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SERVICE DATE – MARCH 25, 2021

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36472<sup>1</sup>

CSX CORPORATION AND CSX TRANSPORTATION, INC., ET AL.  
—CONTROL AND MERGER—

PAN AM SYSTEMS, INC., PAN AM RAILWAYS, INC., BOSTON AND MAINE CORPORATION, MAINE CENTRAL RAILROAD COMPANY, NORTHERN RAILROAD, PAN AM SOUTHERN LLC, PORTLAND TERMINAL COMPANY, SPRINGFIELD TERMINAL RAILWAY COMPANY, STONY BROOK RAILROAD COMPANY, AND VERMONT & MASSACHUSETTS RAILROAD COMPANY

Digest:<sup>2</sup> In this decision, the Board accepts as a prefiling notification the submission that seeks Board approval for CSX Corporation, CSX Transportation, Inc. (CSXT), and 747 Merger Sub 2, Inc., to acquire control of seven rail carriers owned by Pan Am Systems, Inc., and Pan Am Railways, Inc., and to merge six of those railroads into CSXT. The Board determines that this is a “significant” transaction as defined by its regulations and permits the applicants to supplement their submission to include the information required in an application for a significant transaction.

AGENCY: Surface Transportation Board.

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<sup>1</sup> This decision embraces the following dockets: Norfolk Southern Railway—Trackage Rights Exemption—CSX Transportation, Inc., Docket No. FD 36472 (Sub-No. 1); Norfolk Southern Railway—Trackage Rights Exemption—Providence & Worcester Railroad, Docket No. FD 36472 (Sub-No 2); Norfolk Southern Railway—Trackage Rights Exemption—Boston & Maine Corp., Docket No. FD 36472 (Sub-No. 3); Norfolk Southern Railway—Trackage Rights Exemption—Pan Am Southern LLC, Docket No. FD 36472 (Sub-No. 4); Pittsburg & Shawmut Railroad—Operation Exemption—Pan Am Southern LLC, Docket No. FD 36472 (Sub-No. 5); SMS Rail Lines of New York, LLC—Discontinuance Exemption—in Albany County, N.Y., Docket No. AB 1312X.

<sup>2</sup> The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Pol’y Statement on Plain Language Digs. in Decisions, EP 696 (STB served Sept. 2, 2010).

ACTION: Decision No. 1 in Docket No. FD 36472; Notice of Receipt of Prefiling Notification.

SUMMARY: The Surface Transportation Board (Board) has reviewed the submission filed February 25, 2021, by CSX Corporation (CSXC), CSX Transportation Inc. (CSXT),<sup>3</sup> 747 Merger Sub 2, Inc. (747 Merger Sub 2), Pan Am Systems, Inc. (Systems), Pan Am Railways, Inc. (PAR), Boston and Maine Corporation (Boston & Maine), Maine Central Railroad Company (Maine Central), Northern Railroad (Northern), Portland Terminal Company (Portland Terminal), Springfield Terminal Railway Company (Springfield Terminal), Stony Brook Railroad Company (Stony Brook), and Vermont & Massachusetts Railroad Company (V&M) (collectively, Applicants). The submission is styled as an application for a “minor” transaction seeking Board approval for: (1) CSXC, CSXT, and 747 Merger Sub 2 to control the seven railroads controlled by Systems and PAR,<sup>4</sup> and (2) CSXT to merge six of the seven railroads into CSXT. This proposal is referred to as the “Proposed Transaction.”

The Board finds that the Proposed Transaction would be a “significant” transaction. The Board’s regulations require that applicants give notice two to four months prior to the filing of an application in a “significant” transaction. Because Applicants argue that the Proposed Transaction is a “minor” transaction, they did not file the required pre-filing notification before their February 25, 2021 submission seeking Board approval of this “significant” transaction and did not pay the filing fee for a “significant” transaction. Their submission cannot be treated as an application at this time. The Board will, however, consider the February 25, 2021 submission a pre-filing notification<sup>5</sup> and publish notice of it in the Federal Register, which will permit Applicants to perfect their application by supplementing their submission with the requisite information for a “significant” transaction in accordance with the Board’s regulations, between April 25 and June 25, 2021 (i.e., two to four months after the Notice was filed).

When filing a pre-filing notification, merger applicants in a “significant” transaction must propose a procedural schedule for Board review of their proposed transaction. As part of their tender of an application for a “minor” transaction, Applicants had proposed a procedural schedule that tracks the statutory deadlines for processing “minor” applications. Because the Board finds the proposed transaction to be “significant,” Applicants must file with the Board, no later than April 1, 2021, a revised proposed procedural schedule that reflects the Board’s determination that this is a “significant” transaction. The proposed procedural schedule should indicate the approximate filing

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<sup>3</sup> CSXT is a wholly owned subsidiary of CSXC. CSXC and CSXT are referred to collectively as CSX.

<sup>4</sup> Systems directly and wholly owns PAR, which in turn directly and wholly owns four rail carriers: Boston & Maine, Maine Central, Portland Terminal, and Springfield Terminal. Boston & Maine directly and wholly owns Northern and Stony Brook, as well as a 98% interest in V&M. These seven rail carriers will be referred to collectively as the PAR Railroads.

<sup>5</sup> Because the Board will treat the February 25, 2021 submission as the pre-filing notification, that submission will be referred to as the “Notice.”

date of its supplement perfecting its application for a “significant” transaction, which date, as noted, must be between April 25 and June 25, 2021. Comments on the proposed procedural schedule will be due 10 days after publication of the proposed procedural schedule in the Federal Register.

The Board’s regulations also call for merger applicants to indicate in their prefiling notification the year to be used for the impact analysis required in “significant” transactions. In their Notice, Applicants used operating data from 2019 in their Operating Plan-Minor (Exhibit 15). The Board therefore will designate 2019 as the year to be used for impact analysis in the application unless Applicants indicate otherwise when they submit the proposed procedural schedule.

In addition, Applicants must submit the difference between the filing fee for a “minor” transaction (which Applicants already have paid) and the fee for a “significant” transaction when they file their application for a “significant” transaction.

**DATES:** Applicants must, by April 1, 2021, file a proposed procedural schedule with the Board.

**ADDRESSES:** Any filing submitted in this proceeding should be filed with the Board via e-filing on the Board’s website. In addition, one copy of each filing must be sent (and may be sent by e-mail only if service by e-mail is acceptable to the recipient) to each of the following: (1) Secretary of Transportation, 1200 New Jersey Avenue, S.E., Washington, DC 20590; (2) Attorney General of the United States, c/o Assistant Attorney General, Antitrust Division, Room 3109, Department of Justice, Washington, DC 20530; (3) CSX’s and 747 Merger Sub 2’s representative, Anthony J. LaRocca, Steptoe & Johnson LLP, 1330 Connecticut Ave., N.W., Washington, DC 20036; (4) Systems’, PAR’s, and PAR Railroads’ representative, Robert B. Culliford, Pan Am Systems, Inc., 1700 Iron Horse Park, North Billerica, MA 01862; and (5) any other person designated as a Party of Record on the service list.

**FOR FURTHER INFORMATION CONTACT:** Amy Ziehm at (202) 245-0391. Assistance for the hearing impaired is available through the Federal Relay Service at (800) 877-8339.

**SUPPLEMENTARY INFORMATION:** Systems directly and wholly owns PAR, which in turn directly and wholly owns Boston & Maine, Maine Central, Portland Terminal, and Springfield Terminal. Boston & Maine directly and wholly owns Northern and Stony Brook. Boston & Maine also owns a 98% interest in V&M. The PAR Railroads own rail lines and provide rail service on a freight rail network (PAR System) in New England, from Maine in the north to the Boston region in the south.<sup>6</sup> Springfield Terminal operates rail service on the PAR System on behalf of the PAR Railroads pursuant to leases over lines owned and leased by the other PAR Railroads. (Notice 2-3.)

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<sup>6</sup> Applicants state that the PAR System consists of approximately 808 route miles of rail lines, including approximately 724.53 owned and leased (including perpetual freight easement) route miles and approximately 83.62 trackage-rights route miles in Massachusetts, Maine, New Hampshire, and Vermont. (Notice 26.)

Boston & Maine also owns a 50% interest in Pan Am Southern LLC (PAS), a Class II carrier. (Id. at 3.) PAS is a 50/50 joint venture between Boston & Maine and Norfolk Southern Railway Company (NSR). (Id.) PAS runs between upstate New York and a point just past Ayer, Mass., where it connects with the PAR System. (Notice, Ex. 22, V.S. Reishus 6.) PAS also uses a north-south route running between Vermont and Connecticut over lines owned by Genesee & Wyoming, Inc. (GWI), which connects with the PAS mainline at East Deerfield, Mass., and connects with other PAS lines in Connecticut.<sup>7</sup> (Id., Ex. 22, V.S. Reishus 6.) Springfield Terminal, also a Class II rail carrier, operates PAS as PAS's agent. (Notice 3.) NSR has trackage rights over the PAS line between Mechanicville, N.Y., and Ayer, but Springfield Terminal currently operates NSR trains over that segment pursuant to a haulage agreement between PAS and NSR. (Notice, Ex. 15, Operating Plan-Minor 6.)

CSXT, a Class I rail carrier, is a wholly owned subsidiary of CSXC. CSXT owns and operates approximately 19,500 miles of railroad in 23 states and the District of Columbia, as well as in the Canadian Provinces of Ontario and Quebec. (Notice 28.) Applicants state that CSXT's access to New England shippers occurs primarily through its own mainline, which connects with several New England railroads including with the PAR System at Barbers Station, Mass., near Worcester, Mass. (Notice, Ex. 22, V.S. Reishus 6.) Applicants state that CSXT also serves New England shippers by interlining with PAS at Rotterdam Junction, N.Y. (Id., Ex. 22, V.S. Reishus at 6.)

Under the Proposed Transaction, CSX and 747 Merger Sub 2 would acquire control of the PAR Railroads, and CSXT would merge the PAR Railroads, except V&M, into CSXT.<sup>8</sup> (Notice 2.) As CSXT would wholly own and control Boston & Maine, CSX and 747 Merger Sub 2 also seek authority to acquire Boston & Maine's 50% joint ownership in PAS. (Id. at 4.) Applicants state that CSXT, NSR, and GWI have entered into agreements regarding the operation of PAS upon consummation of the Proposed Transaction, specifically: (1) a settlement agreement between CSXT and NSR (NSR Settlement Agreement), which includes an agreement relating to operations at Ayer; and (2) a Term Sheet Agreement among CSXT, NSR and GWI. (Id. at 4-5.) Applicants state that these two agreements contemplate transactions (Related Transactions) that are integrally related to the Proposed Transaction and require Board authorization: (1) Pittsburgh & Shawmut

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<sup>7</sup> PAS's network consists of approximately 425 route miles, including approximately 281.38 owned route miles (including perpetual freight easement) and approximately 143.62 trackage-rights route miles. (Notice 31.)

<sup>8</sup> Specifically, Systems would be merged with 747 Merger Sub 1, Inc., with Systems surviving. Immediately thereafter, Systems would be merged with 747 Merger Sub 2, with 747 Merger Sub 2 surviving and the separate corporate existence of Systems ceasing. 747 Merger Sub 2, as the surviving corporation, would be renamed Pan Am Systems, Inc., and would be a wholly owned subsidiary of CSXC. Concurrent with closing, CSXC would contribute Pan Am Systems, Inc., and all of its subsidiaries to CSXT. CSXT would thereafter control the rail carrier subsidiaries of Pan Am Systems, Inc., and would merge those subsidiaries, except V&M, into CSXT at a later date. (Notice 3.)

Railroad, LLC, d/b/a Berkshire & Eastern Railroad (B&E), a Class III rail carrier and a wholly owned subsidiary of GWI, seeks authority to replace Springfield Terminal as the operator of PAS,<sup>9</sup> and (2) NSR seeks trackage rights over existing lines owned by four carriers (CSXT, Boston & Maine, Providence & Worcester Railroad Company (P&W) (a GWI subsidiary), and PAS) to allow NSR additional flexibility with respect to NSR's existing service to an intermodal facility located on the PAS network at Ayer.<sup>10</sup> (Notice 4-7; *id.*, Ex. 15, Operating Plan-Minor 2-3.)

Related Filings. In connection with the Related Transactions, several verified notices of exemption and a petition for exemption were filed concurrently.

*NSR Trackage Rights Authority.* NSR has filed verified notices of exemption under 49 C.F.R. § 1180.2(d)(7) for overhead trackage rights pursuant to trackage rights agreements with CSXT, P&W, Boston & Maine, and PAS.<sup>11</sup> NSR states that trackage rights being acquired pursuant to these verified notices of exemption would not take effect until the Proposed Transaction is consummated. Applicants state in their Notice that the trackage rights would allow NSR, upon consummation of the Proposed Transaction, to move up to one train pair per day, carrying intermodal and automotive vehicles traffic, between NSR's connection with CSXT at Voorheesville, N.Y., and the intermodal terminal located near Ayer, over CSXT's east-west rail line between Voorheesville and Worcester, then over P&W's rail line between Worcester and Barbers Station, then over Boston & Maine's rail line between Barbers Station and Harvard, Mass., and finally over PAS's rail line between Harvard and Ayer. (Notice 6.) Specifically:

- In Norfolk Southern Railway—Trackage Rights Exemption—CSX Transportation, Inc., Docket No. FD 36472 (Sub-No. 1), NSR seeks approximately 161.5 miles of overhead trackage rights on CSXT's mainline between approximately Voorheesville (at or near

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<sup>9</sup> As described below, this operating agreement is the subject of the petition for exemption filed in Docket No. FD 36472 (Sub-No. 5). Applicants state that they anticipate consummating the Proposed Transaction and Related Transactions at the same time; however, CSXT, NSR, and GWI have agreed that, if the Proposed Transaction is consummated prior to the replacement of Springfield Terminal by B&E and the initiation of PAS operations by B&E, then Springfield Terminal would continue to operate PAS until Springfield Terminal is replaced as the PAS operator. (Notice 5-6.)

<sup>10</sup> As described below, these proposed trackage rights are the subjects of verified notices of exemption that have been filed in Docket Nos. FD 36472 (Sub-No. 1), FD 36472 (Sub-No. 2), FD 36472 (Sub-No. 3), and FD 36472 (Sub-No. 4).

<sup>11</sup> NSR has filed a public version and highly confidential versions of the trackage rights agreements in each of these sub-dockets. A motion for protective order was filed and a protective order issued on March 3, 2021, in Docket No. FD 36472, which by its terms applies to related proceedings. To ensure clarity in the administrative record, however, the Board will issue the same protective order in this decision for all of the related proceedings. See the Appendix to this decision.

milepost QG 22.5) and Worcester (at or near milepost QB 44.5) (inclusive of appurtenant passing tracks and sidings).

- In Norfolk Southern Railway—Trackage Rights Exemption—Providence & Worcester Railroad, Docket No. FD 36472 (Sub-No. 2), NSR seeks approximately 2.90 miles of overhead trackage rights on P&W's mainline between a connection with the tracks of CSXT at Worcester at milepost 0.0, over Track 1 extending from the east side of Green Street to the point of merger of said Track 1 and the Main Track so called at milepost 1.05, south of Garden Street, and over said Main Track thereafter from milepost 1.05 to P&W's Gardner Branch baseline station 153+50, which is the point of connection with the tracks of Boston & Maine at Barbers Station at milepost 2.90.
- In Norfolk Southern Railway—Trackage Rights Exemption—Boston & Maine Corp., Docket No. FD 36472 (Sub-No. 3), NSR seeks approximately 22.08 miles of overhead trackage rights on Boston & Maine's line from milepost X 2.92 at Barber, Mass.,<sup>12</sup> and connection to P&W, to milepost X 25.0 at Harvard and connection to PAS.
- In Norfolk Southern Railway—Trackage Rights Exemption—Pan Am Southern LLC, Docket No. FD 36472 (Sub-No. 4), NSR seeks approximately 3.01 miles of overhead trackage rights on PAS's line from milepost X 25.0 at Harvard, and connection to Boston & Maine, to milepost X 28.01 at Ayer.

*Discontinuance Authority Over NSR Line.* In SMS Rail Lines of New York, LLC—Discontinuance Exemption—in Albany County, N.Y., Docket No. AB 1312X, NSR filed, on behalf of SMS Rail Lines of New York, LLC (SMS) and with SMS's consent, a verified notice of exemption for SMS to discontinue common carrier service and terminate its lease operations over approximately 15 miles of rail line owned by NSR located between milepost 11.00 in Voorheesville and a point 50 feet south of the centerline of the bridge at milepost 26.14 (or engineering station 6136+/-) in Delanson, N.Y., including the use of wye track and any track leading to the Northeast Industrial Park at milepost 12.1 and 12.29, in Albany County, N.Y.

*B&E Operating Authority.* In Pittsburg & Shawmut Railroad—Operation Exemption—Pan Am Southern LLC, Docket No. FD 36472 (Sub-No. 5), B&E has filed a petition for exemption under 49 U.S.C. § 10502 and 49 C.F.R. part 1121 from the provisions of 49 U.S.C. §§ 11323(a)(2) and 11324 to allow B&E to enter into contracts to operate the approximately 425 route miles of lines and incidental trackage rights of PAS currently being operated by Springfield Terminal.<sup>13</sup>

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<sup>12</sup> In the verified notice, NSR uses milepost X 2.92 at Barber, Mass., to describe the overhead trackage rights it seeks. The trackage rights agreement governing this transaction refers to this point as being in Barbers Station, Mass.

<sup>13</sup> NSR has filed a public version and highly confidential versions of the Term Sheet Agreement, entered into among GWI, CSXT and NSR, which contains the significant terms of the

B&E notes that its petition is filed as a transaction integrally related to, and dependent upon, approval of the Proposed Transaction.

Public Interest Considerations. Applicants assert that the Proposed Transaction, combined with the Related Transactions, would substantially enhance competition by improving access to New England over multiple rail routes and would have no adverse impact on competition. (Notice 5, 7.) Applicants state that the Proposed Transaction would be an end-to-end combination of two railroad networks and would allow CSXT to convert interline operations between CSXT and the PAR System to efficient, single-line service. (Notice, Ex. 22, V.S. Pelkey 4.) Applicants further state that the Proposed Transaction would allow CSXT to expand its operations into New England, giving CSXT's existing customers more direct and efficient access to New England markets and giving the PAR System's existing customers better rail service and single-line access to the rest of CSXT's rail network. (*Id.*, Ex. 22, V.S. Pelkey 2.) Applicants assert that this single-line service would reduce switching and interchange, eliminate the need to coordinate a hand-off between separate rail carriers, result in a savings in transit times, and reduce the chance of unexpected problems in the physical interchange of traffic between two independent carriers. (*Id.*, Ex. 22, V.S. Pelkey 4.)

According to Applicants, the Related Transactions would strengthen PAS as an independent route to New England for all carriers that connect to PAS and that the agreements underlying the Related Transactions would enhance competition and improve rail service. (Notice 4.) As part of the Related Transactions, Applicants state that PAS would replace Springfield Terminal with B&E as the contract operator of PAS, and that B&E would operate and set rates for PAS in a non-discriminatory fashion as to all rail carriers that have the ability to interchange traffic with PAS or otherwise connect to PAS. (*Id.* at 8.) Applicants thus argue that CSXT would not have any control over the rates set by PAS, as rate-setting would be exclusively the responsibility of B&E. (Notice, Ex. 22, V.S. Pelkey 11.) Applicants further note that CSXT would retain Boston & Maine's one-half interest in PAS and would be able to use PAS as an alternative means to access New England, but CSXT would not be able to affect the access of other carriers to New England over PAS. (*Id.*, Ex. 22, V.S. Pelkey 11.) Further, Applicants assert that GWI's operating experience and familiarity with the New England rail market would improve PAS operations and rail service. (Notice 13.)

Applicants state that the trackage rights to be obtained by NSR would allow NSR additional flexibility with respect to its existing service to intermodal and automotive facilities at Ayer. (*Id.* at 5.) By obtaining trackage rights over existing lines owned by CSXT, Boston & Maine, P&W, and PAS, NSR would be able to run double-stack intermodal trains into the Boston area, an option that the current PAS route does not accommodate. (Notice, Ex. 22, V.S. Pelkey 11.) Additionally, Applicants assert that the Related Transactions would enhance rail capacity in New England and

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operating agreement to be entered into between PAS and B&E. As discussed above, the Board will issue the same protective order that was issued on March 3, 2021, in Docket No. FD 36472, for all of the related proceedings. See the Appendix to this decision.

operations in and around Ayer by modifying existing trackage rights caps on PAS's Island Line, a short segment of rail line between Harvard and the terminus of PAS, just east of Ayer, which would ensure that an integrated CSXT/PAR System rail network would be able to meet demand for rail service in New England through a route that avoids the congested Boston metropolitan area. (*Id.*, Ex. 22, V.S. Pelkey 11-12.) Lastly, Applicants state that the NSR Settlement Agreement sets forth certain principles to strengthen existing operations of PAS lines and that CSXT has agreed to fund the construction of certain improvements in facilities in Ayer to ensure efficient operations. (*Id.*, Ex. 22, V.S. Pelkey 12.)

**CLASSIFICATION OF THE PROPOSED TRANSACTION.** When a transaction does not involve the merger or control of two or more Class I railroads, its classification will differ depending upon whether the transaction would have “regional or national transportation significance.” 49 U.S.C. § 11325. Under 49 C.F.R. § 1180.2, a transaction that does not involve two or more Class I railroads is to be classified as “minor”—and thus not having regional or national transportation significance—if a determination can be made that either: (1) the transaction clearly will not have any anticompetitive effects; or (2) any anticompetitive effects will clearly be outweighed by the transaction’s anticipated contribution to the public interest in meeting significant transportation needs. A transaction not involving the control or merger of two or more Class I railroads is to be classified as “significant” if neither of these determinations can be made.

A transaction classified as “significant” must meet different procedural and informational requirements than one classified as “minor.” For example, applicants are required to submit more detailed information regarding competitive effects, operating plans, and other issues for a “significant” transaction than for a “minor” transaction. 49 C.F.R. §§ 1180.6(c), 1180.7(a) & (c); 1180.8(b). Responsive applications are not permitted for a “minor” transaction but are allowed for a “significant” transaction. 49 C.F.R. § 1180.4(d). The time limit for Board review is shorter for a “minor” transaction and prefiling notification is not required. 49 U.S.C. § 11325(d); 49 C.F.R. § 1180.4(e). Finally, the filing fee for a “significant” transaction is higher than the fee for a “minor” transaction. 49 C.F.R. § 1002.2(f).

Applicants contend that the Proposed Transaction is “minor” because it is clear, with the commitments Applicants are making,<sup>14</sup> that the transaction would not have any adverse impact on competition, as: (1) no shipper would experience a reduction in the number of serving carriers, (2) no existing routes would be closed, (3) no existing interchange options would be eliminated, (4) no short lines that connect with PAR Railroads would lose a connecting alternative, (5) no Class I carriers that currently have access to New England would lose that access, and (6) CSXT commits to keeping open existing gateways on commercially reasonable terms and to ensuring access to rate

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<sup>14</sup> These commitments include: (i) CSXT’s commitment to provide switching services to reach PAS to certain shippers that will lose a rail alternative as a result of the Proposed Transaction; (ii) the gateway and rate relief commitments described below; and (iii) price and service commitments made by CSXT and NSR to address potential adverse competitive impacts arising from operation of PAS by a GWI subsidiary. (Notice, Ex. 22, V.S. Pelkey 13-16.)

regulation remedies if shippers are dissatisfied with rates for connections to other railroads. (Notice 10.)

Applicants also assert that the agreements with NSR and GWI and the Related Transactions would ensure that no adverse competitive impact would result from CSXT's acquisition of Springfield Terminal, the current operator over PAS, as well as Boston & Maine's 50% interest in PAS. (*Id.* at 11.) According to Applicants, Springfield Terminal would be replaced by B&E as the operator over PAS and as the entity to set rates on PAS, and, as a result, CSXT would not have pricing or operational control power over two generally parallel lines. (Notice 11; *id.*, Ex. 22, V.S. Reishus 20-21.) And, although PAS currently serves two customers that also are served by a GWI-owned carrier and PAS interchanges with one railroad, Vermont Railway (VTR), that also interchanges with a GWI-owned carrier, Applicants argue that there would be no adverse impact on competition as a result of B&E operating PAS, because CSXT and NSR, as owners of PAS, have agreed to certain concessions to those shippers and the interchanging railroad that would preserve existing competitive options. (Notice 11; *id.*, Ex. 22, V.S. Reishus 23-25.)

Applicants contend that the public benefits from the Proposed Transaction are significant and clearly outweigh any potential adverse competitive effects. Applicants note that the Proposed Transaction would unify two already interconnected rail networks to produce efficient single-line service, which would expand market opportunities for shippers on the PAR Railroads and CSXT. (Notice 12.) Applicants state that the Proposed Transaction would bring about improved service, increased reliability, and highly consistent rail operations that would enhance competition and remove truck traffic from roads. (*Id.*) Additionally, Applicants state that the agreements reached with NSR and GWI involve capacity additions in the vicinity of Ayer and the establishment of operating protocols that would improve the efficiency and reliability of operations on PAS. (*Id.* at 13.) Further, Applicants contend that B&E, as a GWI subsidiary, would bring GWI's quality service to PAS shippers and that operating PAS would allow B&E to share resources and facilities among other GWI-owned rail carriers that would create opportunities for efficiencies and cost savings. (*Id.* at 13.)

The purpose of the test articulated in § 1180.2 is to allow the Board to lessen the regulatory burden when "a determination can *clearly* be made, at the time the application is filed, that the transaction passes muster under" the statute. See R.R. Consolidation Procs.: Definition of, & Requirements Applicable to, "Significant Transactions," 9 I.C.C.2d 1198, 1200 (1993) (emphasis in original). Designating a transaction under the regulations at § 1180.2 permits the Board to select the most appropriate procedures to apply to a proposed transaction. See Canadian Pac. Ry.—Control—Dakota, Minn. & E. R.R., FD 35081, slip op. at 6 (STB served Nov. 2, 2007). It is not the purpose of § 1180.2(b) to force the Board to make an advance determination on the extent of the likely competitive effects or to weigh those effects against the public benefits in cases where more information would be helpful. *Id.* Any broader reading of the regulation could effectively require a preliminary determination on the ultimate issue in the case even where the Board regards such a determination as premature. *Id.*

Here, the Board cannot make the determination that the transaction clearly would not have any anticompetitive effects, based on the current record. Under the Proposed Transaction, CSXT would acquire control of over 1,200 miles of rail line throughout the New England area, including joint ownership with NSR of a Class II carrier that currently competes with CSXT's mainline in the region. Applicants acknowledge that, because PAS owns a route that is roughly parallel to an existing CSXT route from upstate New York to the Boston area, CSXT's joint control of PAS and its acquisition of Springfield Terminal could give CSXT "some influence over competition for movements into New England," but for the agreements reached with NSR and GWI. (Notice, Ex. 22, V.S. Huneke 3; see also id., Ex. 22, V.S. Reishus 20 (noting the possibility that, if CSXT were to retain pricing or operational control of PAS, "the transaction could present certain competitive concerns").) In fact, when the Board authorized the creation of PAS in 2009, it noted that the transaction "would significantly increase competition between railroads by providing an upgraded east-west main line route to compete with a parallel main line route operated by CSXT." Norfolk S. Ry.—Joint Control & Operating/Pooling Agreements—Pan Am S. LLC, FD 35147, slip op. at 5 (STB served Mar. 10, 2009). The competitive impact of CSXT acquiring joint ownership of PAS and Springfield Terminal is not clear at this time, notwithstanding the remedial measures that Applicants have proposed.

Further, Applicants have identified "limited instances where the operation of PAS by a GWI-owned railroad could raise competitive concerns" for one railroad, VTR, that also interchanges with a GWI-owned carrier, and two customers that are currently served by PAS and a GWI-owned railroad and would be served by only GWI-owned railroads as a result of the Proposed and Related Transactions. (Notice, Ex. 22, V.S. Reishus 13, 23-25.) Applicants have also identified a small number of jointly served PAS-CSXT shippers in Springfield, Mass., (id., Ex. 22, V.S. Reishus 20 n.44), as well as four shippers that are being served independently by both the PAR System and CSXT, three of which are located in Everett, Mass., an inner industrial suburb near Boston "with difficult rail connections to reach the less congested portion of the freight rail network" (id., Ex. 22, V.S. Reishus 19). Thus, the record currently before the Board does not *clearly* establish that the transaction would not have any anticompetitive effects.

While Applicants have taken steps to attempt to address these potential competitive concerns, such as entering into the agreements with NSR and GWI and making various price, interchange, and other commitments (and requesting that the Board impose the terms of the NSR Settlement Agreement and various commitments as conditions of its approval of the Proposed Transaction), classifying this transaction as "significant" would provide the Board with the additional information and time needed to develop a more comprehensive record so that the Board may analyze the competitive concerns identified here (and any others not apparent from the Notice) and consider whether Applicants' proposed remedies, including the conditions that Applicants have requested the Board impose, adequately address these concerns.<sup>15</sup>

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<sup>15</sup> Vermont Rail System (VRS), a business name used by six short line railroads controlled by Trans Rail Holding Company, including VTR; the Commonwealth of Massachusetts Department

Applicants' submission asserts that there are anticipated benefits associated with the transaction. Based on the information the Board has about the possible competitive impacts today, the Board is unable to conclude at this stage that any anticompetitive impacts would clearly be outweighed by the potential contribution to the public interest in meeting significant transportation needs. However, the classification of this transaction as "significant" should not be read as any indication of how the Board might ultimately assess and weigh the benefits and any impacts on competition after development of a more complete record.

The Board finds the Proposed Transaction to be "significant" and is therefore unable to accept the February 25, 2021 submission as an application. However, as noted, the Board will consider the February 25, 2021 submission a pre-filing notification and publish notice of it in the Federal Register, which will permit Applicants to perfect their application by supplementing their submission with the requisite information for a "significant" transaction, within two to four months of the February 25, 2021 submission. See 49 C.F.R. §§ 1180.4(b), 1180.6(c), 1180.7(a) & (c), 1180.8(b). As discussed above, the Board will designate 2019 as the year to be used for impact analysis in the application unless Applicants indicate otherwise when they submit the proposed procedural schedule. Upon filing a supplement perfecting their application for a "significant" transaction, Applicants will be required to pay the remainder of the filing fee applicable for a "significant" transaction. See 49 C.F.R. § 1002.2(f).

**PROCEDURAL SCHEDULE.** The Board's determination that this transaction is "significant" necessitates a different procedural schedule than that proposed by Applicants. Applicants must file with the Board no later than April 1, 2021, a revised proposed procedural schedule that reflects the Board's determination that this is a "significant" transaction. The proposed procedural schedule shall indicate the approximate filing date of the supplement that will perfect the application in accordance with 49 C.F.R. § 1180.4(b). Comments on the proposed procedural schedule will be due 10 days after publication of the proposed procedural schedule in the Federal Register.<sup>16</sup>

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of Transportation, on behalf of itself and its concurrently-supervised agency, the Massachusetts Bay Transportation Authority (collectively, MassDOT/MBTA); Republic Services, Inc., ECDC Environmental, L.C., and Devens Recycling Center, LLC (collectively, Republic); the State of Vermont, acting through its Agency of Transportation (VTrans); Massachusetts Water Resources Authority; and several commonwealth officials filed comments, asserting, among other things, that the Proposed Transaction should be processed under the Board's procedures for a "significant" transaction. On March 18, 2021, Applicants filed a reply. As discussed, the Board finds this to be a "significant" transaction and will evaluate both the Proposed Transaction and the Related Transactions, including B&E's proposed operations on PAS, when considering the merits of the application.

<sup>16</sup> The Brotherhood of Maintenance of Way Employes Division/IBT; Brotherhood of Railroad Signalmen; International Association of Sheet Metal, Air, Rail and Transportation

**SERVICE LIST.** Every filing made by a Party of Record must have its own certificate of service indicating that all Parties of Record on the service list have been served with a copy of the filing. Members of the United States Congress and Governors are not Parties of Record and need not be served with copies of filings, unless any Member or Governor has requested to be, and is designated as, a Party of Record.

In past proceedings, the Board has served a notice containing the official service list and required each Party of Record to serve copies of all filings previously submitted by that party upon all other Parties of Record (to the extent such filings have not previously been served upon such other parties), and to file a certificate of service with the Board indicating that it had done so. Given the availability of the service list generated on the Board's website for individual proceedings, the Board finds it unnecessary to serve an official service list.

**SERVICE OF DECISIONS, ORDERS, AND NOTICES.** The Board will serve copies of its decisions, orders, and notices on those persons who are designated on the service list as a Party of Record or Non-Party. All other interested persons are encouraged to secure copies of decisions, orders, and notices via the Board's website at [www.stb.gov](http://www.stb.gov).

**SUBMISSIONS RECEIVED PRIOR TO FEBRUARY 25, 2021.** Prior to receiving Applicants' Notice, the Board received 26 letters regarding the Proposed Transaction. As no formal docket existed at the time of their submission, they have been held as correspondence. Those submissions will be included in the record of Docket No. FD 36472 and need not be served on Parties of Record at this time. However, all filings going forward must comply with the service requirements set forth above.

**ACCESS TO FILINGS.** Under the Board's rules, any document filed with the Board (including applications, pleadings, etc.) shall be promptly furnished to interested persons on request, unless subject to a protective order. 49 C.F.R. § 1180.4(a)(3). The Notice and other filings in Docket No. FD 36472 will be furnished to interested persons upon request and will also be

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Workers-Mechanical Division; and National Conference of Firemen and Oilers, 32BJ/SEIU (collectively, Allied Rail Unions); the Transportation Communications Union/IAM; the District Lodge 19 of the International Association of Machinists and Aerospace Workers; the American Train Dispatchers Association; the International Association of Sheet Metal, Air, Rail and Transportation Workers Transportation Division; VRS; MassDOT/MBTA; Republic; and VTrans filed comments on the procedural schedule proposed in Applicants' February 25, 2021 submission. Because Applicants are ordered to submit a revised proposed procedural schedule that reflects the Board's determination that the Proposed Transaction is "significant," parties are invited to comment on the revised proposed procedural schedule after it is published in the Federal Register, as described above.

available on the Board's website at [www.stb.gov](http://www.stb.gov).<sup>17</sup> In addition, the Notice and other filings by Applicants may be obtained from Applicants' representatives at the addresses indicated above.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The submission filed by Applicants on February 25, 2021, is treated as the prefiling notification of the anticipated application.

2. Applicants are directed to supplement the prefiling notification by submitting a revised proposed procedural schedule with the Board no later than April 1, 2021, that is consistent with the Board's determination that this is a "significant" transaction.

3. Applicants are directed to perfect their application for a "significant" transaction, as described above, and to submit the difference between the filing fee for a "minor" transaction and the fee for a "significant" transaction, between April 25 and June 25, 2021.

4. The protective order previously issued on March 3, 2021, is issued for Docket Nos. FD 36472 (Sub-No. 1); FD 36472 (Sub-No. 2); FD 36472 (Sub-No. 3); FD 36472 (Sub-No. 4); FD 36472 (Sub-No. 5); and AB 1312X, and is included in the Appendix to this decision.

5. Filings submitted prior to February 25, 2021, will be placed in the record of Docket No. FD 36472.

6. This decision is effective on March 25, 2021.

Decided: March 19, 2021.

By the Board, Board Members Begeman, Fuchs, Oberman, Primus, and Schultz.

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<sup>17</sup> Applicants have filed a public version and highly confidential version of the Notice. The highly confidential version may be obtained subject to the protective order issued by the Board on March 3, 2021.

## APPENDIX

### PROTECTIVE ORDER

1. For purposes of this Protective Order:

(a) "Confidential Documents" means documents and other tangible materials containing or reflecting Confidential Information.

(b) "Confidential Information" means traffic data (including but not limited to waybills, abstracts, study movement sheets, and any documents or computer tapes containing data derived from waybills, abstracts, study movement sheets, or other data bases, and cost workpapers); the identification of potential shippers and receivers, in conjunction with shipper-specific or other traffic data; the confidential terms of contracts with shippers, or carriers or licensees; confidential financial and cost data; and other confidential or proprietary business or personal information.

(c) "Designated Material" means any documents designated or stamped as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" in accordance with paragraph 2 or 3 of this Protective Order and any Confidential Information contained in such materials.

(d) "Proceedings" means those before the Surface Transportation Board ("Board") concerning the Application for CSX Corporation ("CSXC"), CSX Transportation, Inc. ("CSXT") (CSXC and CSXT are collectively referred to as "CSX"), and 747 Merger Sub No. 2, Inc. to acquire control of and merge certain subsidiaries of Pan An Systems, Inc. ("Systems") filed in STB Docket No. FD 36472, and any related proceedings before the Board, including Docket Nos. FD 36472 (Sub-No. 1), FD 36472 (Sub-No. 2), FD 36472 (Sub-No. 3), FD 36472 (Sub-No. 4), FD 36472 (Sub-No. 5), and AB 1312X, and any judicial review proceedings arising from STB Docket No. FD 36472 or from any related proceedings before the Board.

2. If any party to these Proceedings determines that any part of a document it submits, discovery request it propounds, discovery response it produces, transcript of a deposition or hearing in which it participates, or of a pleading or other paper to be submitted, filed, or served in these Proceedings contains Confidential Information or consists of Confidential Documents, then that party may designate and stamp such Confidential Information and Confidential Documents as "CONFIDENTIAL." Any information or documents designated or stamped as "CONFIDENTIAL" shall be handled as provided for hereinafter.

3. If any party to these Proceedings determines that any part of a document it submits, discovery request it propounds, a discovery response it produces, transcript of a deposition or hearing in which it participates, pleading or other paper to be submitted, filed, or served in

these Proceedings contains shipper-specific rate or cost data; or other competitively sensitive or proprietary information, then that party may designate and stamp such Confidential Information as "HIGHLY CONFIDENTIAL." Any information or documents so designated or stamped shall be handled as provided hereinafter.

4. Information and documents designated or stamped as "CONFIDENTIAL" may not be disclosed in any way, directly or indirectly, or to any person or entity except to an employee, counsel, consultant, or agent of a party to these Proceedings, or an employee of such counsel, consultant, or agent, who, before receiving access to such information or documents, has been given and has read a copy of this Protective Order, has agreed to be bound by its terms by signing a confidentiality undertaking substantially in the form set forth at Exhibit A to this Protective Order, and has provided a copy of the confidentiality undertaking to counsel for CSX and Systems.

5. Information and documents designated or stamped as "HIGHLY CONFIDENTIAL" may not be disclosed in any way, directly or indirectly, to any employee of a party to these Proceedings, or to any other person or entity except to an outside counsel or outside consultant to a party to these proceedings, or to an employee of such outside counsel or outside counsel or outside consultant, who, before receiving access to such information or documents, has been given and has read a copy of this Protective Order, has agreed to be bound by its terms by signing a confidentiality undertaking substantially in the form set forth at Exhibit B to this Protective Order, and has provided a copy of the confidentiality undertaking to counsel for CSX and Systems.

6. All parties must file simultaneously a public version of any Highly Confidential or Confidential submission filed with the Board whether the submission is designated a Highly Confidential Version or Confidential Version. When filing a Highly Confidential Version, the filing party does not need to file a Confidential Version with the Board, but must make available (simultaneously with the party's submission to the Board of its Highly Confidential Version) a Confidential Version reviewable by any other party's in-house counsel. The Confidential Version may be served on other parties in electronic format only. In lieu of preparing a Confidential Version, the filing party may (simultaneously with the party's submission to the Board of its Highly Confidential Version) make available to outside counsel for any other party a list of all "highly confidential" information that must be redacted from its Highly Confidential Version prior to review by in-house personnel, and outside counsel for any other party must then redact that material from the Highly Confidential Version before permitting any clients to review the submission.

7. Any party to these Proceedings may challenge the designation by any other party of information or documents as "CONFIDENTIAL" or as "HIGHLY CONFIDENTIAL" by filing a motion with the Board or with an administrative law judge or other officer to whom authority has been lawfully delegated by the Board to adjudicate such challenges.

8. Designated Material may not be used for any purposes, including without limitation any business, commercial or competitive purposes, other than the preparation and presentation of evidence and argument in STB Docket No. FD 36472, any related proceedings before the Board, and/or any judicial review proceedings in connection with STB Docket No. FD 36472 and/or with any related proceedings.

9. Any party who receives Designated Material in discovery shall destroy such materials and any notes or documents reflecting such materials (other than file copies of pleadings or other documents filed with the Board and retained by outside counsel for a party to these Proceedings) at the earlier of: (a) such time as the party receiving the materials withdraws from these Proceedings, or (b) the completion of these Proceedings, including any petitions for reconsideration, appeals or remands.

10. No party may include Designated Material in any pleading, brief, discovery request or response, or other document submitted to the Board, unless the pleading or other document is submitted under seal, in a package clearly marked on the outside as "Confidential Materials Subject to Protective Order. See 49 C.F.R. § 1104.14. All pleadings and other documents so submitted shall be kept confidential by the Board and shall not be placed in the public docket in these Proceedings except by order of the Board or of an administrative law judge or other officer in the exercise of authority lawfully delegated by the Board.

11. No party may include Designated Material in any pleading, brief, discovery request or response, or other document submitted to any forum other than this Board in these Proceedings unless: (a) the pleading or other document is submitted under seal in accordance with a protective order that requires the pleading or other document to be kept confidential by that tribunal and not be placed in the public docket in the proceeding, or (b) the pleading or other document is submitted in a sealed package clearly marked, "Confidential Materials Subject to Request for Protective Order," and is accompanied by a motion to that tribunal requesting issuance of a protective order that would require the pleading or other document be kept confidential and not be placed in the public docket in the proceeding, and requesting that if the motion for protective order is not issued by that tribunal, the pleading or other document be returned to the filing party.

12. No party may present or otherwise use any Designated Material at a Board hearing in these Proceedings, unless that party has previously submitted, under seal, all proposed exhibits and other documents containing or reflecting such Designated Material to the Board, to an administrative law judge or to another officer to whom relevant authority has been lawfully delegated by the Board, and has accompanied such submission with a written request that the Board, administrative law judge or other officer: (a) restrict attendance at the hearing during any discussion of such Designated Material, and (b) restrict access to any portion of the record or briefs reflecting discussion of such Designated Material in accordance with this Protective Order.

13. If any party intends to use any Designated Material in the course of any deposition in these Proceedings, that party shall so advise counsel for the party producing the Designated Material, counsel for the deponent, and all other counsel attending the deposition. Attendance at any portion of the deposition at which any Designated Material is used or discussed shall be restricted to persons who may review that material under the terms of this Protective Order. All portions of deposition transcripts or exhibits that consist of, refer to, or otherwise disclose Designated Material shall be filed under seal and be otherwise handled as provided in paragraph 10 of this Protective Order.

14. To the extent that materials reflecting Confidential Information are produced by a party in these Proceedings, and are held and/or used by the receiving person in compliance with paragraphs 1, 2 or 3 above, such production, disclosure, holding, and use of the materials and of the data that the materials contain are deemed essential for the disposition of this and any related proceedings and will not be deemed a violation of 49 U.S.C. 11904 or of any other relevant provision of the ICC Termination Act of 1995.

15. All parties must comply with all of the provisions of this Protective Order unless the Board or an administrative law judge or other officer exercising authority lawfully delegated by the Board determines that good cause has been shown warranting suspension of any of the provisions herein.

16. Nothing in this Protective Order restricts the right of any party to disclose voluntarily any Confidential Information originated by that party, or to disclose voluntarily any Confidential Documents originated by that party, if such Confidential Information or Confidential Documents do not contain or reflect any Confidential Information originated by any other party.

**Exhibit A**

**UNDERTAKING-CONFIDENTIAL MATERIAL**

I, \_\_\_\_\_, have read the Protective Order served on \_\_\_\_\_, 2021 governing the production and use of Confidential Information and Confidential Documents in STB Docket Nos. FD 36472, FD 36472 (Sub-No. 1), FD 36472 (Sub-No. 2), FD 36472 (Sub-No. 3), FD 36472 (Sub-No. 4), FD 36472 (Sub-No. 5), and AB 1312X, understand the same, and agree to be bound by its terms. I agree not to use or to permit the use of any Confidential Information or Confidential Documents obtained pursuant to that Protective Order, or to use or to permit the use of any methodologies or techniques disclosed or information learned as a result of receiving such data or information, for any purpose other than the preparation and presentation of evidence and argument in STB Docket No. FD 36472, any related proceedings before the Surface Transportation Board ("Board"), and/or any judicial review proceedings in connection with STB Docket No. FD 36472 and/or with any related proceedings. I further agree not to disclose any Confidential Information, Confidential Documents, methodologies, techniques, or data obtained pursuant to the Protective Order except to persons who are also bound by the terms of the Order and who have executed Undertakings in the form hereof, and that at the conclusion of this proceeding (including any proceeding on administrative review, judicial review, or remand), I will promptly destroy any documents containing or reflecting materials designated or stamped as "CONFIDENTIAL," other than file copies, kept by outside counsel, of pleadings and other documents filed with the Board.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that Applicants or other parties producing Confidential Information or Confidential Documents shall be entitled to specific performance and injunctive and/or other equitable relief as a remedy for any such breach, and I further agree to waive any requirement for the securing or posting of any bond in connection with such remedy. Such remedy shall not be deemed to be the exclusive remedy for breach of this Undertaking but shall be in addition to all remedies available at law or equity.

Signed: \_\_\_\_\_

Name:

Affiliation: \_\_\_\_\_

Dated: \_\_\_\_\_

**Exhibit B**

**UNDERTAKING- HIGHLY CONFIDENTIAL MATERIAL**

I, \_\_\_\_\_, am outside [counsel] [consultant] for \_\_\_\_\_, for whom I am acting in this proceeding. I have read the Protective Order served on \_\_\_\_\_, 2021, governing the production and use of Confidential Information and Confidential Documents in STB Docket Nos. FD 36472, FD 36472 (Sub-No. 1), FD 36472 (Sub-No. 2), FD 36472 (Sub-No. 3), FD 36472 (Sub-No. 4), FD 36472 (Sub-No. 5), and AB 1312X, understand the same, and agree to be bound by its terms. I agree not to use or to permit the use of any Confidential Information or Confidential Documents obtained pursuant to that Protective Order, or to use or to permit the use of any methodologies or techniques disclosed or information learned as a result of receiving such data or information, for any purpose other than the preparation and presentation of evidence and argument in STB Docket No. FD 36472, any related proceedings before the Surface Transportation Board ("Board"), or any judicial review proceedings in connection with STB Docket No. FD 36472 and/or with any related proceedings. I further agree not to disclose any Confidential Information, Confidential Documents, methodologies, techniques, or data obtained pursuant to the Protective Order except to persons who are also bound by the terms of the Order and who have executed undertakings in the form hereof.

I also understand and agree, as a condition precedent to my receiving, reviewing, or using copies of any information or documents designated or stamped as "HIGHLY CONFIDENTIAL," that I will take all necessary steps to ensure that said information or documents be kept on a confidential basis by any outside counsel or outside consultants working with me; that under no circumstances will I permit access to said materials or information by employees of my client or its subsidiaries, affiliates, or owners; and that at the conclusion of this proceeding (including any proceeding on administrative review, judicial review, or remand), I will promptly destroy any documents containing or reflecting information or documents designated or stamped as "HIGHLY CONFIDENTIAL," other than file copies, kept by outside counsel, of pleadings and other documents filed with the Board.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that Applicants or other parties producing Confidential Information or Confidential Documents shall be entitled to specific performance and injunctive and/or other equitable relief as a remedy for any such breach, and I further agree to waive any requirement for the securing or posting of any bond in connection with such remedy. Such remedy shall not be deemed to be the exclusive remedy for breach of this Undertaking but shall be in addition to all remedies available at law or equity.

Signed: \_\_\_\_\_  
          OUTSIDE [COUNSEL] [CONSULTANT]

Dated: \_\_\_\_\_