

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

CITY OF OZARK, ARKANSAS, a municipal corporation	)	
	)	
Plaintiff,	)	
	)	
	)	
vs.	)	
	)	
	)	
UNION PACIFIC RAILROAD COMPANY,	)	
the ARKANSAS STATE HIGHWAY	)	
& TRANSPORTATION DEPARTMENT	)	
(an Agency of) The State of Arkansas,	)	CIVIL ACTION NO:2:14-CV-02196-TLB
AND THE ARKANSAS STATE HIGHWAY	)	
COMMISSION	)	
	)	
Defendants,	)	

**PLAINTIFF, CITY OF OZARK'S, RESPONSE AND OPPOSITION TO SEPARATE
DEFENDANT, UNION PACIFIC RAILROAD COMPANY'S, MOTION TO DISMISS
PLAINTIFF'S FIRST AMENDED AND RESTATED COMPLAINT**

Comes now the Plaintiff, the City of Ozark, Arkansas, a municipal corporation by and through its undersigned counsel, Christopher D. Brockett of Sayre & Brockett, and for its Response and Opposition to the Separate Defendant, Union Pacific Railroad Company's, Motion to Dismiss the Plaintiff's First Amended and Restated Complaint alleges and states as follows:

1. Plaintiff admits the allegations contained in Paragraph 1 of the Separate Defendant's Motion.

2. The Plaintiff denies that its First Amended Complaint should be denied for:

(1) laches, as laches does not apply in this case as the parties have been discussing the reinstallation of the crossing for the entire period after the Plaintiff

learned the Separate Defendant unilaterally removed the public crossing; further, laches does not apply to the Plaintiff as a city municipal corporation;

(2) the City's claims are not preempted by the ICCTA as this matter involves a routine at-grade public crossing that was illegally removed by the Separate Defendant;

(3) the Plaintiff did request the removal of the at-grade public crossing known as Oliver St. Crossing, as this crossing was a necessity for the Plaintiff's downtown development. Further, Arkansas law is clear that only a vote by the city council of the Plaintiff would have allowed the Plaintiff to abandon a public easement and no vote or discussion was ever taken on this issue (See attached Affidavit of Sonya Eveld, City Clerk of City of Ozark and Carol Sneath, former City Clerk of the City of Ozark, which are attached as **Exhibit A-1 and A-2** and incorporated herein as if set forth word for word);

(4) the Plaintiff did not request the removal of the crossing and further, the doctrine of estoppel does not apply as the Separate Defendant cannot satisfy the elements of estoppel;

(5) the Plaintiff has condemnation authority under Arkansas law and pursuant to this authority, the Plaintiff may condemn the property for the use of a public crossing; and

(6) the Plaintiff dropped the conversation claim in the First Amended and Restated Complaint to assert the Count of Unreasonably Interference of Plaintiff's Easement and Reestablishment of the Public Oliver St. Crossing.

3. Paragraph 3 of the Separate Defendant's Motion does not require a response from the Plaintiff. However, to the extent Paragraph 3 attempts to assert liability or a cause of action against the Plaintiff for dismissal, the Plaintiff generally denies the allegations contained in Paragraph 3 of the Separate Defendant's Motion.

4. Plaintiff generally and specifically denies the allegations set forth in Paragraph 4 of the Separate Defendant's Motion. Plaintiff pleads in the affirmative that Plaintiff clearly shows success on the merits, as the Separate Defendant unilaterally removed a 125 year old public crossing without any authority from the Plaintiff's city council as required by Arkansas law.

5. Plaintiff admits that the Separate Defendant illegally removed the crossing and ignored the 2005 suggestion from the Separate Defendant, Arkansas Highway & Transportation Department, to reinstall the public crossing. The Plaintiff generally and specifically denies the remaining allegations contained in Paragraph 5 of the Separate Defendant's Motion. Plaintiff pleads in the affirmative that in the **likely event** that Plaintiff is successful and Separate Defendant is required to reinstall the Oliver St. Crossing, then the permanent injunction is the proper remedy to prevent the current and future interference of the Plaintiff's easement by the Separate Defendant.

6. Plaintiff generally and specifically denies the allegations contained in Paragraph 6 of the Separate Defendant's Motion. Plaintiff pleads in the affirmative that Plaintiff and representatives of the Separate Defendant were in discussion for replacement of the Oliver St. Crossing along with various State and Federal elected officials. Plaintiff pleads further in the affirmative that until all other means were exhausted, the Plaintiff attempted to avoid a contentious lawsuit against the Separate

Defendant, but this does not discount the fact that the Separate Defendant will continue to unreasonably and illegal interfere with the Plaintiff's easement, unless this Honorable Court issues a permanent injunction to prevent this action by the Separate Defendant.

7. Plaintiff generally and specifically denies the allegations contained in the Paragraph 7 of the Separate Defendant's Motion. Plaintiff pleads in the affirmative that Plaintiff's retained expert, George B. Soliz, has provided his own opinion that the reinstallation of the Oliver St. Crossing will not create any safety issue for the public in excess of any other railroad crossing; nor will it interfere with the Separate Defendant's personal railroad operations. See attached Affidavit of George B Soliz attached hereto as **Exhibit B** and incorporated herein. Plaintiff pleads further in the affirmative that for the entire 125 year period that the Oliver St. Crossing was in existence, there was no recorded accident at this crossing.

WHEREFORE, the Plaintiff, the City of Ozark, Arkansas, a municipal corporation, respectfully prays that this Honorable Court issue an Order denying the Separate Defendant, Union Pacific Railroad Company's, Motion to Dismiss the Plaintiff's First Amended and Restated Complaint, for its reasonable attorney's fees and costs for responding to the Separate Defendant's Motion; and for any and all other relief to which this Court finds the Plaintiff is entitled.

Respectfully submitted:

By: /s/ Christopher D. Brockett

Christopher D. Brockett

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ATTORNEYS FOR THE PLAINTIFF

CERTIFICATE OF SERVICE

I, Christopher D. Brockett, hereby certify that a copy of the foregoing Amended Complaint has this date been served by U.S. Mail on the following:

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Done at Ozark, Arkansas, this 13th day of October 2014.

/s/ Christopher D. Brockett
Christopher D. Brockett

EXHIBIT A-1
AFFIDAVIT OF SONYA EVELD
CITY CLERK OF CITY OF OZARK

EXHIBIT A-2

AFFIDAVIT OF CAROL SNEATH
FORMER CITY CLERK OF CITY OF OZARK

EXHIBIT B

AFFIDAVIT OF GEORGE B. SOLIZ
GBS RAILROAD CONSULTING SERVICES LLC