

Before the Surface Transportation Board

STB Docket No. AB-167 (Sub-No. 1189X)

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

STB Docket No. AB-55 (Sub-No. 686X)
CSX TRANSPORTATION, INC.—DISCONTINUANCE OF SERVICE
EXEMPTION—IN HUDSON COUNTY, NJ

STB Docket No. AB-290 (Sub-No.306X)
NORFOLK SOUTHERN RAILWAY COMPANY—DISCONTINUANCE OF
SERVICE EXEMPTION—IN HUDSON COUNTY, NJ

Reply to City et al.'s Motion to Compel

The LLC Intervenors ("LLCs")¹ respectfully file this response to the City of Jersey City, Rails to Trails Conservancy, and Pennsylvania Railroad Harsimus Stem Embankment Preservation Coalition's (the "City et al.") Motion to Compel James Riffin to Respond to Discovery (Document) Requests, filed July 5, 2016. The LLCs are filing this response pursuant to the Surface Transportation Board's (the "Board") July 5, 2016 Order concerning resolution of discovery motions. The LLCs oppose the motion seeking information from James Riffin ("Riffin") because several of those requests relate directly to requests for copies of communications between the LLCs and Riffin.

¹ The LLC Intervenors are 212 Marin Boulevard, LLC, 247 Manila Avenue, LLC, 280 Erie Street, LLC, 317 Jersey Avenue, LLC, 354 Cole Street, LLC, 389 Monmouth Street, LLC, 415 Brunswick Street, LLC, and 446 Newark Avenue, LLC.

These Proceedings involve the abandonment of a line of rail called the Harsimus Branch, located in Jersey City, Hudson County, New Jersey. In 2009, Consolidated Rail Corporation (“Conrail”) filed a notice of exemption abandonment, which initiated the process to consider whether abandonment was appropriate.

The LLCs are the owners of eight parcels commonly referred to as the Embankment. The Embankment is a segment of the Harsimus Branch, and includes six parcels improved with stone retaining walls and two at-grade parcels. The Harsimus Branch had been used by Conrail and its predecessors as a freight line to the Hudson River waterfront. However, freight service ended decades ago. After rail service ended Conrail and the City removed most of the rail infrastructure, including the tracks and cross-bridges, but the stone retaining walls remain. In 2005, Conrail sold the Embankment to the LLCs. In that sale, Conrail represented to the LLCs that the Embankment was part of an unregulated spur track, and not a regulated line of rail.

The sale of the fee interest in the Embankment has sparked over a decade of litigation and administrative proceedings among the City et al., Conrail, the LLCs, and other parties. The City et al.’s goal is to preserve the Embankment, which the City et al. regard as historic properties. (Indeed, the Embankment is identified on the New Jersey list of historic places, and has been designated as historic by a City ordinance, which ordinance has been challenged in the Superior Court of New Jersey.)

To summarize the litigation, which is relevant to the City et al.'s claims for needing discovery from Riffin, the City et al. filed a petition with the Board in 2006 for a declaratory ruling in 2006 that the Harsimus Branch was a line of rail. On August 8, 2007, the Board concluded that it was a line of rail. See, City of Jersey City, et.al. Petition for Declaratory Order, STB Finance Docket No. 34818. The LLCs and Conrail appealed to the D. C. Circuit Court. In 2009, the D.C. Circuit Court reversed, finding the Board lacked jurisdiction to determine the regulated status of the line. Consolidated Rail Corp. v. Surface Transp. Bd., 571 F.3d 13 (D.C. Cir. 2009) ("Harsimus I"). The D.C. Circuit Court concluded that the United States District Court for the District of Columbia had exclusive jurisdiction to determine whether the Harsimus Branch was a line or a spur.

While Harsimus I was pending, Conrail initiated the pending notice of exempt abandonment Proceeding. Although Conrail (and the LLCs) argued in Harsimus I that the Harsimus Branch was an unregulated spur, and not a line (in addition to arguing the Board's jurisdiction), Conrail commenced the abandonment proceedings in the event such action was deemed necessary.

Following the D.C. Circuit Court's holding in Harsimus I, the City et al. filed a declaratory judgment action in 2009 in the D.C. District Court to determine the Harsimus Branch was a line of rail, in accordance with the D.C. Circuit Court's holding. The D.C. District Court initially

dismissed the complaint for lack of standing, City of Jersey City v. Conrail, 741 F. Supp.2d 131 (D.D.C. 2010) (“Harsimus II”), but the D.C. Circuit Court reinstated the case and remanded the matter. City of Jersey City v. Conrail, 681 F.3d 741 (D.C. Cir. 2012) (“Harsimus III”).

While the litigation was pending in the D.C. District Court, the Board issued an order on April 20, 2010 holding Conrail’s abandonment petition in abeyance pending resolution by the District Court of the question whether the Harsimus Branch was a line or a spur.

On remand to the D.C. District Court, the LLCs, in preparing for the litigation on Conrail’s spur track claims, uncovered facts that led them to stipulate with the City et al. that the Harsimus Branch had been transferred to Conrail in 1976 as a regulated line of rail. Based on that stipulation, the City et al. moved for summary judgment on their declaratory complaint, seeking a finding that the Harsimus Branch between two points—as opposed to the full length of the Harsimus Branch was a line of rail. The LLCs opposed summary judgment, requesting the District Court resolve the question of the full length of the Harsimus Branch. The LLCs also sought leave to file an amended answer to assert certain claims against the City, and to raise counts against Conrail for fraud and negligent misrepresentation relating to its spur track theory. The District Court granted the City et al.’s motion summary judgment and denied the LLCs’ motion to file an amended pleading. City of Jersey City v. Consolidated Rail Corp., 968 F.Supp.2d

302 (D.D.C. 2013) ("Harsimus IV"). The D.C. Circuit Court affirmed in an unpublished decision on February 19, 2014 ("Harsimus V"), finding that other forums were available for the LLCs to raise their claims against the City and Conrail.

After the litigation was concluded, in an August 11, 2014 decision, the Board reactivated the matter.

Although the question of the Harsimus Branch's status as line or spur had been resolved, there remained one unresolved question concerning the Board's jurisdiction: whether the 2002 abandonment of another line of rail called the River Line had effected a de facto abandonment of the Harsimus Branch by isolating the Harsimus Branch from the nationwide rail network. The LLCs brought this issue before the Board in a separate proceeding. See, 212 Marin Boulevard, LLC et al. – Petition for Declaratory Order, Docket No. FD 35825. The City was a party to that action and participated in it. On August 11, 2014, the Board rejected the LLCs' position, and denied the LLCs' motion for reconsideration on April 24, 2015. The LLCs accepted that decision and no appeal was filed with the D.C. Circuit Court.

In these proceedings before the Board, the City has filed a notice of intent to file an Offer of Financial Assistance ("OFA"), which would allow the City to acquire the Harsimus Branch for the purpose of continuing freight rail service. See, 49 U.S.C.A. § 10904. However, the Board has not set deadlines for parties to file OFAs. The Office of Environmental

Assessment (“OEA”) of the Board is also actively considering historical and environmental issues pursuant to the National Historic Preservation Act and the National Environmental Protection Act.

Earlier in these proceedings, the Board considered discovery requests filed by the parties. In its May 22, 2015 decision, the Board ruled on document demands served by the City et al. on Conrail and the LLCs, and the LLCs’ demands on the City et al. The Board granted in part and denied in part the parties’ requests. In so ruling, the Board admonished the parties as follows: “We note, however, that the record has become voluminous and, in our opinion, needlessly so. Although the Board cannot limit submission by the parties in the future, we expect the parties to exercise sound judgment when weighing the need for future motions and objections.” (May 22, 2015 Decision of the Board at 8). The Board then ruled on dueling motions to compel filed by the parties, including motions to compel filed by the City et al. against Conrail and the LLCs. By and large, the Board denied the City et al.’s motions, and reiterated the rule that discovery in abandonment proceedings, including this present action, is “disfavored,” and that “parties seeking discovery in abandonments must demonstrate relevance and need.” Id. at 4. Specifically addressing the City et al.’s demands, the Board concluded that most of the City et al.’s discovery demands against both the LLCs and Conrail were overly broad and irrelevant to any issue in this abandonment Proceeding, and granted only limited discovery.

In a later decision dated November 2, 2015, the Board resolved, in the LLCs' favor, a dispute concerning a document the City et al. filed under seal as a "highly confidential" document under a September 24, 2014 protective order. The Board agreed that the document—a statement from a purported customer interested in rail service—was not "highly confidential," and merely select portions were "confidential." The Board ordered the City et al. to file a public version of the shipper statement with "confidential" information redacted. On November 10, 2015, the Board, on the City et al.'s motion, clarified that another party to these Proceedings, CNJ Rail Corporation, could file the public version. The version filed by CNJ Rail was largely redacted. On July 1, 2016, the Board agreed (again) with the LLCs on the scope of the redactions.

The City et al. have simply ignored the Board's May 22, 2015 decision on discovery, both the Board's caution to exercise more discretion before filing motions and the outcome of the motion itself. Having unsuccessfully sought irrelevant information through overly broad discovery demands directed toward the LLCs and Conrail, the City et al. have served demands on Riffin. Riffin is a party to these Proceedings by virtue of the November 2, 2015 Decision, allowing Riffin to appear and file a notice of intent to file an OFA. Although the City et al.'s demands for documents are not directed to the LLCs, the LLCs have an interest in this motion because the City et al. have demanded Riffin turn over documents constituting communications between Riffin and

the LLCs—documents that seek the same irrelevant information the Board has already rejected.

Discussion

The City et al.'s motion is a clear abuse of the May 22, 2015 Decision, both in terms of being yet another unnecessary filing, and because the City is in substance seeking the same overly broad, irrelevant materials in this motion as the Board had previously denied in its May 22, 2015 Decision. Unable to get the information it wants but does not need from the LLCs, the City et al. have turned to Riffin. As established herein, the City et al.'s demands are overly broad and irrelevant. As a result, the City et al.'s motion to compel should be denied.

The City et al. demands the following documents from Riffin:

1. All documents received or possessed by Riffin or any representative of Riffin from the LLCs or any person acting on behalf of the LLCs (including but not limited to the manager of the LLCs (Mr. Steve Hyman) or attorneys for the LLCs), relating in any fashion to the Harsimus Branch, including but not limited to disposition of property in the Harsimus Branch and legal or regulatory disputes concerning the Harsimus Branch, or relating to AB 167 (Sub-no. 1189X).

2. All documents (not otherwise provided pursuant to doc. Req. 1) sent or received by Riffin or on his behalf to or from (a) the LLCs (or any officer, employee, attorney, or representative thereof) or (b) Consolidated Rail Corporation (or any officer, employee, attorney, or representative thereof) relating to the Harsimus Branch, other than legal pleadings filed with the Surface Transportation Board.

3. All documents relating to Riffin's financial responsibility for purposes of making an "offer of financial assistance: in AB 168 (Sub-no. 1189X), including applications for loans or any line of credit, or solicitations from co-investors.

4. All petitions (including amendments thereto) in bankruptcy proceedings and all final orders in bankruptcy proceedings of James Riffin which orders involve the discharge or partial discharge of debts owed by said Riffin, including but not limited to petitions and orders in bankruptcy proceedings referenced by the Surface Transportation Board in its Decision served March 24, 2016 in Finance Docket 35873 at p. 2 footnote 2.

In their motion brief and the accompanying "appendix," the City et al. attempt to explain the rational for their broad, open-ended discovery requests. Specifically, in the appendix (at page 11 of the City et al.'s submission), the City et al. claim their requests relate to the following issues: (a) the LLCs' and Conrail's alleged effort to evade the jurisdiction of the Board; (b) the LLCs' and Conrail's alleged attempt to abuse the Board's processes; (c) the LLCs' and Conrail's alleged effort to unlawfully transfer a rail line; and (d) the LLCs' and Conrail's alleged effort to demolish the Embankment "without any meaningful impacts on adjoining historic districts and without any meaningful consideration of remedied which would avoid these toxic consequences."

The City et al. proceed to explain why discovery on those four topics is necessary: "If the Board does not provide means for parties opposed to the consequences of the Conrail/LLCs' unlawful de facto

abandonments to develop evidence through discovery, then there is no means to ensure that relevant evidence of unlawful activity and unlawful intent (to the extent such showing is required) is presented to the Board. The Board cannot discharge its responsibility to regulate the industry in the public interest if it cannot or will not independently and vigorously investigate and if, at the same time, it does not permit parties adversely impacted by an unlawful abandonment to obtain full and complete discovery.” (City et al. Motion Brief at 11-12).

The City et al. further explains that the financial information is needed from Riffin in response to demand 3 because the City et al. believe that the LLCs are financially supporting Riffin’s proposed OFA. See, City et al.’s motion at 2, 13.

In its May 22, 2015 Decision, the Board reaffirmed the principle that discovery is “typically disfavored in abandonment cases,” and that a party seeking discovery “must demonstrate relevance and need.” May 22, 2015 Decision at 4 (citing Cent. R.R. of Ind.—Aban. Exemption—in Dearborn, Decatur, Franklin, Ripley, & Shelby Cntys., Ind. (Dearborn), AB 459 (Sub-no. 2X) (STB served Apr. 1, 1998)). The City et al.’s effort to pry into communications between Riffin and the LLCs fails on both counts. Moreover, the Board has already denied similarly overbroad, irrelevant requests served by the City et al. on the LLCs and Conrail, and the current discovery demands are an obvious effort to obtain the same or similar information from Riffin. Finally, the financial information the

City et al. seeks from Riffin, to the extent it relates to alleged financial backing of Riffin by the LLCs, is irrelevant, because no such financial backing exists.

I. The City et al.'s Demands are Overly Broad.

After perusing the City et al.'s document demands, it quickly becomes apparent that the demands are overly broad, and would require production of matter far beyond the City et al.'s stated reason for seeking discovery. For example, demand 1 seeks "all documents" exchanged between the LLCs and Riffin "relating in any fashion to the Harsimus Branch." Demand 2 similarly seeks any documents exchanged between the LLCs and Riffin, and Conrail and Riffin, relating to the Harsimus Branch, to the extent not included in Demand 1. The scope of those requests goes well beyond the (irrelevant) reasons for the request, discussed in Point II, infra.

Demand 1 includes examples of the documents the City et al. seek, specifically documents relating to the "disposition of the property in the Harsimus Branch and legal or regulatory disputes concerning the Harsimus Branch...." In its May 22, 2015 Decision, the Board has already concluded that similar requests were overly broad. See, May 22, 2015 Decision, Appendix B, at 19-22 (items 3, 6, 7, 8, 13, and 15). Other overly broad demands were appropriately narrowed by the Board, and the City et al. have received appropriate responses from the LLCs. Id. at 18-22 (items 1, 2, 9, and 14).

It is further noted that the City has explained the discovery is needed, in part, because it will relate to attempts to demolish the Embankment. The Board has already concluded that discovery demands relating to the demolition of the Embankment are overly broad. See, May 22, 2015 Decision, Appendix B, at 21-22 (items 10 and 11).

The City et al.'s requests are clearly overly broad, and the Board has previously rejected similar broad requests made by the City et al. The fact the demands that are the subject of the pending motion were made against Riffin in no way makes those demands acceptable. The motion to compel responses to demands 1 and 2 should be denied.

II. The City et al.'s Demands are Irrelevant to Any Matter Before the Board, and Discovery Should be Denied.

The City et al.'s requests are not relevant to any issue in these Proceedings. Despite the City et al.'s prior, unsuccessful efforts to expand this matter well beyond the Board's jurisdiction in an abandonment proceeding, the Board cannot and will not delve into any of the matters the City et al. claim they need discovery. Indeed, the City et al. appear to want to proceed as a private attorney general to address irrelevant and immaterial issues where no authority for that action exists. Worse yet, there is no good faith basis to pursue these matters, and the City et al. simply distorts the record.

The City has provided four bases to justify demands 1 and 2. Each will be addressed in turn.

1) Evasion of Board Jurisdiction – The City et al. accuse the LLCs and Conrail of trying to evade the Board’s jurisdiction. The City does not explain, however, what relevance that accusation has to the matters before the Board.

Furthermore, the City has not stated any basis upon which the Board could reasonably conclude that the LLCs are seeking to evade the Board’s jurisdiction. As recounted above, the LLCs have in the past raised questions concerning the Board’s jurisdiction. However, far from “evading” the Board, the LLCs have addressed those issues within the proceedings before the Board, including the City et al.’s 2006 petition for a declaratory order and the 2014 petition addressing the River Line abandonment. The LLCs have also raised issues before the D.C. District Court.

Importantly, after receiving final determinations, the LLCs have abided by those decisions, and are now active parties to the pending Proceedings, including acting as a consulting party to the OEA process. The Board has granted the LLCs intervenor status.

The Board will determine whether an exempt abandonment should be granted; the Board will review any OFAs filed by the parties; and the Board will undertake the historic and environmental analysis. The City et al. have not explained how the Board’s jurisdiction has been “evaded.” The City et al. characterize in a self-serving manner past disputes as to the Harsimus Branch as efforts to “evade” the Board’s jurisdiction.

However, the Board in fact has jurisdiction and is exercising jurisdiction, notwithstanding any supposed act the City et al. want to discuss. Therefore, discovery into the City et al.'s unfounded allegations are irrelevant to any issue pending in these proceedings. For example, the historic and environmental review is not only underway, but is listed as one of the Board's top ten "key cases."² The OEA is devoting significant time and attention to its review. The jurisdiction has not been "evaded."

In its May 22, 2015 Decision, the Board has already concluded that documents relating to past, alleged efforts by the LLCs to "evade" the Board's jurisdiction are irrelevant. See, Appendix B, at 19-21 (items 3, 4, 5, 6, 7, 8, 10, 11, 12, and 13) (requests generally seeking documents relating to the transfer of the Embankment and agreements between the LLCs and Conrail). Considering the City et al. have argued that the 2005 sale of the Embankment from Conrail to the LLCs was an attempt to evade the Board's jurisdiction, and the Board has determined that discovery relating to the sale is irrelevant, the City et al.'s attempt to get similar discovery from another party on the same issue should be denied.

2) Abuse of Board's Process – It is unclear how the City et al.'s second explanation of relevance is any different from the first. There is no evidence the LLCs are abusing the Board's procedures, given the fact the Board is, in fact, undertaking its statutory responsibilities. Contradicting the City et al.'s claim that the LLCs are trying to abuse the

² See:

https://www.stb.dot.gov/stb/environment/key_cases_Conrail%20Harsimus%20Branch%20.html.

Board's processes, the Board granted the LLCs' motion to intervene. The Board has ruled in large part on the LLCs' opposition to the City et al.'s discovery demands in the May 22, 2015 decision. The Board again ruled partially in the LLCs' favor on November 2, 2015 when it agreed that a statement by the alleged shipper was improperly filed by the City as a "highly confidential" document, and ordered a public version with "confidential" information redacted.³ The Board again agreed with the LLCs' in a July 1, 2016 decision as to the scope of those redactions. The LLCs are a participating party to the historic and environmental review process now well underway.

In short, the LLCs are not abusing the Board's processes. Further, any alleged abuse is not the subject of discovery. By seeking discovery, the City et al. are in essence acknowledging that there is no evidence of abuse by the LLCs, and the City et al. are looking for something that is not to be found in the record or elsewhere.

3) Unlawful Transfer of the Line of Rail – First, the City et al. improperly assert that the LLCs and Conrail were involved in an improper transfer of a line of rail. The LLCs purchased the fee interest in real estate. They did not acquire a line of rail.

³ The City et al. filed a petition with the D.C. Circuit Court to review the November 2, 2015 decision, and in particular the Board's rulings, adverse to the City's interest, that OFAs are for continuing rail service. By order dated April 4, 2016, the D.C. Circuit Court dismissed the petition as interlocutory. The City's petition was the fourth time this dispute has been before the D.C. Circuit Court.

Moreover, the Board has already concluded that discovery concerning the sale from Conrail to the LLCs is irrelevant. See, May 22, 2015 Decision, at 18-22 (items 1, 3, 5, 6, 7, 8, 9, 12, and 14). The City et al.'s explanation for why it needs discovery in response to their Demands 1 and 2 fails because the transfer of the Embankment to the LLCs is irrelevant to any matter pending before the Board—as the Board has already held.

It should be noted that the Board is well aware of the sale of the fee interest in the Embankment parcels, as the fact of the sale has been disclosed numerous times. Based on a transfer concerning another line, the Board initiated an Ex Parte proceeding to determine the extent to which Conrail has transferred property unbeknownst to the Board. See, Consolidated Rail Corporation's Sales and Discontinuances, Docket Number EP-695. The Board required Conrail to self-report on its disposition of real estate without prior abandonment proceedings. The Embankment sale was noted, though not formally reported (due to these Proceedings), in a footnote in a September 27, 2010 filing by Conrail. The Board has already learned what Conrail has done with respect to selling the fee interest in the Embankment, and it has not taken any action to void any reported transaction. That decision would certainly be within the Board's discretion to manage its own regulatory obligations. The fact the City et al. disagree with how the Board is managing its own regulatory jurisdiction does not give rise to a right to seek discovery on a

non-party to the 2005 sale (Riffin), particularly where such transfer has already been held to be irrelevant to any issue in these Proceedings.

4) Demolition of the Embankment – The Board has already ruled that requests for documents relating to demolition of the Embankment are irrelevant. Id. at 21 (items 10 and 11).

That prior ruling has not stopped the City et al. from asking for the same documents, but from a different party (Riffin). The request to compel should be denied based on the prior ruling that discovery concerning attempts to demolish the Embankment is irrelevant.

Finally, the City et al. aver in their “appendix” at page 12 that discovery is necessary to address the “unlawful de facto abandonment” of the Harsimus Branch. The accusation of an unlawful de facto abandonment is the underpinning for the City et al.’s demands. However, if their claim to sustain their discovery demands is premised on the idea that the Harsimus Branch has been the subject of an unlawful de facto abandonment by the LLCs and Conrail, the City et al.’s motion should be denied. It has been established that the Harsimus Branch was conveyed to Conrail as a line of rail, subject to the abandonment jurisdiction of the Board. Subsequently, the LLCs initiated the proceeding before the Board to determine whether the Harsimus Branch was exempt from the Board’s procedures owing to a de facto abandonment relating to the aforementioned River Line

In short, there has been no de facto abandonment, and the pendency of these Proceedings is the simplest and most direct proof that not only has there not been a de facto abandonment, but discovery is entirely unnecessary and irrelevant.

III. Discovery of Riffin's Financial Responsibility, at least with Respect to Alleged Claims that the LLCs will Fund his OFA, is Irrelevant

The City et al. also seek discovery of Riffin's financial condition, in the hopes of establishing he is not a "financially responsible" person. Demand 3 relates directly to "loans or any line of credit, or solicitations from co-investors." In their brief and "appendix," the City et al. make repeated references to statements made by Riffin to the effect that Riffin believes that the LLCs will finance his OFA and that he intends to file an OFA to help the LLCs.

Riffin has indeed made those statements. However, he has also acknowledged that he does not speak for the LLCs. For their part, the LLCs have stated in other filings that Riffin is not their agent and Riffin does not speak for them.

To be clear, for the record, Riffin's actions and statements are not made on behalf of the LLCs. Riffin is not the agent of the LLCs. For their part, the LLCs are on record in these Proceedings and in litigation in the Superior Court of New Jersey their belief that there is no demonstrated need for freight rail service along the Harsimus Branch, that any OFA should be denied, and the Harsimus Branch should be abandoned. The

LLCs will not support Riffin's OFA, and they have no agreement with Riffin to use parts of the Harsimus Branch for development. Indeed, the LLCs have stated that OFAs are exclusively to be used for freight rail service, and proposing an OFA for any other purpose—even if said purpose is done in conjunction with freight rail service—is improper and an abuse of the Board's rules and procedures. The LLCs will not provide any financial assistance to Riffin in connection with any OFA he may file at a future date.

Conclusion

The Board has already concluded that the topics the City et al. seek discovery on through this pending motion are overly broad or irrelevant or both. There is no justification to permit in substance identical discovery against another party. The City et al.'s discovery is simply an attempt to pursue irrelevant conspiracy theories before the Board. The City et al.'s motion should be denied.

Respectfully submitted,

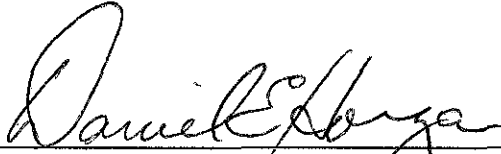


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DATED: July 25, 2016

CERTIFICATION OF SERVICE

I, Daniel E. Horgan, hereby certify that I have caused a copy of the foregoing to be served by First Class Mail upon those on the attached Service List by having same deposited with the U.S. Postal Service on July 25, 2016.

A handwritten signature in cursive script, reading "Daniel E. Horgan", written in black ink.

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