive The Board has been clear and consistent since June 2007 and has never suggested that U S Rail should proceed with its plans and operations Similarly, no state or local authority has given the green light because no state or local permission has been sought

Instead of any suggestion from the Board that U S Rail should proceed, what it has said – and clearly –is that U S Rail should cease and desist That U S Rail chose to ignore the Board’s directive should not now be grounds for a finding in its favor due to some unquantifiable economic harm it might suffer due to its own flagrantly subversive tactics

**C. Neither the Board nor the Board’s Section of Environmental Analysis has suggested that U.S. Rail seek this Petition for Clarification.**

U S Rail claims that

The Parties sought judicial review of the Board’s October 12<sup>th</sup> Decision In its November 19, 2007 Brief in Response to the Parties’ Preliminary Injunction Request, the Board suggested that the Parties seek Board clarification as to whether the Cease and Desist Order permitted the activities requested herein, a suggestion reiterated by the Board’s Section of Environmental Analysis (“SEA”) during its March 17, 2008 meeting with the Parties

Petition at 8

Neither the Board nor SEA have ever committed such a suggestion to writing and U S Rail's representation that the Board and SEA have requested this Petition for Clarification is just another entry in its continuing ledger of misrepresentations and embellishments

A review of all of the decisions issued for this docket, demonstrate that the Board has never advanced such a suggestion U S. Rail's attempt to attribute to the Board that it requested this petition for clarification is based upon the argument of the office of General Counsel in an appellate brief Petition at 4, 8, and 10-11 The Board did not "invite" the Petition for Clarification, but rather in an appellate pleading filed in the U S Court of Appeals for the Second Circuit, counsel for the Surface Transportation Board argued that it would have been more appropriate for Petitioner to address the scope of permitted activities before the Board, than to file for a preliminary injunction. Petition at 11, n 2 The Board makes its positions known through its decisions and not the arguments advanced by its attorneys in litigation

Similarly, the SEA has never offered a written suggestion that U S Rail seek this petition for clarification In fact, to date, the only correspondence issued by SEA was a letter from the Chief of SEA admonishing U S. Rail for mischaracterizing the level of environmental review that would be required under the circumstances See May 1, 2008, annexed hereto at Exhibit D

**D. The Proposed Trackage is not an exempt spur pursuant to 49 U.S.C. § 10906.**

As the Board itself has stated, Petitioners are unlikely to prevail in their argument that the proposed trackage ought to be classified as an exempt "spur" so that it will be exempt from both state and local authorities and the Board For this reason alone, the Board should deny the Petition for Clarification

U S Rail has argued that the rail facility is likely to be deemed a "spur" track, which is subject to Board jurisdiction but does not require construction approval Specifically in its submissions to the

Board, it has claimed the proposed use of the track would not require prior Board approval for construction under 49 U S C § 10901 or operations under 49 U S C § 10902(a) but, rather, qualifies for the exception from the Board's entry/exit licensing authority in 49 U S C § 10906 because the track would be used as a "disconnected" ancillary "spur" of an existing carrier, U S Rail Sec. e.g. Petition for Reconsideration at 7, Petition for Stay at 4, Petition for Clarification at e.g. 8, 13

In fact, the proposed track is either a line of railroad subject to the Board's licensing requirements because it would be an invasion of new territory, or else a "private" track not subject to the Board's jurisdiction but subject to state and local regulations. The track in question cannot be characterized as ancillary "spur" or switching track because it is not adjacent or ancillary to U S Rail's existing rail operations, which are located hundreds of miles away from Brookhaven in Ohio

To date, the Board has agreed. In its November 16th Decision, the Board concluded that the subject track is likely to be characterized as "a line of railroad"<sup>4</sup> because

The purpose of the proposed construction and operations appears to be to allow U S Rail to serve new shippers. The track cannot reasonably be viewed as used for a purpose ancillary to the service that U S Rail is already authorized to provide, as the proposed construction and operations will be located hundreds of miles from U S Rail's existing operations in Ohio

November 16th Decision at 4

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<sup>4</sup> In reaching this conclusion, the Board noted that "[t]here are three types of railroad track: (1) railroad lines that are part of the interstate rail network, which require a Board license under 49 U S C 10901 to construct or acquire and operate, (2) ancillary track, such as "spur," "industrial" or "switching" track, which does not require prior authorization from the Board to construct or remove under 49 U S C 10906, and (3) so called "private" track, which is not part of the national rail transportation system or subject to the Board's jurisdiction because the track is not intended to serve the general public. State and local regulation is fully applicable to private track." November 16th Decision at 1, n 1

**E. U.S. Rail's Intended Use of the Property Does not merit prior Board approval for construction under 49 U.S.C. § 10901 or operations under 49 U.S.C. § 10902(a) because U.S. Rail is not constructing a rail facility**

U S Rail states that "as a preliminary matter," this transaction is a matter "within the jurisdiction of the I C C. Termination Act insofar as it involved the construction and operation of a line of railroad under 49 U S C 10901 " Petition at 12 Repeating this conclusion over and over again does not make it make it so without a Board decision It is for the Board and the Board alone to make the determination regarding whether to exempt rail carrier transportation See 49 U S C. § 10502 Indeed, based on ICC precedent, it is logical for the Board to conclude that the activities proposed by U S Rail in the Petition are construction activities subject to its jurisdiction and cannot commence until the Board completes the required environmental review and grants an application or petition fro exemption

While U S Rail's Petition pre-supposes that the Board will grant it authority to construct a railroad and that it will receive the concomitant benefit of preemption, there remain serious questions with respect to whether what is being proposed at the facility is truly construction that will be undertaken by a rail carrier Given U S Rail's previous omissions, which are well documented in the Board's prior decisions in this matter, a healthy dose of suspicion about its motivations and representations is warranted.

In the pending action in the U S District Court for the Eastern District of New York, U S Rail and the owner of the Property, Sills Road Realty ("Sills") sought to enjoin the Brookhaven from enforcing its local zoning code with respect to the activities that had taken place at the Property While a decision in that matter has not yet been issued, the testimony and evidence

from that preliminary injunction hearing<sup>5</sup> is closed and the parties have submitted post-trial briefs. The evidence and testimony presented at the hearing strongly suggested that U S Rail's involvement at the Property is a mere subterfuge by which U S Rail and the parties that have an interest in the Property are seeking to cloak themselves in federal preemption to avoid state and local oversight of their true business venture—a lucrative sand-mining operation. A copy of Brookhaven's proposed findings of fact and conclusions of law, which summarize this argument are annexed hereto as Exhibit H.

During the preliminary injunction hearing, the following three documents that were introduced into evidence at the hearing demonstrate U S Rail's involvement in a sand-mining scheme: (a) a "Railroad Operating Agreement and Property Lease" ("Lease") (Exhibit I herewith), (b) an Excavation Agreement (Exhibit J herewith), and (c) an unsigned Proposal for construction at the Property (Exhibit K herewith). The Lease – which is for a 28-acre industrial site – has a 3-year term and an annual rent of \$1,000. Under the terms of the Lease, U S Rail has no obligation to pay property taxes and was paid a signing bonus of \$10,000. The second document, the Excavation Agreement, allows Adjo Contracting Corp. ("Adjo") (a general contractor for the BRT and partner in Sills) to sell sand it excavates from the Property and be paid from the proceeds of the sale of the sand up to \$3,000,000 plus a 25% fee or all of its costs. For its part, Sills gets up to \$6,000,000 plus a 50% fee. The third document, the Proposal, is an unsigned document that contains specifications for a rail construction and indicates that it is a "Bid To Sills Road Realty."

At the hearing, U S Rail claimed that the Proposal has been incorporated into the Excavation Agreement and that these documents evidence U S Rail's obligation to construct a rail facility even though neither document contains any reference to the other. Transcript (Exhibit G)

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<sup>5</sup> The preliminary injunction hearing was held in the United States District Court for the Eastern District of New York before United States Magistrate Boyle on December 5-6, 2007. A transcript of that hearing is annexed hereto as Exhibit G.

at 39 U S Rail's President and CEO, Gabriel Hall ("Hall") testified that he was making payments to Adjo for rail construction but produced no proof of these payments at the hearing Id at 42 Hall was so ignorant of the details of the transactions occurring at the Property that he initially testified he was unaware of the provisions of the Excavation Agreement by which Adjo was paid from the proceeds of the materials that were mined from the Property Id at 42 When presented with the text of the Excavation Agreement, Hall acknowledged that it appeared that payments were being made for sand mining but could not confirm that this was the payment arrangement Id at 44

Hall's testimony and the three documents U S Rail offered into evidence present a very clear picture U S Rail, the STB-certified Class III rail carrier, which is allegedly constructing a rail facility (and thus affording the parties the protection of federal preemption) has only a nominal role in the property as evidenced by a sham agreement under which it pays \$1,000 a year to rent 28 acres of prime industrial land with no obligation to pay property taxes In submitting these documents to the court at the hearing, U S Rail was asking the court to believe that it would obligate itself to pay for the \$5,450,000 of rail construction improvements and equipment in the Proposal even though its lease for the property could be terminated on 90 days notice and there is no express provision for repayment of the \$5,450,000 in construction improvements and equipment

While on its face, the Agreement does not make economic sense, when you consider the very lucrative arrangements that Sills and Adjo (a partner in Sills) have negotiated based on their ability to sand-mine at the Property without any state or local oversight, this arrangement makes complete sense The testimony and evidence at the hearing call into question whether U S Rail is truly obligated to construct the rail facility In short, it is quite possible that U S Rail has not petitioned the Board for

exemption because it cannot present evidence that it is in fact constructing a rail facility on the Property

**CONCLUSION**

The Petition for Clarification is an attempt to circumvent the Board decisions in this case and well-established regulatory framework, and is premature. For all of the reasons set forth above, Brookhaven respectfully requests that the Petition be denied.

Respectfully submitted,



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(631) 351-3501

*Attorneys for Town of Brookhaven*

May 30, 2008

**CERTIFICATE OF SERVICE**

I, Mark A Cuthbertson, certify that, on this 30th day of May, 2008, I caused a copy of the foregoing document to be served by e-mail on all parties of record in STB Finance Docket No 35036

  
\_\_\_\_\_  
Mark A Cuthbertson

# EXHIBIT A

**VERIFIED STATEMENT OF  
ROBERT F. QUINLAN**

My name is Robert F. Quinlan I am the Town Attorney of the Town of Brookhaven ("Brookhaven") I am the chief legal officer of Brookhaven, a large town of approximately 480,000 people and 532 square miles in size Brookhaven is located in central Long Island, in the state of New York.

As the Town Attorney I am responsible for significant facets of local land use regulation and code enforcement. In Brookhaven we have comprehensive regulations that govern, among other things, the zoning and site plans for facilities such as those proposed for property involved in this proceeding. Those regulations are intended to ensure that these facilities are sited in appropriate places. In addition, in siting and regulating such facilities we are required to follow the New York State Environmental Quality Review Act ("SEQRA") (the state counterpart to NEPA) to review the environmental impacts of projects and to ensure, if such projects are built that adequate environmental mitigation measures are implemented.

I submit this statement in support of Brookhaven's reply to the petition for stay submitted by Sills Road Realty, LLC ("Sills"), US Rail Corporation ("US Rail") (Sills and US Rail are hereinafter collectively referred to as "Petitioners"). The proceeding before the Board involves property located on Sills Road in the hamlet of Yaphank in Brookhaven ("Property") I have set forth below the history of this matter before the Board, which clearly evidences how the Petitioners are abusing the exemption system to avoid appropriate state and local regulation.

On May 18, 2007, Suffolk filed another verified notice of exemption for the Property. The exemption was sought pursuant to 49 USC §10901 and 49 CFR §1150.31 and indicated that Suffolk has reached an agreement with Sills for the lease and operation of railroad trackage and facilities currently be constructed at the Property. The lease involved the use of approximately 11,000 feet of track on a 28-acre parcel. In the summary of the transaction, it indicated that the exemption involved a lease in common carrier operation by a new Class III short line railroad (Suffolk) over railroad trackage and facilities to be constructed. It contained an extensive description of the proposed facility, including that it will make provisions for rolling stock and construction of an on-site overpass bridge, cross dock, intermodal container storage and receiving, handling and storage bunkers with sufficient capacity to accommodate 500,000 tons of construction aggregates per annum. On June 1, 2007, the Board issued a decision indicating that, based on Suffolk's intent to provide for-hire service over trackage, it appears that Sills was constructing a line of railroad subject to the Board's jurisdiction. It noted that under 49 USC §10901, Board authority is required to construct a line of railroad and that Sills has not sought Board authority for this construction. The Board further indicated that if the Board were to accept Suffolk's verified Notice as complete, Board action might be seen as tacit approval of Suffolk's lease and operation over a line of railroad that has been constructed without Board authority and that because the Notice of Exemption did not provide sufficient information to make a definitive determination that exemption was appropriate here, additional information was necessary for Suffolk's Notice of Exemption to be considered complete. Suffolk was directed to file supplemental information by June

21, 2007 describing its construction activities on the trackage to date and any construction anticipated in the future.

On June 15, 2007 Mr. Heffner wrote the Board a letter indicating that due to a change in circumstance, Suffolk had decided to withdraw its Notice of Exemption.

On July 12, 2007, Mr Heffner, faxed me a letter in my capacity as Town Attorney to advise me that he represented US Rail, an Ohio based company and common carrier short line railroad operating pursuant to authority granted by the former ICC now the STB. His letter stated that US Rail has leased real property and intended to construct and operate a "exempt spur" within the meaning of 49 USC §10906 a line of rail and related side tracks, yard tracks, turn outs, switches and connecting tracks (collectively, the "Rail Yard") thereon for the purpose of operating a common carrier railroad and transload facility at that location. The letter further indicated the Rail Yard will provide rail transportation services to customers shipping and receiving and/or transloading aggregate stone or other stone products as well as lumber, plywood, sheetrock, and related construction materials and other merchandise freight and that as a common carrier railroad, US Rail's construction of the Rail Yard are governed by federal law and subject to the exclusive jurisdiction of the STB.

It is important to note that at this point I was not aware of any activities at the Property or any proceedings before the Board. At no point in his letter did Mr Heffner indicate that there were any pending proceedings in front of the Board. Also, conveniently missing from Mr. Heffner's letter was any mention of the involvement of Sills or Suffolk. I was left to investigate the location of the property because all Mr. Heffner provided were tax map descriptions of the property.

On July 25, 2007, Mr Heffner addressed and mailed a letter to me that was identical to his July 12, 2007 letter, which was received by my office on July 27, 2007 while I was away.

On August 13, 2007, the Board unaware of the new involvement by US Rail, issued a decision in response to Suffolk's attempt to withdraw its second Notice of Exemption. It noted that in its June 1, 2007 decision Suffolk's notice of exemption was found incomplete and it was directed to file supplemental information describing in detail the construction of trackage, which, it noted, would appear to be line of railroad subject to the Board's jurisdiction based on Suffolk's stated intention to provide for-hire service over it. The Board stated that Suffolk had not provided it with the supplemental information required by its June 1, 2007 decision nor had it provided a substantive reason for its withdrawal. In failing to explain the situation, the Board stated that Suffolk left unrefuted in its verified statement that for-hire service is intended for the trackage being constructed by its affiliate Sills. The Board's conclusion that Suffolk and Sills were affiliated was based on telephone conversations between Board staff legal counsel for Suffolk.

The Board's decision denied Suffolk's request to terminate the proceeding. Given the concerns raised, the Board directed Suffolk to file the information required by its June 1 decision, directed Suffolk to provide substantive reasons for the withdrawal and explain whether it or Sills will provide for-hire service at the trackage. The Board commented where, as here, a party concludes that environmental thresholds will not be exceeded, the notice of exemption should explain why the transaction would not exceed the thresholds or otherwise warrant the preparation of environmental documentation.

The Board's decision explained that if for-hire service was intended for the trackage being constructed by Sills then the "construction that has either already occurred or will occur in the future is construction of a line of railroad subject to the Board's jurisdiction, and the Board authorization for the construction is required under 49 U.S.C. 10901. The proposed construction of a line of railroad also requires that the Board conduct an environmental review under the National Environmental Policy Act. See 49 CFR 1105.6(a)(b)(1)."

In its decision the Board was justifiably suspicious of Petitioner's activities and warned:

The Board increasingly has grown concerned that persons using the notice of exemption procedures to obtain authority for the lease or other acquisition and operation of a railroad line may not be making a thorough review of their circumstances prior to filing a verified statement that a proposal should be exempted from environmental and historic reporting because the thresholds at 49 CFR 1105 7(e)(4) or (5) will not be met. See 49 CFR 1105.6(b)(4), (c)(2)(i). Suffolk filed such a statement, but failed to provide any explanation in its notice of exemption as to why the anticipated movements of intermodal containers and up to 500,000 tons of construction aggregates would not meet or exceed the Board's 3 train per day threshold for environmental documentation under 49 CFR 1105 7(e)(5)(ii)(A). Nor did Suffolk explain why the anticipated increase in truck traffic would not meet or exceed the Board's thresholds under 49 CFR 1105 7(e)(5)(ii)(C).

In response to the Board's August 13, 2007 decision, Suffolk filed a response that can only be characterized as evasive.

It is important to note that, when Suffolk received the Board's August 13, 2007 decision, which inquired about its construction activity, it had planned to or was in the

process of commencing construction. Newspaper accounts<sup>1</sup> make it clear that construction commenced at the Property in late August.

Mr. Heffner wrote to the Board on August 23, 2007 and stated that the simple answer to STB's inquiry is that Suffolk and Sills never concluded any agreement or other relationship with respect to the lease, construction, or operation of the rail facility and incredibly also stated that **"Suffolk has never undertaken any development construction or other activity at this site."** He further stated Sills never undertook any construction of rail facilities at the Sills location for the simple reason that Suffolk and Sills never consummated their agreement.

The statement in Mr. Heffner's letter of August 23, 2007 that Suffolk and Sills never undertook any construction at the site is not only contradicted by newspaper accounts that demonstrate that construction began in late August, but also by Mr. Heffner's own letter to this Board of October 9, 2007, attached to the present Petition.

Attached to Mr. Heffner's October 9, 2007 letter as Exhibit D is a timeline submitted by Mr. Heffner which indicates: "August 20, 2007 – Site clearing commences." Clearly Mr. Heffner should have known of this clients' clearing activities before he wrote to the STB three days after they commenced, perhaps craftily, representing to the STB that his now former client "Suffolk has never undertaken any development construction or other activity at this site." Knowing full well that his client, Sills Road, had already started clearing As both Sills and Suffolk had already been

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<sup>1</sup> In a newspaper account on October 1, 2007 in *Newsday*, a Long Island daily newspaper, it was revealed in late August, 2007 work was begun at the Property, which involved clear-cutting 18 acres of the site and the mining of hundreds of thousands of cubic yards of materials. The article indicated that US Rail had signed a 30-year lease with Sills. In this article, Gerard Drumm, the chief financial officer of Sills indicated that they intended to build a rail facility at the site. The article also made it clear that Petitioners were attempting to make an end-run around the Board procedures that would have required Board authorization and environmental review.

identified by the Board as "affiliates" in its prior decisions, the actions of one are attributable to the other in spite of Heffner's efforts in his August 23, 2007 letter to distinguish them

Additionally, upon information and belief, the source of such information and grounds for such belief being conversations with the Town of Brookhaven's Commissioner of the Department of Waste Management, John Kowalchyk, and review of a letter attached hereto as Exhibit A, one of the proposers who responding to the Town's Final Request For Proposals for the disposal of the Solid Waste Stream generated by the Town of Brookhaven, indicated that Sills Road had represented to others in the waste management industry that they "had commenced development efforts" at the Sills Road site prior to August 23, 2007. Attached hereto as Exhibit A is a letter from the President of Sills Road Realty, LLC to Tully Environmental, Inc., a proposer for the removal of waste materials stating the above. This also shows the real purpose to which the facility is intended to be used, as I have been advised by Mr Kowalchyk that Tully submitted the letter in support of their proposal for waste removal to show that the Sills Road site could be used as a potential site for loading waste on to railcars in the future.

Thereafter, the Board, in a decision dated September 25, 2007, allowed Suffolk to withdraw its Notice for Exemption. This decision was based, in large part, on the misrepresentations set forth in Heffner's letter of August 23, 2007. Specifically, the Board relied on the misrepresentations about activity at the site when it stated that "because Suffolk states that neither it nor Sills has undertaken any construction of rail facilities at the Sills Road location or consummated any agreement with Sills Road to

lease or operate over the proposed trackage, Suffolk has provided information to support its attempted withdrawal of its Notice of Exemption "

Petitioners' response was so rife with misrepresentations that the Board made note of this in its decision when it stated:

Suffolk also asserts that Sills never anticipated providing for-hire rail service. However, this statement appears to contradict Suffolk's earlier statement that it "has reached an agreement with Sills for the lease and operation of railroad trackage [at issue here]," through which "Suffolk intends to hold itself out as a common carrier to provide service to all potential customers . . ." <sup>2</sup> Suffolk's filing also appears inconsistent with the statement made by Suffolk's counsel in a telephone conversation with Board staff that Suffolk and Sills are affiliated parties, (in that one owns a significant portion of the other).

Given these suspicious activities and the patent misrepresentations that had been made, the Board concluded with the following admonition:

At the same time, however, Suffolk and Sills should be aware that if either entity anticipates providing for-hire service over trackage to be constructed, approval under 49 U.S.C. 10901 and [sic] an appropriate environmental review would be required. While Suffolk has stated that Sills has not undertaken any construction of "rail facilities" at the Sills Road location, Suffolk has not stated that Sills has not constructed other facilities at that location that might be converted in the future to rail facilities. The Board would view with disfavor any future request for authority to commence rail operations over trackage at this location unless the construction of that trackage has first been authorized by the Board.

Newspaper accounts that reported on activities at the Property made it clear that Sills was constructing facilities at the location that would later be converted to rail facilities, which was in direct contradiction to the representations Heffner made to the Board.

It was only after review of the above referred to applications, decisions and other documents, as well as learning of the reported activity at the site, that the full scope and

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<sup>2</sup> See Suffolk's Verified Notice of Exemption at 3-4

nature of the Petitioner's activity became clear. Given that Petitioners' did not appear to have any approval from the Board, I wrote to Nancy Beiter of the STB on October 2, 2007. In that letter, I requested information as to what, if any, authorization US Rail had received from the Board and to advise the Board that if such information was not forthcoming that Brookhaven intended to file a petition for a declaratory order.

On October 4, 2007 Melvin F. Clemens, in the STB Office of Compliance and Consumer Assistance, wrote to Mr. Heffner and recounted that information that we had provided to the Board with respect to the construction at the Property. Mr. Clemens noted that Mr. Heffner did not deny that construction was taking place at the site (although he had done so shortly a month before that) and did not assert US Rail had received authority from the Board to undertake these activities. He noted that US Rail had sent letters to me in July, 2007 claiming that it was exempt from state and local law.

Since US Rail had received no authority from the STB to construct a rail facility, US Rail and Sills Road were directed by Mr. Clemens to cease activities at the site and to provide the Board with a detailed account of activities taken in the area and to explain why it did not believe Board approval was required. By this time, it was my understanding, that US Rail and Sills Road had already agreed with the New York State Department of Environmental Conservation to cease all activities until a mutual agreement could be reached.

At this point it was clear to me that Petitioners had pulled what could be characterized as a "classic developer's trick": build now and beg forgiveness later. Here, however, forgiveness should not be forthcoming. Eighteen acres of land have been cleared and hundreds of thousands of cubic yards of materials have been mined without any

environmental study as to its impacts as required by both NEPA and SEQRA and what, if any, measures could have been taken in mitigation. Additionally, such clearing was done in violation of Town Codes relating to clearing, site plan review, construction activities and sandmining.

Thereafter, US Rail did submit a response that alleges that what it is now seeking to do does not require Board approval because it is a spur, industrial, team, switching or side track within the meaning of 49 U.S.C. 10906. The merits of this argument are addressed in the foregoing reply prepared by our counsel.

Petitioners disingenuously argue that "Although the Town of Brookhaven has indicated their concern that no review of this project has occurred under federal or New York environmental laws, the Town concedes that US Rail's actions may be, in its words, 'justified' (i.e., exempt from state and local oversight) if it is acting under Board authority." This letter, which was written by me one day after I learned about the activities at the Property, acknowledges that federal preemption may have application in this matter based on what little it knew about the Petitioner's activities at the Property and should hardly be viewed by the Board as Brookhaven's acknowledgement that the issuance of a stay in this matter will not harm any other parties. Brookhaven believes that significant harm may be visited on its environment and on behalf of its approximately 480,000 residents. For this reason, it has indicated its intention to participate actively in this proceeding, commencing with its opposition to the stay sought by petitioners.

There are numerous agencies, organizations and individuals that are concerned with the potential environmental harm that may result from Petitioner's activities at the

Property, including the New York State Department of Environmental Conservation ("DEC") As set forth in a newspaper account in *Newsday* on October 1, 2007 (annexed as Exhibit B), the DEC has issued summonses to the construction contractor at the Property for mining without a permit In that article, the regional director for the DEC, Peter Scully, states that "The most serious concern is that a development project that calls for the clearing of a 28-acre site and the mining of hundreds of thousands of yards of cubic material could move forward without any environmental review." In that article, US Rail's president acknowledges that had received citations from DEC and that it was "in discussions" with the DEC about the citations that could lead to administrative hearings Annexed hereto as Exhibit C are two letters that DEC has sent to counsel for Sills and Suffolk about the sandmining activities that have taken place at the Property. In addition, in the same *Newsday* article, the president of the local civic association expressed her concerns about the potential environmental impacts of the activities at the Property.

Petitioners suggest that "Although the Town of Brookhaven has indicated their concern that no review of this project has occurred under federal or New York environmental laws, the Town concedes that US Rail's actions may be, in its words, 'justified' (i.e., exempt from state and local oversight) if it is acting under Board authority." This letter, which was written by me one day after I had learned about the activities at the Property, acknowledges that federal preemption may have application in this matter based on what little it knew about the Petitioner's activities at the Property and should hardly be viewed by the Board as Brookhaven's acknowledgement that the issuance of a stay in this matter will not harm any other parties. Brookhaven believes

that significant harm may be visited on its environment and on behalf of its approximately 480,000 residents. For this reason, it has indicated its intention to participate actively in this proceeding, commencing with its opposition to the stay sought by petitioners.

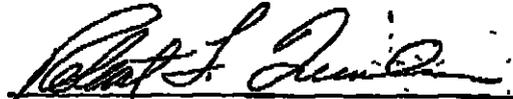
I note in closing that given the lack of information given to the Board to date by Petitioners, the shifting nature of the parties and the outright misrepresentations<sup>3</sup> that have been made, the Board should use whatever means are at its disposal and inquire into the true nature of operations proposed at the facility and the parties involved.

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<sup>3</sup> As further proof of this, I submit to you as Exhibit D a letter I received from counsel for Sills on October 5, 2007 indicating that it previously advised the Town that the Property will be used for an "intermodal transportation center that will incorporate switching and a railroad siding from existing Long Island Railroad tracks located on the property's southern boundary as well as freight transfer areas" and further states that no municipal solid waste will be processed at the site. Counsel offered on behalf of Sills to enter into an agreement to that effect. Conspicuously absent from the letter from Sills' counsel is any representation that it would not process construction and demolition solid waste at the site. A newspaper account in *Newsday* on October 5, 2007 (annexed as Exhibit E) explains the close ties that Sills Road has to the garbage industry and also reveals that US Rail has stated to this Board in a letter dated February 25, 2006 in the *New England Transrail* (annexed as Exhibit F) case that indicates that US Rail "generates a large part of its revenue from hauling solid waste materials" and further states that its research indicates that solid waste in the Northeast region of the United States is that region's major outbound component for export. It made these statements through its attorney who wrote a letter in support of the application of New England Transrail, which, as the Board knows, was seeking approval for its solid waste transload facility.

**VERIFICATION**

I, Robert F. Quinlan, declare under penalty of perjury that the facts stated in the foregoing document are true and correct, to the best of my knowledge, information and belief. Executed on this 5<sup>th</sup> day of November, 2007.



Robert F Quinlan  
Town Attorney  
Town of Brookhaven

# EXHIBIT B

newsday.com/news/local/ny-lrail0927,0,3592796 story

## Newsday.com

### Work started for Yaphank rail site without approvals

BY JENNIFER SMITH AND ERIK GERMAN

[jennifer.smith@newsday.com](mailto:jennifer.smith@newsday.com)  
[erik.german@newsday.com](mailto:erik.german@newsday.com)

10.59 PM EDT, October 1, 2007

An Ohio rail company working with Long Island asphalt plant owners has cleared 18 acres in Yaphank and excavated mountains of sand in preparation for building a rail-to-truck transfer site -- without having sought any government approvals

The state Department of Environmental Conservation has issued citations for mining without a permit to Watral Bros, the Bay Shore subcontractor preparing the site, and to the owner of the land -- Sills Road Realty, a consortium of local asphalt plant and construction business owners with offices in Syosset.

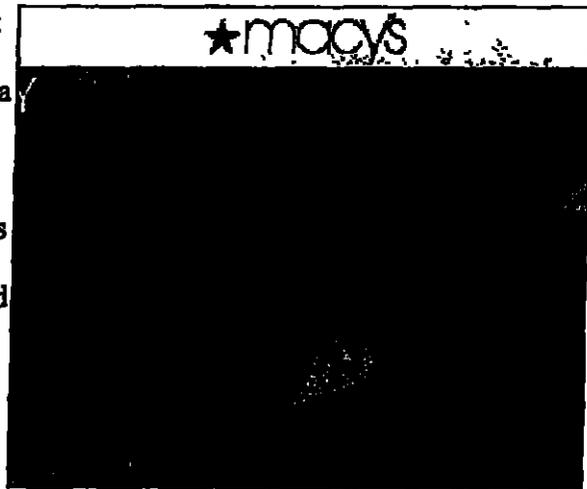
Work at the site was voluntarily halted by Wednesday evening, said DEC regional director Peter Scully. "The most serious concern is that a development project that calls for the clearing of a 28-acre site and the mining of hundreds of thousands of cubic yards of material could move forward without any environmental review," Scully said last week

#### Federal defense

The railroad involved -- U.S. Rail Corp. of Toledo, Ohio, which has signed a 30-year lease with Sills Road Realty -- says federal law allows railroads to undertake such projects without state and local permits. Earlier this year, the same landowners attempted to set up their own railroad to operate a rail spur at the site only to abandon the tack when the process became "unduly complex and complicated," said Gerard Drumm, the chief financial officer and council for Sills Road Realty. And this summer, the state rejected the company's bid for rail bond funding in part because the Department of Transportation didn't have evidence that Sills Road Realty or U.S. Rail were authorized to operate as rail companies in the state

The DEC visited the Yaphank site Monday to make sure work had not resumed, said Scully. Drumm and U.S. Rail president Gabriel Hall said their companies are "in discussions" with the DEC about the citations, which could lead to an administrative hearing if the parties cannot resolve their differences

#### A big haul



Brookhaven town spokesman Tom Burke said a town inspector estimated about 1,000 cubic yards of sand was being removed from the site each day "Judging by the size of the hole it could have been going on for six weeks," Burke said. At that rate, at current prices, the sand could sell for \$330,000 to \$750,000.

"We're not a sand-mining operation," said Drumm. "We're excavating for a construction project ... under state law that isn't mining." Drumm said Friday the sand was being sold

Residents say they first learned of the project in late August, when they saw machinery toppling trees at the site, which is about a mile from homes

"We had no clue who, when, where, what was going on," said Fran Hurley, president of the Yaphank Taxpayers and Civic Association. Hurley said residents are concerned about the traffic from the project, and whether the excavation could affect groundwater resources deep below the site.

Representatives of U S. Rail and Sills Road Realty say they have communicated a number of times with the town and that they are working to address residents' concerns.

Drumm said the industrially zoned site is suited for their facility because it is close to the LIE. He added that it also lies within the town's Empire Zone -- an area where businesses get state tax credits for ventures that attract capital and create jobs. He also said the facility would reduce local truck traffic

Sills Road Realty first discussed the project with Brookhaven officials in January. They then met with the Suffolk planning department, Drumm said. Town and county officials characterized the discussions as preliminary.

### Quite a surprise

County public works department's chief engineer William Hillman said his department had no idea that work had started until late August, when they saw bulldozers in action. Hurley said the company only met with her group after she contacted them herself

Brookhaven town spokesman Burke said the town exercised "due diligence" and recommended that the railroad contact local civic groups.

U.S. Rail told Brookhaven officials in a July 12 letter that they intended to start work in the next 30 days. On July 20, town officials met with a project backer, who they said repeated that they could bypass local and state controls because railroads are overseen by the federal Surface Transportation Board. Said Burke: "It is arguable whether the town should have demanded to see the exemption, but it certainly exists in law and we presumed they qualified for the exemption," Burke said.

Earlier this year Sills Road Realty had tried to set up its own short-line rail company under the name Suffolk and Southern Rail Road. In May, Suffolk and Southern filed a notice of exemption with the Surface Transportation Board seeking federal authority for the project. But the board indicated that the project would require Board authorization -- as well as an environmental review.

### Fall into disfavor

That's when Suffolk and Southern withdrew its application. The board's decision in the matter, released last week, said that it would "view with disfavor any future request for authority to commence rail operations of trackage at this location unless the construction of that trackage has first been authorized

by the Board."

U.S. Rail has not submitted filings on the Yaphank project to the Board. Railroad president Gabriel Hall said his company does not have to file a notice of exemption because U S. Rail is already recognized by the Board as a common carrier in Ohio

A Surface Transportation Board staff attorney said the board could not determine whether U.S. Rail has operating authority for the Yaphank project unless a complaint is filed. As of Monday, nobody had formally done so.

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# EXHIBIT C

LAW OFFICE  
JOHN D. HEFFNER, PLLC  
1750 K STREET N W  
SUITE 350  
WASHINGTON, D C 20006  
PH (202) 296-3333  
FAX (202) 296-3939

March 26, 2008

Ms. Troy Brady  
Section of Environmental Analysis  
Surface Transportation Board  
395 E Street, S.W  
Washington, D.C. 20423

RE: STB Finance Docket No \_\_\_\_\_, U S Rail Corporation,  
Petition for waiver under 49 CFR 1105.10(a)

Dear Mr Brady

Pursuant to 49 CFR 1105.10(c)(2) I am writing on behalf of U S Rail Corporation ("U S Rail"), to request a waiver of the six months pre-filing notice required by the Board's environmental regulations at 49 CFR 1105.10(a)(1). Within the next several weeks U S Rail plans to petition the Board for an individual exemption under 49 U.S.C. 10502 from the requirements of 49 U.S.C. 10901 to permit it to construct and operate a new rail-served facility ("the Brookhaven Rail Terminal" or "BRT") containing approximately 11,000 linear feet of track on a 28 acre site ("Site"), in the Town of Brookhaven in Suffolk County, NY. U S Rail submits that a waiver of the 6 months advance notice requirement is consistent with the regulations of the Section of Energy and Environment ("SEA") and the Board's policies. Because the owner of the Site, Sillis Road Realty, LLC ("Sillis Road"), requires rail service as soon as possible in order to continue receiving inbound shipments of stone aggregate and to meet ongoing, long term commitments, U S Rail asks the SEA to promptly consider and grant this waiver request.

For your information, U S Rail is an existing class III short line railroad that presently conducts operations under the name the Greater Miami & Scioto Railroad in the State of Ohio. I am enclosing with this letter a copy of

its Interstate Commerce Commission operating authority.

U S Rail has leased the Site for the BRT from Sills Road and will construct and operate the facility as a class III railroad. U S Rail will connect with the New York & Atlantic Railway ("NY&A") which is a class III rail carrier that provides freight service over the lines of the Long Island Rail Road. The traffic currently consists of stone aggregate originating at quarries near Saratoga Springs, NY, served by CP Rail, and delivered in a dedicated, private fleet. CP Rail moves this traffic to Long Island via CSX Transportation's Hudson Line and interchanges this traffic to the NY&A at the Fresh Ponds Yard. The current traffic has been delivered to a leased facility, which lease has not been renewed. Upon completion of the BRT once traffic bound for the BRT arrives at the facility's entrance, NY&A will interchange traffic to U S Rail which will then switch the train to the appropriate yard tracks for unloading. U S Rail will then turn the equipment and reassemble the empty cars for interchange back to the NY&A for movement off Long Island.

The waiver provisions of the Board's environmental rules require a party seeking a waiver to describe as completely as possible the environmental effects and timing of the proposed action and to show that all or part of the six month lead period is not appropriate. Moreover, the regulations require a party seeking a waiver to indicate (1) whether the area affected is a nonattainment area, (2) the number of trains per day that would be involved and the commodities and tonnage that would be handled, and (3) the impacts, if any, on endangered species.

In response to these inquiries and as a result of prior, extensive environmental analyses of the Site and its surrounding communities, U S Rail anticipates that the environmental effects of the construction and operation of the BRT will be minimal. Regarding the questions identified above, the subject area is a nonattainment area. The BRT has been designed to handle about 5,000-6,000 carloads annually utilizing one train making a single daily roundtrip, at 40 carloads per trip. Inbound traffic will consist of stone aggregate required by entities related to Sills Road in their current businesses and other construction related products.

Regarding environmental impacts, movement of increased

volumes of stone aggregate made possible by construction of the BRT by rail instead of truck will be very beneficial due to reduced highway congestion and associated air and noise pollution and energy consumption impacts. The trackage at the BRT will not cross any public highways or navigable waterways. The BRT will be built on 28 acres of undeveloped land owned by Sills Road. The surrounding land uses are preoccipantly industrial and utility in nature. There are no residential parcels or community services of any type within 2,000 feet of the Site. The Town of Brookhaven's racial demographics will not trigger any "environmental justice" issues.

The Site has previously been analyzed in connection with a proposal to build a gas-fired electric power plant and by consulting engineers in connection with the design of the BRT. Based on these analyses, the following conclusions can be drawn:

- The soils on the Site consist mainly of sands and loamy sands.
- Depth to groundwater is approximately 66 to 77 feet and depth to bedrock is approximately 1,500 feet.
- Nassau and Suffolk Counties of Long Island have been designated by the US Environmental Protection Agency as a sole source aquifer. There are no surface waters or wetlands on the Site.
- There are no federally listed threatened or endangered animal or plant species that will be potentially affected by this project. While there are two rare state listed plants noted as occurring in the vicinity, none are known to occur on the Site.
- As to air quality, it is moderate attainment for 8-hour ozone and nonattainment for PM 2.5.
- As to noise, the existing daytime noise levels on the Site are 63 dBA and evening levels are 55 dBA.

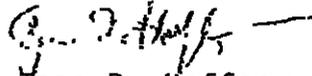
As disclosed in the prior analyses, there are no past or current structures on the Site. Phase IA and IB archeological surveys have previously been conducted and no non-modern artifacts have been found.

Because the environmental effects of this project are

negligible, U S Rail believes that the six months lead time is unnecessary and should be waived.

Please date stamp and return one copy of this letter

Sincerely yours,

  
John D. Heffner

ENCLOSURE

cc: Ms. Vicki Rutson  
Gerard Drumm  
Andrew Kauffman  
Gabriel Hall

# EXHIBIT D



**SURFACE TRANSPORTATION BOARD**  
**Washington, DC 20423**

*Office of Economics, Environmental Analysis and Administration*

May 1, 2008

Mr John Heffner  
1750 K Street, NW  
Suite 350  
Washington, DC 20006

**Re: STB Finance Docket No 35141, U.S. Rail Corporation – in Suffolk County,  
Long Island, NY**

Dear Mr Heffner

This letter is in response to your letter dated April 29, 2008, in which you respond to a submittal made by the Town of Brookhaven, dated April 21, 2008,<sup>1</sup> in the above referenced docket

Your letter references a March 17, 2008 meeting between representatives of the Board's Section of Environmental Analysis (SEA), U S Rail Corporation, Sills Road Realty LLC, Gannett Fleming, Inc , and yourself during which SEA was presented with an overview of the proposed project On page 3 of your letter, you state "At that meeting, environmental reporting requirements were discussed and a consensus reached that the project appeared to warrant an EA, rather than an EIS "

SEA would like to correct the record At the March 17, 2008 meeting, SEA discussed its environmental review process and provided a hand-out describing in detail its environmental review process to those present SEA clearly indicated, as is outlined in the hand-out, that no determination with regard to the preparation of either an EA or EIS would be made until after the completion of several steps culminating with a site visit SEA notes that it has not yet conducted a site visit and has therefore not made a determination regarding the appropriateness of either an EA or an EIS

If you have any questions or require additional information regarding this proceeding, please do not hesitate to call me at (202) 245-0295

Sincerely,

Victoria Rutson  
Chief  
Section of Environmental Analysis

---

<sup>1</sup> In this letter, the Town of Brookhaven submits reasons why it believes that SEA should deny U S Rail Corporation's March 26, 2008, request for a waiver from the Board's six-month pre-filing requirements

# EXHIBIT E

IN THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

-----X  
SILLS ROAD REALTY, LLC, SUFFOLK &  
SOUTHERN RAIL ROAD, LLC and  
U.S. RAIL CORPORATION,

07-5007AG

Petitioners,

**DECLARATION OF  
JOHN L. TURNER  
IN OPPOSITION TO  
PETITIONERS MOTION  
FOR A PRELIMINARY  
INJUNCTION**

v

SURFACE TRANSPORTATION BOARD;  
and THE UNITED STATES OF AMERICA,

Respondents  
-----X

John L. Turner, under penalty of perjury pursuant to 28 U.S.C. §1746, declares as follows:

1. I am the Director of the Division of Environmental Protection for the Town of Brookhaven ("Brookhaven") I am fully familiar with the facts and circumstances set forth herein, except those set forth on information and belief.
2. I submit this Declaration in Opposition to Petitioners' motion for a preliminary injunction.
3. As the Director of the Division of Environmental Protection, I am responsible for the environmental review of land use projects that are proposed for Brookhaven Town. In Brookhaven we have comprehensive rules and regulations that govern environmental review for facilities such as those proposed for the property in question. In addition, in siting and regulating such facilities we are required to follow New York State Environmental Quality Review Act ("SEQRA") to review the environmental impacts of proposed development projects and to ensure, if such projects are built that adequate environmental mitigation measures are implemented

4 After reviewing the plans that have been submitted for this site and inspecting the property in person, I am of the opinion that if this project were submitted to my division for a review, that a positive declaration under SEQRA would be required.

5. The need for a positive declaration stems from, among other things, the fact that this property is in a deep flow recharge zone and is ecologically part of the Long Island Pine Barrens and therefore development of the property may cause significant hydrological and ecological impacts.

6. When a positive declaration is required, an applicant is mandated to prepare an Environmental Impact Statement ("EIS") The EIS is required to look at, among other things, the environmental setting, the resources and features of the property, the impacts of the proposed development, the strategies that can be implemented to mitigate those impacts, and reasonable alternatives to the sponsor's project, one alternative potentially being an assessment of alternative sites.

7. Overall, the EIS is required to detail the impacts the project would have on the natural resources on site and in the the surrounding environment. Among the impacts that the EIS would examine are the effects of the proposal on water quality, wildlife, traffic, air pollution, noise pollution, the removal of soils. In this case, in particular, the removal of sand between the land surface and the water table which is the uppermost expression of the groundwater system as reflected by the upper glacial aquifer reduces a filtering capability of the soil and subsoil regarding water which is recharged into the aquifer

8. Prior to the preparation of an EIS, a scoping session typically takes place with notice to the public. At that session, public input would be solicited as to the relevant topics that would be considered in the EIS.

9. The applicant would then prepare an EIS, which would include a description of the action, a description of the physical setting, a description of all the environmental resources,

a discussion of the impacts of the project on the environment, as well as strategies for mitigating these impacts. In the case of this property, due to the nature and scope of the project, many mitigation strategies might be considered .

10. Under SEQRA, as stated above, the EIS must also contain a discussion of alternatives to the project, including a "no action alternative" where the possibility of no development would take place. In addition to the no action alternative, the EIS would have to examine whether this project could be developed on another property in Brookhaven where it would have less of an impact upon the environment

11 The draft EIS would be submitted to the Brookhaven planning staff for their review to ensure accuracy, adequacy of content and to ensure that all the issues raised in the public scoping session were addressed If the EIS was deemed to be complete , a public hearing would be scheduled. At the public hearing interested parties would comment upon the EIS and further revisions to the EIS would likely be made When and if the staff and the applicant agreed that all environmental impacts had been identified and sufficient mitigation measures could be employed, the SEQRA process would be closed and the Town would adopt a final environmental impact statement and adopt findings related thereto

12. It should be noted that applicants often submit the most aggressive plan for its business enterprise, which does not take into account preservation of the natural environment One of the many positive attributes of the SEQRA process is that it seeks to allow the use of land but requires that consideration of the environment be taken into account In this case the applicant has submitted a plan that makes maximum use of the site and involves significant vegetation removal, grading, and mining to the Property. After the appropriate SEQRA review, it could be the case that ways are identified to allow the Petitioners to operate while reducing or minimizing environmental impacts through less grading and mining at the site and establishing greater buffer areas

13 Based on my site visit and a review of the plans submitted by the Petitioners, there are a number of items I anticipate would be examined in an EIS. First, I believe the layout of the facility would be closely examined. The assigned staff people would inquire as to whether there were other alternative layouts of the site to minimize disturbance to the environment and thereby create layer buffer areas.

14 Another issue that would require close examination is the grading of the property and the mining of materials that takes place in connection therewith. There is a significant change of grade from the northern portion of the property as you go south to the middle of the property. Based on the plans it appears that the whole northern portion of the project would be lowered approximately ten feet.

15. During the SEQRA process, the applicant might be required to examine alternative ways to lay out the site so that less vegetation removal and grading would be required.

16. Another issue that would likely be examined during the SEQRA process is the impact of the traffic generated by the facilities' operations. The traffic generation and configuration of the site would be reviewed and traffic mitigation measures (e.g., reconfiguration of the site, requirement of road widening and turning lanes) might be required.

17. I have been advised by counsel that the purpose of the Declaration is to provide an overview of the SEQRA process and to provide illustrations of what types of mitigation measures might be required. As such I have not touched upon the many other facets of the project that might require further examination. Suffice it to say that a project of this size (28 acres) and intensity (11,000 square feet of rail track and associated facilities and equipment) would entail an exhaustive review and assessment of the many environmental impacts and mitigation measures.

18 The SEQRA process always occurs before construction. In this way unacceptable environmental impacts that would be identified by the SEQRA process can be avoided before they occur.

19. I am advised by counsel that there is a possibility in this case that the SEQRA process would be preempted and that the federal environmental standards under NEPA would apply.

20 Upon information and belief the NEPA process is very similar to the SEQRA process outlined and has been described as follows:

The NEPA process consists of an evaluation of the environmental effects of a federal undertaking including its alternatives. There are three levels of analysis depending on whether or not an undertaking could significantly affect the environment. These three levels include: categorical exclusion determination; preparation of an environmental assessment/finding of no significant impact (EA/FONSI); and preparation of an environmental impact statement (EIS).

\* \* \*

If the EA determines that the environmental consequences of a proposed federal undertaking may be significant, an EIS is prepared. An EIS is a more detailed evaluation of the proposed action and alternatives. The public, other federal agencies and outside parties may provide input into the preparation of an EIS and then comment on the draft EIS when it is completed.

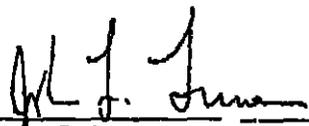
If a federal agency anticipates that an undertaking may significantly impact the environment, or if a project is environmentally controversial, a federal agency may choose to prepare an EIS without having to first prepare an EA.

After a final EIS is prepared and at the time of its decision, a federal agency will prepare a public record of its decision addressing how the findings of the EIS, including consideration of alternatives, were incorporated into the agency's decision-making process.

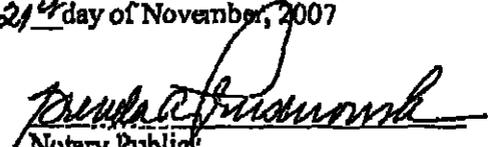
Source: United States Environmental Protection Agency web site, <http://www.epa.gov/compliance/basics/nepa.html#requirement>

21. Presumably the same environmental issues would be identified in the NEPA process and provision would be made for similar mitigation measures. Brookhaven would participate in that process as an interested party and offer the comments noted above, which, as noted above are illustrative of the issues involved and is by no means an exhaustive examination of the environmental concerns.

22. For the reasons set forth above, Petitioners request for a preliminary injunction should be denied.

  
\_\_\_\_\_  
John L. Turner  
J

Sworn to before me this  
21<sup>st</sup> day of November, 2007

  
\_\_\_\_\_  
Notary Public

**BRENDA A. PRUSINOWSKI**  
Notary Public, State of New York  
No. 4584250, Suffolk County  
Commission Expires 7/11/2011

# EXHIBIT F

**JOHN D. HEFFNER, PLLC**

1400 N. GUYMON N.W.

SUITE 200

WASHINGTON, D.C. 20004

PHONE 202-412-0000

FAX (202) 296-6769

jheffner@verizon.net

By overnight courier and facsimile to  
(301) 698-4489

July 12, 2007

Robert F. Quinlan, Esq.  
Town Attorney  
Department of Law  
Town of Brookhaven  
One Independence Hill  
Farmingville, New York 11738

Re: Real Property Described in Attachment A (the "Real Property")

Dear Mr. Quinlan:

I am writing on behalf of U S Rail Corporation ("U S Rail"), an Ohio-based company and common carrier short line railroad operating pursuant to authority granted by the former Interstate Commerce Commission (now the Federal Surface Transportation Board). U S Rail has leased the Real Property and intends to construct and operate as an "except spur" within the meaning of 49 U.S.C. 10506, a line of rail and related side work, yard tracks, turn outs, switches and connecting track (collectively, the "Rail Yard") thereon for the purpose of operating a common carrier railroad and transload facility at that location.

The Rail Yard will provide rail transportation services to customers shipping and receiving and/or transloading aggregate stone and other stone products as well as lumber, plywood, sheetrock and related construction materials and other merchandise freight. As a common carrier railroad, U S Rail's construction and operation of the Rail Yard are governed by federal law, rules and regulations and subject to the exclusive jurisdiction of the Surface Transportation Board thereunder.

U S Rail desires to work with you and other community leaders to develop a very positive relationship. We are available to meet with you at your earliest convenience but anticipate commencing construction of the Rail Yard within the next thirty days.

Should you have any questions, please feel free to contact me at your convenience.

Very truly yours,

John D. Mather, Esq.

cc: Gabriel D. Hall  
President  
U S Rail Corporation

**Attachment A**

**County of Suffolk  
Town of Brookhaven  
District 0200**

**Section 663.00, Block: 03.00, Lot(s): 001.00, 027.001, 027.002, 027.003 & 027.004**

**Section 704.00, Block: 04.00, Lot(s): 001.000 & 002.000**

**Section 704.00, Block: 05.00, Lot(s): 001.000 & 002.000**

**Section 704.00, Block: 02.00, Lot(s): 001.000, 002.000, 030.000, 031.000, 032.000,  
033.000, 034.000, 035.000 & 036.000**

# EXHIBIT G



1 (Call to Order of the Court Appearances stated  
2 as indicated above )

3 THE COURT I set this down for an evidentiary  
4 hearing today, and I assume both sides are ready to  
5 proceed

6 Before we proceed with the hearing, if someone  
7 could bring me up to date I'm familiar with the  
8 background on this case, and the assigned district Judge I  
9 believe was under the impression when you last appeared  
10 before him that this request had been resolved and  
11 settled

12 MS BIBLOW I will give you an update, your  
13 Honor. We thought so, too

14 THE COURT I have no objection if you want to  
15 remain seated

16 If you want to use the podium you are more than  
17 welcome to do it Make sure the lights are on There  
18 should be a little green light at the base

19 Thank you.

20 MS BIBLOW Can you hear me now?

21 Your Honor, when we were last before Judge  
22 Platt, which was on November 2 when we filed the order to  
23 show cause, what we were seeking was a temporary  
24 restraining order and a preliminary injunction

25 What the parties had said at that hearing was --

1 and these concerned, related to a transloading facility  
2 being built in Brookhaven town

3 What the town had said at this hearing was that  
4 they would agree during the interim phase, while we tried  
5 to work out a schedule for the briefings, was they  
6 wouldn't issue any more tickets and wouldn't pursue the  
7 other tickets on the record

8 The judge also indicated that he didn't want any  
9 of the activity to proceed as well, although it wasn't  
10 culminated in a final written order

11 The matters were supposed to agree to a  
12 scheduling order

13 Mr Cuthbertson went back to his client, we had  
14 worked out some proposed language on the temporary  
15 restraining order, and he could not get the town to agree  
16 So we wrote to the court saying that we needed the court  
17 to intercede, to set a briefing schedule and to issue the  
18 TRO because there are two sets of tickets of concern.

19 One set of appearance tickets are returnable  
20 next week, which is why we brought the application at the  
21 beginning of November And there is a second set of  
22 tickets, that are returnable in December 27

23 So that is, you know, a thumbnail sketch of  
24 where we were

25 THE COURT. The town refuses to hold off on any

1 prosecution of those matters while you are before the,  
2 what is it, the federal Surface Transportation Board?

3 MS. BIBLOW We have asked them to do so, and we  
4 have not gotten any final commitment or an order in  
5 writing saying that they would agree to do that

6 THE COURT. What are the disputed issues of  
7 fact, as you see them?

8 MS BIBLOW: Quite frankly, your Honor, I don't  
9 know that there are any disputed issues of fact

10 We are in front of the STB. The defendant  
11 concedes that In the joint exhibit that we presented to  
12 you is the proceedings and the decisions that are in front  
13 of, from the STB.

14 One order in particular, that was issued on  
15 October 12, specifically says that the STB has  
16 jurisdiction over this facility, and either we have to get  
17 approval from the STB as a new rail line or we have to  
18 show that we are an exempt spur. We have believed we are an  
19 exempt spur

20 But in either situation, your Honor, because  
21 there is exclusive and preemptive jurisdiction in the STB,  
22 the town has issued a series of tickets that deal with  
23 site plan preparation and things like that. They are  
24 preempted from doing that. That is the issue with respect  
25 to the TRO

1 THE COURT: That is the legal issue. Are there  
2 any disputed factual issues?

3 MS BIBLOW The only disputed

4 THE COURT: From the plaintiff's perspective?

5 MS. BIBLOW We don't believe that there are any  
6 factual disputed issues because we believe that the facts  
7 are as they are. They issued tickets when they knew we  
8 were already in front of the STB, that the STB had already  
9 asserted jurisdiction, and these tickets are in violation  
10 of the Interstate Commerce Commission Termination Act  
11 clearly.

12 The only disputed issues that I believe that  
13 they contend, that we don't believe is disputed, is that  
14 there was a set of tickets that were issued with respect  
15 to a facility that is not a plaintiff in this matter.  
16 They were issued a couple of weeks after to an entity  
17 called Empire. It is related to the plaintiff also. And  
18 it is an asphalt facility.

19 They were issued by the same inspector. They  
20 were issued for lack of site plan, lack of certificate of  
21 occupancy, and for noise for a facility that is a  
22 preexisting nonconforming use and doesn't need that kind  
23 approval.

24 And the noise violations relate to something  
25 that happened at 7:30 at night. Our facility is closed at

1 5 30

2 So to the extent that they dispute this that  
3 facility is somehow related here, we believe it is and we  
believe that that is a violation of what they said they  
weren't going to do in front of Judge Platt

6 THE COURT Empire isn't before this court, are  
7 they?

8 MS BIBLOW Empire is not before this court,  
9 but those tickets are

10 THE COURT That is the entity that was served  
11 with those tickets?

12 MS BIBLOW That's correct

13 THE COURT What does the town have to say?  
14 What is disputed here and why aren't you agreeing to let  
15 the federal surface -- what is the name of that board?

16 MR CUTHBERTSON Surface Transportation Board,  
17 your Honor

18 THE COURT The Surface Transportation Board  
19 Thank you very much

20 Why aren't you agreeing to let the Surface  
21 Transportation Board decide whether or not it has  
22 exclusive jurisdiction?

23 MR CUTHBERTSON We are and have been actively  
24 litigating in front of that board

25 We had proposed a settlement with plaintiffs

1 that would have involved us not issuing more appearance  
2 tickets during the pendency of the STB proceeding, that we  
3 would not prosecute the tickets that are currently  
4 outstanding during the pendency of the ST proceeding

5 The plaintiffs wanted another prong of the  
6 settlement that said we won't do anything else that would  
7 interfere with the r construction at the site

8 We are currently litigating before the Surface  
9 Transportation Board The town has made two filings  
10 before the Surface Transportation Board one to oppose a  
11 motion for a stay that they made to the Surface  
12 Transportation Board.

13 That motion, the petition for a stay before the  
14 Surface Transportation Board, was denied, so they have  
15 tried to show irreparable harm and a chance of success on  
16 the merits on this spur argument that Ms Biblow alluded  
17 to, and the STB said no, we don't think that argument has  
18 merit, nor do we think that there is irreparable harm

19 THE COURT What is the town's interest in  
20 prosecuting these cases when do they come up on the 12th?

21 MS. BIBLOW The first batch are on December 13  
22 The second batch is December 27

23 THE COURT Why don't you wait to do that?

24 MR CUTHBERTSON I was previously willing to  
25 recommend to the client, and did recommend to the client,

1 that pending the STB proceedings, that we not prosecute or  
2 issue further tickets

3 THE COURT The client is not willing Your  
4 client is not will to accept that?

5 MR CUTHBERTSON Well I wasn't able to go to  
6 the client with that offer because the plaintiffs had a  
7 third part of it, a settlement that they wanted which was  
8 we wouldn't take any other actions that would interfere  
9 with construction

10 We are not willing to do that because we don't  
11 believe that this jurisdictional issue is as simple as  
12 they have stated to you, your Honor, with respect to the  
13 STB jurisdiction

14 The STB, when it denied the stay in this  
15 particular case, issued a decision saying there are three  
16 possibilities here in terms of a legal theory. One is the  
17 spur theory that they say which would mean that the STB  
18 has jurisdiction but does not issue an approval

19 One is that it is a minor railroad which means  
20 the STB has jurisdiction and it also issues an approval

21 The third is that this would be a private line  
22 railroad, which would be fully subject to local  
23 jurisdiction

24 So we believe, unlike plaintiffs, that there is  
25 a chance that this will be found to be a private line

1 railroad, in which case the town's local land use  
2 jurisdiction will apply.

3 THE COURT I understand, but the sole basis to  
4 the application is to enjoin prosecution and issuance of  
5 any further tickets, not any of these other issues that  
6 you say the plaintiff has added to the mix as far as any  
7 settlement.

8 MR CUTHBERTSON. Again when we talked about a  
9 settlement, there was a third prong to the settlement that  
10 said we are not going to take any other actions that  
11 interfere with construction at the facility. That was  
12 what was problematic.

13 THE COURT Let me hear from plaintiff's counsel  
14 on that

15 MS BIBLOW The third prong for our request of  
16 the TRO relate that we didn't want to interfere with  
17 anything --

18 THE COURT That is the third prong before this  
19 court on this motion for a preliminary injunction?

20 MS BIBLOW Yes

21 THE COURT Tell me why, where it is please. I  
22 have your application before me.

23 MS BIBLOW If you look in the order to show  
24 cause, on page 2, it is item number 3. It is the third  
25 prong

1 THE COURT Page 2, No 3  
 2 MS BIBLOW Yes  
 3 THE COURT I'm looking at an affidavit The  
 complaint?  
 MS BIBLOW No it is the actual order to show  
 6 cause, your Honor It has it in here. And it is also in  
 7 our papers but it is laid out there  
 8 THE COURT Do you want to read what that says?  
 9 MS BIBLOW Would you like me to read it?  
 10 THE COURT Yes.  
 11 MS BIBLOW The third prong says preliminarily  
 12 enjoining the defendant from taking any other action to  
 13 interfere with or obstruct plaintiff's construction or  
 14 operation of the Brookhaven Rail Terminal That was the  
 15 third prong we were looking for But I would like to make  
 16 one comment --  
 17 THE COURT How can you possibly make that  
 18 application?  
 19 MS BIBLOW Because we are in front of the STB  
 20 And if the STB allows us to continue to grade but they  
 21 believe that we are a spur, we don't want the town  
 22 stopping us  
 23 THE COURT Call your first witness  
 24 MS BIBLOW Sure  
 25 THE COURT I'm very familiar with this As you

1 probably know, if you did your research, I did this  
 2 evidentiary hearing in the Coastal case that went up to  
 3 the circuit is before the STB now  
 4 MS. BIBLOW We are very aware of that If I  
 5 just may comment on one thing, your Honor  
 6 What Mr Cuthbertson said to me when he came  
 7 back is what the town was willing to do and what they were  
 8 not willing to do  
 9 What we were willing to do was that they were  
 10 not even willing to deal with the issuance of the tickets  
 11 that had been issued And that is when the  
 12 negotiations --  
 13 THE COURT That is not what counsel is saying  
 14 MS BIBLOW That is what he told us  
 15 MR CUTHBERTSON I advised and recommended that  
 16 to the client I couldn't advise them to accept the third  
 17 prong of this  
 18 THE COURT Call your witnesses.  
 19 MS BIBLOW We call Mr Gabriel Hall  
 20 **GABRIEL HALL**  
 21 called by the Plaintiff, having been first duly  
 22 sworn/affirmed, was examined and testified as  
 23 follows  
 24 follows  
 25 THE COURT Before we go any further

1 Didn't you just litigate this issue, this cease  
 2 and desist, before the circuit?  
 3 MS BIBLOW We filed a petition at the Second  
 4 Circuit They last week dismissed it as being premature  
 5 THE COURT But you received a cease and desist  
 6 letter saying 'Stand still Don't do any more work on  
 7 this site.'  
 8 MS BIBLOW.. And we have not done anything.  
 9 THE COURT. - From the Surface Transportation  
 10 Board  
 11 MS BIBLOW: That is correct  
 12 THE COURT. Now you are looking for this court  
 13 to overturn that  
 14 MS. BIBLOW No, we are not. What we are  
 15 looking for this court to do is to tell the town that we  
 16 are in front of the STB, and whatever the STB tells us to  
 17 do --  
 18 THE COURT. I think they know that.  
 19 MS BIBLOW Excuse me I'm sorry.  
 20 But whatever the STB tells us to do They are  
 21 the appropriate agency to say what this facility is and  
 22 whether you need authority or whether you are exempt  
 23 And with respect to what activities fall, we are  
 24 now figuring out We have applications before the STB to  
 25 figure out what activities they may or may not allow with

1 respect to construction  
 2 We are not constructing, but if the STB tells us  
 3 you can do certain things on this site in this interim  
 4 period, we want to be able to do that without the town  
 5 jumping in and closing us down. That is our concern.  
 6 THE COURT As long as they have an opportunity  
 7 to oppose anything before the Surface Transportation  
 8 Board. Does the town have a problem with that?  
 9 MR CUTHBERTSON. With them doing other  
 10 construction?  
 11 THE COURT Assuming you litigate it before, you  
 12 are litigating before the Surface Transportation Board  
 13 MS BIBLOW They are an intervenor already in  
 14 the STB proceeding, your Honor  
 15 THE COURT That is fine. What is wrong with  
 16 that?  
 17 MS BIBLOW There is nothing wrong. But they  
 18 certainly have the opportunity, and have taken the  
 19 opportunity, to oppose certain things that we requested.  
 20 MR CUTHBERTSON Here is the issue, your Honor  
 21 At the town level there has already been a  
 22 discuss on between the plaintiffs and the STB to say  
 23 listen, is there some level of construction activity that  
 24 you would allow?  
 25 The STB has emphasized to us that the town has

1 local police powers that we can exercise in this context  
2 And the reason the town would not stipulate to  
3 the last part of the relief that Miss Biblow wanted is  
4 that in the event that they go back, the STB says okay, we  
5 will allow some reconstruction activity. It is not rail  
6 construction.

7 The town needs the ability to still be able to  
8 litigate that issue because it is not necessarily, when  
9 the STB is saying it is not rail construction, if it is  
10 not rail construction, then we believe it is not subject  
11 to STB jurisdiction.

12 THE COURT Well, if the STB says that they are  
13 permitted to do so some limited construction or to work on  
14 the site, is it your position that that is unacceptable to  
15 you?

16 MR. CUTHBERTSON. I believe it would

17 THE COURT You would need relief in court?

18 MR. CUTHBERTSON I believe my client would take  
19 that position. Yes.

20 THE COURT All right.

21 Okay. The witness has been sworn. Your  
22 questions.

23  
24 DIRECT EXAMINATION  
25 BY MS. BIBLOW

1 Q. Mr. Hall, can you please state by whom are you  
2 employed?

3 A. US Rail Corporation.

4 Q. And what is US Rail Corporation?

5 A. Were a Class III shortline rail carrier.

6 Q. And what does that mean? What is a Class III?

7 A. There are three designations the Surface  
8 Transportation Board has established, as well as under  
9 federal statute there are three distinctions.

10 We are of the smaller type. The Class II is a  
11 regional. A Class I is the larger railroads, the CSX,  
12 Norfolk Southern. Those type.

13 Q. What are your duties and responsibilities for US  
14 Rail?

15 A. I oversee the entire operation of the rail company.

16 Q. And can you just briefly tell the court how long you  
17 have been in the railroad business?

18 A. Approximately 30 years.

19 Q. And can you tell the court what your various  
20 positions have been over these 30 years?

21 A. I started out as a locomotive fireman. Became a  
22 locomotive engineer. Was a train master.

23 Then went into the shortline railroad business  
24 about 1992 and have been running shortline railroads since  
25 then.

1 Q. Does the fact that US Rail is designated a Class III  
2 railroad in any way limit its geographical ability to do  
3 business?

4 A. Not in my belief, no.

5 Q. In your role as -- I'm sorry. What is your title?

6 A. My actual title is president and chief executive  
7 officer.

8 Q. And in your role as the president and chief executive  
9 officer, have you had dealings with the Surface  
10 Transportation Board, or the STB?

11 A. Yes.

12 Q. Have you had dealings with the STB in connection with  
13 this case? In connection with this case.

14 A. Yes, ma'am.

15 Q. Can you tell me, sir, what is an intermodal transload  
16 facility?

17 A. Intermodal is a very specialized term in the railroad  
18 business.

19 It means that you take a usually containerized  
20 it is either a boxcar with dry product, unit or a tank  
21 that is inserted in a square structure that would contain  
22 liquid, oils, other different chemicals.

23 And the term intermodal means that it goes from  
24 one mode of transportation to another, that it would go  
25 from a customer's loading dock, be placed on a flatbed

1 truck, driven to a railroad loading site such as our  
2 proposed site in Brookhaven, load it on a flatbed railcar  
3 there, and then transport it to some other destination,  
4 once again placed on a truck and unloaded at a  
5 destination.

6 Q. What role does the STB have in such facilities?

7 A. They regulate anything to do so with common carrier  
8 the railroad operation side of that.

9 Q. You mentioned the Brookhaven Rail Terminal.

10 Can you tell us what that is?

11 A. That is a proposed rail terminal that US Rail is  
12 hopefully going to construct in Yaphank Long Island, for  
13 the purpose of intermodal logistics, rail transfer,  
14 transloading of construction products and similar  
15 commodities.

16 Q. How is it that US Rail got involved with the  
17 Brookhaven Rail Terminal, as you called it?

18 A. Shortline railroads historically have been involved  
19 in such projects. We do them in other locations. In not  
20 only in Ohio but in Indianapolis, Michigan, Pennsylvania,  
21 one in Paterson, New Jersey, and another one that we are  
22 under discussion with currently in the immediate Chicago  
23 area.

24 Q. And again can you tell us how it is that US Rail  
25 learned of the facility that is going to be built in

1 Brookhaven?

2 A. A member of Sills Road Realty contacted us, who we  
 had a previous relationship with in rail operations, and  
 he contacted us and asked us to come out and visit and  
 5 discuss the possibility of our operating a rail facility  
 6 there.

7 Q. And did those discussions come to fruition?

8 A. Yes, they did. We entered into a lease and an  
 9 operating agreement for the property there in Yaphank.

10 Q. What I would like to do is show the witness what has  
 11 been premarked as Plaintiff's Exhibit 7

12 Mr Hall, can you tell us what Plaintiff's  
 13 Exhibit 7 is?

14 A. This is the railroad operating agreement and lease  
 15 that we entered into with Sills Road Realty for the  
 16 Yaphank operation.

17 Q. And if you could, identify your signature on the back  
 18 page

19 Is that your signature?

20 A Yes.

21 Q.

22 MS BIBLOW Your Honor, I would ask that this  
 23 be moved into evidence

24 THE COURT Any objection?

25 MR CUTHBERTSON Let me look at it quickly,

1 your Honor

2 No

3 BY MS BIBLOW

4 Q. Under this agreement, Exhibit 7 --

5 THE COURT Admitted  
 6 (Plaintiff Exhibit 7 in evidence )

7 BY MS BIBLOW

8 Q. Under this exhibit, Exhibit 7, it lists Sills Road  
 9 Realty as the seller and US Rail Corporation as the  
 10 lessee.

11 What exactly was being eased?

12 A. The real estate that would operate where the rail  
 13 would be and where either the transloading of products  
 14 such as stone, aggregate, or where intermodal containers  
 15 might be on or off, or boxcar loads of lumber or brick  
 16 might be unloaded.

17 Q. Under this railroad operating agreement and property  
 18 lease, what were US Rail's obligations and  
 19 responsibilities?

20 A. We were, or are, obligated to construct a facility as  
 21 far as the rail service is concerned. And then, once it  
 22 is completed, to operate the railroad there.

23 Q. Prior to the STB issuing its October 12, 2007, order,  
 24 what activities did US Rail undertake -- let me withdraw  
 25 that

1 How big a facility or how big a site is this?

2 A. Approximately 28 acres.

3 Q. And prior to you doing any activities, did you  
 4 undertake to survey the property?

5 A. Yes. We had it surveyed. We had a track layout with  
 6 the assistance of Sills Road and the New York and Atlantic  
 7 Railroad. We produced a track layout for the facility for  
 8 the future operation of it, with grades, topography, et  
 9 cetera.

10 Q. What I would like to do now is to show the witness  
 11 what has been premarked as Plaintiff's Exhibit 9

12 Mr Hall, can you tell us what Exhibit 9 is?

13 A. It is a track layout for the Brookhaven Rail  
 14 Terminal.

15 Q. That is the track layout that you were talking about,  
 16 that you helped create?

17 A. Yes. That is what I just immediately referenced.  
 18 Yes.

19 Q. Can you explain what that track layout shows?

20 A. It shows on the far left-hand side the approach to  
 21 the Yaphank yard, or Brookhaven Rail Terminal, where it  
 22 will interchange traffic with the New York and Atlantic  
 23 Long Island Rail Road system. It shows the tracks for  
 24 storage and for transloading

25 And it shows where the aggregate storage bins

1 would be.

2 It describes the bridge, sort of a flyover  
 3 bridge, to enter the property from the Sills Road side and  
 4 then entry to it

5 And then, whether it be parking and other such  
 6 things, scales, other things that are necessary to operate  
 7 a railroad transload facility

8 Q. How much track is intended to be placed into this  
 9 facility under this schematic?

10 A. Approximately 4,000 feet, but up to 17,000

11 Q. And sir, in your 30 years of experience, the diagram  
 12 that is in front of you, does that represent a line on  
 13 railroad, a spur, or a private track?

14 A. In my opinion it is a spur.

15 Q. And C is what, sir?

16 A. Well, what we have traditionally done in the  
 17 industry, and what I've been used to doing previously, is  
 18 that a transload facility, if it is a common carrier  
 19 operated by a railroad such as US Rail, it would be  
 20 considered a spur. It is one of the two designations that  
 21 the STB affords us to operate as a common carrier.

22 If this were not operated by a common carrier,  
 23 not by a railroad but just by a lumber company or someone  
 24 like that, it could be considered, in a way, construed to be  
 25 a private track.

1 In my opinion it is not a line railroad because  
2 there is no other rail line that we connect to We are  
3 the destination or origin at this point. And because of  
4 that we don't become a line railroad The definition has  
5 historically been that way.

6 Q You also used a couple of terms before You said  
7 interchange Could you tell us what you meant by  
8 interchange

9 A. Interchange is a terms used in the railroad industry  
10 for a hundred years, where two railroads exchange cars  
11 between their systems.

12 So where we would get cars from the New York and  
13 Atlantic, or give the New York and Atlantic freight cars,  
14 that is called an interchange movement.

15 It is governed by the American Association of  
16 Railroads' Rules of Interchange

17 Q And does a railroad such as New York and Atlantic,  
18 can they refuse to interchange with US Rail?

19 A. It is my understanding, no.

20 I have never had the experience where a carrier  
21 such as New York and Atlantic could legally refuse to  
22 interchange freight cars with a carrier such as US Rail

23 Q. So if when the Brookhaven Rail Terminal is built, it  
24 is your intention to interchange with the New York and  
25 Atlantic Railroad?

1 A. Our facility will be an interchange point on the New  
2 York and Atlantic. Part of the national rail system.

3 Q Okay You also used a term called, I think you said  
4 storage bins for aggregate

5 Could you explain what you meant by that

6 A. In the center portion of the drawing is some squares  
7 with lines that run from the track That is where those  
8 cars would be unloaded and then put in an area that  
9 confines the stone or aggregate so that it doesn't spill  
10 all over the place.

11 It then is transferred into trucks such as you  
12 would could into an intermodal move, and then it is  
13 transported off the property to whatever customer

14 MS BIBLOW Your Honor, I ask that Exhibit 9 be  
15 moved into evidence

16 THE COURT Any objection?

17 MR CUTHBERTSON No objection

18 THE COURT Admitted

19 (Plaintiff Exhibit 9 In evidence )

20 BY MS BIBLOW

21 Q. Mr Hall, going back to the lease agreement, the  
22 railroad lease agreement

23 I'm sorry, the railroad operating agreement and  
24 property lease

25 To your knowledge how long is that agreement?

1 A. I believe it is a 30-year term.

2 Q. And does it also allow for option periods for  
3 renewal?

4 A. Yes, at the expiration.

5 Q. And what is US Rail going to do specifically at this  
6 facility?

7 A. It is our intention to operate it as a common  
8 carrier.

9 Q. Are you also going to construct it sir

10 A. Oh. Yes. I'm sorry.  
11 We are going to construct it and then operate it  
12 as a common carrier. Yes.

13 Q. And in regard to the construction aspect, can you  
14 tell us what steps US Rail has taken to get this project  
15 constructed

16 A. We have hired a general contractor who has  
17 subsequently hired subcontractors.

18 The property has been under construction, very  
19 limited construction, tree removal. And they had to begin  
20 grading it.

21 It is approximately 12 or 13 feet above the  
22 level that the Long Island New York Atlantic Railway main  
23 line is, and it is impossible to operate a rail line with  
24 that kind of a short grade like that, so it has to be  
25 brought down.

1 Q! You said that you have started to do that. Are you  
2 currently doing any construction?

3 A. We are doing nothing at this juncture.

4 Q. Why?

5 A. Well, basically for two reasons.

6 One, the matter is before the Surface  
7 Transportation Board. They have issued some sort of  
8 ruling prohibiting us from further construction until they  
9 rule on the matter.

10 And then, secondly, because the Town of  
11 Brookhaven issued some appearance tickets. Those were part  
12 of it. And we haven't done any more construction.

13 Q. Well, let me ask you something, sir.

14 The appearance tickets that we are here about  
15 were any appearance tickets issued to US Rail?

16 A. No, ma'am.

17 Q. Now, in terms of what you have done -- withdrawn.

18 Who was the contractor that you hired to do the  
19 grading?

20 A. The general contractor is a company called Adjo.

21 Q. And do you know what the names of the subcontractors  
22 that they have hired are?

23 A. No, I don't.

24 Q. To your knowledge did Adjo get tickets issued by the  
25 Town of Brookhaven?

1 A. I'm not sure I don't know  
2 Q. Now, with respect to the activities that you have  
3 done so far in terms of being eventually able to operate  
4 this facility

5 Can you tell the court what activities you have  
6 done in that respect

7 A. This would be after construction is completed?

8 Q. Well, what you have done up to date

9 For instance, have you purchased any equipment?  
10 Have you done anything in that context?

11 A. We have acquired two locomotives, numbers 112 and  
12 115, they are currently in Indianapolis, Indiana, awaiting  
13 delivery to Brookhaven.

14 They were supposed to be delivered to Brookhaven  
15 sometime in March. Early March or sooner.

16 We have also undertaken quite a sales and  
17 marketing effort with some of our other customers for  
18 transloading. And we have been working with them in terms  
19 of rates and destinations and things like that

20 Nothing has, we have no contract as of yet  
21 because we can't for sure say when the facility is going  
22 to be opened.

23 Q. The two locomotives that you spoke of, what is the  
24 purpose of having two locomotives at the Brookhaven Rail  
25 Terminal?

1 A. Well, we estimated we will be quite busy there. And  
2 you can actually operate, you could operate two in here at  
3 a time. It would be kind of congested, but when you are  
4 running one crew and the locomotive has to be maintained  
5 so when it goes down there is another locomotive there to  
6 take to the place of it. It is a machine and sometimes  
7 locomotives do break down.

8 Q. So is the purpose, just so I'm clear, is the purpose  
9 of those locomotives to move the rail cars that are in the  
10 facilities once they are taken off the interchange?

11 A. They would be, the purpose would be to switch the  
12 cars to the various tracks where they would be unloaded.

13 Also to go up into the interchange track,  
14 receive cars, pull cars into the facilities, off of the  
15 New York and Atlantic, and then take empty cars back.

16 Q. Where would you store those locomotives? If you  
17 can't store them at Brookhaven Rail Terminal in March?

18 A. We would have to find someplace. We would probably  
19 send them to our Jackson, Ohio, division for cold storage.

20 Q. How much do these locomotives cost?

21 A. Approximately \$175,000 each.

22 Q. Have you made any other purchases with respect to  
23 equipment or orders regarding the construction of the  
24 facility and the eventual operation of it?

25 A. We have got an order for rail in place, cross-ties,

1 and some ballasts that would come in in February, I would  
2 hope, or March

3 We also have just sundry other things, such as  
4 computers, an office trailer that's on site now

5 We haven't purchased it, but we will have an on  
6 site motor vehicle, a pick-up truck or sorts, and some  
7 other tools for track maintenance and such

8 Q. And the track that you are purchasing, that you  
9 already purchased, what kind of track is that?

10 A. Well, it is made of steel. 50-foot lengths, 132  
11 pound weight to 115 pounds.

12 The reason for those weights, or we have  
13 designated it for that is, because of the heavy weight of  
14 stone cars and some other products we expect, you need a  
15 heavier rail to do that.

16 Q. To your knowledge -- you keep mentioning stone and  
17 aggregate -- do you know if there are any plans that have  
18 been developed to bring stone to the facility at this  
19 time?

20 A. Yes.

21 Q. Could you tell the court about that?

22 A. Our first deliveries are supposed to arrive sometime  
23 in early March. We estimate during that season or during  
24 the stone season, as it would be construction, somewhere  
25 in the neighborhood of about 4,000 to 5,000 carloads

1 Q. Where is this stone coming from?

2 A. It comes from the Canadian Pacific Railroad in  
3 Upstate New York, in a large quarry. I believe it is  
4 Upstate New York. But it comes off the Canadian Pacific  
5 Railroad and then comes to New York Atlantic Interchanges  
6 there and then interchanges with US

7 Q. Is US Rail involved in any current transloading  
8 operations on Long Island, that involve stone?

9 A. No.

10 THE COURT When you say stone and the ballast,  
11 you are referring to --

12 THE WITNESS That is all separate. The ballast  
13 would be for the construction of the rail. The stone  
14 would be for resale to customers and that would be  
15 customer product being brought in for transloading

16 BY MS. BIBLOW

17 Q. Perhaps you can tell the court what kind of  
18 materials -- you mentioned stone, what you intend to do at  
19 the facility, what kind of material that you have been  
20 talking to other people about.

21 A. We have some customers who have expressed a high  
22 degree of interest in transloading structural steel. In  
23 fact that particular customer has asked to come out to the  
24 site in early February. They would like to begin  
25 transloading in May or June.

1 We have some customers that want to bring in  
2 lumber, particle board, plywood.

3 One customer has expressed an interest in  
4 transloading brick. I even have a customer that would  
5 like to transload salt material, salt-based materials.  
6 I'm not sure if it is bagged salt or road salt or whatever  
7 it is, but he asked for a rate for salt.

8 Q. The salt that you are mentioned, just so everyone is  
9 clear, that is stone that would be eventually used in  
10 construction?

11 A. I believe so, yes.

12 Q. Sir, you also mentioned Adjo as the contractor that  
13 you hired

14 Did you enter into an excavation agreement with  
15 Adjo to do the work?

16 A. Yes, we did.

17 Q. What I would like to do is show you what has been  
18 premarked as Exhibit B

19 Mr. Hall, can you tell us what Exhibit B is

20 A. It is an agreement to do excavation on the site at  
21 Yaphank.

22 Q. And is this the excavation between, in which you  
23 hired Adjo?

24 A. Yes. This is the Adjo agreement to do the  
25 excavation

1 MS BIBLOW Your Honor, I would ask that this  
2 be marked into evidence

3 THE COURT Any objection?

4 MR CUTHBERTSON No objection

5 THE COURT. Admitted

6 (Plaintiff Exhibit B in evidence )

7 BY MS BIBLOW

8 Q. Sir, when did US Rail start construction activities  
9 at the site?

10 A. This past summer. July, August sometime.

11 Q. And you mentioned that you have a project manager  
12 what was his name again?

13 A. Martin Lomasney.

14 Q. Is he on site every day during the construction?

15 A. Yes.

16 Q. Is he still currently your employee?

17 A. Yes.

18 Q. And since the site has had construction stopped by  
19 the STB what is Mr --

20 A. Lomasney --

21 Q. -- doing?

22 A. Talking to us on the telephone every once in a while,  
23 but nothing much else.

24 Q. You are still paying him, correct?

25 A. Yes.

1 Q. If you can please tell us, prior to doing the  
2 construction activities did US Rail seek approval from the  
3 STB to do the work?

4 A. Prior to construction activities?

5 Q. Prior

6 A. No.

7 Q. Why not?

8 A. It is our belief and our STB railroad counsel's  
9 advice to us was that it was an exempt spur and it had all  
10 to the appearances of everything we have done before as an  
11 exempt spur, so there was no need to apply for any status  
12 with the STB.

13 THE COURT Is US Rail a petitioner now in the  
14 proceeding before the Surface Transportation Board?

15 THE WITNESS Yes, we are

16 THE COURT Did you initiate that proceeding?

17 THE WITNESS No, I don't think we initiated it  
18 I think it was a responsive

19 It was a response to the STB's letter from  
20 someone at the board directing us to cease and desist our  
21 actions

22 MS BIBLOW Your Honor, in your documents you  
23 have a joint exhibit that has all of the STB findings in  
24 this matter and included

25 THE COURT Who initiated it?

1 MS BIBLOW I can tell you the following: It  
2 has had a loan history:

3 Originally this was started by an entity called  
4 Suffolk and Southern Railroad which my next effort will  
5 explain who that is

6 They withdrew their application, which was  
7 allowed to be withdrawn, and then our clients, Sils Road,  
8 entered into the agreement with US Rail to do the work and  
9 to do the construction and the operation.

10 In October, October 4 of this year, we received  
11 a letter from the STB's director of enforcement, a man  
12 named Mr. Clemens -- that letter is in the joint  
13 exhibits -- that basically said that they had gotten a  
14 copy of article from Newsday, it was written October 1,  
15 and a letter of inquiry from the town about this facility  
16 and he wanted an explanation of what was going on and  
17 asked, basically said to stop the construction.

18 In response to that we put in a reply explaining  
19 why it was that what was happening was an exempt spur that  
20 was preempted but was exempt

21 On October 1 what the STB did was they reopened  
22 the Sils, I'm sorry, the Suffolk and Southern Railroad  
23 added US Rail as a party to that and went forward from  
24 there

25 So that is how US Rail got involved in the STB

1 proceeding

2 THE COURT So US Rail is joined as a petitioner  
3 in that action

4 MS BIBLOW It is, along with Suffolk and  
5 Southern who really does not have a role to play any more  
6 and Sills Road is the owner of the property

7 THE COURT What is the relief that is sought in  
8 that proceeding?

9 MS BIBLOW Well, there are a couple of things  
10 that are going on there, your Honor

11 In response to the October 12 stay, we have  
12 filed a petition for reconsideration, which is still  
13 pending, saying that we are a spur and should not have to,  
14 you know, the cease and desist order should be lifted so  
15 we can go forward with the proceeding.

16 In addition we have filed a petition for relief  
17 from the -- stay, I guess is what you would call it,  
18 November 16 that was denied

19 You have those decisions in front of you as the  
20 joint exhibit. So --

21 THE COURT It seems to me by operation of law  
22 you are standing in the shoes of, what is it, the Southern  
23 Railroad?

24 MS BIBLOW. The Suffolk and Southern

25 THE COURT The Suffolk and Southern.

1 So what is the relief that is sought in that  
2 proceeding?

3 MS BIBLOW We are seeking to have the STB  
4 declare the activity, the construction, as an exempt spur.

5 MR CUTHBERTSON Your Honor?

6 MS BIBLOW And obviously to lift their cease  
7 and desist order.

8 THE COURT. Sure

9 MR CUTHBERTSON There is more law I think it  
10 is important because Miss Biblow, as a good advocate, has  
11 characterized the STB's record. I think it important for  
12 the court to know that Suffolk and Southern and US Rail  
13 have the same attorney, a fellow named John Heffner, who  
14 works out of Washington, DC.

15 In August, August 23 specifically, of 2007  
16 Mr Heffner was asked to reply to an STB inquiry when  
17 Suffolk and Southern attempted to withdraw their  
18 application

19 He said at that time that Suffolk and Southern,  
20 on August 23, 2007, was not doing any construction at the  
21 site; that Sills was not doing any construction at the  
22 site. However, US Rail, who he also represented, had  
23 started full bore on construction

24 And the STB, in allowing Suffolk and Southern to  
25 withdraw their application -- and they were very specific

1 about this -- said there should not be rail construction  
2 at the facility based on those representations

3 They said in a decision in August while Suffolk  
4 has stated that Sills has not undertaken any construction  
5 of rail facilities.

6 This is based on Mr. Heffner who represents both  
7 of these entities representations. Suffolk has not stated  
8 that Sills has not constructed other facility at that  
9 location that might be converted in the future to rail  
10 facilities.

11 And I think this is the important part. The  
12 board would view with disfavor any future request for  
13 authority to commence rail operation over track at this  
14 location until the construction of that trackage has first  
15 been authorized by the board

16 The STB said this in August

17 Now theirs wasn't the STB's reaction to an  
18 issuance of a cease and desist order, was it just from  
19 letter to the town of Brookhaven and a front page article  
20 in Newsday. It was because there were prior activities in  
21 this case. And they said Listen don't you start rail  
22 construction until you come to us and make sure that this  
23 is not a line of railroad.

24 The STB's position still is that this is a line  
25 of railroad subject to their jurisdiction and construction

1 authority. Prior to that the STB had even said they  
2 warned Suffolk and Southern, who is a related entity in  
3 this, they warned them in a decision before that in  
4 August, and I will be very brief, your Honor, but the  
5 wording is, and this is from a decision dated August 13  
6 from the STB, the board, being the STB, has increasingly  
7 grown concerned that persons using the notice of exemption  
8 procedures to obtain authority for the lease or other  
9 acquisition and operation of railroad lines may not be  
10 making a thorough review of their circumstances prior to  
11 filing a verified statement that a proposal should be  
12 exempted from environmental and historical reporting  
13 thresholds

14 So they specifically said to Suffolk and  
15 Southern we are concerned about this notice of exemption  
16 you filed with us

17 THE COURT: Okay. Thank you very much.

18 If you can, make sure I receive copies of any  
19 rulings that were made.

20 MS BIBLOW: Your Honor, you have them: Joint  
21 Exhibit one. We have stipulated, without the court knowing  
22 it that those should be entered into the record as an  
23 exhibit. So you do have that.

24 THE COURT: Thank you very much. And thank you  
25 for those responses.

1 Would you like to continue with your  
2 examination?

3 MS BIBLOW Yes, sir

4 BY MS BIBLOW

5 Q. Just to follow up on something that Mr Cuthbertson  
6 said

7 To your knowledge is the US Rail the entity that  
8 is doing the construction via its hiring of obviously  
9 contractors?

10 A. Yes. We are.

11 Q. Is Suffolk and Southern doing anything on this  
12 facility?

13 A. Not at all Not to my knowledge.

14 Q. To your knowledge has Suffolk and Southern ever done  
15 any construction activities at this site?

16 A. Not to my knowledge.

17 MS BIBLOW Your Honor, may I have one moment,  
18 please?

19 THE COURT Surely

20 BY MS BIBLOW

21 Q. Sir, what I would like to do so is show you what has  
22 been premarked as Exhibit 10

23 Sir, have you seen this before?

24 A. Yes, I have.

25 Q. And can you tell us what Exhibit 10 is

1 A. It is a proposal for construction work at the Yaphank  
2 Brookhaven railroad terminal by Adjo Contracting  
3 Corporation.

4 Q. And was this proposal eventually adopted into what  
5 now has been Exhibit 8, the excavation agreement?

6 A. Yes.

7 MS. BIBLOW Your Honor, I would like to have  
8 Exhibit 10 admitted into evidence

9 THE COURT Any objection for purposes of this  
10 hearing?

11 MR. CUTHBERTSON You are saying that this was  
12 incorporated into the excavation agreement?

13 MS BIBLOW This is the bid

14 MR CUTHBERTSON And that was the testimony.

15 MS BIBLOW Yes

16 MR CUTHBERTSON No objection

17 THE COURT. Admitted  
18 (Plaintiff Exhibit 10 in evidence )

19 Q. Sir, I just want the clarify one thing  
20 Is there any common ownership between US Rail  
and Sills-Road Realty?

22 A. None whatsoever.

23 Q. And who, besides yourself, are the officers and  
24 directors of LS Rail?

25 A. We are a family-owned railroad company.

1 I'm the fourth generation. My children that are  
2 working are fifth generation.

3 US Rail is all family owned.

4 Q. And do you know, is there any connection or any  
5 interrelatedness between Suffolk and Southern Railroad and  
6 US Rail?

7 A. None whatsoever.

8 MS. BIBLOW I have nothing further, your Honor

9 THE COURT Thank you very much.

10 Cross-examination

11

12 CROSS-EXAMINATION

13 BY MR CUTHBERTSON

14 Q. Good afternoon, Mr. Hall. You noted that US Rail has  
15 not been issued tickets in this case. Correct?

16 A. That is correct.

17 Q. Okay. Do you know why they weren't issued tickets?

18 A. No, I don't.

19 Q. Now, it is not the issuance of these tickets that has

20 stopped your construction. Correct?

21 A. No.

22 Q. Okay. Is there anything in those tickets that you

23 know of that has told you to stop construction?

24 A. The fact that they were issued brought concern to us

25 as US Rail that --

1 Q. I would like you to answer the question I asked.

2 Is there anything in those tickets

3 MS BIBLOW Your Honor

4 BY MR CUTHBERTSON

5 Q. -- that told US Rail to stop construction?

6 BY MR CUTHBERTSON

7 Q. Could you allude to

8 THE COURT I think he was answering it

9 Would you like to answer the question please?

10 THE WITNESS Thank you, your Honor

11 No, there is nothing in there directing US Rail

12 to stop construction

13 BY MR CUTHBERTSON:

14 Q. Okay And you claim that you will be harmed by the

15 work stoppage that is going on?

16 A. Correct. Oh, yes.

17 Q. But the harm that you are going to suffer is not

18 going to be caused by these tickets, is there?

19 A. That I can't tell you. I wouldn't know how to answer

20 that.

21 Q. The New York State Department of Environmental

22 Conservation issued tickets as well, correct?

23 A. I'm not aware of that.

24 Q. You are not aware that the DEC has issued sand mining

25 violations?

1 A. Oh; yes. That I'm aware of. Yes.

2 Q. And the DEC also exacted from either SI's Road or US

3 Rail an agreement to stop construction isn't that

4 correct?

5 A. I believe so.

6 Q. Now, you provided to the court an excavation

7 agreement that you entered into with Adjo Is that

8 correct?

9 A. Yes.

10 Q. And in what it provides for certain payment to Adjo.

11 Correct?

12 A. That's correct

13 Q. Have you had to write a check to Adjo?

14 A. We have written some checks to them, yes.

15 Q. And is the method that they are being paid with by

16 selling the materials they pull out of the site?

17 A. I can't tell you that. I don't know.

18 Q. Are they being compensated for and allowed to sell

19 the material they take out of the site?

20 A. I'm not aware of that.

21 Q. Let me direct your attention, if I could, sir, to

22 paragraph one of the contract, the excavation agreement.

23 A. Yes.

24 Q. Perhaps you could read for me where it says

25 appointment excavation plan

1 A. That entire paragraph?

2 Q. Yes, sir

3 Well, read the first sentence, if you would

4 Maybe that will refresh your recollection

5 A. US Rail agrees to retain contract on the terms and

6 conditions set forth in this agreement to excavate in, on,

7 and under the subject property, and remove all the

8 material and any products derived from such material,

9 collectively bankrun, from the subject properties

10 Contractor shall use its best efforts to conform

11 its operations on the subject properties during the term

12 hereof and in the performance obligations hereunder in

13 compliance with the excavation and site preparation plan

14 in effect at that from time to time, the excavation plan.

15 For all excavation and site preparation work

16 hereunder, contractor shall be entitled to recovery from

17 the proceeds of the sale of bankrun the greater of, (1) \$3

18 million plus 10 percent thereof for overhead, 10 percent

19 thereof for profit, and 5 percent thereof for management,

20 collectively the 25 percent allowance or --

21 Q. Let me stop you there.

22 It appears from that language that the excavator

23 and the contractor Adjo is being permitted to sell the

24 material from the site

25 Correct, sir?

1 A. Yes.

2 Q. And that is the way in which they are receiving their

3 compensation for their work Is that correct, sir?

4 A. I can't tell you that.

5 Q. But you signed this contract.

6 A. Yes.

7 Q. And did you review the contract before you signed it?

8 A. Yes.

9 Q. But you didn't know that that was how they were going

10 to be compensated?

11 A. Not entirely

12 Q. Okay You had mentioned that in your opinion

13 that what is shown on that map is spur track. Correct?

14 A. Yes.

15 Q. And the STB has disagreed with that opinion Is that

16 your understanding?

17 A. No.

18 Q. That is not your understanding?

19 A. That is not my understanding. No.

20 Q. What is your understanding of what the STB has

21 determined thus far?

22 A. The STB has really only prohibited us from doing

23 certain things. They have stopped us from further

24 construction.

25 I don't believe they ever made any finding or

1 any decision that this is a line of railroad or an exempt

2 spur or private track.

3 Q. You don't believe -- let me just -- there is a part

4 of the joint exhibits that have been submitted I don't

5 know offhand which number it is submitted by the

6 plaintiffs.

7 THE COURT. Would you like to mark that as

8 Defendant's Exhibit?

9 MR CUTHBERTSON. Yes. And recognize that it is

10 also part of the joint exhibits that were submitted.

11 THE COURT. Mark that as Defendant's Exhibit A

12 for identification at this point

13 Does counsel have a copy of that?

14 MS BIBLOW. Yes, Your Honor.

15 THE COURT. Excuse me. I stand corrected. You

16 already have A, B, and C.

17 This is D. Correct?

18 MR CUTHBERTSON. I have A, B, C. This would be

19 D, your Honor. Correct.

20 THE COURT. Does plaintiff's counsel

21 MS BIBLOW. I have Exhibit D. Yes.

22 BY MR. CUTHBERTSON:

23 Q. Directing your attention, Mr. Hall to page 1 of 7 of

24 this particular decision

25 It says at the top of that page *it shall hold of*

1 success on the merits

2 Do you see that?

3 A: Yes.

4 Q: If you could, just read that first sentence

5 A:

6 THE COURT Before you read it I understand

7 there is no objection to this

8 MS BIBLOW There is no objection, your Honor

9 THE COURT This is all part of the record

10 Good.

11 MR CUTHBERTSON So there is no need for him to

12 read it

13 THE COURT Proceed

14 THE WITNESS Petitioners have now shown that

15 there is a strong likelihood that they will be successful

16 in their petition for reconsideration of the cease and

17 desist order

18 Petitioner's argument is that the proposed use

19 of the track would not require prior board approval for

20 construction under 49 USC 100901 or operations under 49

21 USC 10902A, but rather qualifies for the exception from

22 the board's entry-exit licensing authority in 49 USC 10906

23 because the track has some of the characteristics of spur

24 track that would be used as a disconnected ancillary spur

25 of an existing carrier, US Rail

1 The key test to determine whether

2 construction --

3 Q: Let me stop you there, Mr Hall, just in the interest

4 of time

5 Based on that sentence, isn't it correct that

6 the STB has not accepted your argument when it comes to it

7 being a spur track?

8 MS BIBLOW Objection Mischaracterization

9 THE COURT Yes, I will sustain that I think

10 this decision really speaks for itself

11 MR CUTHBERTSON Okay, your Honor I will move

12 on

13 BY MR. CUTHBERTSON

14 Q Now, the railroad that you operate, the railroad line

15 is in Ohio

16 Is that correct, Mr Hall?

17 A. One of them.

18 Q And you currently don't have an agreement with New

19 York Atlantic Railroad to move freight from this facility,

20 do you?

21 A: Correct. We do not.

22 Q: But in the future you are looking to interchange with

23 New York Atlantic Railroad

24 A. Correct.

25 Q: Okay But isn't it the case that New York Atlantic

1 has opposed your effort to claim federal preemption in

2 this case?

3 A. That I'm not aware of.

4 Q: Okay I will move on

5 The locomotives that you referenced before the

6 intention is to eventually deploy them at Brookhaven. Is

7 that correct?

8 A. That's correct.

9 Q: But those locomotives could be deployed to other

10 locations, correct?

11 A: If I had a use for them someplace else.

12 Q: And are you obligated to purchase the locomotives at

13 this point?

14 A: I have signed contracts for them, yes.

15 Q: And are you obligated for them?

16 A. Yes.

17 Q: Are there other ways to move stones and aggregates to

18 Long Island?

19 A: The only other way would be by truck.

20 Q: Isn't it true that stone can get moved by barge?

21 A: It is my understanding on a very, very limited basis

22 that it could be moved. Nowhere's near the volume that we

23 would bring on to the island.

24 Q: So it could be moved by barge, though?

25 A: On a very limited basis.

1 Q: Now, have you ever met with the Town of Brookhaven

2 with respect to your plans to construct a rail facility?

3 A. Not with the town representatives of Brookhaven.

4 Q: And in fact -- but your attorney sent the town a

5 letter. Is that correct?

6 A. Yes. At our direction.

7 Q: And have any other officers or employees of US Rail

8 met with the Town of Brookhaven about this facility?

9 A: I'm not aware of who would have if they had.

10 MR CUTHBERTSON I have no further questions,

11 your Honor

12 THE COURT Any further questions?

13 MS BIBLOW Yes

14

15 REDIRECT EXAMINATION

16 BY MS BIBLOW:

17 Q: Mr Hall, you were asked during cross about an

18 agreement with New York and Atlantic. You were

19 negotiating one

20 Do you need such an agreement in order to be

21 able to interchange with that railroad?

22 A. Well, you need some sort of interchange agreement.

23 Yes,

24 Q: And isn't New York and Atlantic obligated to

25 interchange without such an agreement?

1 A. Yes.

2 Q. So when you said you need such an agreement, I'm not

3 quite sure what you meant

4 A. Well, there are some AAR rules that provide for basic

5 interchange without written agreement, but for liability

6 purposes -- derailments, wrecks, and other such things --

7 it is best to have an agreement delineating those things

8 for rereilling of cars and such.

9 Q. But do you need one?

10 A. No.

11 Q. You were asked about the locomotives that you were

12 talking about.

13 And do you have a need for locomotives except

14 for the Brookhaven Rail Terminal?

15 A. At this time no, we have no other need.

16 Q. And you were also questioned about truck

17 transportation of stone

18 Could you explain to the court the difference

19 and the issues that are associated with truck

20 transportation versus rail transportation of the stone

21 A. Well, to be as generalized as possible, your Honor.

22 The truck transportation has for a long time,

23 you have to get on the island via the bridges. And the

24 bridges, the condition that they are in, they are now

25 reducing the weights of the trucks, which means when you

1 called by the Plaintiff, having been first duly

2 sworn/affirmed, was examined and testified as

3 follows

4

5 DIRECT EXAMINATION

6 BY MS BIBLOW

7 Q. Mr Drumm, can you tell us, by whom are you employed?

8 A. I'm employed by Sills Road Realty, LLC.

9 Q. What is Sills Road Realty, LLC?

10 A. Sills Road Realty owns the site at the Brookhaven

11 Rail Terminal.

12 Q. And would it be correct that Sills Road Realty is a

13 property owner?

14 A. It is a property owner. That is correct.

15 Q. What are your duties and responsibilities with

16 respect to Sills Road Realty?

17 A. I'm their chief financial officer and general

18 counsel.

19 Q. And could you explain to us, withdrawn

20 What property does Sills Road Realty own?

21 A. Sills Road Realty owns the 28-acre site in Yaphank.

22 It is the only property that it owns.

23 Q. And could you describe the size of the property, and

24 where it is located

25 A. Yes. The property is 28 plus or minus acres, located

1 could transport a certain quantity in 1,000 trucks, you

2 now need 12,000 or 1,500 or possibly 1,800 trucks to

3 accommodate the same tonnage.

4 It has been reported repeatedly in our

5 industrial trade newsletters about the condition of the

6 bridges, et cetera, and the need to begin transportation

7 or an alternate plan, and rail seems to be the number one

8 selection by all of the politicians in and around New York

9 to move it on to Long Island by rail, to move the stone.

10 Rail moves it without any interruption on the

11 highway. There is less pollution. Less fuel consumption.

12 It is just a much, much better mode of transportation.

13 Q. And how much? Can you do some sort of comparison of

14 how much stone or aggregate you can move in a rail car

15 versus a truck?

16 A. In a single rail car, up to 210 tons. Excuse me, 115

17 tons in a rail car. Whereas, in a truck it is going to be

18 reduced down to about 18 tons and eventually 15 tons.

19 MS BIBLOW Thank you

20 THE COURT Thank you very much You can step

21 down

22 (The witness was excused)

23 MS BIBLOW Gerard Drumm, please

24

25 GERARD DRUMM

1 In what really is an ideal site for a rail terminal.

2 Its northern border is the Long Island

3 Expressway. Its southern border is the Long Island Rail

4 Road.

5 There is an entrance on to the property from

6 Sills Road, which is a county road that has already been

7 developed with road infrastructure, a curbcut, a light

8 turn lanes both for ingress and egress.

9 It's located within the Town of Yaphank's Empire

10 Zone, which is a specifically designated 2,500-acre or

11 so within the Town of Brookhaven specifically earmarked

12 for industrial commercial development which, according to

13 the town planning department, a rail facility would be

14 consistent with.

15 Q. How do you know that that is the position of the town

16 planning department?

17 A. In January of this year Sills Road representatives

18 of Suffolk and Southern Rail Road and the New York and

19 Atlantic met with David Woods, who is the director of

20 planning for the town of Brookhaven and members of his

21 staff. We provided him with a schematic of the facility,

22 explained to him what we were intending to do with it and

23 why we were building it, and eventually in my view

24 received a fairly favorable reception to it.

25 The idea of one creating a rail facility was the

1 catalyst for other development inside their zone. Their  
2 Empire zone was attractive. The county officials and  
3 local officials have been grappling with ways of reducing  
4 truck traffic, not only on the Long Island Expressway but  
5 on congested local highways as well. This seemed to fit  
6 very well into what they felt was the appropriate use of  
7 this property.

8 And the reason Sills Road chose to do this.  
9 Aside from the location of the property from a business  
10 perspective, members of Sills Road and its partners have  
11 been involved for the last three years really in bringing  
12 stone into Long Island, much smaller facilities about two  
13 miles east of here. That facility as of the end of  
14 November was really no longer available to us and wasn't  
15 sufficient to meet our needs in the first place. It could  
16 only provide a small percentage of the stone that we need  
17 for related businesses

18 This facility was viewed as an opportunity to  
19 meet all the needs for construction aggregates that the  
20 members had. Stone would be provided by another member of  
21 the company, which was the quarry owner up in Saratoga  
22 Springs. And so it provided an opportunity for the  
23 members of Sills Road to obtain material for their  
24 businesses at a lower cost and also provided an  
25 opportunity to actually sell to generate third-party

1 sales.

2 THE COURT Generate what?

3 THE WITNESS Third-party sales

4 Sales to third parties

5 BY MS BIBLOW

6 Q. Mr. Drumm, the property that was purchased by Sills  
7 Road, when did you acquire that site?

8 A. Early May of this year.

9 Q. And what kind of zoning district is it in?

10 A. I believe it is L-1, which is light industrial and  
11 commercial.

12 Q. And are there any residences anywhere near, residence  
13 property anywhere near this?

14 A. This site was, as I said, it is 28 acres. To our  
15 knowledge it had never been developed. There was no use  
16 of it beforehand.

17 The nearest property owners are north of the  
18 Long Island Rail Road, roughly. Residence property owners  
19 are north of the Long Island Rail Road, roughly a quarter  
20 of a mile away from the property.

21 Q. What about the adjacent properties? What are they  
22 used for?

23 A. If you go to the east, I'm sorry, if you go to the  
24 west of the property, on the other side of Sills Road,  
25 much of that is also in the Empire Zone of the town. So

1 much of it actually is vacant land. There are some spots  
2 which have been developed and there are plans for other  
3 development, but that is all zoned in the Empire Zone and  
4 zoned for further commercial and industrial development.

5 To the east of us is again empty land. There is  
6 a plot. Directly to the east of us there is an easement  
7 for high tension wire, high-voltage towers.

8 Further east of that there is another 20 acres  
9 that is privately owned but undeveloped forever.

10 And further east of us there is about an 800  
11 acre county farm. But there is no residential development  
12 within sight of this facility.

13 Q. From whom did Sills Road acquire this? Who did you  
14 buy the property from?

15 A. We bought the property from Brookhaven Energy LP,  
16 which was a special purpose entity that was set up by  
17 American National Power.

18 American National Power is an independent energy  
19 producer. Their plan was to develop this site as a gas  
20 pipe --

21 MR. CUTHBERTSON: Your Honor, I mean they are  
22 claiming that their preempted local zoning is preempted.  
23 Now we have had about five minutes of local zoning  
24 patterns

25 I'm not sure what the relevance of that is.

1 prior owner was going to do or what the local land use  
2 scheme is in view of the claim of preemption.

3 MS BIBLOW: Well, we are trying to establish  
4 the property that is --

5 THE COURT: Keep your eye on what the real  
6 issues are as far as this application is concerned.

7 MS BIBLOW: I will move on, your Honor.

8 THE COURT: Sure.

9 BY MS BIBLOW.

10 Q. You mentioned in your answer -- well, withdrawn.

11 Can you explain to the court the genesis of the  
12 Brookhaven Rail Terminal, how that came about?

13 A. Yes.

14 As I said, this Sills Road Realty was formed by  
15 strategic partners, both of whom produce and have a need  
16 for stone. And some of its partners have been receiving  
17 stone by rail for several years at a smaller, adjacent site.  
18 A smaller site up the road.

19 This entity was formed as I said to be able to  
20 acquire this property and have it developed by a railroad  
21 as a rail terminal that would be used principally for  
22 bringing stone in from Upstate New York and distributing  
23 it on Long Island.

24 Q. You mentioned the other rail facility that you had  
25 been using

1 A. Right.

2 Q. First of all, who owns that facility?

3 A. As it turns out, we now know that the trackage,  
4 itself, is owned by the Long Island Rail Road.

5 The property surrounding it is owned by a  
6 company called Nicolla.

7 Q. Why is it that your strategic partner, as you called  
8 it, no longer can use there Nicolla facility?

9 A. There was a lease of that site that expired, I  
10 believe it is at the end of November, and it is not going  
11 to be renewed under any circumstances.

12 Q. How much stone?

13 THE COURT. I'm sorry I'm not understanding  
14 this witness

15 You are going to have to talk slower Please  
16 talk into the microphone.

17 Maybe the court reporter could read back the  
18 last question and answer

19 (The record was read )

20 Q. Can you tell the court who are the, you mentioned  
21 strategic partners Who are they?

22 A. Partners within Sillis Road?

23 Q. Yes

24 A. The partners within Sillis Road are a company called  
25 AD Collins, which is a large quarry operator and

1 construction company in upstate New York, in the Albany  
2 area.

3 Suffolk and Southern Rail Road, which was formed  
4 initially to become a common carrier. It never has become  
5 a common carrier but it was formed by people, individuals  
6 who have had experience in rail logistics and rail  
7 transportation.

8 Another one of the partners is an affiliate of  
9 Adjo Construction, which is in the construction business  
10 and has a need for stone in its businesses.

11 Another partner, the last partner actually, are  
12 two individuals who are in the asphalt business who have  
13 significant need for stone in the production of asphalt.

14 Q. You mentioned Suffolk and Southern Rail Road in your  
15 answer?

16 A. Yes.

17 Q. Could you explain to the court what that is and  
18 whether Suffolk and Southern -- well, first explain what  
19 that is.

20 A. Suffolk and Southern Railroad was formed to become a  
21 common carrier.

22 Suffolk and Southern made an initial filing with  
23 the STB to actually get authority to operate as a common  
24 carrier at the Nicolla site that I mentioned After that  
25 filing was made, and in fact after the STB had agreed to

1 give us exemption so that we could become a common  
2 carrier, we found out that the real estate interest in the  
3 lease that we thought we had, we didn't have

4 Q. Of which site?

5 A. Of the Nicolla site.

6 So we were going to operate, Suffolk and  
7 Southern was going to operate, as a common carrier at the  
8 smaller site, the Nicolla site. So we went to the STB for  
9 authority to do that.

10 It was granted, but then because of defects  
11 basically in our real estate business, our lease interest  
12 in that site, we actually asked the STB to hold that  
13 application in abeyance while we tried to correct the  
14 situation.

15 Q. What kind of defect are you talking about?

16 A. It turned out that the site it was actually owned by  
17 the rail site was actually owned by the Long Island Rail  
18 Road and there were some environmental issues

19 The Long Island Rail Road had apparently used  
20 that site for some period of time to dump batteries, and  
21 they were in the process of, either the process of  
22 cleaning it up or otherwise. But there was no way that we  
23 were going to be able to get a sufficient real estate  
24 interest in that site from the Long Island Rail Road.

25 Q. Did Suffolk and Southern ever request from the STB

1 approval to do any activities at the Sillis Road site?

2 A. At the Brookhaven Rail Terminal?

3 Q. Yes

4 A. Yes. Our plan was, after having gotten authority to  
5 act as a common carrier, that we were in fact going to be  
6 the entity that as a railroad that was going to construct  
7 and operate the Brookhaven Rail Terminal.

8 Once it became clear that the first application  
9 that we made had any connection with that plan, we then  
10 filed the application to operate, to then build and  
11 operate the Brookhaven Rail Terminal again as an exempt  
12 spur.

13 Q. You are talking about, as Suffolk and Southern?

14 A. As Suffolk and Southern.

15 Once it became clear that the first filing that  
16 we made and the problems with the real estate interest  
17 that we had at Nicolla could not be resolved, we informed  
18 the STB that we were withdrawing our application with  
19 respect to the Brookhaven Rail Terminal.

20 Q. Has Suffolk and Southern done

21 THE COURT. I just have a question. You have  
22 used the term we several times --

23 THE WITNESS. Yes.

24 THE COURT. I don't know who you are referring  
25 to.

1 THE WITNESS Suffolk and Southern  
2 In my capacity as CFO and general counsel of  
3 Sills Road Realty, I also act in a similar fashion for  
4 Suffolk and Southern Rail Road

5 THE COURT That is who you are referring to  
6 when you are referring to a single entity.

7 THE WITNESS Yes We, meaning Suffolk and  
8 Southern Rail Road in this case

9 THE COURT You don't have any financial  
10 interest in that or any officer position other than  
11 general counsel Is that what you are saying?

12 THE WITNESS Correct Yes I act in that  
13 capacity for them

14 Q. Now, has Suffolk and Southern ever done any  
15 construction activities at the Brookhaven Rail Terminal?

16 A. No. I mean, we recognize that --

17 Q. And if you can, be very clear about the we

18 A. I'm sorry

19 Suffolk and Southern, because we recognize that,  
20 Suffolk and Southern recognize that because of the  
21 problems with the lease, our lease of the Nicolla site, we  
22 realize that were not going to be in a position to obtain  
23 the common carrier status that would be necessary to build  
24 the Brookhaven Rail Terminal and operate it as an exempt  
25 spur.

1 going to be capable of providing the service that was  
2 expected, that we had to get in touch with an existing  
3 operating railroad in order to do that.

4 Q. Prior to entering into the railroad agreement with US  
5 Rail, which is Exhibit 7, did Sills Road have any  
6 discussions with representatives of the Town of  
7 Brookhaven?

8 A. Oh, yes.

9 Q. Would you tell the court about those?

10 A. Sure.

11 As I said, in January we met with David Woods,  
12 who is the town's director of planning. We also met in  
13 the subsequent month, February, with -- I wasn't at the  
14 meeting but I know the meeting took place -- with the  
15 county director of planning as well.

16 There was a meeting -- it was before  
17 construction was started, I think it was in May -- with  
18 the town supervisor as well as Mr. Foley, as well as with  
19 Ray Donnelly who is the director of economic development  
20 for the town

21 I think that was all the meetings that were held  
22 with the town

23 Q. Was there any discussions, in your meetings with the  
24 town, about needing town approval for this facility?

25 A. One of the things that we, Sills Road, Suffolk and

1 And so it was decided that in order to bring  
2 this plan to fruition we needed to, and the best way to do  
3 this was to work with an existing railroad.

4 At that time then Sills Road Realty contracted  
5 with, entered into a lease and operating agreement with US  
6 Rail in order to build, construct, and operate the  
7 Brookhaven Rail Terminal.

8 Q. Sir, I believe you have in front of you Plaintiff's  
9 Exhibit 7, which is the railroad operating agreement and  
10 property lease?

11 A. Yes

12 Q. Is that the agreement that Sills Road entered into  
13 with US Rail?

14 A. Yes. That's correct.

15 Q. And is it your understanding of that agreement that  
16 US Rail was the entity that was operating, constructing  
17 and operating, the Brookhaven Rail Terminal?

18 A. Yes.

19 Q. Was Sills Road in any way constructing or operating  
20 the Brookhaven Rail Terminal?

21 A. No.

22 Q. How was it that you came to know about US Rail?

23 A. I understand that some of the principals of Sills  
24 Road have had previous business dealings with US Rail, and  
25 so once it became clear that Suffolk and Southern was not

1 Southern actually, had prepared initially was legal memos  
2 from our STB counsel as well as from Farrell Fritz, which  
3 were delivered to the town attorney's office in I believe  
4 late June, which explained in great detail our  
5 understanding of what the legal circumstances were with  
6 respect to STB or the federal preemption of  
7 local environmental requirements, as well as the fact that  
8 this facility was going to be an exempt spur under the  
9 federal law.

10 Q. Did the town ever respond to the receipt of this memo  
11 describing the preemption?

12 A. Not that I'm aware of.

13 Q. Sir, what I would like to do is give you what has  
14 been premarked as Plaintiff's Exhibits 1 through 6, I  
15 believe

16 Actually, I want to give you Exhibits 1 through  
17 5 first.

18 Sir, have you ever seen these tickets before?

19 A. Yes.

20 Q. Can you tell the court what Exhibits 2 through 5 are?

21 A. They are a series of Town of Brookhaven appearance  
22 tickets, virtually identical except for the party who's  
23 named in them. And they were tickets that were issued to  
24 Sills Road Realty, Suffolk and Southern Rail Road, Adjo  
25 Contracting, Pratt Brothers, and Watral Brothers.

1 Q. Who are Pratt and Watral?  
 2 A. Pratt and Watral are I believe subcontractors of Adjo  
 3 Contractors  
 4 Q. Were they doing work at the Brookhaven Rail Terminal?  
 5 A. Yes. They were doing some excavation and I believe  
 6 trucking work  
 7 MS BIBLOW Your Honor, I would ask that these  
 8 series of tickets, marked collectively as Exhibit 1  
 9 through 5, be entered into evidence  
 10 MR CUTHBERTSON, No objection.  
 11 THE COURT Admitted  
 12 (Plaintiff Exhibit 1 through 5 in evidence )  
 13 BY MS BIBLOW  
 14 Q. Sir, when were these tickets served?  
 15 A. If memory serves me, they were served over a series  
 16 of days. I think it was from October 12 through October  
 17 16.  
 18 Q. And at the time that they were served, had the STB  
 19 entered its October 12 ruling regarding the cease and  
 20 desist order?  
 21 A Yes.  
 22 Q. And to your knowledge, at the time that decision was  
 23 issued by the STB was the town participating in the STB  
 24 proceeding?  
 25 A. They were not formally an intervenor, as I understand

1 It, but they certainly were aware of the proceeding since  
 2 it was in part engendered by their letter to the STB.  
 3 Q. Who served these tickets?  
 4 A. The town inspector, Tohill, who I understand is an  
 5 inspector with the town attorneys office.  
 6 Q. You mentioned that the tickets there are a series of  
 7 tickets And I believe, if you look at them carefully,  
 8 there are nine tickets issued to everybody except Adjo  
 9 And Adjo has eight tickets?  
 10 A. I think it was everybody but Watral. Watral had  
 11 eight, and all the other tickets there were nine tickets  
 12 to each of those entities, all of which cited the same  
 13 violations  
 14 Q. And the violations that are noted in those tickets,  
 15 first of all when are those tickets returnable?  
 16 A The 13th of December, I believe.  
 17 Yes, all them are returnable on the 13th of  
 18 December  
 19 Q. Sir, to your knowledge what are the issues or the  
 20 code provisions that are being raised in these tickets?  
 21 A. Most of them, almost all of them, had to do with  
 22 violation of zoning ordinances  
 23 Mining without permits. Not posting a bond  
 24 against mining, I believe Failure to have a permit for  
 25 tree removal There was no building permit. I believe

1 something related to site plan approval. No CEOs.  
 2 Nonpermitted use.  
 3 Q. Sir, is it clear in your mind that none of these  
 4 tickets deal with health and safety issues?  
 5 A. No.  
 6 MR CUTHBERTSON Objection  
 7 THE COURT Overruled  
 8 BY MS. BIBLOW  
 9 Q Is that your understanding that none of these tickets  
 10 do that?  
 11 A. No. They all appear to be related to  
 12 THE COURT You are asking the question again  
 13 MS BIBLOW I thought you said overruled. I'm  
 14 sorry  
 15 THE COURT No. I sustained the objection and I  
 16 struck the answer  
 17 MS BIBLOW I'm sorry  
 18 MR CUTHBERTSON Actually, in deference to Ms.  
 19 Biblow, you did say overruled  
 20 THE COURT Did I say overruled? I struck the  
 21 answer  
 22 THE WITNESS I'm sorry  
 23 THE COURT Do you want to rephrase your  
 24 question? You can go ahead  
 25 BY MS. BIBLOW

1 Q. Is it your understanding that all of the tickets that  
 2 were issued deal with site plan and zoning concerns?  
 3 A. Yes.  
 4 Q. Do any of the tickets to your knowledge concern  
 5 health and safety issues?  
 6 MR CUTHBERTSON Objection  
 7 THE COURT Sustained  
 8 MS BIBLOW I'm sorry I didn't hear what you  
 9 said, your Honor  
 10 THE COURT Sustained  
 11 BY MS BIBLOW  
 12 Q. What have you done as a result of the issuance of  
 13 these tickets?  
 14 A. Well, obviously we take issuance of the tickets quite  
 15 seriously.  
 16 These violations are we risk potential criminal  
 17 prosecution as well as fines. These tickets essentially  
 18 came in after we had been notified by the STB that we were  
 19 no longer permitted to work at the city. But certainly we  
 20 have taken these tickets very seriously and we risk  
 21 criminal prosecution for something that we don't believe  
 22 for violations we don't believe we committed.  
 23 Q. Can you tell the court what activities Sillan Road has  
 24 taken, or its partners have taken with respect to being  
 25 in the stone business and activities that you intend to do

1 at the Brookhaven Rail Terminal  
2 A. With respect to the stone business. As I said, we  
3 continue, we have set up a sister company called Sills  
4 Materials LLC, which is owned by the same entities that  
5 own Sills Road Realty, to be wholesale stone distributor  
6 of stone on Long Island

7 We have entered into an agreement with our  
8 upstate partner.

9 Q. Who is we?

10 A. I'm sorry Sills Materials has entered into an  
11 agreement that Sills material, has been operating under  
12 really since April of this year to supply stone to Long  
13 Island from quarries in upstate New York.

14 Our upstate quarry partner has undertaken to  
15 lease a fleet of cars, roughly 104 cars, that would be  
16 used to, has been used to transport stone down to Long  
17 Island from the quarries.

18 We have been providing and selling aggregate  
19 stone to principally to our partners for related entities.

20 We have been actively engaged in what we expect  
21 to be engaged in, which is the wholesale sale of  
22 aggregates on Long Island.

23 Q. Can you describe these rail cars that you have  
24 mentioned that you have gotten

THE COURT Do you really need this testimony

1 for purposes of the application that is before the court?

2 MS BIBLOW I believe it goes to irreparable  
3 harm, your Honor

4 THE COURT Okay Proceed

5 MR CUTHBERTSON If I can be heard  
6 Your Honor, it is an upstate quarry That is  
7 not before the court. I don't know how the upstate  
8 quarry's lease for railroad cars goes to the issue about  
9 irreparable harm in this action

10 THE COURT I will permit it Go ahead

11 Try to get some focus on your examination It  
12 is a very limited purpose that were here for We are not  
13 trying the whole case

14 MS BIBLOW I understand that.

15 THE COURT The hopes and aspirations of the  
16 lead plaintiff I really don't know what you have in this  
17 proceeding

18 MS BIBLOW In our view, your Honor, we have a  
19 dual obligation in order to get preliminary relief. To  
20 show likelihood of success, which we think is very clear  
21 with respect to the STB who we are in front of, and these  
22 tickets should be held in abeyance, or shouldn't have been  
23 issued actually

24 And we also have to show irreparable harm This  
25 is activities that has been undertaken in order to go into

1 the business at the Brookhaven Rail Terminal  
2 These are expenses that have been incurred  
3 These are contracts that have been entered into, there is  
4 an expectation that the business will start in March or  
5 April And these are all part and parcel of irreparable  
6 harm

7 If Mr Cuthbertson wants to stipulate to it,

8 fine

9 THE COURT I said proceed

10 MS BIBLOW I'm sorry I thought you meant to  
11 respond

12 BY MS BIBLOW

13 Q. Mr Drumm, if you can very briefly talk about, and I  
14 do mean briefly, talk about the impact of the tickets that  
15 have been issued to your business and your ability to  
16 develop a Brookhaven Rail Terminal

17 A. As I said, the first impact

18 MR CUTHBERTSON Objection your Honor It was  
19 asked and answered already.

20 Miss Biblow asked about what the tickets meant  
21 to Mr Drumm and he said it is a criminal prosecution He  
22 is afraid of that I think it was answered already

23 THE COURT Haven't you covered that?

24 MS BIBLOW Your Honor, I think there are other  
25 aspects to it, If the court would

1 THE COURT Do you want to focus in on an aspect  
2 that you haven't covered?

3 MS BIBLOW Yes, with respect to the economic  
4 and noneconomic issues relating to that

5 THE COURT Please go ahead

6 MS. BIBLOW Thank you

7 BY MS BIBLOW

8 Q. As I said, if you can briefly talk about those  
9 impacts as opposed to just the criminal proceedings?

10 A. Well, again, the fact that the town is attempting to  
11 stop the construction of this site, of this facility, is  
12 going to adversely affect our Sills Road Materials  
13 ability to be able to market its wholesale distribution  
14 services to third parties.

15 It will adversely affect

16 THE COURT Mr. Drumm, you understand that the  
17 STB has issued the cease and desist order

18 THE WITNESS That's correct

19 THE COURT Is there anything in these  
20 violations, the cease and desist, doing anything?

21 THE WITNESS I'm sorry I take a ticket that  
22 says come into a court and you may be subject to a  
23 criminal violation, to be a very serious

24 THE COURT You are a lawyer, I'm asking you a  
25 legal question Do you see anything that says cease

1 desist?  
 2 THE WITNESS There is no specific cease and  
 3 desist  
 4 THE COURT However, the STB has issued a cease  
 5 and desist order  
 6 THE WITNESS Yes That's right.  
 7 THE COURT Isn't that the reason why you are  
 8 not proceeding with your construction?  
 9 THE WITNESS No Frankly, I think if the STB  
 10 had not issued a cease and desist order, we would be  
 11 concerned about moving forward with ongoing violations of  
 12 town --  
 13 THE COURT But that is my point They have  
 14 entered a cease and desist order  
 15 THE WITNESS That is correct  
 16 THE COURT And you have taken that to the  
 17 circuit and they have said we are not going to review it  
 18 because that is not a final order  
 19 THE WITNESS Correct  
 20 THE COURT So it not really these tickets that  
 21 are stopping anything, is it?  
 22 THE WITNESS No  
 23 MS BIBLOW Your Honor, if I may be heard on  
 24 this point  
 25 THE COURT I just ask the witness questions I

1 through 5 in evidence? I'm sure you want to do that  
 2 MS BIBLOW I'm sorry I did  
 3 THE COURT Any objection?  
 4 MR CUTHBERTSON I object to the relevance of  
 5 it. I don't know how Mr. Drumm is able to authenticate it  
 6 because he hasn't indicated that he is a principal of  
 7 Empire Asphalt  
 8 THE COURT With Exhibits 1 through 5 is there  
 9 any issue? For whatever relevance they may have in this  
 10 hearing  
 11 MR. CUTHBERTSON: You know what your Honor?  
 12 For the hearing I will not object. I withdraw the  
 13 objection  
 14 THE COURT Thank you very much Admitted  
 15 BY MS BIBLOW  
 16 Q. Now we are on Plaintiff's Exhibit  
 17 MS BIBLOW Just to be clear all the tickets  
 18 are in?  
 19 MR CUTHBERTSON All the tickets are in  
 20 No objection your Honor  
 21 THE COURT Thank you Admitted  
 22 (Plaintiff Exhibit 6 in evidence.)  
 23 BY MS BIBLOW  
 24 Q. Mr. Drumm, when were the tickets issued to Empire  
 25 A. These were issued to Empire around November 14

1 will give you ample opportunity to be heard at the end of  
 2 the case  
 3 BY MS BIBLOW  
 4 Q. Mr Drumm, who is Empire Asphalt?  
 5 A. Empire Asphalt is an asphalt be company that is owned  
 6 by several of the partners of Sills Road Realty.  
 7 It acquired the asphalt operation's previous  
 8 company in April of this year. And it is one of the  
 9 users, one of the purchasers, of stone from Sills  
 10 Materials.  
 11 Q. And after the commencement of this action and the  
 12 filing of the order to show cause, was Empire Asphalt  
 13 issued tickets by the Town of Brookhaven?  
 14 MR CUTHBERTSON: Objection, your Honor I  
 15 don't believe that Empire Asphalt is relevant to this  
 16 action They are not a party to it and I don't see the  
 17 relevance  
 18 THE COURT I will permit the testimony  
 19 MR CUTHBERTSON Okay  
 20 A. I'm sorry? Were they issued tickets?  
 21 BY MS BIBLOW  
 22 Q. Yes. Were they issued tickets?  
 23 A. Yes, they were.  
 24 Q. I would like you to look at premarked Exhibit 6.  
 25 THE COURT Why don't you offer Exhibits 1

1 Q! And do you see the date of the tickets, Sir? They  
 2 are September 26, '07  
 3 Do you know what the delay was in issuing the  
 4 ticket so far as the sixth ticket?  
 5 A. No. I have no idea.  
 6 Q. Who served the sixth ticket on behalf of the town?  
 7 A. I understand that they were served by Inspector  
 8 Tohill.  
 9 Q. Is that the same person that served the other  
 10 tickets, Exhibit 1 through 5?  
 11 A. Yes.  
 12 Q. Could you explain the connection between Empire  
 13 Asphalt, Sills Road Realty, and Adjo, Watral, and Grady  
 14 who were all plaintiffs in this matter?  
 15 A. Well, Empire Asphalt is owned by entities that are  
 16 owned by -- share common ownership with Pratt Brothers,  
 17 with Watral Brothers, with Adjo Contracting  
 18 Q. And to your knowledge  
 19 A. Who are all owners of Sills Road  
 20 Q. And to your knowledge was the Town of Brookhaven  
 21 aware of that interconnection of ownership?  
 22 A. Yes.  
 23 MR CUTHBERTSON: Objection  
 24 THE COURT: I will sustain  
 25 BY MS BIBLOW

1 Q. Sir, does the Town of Brookhaven use the Empire  
2 Asphalt facility, itself, to obtain asphalt?

3 MR. CUTHBERTSON. Objection.

4 THE COURT. Overruled.

5 A. Yes.

6 BY MS. BIBLOW

7 Q. And did to your knowledge Empire have to provide a  
8 bid document to the town in order to get this business?

9 A. Yes.

10 Q. I would like to show you what has been premarked as  
11 Exhibit 12.

12 MR. CUTHBERTSON. Your Honor, looking at this I  
13 believe now were going completely far afield.

14 The fact that one arm of Brookhaven town  
15 government may use this asphalt plant, and to attribute  
16 that knowledge, that there is some connection in what is  
17 probably, this is a board matter, to expect that an  
18 investigator in the town attorneys office is going to have  
19 knowledge of this is really ludicrous. And I believe  
20 completely far out.

21 THE COURT. I believe counsel is trying to  
22 establish knowledge on behalf of the town which is a  
23 single entity. Help him.

24 I will permit it.

25 MR. CUTHBERTSON. Okay.

1 Exhibit 12 into evidence because it does give knowledge

2 THE COURT. You moving this into evidence?

3 MS. BIBLOW. Yes.

4 MR. CUTHBERTSON. There is no foundation, your

5 Honor.

6 She hasn't indicated that Mr. Drumm prepared  
7 this, that he signed it, that his signature is anywhere on  
8 this document.

9 THE COURT. What are you seeking to establish by  
10 this document?

11 MS. BIBLOW. I'm seeking to establish that the  
12 town had knowledge of who the entity was with respect to  
13 Empire in April, your Honor, several months before they  
14 decided to issue tickets to Empire, after they were aware  
15 of the interconnection with the plaintiffs and after they  
16 were aware that their own attorney in this court said that  
17 they would not issue any other tickets.

18 THE COURT. What is it exactly in this 4-page  
19 document that establishes this relationship?

20 MS. BIBLOW. In you look on the last page, sir,  
21 it talks about all of the members of the entities. These  
22 are all the same people that are Pratt, Watral, Bonjourno  
23 was Adjo.

24 And the town uses this facility to get their  
25 asphalt, so they are well aware of who Empire is. This is

1 THE COURT. You have your objection.

2 MR. CUTHBERTSON. Thank you, your Honor.

3 BY MS. BIBLOW

4 Q. Mr. Drumm, can you tell us what Exhibit 12 is?

5 A. Yes. It is a Town of Brookhaven transactional  
6 disclosure form.

7 Q. And in that document does that explain who the  
8 partners are of Empire?

9 A. Yes, it does.

10 There was a supplemental filing made with the  
11 town which outlined in detail both the corporate owners of  
12 Empire and who their individual owners were.

13 Q. And when was this submitted to the town?

14 A. This was submitted in April of 2007.

15 Q. Sir, can you just briefly describe, and I do mean  
16 briefly describe, how long the Empire facility has been in  
17 existence and whether or not, in your knowledge as an  
18 attorney, it requires any permits to operate.

19 MR. CUTHBERTSON. Excuse me, your Honor. If I  
20 can just stop there.

21 If Miss Biblow is no longer talking about this  
22 and has not offered it into evidence, I would object to  
23 this particular document and the line of questioning and  
24 ask that it be stricken.

25 MS. BIBLOW. Then I will ask the court to move

1 a facility that has operated for over 50 years, sir.

2 THE COURT. Where are you seeing? I see a James  
3 Pratt III, and an individual Thomas Pratt Watral.

4 Is that what you are relying on?

5 MS. BIBLOW. That is correct. Those are the  
6 same people who are the principals on Watral, Adjo, and of  
7 Pratt, sir.

8 THE COURT. Who is Adjo here?

9 MS. BIBLOW. Mr. Bonjourno.

10 THE COURT. I will permit it for whatever  
11 relevance it may have.

12 Objection overruled.

13 MR. CUTHBERTSON. Okay.

14 (Plaintiff Exhibit 12 in evidence)

15 BY MS. BIBLOW:

16 Q. Mr. Drumm, do you have a connection to Empire?  
17 You have already testified you have a connection to  
18 Empire. How many years has Empire been in operation?

19 A. Empire itself started operation in April of 2007, the  
20 year when it acquired the plant.

21 Q. And how long has the plant been in operation?

22 A. We understand the plant has been in operation

23 MR. CUTHBERTSON. Objection. The witness is  
24 testifying he understands, not saying that he has any  
25 direct knowledge of how long it has been in existence.

1 THE WITNESS Well, I have --  
 2 THE COURT Do you have any personal knowledge?  
 3 THE WITNESS I do, actually, in terms of --  
 4 THE COURT Overruled  
 5 THE WITNESS -- in doing due diligence I was  
 6 involved in forming Empire Asphalt and in representing  
 7 them in the acquisition of the assets  
 8 For the due diligence that we undertook, I  
 9 undertook, in connection with that purchase, it was clear  
 10 that the plant had been operated by the previous owners  
 11 since 1985. The previous owners were in business and  
 12 various records indicated that the plant had actually been  
 13 originally built and in continuous operation since 1969  
 14 THE COURT Did you say 1969?  
 15 THE WITNESS 1969  
 16 BY MS BIBLOW  
 17 Q: To your knowledge in representing the entity that  
 18 purchased this, had Empire Asphalt ever received any other  
 19 ticket relating to nonconforming use such as the ticket  
 20 that was issued in those other tickets and Exhibit 6?  
 21 A: No, we didn't see anything in their file indicating  
 22 any tickets  
 23 And we got representations in fact from the  
 24 seller that there were no violations.  
 25 Q: Can you explain to the court very briefly what the

1 BY MS BIBLOW  
 2 Q: If I may shortcut your answer as it is in your  
 3 understanding that this is a grandfathered use, as that  
 4 term is used?  
 5 A: That is correct.  
 6 Q: And that you don't have to go back and get permits  
 7 once the zoning has changed if it is a preexisting  
 8 nonconforming use?  
 9 MR CUTHBERTSON: Objection.  
 10 THE COURT: Yes, I'm going to sustain that  
 11 question.  
 12 BY MS BIBLOW  
 13 Q: Mr Drumm, what I would like to do is talk to you a  
 14 little bit, or question you a little bit, about the STB  
 15 proceeding  
 16 A: Yes.  
 17 Q: If you could, tell the court basically the genesis of  
 18 us that proceeding and where it is now.  
 19 A: As I mentioned earlier, the first filing that was  
 20 made with the STB was made on behalf of Suffolk and  
 21 Southern Rail Road to obtain operating authority as the  
 22 common carrier with respect to the rail site at Nicolia.  
 23 There was a subsequent filing with the STB  
 24 again by Suffolk and Southern with respect to the  
 25 Brookhaven Rail Terminal. When I came into the case that

1 nonconforming preexisting use means  
 2 A: Essentially it is, as I understand it is a  
 3 commercial, essentially a commercial use of property that  
 4 was later zoned for other than that use.  
 5 And governments aren't permitted to take  
 6 property without compensation. So as a consequence, when  
 7 zoning ordinances change --  
 8 MR CUTHBERTSON Your Honor, if I can First,  
 9 I think the definition is probably wrong, and I don't know  
 10 that it is really relevant  
 11 THE COURT I will permit it  
 12 I don't know what relevance all this has  
 13 You seem to be ignoring the reason for  
 14 incorporating You form a separate corporation for the  
 15 purpose of limiting liability What relevance is it that  
 16 similar individuals happen to have other corporations?  
 17 They are separate entities  
 18 MS BIBLOW I understand what you are saying,  
 19 your Honor, but our view is that the town was very well  
 20 aware of the interconnective entities at the time it  
 21 issued this ticket.  
 22 THE COURT We don't have a jury here so I'm  
 23 going to permit you to make your record But try to keep  
 24 your eye on the ball here  
 25 MS BIBLOW Thank you

1 Suffolk and Southern was not going to be able to correct  
 2 the defect in the title to the Nicolia site. It withdrew  
 3 the applications, both applications and --  
 4 THE COURT You said both applications were  
 5 withdrawn?  
 6 THE WITNESS Yes.  
 7 A: And Suffolk and Southern now served only as an  
 8 investor in Sills Road Realty. It is not an operating  
 9 entity in any way, shape, or form in the manner of an  
 10 investor.  
 11 I guess it was on October 4, in response to a  
 12 Newsday article and a letter of inquiry from the owner of  
 13 Brookhaven, Sills Road and Suffolk and Southern received a  
 14 letter from Melvin Clemens, who is the director of  
 15 enforcement at the STB.  
 16 MR. CUTHBERTSON: Your Honor, Mr. Drumm is now  
 17 really essentially testifying in the narrative. And I  
 18 understand the wide latitude that the court has to hear  
 19 testimony under these circumstances and Miss Biblow has to  
 20 establish a record, I understand and respect that, but all  
 21 of this information, all of this characterization is a  
 22 part of the STB record, so I don't know that there is a  
 23 need to have Mr. Drumm recite his characterization of the  
 24 STB proceeding.  
 25 THE COURT: Do you have any records you are

1 going to be submitting with regard to what is happening in  
2 that proceeding?

3 MS BIBLOW Your Honor, we have already  
4 submitted, and it is Joint Exhibit 1 which you have  
5 entered into evidence

6 I will sum up in a couple of questions this  
7 witness, if I might

8 THE COURT Proceed  
9 BY MS BIBLOW

10 Q. Sir, is Sills Road Realty and US Rail before the STB  
11 in connection with getting permission to operate  
12 Brookhaven Rail Terminal?

13 A. Yes, we are.

14 MS. BIBLOW No further questions

15 THE WITNESS Thank you

16 THE COURT Okay Cross-examination

17

18 CROSS-EXAMINATION

19 BY MR. CUTHBERTSON

20 Q. Mr. Drumm, you testified before that legal memorandum  
21 were produced and provided to the town

22 Your counsel didn't bring them here today, and  
23 you haven't submitted them to the court, have you?

24 A. No.

25 Q. The you mentioned that Suffolk and Southern had made

1 a filing with the STB?

2 A. Correct.

3 Q. Did you have an attorney that represented you in  
4 that?

5 A. Yes, we did.

6 Q. And who was that?

7 A. Name is John Heffner.

8 Q. And you referred to two filings. One was the Nicola  
9 filing, is that correct?

10 A. Yes.

11 Q. And then the other was for what you term the  
12 Brookhaven Rail Terminal Correct?

13 A. Yes.

14 Q. With respect to the Brookhaven Rail Terminal You  
15 submitted that in May of 2007 Is that correct?

16 A. I think, yes, I think that's correct.

17 Q. And at the time you indicated that Suffolk and  
18 Southern had reached an agreement with Sills Road Realty  
19 for the lease and operation of the rail track in Yaphank,  
20 New York. Correct?

21 A. Yes. Subject to our ability, Suffolk and Southern's  
22 ability to perform that agreement, yes.

23 Q. Did it say anything to that effect in the submission  
24 you made to the STB? Withdrawn

25 You just mentioned some subject-to language

1 about subject to Suffolk and you said ability to perform?

2 A. Right

3 Q. Did you couch your STB filing in those words?

4 A. No.

5 Q. So you said that Suffolk and Southern and Sills had  
6 reached a lease agreement when you submitted in May of  
7 2007 Correct?

8 MS BIBLOW Objection

9 THE COURT Was that an objection?

10 MS BIBLOW He never said it was a lease  
11 agreement, sir.

12 MR CUTHBERTSON Okay

13 THE COURT Would you like the transcript read  
14 back?

15 MR CUTHBERTSON Yes. I just want to grab an  
16 exhibit I apologize

17 In the interest of time your Honor, I can

18 characterize

19 THE COURT Do you say want to rephrase

20 MR. CUTHBERTSON I will move along, I don't  
21 think it is necessary, your Honor, I apologize

22 BY MR. CUTHBERTSON

23 Q. You testified that you had a number of meetings with  
24 the Town of Brookhaven? Correct?

25 A. Yes, sir

1 Q. And prior to July 2007 your intention was to have  
2 Suffolk and Southern establish a railroad and operate at  
3 the Brookhaven Rail Terminal?

4 A. Build and operate the terminal, yes, that is correct.

5 Q. That changed, however, at some point in July 2007?

6 A. Yes. Around that time.

7 Q. And is it fair to say that the Suffolk and Southern  
8 application was based on a different legal theory than US  
9 Rail is pursuing?

10 A. No. Not really.

11 Q. Okay In the case of US Rail do you know whether US  
12 Rail has ever submitted an application to the STB?

13 A. In terms of what?

14 Q. With respect to getting authority to build or

15 operate what?

16 Q. To operate at the Brookhaven Rail Terminal?

17 A. Oh. Sorry. No.

18 Q. But in the case of Suffolk and Southern there was a  
19 submission, wasn't there?

20 A. Yes, that's correct.

21 Q. So they were made under two different legal theories,  
22 won't you believe, based on one had an application, one  
23 did not?

24 A. One really had to do with the fact that I wasn't  
25 clear yet that Suffolk and Southern really had authority

1 as a carrier because of the fact that the first filing had  
2 some defects in it. And so, as I said, the reason we then  
3 turned to US Rail --

4 Q. Let me stop you. So you needed to get authority for  
5 Suffolk and Southern --

6 MS BIBLOW: Can we let the witness finish?

7 THE COURT: Did you finish your response?

8 THE WITNESS: No.

9 We then turned to US Rail, because of that  
10 problem, because they are an existing Class III carrier  
11 BY MR. CUTHBERTSON:

12 Q. So Suffolk and Southern needed to go to the STB to  
13 get authority to become a carrier. Is that correct?

14 A. Yes. That's correct.

15 Q. And US Rail didn't because they are a Class III  
16 carrier. Correct?

17 A. Yes. That's correct.

18 Q. And you had meetings in the spring of 2007, at a time  
19 when Suffolk and Southern was the entity that was going to  
20 operate this facility. Correct?

21 A. That is correct.

22 Q. Did you ever go back to the town and say we have  
23 changed our plans, we have changed our legal theory, we  
24 are now going to operate as US Rail?

MS BIBLOW: Objection.

1 THE COURT: Overruled.

2 A. Did we ever go back and tell them that we were going  
3 to use US Rail?

4 BY MR. CUTHBERTSON:

5 Q. Correct.

6 A. No.

7 Q. You allege that you are going to be harmed as a  
8 result of the construction not moving forward at this  
9 facility. Correct?

10 A. Yes.

11 Q. And currently, stone aggregates comes to Long Island,  
12 I think you have indicated, by a single, the majority of  
13 it by a single vendor. Correct?

14 A. Yes. As far as I'm aware, yes.

15 Q. So aggregate does get here to Long Island for  
16 construction. Right?

17 A. Yes.

18 Q. And it makes its way here by truck. Correct?

19 A. Some by truck and some by barge.

20 Q. So you want to position yourself to be a competitor  
21 with this large vendor, correct?

22 A. Correct. As well as provide for our own needs. More  
23 constant actually.

24 Q. Now, you also made an application to the Second  
25 Circuit for a preliminary injunction. Correct?

1 A. That's correct.

2 Q. You had a different claim of harm in front of the  
3 Second Circuit. Isn't that correct?

4 MS BIBLOW: Objection.

5 THE COURT: I will permit it.

6 BY MR. CUTHBERTSON:

7 Q. In the filing with the Second Circuit, you indicated

8 that the harm you were suffering was that AT&Tiders were  
9 trespassing on the facility. Is that correct?

10 A. That's part of it. Yes.

11 Q. And that you needed the ability to grade the facility  
12 to take away those hills. Correct?

13 A. Yes.

14 Q. You also said that trespassers were coming on and  
15 discharging shotguns on the site.

16 A. That's correct.

17 Q. But you are not making those arguments in this case,  
18 are you?

19 A. We haven't raised them. No.

20 Q. You have indicated that you have done some  
21 substantial marketing in connection with the site.

22 A. Yes.

23 Q. Have you produced a brochure?

24 A. No.

25 Q. Have you taken out any advertisements in a trade

1 journal?

2 A. No. That would be foolhardy, not knowing when  
3 exactly the site was going to be available for use.

4 Q. Well, you have indicated that you have undertaken  
5 substantial marketing. Correct?

6 A. Yes. We have gone out and talked to any number of  
7 people who are interested in acquiring stone.

8 Q. But you haven't developed a web site?

9 A. No, we have not done that.

10 Q. To your knowledge is the Empire Zone a zoning  
11 designation in the Town of Brookhaven?

12 A. I'm not sure if it is a zoning designation, although  
13 I understand it applies to industrial and commercial  
14 developments.

15 The Empire Zone, as I understand it, is a  
16 especially-designated site within the town where certain  
17 estate and local tax breaks are available to businesses  
18 that built in that particular zone.

19 MR. CUTHBERTSON: No further questions, your  
20 Honor.

21 THE COURT: Any further questions of this  
22 witness?

23 MS. BIBLOW: Nothing further, your Honor.

24 THE COURT: Thank you very much. You can step  
25 down.

1 (The witness was excused )  
 2 THE COURT I think we will break for the day  
 3 How many more witnesses do you have?  
 4 MS BIBLOW I have no further witnesses, your  
 5 Honor  
 6 THE COURT Okay  
 7 MR CUTHBERTSON I have one witness who would  
 8 be brief. On the order of five minutes, ten minutes.  
 9 THE COURT Okay

11 BRIAN TOHILL

12 called by the Defense, having been first duly  
 13 sworn/affirmed, was examined and testified as  
 14 follows

16 DIRECT EXAMINATION

17 BY MR CUTHBERTSON

18 Q. Mr Tohill, by whom are you employed?  
 19 A. Town of Brookhaven.  
 20 Q. What is your title?  
 21 A. Town investigator.  
 22 Q. And how long have you been employed by the Town of  
 23 Brookhaven?  
 24 A. 11 years  
 25 Q. And can you quickly describe what your duties are as

1 a town investigator?  
 2 A. Town investigator works in the Town Attorneys office.  
 3 And we respond to complaints received by the Town  
 4 Attorneys office. These complains normally involve  
 5 violations of the town code.  
 6 Q. I show you what has been marked as Defendant's  
 7 Exhibit A.  
 8 Can you tell me what those are  
 9 A. Photographs of the site known to me as the Sills Road  
 10 site.  
 11 Q. And when were they taken?  
 12 A. These were taken on October 4, 2007.  
 13 Q. And do they fairly and accurately depict the  
 14 conditions at the Sills Road site on October 4, 2007?  
 15 A. Yes, they do  
 16 MR CUTHBERTSON I would move those into  
 17 evidence  
 18 THE COURT Any objection?  
 19 MS BIBLOW No objection, your Honor  
 20 THE COURT. Admitted for purposes of this  
 21 hearing  
 22 (Defense Exhibit A in evidence )  
 23 BY MR CUTHBERTSON  
 24 Q. Can you generally describe what the photos depict.  
 25 A. The photos generally depict the front entrance of the

1 premises. Some equipment that was stored on the premise  
 2 piles of material, sand on the premise  
 3 Some darker materials also photographed. A tree  
 4 stump. Some more equipment and trailers. A screening  
 5 machine. And several holes that were dug on the premise.  
 6 Q. And for what purpose were the photos taken?  
 7 A. An investigation into the activity on the site.  
 8 Q. And did you issue tickets as a result of your  
 9 investigation?  
 10 A. Yes, I did.  
 11 Q. And do you have an idea how much land has been  
 12 cleared on the site at this point?  
 13 A. It was determined that it was generally upwards of 18  
 14 acres.  
 15 Q. Any idea how much material has been removed from the  
 16 site?  
 17 A. It wasn't clear to me, or I couldn't make a clear  
 18 determination as to how much material was removed.  
 19 There was quite a good amount of material on the  
 20 site, and there were several holes on the site. Large  
 21 holes.  
 22 Q. Do you know if yours is the only agency that has  
 23 issued tickets with respect to this violation?  
 24 A. No, I'm not the only agency.  
 25 Q. What other agency has issued tickets?

1 A. The DEC also issued summonses.  
 2 Q. Do you know what they were for?  
 3 A. They were for illegal mining activity on the site.  
 4 Q. Do you know what the status of those tickets are?  
 5 A. I did not know. No.  
 6 Q. Let me ask you; there is an entity named US Rail?  
 7 Did you issue tickets to them?  
 8 A. No, I did not.  
 9 Q. And were you aware that they were affiliated with the  
 10 Sills Road site?  
 11 A. Yes, I was.  
 12 Q. And why didn't you issue tickets to US Rail?  
 13 A. I could not find any corporate record or corporate  
 14 information regarding US Rail within the State of New  
 15 York.  
 16 Normally when I issue summonses to a corporate  
 17 entity that has a violation located within the town of  
 18 Brookhaven, I do a search either through Suffolk County or  
 19 the State of New York.  
 20 I could not find anywhere information regarding  
 21 US Rail within the state.  
 22 Q. And is that what stopped you from issuing tickets to  
 23 US Rail?  
 24 A. Yes.  
 25 Q. Why does that stop you from issuing tickets to US

1 Rail?  
 2 A I couldn't reach them.  
 These are violations, they are normally  
 violations of misdemeanors, normally we just reach from  
 5 within Suffolk County and we go to just one county over as  
 6 far as service  
 7 Q. I would ask you to take a look at, it should be in  
 8 front of you, Plaintiff's Exhibit 6  
 9 Do you recognize those?  
 10 A. Yes, I do.  
 11 Q. What are they?  
 12 A. These are appearance tickets issued to Empire  
 13 Asphalt.  
 14 Q. And you issued those tickets Correct?  
 15 A. Yes, I did.  
 16 Q. And was their issuance based on a complaint?  
 17 A. Yes, it was.  
 18 Q. And did you, were you the one who investigated that  
 19 complaint?  
 20 A. Yes, I was.  
 21 Q. And at the time you recorded that complaint, you  
 22 investigated that complaint, did you know of any  
 23 connection between Empire and Sills Road?  
 24 A. No, I did not.  
 25 Q. At the time the tickets were written, did you know of

1 any connection between Empire and Sills Road?  
 2 A. No, I did not.  
 3 Q. Were the tickets written in reprisal for the  
 4 activities were taking place on Sills Road?  
 5 A. No, they were not.  
 6 Q. Did there come a time you learned that Empire had  
 7 some relationship to the Sills Road site?  
 8 A. Yes.  
 9 Q. And how did that happen?  
 10 A. After issuing, physically issuing the tickets, the  
 11 summonses, at the Empire facility, I returned to my office  
 12 and did a corporate search upon Empire Asphalt Inc, and  
 13 did find that their corporate address is located at 485  
 14 Underhill Road in Syosset.  
 15 Q. What is the significance of that?  
 16 A. 48 Underhill Road in Syosset is also the location of  
 17 Sills Realty and Suffolk and Southern Rail Road.  
 18 Q. Did there come a point in time when you were directed  
 19 not to issue any further tickets at the Sills Road site?  
 20 A. I was asked, after my investigation into the Sills  
 21 Road site and my multiple tickets issued, to back off,  
 22 essentially to stop my investigation into any further  
 23 connections, and to wait until the federal case was heard.  
 24 Q. I show you what has been marked as Defense Exhibit C  
 25 Tell me if you recognize that document

1 A. Yes, I do.  
 2 Q. Well, it is a series of documents. Maybe you can  
 3 take a look at it first  
 4 A. Yes.  
 5 Q. And are these records that are kept by the town of  
 6 Brookhaven?  
 7 A. Yes.  
 8 Q. And are these records in connection with the  
 9 complaint on the Empire Asphalt site?  
 10 A. Yes.  
 11 Q. And are they records that you use in your  
 12 investigation?  
 13 A. Yes, they are.  
 14 MR CUTHBERTSON: I would ask that they be  
 15 moved into evidence  
 16 THE COURT: Any objection?  
 17 MS BIBLOW: Your Honor, it may have a minute  
 18 to just look at this  
 19 THE COURT: Surely  
 20 MS. BIBLOW: I have no objection, your Honor  
 21 THE COURT: Admitted for purposes of this  
 22 hearing.  
 23 (Defense Exhibit C in evidence)  
 24 BY MR. CUTHBERTSON  
 25 Q. Can you tell me briefly what this pack of documents

1 is  
 2 A. These documents are several complaints filed by a  
 3 constituent living in the area of the Empire Asphalt  
 4 facility. They refer essentially to disruptive noise,  
 5 smells, emanating from the premises.  
 6 Q. And when did you first receive a complaint from the  
 7 complainant that is mentioned in this document?  
 8 A. Our complaint form that came to our office was  
 9 just so we are clear, that is the first page. The first  
 10 page of the document.  
 11 The complainant, the informant, our office that  
 12 they had a complaint regarding this location on 9/28.  
 13 They filled out the complaint form on 10/3 and it was  
 14 mailed to our office.  
 15 The second page is a document, however, refers  
 16 to a letter sent from the same complainant to her  
 17 councilman, Mr. Furey Rosenfeld, on August 30. This  
 18 information was forwarded to me just prior to the town of  
 19 Brookhaven complaint form.  
 20 Q. Did you use this information in your investigation of  
 21 Empire?  
 22 A. Yes.  
 23 MR CUTHBERTSON: Now for the questions, your  
 24 Honor  
 25 THE COURT: Any cross-examination?

1 MS BIBLOW Yes, I do

2  
3 CROSS-EXAMINATION  
4 BY MS. BIBLOW

5 Q: Mr. Tohill, who directed you to go to the Brookhaven  
6 Rail Terminal site on October 4, 2007?

7 A: I believe Mr. Quinlan, the town attorney, directed my  
8 senior to send someone to the site, and I was directed to  
9 go.

10 Q: And did you speak to Mr. Quinlan about this site?

11 A: Afterwards, yes.

12 Q: And what was your discussion with Mr. Quinlan about  
13 the site?

14 A: Briefly, I just let him know what I observed on the  
15 site.

16 Q: And had you read any articles in Newsday before going  
17 to the site about the Sills Road Realty site?

18 A: Yes.

19 Q: And when was that?

20 A: I believe the articles began appearing on or about  
21 October 1.

22 Q: And prior to that had you ever gone to that site  
23 before?

24 A: Not myself. No.

25 Q: Did anybody else from the Town of Brookhaven

1 investigative office to your knowledge ever go there?

2 A: No.

3 Q: With respect to the Empire ticket, sir  
4 If you look on Exhibit C?

5 The complaining witness, Catherine Goldhaft,  
6 signed this on October 5, 2007. Do you see that?

7 A: Yes.

8 Q: Is that when it actually got to the Town of  
9 Brookhaven?

10 A: No.

11 Q: Then what is the significance of that 10/5/07 date?

12 A: The form as you see up on the top, towards the top,  
13 underneath the 07 and 10/05, also has a date of 9/28/07.

14 This is the date the complainant initially  
15 called the Town of Brookhaven Town Attorney's office to  
16 make the complaint.

17 Q: Sir, can I refer to you Plaintiff's Exhibit 6, or to  
18 the Empire ticket. It should be in front of you

19 A: Yes.

20 Q: Can you explain to the court why those are dated two  
21 days before you got the complaint

22 The date is September 26, 2007. Did you get the  
23 complaint on 9/28/2007?

24 A: As I had stated previously, the second page of the  
25 document also refers to a letter forwarded from the

1 complainant to Councilman Purey to send his office on  
2 September 30.

3 Q: When did your office get the complaint? Was that  
4 9/28?

5 A: No, it was not.

6 Q: When was it?

7 A: I don't have the exact date that in particular  
8 document reached my office, no.

9 Q: Well, is it clear that the tickets were issued before  
10 you got the complaint from Miss Goldhaft?

11 A: The complaint that came from the Town of Brookhaven's  
12 Town Attorney's office, I need to back up obviously.

13 Complaints come from various locations. We are  
14 directed from either the council people or from  
15 supervisor's office or from building department, planning  
16 department.

17 Lots of these different agencies receive  
18 complaints. Some of them can handle what's going on, or  
19 or they don't understand or they want more  
20 information to a different agency.

21 The Town Attorney's office, the town  
22 investigates, receives these complaints, sometimes in the  
23 form of a letter or an email, stating that this individual  
24 has a complaint regarding the location. Can we go and  
25 check it out.

1 At the same time we direct these other agencies,  
2 supervisor's office and council people to have that  
3 individual call the Town Attorney's office and make a  
4 formal complaint so that we can also have that  
5 documentation.

6 Q: And it is your testimony, just so I'm clear, that the  
7 complaint came in from Miss Goldhaft on 9/28/07?

8 A: Correct. They called the Town of Brookhaven Town  
9 Attorney's office on that date.

10 Q: Had you seen the letter that Miss Goldhaft - when  
11 was the first time you saw that August 30, 2007 letter?

12 A: In between August 30 and you September 26.

13 Q: Do you have any record with you today that shows when  
14 you got that?

15 A: No.

16 Q: How about the October 8 letter, that is attached to  
17 that same exhibit? This is page 10 of the exhibit.

18 Would you look at that. When did you get that  
19 sir?

20 A: That would probably be on or about October 8.

21 Q: Does that concern the same entity?

22 A: Yes, it does.

23 Q: Sir, did you ever ask Mr. Bonjourne - if you recall,  
24 do you know Mr. Bonjourne Adlo?

25 A: I met him when I served the summons. I did not know

1 - him prior, no.

2 Q. Had you ever asked Mr. Bonjourno to identify what  
3 facilities Adjo was associated with before you issued the  
4 tickets to Empire?

5 A. No, I did not.

6 MS BIBLOW. Nothing further, your Honor

7 THE COURT Where is this Empire site as

8 distinct from the site where they want to operate what  
9 they consider to be a railway spur?

10 THE WITNESS It is essentially on the North

11 Shore, your Honor. The Empire facility is an asphalt

12 plant located on Comsewogue Road in Setauket. It is quite  
13 a distance away.

14 THE COURT About 20 miles away?

15 THE WITNESS Yes, your Honor.

16 THE COURT What are these offenses? Are they  
17 violations of town law?

18 THE WITNESS Yes, sir.

19 THE COURT And code?

20 THE WITNESS Town of Brookhaven town code.

21 Yes, sir.

22 THE COURT Are they civil in nature or

23 criminal?

24 THE WITNESS They are violations, sir. They  
25 appear in the Sixth District Court.

1 THE COURT My recollection of state law is, you  
2 have categories of felonies, misdemeanors. And then  
3 violations, which would be prosecuted in the district  
4 court, are really considered noncriminal in nature.

5 THE WITNESS Yes, your Honor.

6 THE COURT Do you know what category these  
7 violations are in?

8 THE WITNESS Well, I believe that they could  
9 fall under civil or less than criminal in nature. They  
10 are essentially violations.

11 I don't believe, to the best of my recollection  
12 the zoning violations don't hold a high penalty as far as  
13 monetary fees.

14 THE COURT Would this all be defined  
15 particularly in the town code?

16 THE WITNESS Yes, it would, your Honor.

17 MS BIBLOW Your Honor, if I may follow up on  
18 that.

19 If you look on Exhibits 1 through 5, they  
20 actually have indicated what the tickets are. Some of  
21 them are misdemeanors.

22 You are asking about the Empire violations or  
23 the others?

24 THE COURT I was just asking you about the  
25 violations in general. They all seem to be very, very

1 similar.

2 THE WITNESS Yes, the counsel is correct, there  
3 are some misdemeanor violations.

4 The grading violations are considered

5 misdemeanors.

6 THE COURT The return date on this is December  
7 12 or 13 or thereabouts. Is that right?

8 THE WITNESS On the Sills Road facility, yes.

9 THE COURT On that date that would be

10 considered to be an initial appearance.

11 THE WITNESS Yes, your Honor.

12 THE COURT And that is when they would appear

13 with counsel or appear pro se.

14 THE WITNESS Yes, sir.

15 THE COURT It wouldn't be a trial on that date.

16 THE WITNESS No, your Honor.

17 THE COURT That would be a district court judge

18 that they would appear before on that date.

19 THE WITNESS Yes, your Honor.

20 THE COURT Thank you very much.

21 Does that generate any questions at all by

22 either of you?

23 MR. CUTHBERTSON. Just one follow up, your

24 Honor.

25 REDIRECT EXAMINATION

1 BY MR. CUTHBERTSON

2 Q. Mr. Tohill, in your experience does the town of  
3 Brookhaven seek criminal penalty as a result of these  
4 violations?

5 MS BIBLOW: Objection.

6 THE COURT If he knows, overruled.

7 A. The misdemeanors, when they go to or they reach the  
8 District Court obviously the defendant normally does have  
9 the opportunity to ask for a trial in the district court.

10 However, I have very rarely seen anything that amounts to  
11 trial in the district court.

12 We normally would take a motion like this.

13 Initially what we would do is seek remedy in a lower court  
14 and then proceed to a state or a county Supreme Court.

15 Q. Do you seek, does the town in these cases seek a jail  
16 sentence?

17 A. No.

18

19 RECROSS-EXAMINATION

20 BY MS BIBLOW,

21 Q. Mr. Tohill, the tickets that were issued, Exhibits 1  
22 through 5, as you mentioned, some of them were

23 misdemeanors. Correct.

24 A. I would like to take a look to believe they are

25 Yes.

1 Yes, they are. Yes, Yes, the first one, right  
 2 here, Adjo Contracting Corp., ticket number 91293.  
 3 Q. These are returnable in a district court  
 4 This is People of the State of New York v, for  
 5 instance, Adjo Contracting  
 6 These are criminal appearance tickets. Correct?  
 7 A. The Town of Brookhaven versus. Yes.  
 8 Q. And as far as you know, if a district court judge  
 9 decided to issue a penalty, could that include jail time  
 10 as well as fines?  
 11 A. Yes.  
 12 MS BIBLOW Thank you  
 13 MR CUTHBERTSON No further questions  
 14 THE COURT Thank you very much  
 15 You may step down  
 16 (The witness was excused )  
 17 THE COURT Have you offered all your exhibits?  
 18 I don't recall anything with regard to B  
 19 MR CUTHBERTSON Actually, if I could just see  
 20 the list. I apologize, your Honor  
 21 B I believe is Plaintiff's Exhibit 6. So yes,  
 22 that has been offered so it would not be offered as B  
 23 THE COURT: So that is part of Plaintiff's  
 24 Exhibit 6  
 25 MR CUTHBERTSON It is identical to Plaintiff's

1 Exhibit 6, your Honor  
 2 THE COURT All right  
 3 In light of the hour what I would like to do is  
 4 put this over until tomorrow  
 5 Both sides rest?  
 6 MS BIBLOW Yes, your Honor  
 7 MR CUTHBERTSON Yes, your Honor  
 8 **BOTH SIDES REST**  
 9 THE COURT I assume you would like to be heard  
 10 MS BIBLOW Your Honor, if we are going to be  
 11 heard tomorrow, is it possible that we are heard in the  
 12 morning? Only because I have another matter in the  
 13 afternoon at 4 o'clock with the Town of Brookhaven and I  
 14 would like to make it  
 15 THE COURT I don't think I have tomorrow  
 16 morning free  
 17 MS BIBLOW: As long as it is before 3 o'clock  
 18 THE COURT What I was going to suggest was 11  
 19 o'clock tomorrow  
 20 MR CUTHBERTSON Fine, your Honor  
 21 Your Honor, if eventually the courts does ask us  
 22 to submit findings of fact and conclusions of law, would  
 23 you prefer that in lieu of an appearance tomorrow?  
 24 THE COURT No I would prefer to question both  
 25 of you a little bit more in regard to your original

1 arguments, so be prepared.  
 2 The plaintiff in particular should be prepared  
 3 for what I see as a very substantial issue with regard to  
 4 asking this court to intervene in an administrative  
 5 proceeding under circumstances where the Second Circuit  
 6 Court of Appeals has already refused to intervene in any  
 7 way and where in my opinion it affects the material  
 8 structure of how we litigate cases of this nature.  
 9 In other words you go before the Surface  
 10 Transportation Review Board and then if there is adverse  
 11 determination you have the right to come into this court.  
 12 So if you could address that tomorrow, that would be  
 13 helpful.  
 14 I will be asking for a copy of the transcript  
 15 and your proposed findings of fact and conclusions of law.  
 16 The other thing I would ask Miss Biblow to  
 17 address is why any federal preemption issues can't be  
 18 raised in the district court of Suffolk County in defense  
 19 on these cases  
 20 MS. BIBLOW Your Honor, just so I'm clear, do  
 21 you want the findings of fact and conclusions of law  
 22 tomorrow?  
 23 THE COURT No, No, I will hear your  
 24 summations tomorrow and then we will set a schedule  
 25 It would probably take a lot of pressure on

1 everyone if you could form some kind of agreement with  
 2 regard to the outstanding proceeding. But I don't see any  
 3 eminent trial at this point, so you have some flexibility.  
 4 I think I think it would be a better way to proceed, but  
 5 that is tell up to you.  
 6 MR. CUTHBERTSON Certainly, your Honor  
 7 Pending your determination, the town is willing not to  
 8 issue more tickets and/or to prosecute. They would just  
 9 adjourn the existing tickets either without date or until  
 10 such time as the court renders a decision.  
 11 THE COURT I think that is very, very helpful.  
 12 The plaintiff also of course has to address  
 13 whether the irreparable harm in this case comes from the  
 14 cease and desist order or comes from these notices of  
 15 violation or violations, appearance tickets.  
 16 Okay. I will see you at 11 o'clock tomorrow.  
 17 (Proceedings adjourned at 5 pm)

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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

----- X  
SILLS ROAD REALTY, LLC,  
US RAIL CORPORATION, et al , 07-CV-4584 (TGP)  
Plaintiff,  
-against- US Courthouse  
Central Islip, NY  
THE TOWN OF BROOKHAVEN, :  
Defendant . December 6, 2007  
11:40 am  
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TRANSCRIPT OF PROCEEDINGS  
BEFORE THE HONORABLE E. THOMAS BOYLE  
UNITED STATES MAGISTRATE JUDGE

APPEARANCES.

For the Plaintiff: FARRELL FRITZ PC  
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Proceedings recorded by mechanical stenography  
Transcript produced by computer

1 (Call to Order of the Court. Appearances stated  
2 as indicated above.)

3 THE COURT This is the application of the  
4 plaintiff. So Miss Biblow, if you would like to start  
5 off

6 MS. BIBLOW: Good morning, your Honor. What I  
7 would like to do in my summation is to address my  
8 summation to three questions that you asked at the end of  
9 the proceeding, and do it in the order that I believe you  
10 asked them.

11 The first question had to do with the Second  
12 Circuit. The second question had to do with raising  
13 federal preemption in the local district court. And the  
14 third question, which is really the crux of the matter, is  
15 the irreparable harm.

16 What we have done for your Honor's purposes is,  
17 we have created a binder with all of the materials that  
18 were submitted to the Second Circuit. We have a copy for  
19 Mr. Cuthbertson, although I'm sure he has his own set.  
20 But it we would like to hand that up to you so that you  
21 will have a complete set of everything, including the  
22 orders.

23 THE COURT: And Mr. Cuthbertson has seen that?

24 MR. CUTHBERTSON: I haven't seen it. I trust  
25 that it is what Miss Biblow represents it is.

1 THE COURT: Just to set the framework for your  
2 argument.

3 I assume that any appeal from the STB goes  
4 direct to the circuit?

5 MS. BIBLOW: That is correct, your Honor.

6 THE COURT: Is that your understanding?

7 MS. BIBLOW: Yes. That is correct.

8 THE COURT: So any adverse determination that  
9 the plaintiff would receive before the STB would not be  
10 resolved in this case?

11 MS. BIBLOW: That is correct.

12 Appeals of decisions go directly to the circuit  
13 court, either the Second Circuit or the DC Circuit. In  
14 this case it would go to the Second Circuit. And this is  
15 exactly what it is.

16 So I would like to just explain the Second  
17 Circuit because I think there was some confusion yesterday  
18 or may have been some misstatements as to what is going on  
19 there, what is being challenged there, and what the  
20 decision of the circuit was.

21 As we were discussing yesterday, the STB issued  
22 an order on October 12th that contained two things. It  
23 contained a clear assertion of jurisdiction by the STB  
24 requiring Sills Road, US Rail and Suffolk and Southern to  
25 either apply to the STB for approval as a rail line or to

1 demonstrate to the STB that they were an exempt spur.  
2 Also in that order was a cease and desist order with respect  
3 to construction of the rail terminal.

4 Under the STB rules what you do is, you can file  
5 two things. One is a petition to stay the cease and  
6 desist order, and the other is an petition for  
7 reconsideration of the entire decision. We did both.

8 The petition for the stay, once you file that,  
9 you have the ability to go directly to the Second Circuit  
10 to challenge the determination. That is the direct route,  
11 which we took that opportunity to do as well.

12 The Second Circuit has the discretion to decide  
13 the case, the hold it in abeyance, or to dismiss it as  
14 premature pending the determination of the petition for  
15 reconsideration.

16 What we were challenging in the Second Circuit  
17 and in the petition was the decision of October 12th.

18 THE COURT: In all respects?

19 MS. BIBLOW: In all respects.

20 And we coupled that with a motion for temporary  
21 restraining order and preliminary injunction to do certain  
22 construction activities because the October 12th order was  
23 a blanket restriction.

24 THE COURT: So are you saying that your  
25 application before the circuit de novo was for relief that

1 you hadn't sought before the STB?

2 MS. BIBLOW: We had not sought. Well we  
3 hadn't sought the ability to construct prior to the  
4 October 12th order. That is the one that stopped us. But  
5 we did ask for in our petition to lift the stay. In our  
6 petition for reconsideration we asked to be able to  
7 continue constructing.

8 THE COURT: And you filed that with the STB?

9 MS. BIBLOW: Yes, we did.

10 In our application with the Second Circuit what  
11 we focused in on the TRO application there were certain  
12 conditions that became apparent after our filing of the  
13 two petition. The two state petition had to do with  
14 basically safety issues.

15 One had to do with the fact that there was a  
16 construction project that had stopped midstream and that  
17 there were these large piles of sand and that all of the  
18 were coming on the site, were using this as a free for  
19 All.

20 In addition, we became aware of the fact that  
21 people were coming on to the site and shooting shotguns at  
22 the holes that were there and

23 THE COURT: This is an unfenced area?

24 MS. BIBLOW: It is. It is 23 acres. There is  
25 certainly a fence in the front, but people are breaking

1 through and getting through.  
2 They were bringing in ATV vehicles And because  
3 we had been stopped from constructing, we were also  
4 stopped from putting in utilities

5 So we had this condition of people riding ATVs,  
6 people with shotguns, there are no lights, and that is  
7 what we had asked the circuit court to focus in on We  
8 also asking to be allowed to continue the construction  
9 But that was the main focus

10 What the Second Circuit did is, they denied our  
11 request for a TRO but they expedited our hearing on the  
12 preliminary injunction. And we had oral argument on that  
13 November, I think it was the 27th.

14 THE COURT And you are seeing to continue  
15 construction

16 MS BIBLOW We are seeking to continue  
17 construction, yes

18 THE COURT Before the STB

19 MS BIBLOW Yes. And in front of the Circuit  
20 What the circuit did rule on our preliminary  
21 injunction that is in the binder is, they decided that the  
22 entire case was premature. It is before the STB Go to  
23 the STB So that is where that stands

24 THE COURT Don't we have the same situation  
25 here?

1 MS BIBLOW Well, what you have here, your  
2 Honor, is different Because the harm, the tickets you  
3 cannot adjudicate

4 THE COURT. That is a matter of record  
5 The reason this case is continuing, as I  
6 understand it then, is your third request for relief And  
7 that request is that the town is preempted by federal  
8 law -- this is what you are seeking -- from interfering  
9 with the construction and operation of the Brookhaven Rail  
10 Terminal

11 Now, in Green Mountain, the Second Circuit told  
12 us that as the agency authorized by Congress to administer  
13 the termination act, the STB is uniquely qualified to  
14 determine whether state law should be preempted by the  
15 termination act

16 And the Green Mountain case goes on to say that  
17 notwithstanding the termination act's preemption  
18 provision, state and local authorities retain police  
19 powers to enforce regulations, and they define the types  
20 of powers that they are entitled to do

21 But you are asking this court to give you a  
22 blanket preemption from any interference by the Town of  
23 Brookhaven with the operation or construction It is  
24 frivolous on its face

25 MS BIBLOW Your Honor, perhaps if I can

1 explain exactly what we are looking for in that prong  
2 Maybe it was poorly worded, but this is what the intent  
3 was

4 There were certain activities clearly that are  
5 preempted, as you have mentioned, and there were certain  
6 activities that may be allowed. I mean, they talk about  
7 police powers. They are talking about things  
8 nondiscretionary things such as high fences. Whether you  
9 are use are the right light bulb to illuminate things.  
10 They are not talking about the kinds of things that these  
11 entities --

12 THE COURT But I want to get back to my  
13 observation to you, because the court of Appeals said this  
14 is premature; go back to the STB, what I'm suggesting to  
15 you is your application is premature here

16 You may not even have a case in controversy  
17 before this court as far as that request for relief  
18 Because at this point everything is hypothetical

19 I don't know what is going to happen before the  
20 STB I don't think you do either. And that could be very  
21 defining as far as the extent to which the town of  
22 Brookhaven may or may not want to get involved in the  
23 operation and the construction involved in this project

24 MS. BIBLOW Your Honor

25 THE COURT I don't know how you can come to

1 this court and ask for that kind of blanket relief given  
2 these circumstances

3 MS BIBLOW Well, what we are trying to do  
4 there, sir, is, the town has issued a series of appearance  
5 tickets They have other mechanisms that they can use  
6 other codes of enforcement

7 THE COURT We have to deal with reality

8 MS BIBLOW we are dealing with reality

9 THE COURT I'm not dealing with hypotheticals  
10 We are dealing with the real world

11 They have made the representation that there  
12 will be no further tickets issued pending the outcome of  
13 the proceedings before the STB. And they have said that  
14 the prosecution won't go forward

15 MR. CUTHBERTSON Your Honor, yesterday, I  
16 believe I said on the record we would do that pending your  
17 decision in this case

18 MS BIBLOW Your Honor

19 THE COURT okay. So that is very much alive  
20 Don't spend any time on it

21 MS. BIBLOW The problem we are having is, and  
22 the issue that we have here with respect to that is, we  
23 mentioned the whole issue about the Empire tickets

24 This is a town that is taking steps to interfere  
25 and issue tickets that it is preempted from doing, and it

1 nas continued to do that. There are other mechanisms that  
2 it has at its ability to --

3 THE COURT This is the site over in East  
4 Setauket, you are talking about?

5 MS BIBLOW: Yes That is one of the sites

6 THE COURT They are not even a party

7 MS BIBLOW: Excuse me?

8 THE COURT They are not even a party It  
9 doesn't even fall within the category of your request for  
10 relief

11 MS. BIBLOW: I understand that, your Honor But  
12 you are also telling us you have to look at the whole  
13 totality of what this town is doing

14 If you look at the documents that  
15 Mr. Cuthbertson put into the record, Exhibits A and C,  
16 which were relating to the Sills Road site, we saw the big  
17 US Rail sign.

18 And if you look at exhibit, I think it is C,  
19 which was the complaint form for Empire, what you see is  
20 it is a whole series of entities that are listed there,  
21 some of which have nothing to do with my client. Some of  
22 them they happen to be in that area

23 The only entity that was issued a ticket was  
24 Empire. Empire had nothing with noises They had nothing  
25 to do with the complaints, if you look at that exhibit.

1 So it raises an issue on what it is the purpose  
2 of these tickets

3 THE COURT They are not a party before the  
4 court. They are not included in your request for relief.  
5 Your request for relief refers to tickets that were issued  
6 on October 4 This ticket was issued on September 26th  
7 It is then a separate entity. It is not a plaintiff here.

8 MS BIBLOW: I understand that But we are  
9 talking about the tickets for the six entities that are in  
10 front of it you, the six plaintiffs that are in front of  
11 you.

12 And you have asked me about the third prong, and  
13 the third prong is very important to our client. And you  
14 can rephrase it any way you, the judge, wants. If you  
15 choose to --

16 THE COURT I'm not going to rephrase any  
17 request you have for relief

18 MS BIBLOW. Well, I'm trying to say that the  
19 interpretation that we intend by that provision was we  
20 didn't want the town to continue to issue anything that  
21 would be preempted by the STB In addition to appearance  
22 tickets --

23 THE COURT I think I probably spoke too soon  
24 You better cover in your remarks, that entire issue.

25 MS BIBLOW Okay

1 THE COURT With regards to a stay With  
2 regards to the prosecution of anything you can include  
3 Empire

4 So I'm still waiting for an answer to my  
5 question

6 MS BIBLOW The answer to your question, sir  
7 is that this is a town what we are seeking by that third  
8 prong is that we want to forestall any other mechanism  
9 that this town will use to usurp the power of the STB in  
10 operating and constructing this rail terminal. This is  
11 what the intent of that third prong was

12 And whether they do it through appearance  
13 tickets, whether they do it through some other mechanism  
14 that the town has prospectively it is not hypothetical  
15 I mean that is reality they have been doing that with  
16 respect to this.

17 THE COURT Let me restate your request again  
18 That the town is preempted by federal law from interfering  
19 with the construction and operating of Brookhaven Rail  
20 Terminal

21 Are you modifying your request for relief?

22 MS BIBLOW: I'm sorry I didn't understand  
23 that

24 THE COURT: Are you modifying your request for  
25 relief?

1 MS. BIBLOW To the extent that -- I guess we  
2 are

3 But to the extent that you are saying that to  
4 the extent that I'm saying that we want that third prong  
5 to be anything that is preempted by federal law whatever  
6 activities are going to do with respect to construction  
7 and operation of that rail terminal whatever it be

8 And we don't intend that to include  
9 participating in the proceeding obviously in front of the  
10 STB, but anything that would run a foul of the STB's  
11 authority with respect to this facility they are  
12 preempted and they should be and this court should tell  
13 them they are preempted in addition to the lines  
14 themselves That is what we are seeking

15 THE COURT: Do you have anything further?

16 MS BIBLOW: I do have other comments  
17 believe I covered all of the -- let me go back to the  
18 Second Circuit, just to finish up my comments about that

19 One last comment is that three of the entities  
20 that have been subject to these tickets, namely Watral  
21 Adjo, and Pratt, are not before the court, would not be  
22 before them This was not part of the entire doing  
23 construction. All it is is US Rail

24 So clearly with respect to the tickets issued  
25 to them, they have no remedy in front of the Second

1 Circuit. Their remedy is here, your Honor  
 2 With respect to the question you raise about  
 3 isn't the correct place to handle these tickets in the  
 4 local District Court. The answer to that is no, it is  
 5 not.  
 6 First of all, that is a court of very limited  
 7 jurisdiction. Generally, they have very limited equity  
 8 power, your Honor.  
 9 THE COURT That is part of the Unified Court  
 10 System of the State of New York, is it not?  
 11 MS BIBLOW Yes, it is.  
 12 THE COURT Are you suggesting that they don't  
 13 have the authority to rule on constitutional issues?  
 14 MS BIBLOW They don't have the equitable  
 15 powers, your Honor, that we are seeking here. That is one  
 16 point.  
 17 THE COURT You are charged with criminal acts  
 18 and you had asserted a defense based on the criminal law  
 19 presumably and you would challenge jurisdiction.  
 20 Those aren't issues that can be raised in the  
 21 district court? Are you saying that?  
 22 MS BIBLOW I'm not suggesting that, your  
 23 Honor. What I'm suggesting is, with respect to the  
 24 equitable remedy that we are seeking in this lawsuit,  
 including declaratory judgments, there is more at stake

1 here than just these tickets.  
 2 THE COURT You misunderstood my question.  
 3 My question, which I directed yesterday  
 4 afternoon, was, tell me why these issues couldn't be  
 5 addressed as part of the defense to the misdemeanor trial.  
 6 MS BIBLOW Your Honor, we certainly could  
 7 raise those as defenses. The issue is, those tickets are  
 8 preempted under federal law. It is a federal question.  
 9 And we shouldn't have to incur the cost, the expense, the  
 10 fear of criminal convictions in a district court who may  
 11 or may not understand claim or questions.  
 12 And the town has basically conceded that these  
 13 tickets are preempted. They did not put on any witnesses  
 14 who claimed that --  
 15 THE COURT I don't take that as any kind of a  
 16 concession by the town. You have the sole burden. Go  
 17 ahead.  
 18 MS BIBLOW And I believe we have handled that  
 19 burden. We are in front of the STB. They are certainly,  
 20 this court is better certainly better equipped to deal  
 21 with federal questions of preemption than a local district  
 22 court.  
 23 And again, as I said, they are certainly not  
 24 eligible or able to handle certain of the equitable claims  
 25 that we have raised here.

1 And, in addition, the party that basically is  
 2 the source of the preemption, which is the common carrier,  
 3 US Rail, is not in front of the district court and was not  
 4 issued tickets.  
 5 So that is a problem, also being able to raise  
 6 that defense, because it is US Rail's status as a common  
 7 carrier doing the operation, the construction and operation  
 8 of the rail facility that brings us into the jurisdiction  
 9 of the STB and brings us into the preemption of STB and  
 10 they are not in front of the local district court.  
 11 I would like to raise one other point with  
 12 respect to the likelihood of success as irreparable harm  
 13 in the local district court.  
 14 I don't believe the local district court has the  
 15 ability to issue a temporary restraining order restricting  
 16 the town from issuing new tickets. They can certainly  
 17 adjudicate what is in front of them, but I don't believe  
 18 they have that authority. This court does.  
 19 As to the two prongs of the request for interim  
 20 relief, your Honor, I would like to briefly talk on the  
 21 likelihood of success and I would concentrate on  
 22 irreparable harm.  
 23 With respect to likelihood of success, it is  
 24 clear in our view that we are before the STB on an  
 25 application that involves construction of a railroad

1 facility, as a spur. There is no question that that  
 2 activity in front of the STB preempts any local activity  
 3 to enforce the kinds of issues and the kinds of tickets  
 4 that were issued in this matter.  
 5 If you look at the tickets and the kinds of  
 6 issues that were raised, they are all with respect to site  
 7 plan, certificates of occupancy, getting approval from the  
 8 planning board. These are precisely the activities that  
 9 Green Mountain and the Coastal case said is not a role for  
 10 local control.  
 11 THE COURT Didn't one of the most recent  
 12 decisions from the STB, I believe the date is  
 13 November 16th, on one of your motions for a stay or for  
 14 reconsideration, get into this area of likelihood of  
 15 success? And didn't they opine in that opinion that you  
 16 had failed to establish that likelihood of success?  
 17 MS BIBLOW That had to do with lifting of the  
 18 stay for construction and/or continuing the construction,  
 19 cease and desist order.  
 20 THE COURT What is your third prong, is it not?  
 21 MS BIBLOW Excuse me?  
 22 THE COURT That is your third prong here.  
 23 Didn't they go just counter to what you just said?  
 24 MS BIBLOW No, they didn't. In fact what they  
 25 have done is, they actually in that decision, what they

1 have done is, in my view, reinforced our point about  
2 likelihood of success  
3 They are saying in that decision you are either  
4 a railroad, you are either a spur, and they even discussed  
5 private track. But whatever it is you are, it is the STB  
6 that has jurisdiction to control that project to approve  
7 it, to not approve it, and --

8 THE COURT: Well, this is the very reason that  
9 I'm suggesting to you that your issue with regard to your  
10 third prong is premature before this court

11 MS. BIBLOW: Your Honor, may I have one minute,  
12 please? I just want to talk to my client for one minute.  
13 (There was a pause in the proceedings)

14 MS. BIBLOW: Your Honor, with respect to the  
15 November 16th decision of the STB and your comment  
16 about --

17 THE COURT: There is a whole section on  
18 likelihood of success

19 MS. BIBLOW: Right. But what they did not say  
20 in that decision, and which is crucial to this court, is  
21 that they never said that US Rail was not a railroad and  
22 not a common carrier. They clearly are. They clearly  
23 were. They never said they weren't.

24 That is all I need to show here, your Honor,  
25 basically is that we are a --

1 THE COURT: What they said is with a huge gap  
2 between Ohio and Long Island this probably wasn't going to  
3 be considered a spur by them

4 MS. BIBLOW: And that is a --

5 THE COURT: I realize that is not a definitive  
6 decision by them, but it seems to me if you are going to  
7 argue to this court that there is a likelihood of success  
8 before the STB, that is something you have to deal with.

9 MS. BIBLOW: The likelihood, the reason, the  
10 likelihood of success we are talking here is in terms of  
11 preemption, your Honor, not in terms of what eventually  
12 the STB allows us to do on that piece of property

13 The question before this court is whether the  
14 STB has asserted jurisdiction over this project, which it  
15 has, which then results in, under the Interstate Commerce  
16 Commission Determination Act, preempting local control

17 That has happened. The STB has not said you  
18 don't belong in front of us on this project. We are not  
19 making a ruling on it. You don't belong. What they have  
20 actually said is, you do belong here

21 So the likelihood of success in front of the STB  
22 is a different question as opposed to the likelihood of  
23 success in this case.

24 THE COURT: Is it really?

25 MS. BIBLOW: Yes. I believe so

1 THE COURT: In relation to your third prong  
2 MS. BIBLOW: Well, let me discuss the third  
3 prong because that seems to be the issue.

4 What we are trying to do in the third prong and  
5 if I have to make an application to modify that I will do  
6 that. All we are intending to do by that is to prevent  
7 the town from using any of its code enforcement activities  
8 separate and apart from issuing appearance tickets that  
9 run afoul of the jurisdiction and preemptive powers of the  
10 STB. That is what we want from this court. And I think  
11 that --

12 THE COURT: That is not what you have asked this  
13 court

14 MS. BIBLOW: Which is why, to the extent that  
15 if that is what you are viewing our request, I'm asking  
16 that that be modified

17 THE COURT: It's a little bit late to modify  
18 it

19 MS. BIBLOW: If I may go back to the likelihood  
20 of success and the irreparable harm with respect to the  
21 issuance of the tickets that are currently before you,  
22 your Honor

23 The criminal prosecutions that my clients face  
24 involve serious penalties that can be enforced against  
25 them

1 With respect to the sand and gravel violations  
2 that have been issued, we are looking at fines up to  
3 \$2,000 and imprisonment not exceeding 15 days for each  
4 violation. And every day is considered a new violation.

5 THE COURT: Why are you only concerned with the  
6 town? The DEC has issued similar violations, have they  
7 not?

8 MS. BIBLOW: What the DEC has done, your Honor,  
9 is, they issued us a letter, this is not in front of you,  
10 which basically said to us if you show us that we are  
11 preempted and in front of the STB, fine, and indeed we are  
12 shown that you are not preempted, they have some concerns  
13 about it

14 They did not issue a formal cease and desist  
15 order. It was a voluntary

16 THE COURT: The town didn't either  
17 MS. BIBLOW: Excuse me?

18 THE COURT: The town didn't either. Are you  
19 saying that the DEC didn't actually assert charges for  
20 mining without a permit?

21 MS. BIBLOW: They served charges that were  
22 returnable before the regional council as opposed to a  
23 hearing. Our clients contacted the regional council  
24 Craig Elligot

25 And Mr. Elligot and I have been in

1 communication. There is a letter from the DEC that says  
2 If you are not under the STB preemption, then you have to  
3 go through our proceedings, but if you are, then the DEC  
4 is going to back off, basically That is where we are  
5 with the DEC

6 They are not in front of your Honor We do not  
7 need, and there was no imminence of harm because those  
8 tickets are not returnable any time As I said, they were  
9 basically a request that my clients contact the DEC, which  
10 they did There is no hearing scheduled There is no  
11 return date on those tickets And that is the position of  
12 the DEC presently They have said if we are preempted, we  
13 are preempted And that is what they are waiting for,  
14 your Honor

15 Some other penalties that may be imposed by  
16 these tickets, your Honor, with respect to the Tree  
17 Reservation standard are again violations that are not  
18 insignificant They are written as a *per tree*, the way we  
19 look at it, violation This was several acres of clearing  
20 that had been done And we are talking about fines of  
21 \$250 or not more than \$1,000 and imprisonment for again a  
22 period of 15 days

23 With respect to the site plan and the  
24 nonapproval and the lack of a certificate of occupancy, we  
25 are looking at violations that every week is viewed as a

1 new violation under the town code Again, we are looking  
2 at violations that have fines and imprisonment We have  
3 fines of \$500 and imprisonment of not more than 15 days  
4 for the first offense

5 For the second offense within a 5-year period we  
6 are looking at fines of \$350 not exceeding \$1,000 and  
7 imprisonment for 15 days or both

8 For a third offense within a 5-year period, of  
9 fines go up to \$750 not exceeding \$2,000 and a jail term  
10 of 6 months

11 And again under their code every one of a  
12 continued violation is considered a new violation So  
13 these penalties and jail terms are cumulative.

14 This is the kind of irreparable harm that our  
15 clients face if these tickets are allowed to proceed or  
16 additional tickets are issued

17 Again, when you look at the tickets, the kinds  
18 of tickets that were issued, these are precisely the kinds  
19 of local control that the case law clearly says the STB  
20 preempts That that statute preempts

21 And there is a reason for that. They do not  
22 want to leave local control to local discretion because  
23 they are going to be unduly interfering with interstate  
24 commerce and with the control of commerce That is an STB  
25 function

1 With respect to other areas of irreparable harm  
2 which we prepared testimony about yesterday, we are  
3 talking about losing customer base. Mr. Hall and  
4 Mr. Drumm both testified about that.

5 As you can well imagine, having criminal charges  
6 pending against you is certainly going to come back. It  
7 may impair the relationship with existing customers. It  
8 may impair the ability to bid on contracts because these  
9 things have to be disclosed. There is a risk to the  
10 business reputation just being criminal. That is what is  
11 going on here.

12 And I also think you have to look at how these  
13 tickets were issued and the manner in which they were  
14 issued to get a feel for the animus we believe that the  
15 town has experienced with respect to this project.

16 We have tickets that were issued to the  
17 plaintiffs after the STB issued its decision saying that  
18 they have jurisdiction. The town was well aware of it.  
19 They were participating in that proceeding.

20 In addition, to get back to the Empire tickets,  
21 your Honor, just to show you how with an animus continues,  
22 the town had knowledge of the interrelationships between  
23 the entities. In fact I believe in Mr. Stohill's answer to  
24 one question responded that he was instructed to stop  
25 looking at the connection. It was his phrase, between the

1 companies

2 These tickets, if you look at the nbj/cg from the  
3 defendants what you see is a complaint that supposedly was  
4 received in August about noise and a variety of things.  
5 The tickets are written up September 6th. They don't get  
6 the actual complaint from the complainant until  
7 September 28th. And those tickets again are not served  
8 until well after the STB had ruled on this and after the  
9 appearance tickets were issued. What is the intimidation  
10 what is going on here?

11 THE COURT: Is Empire before the STB?

12 MS. BIBLOW: No, they are not. But I don't  
13 think you can look at this in a vacuum, your Honor.

14 THE COURT: I know. You keep talking about this  
15 interrelationship because you know investors happen to be  
16 involved in different entities, legal entities.

17 Don't you respect the disincorporation and the  
18 reason for a legal entity, a corporation?

19 MS. BIBLOW: I certainly respect them. I don't  
20 think the town is respecting them.

21 THE COURT: This is the site that is 20 miles  
22 away.

23 MS. BIBLOW: But it is also a site that has been  
24 operated for many, many years and never had a violation.  
25 And when you look at it, never had these kind of violations.

1 issued

2 When you look at the complaint that was issued,  
3 the complaint talks about a whole variety of different  
4 sites in Setauket that are located in the whole area, none  
5 of which has to do with Empire, none of which have to do  
6 with my clients' principals

7 The only entity that ended up getting a ticket  
8 with respect to this complaint that is two months old with  
9 respect to a noise violation was Empire That is the only  
10 entity. Meanwhile, when you look --

11 THE COURT. That was part of your joint  
12 submission

13 MS BIBLOW. Well, actually it is a Defendant's  
14 Exhibit. I believe it is Exhibit C

15 THE COURT. What are they supposed to do, ignore  
16 the resident complaint because of this, quote,  
17 interrelationship?

18 MS BIBLOW. I think what they should do, your  
19 Honor -- I didn't mean to interrupt you. If I did, I  
20 apologize

21 THE COURT. You didn't

22 MS. BIBLOW. They should ticket the entities  
23 about whom they are complaining, and they did not do that  
24 When you look at the complaint and when you look  
25 at the allegations in August and in October that are in

1 those letters from the neighbor, she is not complaining  
2 about activities of the asphalt plant that Empire runs.  
3 She is complaining about activities at adjacent companies  
4 that have nothing to do with Empire. Yet, it is only  
5 Empire

6 THE COURT. So defend it.

7 MS BIBLOW. We will. But again, this goes to  
8 the third prong, your Honor, which is that this town is  
9 doing other things with respect to its code enforcement  
10 that is impacting our clients

11 And that is the kind of thing that we are  
12 looking to avoid, and we believe that we have demonstrated  
13 why it is irreparably harming us

14 That is the issue with respect to the third  
15 prong. The first two prongs, the tickets issued to five  
16 of the six plaintiffs because they did not serve US Rail

17 THE COURT. The issue on the third prong is  
18 limited to the Empire situation? Is that what you just  
19 said?

20 MS BIBLOW. No, it is not limited to them. It  
21 is the enforcement of their code in a manner that runs  
22 afoul of the STB's jurisdiction. And that is what it is  
23 they are preempted from

24 But if they are going to enforce their code in a  
25 manner which is an abuse of process, that is certainly

1 part of this lawsuit

2 THE COURT. Okay. Do you have anything else  
3 Otherwise I will hear from the town.

4 MS BIBLOW. If I just may sum up very, very  
5 quickly

6 THE COURT. Sure

7 MS. BIBLOW. We are seeking in this application  
8 three things, and they are to address the appearance  
9 tickets that have been issued with respect to this

10 facility; to get the town to stop issuing tickets and to  
11 get the town to not take any other actions with respect to  
12 their code enforcement or other activities that will run

13 afoul of the jurisdiction and the preemptive nature of the  
14 proceedings in front of the STB. That is what we are  
15 seeking

16 In order to do that we had to demonstrate  
17 likelihood of success on the merits and irreparable harm.

18 I'm not going to repeat what I said before, but just  
19 clearly the activities that the town is seeking in these  
20 tickets to enforce are clearly within the jurisdiction of

21 the STB and they are clearly preempted from going forward.

22 Thank you.

23 THE COURT. Thank you.  
24 Mr. Cuthbertson. Why isn't the town willing to  
25 take the wait-and-see attitude that was described by Miss

1 Biblow with regard to the DEC violation?

2 MR. CUTHBERTSON. With regard to the DEC?  
3 Because they actually don't believe that the STB has  
4 clearly asserted their jurisdiction. They believe there  
5 are circumstances, and the STB's November 10th decision  
6 indicate, that one of the possible outcomes in this case  
7 is that it is private line of railroad, in which case  
8 state and local jurisdiction fully apply.

9 THE COURT. That is true. But that is exactly  
10 my point. Why don't you take a wait-and-see attitude with  
11 regard to any further ticketing? As the DEC says, they  
12 will to wait and see whether it is determined to be a  
13 private line, whether it is a spur or whether it is a  
14 railroad line.

15 MR. CUTHBERTSON. The town --

16 THE COURT. It seems to me that is a very

17 reasonable position for a town to take.

18 MR. CUTHBERTSON. The town's concern, and this  
19 relates directly to the third prong Miss Biblow was  
20 talking about, is that there is the potential here that

21 the STB is going to issue an order to clarify what  
22 construction is permitted, in which case the town believes  
23 that there is the possibility that the local police power

24 that you spoke of before, which the town maintains under  
25 Green Mountain would come into play, and that there would

1 be a role for the town to play based on their local police  
2 powers; specifically based on the sand mining that has  
3 gone on at this site

THE COURT Presumably, it would be exercising,  
whatever powers it did have under Green Mountain and,  
under the structure that Congress has set up, with  
knowledge of what the STB had done Because what they do  
in this case is determinative of how far you the town can  
go Would you agree with me?

MR CUTHBERTSON If this is a private line

THE COURT As you argued before the STB, then  
you may be entitled to enforce all your rules and  
regulations or your ordinances

On the other hand, if they were found to be a  
rail carrier it seems to me there would be limitations and  
there might be federal environmental review, and I think  
that is what you argued to the STB

MR CUTHBERTSON Your Honor, before this  
hearing I might have agreed with that statement I have  
to tell you, based on the evidence that was presented  
yesterday, I don't agree with that because I think what  
was presented, granted the nature of a preliminary  
injunction hearing is very fast, was a sham lease for the  
property

And I can explain to you why I believe that is,

1 because, and a sand mining agreement that doesn't involve  
2 any construction by a rail carrier

Let me be specific about that because I believe  
at the end of the day that this is a sand mining operation  
that is seeking to cloak itself under a federal  
preemption

The lease that they provided your Honor is a  
lease for a 28-acre industrial site The rent for that  
28-acre industrial site that is to be paid is \$1,000 a  
year That wouldn't even cover the taxes for a month on  
this property The taxes are to be paid by the landlord.  
The tenant doesn't pay any of the taxes under this lease

The lease also says at any time during the lease  
US Rail can transfer the day-to-day operations to another  
entity It doesn't say that it has to be a railroad  
entity And here it specifically says that all US Rail  
can do at this site is to provide for the loading and  
unloading of rail cars as requested by the landlord or  
their customer

The lease is not for the fee interest in the  
property The lease is for the right-of-way on the  
property

Now, even more troubling in this situation is  
the excavation agreement The president of US Ra l was  
here yesterday and he has stated in his affidavit to this

1 court that they have leased this site from Sils Road and  
2 they are paying to construct a rail facility at the site  
3 and that they have done this at significant expense

All that they produced yesterday is a sand  
mining agreement Under the terms of the agreement it  
says that US rail is to allow the contractor to come onto  
the property and the contractor is to be paid up to \$3  
million

And it has a formula for various things so I  
can't say exactly, but one of the things that they are  
going to get is up to \$3 million

The contractor here is Adjo Adjo is the  
general contractor who is also an interested party in the  
Sils Road entity, the entity that owns the property So  
Adjo gets the sand mine at the property Okay

There is another party to the excavation  
agreement That is the owner of the property The owner  
of the property is Sils Road Sils Road based on the  
sand mining that can take place up to \$6 million  
under this contract, this so-called construction contract

Now, there was a representation yesterday in  
court that there were construction specifications that  
were unsigned that were incorporated into this excavation  
agreement

There is no reference to an incorporation of

1 that at least construction item So what you have before  
2 the court right now is a sham lease and you have a sand  
3 mining agreement

What is necessary here for US rail to claim  
preemption is for them to construct a rail facility  
There is no evidence right now before this court that they  
are constructing a rail facility

So, as I said, your Honor

THE COURT Do you think that the cease and  
desist order had something with that

MR CUTHBERTSON: What is that

THE COURT I said did you think that this  
cease and desist order had something to do with that

MR CUTHBERTSON: To do with what your Honor

THE COURT Stopping the progress

MR CUTHBERTSON: I think that had something to  
do with stopping the progress Yes

THE COURT The construction Yes

MR CUTHBERTSON: I think the STB had tremendous  
suspicions about what was going on

THE COURT You said there is no evidence before  
this court that this is construction of a rail terminal  
and I'm suggesting to you that perhaps the STB ordered  
something to do with that

Did it stop the progress right in its tracks?

1 MR CUTHBERTSON Perhaps it did.

2 THE COURT Yes

3 MR CUTHBERTSON. But in order for federal  
4 preemption to apply, they have to show you at least that  
5 federal preemption would be applicable. And I don't  
6 believe, based on the evidence they have produced, that  
7 federal preemption is going to be applicable.

8 THE COURT Isn't that a question for the STB?

9 MR CUTHBERTSON They have presented here I  
10 mean, they are asking for your relief. They are asking  
11 for an injunction, your Honor.

12 So the question is before you. And the question  
13 is one of likelihood of success on the merits. And Miss  
14 Blbow said it, before that it goes to whether preemption  
15 is going to apply.

16 Based on the evidence they have presented, I  
17 don't believe preemption is going to apply.

18 If I can continue, your Honor. I think what may  
19 be useful, to try and sum up, is to look to the Coastal  
20 case. It is a case you are familiar with. It is a case  
21 I'm intimately familiar with.

22 In Coastal the town issued a stop-work order,  
23 and there was an existing operating rail facility. There  
24 was a finding by this court that there was going to be  
25 irreparable harm on that basis.

1 In this case is that is not the case. There is  
2 no town stop-work order. The two agencies who ostensibly  
3 have made the work-stop, the STB and the DEC, are not  
4 before this court.

5 The plaintiff sought to enjoin the STB's cease  
6 and desist in order in the Second Circuit. They were not  
7 successful in doing that.

8 There is a long history of procedure before the  
9 STB already in this case, as opposed to Coastal where  
10 there was none.

11 I would say, though, these facts are very  
12 different from Coastal as well. In Coastal you had a  
13 letter from the DEC that said we don't have jurisdiction,  
14 there is federal preemption, based on what we have  
15 examined at the facility. And, as I mentioned, at the

16 time there was a business that was up and running. You  
17 also had the involvement in Coastal.

18 It's a very different legal argument of the New  
19 York and Atlantic Railroad. The New York and Atlantic  
20 Railroad has the freight rights for all of Long Island.  
21 They are the entity that can use the Long Island Rail Road  
22 tracks in order to move freight on Long Island.

23 New York and Atlantic Railroad has actually  
24 participated in the STB proceeding and made submissions in  
25 that proceeding and they oppose the effort.

1 THE COURT. They changed their position in the  
2 proceeding, didn't they?

3 I was reading the materials you submitted last  
4 night, and it seemed to me that they had almost come full  
5 circle here.

6 MR CUTHBERTSON. They believed they had an  
7 agreement with the owner of the property.

8 THE COURT Sills?

9 MR CUTHBERTSON. As to the way they were going  
10 the present their application to the STB.

11 When they believed Sills renege on that  
12 agreement, they no longer support the basis for  
13 preemption.

14 Here you have an entity that just went to the  
15 STB under a different legal theory, pulled back from that,  
16 got the STB to allow them to withdraw their application  
17 based on their statements that they were just constructing  
18 at the property.

19 Their attorney, that represents both the Sills  
20 Road entity and US Rail, actually put in a submission to  
21 the STB on August 3, after the clearing had started, that  
22 said, well, Sills isn't doing any construction at the  
23 property. Oh, and by the way, Suffolk and Southern, the  
24 agreement we said we had before that would have enabled us  
25 to be in front of you, we don't have. Never mentioned that.

1 US Rail, ostensibly US Rail, was undertaking sand mining  
2 and construction at the facility. And I think that is an  
3 important difference.

4 In this case the basis of irreparable harm  
5 don't think, there is no basis for irreparable harm.

6 The tickets. They have the right, as your Honor  
7 alluded to, to defend in that case. The issue of this  
8 Empire company, 20 miles away in Secaucus, I asked the  
9 Inspector yesterday directly was this done as a reprisal  
10 for what was going on at Sills Road? He said under oath  
11 it was not.

12 THE COURT. Why isn't there criminal prosecution  
13 and the recurring violations, they are apparently three  
14 according to counsel representations, why isn't that  
15 irreparable harm?

16 MR CUTHBERTSON. Because they can contest those  
17 or pay money. It is not that irreparable, these  
18 companies can gain a criminal conviction when in fact  
19 there may not be any basis for the tickets.

20 MR CUTHBERTSON. Well, first, there isn't any  
21 petition for the ticket. That is for the district court  
22 to adjudicate. They are competent.

23 THE COURT. Does the district court have equity  
24 powers?

25 MR CUTHBERTSON. I don't believe they need

1 equity powers, your Honor

2 THE COURT: So if this court were to agree with  
3 your reasoning, what would prevent the town from just  
4 reticketing throughout the duration of this case before  
5 the STB?

6 MR CUTHBERTSON: What would?

7 THE COURT: What prevents the town from doing  
8 that?

9 MR CUTHBERTSON: There is nothing to prevent  
10 the town if you do not enjoin our activity

11 THE COURT: To you really want to do that here?

12 MR CUTHBERTSON. It is not, your Honor --

13 THE COURT: That is not what the state, the

14 position the state has taken, either

15 MR CUTHBERTSON: Your Honor, we don't want to  
16 be handcuffed into being able to do nothing

17 (There was a pause in the proceedings )

18 THE COURT: Excuse me, finish your sentence

19 The court reporter has been summoned. We will  
20 take a short break and when he comes back we will resume  
21 this argument

22 MR CUTHBERTSON: Sorry for the interruption.  
23 Just for your line of thought if you would.

24 There is the potential here that the STB is  
25 going to allow the plaintiffs the limited ability to move

1 forward with construction. Construction that we don't  
2 believe will be --

3 THE COURT: So why don't you wait and see what  
4 they do and then you are dealing with a definite rather  
5 than hypotheticals

6 The two of you are dealing with hypotheticals  
7 and you are asking this court to anticipate everything,  
8 when this is the exclusive agency that has been designated  
9 by Congress to deal with the very issue that you are  
10 talking about

11 MR CUTHBERTSON: Your Honor --

12 THE COURT: The extent to which there is local  
13 control over ordinances and the project.

14 MR CUTHBERTSON: What I'm doing is resisting a  
15 prong of an injunction that they want that would bind my  
16 hands in the event what is now speculation comes to pass

17 THE COURT: We are going to take a break and you  
18 can pick up after

19 (Recess taken from 12:35 pm until 12.50 pm )

20 THE COURT: Back on the record

21 MR CUTHBERTSON: I will bring it to a close  
22 We talked about success on the merits

23 In terms of irreparable harm. With respect to  
24 the economic harm arguments that are made here, the STB  
25 has already rejected the notion that there is irreparable

1 harm in their proceedings

2 THE COURT: What about the harm from the  
3 prosecution? You have indicated that you would stipulate  
4 until you can get a decision with regard to this  
5 application?

6 MR. CUTHBERTSON: Correct your Honor

7 THE COURT: But that leaves open a period of  
8 time. I assume it will be thereafter that this case may  
9 be before the STB, so during that period of time you can  
10 continue to prosecute. That is the irreparable harm.  
11 Why isn't that irreparable harm?

12 MR. CUTHBERTSON: Again, your Honor, they can  
13 defend. Like any other type of criminal/evil summons,  
14 they can go two before.

15 THE COURT: It is not slash evil summons. This  
16 is a criminal action.

17 MR. CUTHBERTSON: Which normally is adjudicated  
18 by the payment of money. The inspector that that  
19 testified here --

20 THE COURT: It is still a criminal action. It  
21 is a criminal proceeding.

22 MR CUTHBERTSON: It is a criminal proceeding  
23 that normally results in the payment of money or an  
24 acquittal. As the inspector who testified here yesterday  
25 said, they don't seek, nor has he ever seen here, a

1 jail sentence imposed in those cases

2 THE COURT: So because the only punishment is by  
3 a fine against the corporation, you can't send a  
4 corporation to jail, there is no irreparable injury. Is  
5 that your position?

6 MR. CUTHBERTSON: I think that is a fair  
7 statement of the position.

8 THE COURT: Have you got some basis to back that  
9 up?

10 MR CUTHBERTSON: I'm not here but I certainly would  
11 when we submit findings of fact.

12 THE COURT: If there are any out there, I would  
13 be very interested in seeing them.

14 MR CUTHBERTSON: Okay.

15 THE COURT: Thank you.

16 MR CUTHBERTSON: With that, the last thing is  
17 just, your Honor, why does the town care about this case?

18 And is this just the town opposing any industrial project?

19 THE COURT: you don't have to explain to me why  
20 the town is interested in this case.

21 MR CUTHBERTSON: Good enough. Thank you will  
22 conclude, your Honor.

23 Thank you

24 THE COURT: You get the last word

25 MS BIBLOW: Thank you, your Honor

Your Honor, I just want to address a few points

raised by Mr Cuthbertson

With respect to his claim that this is a sand mining operation and not a railroad First of all, I would like to say the testimony yesterday clearly established what was happening at this facility

We had testimony from Mr Hall that it is a rail facility and going to be a rail facility and not a sand operation Mr Cuthbertson can recast the excavation agreement any way he wants, but he did it incorrectly

You have to excavate in order to bring this property down to grade You had the testimony of Mr Hall as to why that was being done You have in the record the schematic of the plan We have testimony about the purchase of locomotives We have testimony about the purchase of 104 rail cars We have testimony about interaction with the Long Island Rail Road and New York and Atlantic to put a switch in to have an interchange agreement

These are all part and parcel of operating a rail facility, not a sand mine operation, your Honor

THE COURT Did you mention the locomotives?

MS BIBLOW Two locomotives I thought I had

And so to suggest otherwise I think is just disingenuous, quite frankly This is a rail operation

And it is being done by US Rail, a Class III shortline railroad, that is authorized by the STB already.

With respect to the question about what the town is or is not willing to stipulate to, that seems to be a moving target, quite frankly, and that is our concern

Yesterday they said one thing When they were talking about we had this application, they said they would do something else It seems, absent this court entering an order telling the town what it can and cannot do during this interim period, we have no guarantee that they will live up to any representations they have made because they just --

THE COURT I intend to rely on the town's position to the stipulation, that they are willing to hold off with regard to any further tickets of any of the plaintiffs and any prosecution with regard to any of the present tickets, with the exception of Empire, until there is a decision on this application

MR CUTHBERTSON That's correct. Until there is a decision on this application

MS BIBLOW And the last thing I would like to clarify with respect to the November 16th decision and likelihood of success.

That decision was dealing with whether or not we were likely to succeed as an exempt spur Nothing as to

whether or not were a railroad your Honor, and whether or not we were under the rubric of preparing under the STB it had to do with whether we were an exempt spur or a spur --

THE COURT: Correct me if I'm wrong, but I didn't see anything where you have ever maintained that this would be a railroad line.

MS BIBLOW: Our view.

THE COURT: As opposed to a spur.

MS. BIBLOW: Our view is that it is a spur.

It is the STB's view in the November 16th that it may not be an exempt spur. But that is a distinction and that is a ruling for the STB to determine, not for this court. And that is why these tickets should be preempted, your Honor.

Thank you

THE COURT: Okay. Thank you all very much.

Now, you want to submit proposed findings of fact and conclusions of law.

How much time do you need to do that? Make all your citations to the record of course.

This is why the town's stipulation is important to me, because it takes the pressure off you of a December 13th date.

MR CUTHBERTSON: Yes. And those will

adjourned

Three weeks, your Honor?

THE COURT: Three weeks?

Do you want to do joint submissions and then a reply?

MS. BIBLOW: The only concern I have is the transcript

I assume we need to wait for that in order to cite the record

THE COURT: How about three weeks from receipt of the transcript?

MR CUTHBERTSON: Fine.

MS BIBLOW: Fine with me.

Just so I'm clear as to what is being done today so that my clients, obviously sitting in the box, are very clear

Is this court going to enter an order that incorporates the town's stipulation as to the pending tickets and no further tickets?

THE COURT: I take counsel's client at their word.

I don't know if that is necessary. If you think that something else is appropriate, why don't you talk. It seems to me that is a stipulation on this record.

MR CUTHBERTSON: I have made the

1 representation. I will send a letter to my client to that  
2 effect, that that is exactly what is to happen I don't  
3 feel there is the need for the entry of an order

MS BIBLOW If I may suggest because as I said  
4 we have been hearing different things from town, the town  
5 board is charging in January, I would be certainly much  
6 more comfortable if that letter was so ordered by the  
7 court

THE COURT Why don't you draw something up if  
8 you would look something in writing, a stipulation, and I  
9 would be glad to sign it But counsel has made the  
10 representation that he has

MR CUTHBERTSON I really don't think it is  
11 necessary This is a case that has been in the media. So  
12 now we are going to have an order reported that the town  
13 is restrained for a time period, and there is going to be  
14 something imputed to that

I don't think that that is necessary I'm  
15 making a representation in open court. I don't think a  
16 signed order that becomes a public document is something  
17 that is necessary

THE COURT Why don't the two of you discuss it  
18 further, and if there is any need for intervention, I'm  
19 always available

Anything further from either side? Decision

1 reserved.

2 (Proceedings concluded at 1 pm )  
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# EXHIBIT H

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

X

SILLS ROAD REALTY, LLC, US RAIL CORPORATION,  
WATRAL BROTHERS, INC., PRATT BROTHERS, INC.,  
ADJO CONTRACTING CORP AND SUFFOLK &  
SOUTHERN RAIL ROAD LLC,

07-CV-4584 (TCP) (ETB)

Plaintiffs,

-against-

THE TOWN OF BROOKHAVEN,

Defendant

X

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**PROPOSED FINDINGS OF FACT  
AND CONCLUSIONS OF LAW  
SUBMITTED BY DEFENDANT TOWN OF BROOKHAVEN**

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Law Offices of Mark A. Cuthbertson  
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(631) 351-3501

**PRELIMINARY STATEMENT**

Defendant Town of Brookhaven ("Brookhaven") submits the within findings of fact and conclusions of law in opposition to the application for a preliminary injunction by Plaintiffs Sills Road Realty, LLC ("Sills"), US Rail Corporation ("US Rail"), Watral Brothers, Inc ("Watral"), Pratt Brothers, Inc ("Pratt"), Adjo Contracting Corp ("Adjo"), and Suffolk & Southern Rail Road L.L.C ("Suffolk") (hereinafter collectively referred to as "Plaintiffs") Plaintiffs argue that the Interstate Commerce Commission Termination Act of 1995 ("ICCTA") preempts the Town of Brookhaven ("Town") from enforcing its local zoning regulations As set forth below, these arguments are without any legal merit

**PROPOSED FINDINGS OF FACT**

Brookhaven respectfully submits the following proposed findings of fact with regard to the issues raised at the preliminary injunction hearing held on December 5-6, 2007

**The Plaintiffs**

1 Sills Road Realty, LLC ("Sills") is a New York limited liability corporation that owns the real property ("Property") on which the proposed rail terminal ("Rail Terminal") is to be located (Tr 52) US Rail Corporation ("US Rail") is an Ohio corporation with a place of business in Toledo, Ohio and is also an existing Class III short line railroad authorized to operate by the United States Surface Transportation Board ("STB") (Tr 15) Adjo is a New York corporation that is the general contractor for the construction of the Rail Terminal (Tr 25) Watral and Pratt are New York corporations and subcontractors of Adjo for the construction of the Rail Facility (Tr 66) Suffolk is a partner in Sills and was initially formed to become a common carrier but never received such status (Tr 59)

2 Sills was formed by strategic partners who include AD Collins, a large upstate quarry company, Suffolk, Adjo and two unnamed individuals who are in the asphalt business and have a significant need for stone in the production of asphalt (Tr 58-59)

**History before the STB**

3 Prior to commencing this action, Plaintiffs made several filings with the STB, which are set forth in detail at Joint Exhibit 1 (hereinafter "JE-1") Those proceedings culminated in a decision by the STB dated October 12, 2007 ("October 12 Decision"), which directed US Rail, Suffolk, Sills, or any other related entity conducting rail construction at the Property to immediately cease from such activity and either obtain authority from the STB or an STB decision finding that such activity does not require STB approval (JE-1, Tab 1, Exhibit A)

4 The history of the proceedings is summarized below and at length in a subsequent STB decision, which denied Plaintiffs' request for a stay of the October 12 Decision (JE-1, Tab 6, Exhibit B)

5 On May 18, 2007, Suffolk filed a verified notice of exemption from construction authority pursuant to 49 USC §10901 and 49 CFR §1150.31 and indicated that Suffolk has reached an agreement with Sills for the lease and operation of railroad trackage and facilities currently being constructed at the Property (JE-1, Tab 6, Exhibit B, p 1)

6 On June 1, 2007, the STB issued a decision indicating that, based on Suffolk's intent to provide for-hire service over trackage, it appears that Sills was constructing a "line of railroad" subject to the STB's jurisdiction. *Id.* It noted that under 49 USC §10901, STB authority is required to construct a line of railroad and that Sills has not sought STB authority for this construction. *Id.* Suffolk was directed to file supplemental information by June 21, 2007 describing its construction activities on the trackage. *Id.*

7 On June 15, 2007 Suffolk informed the STB that due to a change in circumstance, it had decided to withdraw its Notice of Exemption (JE-1, Tab 6, Exhibit B, p 2)

8 On July 12, 2007 and July 25, 2007, an attorney for US Rail advised the Defendant, in letters to the Town Attorney, that he represented US Rail, an Ohio based company and common carrier short line railroad operating pursuant to authority granted by the former ICC now the STB (JE-1, Tab 7, Exhibit A, Exhibits C&D) The letter stated that US Rail has leased the Property and intended to construct and operate an "exempt spur" within the meaning of 49 USC §10906 *Id*

9 On August 13, 2007, the STB issued a decision denying Suffolk's request to terminate the proceeding and directed Suffolk to file the information required by its June 1 decision (JE-1, Tab 6, Exhibit D) The STB's decision explained that if for-hire service was intended for the trackage being constructed, STB authorization for the construction is required under 49 U.S.C. 10901 as well as an environmental review under the National Environmental Policy Act *Id*

10 In its August 13, 2007 decision the STB warned

The STB increasingly has grown concerned that persons using the notice of exemption procedures to obtain authority for the lease or other acquisition and operation of a railroad line may not be making a thorough review of their circumstances prior to filing a verified statement that a proposal should be exempted from environmental and historic reporting because the thresholds will not be met Suffolk filed such a statement, but failed to provide any explanation in its notice of exemption as to why the anticipated movements of intermodal containers and up to 500,000 tons of construction aggregates would not meet or exceed the STB's 3 train per day threshold for environmental documentation Nor did Suffolk explain why the anticipated increase in truck traffic would not meet or exceed the STB's thresholds

*Id*

11 On August 23, 2007 Suffolk filed a response and stated that Suffolk and Sills never concluded an agreement or other relationship with respect to the lease, construction, or operation of the rail facility and Sills never undertook any construction of rail facilities at the location (JE-1, Tab 6, Exhibit B, p. 1) (emphasis added)

12 Thereafter, the STB, in a decision dated September 25, 2007, allowed Suffolk to withdraw its Notice for Exemption "because Suffolk had stated that neither it nor Sills had undertaken

any construction of rail facilities at the Sills Road location or consummated any agreement with Sills Road to lease or operate over the proposed trackage ” (JE-1, Tab 6, Exhibit B, pp 1-2)

13 On October 2, 2007, the STB received a letter from the Defendant concerning a proposed rail facility being constructed on the Property (JE-1, Tab 1, Exhibit C, p 2) This followed a newspaper account indicating that Plaintiffs had cleared 18 acres of land and excavated mountains of sand (estimated at approximately 30,000 cubic yards of sand with a value of between \$330,000 and \$750,000) at the Property (JE-1, Tab 1, Exhibit D, Exhibit B)

14 Based on the new evidence that rail construction might be occurring or contemplated on this property, and because no party had sought construction authority, the STB issued the October 12 Decision ordering the parties to cease all construction activities and made US Rail a party to the proceeding pending before it (JE-1, Tab 1, Exhibit C, p 2)

15 US Rail and Suffolk filed petitions asking for a stay and administrative reconsideration<sup>1</sup> of the October 12 Decision on October 18, 2007 and October 26, 2007, respectively

16 In a decision dated November 16, 2007, the STB denied the petition for a stay, explaining that the petitioners had failed to make a strong showing with respect to the factors to be considered in issuing a stay, which include (1) whether there is a strong likelihood that petitioners will prevail on the merits, (2) whether petitioners will be irreparably harmed in the absence of a stay, (3) whether issuance of a stay would substantially harm other parties, and (4) whether issuance of a stay would be in the public interest (JE-1, Tab 6, Exhibit B)

#### **The STB and Second Circuit Deny Plaintiffs' Stay Request**

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<sup>1</sup> The petition for reconsideration was ultimately denied in a decision dated December 20, 2007, based on grounds nearly identical to those articulated to deny the request for a stay *Suffolk & Southern Rail Road LLC – Lease and Operation Exemption – Sills Road Realty, LLC* STB Finance Docket No. 35036, WL 4466696 (STB December 20, 2007)

17 The STB's decision denying a stay indicated that petitioners were unlikely to succeed on the merits of their argument that no STB authority or NEPA review was required (JE-1, Tab 6, Exhibit B, pp 4-6)

18 In analyzing the irreparable harm argument advanced in the petition, the STB commented that "[p]etitioners' claim of opportunity costs and construction costs are strictly monetary in nature. Alleged monetary damages, even if proven do not constitute irreparable harm." (JE-1, Tab 6, Exhibit B, p 6) (citations omitted)

19 In evaluating the "public interest" criteria required for a stay, the STB noted that "[w]hile petitioners cite the need for more freight facilities on Long Island, the October 12 Decision does not prevent the facility from being constructed once appropriate approvals are obtained. Thus, any potential public benefit could still be realized. Instead, the public interest is better served by precluding the potential evasion or misuse of the Board's processes that could result from allowing the construction and operations proposed here to proceed without the license and NEPA review that appear to be required." (JE-1, Tab 6, Exhibit B, p 7)

20 On November 9, 2007, with the petition for reconsideration still pending with the STB, Sills, Suffolk and US Rail filed a petition for judicial review of the October 12 Decision in the United States Court of Appeals for the Second Circuit, requesting a temporary restraining order and a preliminary injunction to allow construction activities to continue. The Second Circuit denied the request for a temporary restraining order on November 13, 2007 and thereafter dismissed the petition for judicial review, on the grounds that the October 12 Decision was not final. (JE-1, Tab 10)

#### **Plaintiffs' Request for a Preliminary Injunction**

21 Plaintiffs commenced this action seeking to preliminarily enjoin the Town from taking any action to prosecute appearance tickets it issued to Plaintiffs on October 4, 2007 ("Tickets") or from issuing further tickets. Plaintiffs also sought to enjoin the Town from "taking any other action to interfere with or obstruct Plaintiffs' construction and operation of" the Rail Terminal. Order to Show

Cause. p 2 In seeking this preliminary injunction, Plaintiffs alleged that "[p]rosecution of the Appearance Tickets and/or imposing a requirement that the Brookhaven Rail Terminal submit to Defendant's permitting processes have resulted in delays to the construction of the Brookhaven Rail Terminal with attendant damages – all of which are irreparable. Order to Show Cause, Affidavit of Gerard Drumm ¶29

**Plaintiffs' Evidence of "Rail Construction"**

22 US Rail claims that it is obligated to construct and operate a rail facility at the Property pursuant to a document entitled "Railroad Operating Agreement and Property Lease" ("Agreement") (Exhibit 7) (Tr 20)

23 Under Paragraph 3(b) of the Agreement, US Rail "will pay annual rent in the amount of one thousand dollars (\$1,000) per year during the term of this lease, including any renewal periods" (Exhibit 7, ¶3(b))

24 Under Paragraph 3(c) of the Agreement, in the event of early termination, Sills will pay all of US Rail's reasonable costs of termination, including costs of moving US Rail's equipment from the Premises (Exhibit 7, ¶3(c))

25 Under Paragraph 4 of the Agreement, Sills will pay US Rail ten thousand dollars (\$10,000.00) upon execution of the Agreement (Exhibit 7, ¶4)

26 Under Paragraph 9 of the Agreement, Sills shall pay when due all taxes imposed with respect to the Leased Assets during the term of the Lease, other than US Rail's income taxes (Exhibit 7, ¶9)

27 US Rail also alleges that an Excavation Agreement dated August 7, 2007 ("Excavation Agreement") (Exhibit 8) and a "proposal" for construction ("Proposal") (Exhibit 10) evidence its obligation to construct a rail facility at the Property

28 The Proposal, which allegedly delineates the construction work and improvements to be performed by Adjo has a total price tag of \$5,450,000 (Exhibit 10)

29 The Excavation Agreement is between US Rail, Adjo as "Contractor" and Sills as Owner" and provides in the first and second "Whereas" clauses, that the US Rail has contracted with the Contractor, Adjo, for the improvement of the subject properties and the installation of the Rail Terminal (Exhibit 8. p 1)

30 Paragraph 1 of the Excavation Agreement also provides that

"US Rail agrees to retain Contractor, on the terms and conditions set forth in this Agreement, to excavate in, on, and under the Subject Properties and to remove all materials, and any products derived from such materials (collectively, "Bank Run"), from the Subject Properties Contractor shall use its best efforts to conform its operations on the Subject Properties during the Term hereof and to perform its obligation hereunder in compliance with the excavation and site preparation plan in effect from time to time (the "Excavation Plan") For all excavation and site preparation work hereunder, Contractor shall be entitled to recover, from the proceeds of the sale of Bank Run the greater of (i) \$ 3,000,000 plus ten percent (10%) thereof for overhead, ten percent (10%) thereof for profit and five percent (5%) thereof for management (collectively, the "25% Allowance") or (ii) all of Contractor's Costs, as hereinafter defined, plus the 25% Allowance, provided, however, that, with respect to Contractor's Costs that are subcontractor costs, the 25% Allowance shall be ten percent (10%) "

Exhibit 8, ¶1

31 Paragraph 4 of the Excavation Agreement provides as follows

"(a) For all Bank Run, Contractor agrees to pay, or provide payment, to Owner (i) Six Million Dollars (\$6,000,000) (the "Base Payment") plus (ii) fifty percent (50%) of the excess (the "Excess Payment"), if any, of all Revenues (as hereinafter defined) over Contractor's Expenses (as hereinafter defined) The Base Payment shall be paid in installments as set forth in Exhibit B hereto The Excess Payment shall be paid within sixty (60) days following the end of the Term or earlier termination of this Agreement Quantities of Bank Run extracted from the Subject Properties shall be determined using Owner's scales installed on the Subject Properties (b) For the purposes of this Agreement, (i) "Revenues" shall mean the gross revenues derived from the sale of Bank Run and all other gross revenues derived from the excavation and site preparation of the Subject Properties and (ii) "Contractor's Expenses" shall mean all documented costs of Contractor in performing its obligations under this Agreement ("Costs"), an allowance equal to twenty five percent (25%) of Costs and the Base Payment actually paid to Owner Owner shall have the right from time to time to inspect Contractor's books and records to confirm any determination of Revenues or Contractor's Expenses (c) Owner agrees to allow Contractor to remove an indeterminate quantity of Bank Run from the Subject Properties, with no annual or cumulative maximum quantities, limited only by the requirements of the

Excavation Plan and the depletion of Bank Run reserves on the Subject Properties ”

Exhibit 8. ¶ 4

32 Gabriel Hall ( ‘Hall’), President and CEO of US Rail initially testified that US Rail was doing the construction at the Property via its hiring of contractors (Tr 38) Mr Hall produced the Proposal (Exhibit 10) for construction work at the Rail Terminal to be performed by Adjo and claimed that the Proposal was adopted into the Excavation Agreement (Tr 39)

33 The Excavation Agreement contains absolutely no reference to the Proposal The Proposal also does not contain any reference to US Rail but rather indicates that it is a “Bid To Sills Road Realty ” (Exhibit 10)

34 Hall testified that he had written some checks to Adjo for their construction work but could not tell whether the method by which Adjo was being paid was by selling materials being pulled out of the site and was not aware that Adjo was being compensated for and allowed to sell the material they took out of the site (Tr 43)

35 After reviewing the Excavation Agreement, Hall acknowledged that Adjo appears to be permitted to sell the material from the site but could not confirm that this was how they were being paid despite having reviewed and signed the Excavation Agreement on behalf of US Rail (Tr 44)

36 Hall acknowledged that there was nothing in the Tickets directing US Rail to stop construction (Tr 41)

37 Gerard Drumm is CFO and General Counsel to both Sills and Suffolk (Tr 52 & 62) He acknowledged that there was no cease and desist language in the Tickets (Tr 73)

38 Empire Asphalt ( ‘Empire’) is an asphalt company that is owned by Adjo, Watral and Pratt, which is located approximately 20 miles away from the Property (Tr 75, 77 & 106) At the hearing, Plaintiffs attempted to establish that tickets were issued to Empire (Exhibit 6) in retribution

for Plaintiffs' activities at the Property and with knowledge of the fact that some of Plaintiffs were partners in Empire (Tr 75-84)

39 An investigator for the Town Attorneys Office of Defendant, Brian Tohill, testified that he was responsible for issuing the tickets to Plaintiffs and tickets to Empire and he did not know of the connection between Empire and Plaintiffs (Tr 98) He further testified that the tickets issued to Empire were not issued in reprisal for activities at the Property but were based on complaints received from a constituent living in the vicinity of Empire on or about September 28, 2007 (Tr 99 & 105) (Exhibit C)

### **PROPOSED CONCLUSIONS OF LAW**

#### **POINT I**

#### **THIS CASE SHOULD BE DISMISSED BASED ON *YOUNGER* ABSTENTION**

This action should be dismissed based upon the principles of abstention established by the Supreme Court in *Younger v Harris*, 401 U S 37 (1971) In *Younger*, the Supreme Court held there is a "federal policy forbidding federal courts from enjoining pending state criminal proceedings except under extraordinary circumstances " *Id* at 46 As the *Younger* Court noted, "the normal thing to do when federal courts are asked to enjoin pending proceedings in state courts is not to issue such injunctions " *Id* at 45

In applying *Younger*, the Second Circuit has stated

[F]ederal courts should generally refrain from enjoining or otherwise interfering in ongoing state proceedings This principle of abstention is grounded in interrelated principles of comity and federalism Both considerations require federal courts to be cognizant that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways In recognition of this balance of interests, *Younger* generally prohibits courts from taking jurisdiction over federal constitutional claims that involve or call into question ongoing state proceedings so as to avoid unnecessary friction

*Spargo v NY State Comm'n on Judicial Conduct*, 351 F 3d 65, 74 (2d Cir 2003) (citations omitted)

The Second Circuit has consistently applied *Younger* to reject inappropriate attempts to enjoin state criminal proceedings. *Citizens for a Better Environment, Inc v Nassau County*, 488 F.2d 1353, 1358 (2d Cir. 1973), *Schlagler v Phillips*, 166 F.3d 439 (2d Cir. 1999), *Hansel v Town Court*, 56 F.3d 391 (2d Cir. 1995). In *Citizens for a Better Environment*, several plaintiffs sought to enjoin a county's enforcement of appearance tickets issued for violation of an anti-solicitation ordinance. *Citizens for a Better Environment*, 488 F.2d at 1358. Violation of the ordinance in question was punishable by a fine not exceeding \$250 or imprisonment, or both. *Id.* Applying *Younger*, the Court held "to the extent the individual plaintiffs are seeking to enjoin the criminal actions against them, *Younger* must control." *Id.* at 1359. Similarly, in *Schlagler*, the plaintiff was issued an appearance ticket charging him with a violation of the New York State Penal Law for placing racially-offensive stickers throughout a café. *Schlagler*, 166 F.3d at 439. Schlagler sought an action to enjoin the pending criminal proceedings claiming that the ticket violated his constitutional right to free speech. *Id.* The Second Circuit held that an injunction should not be granted insofar as "abstention is required absent a suggestion that a prosecution was 'brought in bad faith or is only one of a series of repeated prosecutions'" reasoning that the constitutionality of the statute could be addressed in Schlagler's state criminal prosecution. *Id.* at 443 (quoting *Younger* 401 U.S. at 49).

While *Citizens for a Better Environment* and *Schlagler* involved constitutional claims, the United States Supreme Court places preemption claims on the same footing as other federal constitutional claims for abstention purposes. *New Orleans Public Service, Inc v Council of the City of New Orleans* 491 U.S. 350, 365 (1989) ("[t]here is no greater federal interest in enforcing the supremacy of federal statutes than in enforcing the supremacy of explicit constitutional guarantees, and constitutional challenges to state action, no less than pre-emption-based challenges, call into question the legitimacy of the State's interest in its proceedings reviewing or enforcing that action.")

In applying *Younger* abstention courts "must determine (1) whether there is an ongoing state proceeding, (2) whether an important state interest is involved, and (3) whether the federal plaintiff

has an adequate opportunity for judicial review of his constitutional claims during or after the proceeding.” *University Club v City of New York*, 842 F.2d 37, 40 (2d Cir. 1988) (quoting *Christ the King Regional High School v Culvert*, 815 F.2d 219, 224 (2d Cir.), cert. denied, 484 U.S. 830, 108 S.Ct. 102, 98 L.Ed.2d 63 (1987)). An exception to *Younger* provides that even if all three factors point toward abstention, a federal court may still intervene if a plaintiff demonstrates bad faith, harassment or any unusual circumstances that would call for equitable relief. *Spargo*, 351 F.3d at 75, n. 11.

The Tickets are a part of ongoing State Criminal Proceedings

Plaintiffs seek to enjoin a criminal proceeding<sup>2</sup> (Tr. 106-111). The Tickets read “The People of the State of New York v.” a number of the Plaintiffs named herein and there was testimony that many of these Tickets are considered misdemeanors (Exhibits 1-5)(Tr. 109). As such, there can be no serious argument that the Tickets are not a part of an ongoing criminal proceeding.

The Tickets are a part of State Criminal Proceedings that Implicate Important State Interests

“There is no question that [an] ongoing prosecution implicates important state interests.” *Davis v Lansing*, 851 F.2d 72, 76 (2d Cir. 1988). Protecting the health, safety and welfare of the public through enforcement of local ordinances is an important interest. In fact, this Court has held that the right of a municipality to “regulate land use and enforce its regulations through criminal and civil enforcement actions implicates important state interests.” *Sendlewski v Town of Southampton*, 734 F. Supp. 586, 591 (E.D.N.Y. 1990).

The State Proceedings Provide an Adequate Forum for Plaintiffs to Raise any Federal Claims

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<sup>2</sup> There was some discussion at the hearing as to whether the Tickets were criminal or civil in nature (Tr. 106-108). Even if the tickets were considered civil in nature, abstention would still apply insofar as *Younger* has been extended to state civil or administrative proceedings. See *Washington v County of Rockland*, 373 F.3d 310, 318 (2d Cir. 2004), *Diamond "D" Const. Corp v McGowan*, 282 F.3d 191, 198 (2d Cir. 2002), *Sabrina v Jones*, 1988 U.S. Dist. LEXIS 15289 (2d Cir. 1988).

Plaintiffs asserted at the hearing that this Court is "better equipped to deal with federal questions of preemption than a local district court" (Tr 129). This argument clearly runs afoul of the notions of federalism and comity articulated in *Younger v Spargo*, 351 F.3d at 74 (noting "the vital purpose of reaffirming the competence of the state courts, and acknowledging the dignity of states as co-equal sovereigns"). Moreover there are myriad examples of state courts, including district courts, adjudicating federal or constitutional questions. See e.g. *People of the State of New York v Sposito*, 126 Misc.2d 185, 481 N.Y.S.2d 613 (Suff. Cty. Dist. Ct. 1984) (holding a portion of Brookhaven Town Ordinance §85-121A unconstitutionally vague), *People of the State of New York v Mendelson*, 15 Misc.3d 925, 834 N.Y.S.2d 445 (Nass. Cty. Dist. Ct. 2007) (holding town ordinance violative of the First Amendment), *People of the State of New York v Frie*, 169 Misc.2d 407, 646 N.Y.S.2d 961 (Suff. Cty. Dist. Ct. 1996) (holding an anti-noise ordinance does not run afoul of constitutional vagueness standard).

There is No Evidence of Harassment or Bad Faith Prosecution

Plaintiffs sought to establish that tickets were issued to Empire in retribution for Plaintiffs' activities at the Property and with knowledge of the fact that some of Plaintiffs were partners in Empire (Tr 75-84). An investigator for Defendant testified that he was responsible for issuing the tickets to Plaintiffs and tickets to Empire and he did not know of the connection between Empire and Plaintiffs (Tr 98). He further testified that the tickets issued to Empire were not issued in reprisal for activities at the Property but rather were based on complaints received from a constituent living in the vicinity of Empire on or about September 28, 2007 (Exhibit C)(Tr 99 & 105). It was also established at the hearing that the Empire facility is located approximately 20 miles away from the Property (Tr 75, 77 & 106). In sum, the Tickets were not issued in bad faith or to harass the Plaintiffs.

**POINT II**

**PLAINTIFFS LACK STANDING**

Plaintiffs lack standing because this Court cannot grant them relief that would redress the alleged harm. Even a completely favorable decision by this Court, which would enjoin the prosecution of the Tickets, the issuance of additional tickets and forbid any Town efforts to impede construction, would not redress Plaintiffs' alleged injury (their inability to continue construction) since the STB cease and desist order (October 12 Decision) is still in effect and will not allow construction.

It is an "irreducible constitutional minimum of standing" that (1) the plaintiff suffer an injury in fact, which is "an invasion of a legally protected interest which is concrete and particularized and actual or imminent rather than conjectural or hypothetical", (2) there be "a causal connection between the injury and conduct complained of" so that the injury is "fairly traceable to the challenged action of the defendant and not the result of the independent action of some third party not before the court", and (3) it be "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992), *Ziembra v. Rell*, 409 F.3d 553, 554 (2d Cir. 2005), *NY Coastal P'ship, Inc. v. United States DOI*, 341 F.3d 112, 116 (2d Cir. 2003). "Without a plaintiff's satisfaction and demonstration of the requirements of Article III standing, a federal court has no subject matter jurisdiction to hear the merits" of a plaintiff's claim. *Cent. States Southeast & Southwest Areas Health & Welfare Fund v. Merck Medco Managed Care, L.L.C.*, 443 F.3d at 181 ("Where the relief sought would not resolve the entire case or controversy as to any party, but would merely determine a collateral legal issue governing certain aspects of pending or future suits, a declaratory judgment action falls outside the constitutional definition of a 'case' in Article III.") See also, *Jenkins v. United States*, 386 F.3d 415 (2d Cir. 2004).

The Second Circuit has denied standing when the court could only speculate whether the remedy plaintiffs sought would redress their purported injuries. *NY Coastal P'ship, Inc v United States DOI*, 341 F.3d 112. In *NY Coastal*, the Plaintiffs sought to compel the Department of the Interior to implement the Fire Island Interim Project ("FIIP") or take affirmative steps to combat shore erosion on Fire Island. *Id.* The Court held there was no indication that implementation of the FIIP would ameliorate Fire Island's erosion problems and denied plaintiffs' standing because the remedial effect of the requested relief was speculative. *Id.* at 116.

Plaintiffs have only made conclusory allegations about the impact of Defendant's actions in issuing the Tickets. They claim that "Defendant's actions have a direct and immediate impact on the construction and operation of the Brookhaven Rail Terminal and impose actual concrete injury upon Plaintiffs (Complaint ¶36) and that they have "suffered and, absent preliminary and permanent injunctive relief, will continue to suffer irreparable harm by reason of Defendant's improper conduct" (Complaint, ¶50). They further allege that Defendant's illegal actions have and will cause them economic harm due to the construction delays for the Rail Terminal. Based on these alleged illegal actions and irreparable harm, they are requesting that this Court enjoin the Defendant from (a) prosecuting the Tickets, (b) issuing more tickets, and (c) "taking any other action to interfere with or obstruct Plaintiffs' construction and operation of the Brookhaven Rail Terminal"

However, the construction delay and attendant harm are not due to the actions of Defendant. Plaintiffs' witnesses testified that construction has stopped based on the cease and desist mandate set forth in the STB October 12 Decision. Moreover, Plaintiffs' witnesses conceded there is nothing in the tickets directing them to stop construction. (Tr. 41 & 74)

Thus, even if Defendant were to concede (which it does not) that Plaintiffs had suffered an injury-in-fact at the hands of Defendant that was fairly traceable to the challenged action, there is no way that this injury could be redressed by the requested relief. This Court expressed a similar concern relative to the third prong of Plaintiffs' Order to Show Cause when it noted "you may not even have a

case in controversy before this court as far as that request for relief. Because at this point everything is very hypothetical.” (Tr. 122)

Based on the foregoing, Plaintiffs have failed to satisfy their burden of establishing standing, and therefore this Court should decline to exercise subject matter jurisdiction over their claims.

### **POINT III**

#### **PLAINTIFFS HAVE FAILED TO MEET THE REQUIREMENTS FOR A PRELIMINARY INJUNCTION**

A preliminary injunction is an extraordinary remedy that should not be granted as a routine matter. See *Ticor Title Ins. Co. v. Cohen*, 173 F.3d 63 (2d Cir. 1999), *JSG Trading Corp. v. Tray-Wrap, Inc.*, 917 F.2d 75, 80 (2d Cir. 1990). A party seeking a preliminary injunction generally must demonstrate that he or she (a) will suffer irreparable harm in the absence of the requested relief, and (b) either (1) is likely to succeed on the merits or (2) there are sufficiently serious questions going to the merits and the balances of hardship tips decidedly in the movant's favor. See *Latino Officers Ass'n v. Safir*, 170 F.3d 167, 171 (2d Cir. 1999), *Jackson Dairy, Inc. v. H.P. Hood & Sons*, 596 F.2d 70 (2d Cir. 1979). Where a private party seeks to enjoin enforcement of state power, the public interest must be balanced against the private interest asserted by the plaintiff. *Brody v. Village of Port Chester*, 261 F.3d 288 (2d Cir. 2001).

There must be an “extraordinarily pressing need for immediate federal equitable relief.” *Lawson v. City of Buffalo*, 52 Fed. Appx. 562, 563 (2d Cir. 2002), *Diamond “D” Const. Corp. v. McGowan*, 282 F.3d 191, 198 (2d Cir. 2002).

As noted above, there is no need for immediate federal equitable relief here because Plaintiffs cannot resume construction of their rail facility even if granted an injunction. In addition, as set forth below, Plaintiffs have neither sustained nor alleged irreparable harm, nor are they likely to succeed on the merits. Therefore, their request for a preliminary injunction must be denied.

**A. Plaintiffs Have Failed To Establish That They Have, Or Will, Suffer An Irreparable Harm If This Application Is Not Granted By The Court**

The showing of irreparable harm is the “single most important prerequisite for the issuance of a preliminary injunction” *Bell & Howell v Masel Supply Co*, 719 F.2d 42, 45 (2d Cir. 1983). The mere possibility of harm is not sufficient; the harm must be imminent and the movant must show she is likely to suffer irreparable harm if equitable relief is denied. *JSG Trading Corp.*, 917 F.2d at 80. Nor will a preliminary injunction be granted if the movant can be compensated adequately by money damages. *Borey v National Union Fire Ins. Co.*, 934 F.2d 30, 34 (2d Cir. 1991).

**1. Plaintiffs’ Right To Defend The Tickets In a Local District Court defeats their Irreparable Harm Argument.**

The “cost or inconvenience of having to defend against a single criminal prosecution” does not establish the sort of irreparable injury that would permit state interference in state proceedings. *Feerick v Sudoinik*, 816 F.Supp. 879 (SDNY 1993) (quoting *Younger*, 401 U.S. at 46). Indeed, this Court has held that a party who has an opportunity to redress his federal claim in state court cannot establish irreparable harm. *Hart v Felder*, 2007 U.S. Dist. LEXIS 89915 at \*5 (EDNY 2007) (citing *Lusk v Vill. of Cold Spring*, 475 F.3d 480, 485 (2d Cir. 2007)).

While Plaintiffs sought to attach great significance to the fact that they were issued criminal violations, (Tr. 73), the mere fact that they are being subject to criminal prosecution does not establish irreparable harm.

**2. Plaintiffs’ Circumstances are Not Similar to the *Coastal* or *BSOR* cases.**

Plaintiffs have pinned much of their hopes of demonstrating irreparable harm on what they have described as the remarkable similarity of their case to a recent Second Circuit case, *Coastal Distribution, LLC v Town of Babylon*, 216 Fed. Appx. 97, 100 (2d Cir. 2007) (“*Coastal*”) and *Buffalo Southern Railroad, Inc. Village of Croton on Hudson*, 434 F.Supp.2d 241 (SDNY 2006) (“*BSOR*”).<sup>3</sup>

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<sup>3</sup> The *Coastal* case has been modified to the extent that STB recently ruled that Coastal was not acting as an Agent of New York and Atlantic Railroad and, as a result, the STB “does not have jurisdiction over Coastal’s activities, and the federal pre-emption in section 10501(b) does not apply. See *Town of Babylon and Pinelawn Cemetery – Petition for Declaratory Order*. STB Finance Docket No. 35057, 2008 WL 6488488 (STB February 1, 2008).

It is clear that Plaintiffs have not demonstrated facts remotely similar to those set forth in *Coastal* or *BSOR*. In *Coastal*, the Town of Babylon issued a stop-work order and attempted to close a rail facility that was already operating. *Coastal*, 216 Fed. Appx. At 99. The Second Circuit held that it was not clearly erroneous for the District Court to find that Coastal's relationships would be permanently harmed by its inability to assure customers that its business would be ongoing. *Id.* at 100.

In *BSOR*, there was an existing rail facility in operation and the plaintiff rail entity alleged that eminent domain proceedings instituted by the Village would foreclose its ability to do business in the area entirely and would cause the loss of a potential business and customer goodwill. *BSOR*, 434 F. Supp. 2d at 247-48. The Court specifically noted that such factors had been held to constitute irreparable injury in the analogous *Coastal* case. *Id.*

In this case, Plaintiffs have a business plan to transport rock and stone by rail to deliver better pricing in a competitive market (Tr. 54-55). However, unlike *Coastal* or *BSOR* there is no ongoing operation nor have they begun to provide a service or product to customers.

This Court is not the first venue in which Plaintiffs have advanced their vacuous argument for irreparable harm. The STB considered and rejected Plaintiffs' claims of irreparable harm, explaining that Plaintiffs' "claim of opportunity costs and construction costs are strictly monetary in nature." Alleged monetary damages, even if proven do not constitute irreparable harm. (JE-1, Tab 6, Exhibit C, p. 6) (citations omitted).

**B. Plaintiffs Have Failed To Establish That They Will Succeed on the Merits of Their Claim**

Plaintiffs argue that regulation of their activities is preempted by ICCTA. This Court should review Plaintiffs' preemption arguments in light of the strong presumption against preemption. "Preemption analysis begins with the 'presumption that Congress does not intend to supplant state law.'" *AGG Enterp. v. Washington County*, 281 F.3d 1324, 1327 (9th Cir. 2002). *Florida East Coast Railway Company v. City of West Palm Beach*, 266 F.3d 1324 (11th Cir. 2001) (there is a presumption

against preemption recognized by the U S Supreme Court) Reliance “on the presumption against pre-emption limits ‘congressional intrusion into the States’ traditional prerogatives and general authority to regulate for the health and welfare of their citizens ’” *Id* at 1328 (citing *City of Boerne v Flores*, 521 U S 507, 534 (1997))

**a The STB has rejected the merits of Plaintiffs’ Arguments.**

As set forth below, Plaintiffs are unlikely to prevail in their argument that the STB will treat them as an exempt “spur” and as such will not ultimately prevail on the merits of their substantive claim

Plaintiffs have argued that the rail facility is likely to be deemed a “spur” track, which is subject to STB jurisdiction but does not require construction approval Specifically in their submissions to the STB, they have claimed “the proposed use of the track would not require prior Board approval for construction under 49 U S C 10901 or operations under 49 U S C 10902(a) but, rather, qualifies for the exception from the Board’s entry/exit licensing authority in 49 U S C 10906 because the track has some of the characteristics of “spur” track and would be used as a “disconnected” ancillary “spur” of an existing carrier, U S Rail ” (JE-1, Tab 6, Exhibit B, p 3)

Defendant maintains that “the proposed track is either a line of railroad subject to the Board’s licensing requirements because it would be an invasion of new territory, or else “private” track not subject to the Board’s jurisdiction ” (JE-1, Tab 6, Exhibit B, p 4) Defendant further contends that the track in question cannot “be characterized as ancillary “spur” or switching track because it is not adjacent or ancillary to U S Rail’s existing rail operations, which are located hundreds of miles away from Brookhaven in Ohio *Id*

The STB was required to examine the likelihood of Plaintiffs’ “spur” track argument on the merits when it decided Plaintiffs’ petition for a stay of the October 12 Decision The STB concluded

that the subject track is likely to be characterized as "a line of railroad"<sup>4</sup> because the "purpose of the proposed construction and operations appears to be to allow U S Rail to serve new shippers and noted that the track cannot reasonably be viewed as used for a purpose ancillary to the service that U S Rail is already authorized to provide, as the proposed construction and operations will be located hundreds of miles from U S Rail's existing operations in Ohio (*Id* at p 4)

**b. Plaintiffs did not present proof of rail construction.**

In order to have this Court seriously consider that Plaintiffs are seeking construction authority from the STB, they should, at a minimum, show evidence of rail construction. Given the Plaintiffs' checkered past with the STB, a healthy dose of suspicion about its motivations and representations is warranted. Among the Plaintiffs are entities, Suffolk and Sills, that made application to the STB for a certain type of exemption from STB construction authority. In seeking to withdraw that application, Suffolk and Sills represented that they never undertook any construction of rail facilities at the Property (JE-1, Tab 6, Exhibit C, p 1). Sills made this representation in mid-August, 2007 even though it had already signed the Excavation Agreement on August 7, 2007, pursuant to which, railroad construction was to occur (Exhibit 10). The STB allowed Suffolk and Sills to withdraw their application based on this false representation (JE-1, Tab 6, Exhibit B, pp 1-2). When the STB became aware of the nature of the activities of Suffolk, US Rail and Sills, it issued the October 12 Decision mandating that Plaintiffs cease all construction activities (JE-1, Tab 1, Exhibit A).

Now this Court is being asked to enjoin local code enforcement efforts based on Plaintiffs' representations that it intends to construct a rail facility. However, the documents presented to this Court clearly demonstrate that the past pattern of misrepresentations continue. The documents

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<sup>4</sup> In reaching this conclusion, the STB noted that "[t]here are three types of railroad track: (1) railroad lines that are part of the interstate rail network, which require a Board license under 49 U.S.C. 10901 to construct or acquire and operate; (2) ancillary track, such as "spur," "industrial" or "switching" track, which does not require prior authorization from the Board to construct or remove under 49 U.S.C. 10906; and (3) so called "private" track, which is not part of the national rail transportation system or subject to the Board's jurisdiction because the track is not intended to serve the general public. State and local regulation is fully applicable to private track." (JE-1, Tab 6, Exhibit B, p 2)

introduced into evidence at the hearing do not establish an intent to pursue "rail construction" rather they starkly demonstrate that US Rail's involvement at the Property is a mere subterfuge by which Plaintiffs seek to cloak themselves in federal preemption to avoid state and local oversight of their true business venture—a lucrative sand-mining operation

US Rail's involvement in this sand-mining scheme is governed by three documents that were introduced at the hearing (a) a "Railroad Operating Agreement and Property Lease", (b) an Excavation Agreement, and (c) the unsigned Proposal. The first document, the Agreement, is a lease for a 28-acre industrial site, for a 30-year term for the whopping annual rent of \$1,000. Under the terms of the Agreement, US Rail has no obligation to pay property taxes and was paid a signing bonus of \$10,000. The second document, the Excavation Agreement, allows Adjo, the general contractor (and partner in Sills) to sell sand it excavates from the Property and be paid from the proceeds of the sale of the sand up to \$3,000,000 plus a 25% fee or all of its costs (Exhibit 10). For its part, Sills gets up to \$6,000,000 plus a 50% fee (Exhibit 10). The third document, The Proposal, is an unsigned document that contains specifications for a rail construction and indicates that it is a "Bid To Sills Road Realty" (Exhibit 10).

Plaintiffs claim that the Proposal has been incorporated into the Excavation Agreement (Tr 39) (even though neither document contains any reference to the other) and further claim that these documents evidence US Rail's obligation to construct a rail facility (Exhibit 9 & 10). Hall, US Rail's President and CEO, testified that he was making payments to Adjo for construction, he produced no proof of these payments at the hearing (Tr 42). Hall was so ignorant of the details of the transactions occurring at the Property that he initially testified he was unaware of the provisions of the Excavation Agreement by which Adjo was paid from the proceeds of the materials that were mined from the Property (Tr 42). When presented with the text of the Excavation Agreement, Hall acknowledged that it appeared that payments were being made for sand mining but could not confirm that this was the payment arrangement (Tr 44).

Hall's testimony and the three documents Plaintiffs offered into evidence present a very clear picture. US Rail, the STB-certified Class III rail carrier, which is allegedly constructing a rail facility thereby affording the parties the protection of federal preemption, has only a nominal role in the Property as evidenced by a sham agreement under which it pays \$1,000 a year<sup>5</sup> to rent 28 acres of prime industrial land with no obligation to pay property taxes. This Court is also asked to believe that US Rail would obligate itself to pay for the \$5,450,000 of rail construction improvements and equipment in the Proposal even though its lease for the Property could be terminated on 90 days notice and there is no express provision for repayment of the \$5,450,000 in construction improvements and equipment. (Exhibit 7, ¶3(b))

While the Agreement, appears not to make economic sense, when you consider the very lucrative arrangements that Sills and Adjo (a partner in Sills) have negotiated based on their ability to sand-mine at the Property without any state or local oversight, this arrangement makes complete sense. As the Second Circuit has noted, the equitable powers of the Court should "never be exerted in behalf of one who has acted fraudulently, or who by deceit or any unfair means has gained an advantage." *PenneCom B V v Merrill Lynch & Co, Inc*, 372 F 3d 488, 493 (2d Cir 2004) (quoting *Bein v Heath*, 47 U S 228, 247 (1848)). Along the same lines, this Court is being asked to sanction an abuse of the federal railroad preemption doctrine in order to further Plaintiffs' thinly-veiled scheme to avoid legitimate local land use and sand-mining regulations.

**C The October 12 Decision does not represent an assertion of jurisdiction over the facility by the STB.**

Plaintiffs have argued that the October 12 Decision represents an assertion of jurisdiction over the rail facility by the STB. As a result, they claim they are likely to succeed on the merits of their claim that the rail facility falls within the purview of 49 U S C §10901(a), and thereby preempts any local code enforcement efforts. This argument is directly contrary to the STB's October 12 Decision,

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<sup>5</sup> At the present time, US Rail rents the Property at no cost because it was paid a \$10,000 signing bonus

which has directed Plaintiffs to cease from conducting rail construction and either obtain authorization from the STB pursuant to 49 U.S.C. 10901(a) or obtain an STB decision finding that such activity does not require STB approval.

Until such time as Plaintiffs receive such direction from the STB, the STB has not asserted jurisdiction. At this point, the only thing which the STB has "asserted" is that if Plaintiffs intend to pursue "rail construction" they must apply to the STB and obtain approval or an exemption.

In making this argument, Plaintiffs rely heavily on the *BSOR* case. However, *BSOR* is readily distinguishable from this matter in numerous material respects. In *BSOR*, Plaintiff rail entity sought to restrain the Village from continuing an eminent domain proceeding that would force operations at the site to cease. *BSOR*, 434 Supp 2d at 254. Here operations at the site have ceased due to the STB's October 12 Decision. Unlike *BSOR*, where Plaintiff sought enjoin on eminent domain proceeding that would close its operations, the Plaintiffs here must merely defend ordinance violations in local District Court and are free to raise, as a defense, the arguments they have articulated in this proceeding.

In *BSOR*, the Village interposed the argument that *BSOR* was not really a "rail carrier" - at least, not in the part of the world. *Id.* at 250. The Village argued that *BSOR* "was not a rail carrier in this part of the world" because its "proposed operation is an attempt to acquire or operate an 'extended or additional rail line' without first obtaining the necessary operating authority." *Id.* at 251. This argument, which is very similar to the arguments that STB has considered about US Rail's its likelihood of success, was not, however, presented to the STB. On the other hand, in this matter the argument that US Rail is not "a rail carrier in these parts" has been presented to the STB and the STB has found, in unequivocal terms, that what US Rail is attempting to do is to extend a line of railroad, something which they cannot do until they apply for and receive STB approval. (JE-1, Tab 6, Exhibit C, pp 4-6)

An additional distinction is that in *BSOR*, the Court declined to delve into whether *BSOR* was actually looking to extend a "line of railroad" (the position advanced by the Village) because the site

was subject already to STB jurisdiction, in part, because the *BSOR* was operating from a yard that would be considered a "facility" under ICCTA. *Id.* at 252. The facility in question contained 1,600 feet of spur track, which intersected with the main line at the edge of the property and contained a warehouse connected to the spur that allowed the spur to be used as a "transloading facility." *Id.* at 244. As such, transportation by rail carrier was immediately possible. Here, there is only vacant land for which Plaintiffs may seek construction authority from the STB. An existing rail facility does not exist.

There is, however, one significant similarity between this case and *BSOR* that this Court should consider and follow. In *BSOR*, the plaintiff sought to enjoin "the enforcement of Village zoning laws, permitting and pre-clearance requirements and other local ordinances and regulations that could interfere with its operations." *Id.* at 249 (emphasis added). That request for injunctive relief was not granted. *Id.* at 256-57. Here, Plaintiffs are essentially asking for the same injunctive relief by seeking to enjoin the (a) prosecution of the Tickets, (a) issuance of further tickets and, and (c) taking of any other action to interfere with or obstruct Plaintiffs' construction of the Rail Terminal. As in *BSOR*, this request for injunctive relief must be denied.

#### **D. The Equities Balance against an Injunction**

Plaintiffs face a very simple result if an injunction does not issue: they will be required to defend the prosecution of Tickets in local District Court. During those proceedings they are free to raise as defenses the federal preemption arguments they raise in this matter. Defendant, on the other hand, faces a more difficult result if an injunction is granted: its hands will be completely tied when it comes to dealing with Plaintiffs even though, as has been widely reported, Plaintiffs have clear cut 18 acres of trees and sand-mined thousands of cubic yards of material from the site (JE-1, Tab 1, Exhibit D, Exhibit B). On balance, Defendant and (the public's) interest should outweigh those asserted by Plaintiffs.

**E. The possibility of Harm to other Interested Parties and to the Public Interest in General Should be Considered in Deciding whether to Grant the Preliminary Injunction**

This court should consider the possibility of harm to other interested persons from the grant or denial of injunctive relief. *Liddy v Cisneros*, 823 F. Supp. 164, 177 (S.D.N.Y. 1993) (citing *Stamcarbon, NV v American Cyanamid Co.*, 506 F.2d 532, 537 (1974)) (determination of propriety of injunction “cannot always be made simply by reference to the interests of the parties before the court”) (quoting *Virginian Ry. Co. v System Federation*, 300 U.S. 515, 552, 57 S. Ct. 592, 601 (1937)), *Standard & Poor's Corp. v Commodity Exchange, Inc.*, 683 F.2d 704, 711 (2d Cir. 1982))

There is a very legitimate public interest in ensuring that the integrity of Defendant's local land use regulations, to the extent not preempted by federal law, are maintained. As the STB has noted in the October 12 Decision there is a possibility that the facility in question would be found to be a “private track,” in which case, which is not subject to STB jurisdiction and to which state and local regulation would be fully applicable (JE-1, Tab 6, Exhibit B, p. 1, n. 1). Since Plaintiffs did not apply to the STB for construction authority prior to commencing their work, there is no way on knowing whether federal or state and local law would apply. Moreover, notwithstanding any claim of federal preemption the Second Circuit has held in *Green Mountain*<sup>6</sup> that local authorities may continue to exercise “traditional police powers,” provided that the regulations protect public health and safety, are settled and defined, can be obeyed with reasonable certainty, entail no extended or open-ended delays, and can be approved (or rejected) without the exercise of discretion on subjective questions. Insofar as the local ordinances on which the Tickets are based could still be found to be permissible health safety and welfare regulations, it is in the public interest not to enjoin Defendant's enforcement efforts and allow a local court to make this decision.

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<sup>6</sup> 404 F.3d 638, 645 (2d Cir. 2005)

Plaintiffs have articulated their public interest argument to the STB in their petition for a stay of the October 12 Decision. In addressing this argument, the STB noted that “[w]hile petitioners cite the need for more freight facilities on Long Island, the October 12 Decision does not prevent the facility from being constructed once appropriate approvals are obtained. Thus, any potential public benefit could still be realized. Instead, the public interest is better served by precluding the potential evasion or misuse of the Board’s processes that could result from allowing the construction and operations proposed here to proceed without the license and NEPA review that appear to be required” (JE-1, Tab 6, Exhibit B, p. 7). That rationale is equally compelling in the current context.

**CONCLUSION**

For the reasons set forth above, Defendant Town of Brookhaven respectfully submits that the evidence in the hearing record warrants a denial of Plaintiffs’ request for a preliminary injunction.

Dated: Huntington, New York  
March 31, 2008

Respectfully submitted,

LAW OFFICES OF  
MARK A. CUTHBERTSON

/s/ Mark A. Cuthbertson

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(631) 351-3501

To: Charlotte A. Biblow, Esq.  
Attorney for Plaintiffs

# EXHIBIT I

## **RAILROAD OPERATING AGREEMENT AND PROPERTY LEASE**

THIS AGREEMENT is made by and between: Silis Road Realty, LLC, a New York limited liability company, whose address is 485 Underhill Boulevard, Syosset, New York, hereinafter "LESSOR" and by U S RAIL Corporation, whose address is 7846 W. Central Avenue Toledo, Ohio 43617, hereinafter "LESSEE", and collectively the "PARTIES"

THE PARTIES AGREE AS FOLLOWS:

### **1. LEASED ASSETS.**

Lessor hereby leases to Lessee, upon the terms and conditions of this Agreement, the real property right of way more fully described on the attached Exhibit # 1, (the "Leased Assets") for the purpose of operating a common carrier railroad and transload facility, including but not limited to the following assets:

- (a) All tracks, switches and connecting track, related or connected property, or any other property associated or connected with the running, operating or servicing of customers of the Lessee, and all road ways or other property used, connected or related to the operation of the railroad, including all buildings described on Exhibit #1 to be built by the Lessee and constructed to the design and satisfaction of Lessor;
- (b) All transferable governmental permits, consents, approvals and licenses owned or used by Lessor in connection with the Leased Assets;

- (c) All rights, benefits and privileges of the Lessor in connection with the Leased Assets in its capacity as grantor, licensors, lessor or franchiser, or in any similar capacity, arising out of or under any contract, easement, franchise, right-of-way, license or lease, if any, relating to the Leased Assets;
- (d) All leases, easements, licenses, rights-of-way or other interests in real property owned, leased, used, held for use or otherwise held by the Lessor in connection with the operation, use or enjoyment of the Leased Assets, if any, and
- (e) All utility service contracts in connection with the operation, use or enjoyment of the Leased Assets (including, without limitation, public and private grade crossing agreements, and pipeline, wireline, fiber optic and other utility service agreements) if any.

## **2. LESSEE'S RIGHTS:**

- (a) Effective on the date of execution of this Agreement, Lessee will have all rights, free from restriction, interference or hindrance from the Lessor, its agents, affiliates, employees, or any entity connected to any of them, to:
  - (i) To fully and completely use all Leased Assets for any lawful purpose;
  - (ii) To operate the Leased Assets as a common carrier railroad or other legitimate business connected with the operation of a common carrier railroad.

(iii) to receive and demand payment for rail services to customers; and

(iv) To receive and demand payment for easements, leases, rentals or repair services.

(b) At any time during the term of the Lease, Lessee may enter into an agreement with an affiliated business entity that will handle the actual day-to-day operation of the Leased Assets as a common carrier railroad, provided however, that Lessee shall remain primarily liable for the performance of such day-to-day operations in accordance with this Lease.

### **3. TERM AND RENTAL PAYMENTS.**

(a) Term: Subject to Section 3(c) of the Lease, the term of this Agreement shall be thirty (30) years, beginning July 1, 2007. Thereafter, this Lease will automatically renew for additional periods of ten (10) years each unless Lessee gives written notice of its intention to terminate the Lease to the Lessor at least one (1) year prior to the expiration of the Lease.

(b) Base Rent: Lessee will pay annual rent in the amount of one thousand dollars (\$1,000) per year during the term of this Lease, including any renewal periods.

(c) Early Termination: Lessor may terminate this lease at any time upon ninety (90) days prior written notice to the Lessee. In the event of such termination, Lessor shall pay promptly upon receipt of Lessee's invoice therefor, all of Lessee's reasonable costs of termination, including costs of moving Lessee's equipment from the premises.

**4. INDUCEMENT TO LESSEE.**

In order to induce Lessee to enter in to this Lease, Lessor agrees to pay Lessee upon execution of this Lease, the sum of Ten Thousand Dollars (\$10,000.00). Lessee agrees that it will treat this payment by Lessor for services provided by Lessee to Lessor and credited to Lessor for engineering and construction services provide in connection with the construction of the track on the Leased Assets.

**5. OWNERSHIP AND USE.**

- (a) The Leased Assets shall be the exclusive property of Lessor, except for Lessee's rights to use them in normal business operations under this Lease.
- (b) Lessee shall keep all Leased Assets at all times free and clear from all liens and encumbrances unless agreed to by Lessor. Lessee shall give Lessor immediate notice of any such attachment or other judicial process affecting any of the Leased Assets.
- (c) Lessee shall use the Leased Assets in a careful and proper manner and shall comply with all federal laws regulating railroads and all other applicable laws. Lessee shall not make any alterations to the Leased Assets that shall decrease the value of said Leased Assets without Lessor's prior written consent.
- (d) Lessee may not sublease any of the Leased Assets without Lessor's prior written consent.
- (e) Notwithstanding anything to the contrary set forth in this Lease, Lessee's use and occupation of the Leased Assets shall be solely for the purpose, and only to the extent necessary, to provide for the movement of railcars and

the loading and unloading thereof, as required or requested by the Lessor or a customer situated on the premises and to fulfill its obligations under Section 4 (b) hereof. Lessor retains all rights to otherwise use and occupy the Leased Assets for its purposes. Lessor and Lessee agree to execute and deliver such modifications to this Lease or such other instruments as may be necessary or desirable to evidence and implement their respective rights hereunder to use and occupy the Leased Assets.

**6. NOTICES.**

Lessee, at its own cost and expense, will be responsible for preparing and filing all notices, if any, with respect to this Lease that are required by the United States Surface Transportation Board, the Federal Railroad Administration, and any other federal government agency or administrative body having jurisdiction over the operation of the Leased Assets by Lessee or its assignee.

**7. REPAIRS AND REPLACEMENTS.**

Lessee shall keep the Leased Assets in good condition and, at Lessee's own cost and expense, make all repairs and replacements where necessary. All such replacements shall immediately become the property of Lessor.

**8. INSURANCE.**

Lessee, at Lessee's own cost and expense, shall insure the Leased Assets against casualty, fire, and vandalism in the amount of \$2 million, and obtain public liability insurance with minimum limits of \$1 million per person / \$5 million per accident.

for bodily injury and \$1 million for property damage, all in the form and with the insurance companies that shall be satisfactory to Lessor. All insurance policies shall name both Lessee and Lessor as insured, and copies of the policies and the receipts for the payment of premiums shall be furnished to Lessor. Each liability policy shall provide that all losses be paid on behalf of Lessee and Lessor as their respective interests appear. Each insurance company shall agree that it will give Lessor 30 day's prior written notice of any alteration or cancellation of any policy.

**9. TAXES.**

Lessor shall pay when due all taxes imposed with respect to the Leased Assets during the term of the Lease, other than Lessee's income taxes.

**10. INDEMNITY.**

Lessee assumes liability for and shall indemnify Lessor from all losses, damages, claims, suits, costs, expenses, and disbursements, including legal expenses, incurred by Lessor in any way relating to the use of the Leased Assets. The indemnities contained in this section shall continue even after the termination of this Lease if arising with respect to occurrences during the term of this Lease.

**11. INSPECTION.**

Agents of or the Lessor may at reasonable times enter Lessee's premises to inspect the Leased Assets and the manner in which the Leased Assets are being used.

**12. REPRESENTATIONS AND WARRANTIES OF LESSOR**

Lessor represents and warrants the following to be true:

- (a) Status of Lessor. Lessor is a New York limited liability company duly organized, validly existing, and in good standing under the laws of that State; and further, is properly authorized, according to its Operating Agreement, and duly adopted Resolution, to enter into and carry out the transactions contemplated by this Lease.
- (b) Authority. When executed, this Lease will be a legal, valid, and binding obligation of Lessor.
- (c) Absence of Undisclosed Liabilities. Lessor does not know or have reasonable grounds to know of any basis for the assertion against Lessor, of any claim that, if presented, would impair Lessor's ability to enter into this lease, or impair Lessee's ability to use the Leased Assets or operate a railroad.
- (d) Title to Properties. Lessor has good and marketable title to all of the Leased Assets, subject to no mortgage, pledge, lien, encumbrance, security interest or charge other than the encumbrances set forth in Exhibit 2 to this Lease. Further, except as set forth in this Lease, there are no imperfections of title that would affect the marketability of title of Lessor's assets, or the ability of Lessor to lease the Leased Assets to Lessee.
- (e) Status of Contracts. Lessor has, to the best of its knowledge, complied with all of the provisions of contracts described in this Lease, if any, and of all other contracts and commitments to which Lessor is a party to the extent non-compliance would materially and adversely affect Lessor's performance of this Lease.

- (f) Taxes. All personal property taxes and other taxes of any nature assessed against Lessor and/or the Leased Assets are fully paid by Lessor when due through the date of execution of this Lease.
- (g) No Tax Disputes. Lessor is not involved in any dispute with any tax authority on the amount of taxes due nor has it received any notice of any deficiency, audit, or other indication of deficiency from any tax authority not disclosed to the Lessee to this Lease, other than as set forth in Exhibit #2 to this Lease.
- (h) Litigation or Insolvency Proceedings.
  - (i) Litigation. There are no actions, suits, claims, investigations, or legal, administrative, or arbitration proceedings pending or, to the best of Lessor's knowledge, threatened or likely to be asserted by or against Lessor or relating to the Leased Assets of this Lease before any court, governmental agency, or other body, including any quasi-judicial or administrative forum, and no judgment, orders with injunction, decree, or other similar command of any court, governmental agency, or body has been entered against or served upon Lessor which, in the aggregate, would materially and adversely affect Lessor's performance of this Lease.
  - (ii) Insolvency Proceedings. Lessor is not involved in any proceeding by or against it in any court under the Bankruptcy Code or any other insolvency or debtor relief act, whether state or federal, or for the appointment of a trustee, receiver, liquidator, assignee, or other similar official of Lessor or its property.
- (k) Labor Relations—Employees.

- (i) Collective Bargaining Agreements: There are no collective bargaining agreements currently in effect between Lessor and labor unions or organizations representing any of Lessor's employees; and there does not now exist and there has been no formal or informal request to Lessor for collective bargaining or for an employee election from any union or from the National Labor Relations Board (the "NLRB").
- (ii) Employment Regulations Compliance: Lessor is in material compliance with all applicable federal, state, and local laws and regulations respecting employment and employment practices, terms, and conditions of employment and wages and hours; and further, (a) there are no unfair labor practice complaints against Lessor pending before the NLRB and no such complaints have been threatened; (b) there is no labor strike, dispute, slowdown, or stoppage actually in progress or threatened against Seller; (c) no grievance or arbitration proceedings are pending and no such claim has been asserted; and (d) Lessee will not incur any liability or obligation of any kind arising out of Lessor's employment or termination of Lessor's employees nor for any other claim by any of Lessor's employees arising out of any employment relationship with Lessor.
- (iii) Exclusion of Employee Benefits: Lessor acknowledges:  
Lessee does not assume any employee benefits of Lessor whatsoever; and (b) Lessee shall have no obligation to provide employee benefits other than such benefits as Lessee shall agree to provide to its employees in the exercise of Lessee's sole discretion.

(l) Environmental Matters. To the best of Lessor's knowledge, there is no Hazardous Material in, on, or under any of the property of the Leased Assets. In addition, there are no presently pending or threatened administrative or enforcement actions, investigations, compliance orders, claims, demands, actions, or litigation based on environmental laws or regulations or otherwise related to the presence of Hazardous Material, in, on, or under the Leased Assets. Lessor makes no other environmental representations or warranties, but Lessor acknowledges that neither Party is required to sign this Lease unless satisfied with the environmental reports or assessments conducted by or on behalf party in accordance with this Agreement. For purposes of this paragraph, the term "Hazardous Material" shall mean any toxic or hazardous waste or substance (including without limitation asbestos and petroleum products) which is regulated by applicable local, state, or federal environmental laws or regulations.

(m) Condition of Leased Assets. Subject to Section 14(c) hereof, the following representations are made with respect to the Leased Assets:

- (i) There are not any known defects that have not been disclosed to Lessee.
- (ii) There are no known outstanding citations issued by any health, building, or other governmental agency under the Occupational Safety and Health Act and/or under the Americans with Disabilities Act having jurisdiction over the operation of the Leased Assets and/or the Lessor, including any claims or any violation of any federal, state, or local environmental statutes, regulations, ordinances, or other environmental regulatory requirements.

- (n) No Violation or Breach. The performance of this Lease will not be in violation of any laws, statutes, local ordinances, state or federal regulations, court or administrative order, or ruling, nor is the performance of this Lease in violation of the conditions or restrictions in effect for financing pursuant to any loan documents, whether any such loan is secured or unsecured other than as set forth in Exhibit #2 to this Lease.
- (o) Broker's or Finder's Fees. No agent, broker, investment banker, person, or firm acting on behalf of Lessor is or will be entitled to any broker's or finder's fees or any other commission or similar fee directly or indirectly from either of the Parties in connection with the Lease.
- (q) Reliance. Subject to Section 14(c) of this Lease, the foregoing representations and warranties are made by the Lessor with the knowledge and expectation that Lessee is placing complete reliance on them.

#### **14. REPRESENTATIONS AND WARRANTIES OF LESSEE**

Lessee represents and warrants the following to be true:

- (a) Status of Purchaser. Lessee is an Ohio corporation duly organized, validly existing, and in good standing under the laws of that State; and, further, is properly authorized, according to its Articles or Bylaws and by a duly adopted Resolution, to enter into and carry out the transactions contemplated by this Lease.
- (b) Authority. This Lease when executed will be a legal, valid, and binding obligation of Lessee.

(c) Awareness of Lessee. Lessee acknowledges the following:

(i) Lessee has had an opportunity to examine the Leased Assets and agrees to accept the same "As Is," subject to the remaining conditions and other provisions of this Lease.

(ii) Lessee has, either individually or through its agents or employees, sufficient knowledge, expertise, and financial capacity, Lessee is capable of evaluating the merits and risks of leasing the Leased Assets pursuant to this Lease.

(d) Litigation. There are no actions, suits, or proceedings pending or, to Lessee's knowledge, threatened or likely to be asserted, against the Lessee, before any court, administrative agency, or other body that would impair Lessee's ability to enter into this Lease or to operate the Leased Assets as a railroad as contemplated, and no judgment, order, writ, injunction, decree, or other similar command of any court or governmental agency has been entered against or served upon Lessee relating to this Lease and/or the transactions contemplated by this Lease.

(e) Broker's or Finder's Fees. No agent, broker, investment banker, person, or firm acting on behalf of Lessee is or will be entitled to any broker's or finder's fees or any other commission or similar fee directly or indirectly from either of the Parties in connection with this Lease.

**15. LIABILITY FOR DAMAGE.**

Lessee shall be responsible for any damage to the Leased Assets during the term of this lease and shall pay to Lessor the

value of as much of the Leased Assets as may be damaged or destroyed. On receipt of the payment, Lessor shall, to the extent of the amount paid, assign to Lessee any rights Lessor may have with respect to the damaged or destroyed Leased Assets under any insurance.

**16. BREACH.**

Upon a failure to pay rent when due or upon a breach of any other condition of this Lease, or Lessee discontinues business, Lessor shall have the right to terminate this Lease upon giving sixty (60) days advanced written notice, with respect to a breach other than the failure to pay rent when due, to Lessee, specifying the breach on which such termination is based. Lessee shall have adequate time, but not less than 60 calendar days from the date of such notice to cure the breach specified by Lessor. In the event this Lease is terminated for failure to cure the breach, Lessor shall have the right to pursue any remedies available to Lessor as are permitted by law.

**17. GENERAL.**

- (a) Lessee may not assign or transfer (by operation of law or otherwise) any of its rights or obligations under this Lease, except to an affiliate of Lessee, or with the agreement of Lessor.
- (b) Lessor may not assign this Lease without Lessee's consent, other than to financial institutions that may, from time to time, provide financing to the Lessor in connection with the Leased Assets.
- (c) This Lease contains the entire agreement between the Parties, cannot be modified except in writing and signed by Lessor and Lessee, and shall be binding upon the

parties and their legal representatives, heirs, successors and assigns.

- (d) This Lease can be specifically enforced.
- (e) The interpretation and enforcement of this Lease shall be governed by New York law, and applicable federal law.
- (f) This Lease may be executed in counterparts, with each counterpart constituting one and the same instrument.

**18. Agreement Not To Compete.**

From the effective date of this Lease until two years following the termination hereof, Lessee will not, without the express written consent of Lessor, own, lease, operate or otherwise provide railroad operating services at any rail yard, side track, industrial side track or other railroad facility located within the County of Suffolk, New York. Lessee recognizes and acknowledges the competitive value of its agreement contained in this Section 18 and the damage that could result to Lessor from Lessee's breach thereof. Accordingly, Lessee agrees that money damages would not be a sufficient remedy for any such breach by it, and that, in addition to the rights and remedies otherwise available to Lessor, Lessor shall be entitled to equitable relief by way of specific performance, injunction, or otherwise if Lessee breaches or threatens to breach any of its agreements contained in this Section 18. In the event of any legal proceedings to enforce or protect any rights under this Section 18, Lessor shall be entitled to recover its costs (including reasonable attorneys' fees) incurred in connection therewith. Lessee hereby submits to the jurisdiction of any federal or New York State court located in the City of New York, New York in connection with any legal proceedings brought by Lessor to enforce its rights hereunder. Notwithstanding any other provision herein to the contrary, Lessee shall not be liable for punitive

consequential, special, indirect, exemplary or any other damages other than actual damages arising under or as a result of a breach of, its obligations under this Section 18.

This Lease is executed on the dates set forth below, and the parties intend it to be effective as of the commencement of the lease term specified in §3(a).

[Signature Page Follows]

THIS LEASE HAS BEEN EXECUTED BY THE PARTIES HERETO ON THE  
BELOW INDICATED DATES AFTER THEIR RESPECTIVE SIGNATURES.

**Sills Road Realty, LLC, Lessor**

By: *[Signature]*, Pres. Date: 8/8/2011

**U S RAIL Corporation, Lessee**

By: \_\_\_\_\_ Date: \_\_\_\_\_

THIS LEASE HAS BEEN EXECUTED BY THE PARTIES HERETO ON THE  
BELOW INDICATED DATES AFTER THEIR RESPECTIVE SIGNATURES

**Sills Road Realty, LLC, Lessor**

By: \_\_\_\_\_ Date: \_\_\_\_\_

**U S RAIL Corporation, Lessee**

By: J. Hall, President Date: Aug 7, 2007

**EXHIBIT 1  
Leased Assets**

<b>Property Name</b>	<b>Vacant Land-Sills Road</b>
<b>Location</b>	<b>S/W/C of Sills Road &amp; Express Drive South, Yaphank, New York</b>
<b>Assessor's Parcel Number</b>	<b>663-3-1, 27.001, 27.002, 27.003 &amp; 27.004 704-2-2, 30, 31, 32, 33, 34, 35 &amp; 36 704-4-1 &amp; 2 704-5-1 &amp; 2</b>

**EXHIBIT 2**  
**Qualifications to Lessee's Representations**

**Section 12 (d). Encumbrances on the Leased Assets.** The Leased Assets are subject to a first mortgage lien, securing debt in the principal amount of \$5,300,000, in favor of Kennedy Funding, Inc.

**Section 12 (g). Tax disputes.** Lessee has asserted a claim challenging the real property tax assessment on the Leased Assets.

**Section 12 (n). Compliance with other agreements.** Execution and delivery of the Agreement requires the consent of Kennedy Funding, Inc.

# EXHIBIT J

## EXCAVATION AGREEMENT

AGREEMENT entered into as of the 7th day of August, 2007, among ADJO CONTRACTING, CORP., a New York corporation, having its principal place of business at 207 Krickerbocker Avenue, Bohemus, New York 11716 (hereinafter referred to as "Contractor"), U S RAIL CORPORATION, an Ohio corporation, having its principal place of business at 7846 W. Central Avenue, Toledo, Ohio 43617 (hereinafter referred to as "U S Rail") and SILLS ROAD REALTY LLC, a New York limited liability company, having its principal place of business at 485 Underhill Boulevard, Syosset, New York 11791 (hereinafter referred to as "Owner").

WHEREAS, Owner has acquired land in the Town of Brookhaven, Suffolk County, New York, described more fully in Exhibit A hereto (the "Subject Properties") and has leased the Subject Properties to U S Rail for the purpose of constructing and operating a rail terminal ("Rail Terminal") thereon but has retained all rights to any minerals which may be extracted from the Subject Properties;

WHEREAS, U S Rail has contracted with Contractor for the improvement of the Subject Properties and the installation of the Rail Terminal,

WHEREAS, in order to facilitate the improvement of the Subject Properties and the installation of the Rail Terminal, the parties desire to enter into an agreement under which Contractor will arrange for the excavation and site preparation of the Subject Properties;

NOW THEREFORE, for and in consideration of the mutual promises and benefits herein contained, the parties agree as set forth herein

### 1 APPOINTMENT; EXCAVATION PLAN.

U S Rail agrees to retain Contractor, on the terms and conditions set forth in this Agreement, to excavate in, on, and under the Subject Properties and to remove all materials, and any products derived from such materials (collectively, "Bank Run"), from the Subject Properties. Contractor shall use its best efforts to conform its operations on the Subject Properties during the Term hereof and to perform its obligations hereunder in compliance with the excavation and site preparation plan in effect from time to time (the "Excavation Plan"). For all excavation and site preparation work hereunder, Contractor shall be entitled to recover, from the proceeds of the sale of Bank Run, the greater of (i) \$ 3,000,000, plus ten percent (10%) thereof for overhead, ten percent (10%) thereof for profit and five percent (5%) thereof for management (collectively, the "25% Allowance") or (ii) all of Contractor's Costs, as hereinafter defined, plus the 25% Allowance; provided, however, that, with respect to Contractor's Costs that are subcontractor costs, the 25% Allowance shall be ten percent (10%).

### 2. CONTRACTOR'S EXCLUSIVE RIGHTS; U S RAIL'S RESERVED RIGHTS.

Contractor shall have the exclusive right to enter on the Subject Properties at any and all times during the term of this Agreement to remove Bank Run for Contractor's use in accordance herewith. U S Rail reserves to itself the right to go on and use the Subject Properties, for any purpose, without unreasonable interference with the operations of Contractor. However, neither U S Rail nor Owner shall remove Bank Run from the Subject Properties except for use in constructing the Rail Terminal. Owner shall not sell, or grant, lease, or license, any rights to remove Bank Run from the Subject Properties to any person other than Contractor.

### 3. TERM AND TERMINATION.

(a) Term. The term of this Agreement shall be deemed to have commenced as of the effective date of this Agreement as set forth in the first paragraph on the first page of this Agreement (the "Effective Date") and shall continue for a period of two (2) years from the Effective Date of this Agreement (the "Term"). This Agreement may be terminated prior to the end of the Term in accordance with the provisions of Sections 3(b) and 3(c)

(b) Termination by U S Rail or Owner Either U S Rail or Owner may terminate this Agreement upon sixty (60) days notice to Contractor

(c) Termination by Any Party This Agreement may be terminated by any party upon or after the occurrence of any of the following events:

(i) failure by any other party to make any payment due hereunder within ten (10) days after receipt of written demand therefor;

(ii) breach by any other party of any of the other material terms or conditions of this Agreement which is not cured within ninety (90) days after receipt of written notification thereof, provided, however, that the ninety-day cure period shall be extended to account for any period during which cure is made impossible or impractical by seasonal or weather conditions;

(iii) depletion of Bank Run reserves on the Subject Properties,

(iv) entry of an "Order for Relief" naming any other party as a "Debtor" under Title 11 of the United States Code or upon the entry of a decree or order by a court having competent jurisdiction in respect to any petition filed or action respecting such party directly involved in a reorganization, arrangement, creditors composition, readjustment, liquidation, dissolution, bankruptcy or similar relief under any other present or future statute, law or regulation, whether or not resulting in the appointment of a receiver, liquidator, assignee, trustee, custodian, or other similar official, and the continuation of any such decree or order is unstayed and in effect for a period of ninety (90) consecutive days; or

(v) making by any other party of an assignment for the benefit of creditors, or the admission by such party in writing of its inability to pay its debts generally as they become due, or the taking of action by such party in furtherance of any such action.

#### 4. PRICING; PAYMENT; QUANTITIES.

(a) For all Bank Run, Contractor agrees to pay, or provide payment, to Owner (i) Six Million Dollars (\$6,000,000) (the "Base Payment") plus (ii) fifty percent (50%) of the excess (the "Excess Payment") if any, of all Revenues (as hereinafter defined) over Contractor's Expenses (as hereinafter defined). The Base Payment shall be paid in installments as set forth in Exhibit B hereto. The Excess Payment shall be paid within sixty (60) days following the end of the Term or earlier termination of this Agreement. Quantities of Bank Run extracted from the Subject Properties shall be determined using Owner's scales installed on the Subject Properties.

(b) For the purposes of this Agreement, (i) "Revenues" shall mean the gross revenues derived from the sale of Bank Run and all other gross revenues derived from the excavation and site preparation of the Subject Properties and (ii) "Contractor's Expenses" shall mean all documented costs of Contractor in performing its obligations under this Agreement ("Costs"), an allowance equal to twenty five percent (25%) of Costs and the Base Payment actually paid to Owner. Owner shall have the right from time to time to inspect Contractor's books and records to confirm any determination of Revenues or Contractor's Expenses.

(c) Owner agrees to allow Contractor to remove an indeterminate quantity of Bank Run from the Subject Properties, with no annual or cumulative maximum quantities, limited only by the requirements of the Excavation Plan and the depletion of Bank Run reserves on the Subject Properties.

#### 5 OPERATIONS; ROADS, MACHINERY AND EQUIPMENT.

(a) Contractor agrees to perform all labor and provide all equipment necessary for the exploration, extraction, processing, loading, and hauling of Bank Run and to otherwise perform its obligations under this Agreement.

(b) Contractor and U S Rail will consult, confer, and cooperate in planning excavation of the Subject Properties and establishing stockpile or processing areas, and arranging brush and timber as needed for such purposes

(c) In order to obtain access to the Subject Properties, and to carry on its operations, Contractor shall have the right to make use of and, if Contractor so desires, improve all roadways now existing on the Subject Properties, and shall have the right to build such additional roads as may be necessary for the excavation, processing, stockpiling and removal of Bank Run and to otherwise perform its obligations under this Agreement. In maintaining, improving, or building such roads, Contractor may use sand, gravel, and fill from the Subject Properties. Contractor shall not be required to pay for such materials so used. Any road not in use by Contractor shall be left in a condition at least as good as existed before use by Contractor under this Agreement. Contractor shall consult and confer with US Rail as to the location, layout, and standards of new roads that may be required, but U S Rail shall not unreasonably withhold approval of any such new road. Contractor and U S Rail shall negotiate in good faith to share the costs of construction and maintenance of any such roads that will be used to a significant extent by U S Rail, based on the relative use of such roads by Contractor and U S Rail. Contractor and U S Rail may construct and maintain gates on roads as either may require, at the cost of the party so requiring, provided that the other party shall be given keys thereto.

(d) Contractor shall have the right to place on the Subject Properties machinery, equipment, Bank Run processing equipment, tool sheds, and other structures required by it in connection with its operations with the full right to remove all the machinery, equipment and structure within one hundred eighty (180) days after termination of this Agreement.

#### 6. PERMITS; TAXES; INSURANCE

(a) U S Rail and Contractor shall cooperate, consult and confer to plan operations in accordance with existing permits and licenses and to obtain new permits and licenses as needed, and Owner, as property owner, shall provide any and all approvals and signatures that are necessary to maintain and/or obtain such permits and licenses.

(b) Contractor shall be responsible, on behalf of Owner, for payment of and filing all reports and returns for excavation or similar taxes relating to the Subject Properties. Owner shall be responsible for the payment of and filing all reports and returns for property taxes relating to the Subject Properties.

(c) Contractor shall be responsible for any taxes on any machinery, equipment, or structures that it owns.

(d) Contractor shall maintain in full force and effect at all times during the term of this Agreement insurance with reputable carriers insuring U S Rail, Owner and Contractor as their interests may appear against liability to third parties arising from Contractor's operations on the Subject Properties in accordance with industry standards for similar operations. Prior to entry on the Subject Properties, Contractor shall provide U S Rail and Owner with certificates evidencing the insurance required by this Section 6(d).

#### 7 RECLAMATION

On conclusion of operations of any significant portion of the Subject Properties and on termination of this Agreement, Contractor shall perform at its cost any reclamation work required by the Excavation Plan, by law or under the applicable permits, and remove Contractor's machinery, equipment, and structures.

#### 8 COMPLIANCE WITH LAW

Each party agrees to comply with all applicable laws, statutes, ordinances, and governmental rules and regulations applicable to the subject matter of this Agreement. U S Rail and Owner shall have the right to inspect the Subject Properties, and to require Contractor to perform such tests as may be desired, to confirm Contractor's compliance with its obligations under this Section.

## 9 INDEMNITY

(a) Contractor will hold U S Rail and Owner harmless from all claims that may arise out of its occupation of the Subject Properties and operations conducted thereon by it, its employees, agents, or contractors and shall indemnify and defend U S Rail and Owner against any suit, claim, judgment or demand whatsoever arising out of the breach of this Agreement by Contractor or the negligence or willful misconduct of Contractor in the exercise of any of its rights pursuant to this Agreement, but only to the extent that U S Rail or Owner, as the case may be, is not a contributing cause to the events giving rise to such suit, claim, demand or judgment.

(b) Owner and US Rail, severally and not jointly, will hold Contractor harmless from all claims that may arise out of Owner's or US Rail's ownership or use of the Subject Properties and shall indemnify and defend Contractor against any suit, claim, judgment or demand whatsoever arising out of the breach of this Agreement by Owner or US Rail, as the case may be, or the negligence or willful misconduct of Owner or US Rail, but only to the extent that Contractor is not a contributing cause to the events giving rise to such suit, claim, demand or judgment.

(c) The obligations of the parties under this Section shall survive the expiration or termination of this Agreement.

## 10. FORCE MAJEURE

No party shall be liable for failure to perform any of its obligations under this Agreement, other than an obligation for the payment of money, during any period in which performance is prevented by any cause beyond such party's control, which causes are called "force majeure" below. For purposes of this Agreement, "force majeure" includes, but is not limited to, acts of God, fire, flood, undue shortage of energy or power, strikes, insurrection or mob violence, requirements or regulations of government, with which a party cannot reasonably comply, and other causes of a similar nature that are beyond the control of a party. The party whose performance is prevented will notify the other parties of the date of commencement and cause of each period of force majeure and the time of removal of such cause.

## 11. INDEPENDENT CONTRACTORS

This Agreement shall not constitute or give rise to a partnership or joint venture between or among the parties. All activities by a party under the terms of this Agreement shall be carried on as independent contracting parties and not as an agent for or employee of any other party, and each party shall be solely responsible for the acts of its agents and employees. No party shall have any right, power, or authority to create any obligation, express or implied, on behalf of any other party.

## 12. NOTICES

All notices, reports, and consents required or permitted to be given under this Agreement shall be in writing and deemed given when hand delivered or by documented overnight delivery service, or sent by telecopy, telefax, or other electronic transmission service, provided a confirmation copy is also sent no later than the next business day by first class mail, return receipt requested, to the party to whom the same is directed at its address as set forth in the first paragraph of this Agreement or to such other address as such party shall designate by notice under this Section.

## 13. GENERAL

(a) **Governing Law.** This Agreement shall be governed by and construed in accordance with the laws of the State of New York, without regard to its principles of conflicts of laws.

(b) **Entire Agreement.** This Agreement, including all exhibits hereto, constitutes the entire agreement of the parties with respect to the subject matter hereof and supersedes all prior understandings, whether oral or in writing.

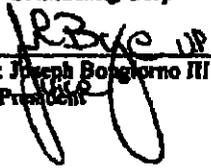
(c) Severability Whenever possible, each provision of this Agreement shall be interpreted in such a manner as to be effective and valid under applicable law. The determination by any court of competent jurisdiction that one or more of the sections or provisions of this Agreement are unenforceable shall not invalidate this Agreement, and the decision of such court shall be given effect so as to limit to the extent possible the sections or provisions of this Agreement which are deemed unenforceable. To the extent such determination has a material impact upon the economic expectations of the parties hereto, the parties agree to make appropriate modifications to this Agreement to take such impact into account.

(d) Headings; Construction Section headings contained in this Agreement are for convenient reference only and shall not in any way affect the meaning or interpretation of this Agreement. The language used in this Agreement will be deemed the language chosen by the parties hereto to express their mutual intent and no rule of strict construction will be applied against any party.

(e) Counterparts. This Agreement may be executed simultaneously in one or more counterparts, including by means of telefaxed signature pages, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

THIS AGREEMENT has been executed by the duly authorized representative of the parties as of the date first hereinabove set forth.

ADJO Contracting Corp

By:   
Name: Joseph Bongiorno III  
Title: President

Sills Road Realty, LLC

By:   
Name: Andrew Kaufman  
Title: President

U S Rail Corporation

By: \_\_\_\_\_  
Name: Gabriel D Hall  
Title: President

(c) **Severability.** Whenever possible, each provision of this Agreement shall be interpreted in such a manner as to be effective and valid under applicable law. The determination by any court of competent jurisdiction that one or more of the sections or provisions of this Agreement are unenforceable shall not invalidate this Agreement, and the decision of such court shall be given effect so as to limit to the extent possible the sections or provisions of this Agreement which are deemed unenforceable. To the extent such determination has a material impact upon the economic expectations of the parties hereto, the parties agree to make appropriate modifications to this Agreement to take such impact into account.

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THIS AGREEMENT has been executed by the duly authorized representative of the parties as of the date first hereinabove set forth.

**ADJO Contracting Corp.**

By: \_\_\_\_\_  
Name: Joseph Bongiorno III  
Title: President

**Sills Road Realty, LLC**

By: \_\_\_\_\_  
Name: Andrew Kaufman  
Title: President

**D S Real Corporation**

By: \_\_\_\_\_  
Name: Gabriel D. Hall  
Title: President

**Exhibit A**  
**Description of Subject Properties**

<b>Property Name</b>	<b>Vacant Land-Sills Road</b>
<b>Location</b>	<b>S/W/C of Sills Road &amp; Express Drive South, Yaphank, New York</b>
<b>Assessor's Parcel Number</b>	<b>663-3-1, 27 001, 27 002, 27 003 &amp; 27 004 704-2-2, 30, 31, 32, 33, 34, 35 &amp; 36 704-4-1 &amp; 2 704-5-1 &amp; 2</b>

**Exhibit B**  
**Payment of Base Payments**

Base Payments shall be payable on the first day of the months and in the respective amounts set forth below:

September, 2007	\$250,000
October, 2007	\$350,000
November, 2007	\$350,000
December, 2007	\$200,000
January, 2008	\$200,000
February, 2008	\$200,000
March, 2008	\$200,000
April, 2008	\$350,000
For the 8 months thereafter	\$487,500 each month

# EXHIBIT K

# ADJO CONTRACTING CORP.

WATER, DRAINAGE, SANITARY SYSTEMS

207 Knickerbocker Avenue, Bohemia, NY 11716

PJI (412) 589-0000

JAX (412) 589-0001

Don Quigley

proposal

Page 1 of 3

PROJECT NAME:

Brookhaven Rail Link, Side Road, Yaphank

BID TO:

Side Road Realty

ADDRESS

TOWN

STATE

ZIP

WE HEREBY SUBMIT SPECIFICATIONS AND ESTIMATES FOR:

## Brookhaven Rail Terminal

### 28 acre facility

We propose to perform the following scope of work at the above referenced project.

Site subgrading work for 1,097,712 square feet

\$80,000.00

Site Drainage

\$85,000

Sub-base and Paving

\$800,000.00

	Quantity	Unit Price	Total
New Main Line Switch	1	\$ 800,000	\$ 800,000
Reconditioned Interior Switch	17	\$ 45,000	\$ 765,000
New Track, ties and ballast	11,000	\$ 120	\$ 1,320,000
Misc. track equipment	1	\$ 100,000	\$ 100,000
Entrance and Bridge	1	\$ 500,000	\$ 500,000
Aggregates Unloading & Bunkers	1	\$ 350,000	\$ 350,000
Transload Facility	1	\$ 1,000,000	\$ 1,000,000
General Conditions			\$250,000
GC Fee			\$400,000
Misc.			\$100,000

This proposal, in its entirety, shall be the basis of our agreement and shall be made an integral part of and be incorporated into any purchase order, AIA contract or subcontract agreement and shall take precedence should there be any conflict.

We hereby propose to furnish labor and materials - complete in

accordance with the above specifications, for the sum of

cash payment to be made as follows

All material is guaranteed to be as specified. All work to be completed in a workmanlike manner according to standard practices. Any alteration or deviation from above specifications involving extra costs, will be outlined only upon written orders, and will become an extra charge over and above the estimate. All agreements contingent upon strikes, accidents or delays beyond our control. ADJO Contracting reserves the right to renegotiate contract price in strikes, accidents or delays are encountered. Owner to pay fire, storms and other necessary expenses. Our workers are fully covered by Workers's Compensation Insurance  
Authorized Signature \_\_\_\_\_

## ACCEPTANCE OF PROPOSAL

The above prices, specifications and conditions are hereby accepted. You are authorized to do the work specified. Payment will be made as outlined above.

ACCEPTED

Signature

Signature

**ADJO CONTRACTING CORP.**  
**WATER, DRAINAGE, SANITARY SYSTEMS**  
 207 Knickerbocker Avenue, Bohemia, NY 11716

*RH (631) 589-0800*  
*FAX (631) 589-0804*

Don Quigley

Date		
<b>proposal</b>		Page 2 of 3
PROJECT NAME: Brookhaven Rail Link, Bills Road, Yaphank		
BID TO: Bills Road Realty		
ADDRESS		
TOWN	STATE	ZIP

WE HEREBY SUBMIT SPECIFICATIONS AND ESTIMATES FOR:

Site Lighting w/ 80 foot poles, concrete bases, high intensity fixtures

Site Utilities  
 \$85,000.00

Prestressed Membrane Building with Concrete Foundation

This proposal, in its entirety, shall be the basis of our agreement and shall be made an integral part of and be incorporated into any purchase order, AIA contract or subcontract agreement and shall take precedence should there be any conflict.

We hereby propose to furnish labor and materials - complete in accordance with the above specifications, for the sum of \$85,000.00. Payment to be made as follows:

All material is guaranteed to be as specified. All work to be completed in a workmanlike manner according to standard practices. Any alteration or deviation from above specifications involving extra costs, will be executed by upon written orders, and will become an extra charge over and above the estimate. All agreements contingent upon strikes, accidents or delays beyond our control. ADJO Contracting reserves the right to renegotiate contract price if strikes, accidents or delays are encountered. Owner to carry fire, tornado and other necessary insurance. Our workers are fully covered by Workmen's Compensation insurance.

Authorized Signature: \_\_\_\_\_

NOTE: This proposal may be withdrawn by us if not accepted within \_\_\_\_\_ days.

**ACCEPTANCE OF PROPOSAL**

The above prices, specifications and conditions are satisfactory and are hereby accepted. You are authorized to do the work specified. Payment will be made as outlined above.

ACCEPTED

Signature

Signature

Date

**ADJO CONTRACTING CORP.**  
**WATER, DRAINAGE, SANITARY SYSTEMS**  
 207 Knickerbocker Avenue, Bohemia, NY 11716

PH (609) 589-0800  
 FAX (609) 589-0801

**Exclusion List** Page 3 of 3

PROJECT NAME:

Brookhaven Rail Line, Sills Road, Yaphank

BID TO:

Sills Road Realty

ADDRESS

TOWN

STATE

ZIP

Don Quigley

This proposal, in its entirety, shall be the basis of our agreement and shall be made an integral part of and be incorporated into any purchase order, AIA contract or subcontract agreement and shall take precedence should there be any conflict.

**EXCLUSION LIST:**

- Engineering, line, grade, or stake out
- Bonds, fees, permits
- Saw cut, demolition & removal of concrete subroad, if any
- Soils engineer & testing
- Removal & dumping of buried debris, rubble, hazardous material, contaminated soil, buried fuel tanks
- Asbestos abatement
- Unsuitable excavation- below plan grade and control fill & backfill of the same
- Furnish and install bankrun, gravel and/or select backfill materials, collar material from on site only
- Rock excavation
- Erosion control-silt fence-hay bales
- dust control
- Frost excavation and backfill
- Mechanical trade excavation & backfill
- Curb excavations
- Removal of excess fill
- Off set, sheeting, shoring, bracing, and/or underpinning or excavation for same
- Utility interference/utility disconnects and/or damage to unmarked underground utilities
- Dewatering & pumping of any kind
- Winter Conditions
- Conflicts for minimum separation between sewer, water, or drainage
- Cast iron pipe
- Hand labor excavations
- Any Penetration of building, all piping terminates 5 feet outside of building
- Vents, traps, pits, cast iron/ductile pipe, dummy ring, add. depth for proper percolation as per county requirements
- Electrical disconnects or other utility disconnects
- Select pipe type due to conflicts for minimum cover of water, sewer, or drainage
- Site to be plus or minus 6" to rough grade prior to the commencement of work
- Temporary fencing, barricades, lights, etc.
- RPZ freeze protection, insulation, heat tracing, electrical wiring, yearly RPZ Certifications
- Irrigation sprinkler systems and winterizing
- Micro biological testing and lab analysis of water systems
- Tap fees / Meter fees
- Water Meter or RPZ assembly
- Tree protection and restoration
- As Builts on Miar, CAD or Microfilm, stamped by a LS/PE
- Restoration (curb, sidewalk, asphalt, landscape, sawcutting, fence, etc.)
- Master Mechanics, Teamster Stewards and/or Labor Stewards or charges related to same
- Any compaction around drywells other than water jetting, if required
- Removal of concrete paving
- Changes in time, labor, equipment due to a higher water table than indicated on the plans or test borings
- If item is not listed on proposal or excluded, then it is excluded

ACCEPTED

Signature