

ET-7212

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April 29, 2008

Mr. Troy Brady  
Section of Environmental Analysis  
Surface Transportation Board  
395 E Street, S.W.  
Washington, DC 20423

Re: STB Finance Docket No. \_\_\_\_\_, U S Rail Corporation,  
Petition for wavier under 49 C.F.R.1105.10(a)

Dear Mr. Brady,

I am responding on behalf of U S Rail Corporation ("U S Rail" or "Petitioner") to the April 21, 2008 letter of objection submitted by the Town of Brookhaven ("Brookhaven") to U S Rail's March 26, 2008 letter requesting a waiver of the six-month pre-filing notice requirements of 49 CFR 1105.10(a)(1). U S Rail seeks Board approval under 49 U.S.C. 10901 to construct a new rail-served facility (the Brookhaven Rail Terminal or "BRT") at Yaphank, in the Town of Brookhaven, Suffolk County, Long Island, New York.

Briefly stated, Brookhaven argues that U S Rail's project is not entitled to a waiver because (1) it has not accurately and completely described the environmental impacts of the proposed action, (2) that the construction of the BRT is a

subterfuge for a sand mining operation, and (3) that U S Rail intends to use the property for a municipal solid waste ("MSW") transfer station and/or for transloading construction and demolition ("C&D") materials.

The overall tenor of Brookhaven's comments reveals its determination to derail this construction project at every turn. Brookhaven confuses the environmental fact-finding and mitigation imposition processes of the Board's Section of Environmental Analysis ("SEA") with the licensing and adjudication functions of the Board's Office of Proceedings ("OP"). As the SEA will recognize, many of Brookhaven's comments entail whether or not the Board should grant Petitioner's request for construction authority, an issue of public convenience and necessity within OP purview. The SEA should disregard Brookhaven's misdirected comments at this stage of the proceedings.

**1. Waiver of the six-month advance notice requirement is appropriate under the circumstances presented.**

Citing no authority for its contention, Brookhaven nonetheless contends that waiver of the six-month advance notice requirement is not consistent with the regulations of the Section of Energy and Environmental [sic] and the Board's policies.

The applicable regulation states, "Where an *environmental impact statement* is required or contemplated, the prospective applicant must provide the Section of Environmental Analysis with written notice of its forthcoming proposal at least six months prior to filing its application." 1105.10(a)(1). (Emphasis supplied.)

However, by implication and as a matter of long standing policy the Board will entertain and routinely grant a waiver of the six-month advance notice requirement where, as should be the case here, the SEA believes an Environmental Assessment (EA) should be adequate for the circumstances presented.

On March 17, 2008, U S Rail met with the SEA in advance of filing its construction petition. At that meeting, environmental reporting requirements were discussed and a consensus reached that the project appeared to warrant an EA, rather than an EIS. Also present at the March 17<sup>th</sup> meeting were representatives of U S Rail's proposed third party environmental consultant, who, once approved by SEA, will fully review the previous environmental documentation for the site (See Brookhaven Exhibit C), as well as conduct an independent environmental analysis of its own, fully addressing each of the environmental issues Brookhaven raises in its April 21<sup>st</sup> letter, i.e. grading, mixed deciduous forests, sole source aquifers, deep recharge areas, hydro-geologically sensitive zones, non-attainment areas, etc.

Board policy and precedent is consistent with the action plan contemplated in this proceeding. For example, in BNSF Railway Company-Construction and Operation Exemption-Merced County, CA, STB Finance Docket No. 34305 (Service date: November 7, 2003) the Board found an EIS to be unnecessary where an EA sufficiently considered the potential environmental impacts of BNSF's proposed construction and operation of approximately 850 feet of rail line to serve Quebecor World, Inc. (Quebecor) in Merced County, California. FN1

Based on the information provided from all sources and its own independent analysis, SEA preliminarily concluded that construction and operation of the proposed rail line would have no significant environmental impacts if the Board imposes and BNSF implements the recommended mitigation measures set forth in the EA.

Because the Brookhaven Rail Terminal, like the BNSF project discussed above, is the type of minor construction project that is appropriate for environmental review under an EA, the SEA should grant U S Rail's six months advance notice waiver request.

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FN1 That proposed rail line provided rail access for a second rail carrier to provide paper shipments to Quebecor.

**2. U S Rail's March 26<sup>th</sup> letter presents a complete and accurate description of the project**

Brookhaven would have the SEA believe that U S Rail intentionally omitted information from its March 26<sup>th</sup> waiver letter so as to disguise as a rail terminal what Brookhaven claims is a sand mining operation subject to New York State environmental permitting laws. Completely inconsistent with this latest assertion, Brookhaven also has suggested on numerous occasions, including in its April 21<sup>st</sup> letter, that the facility is a rail terminal intended to handle the transportation of MSW and/or C&D materials.

Brookhaven's allegations misconstrue the purpose of Petitioner's waiver request. Section 1105.10 states that the request for waiver must describe as completely as possible the anticipated environmental effects and timing of the proposed action, and show that all or part of the six month lead period is not appropriate. U S Rail's letter has done so by reviewing the impacts on such matters as whether the area is a nonattainment area, the number of trains and type and volume of traffic that would be involved, the impacts, if any, on flora and fauna including any endangered species, the character of the land on which the facility will be built, the impacts on land use, public highways, air and noise pollution, energy

consumption, and historic and cultural resources, among other matters. The regulations do not require that the waiver letter present an exhaustive review of the project. That is for the SEA to do as part of its review mandate under the National Environmental Policy Act ("NEPA").

**3. New York State environmental laws are preempted or are otherwise inapplicable to the project at hand.**

Brookhaven's reference to New York State's environmental statute is superfluous where, as here, SEA is mandated to perform a careful analysis under NEPA. In fact, the Board has ruled that when a construction applicant or petitioner engages its jurisdiction, state and local environmental, permitting, and zoning laws are preempted. DesertXpress Enterprises, LLC- Petition for Declaratory Order, STB Finance Docket No. 34914 (Service Date: June 27, 2007).

Moreover, the New York State Department of Environmental Conservation ("DEC") issued an October 4, 2007 letter to Sills' counsel agreeing to stay enforcement proceedings upon a showing of federal jurisdiction, such as has been made herein. See Petitioner's Exhibit A.

4. Petitioner has made full disclosure of all relevant facts regarding construction of the BRT as an STB-licensed rail facility with ancillary excavation operations.

To reiterate what is clearly and unambiguously set forth in its March 26<sup>th</sup> letter to the SEA, U S Rail will be seeking Board approval to construct and operate a rail terminal for the transloading of stone and other construction materials delivered by rail to Brookhaven. See December 5, 2007 testimony of U S Rail President Gabriel Hall at T.29, L.2-6 (Brookhaven Exhibit D).

By applying for construction and operating authority under 49 U.S.C. 10901, U S Rail is following the exact mandate given by the Board in its October 12, 2007, "cease and desist order" and the then-stated desires of the Town of Brookhaven. Terming U S Rail's involvement a "mere subterfuge" and "sham", Brookhaven ignores testimony that this freight service has already commenced, and that until November 2007 stone was delivered to another location (the Nicolia site), which was unfortunately of insufficient size to meet demand. See December 5, 2007 testimony of Gerard Drumm at T.57, L.14-23 and T.58, L.9-11 (Brookhaven Exhibit D).

The fact that there may be a market for the resale of sand excavated in site grading operations (See Brookhaven Exhibit D

at T.43, L.5-20 (Hall testimony)) should neither be surprising nor mistaken for evidence that U S Rail's involvement is a "mere subterfuge" or "sham" as Brookhaven recklessly charges. Moreover, the laws of physics compel the grading of a rail line to reduce slope to a miniscule degree, or, better still, to entirely eliminate slope. See Brookhaven Exhibit D at T.24, L.16-25 (Hall testimony). This will require U S Rail, with Board approval, to grade the property an estimated 12-13 feet to be compatible with the LIRR track level.

In its March 26<sup>th</sup> letter to the SEA, U S Rail quite logically and understandably focused attention on what is prospectively contemplated for the site. U S Rail saw no need to burden the record with information already of record in this previous proceeding. Brookhaven, on the other hand, focuses in their April 21<sup>st</sup> letter retrospectively on events that took place prior to the Board's October 12, 2007 decision, specifically preliminary site grading and clearing activities. In fact, what transpired in the past is irrelevant to whether or not the SEA's review of this project satisfies the requirements of the NEPA. To the extent, that past evidence presented in the prior litigation is even relevant at all, it belongs in the Board's consideration of the transportation merits of this matter at the

time the Board has before it U S Rail's Petition for Exemption for Construction and Operation under 49 U.S.C. 10901. FN2

**5. Solid Waste Transfer Operating Authority is not being sought by Petitioner.**

U S Rail disputes that it is obliged under 49 CFR 1105 to provide the SEA with "binding representations" that transportation of solid waste will not be involved at Brookhaven Rail Terminal ("BRT"). Without waiving objection, U S Rail avers that no activity subject to P.L. No. 110-161, 121 Stat.1844 (2007), the Consolidated Appropriations Act of 2008, is presently contemplated as part of this application. Petitioner lacks sufficient knowledge or information to state definitively whether or not any such activity might become contemplated in the future, at which time and in which event the required notice would be provided. Moreover, the site owner's general counsel and chief financial officer Gerard Drumm has previously provided Brookhaven with an affidavit that the BRT is not intended for use as a solid waste transfer station. See Petitioner's Exhibit B at Para. 44.

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FN2 So that the record is abundantly clear on the point, U S Rail will incorporate by reference in the as yet to be filed Petition for Exemption Construction and Operation Compliance and Consumer Assistance, issued his October 4<sup>th</sup> letter staying construction pending Board review. See Plaintiff's Proposed Findings of Fact and Conclusions of Law, annexed hereto as Exhibit A, at Paragraph 53 ("Petitioner's Exhibit A").

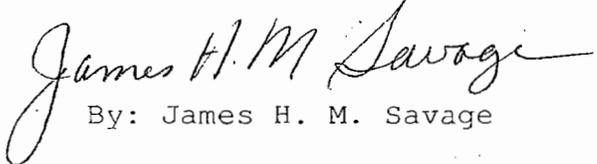
While acknowledging that U S Rail's January 25, 2006 letter accurately described its operations as of that date and time, the letter in no way indicates or implies its intentions with regard to operating the BRT, the terms of which are set forth in Brookhaven's Exhibit F ("Railroad Operating Agreement and Property Lease").

## Conclusion

Given that the interests of all stakeholders will be adequately protected throughout the proceeding, there is no basis for imposing further costs upon the petitioner resulting from an additional six month delay. The SEA will specifically invite comments on all aspects of its EA, including suggestions for additional mitigation measures. SEA will consider all comments received in response to the EA in making its final recommendations to the Board. The Board will consider the entire environmental record, SEA's final recommendations, including final recommended mitigation measures, and the environmental comments in making its final decision in this proceeding.

For the foregoing reasons and based upon the above cited authority, U S Rail respectfully requests the SEA grant a waiver of the six month pre-filing notice requirements of 1105.10(c)(2).

Respectfully submitted,  
John D. Heffner, PLLC

  
By: James H. M. Savage

Counsel for Petitioner  
U S Rail Corporation

JHMS/mhd

Att.

cc: Mark A. Cuthbertson (w/att.)

bcc: Gerard T. Drumm  
Andrew Kaufman  
Gabriel D. Hall

## **EXHIBIT A**

Received at: 4:44PM, 10/4/2007

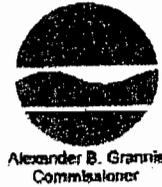
10/04/2007 THU 16:32 FAX 6314440348

NYSDEC Legal Affairs

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**New York State Department of Environmental Conservation  
Division of Legal Affairs, Region One**

Stony Brook University  
50 Circle Road, Stony Brook, New York 11790 - 3409  
Phone: (631) 444-0260 • FAX: (631) 444-0348  
Website: www.dec.state.ny.us



October 4, 2007

VIA MAIL & FAX (516) 227-0777  
Charlotte A. Biblow, Esq.  
Farrell Fritz, P.C.  
1320 RexCorp Plaza  
Uniondale, NY 11556-1320

RE: 28 acre site at Sills Road, Yaphank

Dear Ms. Biblow:

In order for your client to be granted an exemption from the authority of the New York State Department of Environmental Conservation ("Department") to regulate mining at the subject site pursuant to Environmental Conservation Law Article 23 - the Mined Land Reclamation Act, either site plan approval must first be obtained from the Town of Brookhaven, or a sufficient demonstration shall be made to the Department that the proposed activities are entitled to preemption and have undergone the necessary environmental review. In the absence of the foregoing, mining at the site would be a violation.

The undersigned may be contacted directly at (631) 444-0262, to discuss this matter further.

Sincerely,

Craig L. Elgut  
Acting Regional Attorney

cc: Peter A. Scully, Regional Director, NYSDEC  
Robert Yager, Mined Land Reclamation Specialist, NYSDEC

## **EXHIBIT B**

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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SILLS ROAD REALTY, LLC; US RAIL  
CORPORATION; WATRAL BROTHERS, INC.,  
PRATT BROTHERS, INC., ADJO CONTRACTING  
CORP. and SUFFOLK & SOUTHERN RAIL ROAD  
LLC,

Case No. 07-CV-4584 (TCP) (ETB)

Plaintiffs,

-against-

THE TOWN OF BROOKHAVEN,

Defendant.

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**PLAINTIFFS' PROPOSED  
FINDINGS OF FACT  
AND CONCLUSIONS OF LAW**

Plaintiffs Sils Road Realty, LLC ("Sils Road"), US Rail Corporation ("US Rail"), Watral Brothers, Inc. ("Watral"), Pratt Brothers, Inc. ("Pratt"), ADJO Contracting Corp. ("ADJO"), and Suffolk & Southern Rail Road, LLC ("Suffolk and Southern"), (collectively "Plaintiffs"), herein submit the following as and for their proposed findings of facts and conclusions of law with respect to the preliminary injunction hearing held before the Hon. E. Thomas Boyle, United States Magistrate Judge, on December 5-6, 2007, in the above action.<sup>1</sup>

**PROPOSED FINDINGS OF FACT**

**Background**

1. On November 1, 2007, Plaintiffs commenced this action, by service of a summons and complaint, and order to show cause, seeking, *inter alia*, a preliminary injunction

<sup>1</sup> References to exhibits in evidence are denoted herein as "Tr. Ex. \_\_\_" or "Joint Tr. Ex. 1; Tab \_\_\_," the transcripts of hearing testimony in this action are denoted herein by the name of the witness, date of testimony and page number from the transcript (i.e., "HALL, 12/5/07 at 1-2"); and, the Affidavit of Gerard T. Drumm in Support of Plaintiffs' Application for a Preliminary Injunction, dated October 31, 2007, is referred to as the "DRUMM AFF."

enjoining the Town of Brookhaven ("Town") from: (i) taking any action to prosecute the Appearance Tickets issued to Plaintiffs; (ii) issuing any other appearance tickets in connection with the construction or operation of the Brookhaven Rail Terminal; and (iii) taking any other acts to interfere with or obstruct the construction and operation of the Brookhaven Rail Terminal.

2. This matter was referred to the Hon. E. Thomas Boyle, United States Magistrate Judge, for a hearing on Plaintiffs' application.

3. As demonstrated below, Plaintiffs are entitled to the relief they seek because they have demonstrated that the Town has taken improper action by issuing the Appearance Tickets, that they would be irreparably harmed if the Appearance Tickets (or any other tickets) were prosecuted, and a high likelihood of success on the merits of their claims.

#### **The Parties**

##### **Sills Road**

4. Sills Road is a New York limited liability company that owns a 28-acre parcel of real property located in Yaphank, NY (the "Property"), which is located within the geographic boundaries of defendant Town of Brookhaven. (HALL, 12/5/07 at 52.)

5. Sills Road acquired the Property in May 2006. (DRUMM, 12/5/07 at 57.)

6. Gerard Drumm ("Drumm") is the Chief Financial Officer and General Counsel of Sills Road. (DRUMM, 12/5/07 at 52.)

7. Drumm is also the Chief Financial Officer and General Counsel of Suffolk and Southern. (DRUMM, 12/5/07 at 62.)

8. In or around August, 2007, Sills Road leased the Property to US Rail. (DRUMM, 12/5/07 at 18-19; Tr. Ex. 7.)

9. US Rail leased the Property from Sills Road in order to construct and operate an intermodal transloading facility at the Property, known as the Brookhaven Rail Terminal. (DRUMM, 12/5/07 at 63.)

10. Sills Road has never constructed or operated, nor did it ever intend to construct or operate, the Brookhaven Rail Terminal. (DRUMM, 12/5/07 at 63.)

11. In mid-October 2007, Sills Road was issued nine Appearance Tickets by the Town for alleged violations of the Town's zoning code regarding the construction and operation of the Brookhaven Rail Terminal. (DRUMM, 12/5/07 at 65-66; Tr. Ex. 3.)

**US Rail**

12. US Rail is an existing Class III short line rail carrier and is authorized by the United States Surface Transportation Board ("STB") as such. (HALL, 12/5/07 at 17.)

13. Gabriel Hall ("Hall") is the President and Chief Executive Officer of US Rail. (HALL, 12/5/07 at 16.)

14. US Rail is constructing the intermodal transloading facility known as the Brookhaven Rail Terminal. (HALL, 12/5/07 at 17, 38.)

15. In or around August, 2007, US Rail entered into a thirty-year lease and operating agreement with Sills Road for the Property. (HALL, 12/5/07 at 18-19, 24; Tr. Ex. 7.)

16. Under the lease, US Rail is obligated to construct the Brookhaven Rail Terminal and once it is completed, US Rail is obligated to operate the facility. (HALL, 12/5/07 at 19; Tr. Ex. 7.)

17. US Rail intends to operate the Brookhaven Rail Terminal in its status as a common rail carrier. (HALL, 12/5/07 at 24.)

18. US Rail was not issued any Appearance Tickets by the Town. (HALL, 12/5/07 at 25.)

**ADJO**

19. ADJO is a New York corporation and is the general contractor hired by US Rail to excavate and grade the Property on which the Brookhaven Rail Terminal is being constructed. (HALL, 12/5/07 at 30; Tr. Ex. 8.)

20. ADJO and US Rail are also negotiating a proposal, wherein ADJO would construct the Brookhaven Rail Terminal for US Rail after the site is excavated and graded. (HALL, 12/5/07 at 39; Tr. Ex. 10.)

21. In mid-October 2007, ADJO was issued nine Appearance Tickets from the Town for alleged violations of the Town's zoning code regarding the construction of the Brookhaven Rail Terminal. (DRUMM, 12/5/07 at 65-66; Tr. Ex. 1.)

**Pratt**

22. Pratt is a New York corporation and is a subcontractor hired by ADJO to perform certain construction activities at the Brookhaven Rail Terminal. (DRUMM, 12/5/07 at 66.)

23. In mid-October 2007, Pratt was issued nine Appearance Tickets from the Town for alleged violations of the Town's zoning code regarding the construction of the Brookhaven Rail Terminal. (DRUMM, 12/5/07 at 65-66; Tr. Ex. 2.)

**Watral**

24. Watral is a New York corporation and is a subcontractor hired by ADJO to perform certain construction activities at the Brookhaven Rail Terminal. (DRUMM, 12/5/07 at 66.)

25. In mid-October 2007, Watral was issued eight Appearance Tickets from the Town for alleged violations of the Town's zoning code regarding the construction of the Brookhaven Rail Terminal. (DRUMM, 12/5/07 at 65-66; Tr. Ex. 5).

**Suffolk and Southern**

26. Suffolk and Southern was formed to become a common rail carrier. (DRUMM, 12/5/07 at 59.)

27. Suffolk and Southern never performed any construction activities at the Brookhaven Rail Terminal site. (DRUMM, 12/5/07 at 62.)

28. Suffolk and Southern was issued nine Appearance Tickets from the Town for alleged violations of the Town's zoning code regarding the construction of the Brookhaven Rail Terminal. (DRUMM, 12/5/07 at 65-66; Tr. Ex. 4.)

29. There is no common ownership, connection or interrelatedness between US Rail and Suffolk and Southern. (HALL, 12/5/07 at 39-40.)

**Sills Road Materials, LLC**

30. Sills Road Materials, LLC ("Sills Materials") is a New York limited liability company and is an affiliate of Sills Road, and they have common principals who manage the entities. (DRUMM, 12/5/07 at 70.)

31. Sills Materials was formed for the purpose of being a wholesale distributor of stone and aggregates (collectively "Stone") on Long Island. (DRUMM, 12/5/07 at 70.)

32. Sills Materials entered into an agreement with a quarry located in upstate New York to supply Sills Materials with Stone. (DRUMM, 12/5/07 at 70.)

33. Sills Materials has also engaged in marketing to promote its entrance into the Stone supply market. (DRUMM AFF. at ¶ 26.)

34. Sills Materials intends to use the Brookhaven Rail Terminal to transload the Stone from the upstate quarry. (DRUMM, 12/5/07 at 70.)

**Empire Asphalt LLC**

35. Empire Asphalt LLC ("Empire") is a New York limited liability company and is an asphalt company that is owned by several of the partners of Sills Road. (DRUMM, 12/5/07 at 75, 77; Tr. Ex. 12.)

36. After the commencement of this action, Empire was issued four Appearance Tickets by the Town for alleged violations of the Town's zoning code. (Tr. Ex. 6.)

37. At the time that the Town issued the four Appearance Tickets to Empire, the Town was aware that Empire shared a commonality of ownership with Sills Road. (DRUMM, 12/5/07 at 77; Tr. Ex. 12.)

**The Town**

38. The Town is a municipal corporation, located in Suffolk County. (Complaint at ¶ 9.)

39. Brian Tohill ("Tohill") is an Inspector employed by the Town. (TOHILL, 12/5/07 at 94.)

40. Tohill issued the Appearance Tickets to Sills Road, ADJO, Pratt Bros., Watral, Southern and Suffolk, and Empire. (TOHILL, 12/5/07 at 96.)

**The Brookhaven Rail Terminal and the Appearance Tickets**

41. The Brookhaven Rail Terminal was conceived by a number of parties that have a need for Stone in their businesses on Long Island. (DRUMM, 12/5/07 at 57.)

42. The Brookhaven Rail Terminal is going to be an intermodal transloading facility for the purpose of intermodal logistics, rail transfer, transloading of construction products and similar commodities. (HALL, 12/5/07 at 17.)

43. The Brookhaven Rail Terminal will initially be utilized by US Rail to transload Stone, although it will also be used to transload other construction commodities. (HALL, 12/5/07 at 28, 29-30.)

44. The Brookhaven Rail Terminal is not intended to be used as a solid waste transfer station. (DRUMM AFF. at ¶ 12, ft. nt. 2.)

45. The Brookhaven Rail Terminal is located within the geographical boundaries of the Town's Empire Zone, an area within the Town designated for industrial and commercial development. (HALL, 12/5/07 at 53.)

46. The property on which the Brookhaven Rail Terminal site is being constructed is 28 acres in size, on which there is intended to be approximately 11,000 feet of track. (HALL, 12/5/07 at 20-21.)

47. US Rail prepared a track layout for the Brookhaven Rail Terminal with the assistance of Sills Road and the New York and Atlantic Railroad. (HALL, 12/5/07 at 20; Tr. Ex. 9.)

48. New York and Atlantic Railroad holds the freight rights for the Long Island Rail Road tracks. (Joint Tr. Ex. 1, Tab 4.)

49. The New York and Atlantic Railroad is compelled by federal statute to interchange rail cars with US Rail at the Brookhaven Rail Terminal (once it is constructed), which will then send the rail cars into the National rail system. (HALL, 12/5/07 at 23, 49-50.)

50. US Rail's construction activities at the Brookhaven Rail Terminal began in July/August 2007. (HALL, 12/5/07 at 31.)

51. The construction activities at the Brookhaven Rail Terminal, included tree removal and initial grading of the Property. (HALL, 12/5/07 at 24.)

52. In order to oversee the construction of the Brookhaven Rail Terminal, US Rail hired a project manager, Martin Lomasney. (HALL, 12/5/07 at 31.)

53. US Rail voluntarily stopped construction activities at the Brookhaven Rail Terminal at the end of September 2007, pursuant to an oral agreement with the New York State Department of Environmental Conservation ("NYSDEC"). (HALL, 12/5/07 at 42.)

54. After US Rail stopped construction activities at the Brookhaven Rail Terminal, the Appearance Tickets were issued by the Town to US Rail's co-Plaintiffs, but not to US Rail. (HALL, 12/5/07 at 25.)

55. Well prior to the commencement of any construction at the Property, in January 2007, representatives of Sills Road and Suffolk and Southern met with representatives of the Town to present their plans for the Brookhaven Rail Terminal and to provide the Town with the legal authority substantiating the fact that the Brookhaven Rail Terminal was under the exclusive jurisdiction of the STB, and not subject to the Town's local zoning code. (DRUMM, 12/5/07 at 65.)

56. The Town did not seek to stop any of the construction activities at the Brookhaven Rail Terminal until after an article appeared in the October 1, 2007 edition of *Newsday*. (DRUMM, 12/5/07 at 64-66; TOHILL, 12/5/07 at 102.)

57. Between October 12 and October 16, 2007, the Town served multiple Appearance Tickets on Sills Road, ADJO, Watral, Pratt and Suffolk and Southern in which the Town claimed that the activities at the Brookhaven Rail Terminal violated provisions of its zoning code. (DRUMM, 12/5/07 at 66; Tr. Ex. 1-5.)

58. The Appearance Tickets charged Sills Road, ADJO, Watral, Pratt and Suffolk and Southern with violating the following provisions of the zoning code of the Town: no special

permit from the Planning Board (§ 85-311-1);<sup>2</sup> non-permitted use in an L-1 Zoning District (§ 85-308); no site plan approval (§ 85-45A); no certificate of occupancy (§ 85-20A); no building permit (§ 85-17); no tree clearing permit (§ 70-3); failure to post bond (§ 53-5); failure to pay fees (§ 53-34(2)); and conducting a mining operation without approved plan (§ 53-3E). (Tr. Ex. 1-5.)

59. The Appearance Tickets required the Plaintiffs (other than US Rail) to appear on December 13, 2007, at the 6<sup>th</sup> District Court located in Suffolk, New York to answer and defend against the criminal charges alleged in the Appearance Tickets. (*Id.*)

60. The Plaintiffs to whom the Appearance Tickets were issued each risk criminal prosecution for the charges alleged; which are of serious concern to the recipients. (DRUMM, 12/5/07 at 69; TOHILL 12/5/07 at 110; Tr. Ex. 1-5.)

61. Empire was also issued Appearance Tickets by the Town, each of these tickets was supposedly dated either September 26, 2007 or October 30, 2007, but all of which were served, on or about November 14, 2007, by Tohill after the commencement of this action. (DRUMM, 12/5/07 at 77; Tr. Ex. 6.)

62. At the time that the Town served the Appearance Tickets on Empire, it knew of Empire's relationship with the Plaintiffs in this action. (DRUMM, 12/5/07 at 78-81; Tr. Ex. 12.)

63. The Appearance Tickets issued to Empire lacked any foundation and were only issued to further harass Plaintiffs. (DRUMM, 12/5/07 at 84.)

64. Tohill admitted at the trial that the complaint which allegedly led to the issuance of the Appearance Tickets to Empire was not received by his office until *two days after* he issued the Appearance Tickets to Empire. (TOHILL, 12/5/07 at 101, 103; *compare* Tr. Exs. C and 6.)

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<sup>2</sup> Watral was issued eight Appearance Tickets, it was not issued a ticket for "no special permit" under Town Code § "85-311.1."

65. After issuing the Appearance Tickets to Empire, Tohill testified he was told by Town officials "to back, off, essentially to stop [his] investigation into any further connections" between Plaintiffs and Empire. (TOHILL, 12/5/07 at 99.)

66. US Rail continues to pay its construction manager, Mr. Lomasney, even though the construction at the Property was halted. (HALL, 12/5/07 at 31.)

67. In anticipation of operating the Brookhaven Rail Terminal, US Rail acquired two (2) locomotives at a cost of \$175,000 each. (HALL, 12/5/07 at 26, 27.)

68. These locomotives were scheduled for delivery by early March 2008. (HALL, 12/5/07 at 26.)

69. These locomotives were purchased to move rail cars within the Brookhaven Rail Terminal, to switch rail cars among the various tracks at the facility, and to interchange the rail cars with the New York and Atlantic rail line. (HALL, 12/5/07 at 27.)

70. If these locomotives are not used at the Brookhaven Rail Terminal, US Rail has no other use for them and they would have to be put in "cold storage" pending construction of the Brookhaven Rail Terminal. (HALL, 12/5/07 at 27, 48, 50.)

71. US Rail has also ordered materials for the construction of the Brookhaven Rail Terminal, including "rails in place," cross-ties, and ballast which were scheduled to be delivered to the site in February/March 2008. (HALL, 12/5/07 at 28.)

72. US Rail also purchased steel rail track, in fifty (50) foot length, with a weight of 115-132 pounds. (HALL, 12/5/07 at 28.) These types of tracks are necessary to accommodate the weight of the rail cars filled with Stone, which are anticipated to be transloaded at the Brookhaven Rail Terminal. (HALL, 12/5/07 at 28.)

73. In addition to these rail construction materials, US Rail also purchased computers and a construction trailer for use at the Brookhaven Rail Terminal. (HALL, 12/5/07 at 28.)

74. In anticipation of operating the Brookhaven Rail Terminal, US Rail has also undertaken a sales and marketing effort aimed at other transloading customers. (HALL, 12/5/07 at 26.)

75. Similarly, Sills Road and Sills Materials have undertaken marketing efforts to promote the availability of Stone at the Brookhaven Rail Terminal to other users of Stone on Long Island. (DRUMM, 12/5/07 at 93; DRUMM AFF. at ¶ 26.)

76. Additionally, one of the members of Sills Road and Sills Materials, the up-state quarry, has leased approximately 104 rail cars to transport Stone from the quarry to the Brookhaven Rail Terminal. (DRUMM, 12/5/07 at 70.)

77. The first delivery of Stone from the upstate quarry was scheduled to be delivered in March 2008. (HALL, 12/5/07 at 28.)

78. It is estimated that during the construction season, the Brookhaven Rail Terminal will accommodate 4,000-5,000 carloads of Stone from the upstate quarry. (HALL, 12/5/07 at 28-29.)

79. Other potential customers have indicated an interest in transloading at the Brookhaven Rail Terminal structural steel, lumber, particle board, plywood, brick and salt-based materials. (HALL, 12/5/07 at 29-30.)

80. Aside from rail car transport, the only other ways to transport Stone to Long Island is by truck and to a limited extent by barge. (HALL, 12/5/07 at 48.)

81. Truck transportation of Stone to Long Island is burdensome because the trucks must traverse several bridges, and the weights of trucks that can cross the bridges have recently

been reduced. Accordingly, it now takes more trucks to bring the same amount of Stone to Long Island. (HALL, 12/5/07 at 50-51.)

82. Rail transport moves commodities to Long Island without interruption on highways, with less pollution and less fuel consumption. (HALL, 12/5/07 at 51.)

83. Each rail car can move 115 tons of Stone, meaning that the 104 cars can transport 11,960 tons of Stone to the Brookhaven Rail Terminal each trip from the quarry, whereas a truck can only move between 15-18 tons per trip from the quarry. (HALL, 12/5/07 at 51.)

**The Nicolia Site**

84. The members of Sills Road are in the business of commercial contracting and had previously brought Stone to Long Island for several years at an existing transloading site owned by a company called Nicolia. (DRUMM, 12/5/07 at 54.)

85. Suffolk and Southern initially sought STB approval to operate as a common rail carrier at the Nicolia location. (DRUMM, 12/5/07 at 58.)

86. Subsequent to Suffolk and Southern submitting its application to become a common rail carrier, it was informed that there was a defect in the title to the Nicolia site that resulted in Nicolia being unable to lease the rail portion of the Nicolia site to Suffolk and Southern. (DRUMM, 12/5/07 at 60, 85.)

87. After November 2007, the Nicolia site was no longer available to Sills Road, for the transloading of Stone. Also, the Nicolia location could not accommodate the amount of Stone that was anticipated to be brought to Long Island, necessitating the need for the Brookhaven Rail Terminal. (DRUMM, 12/5/07 at 54.)

**The Proceedings Pending Before the STB**

88. Since Suffolk and Southern was not yet an existing common rail carrier, it needed to file an application with the STB in order to operate at the Nicolia site. (DRUMM, 12/5/07 at 90.)

89. In addition, Suffolk and Southern would need STB approval to construct and operate the Brookhaven Rail Terminal, as an exempt rail spur, since it was not an existing common rail carrier. (DRUMM, 12/5/07 at 61.)

90. Suffolk and Southern withdrew its application before the STB, in June 2007, once it learned that the Nicolia site defect was incurable. The STB granted the request to withdraw in August 2007. (DRUMM, 12/5/07 at 84-5; Joint Tr. Ex. 1, Tab 5.)

91. Upon learning that Suffolk and Southern's application to become a common rail carrier was hampered by Nicolia's inability to demonstrate it owned the rail yard, Sills Road contacted US Rail, an existing Class III railroad, to construct and operate the Brookhaven Rail Terminal. (DRUMM, 12/5/07 at 63.)

92. In response to a letter from the Town, dated October 2, 2007, and an article in the October 1, 2007 edition of *Newsday*, the STB reopened Suffolk and Southern's application for the construction of the Brookhaven Rail Terminal and made US Rail a party to that proceeding. (Joint Tr. Ex. 1, Tab 9.)

93. On October 4, 2007, Melvin F. Clemens, Directors of the STB Office of Compliance and Consumer Assistance wrote to U S Rail's counsel inquiring into the activities at the Brookhaven Rail Terminal, directing U.S Rail to serve a response by October 9, 2007, and to stop construction activities pending the STB's receipt and review of U S Rail's response. (A

copy of this letter is annexed to the DRUMM AFF. as Exhibit B; *see also* Joint Tr. Ex. 1, Tab 11, Ex. E.)

94. Mr. Clemens sent his letter approximately three days after *Newsday*, a local newspaper, published an article, on October 1, 2007, questioning the construction activities taking place at the Brookhaven Rail Terminal.

95. U S Rail filed its response to Mr. Clemens on October 9, 2007, explaining that it was an existing Class III rail carrier, that it was constructing an exempt rail spur which did not need STB pre-approval to construct pursuant to 49 U.S.C. § 10906, and requesting that it be permitted to proceed with construction. (A copy of this response is annexed to the DRUMM AFF. as Exhibit C; *see also* Joint Tr. Ex. 1, Tab 11, Ex. F.)

96. By decision dated October 12, 2007, the STB reopened the Suffolk application (the "October 12<sup>th</sup> STB Order"). (A copy of the October 12<sup>th</sup> STB Order is annexed to the DRUMM AFF. as Exhibit D; *see also* Joint Tr. Ex. 1, Tab 9.)

97. In the October 12<sup>th</sup> STB Order, the STB ordered Sills Road and U S Rail to obtain either (i) authorization from the STB to construct and operate the Brookhaven Rail Terminal or (ii) an STB decision that the Brookhaven Rail Terminal does not require STB approval, as an exempt "spur." (Joint Tr. Ex. 1, Tab 9.) The October 12<sup>th</sup> STB Order clearly indicates that the Brookhaven Rail Terminal falls within the STB's exclusive jurisdiction, pre-empting local and state regulation of the facility.

98. The October 12<sup>th</sup> STB Order also contains a cease and desist provision halting all construction activities pending further Order of the STB. (Joint Tr. Ex. 1, Tab 9.)

99. On October 18, 2007, Plaintiffs petitioned the STB to stay its October 12, 2007 Order, and to permit U S Rail to continue preparation of the Brookhaven Rail Terminal site

pending a decision on a Petition for Reconsideration, which Plaintiffs filed on October 26, 2007. (Joint Tr. Ex. 1, Tab 11.)

100. After completion of the hearings in this matter, on December 20, 2007, the STB issued a determination on Plaintiffs' motion for reconsideration (the "December 20<sup>th</sup> Decision"). The December 20<sup>th</sup> Decision makes it clear that the STB has asserted jurisdiction over the Brookhaven Rail Terminal. (*Id.*) (The December 20<sup>th</sup> Decision was not part of Joint Exhibit 1 because it was issued after the hearings in this matter; a copy of the December 20<sup>th</sup> Decision is annexed hereto as Addendum "A." Counsel for both parties have agreed to allow Joint Exhibit 1 to be amended to include the December 20<sup>th</sup> Decision.)

101. Subsequent to the issuance of the December 20<sup>th</sup> Decision, US Rail continued its efforts before the STB with regard to the Brookhaven Rail Terminal. On March 24, 2008, US Rail filed with the STB a request for approval to retain an independent third-party consultant to develop the appropriate environmental and historic documentation necessary for its application before the STB. On March 26, 2008, US Rail sought from the STB a waiver of the six-month pre-filing notice required by the STB's environmental regulation. (Copies of these documents are annexed hereto as Addendum "B.")

102. As set forth in the March 24, 2008 filing, US Rail will be filing a "Petition for Exemption" with the STB in the next several weeks seeking STB approval for the construction and operation of the Brookhaven Rail Terminal. (*See* Addendum "B.")

103. Accordingly, the STB has asserted jurisdiction over the Brookhaven rail Terminal and US Rail is before the STB in order to construct and operate the Brookhaven Rail Terminal. (DRUMM, 12/5/07 at 86; Town Counsel's Statements at Oral Argument, 12/5/07 at 7; Joint Tr. Ex. 1; Addendum A; Addendum B.)

**PROPOSED CONCLUSIONS OF LAW**

**PLAINTIFFS HAVE DEMONSTRATED  
THEIR ENTITLEMENT TO A PRELIMINARY INJUNCTION**

104. A party seeking preliminary injunctive relief to enjoin a government action allegedly taken in the public interest must show that the party “will be irreparably harmed in the absence of an injunction, and . . . a likelihood of success on the merits.” (*Coastal Distribution, LLC v. Town of Babylon*, 216 Fed.Appx. 97, 100 (2d. Cir. 2007) (citing *Forest City Daly Hous., Inc. v. Town of N. Hempstead*, 175 F.3d 144, 149 (2d. Cir.1999).) Plaintiffs have demonstrated that they have suffered irreparable harm and a likelihood of success and therefore are entitled to a preliminary injunction.

**A. Plaintiffs Have Demonstrated a High Likelihood of Success on the Merits**

105. Plaintiffs’ Complaint includes causes of action seeking a declaration that: (i) the Town is preempted from enforcing its Town Code provisions against the Brookhaven Rail Terminal, and (ii) the Appearance Tickets should be declared null and void. The Complaint also seeks an injunction against the enforcement of the Appearance Tickets, because of the express provisions of the Interstate Commerce Commission Termination Act, 49 U.S.C. §10101, *et. seq.* (the “ICCTA”), which preempts local zoning control over rail facilities. (COMPLAINT, ¶¶ 32-52.)

106. In 1995, Congress enacted the ICCTA which abolished the Interstate Commerce Commission and created the STB. This was done as an effort to further deregulate the surface transportation industries. (*See* 49 U.S.C. §10101, *et. seq.*)

107. The ICCTA vests the STB “with exclusive jurisdiction over ‘transportation by rail carriers’ and ‘the **construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or**

**intended to be located, entirely in one State.”** (*Green Mountain Railroad Corp. v. Vermont*, 404 F.3d 638, 642 [2d. Cir. 2005] quoting 49 USC § 10501(b) (emphasis added).)

108. The ICCTA defines a “rail carrier” as a “person providing common carrier railroad transportation for compensation.” (49 U.S.C § 10102(5).) “‘**Transportation**’ is expansively defined to include: ‘a locomotive, car, vehicle, vessel, warehouse . . . yard, property, **facility**, instrumentality, or **equipment of any kind related to the movement of passengers or property**, or both, **by rail.**’” (*Green Mountain* 404 F.3d at 642, quoting 49 USC § 10102(9) (emphasis added).)

109. Moreover, “[F]ederal courts recognize that the [ICCTA] preempts most pre-construction permit requirements imposed by states and localities.” (*Green Mountain*, 404 F.3d at 642, citing *City of Auburn v. United States*, 154 F.3d 1025, 1030-31 (9th Cir. 1998); see also, *Soo Line R.R. Co. v. City of Minneapolis*, 38 F.Supp.2d 1096, 1101 (Dist. Minn. 1998); *Village of Ridgefield Park v. New York, Susquehanna & Western Railway Corp.*, 750 A2d 57, 64 (N.J. 2000) (“railroads are exempt from the traditional permitting process . . .”).)

110. Therefore “state and local authorities cannot subject the construction of railroad facilities to pre-permitting processes where there are no clear construction standards and where the permit depends on the discretion of a local agency.” (*Coastal Distribution, LLC*, 216 Fed.Appx. at 100; see also, *Green Mountain*, 404 F.3d at 642 (“The STB “has likewise ruled that ‘state and local permitting or preclearance requirements (including environmental requirements) are preempted because by their nature they unduly interfere with interstate commerce.’”); *CSX Transp.*, 944 F.Supp.1573, 1581 (N.D.Ga.1996) (“It is difficult to imagine a broader statement of Congress’ intent to preempt state regulatory authority over railroad operations.”).)

111. Consequently, a rail transportation facility, like the Brookhaven Rail Terminal, is not subject to local zoning, permitting or pre-clearance requirements because it is being constructed by a rail carrier. (See *Canadian National RR v. City of Rockwood*, 2005 WL 1349077 (E.D. Mich. 2005) (county zoning laws and permitting and preclearance requirements preempted for railroad “transloading” facility); *Grafton and Upton Railroad Co v. Town of Milford*, 337 F.Supp.2d 233 (D. Mass 2004) (granting preliminary injunction enjoining municipality from taking any action to enforce its zoning ordinance and prohibiting municipality from otherwise attempting to prevent, delay, obstruct or prohibit “terminal railroad company’s” development of rail yard into a transloading facility); *Norfolk Southern RR v. City of Austell*, 1997 WL 1113647 (N.D. GA 1997) (local zoning and land use permitting regulations for transloading facility preempted).)

112. Sills Road leased the property to U S Rail, an existing Class III short line rail carrier, and it is US Rail that is constructing and will operate the Brookhaven Rail Terminal. (HALL, 12/5/04, at 17, 38; Tr. Ex. 7.)

113. The STB has asserted authority over the construction of the Brookhaven Rail Terminal, preempting the Town from control of any sort over the Brookhaven Rail Terminal. (DRUMM, 12/5/07 at 86; Town Counsel’s Statements at Oral Argument, 12/5/07 at 7.)

114. Because the construction and operation of the Brookhaven Rail Terminal is within the scope of interstate commerce governed by the ICCTA, and the STB has asserted its jurisdiction in the matter, the Town is preempted from control or jurisdiction over the Brookhaven Rail Terminal; the Town cannot issue or prosecute the Appearance Tickets already issued for alleged violations of Town Code provisions in connection with the Brookhaven Rail Terminal’s construction or operation or issue new Appearance Tickets with regard to alleged

violations of the Town code. (*Buffalo Southern Railroad, Inc. v. Village of Croton-on-Hudson*, 434 F. Supp.2d 241 (S.D.N.Y. 2006).)

115. Plaintiffs have demonstrated that they are likely to prevail on the merits as the Town's actions in issuing and prosecuting the Appearance Tickets to Plaintiffs is preempted by the ICCTA.

116. Plaintiffs also asserted a claim for violation of their right to substantive procedural Due Process and Equal Protection of the Laws under Articles 13 and 14 of the United States Constitution, 42 U.S.C. § 1983, and Article I, Section 6 of the New York State Constitution and for Abuse of Process.

117. The Town issued the Appearance Tickets with actual knowledge that the Brookhaven Rail Terminal was exempt from its oversight and under the exclusive jurisdiction of the STB, and in fact, Plaintiffs provided the Town with an extensive written memorandum demonstrating the STB's exclusive jurisdiction ten months before the Appearance Tickets were issued. (DRUMM, 12/5/07 at 53-54.)

118. The Town also issued the Appearance Tickets to Empire in retribution for the bringing of this action.

119. Because the Town has issued the Appearance Tickets (as well as those issued to Empire) without basis, Plaintiffs have demonstrated they are likely to prevail on the third-prong of their request for a preliminary injunction stopping the Town from taking any action that is preempted by the ICCTA with regard to the construction or operation of the Brookhaven Rail Terminal

**B. Plaintiffs Have Demonstrated Irreparable Harm**

120. Irreparable harm is “a fundamental and traditional requirement of all preliminary relief.” (*Triebwasser & Katz v. American Telephone & Telegraph Co.*, 535 F.2d 1356, 1359 (2d Cir. 1976).)

121. Irreparable harm “may be found where damages are difficult to establish and measure,” such as where a party will otherwise lose customer relationships that account for an indeterminate amount of business over the years. (*Coastal*, 216 Fed.Appx. at 100 (quoting *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 404 (2d Cir. 2004)).)

122. Plaintiffs also suffer irreparable harm as a matter of constitutional law because the Defendant is effectively denying Plaintiffs a right to participate in interstate commerce granted to them under the Commerce Clause of the United States Constitution. The Commerce Clause is “. . . a substantive restriction on permissible state regulation of interstate commerce . . . individuals injured by state action that violates this aspect of the Commerce Clause may sue and obtain injunctive and declaratory relief.” (*Mark E. Dennis v. Margaret L. Higgins*, 498 U.S. 439 (1991).)

123. Plaintiffs have been harmed by the Town’s issuance of the Appearance Tickets which were issued to halt construction of the Brookhaven Rail Terminal and require Plaintiffs to defend against alleged violations of the Town Code. (HALL, 12/5/07 at 41.)

124. Irreparable harm has been demonstrated by the fact that the Appearance Tickets issued by the Town to Plaintiffs involve alleged criminal acts, which can result in both jail time and fines being imposed against Plaintiffs, for activities which are preempted from the Town’s jurisdiction. (DRUMM, 12/5/07 at 69; TOHILL, 12/5/07 at 110.)

125. Moreover, it was intended that the Brookhaven Rail Terminal would be used to continue to transport Stone to Long Island via rail after November 2007 in larger quantities than had been previously brought to the Nicolia location. (DRUMM, 12/5/07 at 54.)

126. These materials were to be used both by the members of Sills Road and sold to third parties at a profit. (DRUMM, 12/5/07 at 54-5.)

127. Sills Road and Sills Materials took efforts to prepare for bringing the Stone to Long Island, including marketing the availability of the Stone and making commitments to third parties to provide Stone. (DRUMM AFF. at ¶ 26.)

128. By using the Brookhaven Rail Terminal as a transloading facility, the members of Sills Road expected to obtain materials at a lower cost, and also to sell Stone to third-parties and achieve a profit on those sales, which will now be lost. (DRUMM, 12/5/07 at 54-5.)

129. All of the efforts and monies expended by US Rail to develop and market the Brookhaven Rail Terminal (*supra*), *inter alia*, purchasing locomotives, leasing rail cars, and purchasing train tracks will have all been for naught if the Town is permitted to prosecute the Appearance Tickets (or issue additional tickets) in violation of federal law.

130. The loss of these business opportunities, and the monies expended to pursue them cannot be recovered by the Plaintiffs and constitutes irreparable harm. (*Coastal*, 216 Fed.Appx. at 100.)

**C. The Relief Plaintiffs Seek Is In The Public Interest**

131. The construction and operation of the Brookhaven Rail Terminal will promote the reduction of highway congestion, result in fuel conservation and encourage the laudable goal of increased use of the national rail system. (HALL, 12/5/07 at 50-51.)

132. Development of rail-truck facilities and services is a national policy. 49 U.S.C. §302 states:

(e) Intermodal transportation. -- It is the policy of the United States Government to encourage and promote development of a national intermodal transportation system in the United States to move people and goods in an energy-efficient manner, provide the foundation for improved productivity growth, strengthen the Nation's ability to compete in the global economy, and obtain the optimum yield from the Nation's transportation resources.

133. The injury to the other customers of the Brookhaven Rail Terminal and to residents of Long Island in general is also irreparable. Because of new limitations on truck gross vehicular weight crossing bridges to Long Island, there is no economical way for that traffic to move in the volumes of Stone contemplated by Sills Road other than by rail. Already congested highways and bridges would be further burdened by handling tens of thousands of additional truck trips, potentially inflicting considerable damage on area highways as well as unnecessary fuel consumption and air pollution. Moreover, there are no other rail transloading facilities on eastern Long Island that are available to Sills Road to handle the Stone in the volumes contemplated. (DRUMM, 12/5/07 at 50-51; DRUMM AFF. at ¶ 27.)

134. The construction and operation of the Brookhaven Rail Terminal will result in less truck traffic on Long Island, which is in the public interest and in conformance with the national public policy. (*Id.*)

**D. Issuance Of A Preliminary Injunction Will Not Be Harmful To The Town**

135. The issuance of preliminary injunctive relief will not harm the Town or any other entity.

136. The Appearance Tickets concern citations to Town Code provisions regarding, *inter alia*, the alleged failure to obtain permission and approvals from the Town and failure to pay fees associated with these permits and approvals in advance of constructing the Brookhaven Rail Terminal. (Tr. Ex. 1-5.)

137. Congress, in enacting the ICCTA and providing the STB with exclusive jurisdiction over rail facilities, has made a public policy determination that it would be harmful to permit local municipal zoning oversight of rail facilities. (*See* 49 U.S.C. §10101, *et. seq.*)

138. Instead, the ICCTA permits local municipalities, such as the Town, to participate in the proceedings before the STB and raise any concerns it may have in that forum. The Town has intervened in the Brookhaven Rail Terminal proceeding pending before the STB. (*See* Joint Tr. Ex. 1, Tab 13.)

139. Accordingly, the issuance of a preliminary injunction which comports with Congress' intent in passing the ICCTA cannot be harmful to the Town.

**E. Plaintiffs Are Entitled to the Preliminary Relief they Seek**

140. Plaintiffs seek a three-pronged preliminary injunction which is warranted based upon the above listed facts and the applicable law. Plaintiffs seek an injunction enjoining the Town from:

- a. taking any action to prosecute the Appearance Tickets issued to Plaintiffs;
  - this relief is warranted because the Town's issuance of the Tickets was in direct violation of the ICCTA because a rail facility, like the Brookhaven Rail Terminal, is not subject to the Town's pre-

construction permitting process (*see, Green Mountain*, 404 F.3d at 642-3);

- b. issuing any new Appearance Tickets in connection with the construction or operation of the Brookhaven Rail Terminal;
  - this relief is warranted because the ICCTA preempts the Town from issuing tickets for permitting issues regarding the construction or operation of the Brookhaven Rail Terminal, because it vest exclusive jurisdiction over the Brookhaven Rail Terminal in the STB (*see, id.*); and
- c. taking any other acts to interfere with or obstruct the construction or operation of the Brookhaven Rail Terminal;
  - this relief is warranted because, by issuing Appearance Tickets (including those issued to Empire) the Town has demonstrated that it will improperly attempt to usurp the STB's exclusive oversight over the construction and operation of the Brookhaven Rail Terminal. Moreover, the Town's harassment through the issuance of the Appearance Tickets is the subject of one of Plaintiffs' causes of action in this litigation.

141. Presently the Plaintiffs face criminal charges for the Appearance Tickets the Town already issued, which contravenes the preemption provisions found in the ICCTA.

142. Moreover, if the injunction sought is not issued, the Town will be free to continue to obstruct the construction and development of the Brookhaven Rail Terminal, again in contravention of the ICCTA's preemption provisions.

#### CONCLUSION

143. Accordingly, because the Plaintiffs have demonstrated that the Town has violated federal law by the Town's issuance of the Appearance Tickets, that Plaintiffs will suffer irreparable harm absent the requested relief and a high likelihood of success on the merits of their claims, Plaintiffs are entitled to a preliminary injunction enjoining the Town from: (i) taking any action to prosecute the Appearance Tickets issued to Plaintiffs; (ii) issuing any other

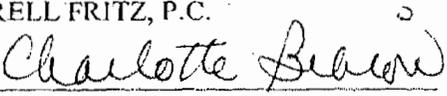
Appearance Tickets in connection with the construction or operation of the Brookhaven Rail Terminal; and (iii) taking any other acts to interfere with or obstruct the construction and operation of the Brookhaven Rail Terminal.

WHEREFORE, Plaintiffs respectfully request that the Court grant their request for a preliminary injunction in its entirety.

Dated: Uniondale, New York  
March 31, 2008

RESPECTFULLY SUBMITTED,  
FARRELL FRITZ, P.C.

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